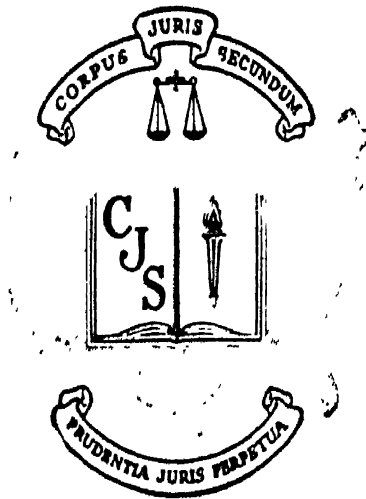


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CORPUS JURIS

SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW

AS DEVELOPED BY
ALL REPORTED CASES

By
FRANCIS J. LUDES
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and
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

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Addams' Ecclesiastical (Eng.)
Adolphus & Ellis (Eng.)
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American & English Encyclopædia of Law & Practice
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A. K. Marshall (Ky.)
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American Criminal
American Decisions
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American & English Corporation Cases New Series
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American and English Patent Cases
American and English Railroad Cases
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American & English Railroad Cases
American & English Railroad Cases New Series
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Am.St.R.D. American Street Railway Decisions
And. Anderson (Eng.)
Andr. Andrews (Eng.)
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Ann.Cas.1912A American Annotated Cases 1912A, et seq.
Anstr. Anstruther (Eng.)
Anth.N.P. Anthons's Nisi Prius (N.Y.)
App.D.C. Appeal Cases (D.C.)
App.Cas. Law Reports Appeal Cases (Eng.)
App.Div. Appellate Division (N.Y.)
Ariz. Arizona
Ark. Arkansas
Ark.Just. Arkley's Justiciary (Sc.)
Arn. Arnold (Eng.)
Arn.&H. Arnold & Hodges (Eng.)
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Aspinall's Maritime Cases (Eng.)
Atk. Atkyn (Eng.)
Austr.C.L.R. Commonwealth Law Reports, Australia
Austr.Jur. Australian Jurist
Austr.L.T. Australian Law Times

B

Bacon's Abridgment (Eng.)
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Barbour's Chancery (N.Y.)
Barron & Arnold (Eng.)
Barnardiston King's Bench (Eng.)
Barnardiston Chancery (Eng.)
Barnes' Practice Cases (Eng.)
Barnes' Notes (Eng.)
Batty (Ir.)
Barron & Austin (Eng.)
Baxter (Tenn.)
Bay (S.C.)
Broderip & Bingham (Eng.)
British Columbia

Bacon's Abridgment (Eng.)
 Bailey's Equity (S.C.)
 Bailey's Law (S.C.)
 Barnewell & Adolphus (Eng.)
 Barnewell & Alderson (Eng.)
 Baldwin (U.S.)
 Balfour's Practice (Sc.)
 Ball & Beatty (Ir.)
 Bankruptcy and Insolvency Reports
 (Eng.)
 Bannister (Eng.)
 Banning & Arden (U.S.)
 Barbour (N.Y.)
 Barbour's Chancery (N.Y.)
 Barron & Arnold (Eng.)
 Barnardiston King's Bench (Eng.)
 Barnardiston Chancery (Eng.)
 Barnes' Practice Cases (Eng.)
 Barnes' Notes (Eng.)
 Batty (Ir.)
 Barron & Austin (Eng.)
 Baxter (Tenn.)
 Bay (S.C.)
 Broderip & Bingham (Eng.)
 British Columbia

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 Coke Coke (Eng.)
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 Colo. Colorado
 Colo.App. Colorado Appeals
 Colq. Colquitt
 Coltm. Coltman (Eng.)
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 Coop.t.Cott. Cooper's Cases temp. Cottenham (Eng.)
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 Cow. Cowen (N.Y.)
 Gow.Cr.Rep. Cowen's Criminal (N.Y.)
 Cowp. Cowper (Eng.)
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 Cromp.&M. Crompton & Meeson (Eng.)
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 Ct.Cust.&Pat. App. Court of Customs and Patent Appeals
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 Curt. Curtis (U.S.)
 Curt.Eccl. Curteis Ecclesiastical (Eng.)
 Cush. Cushing (Mass.)
 Cust.A. United States Customs Appeals
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 Cyc.Ann. Cyclopaedia of Law & Procedure Annotations
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 Dall. Dallaman's Decisions (Tex.)
 Dall. Dallas (Pa.)
 Dall. Dallas (U.S.)
 Dalr.Dec. Dalrymple's Decisions (Sc.)
 Daly Daly (N.Y.)
 Dan. Daniell (Eng.)
 Dana Dana (Ky.)
 Dane Abr. Dane's Abridgment
 Dans.&L. Danson & Lloyd (Eng.)
 D'Any.Abr. D'Anver's Abridgment (Eng.)
 Dauph.Co. Dauphin County (Pa.)
 Dav.&M. Davison & Merivale (Eng.)
 Davys Davys (Ir.)
 Day Day (Conn.)
 D.B.&M. Dunlop, Bell & Murray (Sc.)
 D.C. District of Columbia
 D.Chipm. D. Chipman (Vt.)
 D.C.Mun.App. Municipal Court of Appeals (D.C.)
 Deac. Deacon (Eng.)
 Deac.&C. Deacon & Chitty (Eng.)
 Deady Deady (U.S.)
 Dears.&B. Dearsley & Bell (Eng.)
 Dears.C.O. Dearsley's Crown Cases (Eng.)
 Deas & A. Deas & Anderson (Eng.)
 De Gex De Gex (Eng.)
 De G.F.&J. De Gex, Fisher & Jones (Eng.)
 De G.J.&S. De Gex, Jones & Smith (Eng.)
 De G.&J. De Gex & Jones (Eng.)
 De G.M.&G. De Gex, MacNaghten & Gordon (Eng.)
 De G.&Sm. De Gex & Smale (Eng.)
 Del. Delaware
 Del.Ch. Delaware Chancery
 Del.Co. Delaware County (Pa.)
 Dem.Surr. Demarest's Surrogate (N.Y.)
 Den. Denio (N.Y.)
 Den.C.C. Denison's Crown Cases (Eng.)
 Desaus.Eq. Desaussure (S.C.)
 Dev.Ct.Cl. Devereux's Court of Claims (U.S.)
 Dev.L. Devereux (N.C.)
 Dev.&Bat. Devereux & Battle (N.C.)
 Dick. Dickens (Sc.)
 Dill. Dillon (U.S.)
 Dirld.Dec. Dirleton's Decisions (Sc.)
 Disn. Disney (Oh.)

Green Cr.
Greene
Gwill.T.Cas.

Green's Criminal Law (Eng.)
Greene (Iowa)
Gwillim's Tithe Cases (Eng.)

H

Hadd.
Hagg.Adm.
Hagg.Cons.
Hagg.Eccl.
Hailes Dec.
Hale
Hale Ecc.
Hale P.O.
Hall
Hall&T.
Halsbury L.Eng.
Handy
Han.(N.B.)
Hard.
Hardres
Hare
Harp.Eq.
Harr.
Harr.Del.
Harr.Mich.

Haddington (Eng.)
Haggard's Admiralty (Eng.)
Haggard's Consistory (Eng.)
Haggard's Ecclesiastical (Eng.)
Hailes' Decisions (Sc.)
Hale's Common Law (Eng.)
Hale's Ecclesiastical (Eng.)
Hale's Pleas of the Crown (Eng.)
Hall's Superior Court (N.Y.)
Hall & Twells (Eng.)
Halsbury's Law of England
Handy (Oh.)
Hannay's Reports, New Brunswick
Hardin (Ky.)
Hardres (Eng.)
Hare (Eng.)
Harper (S.O.)
Harrison's Chancery (Mich.)
Harrington (Del.)
Harrington's Michigan Chancery Reports

Harr.&G.
Harr.Ch.
Harr.&H.
Harr.&J.
Harr.&M.
Harr.&R.
Harr.&W.
Hask.
Hayil.
Hawaii
Hawaii.Fed.
Hawaii Rep.
Hawk.P.O.
Hay.Exch.
Hayes
Hayes&J.
Hay&M.
Hayw.
Hayw.
Hayw.&H.
Haz.Reg.
H.BI.
H.&O.
Head
Heisk.
Hem.&M.
Hempst.
Hen.&M.
Het.
Het.O.P.
H.&H.
Hill
Hill S.C.
Hill & Den.
Hill & Den. Supp.

Harris & Gill (Md.)
Harrison's Chancery (Eng.)
Harrison & Hodgins (U.C.)
Harris & Johnson (Md.)
Harris & McHenry (Md.)
Harrison & Rutherford (Eng.)
Harrison & Wollaston (Eng.)
Haskell (U.S.)
Haviland (Pr.Edw.Is.)
Hawaiian
Hawaiian Federal
Hawaii Reports
Hawkins' Pleas of the Crown (Eng.)
Hayes Exchequer (Ir.)
Hayes (Ir.)
Hayes & Jones (Ir.)
Hay & Marriott (Eng.)
Haywood (N.C.)
Haywood (Tenn.)
Haywood & Hazelton (U.S.)
Hazard's Register (Pa.)
Henry Blackstone (Eng.)
Hurlstone & Coltman (Eng.)
Head (Tenn.)
Heiskell (Tenn.)
Hemming & Miller (Eng.)
Hempstead (U.S.)
Hening & Munford (Va.)
Hetley (Eng.)
Hetley's Common Pleas (Eng.)
Horn & Hurlstone (Eng.)
Hill (N.Y.)
Hill (S.C.)
Hill & Denio (N.Y.)
Lalor's Supplement to Hill & Denio's (N.Y.)

Hilt.
Hil.T.
H.L.Cas.
H.&N.
Hob.
Hodg.Ell.
Hodges
Hoffm.
Hoffm.Land Cas.
Hog.
Holmes
Holt's Adm.Cas.
Holt Eq.
Holt K.B.
Holt N.P.
Home
Hope Dec.
Hopk.
Hopk.Dec.
Hopw.&C.
Hopw.&F.

Hilton (N.Y.)
Hilary Term (Eng.)
House of Lords Cases (Eng.)
Hurlstone & Norman (Eng.)
Hobart (Eng.)
Hodgins' Election (U.C.)
Hodges (Eng.)
Hoffman's Chancery (N.Y.)
Hoffman's Land Cases (U.S.)
Hogan (Ir.)
Holmes (U.S.)
Holt's English Admiralty Cases
Holt's Equity (Eng.)
Holt's King's Bench (Eng.)
Holt's Nisi Prius (Eng.)
Home (Sc.)
Hope's Decisions (Sc.)
Hopkins' Chancery (N.Y.)
Hopkins' Decisions (Pa.)
Hopwood & Coltman (Eng.)
Hopwood & Philbrick (Eng.)

Hosea.
Houst.
Houst.Or.
How.
How.Miss.
How.A.Cas.
How.N.P.
How.Pr.
How.Pr.N.S.
How.St.Tr.
Hud.&B.
Hughes
Hughes
Hume
Humphr.
Hun
Hurl.&Gord.
Hurl.&W.
Hutt.

Hosea (Ohio)
Houston (Del.)
Houston's Criminal Cases (Del.)
Howard (U.S.)
Howard (Miss.)
Howard's Appeal Cases (N.Y.)
Howell's Nisi Prius (Mich.)
Howard's Practice (N.Y.)
Howard's Practice New Series (N.Y.)
Howell's State Trials (Eng.)
Hudson & Brooke (Ir.)
Hughes (Ky.)
Hughes (U.S.)
Hume's Decisions (Sc.)
Humphreys (Tenn.)
Hun (N.Y.)
Hurlstone & Gordon (Eng.)
Hurlstone & Walmsley (Eng.)
Hutton (Eng.)

I

Idaho
Iddings D.R.D.
Ill.
Ill.App.
Ill.Cir.
Ind.
Ind.App.
Ind.T.
Ins.L.J.
Int.Com.Comma.
Int.Com.Rep.
Int.Rev.Rec.
Iowa
[1891] Ir.
Ir.Ch.
Ir.C.L.
Ir.Eccl.
Ired.
Ir.Eq.
Ir.Law Rep.
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Ir.R.1894.
Ir.R.O.L.
Ir.R.Eq.
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Indiana
Indiana Appellate Court
Indian Territory
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Interstate Commerce Reports
Internal Revenue Record
Iowa
Law Reports [1891] Irish
Irish Chancery
Irish Common Law
Irish Ecclesiastical Reports
Iredell (N.C.)
Irish Equity
Irish Law Reports
Irish Law and Equity Reports
Irish Law Reports for year 1894
Irish Reports Common Law
Irish Reports Equity
Irvine's Justiciary Cases (Eng.)

J

Jac.
Jac.&W.
J.Bridgm.
J.&C.
Jebb & B.
Jebb C.O.
Jebb&S.
Jeff.
Jenk.
J.J.Marsh.
J.&L.
Johns.
Johns.
Johns.Cas.
Johns.Ch.
Johns.V.C.

Jacob (Eng.)
Jacob & Walker (Eng.)
John Bridgman (Eng.)
Jones & Carey (Ir.)
Jebb & Bourke (Ir.)
Jebb's Crown Cases (Ir.)
Jebb & Symes (Ir.)
Jefferson (Va.)
Jenkins (Eng.)
J. J. Marshall (Ky.)
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Johnson (Eng.)
Johnson (N.Y.)
Johnson's Cases (N.Y.)
Johnson's Chancery (N.Y.)
Johnson's English Vice-Chancellors (Eng.)

Johns.&H.
Jones Exch.
Jones T.

Johnson & Hemming (Eng.)
Jones Exchequer (Ir.)
Sir Thomas Jones' English King's Bench Reports
Sir William Jones' English King's Bench Reports

Jones W.
Jones&Spem.
Journ.Jur.
J.P.
Jur.
Jur.N.S.
Just.L.R.

Jones & Spencer (N.Y.)
Journal of Jurisprudence (Pa.)
Justice of Peace (Eng.)
Jurist (Eng.)
Jurist New Series (Eng.)
Justices' Law Reporter (Pa.)

K

Kames Dec.
Kames Elucid.

Kames' Decisions (Sc.)
Kames' Elucidation (Sc.)

Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)	Ley	Ley (Eng.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)	L.G.	Law Glossary
Kan.	Kansas	Liberian L.	Liberian Law
Kan.App.	Kansas Appeals	Litt.	Littell (Ky.)
Kay	Kay (Eng.)	Litt.	Littleton (Eng.)
Kay&J.	Kay & Johnson (Eng.)	Litt.Sel.Cas.	Littell's Select Cases (Ky.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)	L.J.Adm.	Law Journal Admiralty New Series (Eng.)
Keane & Gr.	Keane & Grant (Eng.)	L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
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Keilw.	Keilway (Eng.)	L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
Kel.O.C.	Kelyng's Crown Cases (Eng.)	L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
Kelly	Kelly (Ga.)	L.J.Exch.	Law Journal Exchequer New Series (Eng.)
Kelyng, J.	Kelyng's English Crown Cases	L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
Kelynge, W.	Kelynge's Chancery (Eng.)	L.J.K.B.	Law Journal King's Bench New Series (Eng.)
Keyes.	Keyes (N.Y.)	L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
K.&G.	Keane & Grant (Eng.)	L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)	L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
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Kn.&Moo.	Knapp & Moore (Eng.)	L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
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Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)	L.R.A.N.S.	Lawyers' Reports Annotated New Series
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Latch	Latch (Eng.)	L.R.Indian App.	Law Reports Indian Appeals (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)	L.R.Ir.	Law Reports Irish
Law.L.J.	Lawrence Law Journal (Pa.)	L.R.P.C.	Law Reports Privy Council (Eng.)
L.C.	Lower Canada	L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.&C.	Leigh & Cave (Eng.)	L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.C.Jur.	Lower Canada Jurist	L.T.	Law Times (Pa.)
L.C.L.J.	Lower Canada Law Journal	L.T.N.S.	Law Times New Series (Pa.)
L.C.Rep.S.Qu	Lower Canada Reports Seigniorial Questions	L.T.O.S.	Law Times, Old Series (Eng.)
L.D.	Law Dictionary	L.T.O.S.	Law Times, Old Series (Pa.)
Ld.Ken.	Lord Kenyon (Eng.)	L.T.Rep.N.S.	Law Times Reports, New Series (Eng.)
Ld.Raym.	Lord Raymond (Eng.)	Lush.	Lushington's Admiralty (Eng.)
Lea	Lea (Tenn.)	Lutw.	Lutwyche (Eng.)
Leach C.O.	Leach's Crown Cases (Eng.)		
L.Ed.	Lawyers' Edition United States Supreme Court		
Lee Eccl.	Lee's Ecclesiastical (Eng.)		
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)		
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)		
Leg.Chron.	Legal Chronicle (Pa.)		
Leg.Gaz.	Legal Gazette (Pa.)		
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)		
Leg.Int.	Legal Intelligencer (Pa.)		
Leg.Op.	Legal Opinions (Pa.)		
Leg.Rec.	Legal Record (Pa.)		
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)		
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)		
Leigh	Leigh (Va.)		
Leigh & O.	Leigh & Cave's English Crown Cases		
Leon.	Leonard (Eng.)		
Lev.	Levinz (Eng.)		
Lew.C.O.	Lewin's Crown Cases (Eng.)		

XIII

Lutw.Reg.Cas. Luz.Reg.Obs.
 Luz.Reg.Obs. Luz.Reg.Reg.
 Luz.L.J. Lycoming
 Lynd.Prov.

MacA.Pat.Cas. MacArth.
 MacAr.&M.
 Maccl.
 MacFarl.
 Mackey
 MacI.&R.
 Macn.&G.
 Macph.
 Macph.S.&L.
 Macq.
 Madd.
 Madd.Ch.Pr.
 Malloy
 Man.
 Man.El.Cas.
 Man.Exch.Pr.
 Man.Gr.&S.
 Man.L.J.
 Man.&Ry.
 Man.&Ry.Mag.
 Cas.
 Man.&S.
 Mann.Unrep.Cas.
 Manson
 Man.t.Wood
 March
 Mar.Prov.
 Mars.Adm.
 Marsh.
 Marsh.J.J.
 Mart.
 Mart.
 Mart.N.S.
 Mart.&Y.
 Marv.
 Mason
 Mass.
 Maule & S.
 Mayn.
 McAll.
 McC.
 McClell.
 McClell.&Y.
 McCord
 McCrary
 McG.
 McLean
 McMull.
 Md.
 Md.Ch.
 Me.
 Mees.&Ros.
 Mees.&W.
 Meg.
 Meigs
 Menzies Cape of
 Good Hope
 Meriv.
 Metc.
 Metc.
 M.&G.
 M.&H.
 Mich.
 Mich.N.P.
 Mich.T.
 Miles
 Mill Const.
 Mill.Dec.
 Mills
 Milw.
 Minn.
 Minor

Lutwyche's Registration Cases (Eng.)
 Luzerne Legal Observer (Pa.)
 Luzerne Legal Register (Pa.)
 Luzerne Law Journal (Pa.)
 Lycoming Reporter (Pa.)
 Lyndwood's Provinciales

M
 MacArthur's Patent Cases (D.C.)
 MacArthur's District of Columbia Reports
 MacArthur & Mackey's District of Columbia Reports
 Macclesfield (Eng.)
 MacFarlane (Sc.)
 Mackey's Reports, District of Columbia
 Maclean & Robinson (Eng.)
 Macnaghten & Gordon (Eng.)
 Macpherson (Sc.)
 Macpherson, Shirreff & Lee (Sc.)
 Macqueen's Scotch Appeal Cases
 Maddock (Eng.)
 Maddock's Chancery Practice (Eng.)
 Malloy (Ir.)
 Manitoba Law
 Manning's Election Cases (Eng.)
 Manning's Exchequer Practice (Eng.)
 Manning, Granger & Scott (Eng.)
 Manitoba Law Journal
 Manning & Ryland (Eng.)
 Manning & Ryland's Magistrates' Cases (Eng.)
 Manning & Scott (Eng.)
 Manning's Unreported Cases (La.)
 Manson (Eng.)
 Manitoba temp. Wood
 March (Eng.)
 Maritime Province Reports (Can.)
 Marsden's Admiralty (Eng.)
 Marshall (Eng.)
 J. J. Marshall (Ky.)
 Martin Old Series (La.)
 Martin (N.C.)
 Martin New Series (La.)
 Martin & Yergler (Tenn.)
 Marvel (Del.)
 Mason (U.S.)
 Massachusetts
 Maule & Selwyn (Eng.)
 Maynard (Eng.)
 McAllister (U.S.)
 McCahon (Kan.)
 McClelland (Eng.)
 McClelland & Younge (Eng.)
 McCord (S.C.)
 McCrary (U.S.)
 McGloin (La.)
 McLean (U.S.)
 McMullan (S.C.)
 Maryland
 Maryland Chancery
 Maine
 Meeson & Roscoe (Eng.)
 Meeson & Welsby (Eng.)
 Megone (Eng.)
 Meigs (Tenn.)
 Menzies Cape of Good Hope
 Merivale (Eng.)
 Metcalf (Mass.)
 Metcalfe (Ky.)
 Munning & Granger (Eng.)
 Murphy & Hurlstone (Eng.)
 Michigan
 Michigan Nisi Prius
 Michaelmas Term (Eng.)
 Miles (Pa.)
 Mill's Constitutional (S.C.)
 Miller's Decisions (U.S.)
 Mills (N.Y.)
 Milward (Ir.)
 Minnesota
 Minor (Ala.)

Misc.
 Miss.
 Miss.Dec.
 Miss.St.Cas.
 M.&M.
 Mo.
 Mo.App.
 Moak
 Mo.A.R.
 Mod.
 M.A.L.
 Mod.Cas.L.&Eq.
 Molloy
 Mon.
 Monroe L.R.
 Mont.
 Mont.
 Mont.Bank.Rep.
 Mont.L.R.
 Mont.&A.
 Mont.&B.
 Mont.&C.
 Mont.D.&DeG.
 Montg.Co.
 Mont.&M.
 Montr.Cond.Rep.
 Montr.Leg.N.
 Montr.Q.B.
 Montr.Super.
 Moody C.O.
 Moore C.P.
 Moore Indian App.
 Moore K.B.
 Moore P.C.
 Moore P.C.N.S.
 Moore & S.
 Moore & W.
 Mor.Min.Rep.
 Morr.
 Morr.Bankr.Cas.
 Morr.St.Cas.
 Mosely
 M.&P.
 M.&R.
 M.&Rob.
 M.&S.
 Mun.Corp.Cas.
 Munf.
 Mun.L.R.
 Murph.
 Murr.
 M.&W.
 Myl.&C.
 Myl.&K.
 Myr.Prob.
 Nat.Bankr.Reg.
 Nat.Corp.Reg.
 Nat.L.Rep.
 N.B.
 N.Benl.
 N.B.Eq.
 N.C.
 N.Chipm.
 N.C.Conf.
 N.C.T.Rep.
 N.D.
 N.E.
 N.E.2d
 Neb.
 Neb.Unoff.
 Nels.
 Nels.Abr.
 Nev.
 Newb.Adm.
 Newfoundl.
 Newf.Sel.Cas.

Miscellaneous (N.Y.)
 Mississippi
 Mississippi Decisions
 Mississippi State Cases
 Moody & Malkin (Eng.)
 Missouri
 Missouri Appeals
 Moak (Eng.)
 Missouri Appeals Reporter
 Modern (Eng.)
 Modern American Law
 Modern Cases at Law and Equity (Eng.)
 Molloy (Ir.)
 Monaghan (Pa.)
 Monroe Law Reports (Pa.)
 Montana
 Montagu (Eng.)
 Montagu's English Bankruptcy Reports
 Montreal Law Reports (Can.)
 Montagu & Ayrton (Eng.)
 Montagu & Bligh (Eng.)
 Montagu & Chitty (Eng.)
 Montagu, Deacon & De Gex (Eng.)
 Montgomery County Law Reporter (Pa.)
 Montagu & McArthur (Eng.)
 Montreal Condensed Reports
 Montreal Legal News
 Montreal Law Reports Queen's Bench
 Montreal Law Reports Superior Court
 Moody's Crown Cases (Eng.)
 Moore's Common Pleas (Eng.)
 Moore's Indian Appeals (Eng.)
 Moore's King's Bench (Eng.)
 Moore's Privy Council Old Series (Eng.)
 Moore's Privy Council New Series (Eng.)
 Moore & Scott (Eng.)
 Moore & Walker (Tex.)
 Morrison's Mining Reports
 Morris (Iowa)
 Morrell's Bankruptcy Cases (Eng.)
 Morris' State Cases (Miss.)
 Mosely (Eng.)
 Moore & Payne (Eng.)
 Manning & Ryland (Eng.)
 Moody & Robinson (Eng.)
 Maule & Selwyn (Eng.)
 Municipal Corporation Cases
 Munford (Va.)
 Municipal Law Reporter (Pa.)
 Murphey (N.C.)
 Murray (Sc.)
 Meeson & Welsby (Eng.)
 Mylne & Craig (Eng.)
 Mylne & Keen (Eng.)
 Myrick's Probate (Cal.)

N
 National Bankruptcy Register (U.S.)
 National Corporation Reporter
 National Law Reporter
 New Brunswick
 New Benloe (Eng.)
 New Brunswick Equity
 North Carolina
 N. Chipman (Vt.)
 North Carolina Conference
 North Carolina Term Reports
 North Dakota
 North Eastern Reporter
 North Eastern Reporter Second Series
 Nebraska
 Nebraska Unofficial
 Nelson (Eng.)
 Nelson's Abridgment of the Common Law
 Nevada
 Newberry's Admiralty (U.S.)
 Newfoundland
 Newfoundland Select Cases

New Rep.	New Reports in all Courts (Eng.)	Op. Atty.-Gen.	Opinions of Attorneys-General (U.S.)
New Sess. Cas.	New Session Cases (Eng.)	Op. Sol. Dept.	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
New Zeal. L.	New Zealand Law	Labor	
N.H.	New Hampshire	Or.	Oregon
N.J.	New Jersey Reports	Orleans App.	Orleans Appeals (La.)
N.J. Eq.	New Jersey Equity	Overt.	Overton (Tenn.)
N.J. Law	New Jersey Law	Owen	Owen (Eng.)
N.J. L.J.	New Jersey Law Journal		
N.J. Misc.	New Jersey Miscellaneous		
N.J. Super.	New Jersey Superior Court Reports		
N.M.	New Mexico		
N. & M.	Neville & Manning (Eng.)		
N. & Macn.	Neville & Macnamara (Eng.)		
Nolan	Nolan (Eng.)		
North.	Northington (Eng.)		
North. Co.	Northampton County Reporter (Pa.)		
Northumb. Co. Leg.	Northumberland County Legal News (Pa.)		
N.	Northumberland County Legal Journal (Pa.)		
Northumb. Leg. J.	Notes of Cases (Eng.)		
Notes of Cas.	Nott & McCord (S.C.)		
Nott & McC.	Noy (Eng.)		
Noy	Neville & Perry (Eng.)		
N. & P.	Nova Scotia		
N.S.	Nova Scotia Decisions		
N.S. Dec.	New South Wales		
N.S. Wales	New South Wales Law		
N.S. Wales L.	New South Wales Law Reports Equity		
N.S. Wales L.R. Eq.	North Western Reporter		
N.W.	North Western Reporter Second Series		
N.W. 2d	New York		
N.Y.	New York Annotated Cases		
N.Y. Ann. Cas.	New York City Court		
N.Y. City Ct.	New York City Court Supplement		
N.Y. City Ct. Suppl.	New York Civil Procedure		
N.Y. Civ. Proc.	New York Civil Procedure Reports		
N.Y. Civ. Pr. Rep.	New York Code Reports, New Series		
N.Y. Code Reports,	New York Criminal		
N.S.	New York Legal Observer		
N.Y. Cr.	New York Law Record		
N.Y. Leg. Obs.	New York Monthly Law Bulletin		
N.Y. L. Rec.	New York Supplement		
N.Y. Month. L. Bul.	New York Supplement Second Series		
N.Y. S.	New York State Reporter		
N.Y. S. 2d	New York Superior Court		
N.Y. St.	New York Weekly Digest		
N.Y. Super.			
N.Y. Wkly. Dig.			
O. Ben.	Old Benloe (Eng.)		
O. Bridgm.	Orlando Bridgman (Eng.)		
Off. Gaz.	Official Gazette		
Ohio	Ohio		
Ohio App.	Ohio Court of Appeals		
Ohio Cir. Ct.	Ohio Circuit Court		
Ohio Cir. Ct. N.S.	Ohio Circuit Court New Series		
Ohio Cir. Dec.	Ohio Circuit Decisions		
Ohio Dec. Reprint	Ohio Decisions (Reprint)		
Ohio F. Dec.	Ohio Federal Decisions		
Ohio L.J.	Ohio Law Journal		
Ohio N.P.	Ohio Nisi Prius		
Ohio N.P. N.S.	Ohio Nisi Prius New Series		
Ohio O.	Ohio Opinions		
Ohio Prob.	Ohio Probate		
Ohio S. & C.P.	Ohio Superior & Common Pleas Decisions		
Ohio St.	Ohio State		
Ohio Supp.	Ohio Supplement		
Okl.	Oklahoma		
Okl. Cr.	Oklahoma Criminal		
Olcott	Olcott (U.S.)		
Oliv. B. & L.	Oliver, Beavan & Lefroy (Eng.)		
O'M. & H.	O'Malley & Hardcastle (Ir.)		
Ont.	Ontario		
Ont. A.	Ontario Appeals		
Ont. El. Cas.	Ontario Election Cases		
Ont. L.	Ontario Law		
Ont. L.J.	Ontario Law Journal		
Ont. L.J. N.S.	Ontario Law Journal New Series		
Ont. Pr.	Ontario Practice		
Ont. W.N.	Ontario Weekly Notes		
Ont. W.R.	Ontario Weekly Reporter		
		P.	Pacific Reporter
		P. 2d	Pacific Reporter Second Series
		[1891] P.	Law Reports [1891] Probate (Eng.)
		Pa.	Pennsylvania State
		Pa. Cas.	Pennsylvania Supreme Court Cases (Sadler)
		Pa. Co.	Pennsylvania County Court
		Pa. Corp.	Pennsylvania Corporation Reporter
		Pa. O. Pl.	Common Pleas (Pa.)
		Pa. Dist.	Pennsylvania District
		Pa. Dist. & Co.	Pennsylvania District and County
		Paige	Paige's Chancery (N.Y.)
		Paine	Paine (U.S.)
		Pa. L. J.	Pennsylvania Law Journal
		Pa. L. Rec.	Pennsylvania Law Record
		Pa. L. J. R.	Clark's Pennsylvania Law Journal Reports
		Palm.	Palmer (Eng.)
		Pa. Rec.	Pennsylvania Record
		Park.	Park (Eng.)
		Park. Cr.	Parker's Criminal (N.Y.)
		Park. Exch.	Parker's Exchequer (Eng.)
		Park. Ins.	Parker's Insurance (Eng.)
		Pars. Eq. Cas.	Parsons' Equity Cases (Pa.)
		Pa. Super.	Pennsylvania Superior Court
		Paton App. Cas.	Paton's Appeal Cases (Sc.)
		Patrick El. Cas.	Patrick's Election Cases (Can.)
		Patt. & H.	Patton & Heath (Va.)
		P. D.	Law Reports Probate Division (Eng.)
		P. & D.	Perry & Davison (Eng.)
		Peake N.P.	Peake's Nisi Prius (Eng.)
		Pearce C.O.	Pearce's Reports in Dearsly's (Eng.)
		Pearson	Pearson (Pa.)
		Peck	Peck (Tenn.)
		Peck. El. Cas.	Peckwell's Election Cases (Eng.)
		Pennew.	Pennewill (Del.)
		Pennyp.	Pennypacker (Pa.)
		Penr. & W.	Penrose & Watts (Pa.)
		Perry & Kn.	Perry & Knapp Election Cases (Eng.)
		Pet.	Peters (U.S.)
		Pet. Adm.	Peters' Admiralty (U.S.)
		Pet. C.C.	Peters' Circuit Court (U.S.)
		Phil.	Phillips (Eng.)
		Phil.	Phillip (N.O.)
		Phila.	Philadelphia (Pa.)
		Philippine	Philippine
		Phillim.	Phillimore Ecclesiastical (Eng.)
		Pick.	Pickering (Mass.)
		Pig. & R.	Pigott & Rodwell (Eng.)
		Pig. Rec.	Pigott's Recoveries (Eng.)
		Pinn.	Pinney (Wis.)
		Pittsb.	Pittsburgh (Pa.)
		Pittsb. Leg. J.	Pittsburgh Legal Journal (Pa.)
		Pittsb. Leg. J. N.S.	Pittsburgh Legal Journal New Series (Pa.)
		P. & K.	Perry & Knapp (Eng.)
		Plowden	Plowden (Eng.)
		Pollexf.	Pollexfen (Eng.)
		Poph.	Popham (Eng.)
		Port.	Porter (Ala.)
		Posey	Posey's Unreported Cases (Tex.)
		Puerto Rico	Puerto Rico
		Puerto Rico Fed.	Puerto Rico Federal
		Pow. Sur.	Powers' Surrogate (N.Y.)
		P. R. & D. El. Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
		Prec. Ch.	Precedents in Chancery (Eng.)
		Pr. Edw. Isl.	Prince Edward Island
		Price	Price (Eng.)
		Price Pr. Cas.	Price's Practice Cases (Eng.)
		Prid. & C.	Prideaux & Cole (Eng.)
		Prob. [1917]	Law Reports, Probate Division (Eng.)
		Prob. Rep.	Probate Reports (Eng.)

Pr.Rep.	Practice Reports (Eng.)	Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
P.Wms.	Peere-Williams (Eng.)	Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
P.U.R.	Public Utilities Reports	Russ.&Geld.	Russell & Geldert, Nova Scotia
Pyke	Pyke (Can.)	Russ.&M.	Russell & Myline (Eng.)
		Ry.&M.	Ryan & Moody (Eng.)
Q			
Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)	S	
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)	Salk.	Salkeld (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)	Sandf.	Sandford's Superior Court (N.Y.)
Queensl.J.P.	Queensland Justice of the Peace	Sandf.Oh.	Sandford's Chancery (N.Y.)
Queensl.L.	Queensland Law	Sask.L.	Saskatchewan Law
Queensl.L.J.	Queensland Law Journal	Saund.	Saunders (Eng.)
Que.L.	Quebec Law	Saund.&C.	Saunders & Cole (Eng.)
Que.Pr.	Quebec Practice	Sau.&Sc.	Sausse & Scully (Ir.)
Que.Q.B.	Quebec Official Reports Queen's Bench	S.Austr.L.	South Australia Law
Que.Rev.Jud.	Quebec Revised Judicial	Sav.	Savile (Eng.)
Que.Super.	Quebec Official Reports Superior Court	Sawy.	Sawyer (U.S.)
Quincy	Quincy (Mass.)	Saxt.	Saxton (N.J.)
R		Say.	Sayer (Eng.)
Rand.	Randolph (Va.)	S.C.	South Carolina
Rap.Jud. Q.C.S.	Rapport's Judicials de Quebec Cour Superieure	[1907]S.C.	Court of Session Cases (Sc.)
Rawle	Rawle (Pa.)	Scam.	Scammon (Ill.)
R.C.L.	Ruling Case Law	S.C.Eq.	South Carolina Equity
R.&Can.Cas.	Railway & Canal Cases (Eng.)	Sch.&Lef.	Schoales & Lefroy (Ir.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)	Sch.Leg.Rec.	Schuykill Legal Record (Pa.)
Redf.	Redfield's Surrogate (N.Y.)	Sch.Reg.	Schuykill Register (Pa.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)	[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)	Sc.Jur.	Scottish Jurist
Redf.Surr.	Redfield's Surrogate (N.Y.)	S.C.L.	South Carolina Law
Reeve Eng.L.	Reeve's English Law	Sc.L.Rep.	Scottish Law Reporter
Reports	Reports (Eng.)	Scot L.T.	Scot Law Times
Reprint	English Reprint	Scott	Scott (Eng.)
Rept.Finch	Cases temp. Finch (Eng.)	Scott N.R.	Scott's New Reporter (Eng.)
Rept.Hard.	Lee's Reports <i>tempore</i> Hardwicke (Eng.)	Scr.L.T.	Scranton Law Times (Pa.)
Rept.Holt	Reports <i>tempore</i> Holt (English Cases of Settlement)	Sc.Sess.Cas.	Scotch Court of Session Cases
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)	S.Ct.	Supreme Court Reporter (U.S.)
Rev.Crit.	Revue Critique (Can.)	S.D.	South Dakota
Rev.de Jur.	Revue de Jurisprudence (Can.)	S.E.	South Eastern Reporter
Rev.de Legis.	Revue de Legislation (Can.)	S.E.2d	South Eastern Reporter Second Series
Rev.Leg.	Revue Legale (Can.)	Searle & Sm.	Searle & Smith (Eng.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)	Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Rev.Rep.	Revised Reports (Eng.)	Seld.	Selden's Notes (N.Y.)
R.I.	Rhode Island	Selden	Selden (N.Y.)
Rice	Rice (S.C.)	Selw.	Selwyn's Nisi Prius (Eng.)
Rich.	Richardson (S.C.)	Serg.&R.	Sergeant & Rawle (Pa.)
Rich.O.P.	Richardson's Practice Common Pleas (Eng.)	Sess.Cas.	Court of Session Cases (Eng.)
Ridg.	Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.)	Shan.	Shannon (Tenn.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)	Shaw	Shaw (Sc.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)	Shaw & D.	Shaw & Dunlop (Sc.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)	Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)	Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Riley	Riley (S.C.)	Shaw&M.	Shaw & MacLean (Sc.)
R.&M.	Ryan & Moody (Eng.)	Sheld.	Sheldon (N.Y.)
R.M.Charlt.	R. M. Charlton (Ga.)	Shep.Abr.	Sheppard's Abridgment
Rob.	Robinson (La.)	Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Rob.	Robinson (Va.)	Show.	Shower (Eng.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)	Show.P.C.	Shower's Parliament Cases (Eng.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)	Sid.	Siderfin (Eng.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)	Silv.A.	Silvernail's Appeals (N.Y.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)	Silv.Sup.	Silvernail's Supreme (N.Y.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)	Sim.	Simons (Eng.)
Rolle	Rolle (Eng.)	Sim.N.S.	Simons New Series (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)	Sim.&St.	Simons & Stuart (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports	Skin.	Skinner (Eng.)
Rom.Cas.	Romilly's Notes of Cases (Eng.)	Smale&G.	Smale & Giffard (Eng.)
Root	Root (Conn.)	Smith	Smith (Ind.)
Rose	Rose (Eng.)	Smith	Smith (N.H.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)	Smith&B.	Smith & Batty (Ir.)
R.&R.	Russell & Ryan Crown Cases (Eng.)	Smith K.B.	Smith's King's Bench (Eng.)
Russ.	Russell (Eng.)	Smith Lead.Cas.	Smith's Leading Cases (Eng.)
		Smith Reg.	Smith's Registration (Eng.)
		Sm.&M.	Smedes & Marshall (Miss.)
		Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
		Smythe	Smythe (Ir.)
		Sneed	Sneed (Tenn.)
		So.	Southern Reporter
		So.2d	Southern Reporter Second Series
		Sol.J.	Solicitor's Journal (Eng.)
		Som.Leg.J.	Somerset Legal Journal (Pa.)
		Sp.	Spears (S.C.)
		Spinks	Spinks Admiralty (Eng.)
		Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.
 Spottisw.
 Spottisw.Eq.
 Sprague
 Stair
 Stark.
 Stat. at L.
 Stew.
 Stew.
 Stew.&P.
 Stockt.Vice-Adm.
 Story
 Str.
 Strob.
 Stuart Vice-Adm.
 Stu.M.&P.
 Style
 Sumn.
 Susq.Leg.Chron.
 S.W.
 S.W.2d
 Swab.
 Swab.&Tr.
 Swan
 Swanst.
 Spinks' Prize Cases (Eng.)
 Spottiswoode (Sc.)
 Spottiswoode's Equity (Sc.)
 Sprague (U.S.)
 Stair (Sc.)
 Starkie Nisi Prius (Eng.)
 United States Statutes at Large
 Stewart (Ala.)
 Stewart's Reports (N.S.)
 Stewart & Porter (Ala.)
 Stockton's Vice-Admiralty (N.B.)
 Story (U.S.)
 Strange (Eng.)
 Strobhart (S.C.)
 Stuart's Vice-Admiralty (L.C.)
 Stuart, Milne & Peddie (Sc.)
 Style (Eng.)
 Sumner (U.S.)
 Susquehanna Legal Chronicle (Pa.)
 South Western Reporter
 South Western Reporter Second Series
 Swabey's Admiralty (Eng.)
 Swabey & Tristram (Eng.)
 Swan (Tenn.)
 Swanston (Eng.)

T

Taml.
 Taney
 Tapp.
 Taunt.
 Taylor
 T.B.Mon.
 Tenn.
 Tenn.App.
 Tenn.Cas.
 Tenn.Ch.
 Tenn.Ch.A.
 Tenn.Civ.A.
 Terr.L.
 Tex.
 Tex.App.
 Tex.A.Civ.Cas.
 Tex.Civ.App.
 Tex.Cr.
 Tex.Suppl.
 Tex.Unrep.Cas.
 Thach.Cr.
 Thomps.&C.
 Thomps.Cas.
 Tinw.
 T.Jones
 T.L.R.
 T.M.R.
 T.&M.
 Toth.
 T.R.
 Transcr.A.
 T.Raym.
 Tread.Const.
 Treas.Dec.
 Tr.&H.Pr.
 Trint.T.
 Truem.Eq.Cas.
 Tuck.Sel.Cas.
 Tuck.Surr.
 T.U.P.Charit.
 Turn.&R.
 Tyler
 Tyrw.
 Tyrw.&G.
 Tamlyn (Eng.)
 Taney (U.S.)
 Tappan (Oh.)
 Taunton (Eng.)
 Taylor (N.C.)
 T. B. Monroe (Ky.)
 Tennessee
 Tennessee Appeals
 Unreported Tennessee Cases
 Tennessee Chancery
 Tennessee Chancery Appeals
 Tennessee Civil Appeals
 Territories Law (Northwest Territories)
 Texas
 Texas Court of Appeals
 White & Wilson's Civil Cases (Tex.)
 Texas Civil Appeals
 Texas Criminal
 Texas Supplement
 Posey's Unreported Cases (Tex.)
 Thacher's Criminal Cases (Mass.)
 Thompson & Cook (N.Y.)
 Thompson's Cases (Tenn.)
 Tinwald (Sc.)
 Thomas Jones (Eng.)
 Times Law Reports (Eng.)
 Trade Mark Reports
 Temple & Mew (Eng.)
 Tothill (Eng.)
 Term Reports (Durnford & East) (Eng.)
 Transcript Appeals (N.Y.)
 Thomas Raymond (Eng.)
 Treadway Constitutional (S.C.)
 Treasury Decisions (U.S.)
 Troubat & Haly's Practice (Pa.)
 Trinity Term (Eng.)
 Trueman's Equity Cases (N.B.)
 Tucker's Select Cases (Newfoundland)
 Tucker's Surrogate (N.Y.)
 T. U. P. Charlton (Ga.)
 Turner & Russell (Eng.)
 Tyler (Vt.)
 Tyrwhitt (Eng.)
 Tyrwhitt & Granger (Eng.)

U

U.C.
 U.C.Ch.
 U.C.Cham.
 U.C.C.P.
 U.C.E.&A.
 U.C.K.B.
 Upper Canada
 Upper Canada Chancery
 Upper Canada Chamber
 Upper Canada Common Pleas
 Upper Canada Error and Appeal
 Upper Canada King's Bench Reports

U.C.Q.B.
 U.C.Q.B.O.S.
 U.S.
 U.S.App.D.C.
 U.S.Aviation Rep.
 U.S.C.A.
 Utah
 Upper Canada Queen's Bench
 Upper Canada Queen's Bench Old Series
 United States
 United States Appeal Cases (D.C.)
 Aviation Reports (U.S.)
 United States Code Annotated
 Utah

V

Va.
 Va.Cas.
 Va.Ch.Dec.
 Va.Dec.
 Van Ness Prize
 Cas.
 Vaughn.
 Vaux.
 Vent.
 Vern.
 Vern.Ch.
 Vern.&S.
 Ves.
 Ves.&B.
 Ves.Jr.
 Ves.Jr.Suppl.
 Ves.Suppl.
 Vict.
 Vict.L.
 Vict.L.T.
 Vict.Rep.
 Vict.St.Tr.
 Vin.Abr.
 Virgin Islands
 Vt.
 Virginia
 Virginia Cases
 Chancery Decisions (Va.)
 Virginia Decisions
 Van Ness Prize Cases (U.S.)
 Vaughan (Eng.)
 Vaux's Decisions (Pa.)
 Ventris (Eng.)
 Vernon's Cases (Eng.)
 Vernon's Chancery (Eng.)
 Vernon & Scriven (Ir.)
 Vesey Senior (Eng.)
 Vesey & Beames (Eng.)
 Vesey Junior (Eng.)
 Vesey Junior Supplement (Eng.)
 Vesey Senior Supplement (Eng.)
 Victorian
 Victorian Law
 Victorian Law Times
 Victorian Reports
 Victorian State Trials
 Viner's Abridgment (Eng.)
 Virgin Islands
 Vermont

W

Walk.
 Walk.
 Wall.
 Wall.C.C.
 Wall.Jr.
 Wall.Sr.
 Wallis
 Ware
 Wash.
 Wash.2d
 Wash.
 Wash.St.
 Wash.C.C.
 Wash.Co.
 Wash.T.
 Watts
 Watts&S.
 W.Bl.
 W.C.C.
 Webb, A.B.&W.L.
 P.&M.
 Web.Pat.Cas.
 Welsh
 Wend.
 West
 West.Co.L.J.
 West.L.J.
 West.L.Month.
 West.L.R.
 West.L.T.
 West.R.
 West t.Hardw.
 West.Wkly.
 [1917] West.Wkly.
 Whart.
 Wheat.
 Wheel.Cr.
 White&T.Lead.
 Cas.Eq.
 Whitm.Pat.Cas.
 Wight.
 Walker (Pa.)
 Walker's Chancery (Mich.)
 Wallace (U.S.)
 Wallace (U.S.)
 Wallace Junior (U.S.)
 Wallace Senior (U.S.)
 Wallis (Ir.)
 Ware (U.S.)
 Washington
 Washington Reports, Second Series
 Washington (Va.)
 Washington State
 Washington Circuit Court (U.S.)
 Washington County Reports (Pa.)
 Washington Territory
 Watts (Pa.)
 Watts & Sergeant (Pa.)
 William Blackstone (Eng.)
 Minton-Senhouse's Workmen's Compensation Cases (Eng.)
 Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
 Webster's Patent Cases (Eng.)
 Welsh Registry Cases (Ir.)
 Wendell (N.Y.)
 West (Eng.)
 Westmoreland County Law Journal (Pa.)
 Western Law Journal (Oh.)
 Western Law Monthly (Oh.)
 Western Law Reporter (Can.)
 Western Law Times (Can.)
 Western Reporter
 West temp. Hardwicke (Eng.)
 Western Weekly (Can.)
 [1917] Western Weekly (Can.)
 Wharton (Pa.)
 Wheaton (U.S.)
 Wheeler's Criminal (N.Y.)
 White & Tudor's Leading Cases in Equity (Eng.)
 Whitman's Patent Cases (U.S.)
 Wightwicke (Eng.)

Wilcox	Wilcox (Pa.)	Words & Phrases	Words & Phrases
Willes	Willes (Eng.)	Wright	Wright (Oh.)
Wilm.	Wilmot's Notes (Eng.)	W.Rob.	William Robinson's Admiralty (Eng.)
Wils.	Wilson (Ind.)	W.R.Pa.	Wright (Pa.)
Wils.Ch.	Wilson's Chancery (Eng.)	W.Va.	West Virginia
Wils.C.P.	Wilson's Common Pleas (Eng.)	W.W.Harr.	W. W. Harrington (Del.)
Wils.Exch.	Wilson's Exchequer (Eng.)	W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)		Willmore, Wollaston & Hodges (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)	W.W.&H.	Wyoming
Winch	Winch (Eng.)	Wyo.	Wythe's Chancery (Va.)
Winst.	Winston (N.C.)	Wythe	Wyatt & Webb (Vict.)
Wis.	Wisconsin	Wy.&W.	Wyatt & Webb & A'Beckett (Vict.)
W.Jones	William Jones (Eng.)	Wy.W.&A'Beck.	
W.Kel.	William Kelynge (Eng.)		
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)		
Wkly.N.C.	Weekly Notes of Cases (Pa.)		
Wkly.Rep.	Weekly Reporter (Eng.)		
Wms.Saund.	Williams Notes to Saunders' Reports		
W.N.	Weekly Notes (Eng.)		
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)		
	Wolferstan & Dew's Election Cases (Eng.)		
Wolf.&D.			
Woll.	Wollaston (Eng.)		
Woodb.&M.	Woodbury & Minot (U.S.)		
Woods	Woods (U.S.)		
Woodw.	Woodward's Decisions (Pa.)		
Woolw.	Woolworth (U.S.)		

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal	Md.L.Rev.	Maryland Law Review
Ala.L.Rev.	Alabama Law Review	Mass.L.Q.	Massachusetts Law Quarterly
Albany L.Rev.	Albany Law Review	Mercer, Beasley	
Am.J.Int.Law	American Journal of International Law	L.Rev.	Mercer, Beasley Law Review
Am.Law S.Rev.	American Law School Review	Miami L.Q.	Miami Law Quarterly
Ark.L.Rev.	Arkansas Law Review	Mich.L.Rev.	Michigan Law Review
Aust.L.J.	Australian Law Journal	Minn.L.Rev.	Minnesota Law Review
B.U.L.Rev.	Boston University Law Review	Miss.L.J.	Mississippi Law Journal
Brooklyn L.Rev.	Brooklyn Law Review	Mo.L.Rev.	Missouri Law Review
Calif.L.Rev.	California Law Review	Montana L.Rev.	Montana Law Review
Camb.L.J.	Cambridge Law Journal	Neb.L.B.	Nebraska Law Bulletin
Chi-Kent Rev.	Chicago-Kent Review	N.J.L.J.	New Jersey Law Journal
Colum.L.Rev.	Columbia Law Review	N.J.L.Rev.	New Jersey Law Review
Com.L.J.	Commercial Law Journal	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Cornell L.Q.	Cornell Law Quarterly		
Detroit L.Rev.	Detroit Law Review	Notre Dame Law	Notre Dame Lawyer
Dick.L.Rev.	Dickinson Law Review	N.C.L.Rev.	North Carolina Law Review
Fed.B.A.J.	Federal Bar Association Journal	Okla.L.Rev.	Oklahoma Law Review
Fla.L.J.	Florida Law Journal	Oreg.L.Rev.	Oregon Law Review
Fordham L.Rev.	Fordham Law Review	Phil.L.J.	Philippine Law Journal
Geo.Wash.L.Rev.	George Washington Law Review	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Geo.L.J.	Georgetown Law Journal	Rutgers U.L.Rev.	Rutgers University Law Review
Harv.L.Rev.	Harvard Law Review	St. John's L.Rev.	St. John's Law Review
Ia.L.Rev.	Iowa Law Review	St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
Idaho L.J.	Idaho Law Journal		
Ill.L.Rev.	Illinois Law Review	So.Calif.L.Rev.	Southern California Law Review
Ind.L.J.	Indiana Law Journal	Southwestern L.J.	Southwestern Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society	Stanford L.Rev.	Stanford Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Temp.L.Q.	Temple Law Quarterly
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tenn.L.Rev.	Tennessee Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	Tex.L.Rev.	Texas Law Review
		Tul.L.Rev.	Tulane Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U.Chi.L.Rev.	University of Chicago Law Review
Kan.City L.Rev.	Kansas City Law Review	U.Cin.L.Rev.	University of Cincinnati Law Review
Kan.St.L.J.	Kansas State Law Journal	U.Detroit L.J.	University of Detroit Law Journal
Ky.L.J.	Kentucky Law Journal	U.Florida L.Rev.	University of Florida Law Review
L.J.	Law Journal	U.Kan.City L.Rev.	University of Kansas City Law Review
L.Lib.J.	Law Library Journal		
Law Q.Rev.	Law Quarterly Review	U.Pa.L.Rev.	University of Pennsylvania Law Review
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series		
Law Soc.J.	Law Society Journal	U. of Pitts.L.Rev.	University of Pittsburgh Law Review
Lincoln L.Rev.	Lincoln Law Review	U.Toronto L.J.	University of Toronto Law Journal
La.L.Rev.	Louisiana Law Review	Vanderbilt L.Rev.	Vanderbilt Law Review
Loyola L.Rev.	Loyola Law Review	Va.L.Rev.	Virginia Law Review
Marq.L.Rev.	Marquette Law Review	Wash.L.Rev.	Washington Law Review
		Wash.U.L.Q.	Washington University Law Quarterly
		Wash.& Lee L.Rev.	Washington and Lee Law Review
		W.Va.L.Q.	West Virginia Law Quarterly and The Bar
		Wis.L.Rev.	Wisconsin Law Review
		Wyo.L.J.	Wyoming Law Journal
		Yale L.J.	Yale Law Journal

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

Abandonment	Associations	Colleges and Universities
Abatement and Revival	Assumpsit, Action of	Collision
Abduction	Asylums	Commerce
Abortion	Attachment	Common Lands
Absentees	Attorney and Client	Common Law
Abstracts of Title	Attorney General	Common Scold
Accession	Auctions and Auctioneers	Compositions with Creditors
Accord and Satisfaction	Audita Querela	Compounding Offenses
Account, Action on	Bail	Compromise and Settlement
Accounting	Bailments	Concealment of Birth or Death
Account Stated	Bankruptcy	Conflict of Laws
Acknowledgments	Banks and Banking	Confusion of Goods
Actions	Barratry	Conspiracy
Adjoining Landowners	Bastards	Constitutional Law
Admiralty	Beneficial Associations	Contempt
Adoption of Children	Bigamy	Continuances
Adulteration	Bills and Notes	Contracts
Adultery	Blasphemy	Contratos
Adverse Possession	Bonds	Contribution
Aerial Navigation	Boundaries	Conversion
Affidavits	Bounties	Convicts
Affray	Breach of Marriage Promise	Copyright and Literary
Agency	Breach of the Peace	Property
Agriculture	Bribery	Coroners
Aliens	Bridges	Corporations
Alteration of Instruments	Brokers	Costs
Ambassadors and Consuls	Building and Loan Associations	Counterfeiting
Amicus Curiae	Burglary	Counties
Animals	Business Trusts	Court Commissioners
Annuities	Canals	Courts
Appeal and Error	Cancellation of Instruments	Covenant, Action of
Appearances	Carriers	Covenants
Apprentices	Case, Action on	Creditors' Suits
Arbitration and Award	Cemeteries	Criminal Law
Architects	Census	Crops
Army and Navy	Certiorari	Culpa
Arrest	Champerty and Maintenance	Curtesy
Arson	Charities	Customs and Usages
Assault and Battery	Chattel Mortgages	Customs Duties
Assignments	Citizens	Damages
Assignments for Benefit of	Civil Rights	Dead Bodies
Creditors	Clerks of Courts	Death
Assistance, Writ of	Clubs	Debt, Action of

Dedication	Fences	Intoxicating Liquors
Deeds	Ferries	Joint Adventures
Dependencies, Colonies, and British Possessions	Finding Lost Goods	Joint Stock Companies
Depositaries	Fines	Joint Tenancy
Depositions	Fires	Judges
Deposits in Court	Fish	Judgments
Descent and Distribution	Fixtures	Judicial Sales
Detectives	Flags	Juries
Detinue	Food	Justices of the Peace
Discovery	Forcible Entry and Detainer	Kidnapping
Dismissal and Nonsuit	Forfeiture	Landlord and Tenant
Disorderly Conduct	Forgery	Larceny
Disorderly Houses	Fornication	Levees and Flood Control
District and Prosecuting Attorneys	Franchises	Lewdness
District of Columbia	Fraud	Libel and Slander
Disturbance of Public Meetings	Frauds, Statute of	Licenses
Divorce	Fraudulent Conveyances	Liens
Domicile	Game	Limitations of Actions
Dower	Gaming	Lis Pendens
Drains	Garnishment	Livery Stable Keepers
Druggists	Gas	Logs and Logging
Drunkards	Gifts	Lost Instruments
Dueling	Good Will	Lotteries
Easements	Grand Juries	Malicious Mischief
Ejectment	Ground Rents	Malicious Prosecution
Election of Remedies	Guaranty	Mandamus
Elections	Guardian and Ward	Manufactures
Electricity	Habeas Corpus	Maritime Liens
Embezzlement	Hawkers and Peddlers	Marriage
Embracery	Health	Marshaling Assets and Securities
Eminent Domain	Highways	Master and Servant
Entry, Writ of	Holidays	Masters' and Employers' Associations
Equity	Homesteads	Mayhem
Escape	Homicide	Mechanics' Liens
Escheat	Hospitals	Mercantile Agencies
Escrows	Husband and Wife	Militia
Estates	Improvements	Mills
Estoppel	Incest	Mines and Minerals
Evidence	Indemnity	Miscegenation
Exchange of Property	Indians	Modern Civil Law
Exchanges	Indictments and Informations	Money Lenders
Executions	Industrial Co-operative Societies	Money Lent
Executors and Administrators	Infants	Money Paid
Exemptions	Injunctions	Money Received
Explosives	Innkeepers	Monopolies
Extortion	Insane Persons	Mortgages
Extradition	Insolvency	Motions and Orders
Extraterritoriality	Inspection	Motor Vehicles
Factors	Insurance	Municipal Corporations
False Imprisonment	Insurrection and Sedition	Names
False Personation	Interest	Navigable Waters
False Pretenses	Internal Revenue	Ne Exeat
Federal Courts	International Law	Negligence
	Interpleader	

Neutrality Laws
 Newspapers
 New Trial
 Notaries
 Notice
 Novation
 Nuisances
 Oaths and Affirmations
 Obscenity
 Obstructing Justice
 Officers
 Pardons
 Parent and Child
 Parliamentary Law
 Parties
 Partition
 Partnership
 Party Walls
 Patents
 Paupers
 Pawnbrokers
 Payment
 Penalties
 Pensions
 Pent Roads
 Peonage
 Perjury
 Perpetuities
 Physicians and Surgeons
 Pilots
 Piracy
 Pleading
 Pledges
 Poisons
 Possessory Warrant
 Post Office
 Powers
 Principal and Surety
 Prisons
 Private Roads
 Prize Fighting
 Process
 Profanity
 Prohibition
 Property
 Prostitution
 Public Administrative Bodies
 and Procedure
 Public Lands
 Public Utilities
 Quieting Title

Quo Warranto
 Railroads
 Rape
 Real Actions
 Receivers
 Receiving Stolen Goods
 Recognizances
 Records
 References
 Reformation of Instruments
 Reformatories
 Registers of Deeds
 Registration of Land Titles
 Release
 Religious Societies
 Removal of Causes
 Replevin
 Reports
 Rescue
 Review
 Rewards
 Right of Privacy
 Riot
 Robbery
 Sales
 Salvage
 Schools and School Districts
 Scire Facias
 Seals
 Seamen
 Searches and Seizures
 Seduction
 Sequestration
 Set-Off and Counterclaim
 Sheriffs and Constables
 Shipping
 Signatures
 Slaves
 Social Security and Public
 Welfare
 Sodomy
 Specific Performance
 Spendthrifts
 States
 Statutes
 Steam
 Stenographers
 Stipulations
 Street Railroads
 Submission of Controversy
 Subrogation
 Subscriptions

Suicide
 Summary Proceedings
 Sunday
 Supersedeas
 Taxation
 Telegraphs and Telephones
 Tenancy in Common
 Tender
 Territories
 Theaters and Shows
 Threats and Unlawful
 Communication
 Time
 Torts
 Towage
 Towns
 Trade-Marks, Trade-Names,
 and Unfair Competition
 Trade Unions
 Trading Stamps and Coupons
 Treason
 Treaties
 Trespass
 Trespass to Try Title
 Trial
 Trover and Conversion
 Trusts
 Turnpikes and Toll Roads
 Undertakings
 United States
 United States Commissioners
 United States Marshals
 Unlawful Assembly
 Use and Occupation
 Usury
 Vagrancy
 Vendor and Purchaser
 Venue
 War
 Warehousemen and Safe
 Depositories
 Waste
 Waters
 Weapons
 Weights and Measures
 Wharves
 Wills
 Witnesses
 Woods and Forests
 Work and Labor
 Workmen's Compensation

TITLES IN THIS VOLUME

	Page
Stipulations -----	1
Street Railroads -----	126
Submission of Controversy -----	559
Subrogation -----	573
Subscriptions -----	731
Suicide -----	781
Summary Proceedings -----	790
Sunday -----	797
Supersedeas -----	890

CORPUS JURIS

SECUNDUM

VOLUME EIGHTY-THREE

STIPULATIONS

This Title includes agreements between parties to actions or other proceedings or their attorneys or other representatives relating to proceedings therein; nature, requisites, sufficiency, operation, and effect of such agreements in general; and withdrawing or setting aside such stipulations.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition and nature—p 2
- 2. Favored by courts—p 2
- 3. Form, requisites, and validity—p 3
- 4. — Oral or in writing—p 4
- 5. — Signing—p 7
- 6. — Entry on minutes, filing, or record—p 8
- 7. — Supervision and assent of court—p 10
- 8. — Consideration—p 11
- 9. Capacity and authority to enter into stipulation—p 11
- 10. Matters which may be the subject of stipulation—p 12
- 11. Construction in general—p 26
- 12. Operation and effect in general—p 30
- 13. Conclusiveness in general—p 31
- 14. Persons concluded—p 33
- 15. — Persons under disability—p 36
- 16. Persons in whose favor operative—p 37
- 17. Conclusive effect on court—p 37
- 18. Conclusiveness and effect of particular stipulations—p 39
- 19. — To abide event—p 40
- 20. — For dismissal, discontinuance, reinstatement, or revival—p 42
- 21. — As to pleadings—p 43
- 22. — As to issues—p 46
- 23. — As to evidence—p 49
- 24. — As to admissions—p 56
- 25. — As to agreed statement of facts—p 65
- 26. — As to trial—p 74
- 27. — As to judgments and executions—p 78
- 28. — As to review—p 81
- 29. — Other stipulations—p 82
- 30. Rescission, withdrawal, abrogation, waiver, or abandonment—p 83
- 31. Enforcement of stipulation in general—p 85

See also descriptive word index in the back of this Volume

- § 32. Pleading—p 86
- 33. Evidence—p 87
- 34. Relief from stipulation—p 88
- 35. — Grounds—p 90
- 36. — Proceedings for relief—p 93
- 37. — Nature and extent of relief—p 94

See also descriptive word index in the back of this Volume

§ 1. Definition and Nature

A stipulation is an agreement between counsel with respect to business before a court, and is not one of the usual pleadings, but is a proceeding in the cause and as such is under the supervision of the court, and has been compared to, and distinguished from, a contract.

A stipulation, in the sense discussed in this title, is an agreement between counsel with respect to business before a court.¹ It is not one of the usual pleadings,² but is a proceeding in the cause and as such is under the supervision of the court,³ by means of its coercive power over the parties to the suit and their attorneys.⁴

"Contracts" compared and distinguished. While stipulations concerning pending causes in court have sometimes been described as "contracts,"⁵ or as "contracts made in the course of judicial proceedings,"⁶ and stipulations operating as concessions of some rights as a consideration for those secured have been said to have all the essential characteristics of mutual contracts,⁷ other decisions have

stated without qualification that stipulations concerning a pending cause in courts are not contracts;⁸ and, as discussed in Contracts § 10, it is generally held that stipulations are obligations unlike ordinary contracts between parties not in court, and are not governed by the rules of law ordinarily applicable to contracts. Further, as discussed infra § 8, according to the weight of authority, stipulations need no consideration or mutuality to support them.

Not decree or consent decree. A stipulation is neither a decree⁹ nor a consent decree.¹⁰

§ 2. Favored by Courts

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs, but it is not the duty of the court to require one of the litigants to stipulate with his adversary.

Whether the aid of the court is invoked by some summary method during the pendency of the cause, or by a resort to another independent action,¹¹

1. U.S.—In re Morris Metal Products Corporation, C.C.A.2, 4 F.2d 1003—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, D.C.Mo., 9 F.Supp. 988.

Cal.—Palmer v. City of Long Beach, 199 P.2d 952, 33 Cal.2d 134.

Va.—Burke v. Gale, 67 S.E.2d 917, 193 Va. 130.

Wis.—Corpus Juris cited in City of Milwaukee v. City of West Allis, 294 N.W. 625, 630, 236 Wis. 371, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

60 C.J. p 39 note 1.

2. Mo.—Keller v. Keklikian, 244 S.W.2d 1001, 362 Mo. 919.

3. Mo.—Keller v. Keklikian, supra—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

N.J.—Hygrade Cut Fabric Co. v. U. S. Stores Corporation, 144 A. 605, 105 N.J.Law 324.

60 C.J. p 39 note 2.

4. N.Y.—Becker v. Lamont, 13 How. Fr. 23.

5. Wis.—Southern Colonization Co. v. Cole, 201 N.W. 817, 185 Wis. 469.

60 C.J. p 39 note 4.

A stipulation made in open court and spread on the record "is a contract but made with more solemnity and better protection to the rights of the parties than an ordinary contract made out of court."—Fair Mercantile Co. v. Union-May-Stern Co., 221 S.W.2d 751, 755, 359 Mo. 385.

A stipulation made in presence of the court, touching subject matter of the litigation, is a contract with the court as well as with the adverse party, which the court is bound to enforce for protection of the latter.—De Santolo v. La Porte, 89 N.Y.S. 2d 114.

Stipulation of settlement entered into between parties to action constitutes contract between parties.—Kynin v. Grand Plaza Caterers, 265 N.Y.S. 614, 148 Misc. 156.

6. Wis.—State v. St. Croix County Cir. Ct., 203 N.W. 923, 187 Wis. 1, 48 A.L.R. 894.

7. Wis.—Paine v. Chicago & N. W. Ry. Co., 258 N.W. 846, 217 Wis. 601—Illinois Steel Co. v. Warras, 123 N.W. 656, 141 Wis. 119.

Sanctity of ordinary contract
Stipulations having all characteristics as concessions of some rights as

consideration for those secured are entitled to all sanctity of ordinary contract.—Thayer v. Federal Life Ins. Co., 258 N.W. 849, 217 Wis. 282—Illinois Steel Co. v. Warras, 123 N.W. 656, 141 Wis. 119.

8. N.J.—Hygrade Cut Fabric Co. v. U. S. Stores Corporation, 144 A. 605, 105 N.J.Law 324.

60 C.J. p 39 note 6.

Agreement held stipulation

Agreement between parties, designated as stipulation, which provided for settlement of action by payment of specified amount in installments and gave plaintiff right, on notice of default, to enter judgment, was not a fixed contract, but a stipulation over which court retained control.—Goldstein v. Goldsmith, 276 N.Y.S. 861, 243 App.Div. 268.

9. Ill.—People v. Spring Lake Drain, etc., Dist., 97 N.E. 1042, 253 Ill. 479.

60 C.J. p 39 note 13.

10. Ill.—People v. Spring Lake Drain, etc., Dist., supra.

60 C.J. p 39 note 14.

11. Ill.—People v. Spring Lake Drain, etc., Dist., 97 N.E. 1042, 253 Ill. 479.

courts ordinarily look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs to the parties,¹² and such stipulations should be encouraged by the courts rather than discouraged,¹³ and enforced by them unless good cause is shown to the contrary, as discussed infra § 31. However, it is not the duty or function of the trial court to require one of the parties to litigation to stipulate with his adversary,¹⁴ and in some types of suits, which are themselves looked on with disfavor by the courts, the court may view a stipulation entered therein with suspicion.¹⁵

§ 3. Form, Requisites, and Validity

While a stipulation need not follow any particular form, its terms must be definite and certain and it is essential that they be assented to by the parties or their representatives.

While a stipulation need not follow any particular form,¹⁶ its terms must be definite and certain in order to afford a proper basis for judicial decision,¹⁷ and it is essential that they be assented to by the parties or those representing them.¹⁸ Silence, under some circumstances, may be deemed assent, or, at least, may operate to bar a subsequent repudia-

Enforcement of stipulation in general see infra § 31.

12. U.S.—*N. L. R. B. v. J. L. Hudson Co.*, C.C.A.6, 135 F.2d 380, certiorari denied 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439—*In re American States Public Service Co.*, D.C.Md., 12 F.Supp. 667, modified on other grounds, C.C.A., *Burco, Inc. v. Whitworth*, 81 F.2d 721, certiorari denied 56 S.Ct. 670, two cases, 297 U.S. 724, 80 L.Ed. 1008.

Fla.—*Dunscombe v. Smith*, 190 So. 796, 139 Fla. 497—*Federal Land Bank of Columbia v. Brooks*, 190 So. 737, 139 Fla. 506—*Esch v. Forster*, 168 So. 229, 123 Fla. 905.

Ill.—*Rooth v. Kusel*, 278 Ill.App. 152. Ind.—*Schreiber v. Rickert*, 50 N.E.2d 879, 114 Ind.App. 55.

Iowa.—*Corpus Juris* quoted in *Burnett v. Poage*, 29 N.W.2d 431, 435, 239 Iowa 31.

Minn.—*Gelin v. Hollister*, 24 N.W.2d 496, 222 Minn. 339, 168 A.L.R. 195. N.D.—*Mongeon v. Burkeville*, 55 N.W.2d 445.

Va.—*Mulkey v. Firth Bros. Iron Works*, 50 S.E.2d 404, 188 Va. 451. W.Va.—*Gilkerson v. Baltimore & O. R. Co.*, 51 S.E.2d 767, 132 W.Va. 133.

60 C.J. p 40 note 16.

13. U.S.—*U. S. v. Champion Coated Paper Co.*, 22 C.C.P.A., Customs, 414.

Fla.—*Esch v. Forster*, 168 So. 229, 123 Fla. 905.

Nev.—*Corpus Juris* cited in *Gottwals v. Rencher*, 98 P.2d 481, 484, 60 Nev. 35, 126 A.L.R. 1262.

Tenn.—*Brown v. McCulloch*, 144 S.W.2d 1, 24 Tenn.App. 324. 60 C.J. p 40 note 17.

14. U.S.—*Brooks v. Great Atlantic & Pacific Tea Co.*, C.C.A.Cal., 92 F.2d 794.

Cal.—*Moore v. Oberg*, 142 P.2d 443, 61 Cal.App.2d 216.

15. Ky.—*Kockritz v. City of Henderson*, 107 S.W.2d 245, 269 Ky. 334.

Stipulation held entitled to full faith where circumstances under which it was entered dispelled the initial suspicion.—*Kockritz v. City of Henderson*, supra.

16. Series of letters constituted a written stipulation.—*Bank of America N. T. & S. A. v. Superior Court of San Francisco*, 117 P.2d 932, 47 Cal.App.2d 359.

Medical report, settlement, receipt, and order approving settlement in original proceeding, based on permanent partial disability, constituted stipulated evidence that workman was permanently and partially disabled.—*Oklahoma Portland Cement Co. v. Smith*, 73 P.2d 446, 181 Okl. 313.

Policy attached to agreed statement of facts in suit on policy became a part of agreement.—*Southwestern Life Ins. Co. v. Houston*, Tex.Civ.App., 121 S.W.2d 619, error refused.

17. Cal.—*Hunt v. United Artists Studio*, 180 P.2d 460, 79 Cal.App.2d 619—*Back v. Farnsworth*, 77 P.2d 295, 25 Cal.App.2d 212.

Fla.—*Troup v. Bird*, 53 So.2d 717. N.Y.—*People v. Feltman*, 268 N.Y.S. 810, 149 Misc. 633.

Tex.—*Matthews v. Looney*, 123 S.W.2d 871, 132 Tex. 313—*Park v. Roberts*, Civ.App., 219 S.W.2d 598.

Wash.—*Lasell v. Beck*, 208 P.2d 139, 34 Wash.2d 211.

Stipulation as to agreed statement of facts see infra § 10 f.

Stipulation should be clear and mutually understood by all parties.—*Pioneer Irr. Dist. v. American Ditch Ass'n*, 1 P.2d 196, 50 Idaho 732.

Description of real property such as would satisfy requirements of statute of frauds was not necessary in a stipulation made in open court purporting to effect division of property of parties.—*Deer v. Deer*, 186 P.2d 619, 29 Wash.2d 202.

Failure of stipulation to determine all facts with respect to the numerous issues does not render it void.—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328.

Practice of indicating a date by numbers representing month of the year, day of the month, and year of the century is not approved.—*Ed-*

wards v. Edwards, 68 S.E.2d 822, 235 N.C. 93.

Terms held too vague and indefinite to afford a proper basis for decision.—*Sanford's Estate v. C. I. R.*, 60 S.Ct. 51, 308 U.S. 39, 84 L.Ed. 20, rehearing denied 60 S.Ct. 258, 308 U.S. 637, 84 L.Ed. 529.

Ambiguous statement held not to amount to "stipulation of record."—*Sefton v. Valley Dairy Co.*, 28 A.2d 313, 345 Pa. 324.

Sufficient certainty held shown

Ill.—*Vidon v. Roberts*, 69 N.E.2d 721, 330 Ill.App. 104.

18. U.S.—*Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, D.C.Mo.*, 9 F.Supp. 988.

Cal.—*Corpus Juris* cited in *Palmer v. City of Long Beach*, 199 P.2d 952, 957, 33 Cal.2d 134—*Moore v. Oberg*, 142 P.2d 443, 61 Cal.App.2d 216.

Tex.—*Matthews v. Looney*, 123 S.W.2d 871, 132 Tex. 313—*Park v. Roberts*, Civ.App., 219 S.W.2d 598. 60 C.J. p 40 note 19.

One litigant and court cannot make a stipulation binding on the adverse party without his or his attorney's consent.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134—*Moore v. Oberg*, 142 P.2d 443, 61 Cal.App.2d 216.

Impleader; stipulation by original parties

Where plaintiff filed a contract suit against defendant who impleaded another and charged him with negligence, and plaintiff filed amended petition charging the cross defendant with negligence, plaintiff and defendant were within their rights in making stipulation on which the contract liability as between them was to be determined.—*Rose v. Baker*, 183 S.W.2d 438, 143 Tex. 202.

Giving up basic defense

The rule stated in the text is particularly pertinent where the purported stipulation gave up the basic defense on which defendant relied.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134.

tion.¹⁹ The fact that the obligation of a stipulation is also involved in an independent agreement does not deprive a party of the privilege of asserting rights under the stipulation, even though such agreement is invalid.²⁰

Stipulation invalid in part. Where a stipulation is an entirety, and is invalid in part, the stipulation is void in toto.²¹

§ 4. — Oral or in Writing

- a. In general
- b. Exceptions to rule

a. In General

Generally, under statutes and rules of courts so providing, stipulations are required to be in writing and an oral stipulation is invalid, if disputed.

In the absence of some statute or rule of court providing to the contrary, any valid stipulation re-

lating to a pending cause is enforceable.²² Nevertheless, it is usually required by statute or rule of court that stipulations with relation to a pending cause shall be in writing, and such requirement, subject to the exceptions discussed infra subsection b of this section, must be observed, and no oral stipulation with respect to a pending cause is valid and enforceable, if disputed,²³ at least unless it has been executed in whole or in part.²⁴

Purpose of, and reason for, rule. The rule requiring stipulations to be reduced to writing was adopted to prevent fraudulent claims of oral stipulations,²⁵ and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes,²⁶ which it has been said are often more perplexing than the case itself.²⁷ The time of the court should not be taken up in controversial matters of this character.²⁸

19. Md.—Bloom v. Graff, 63 A.2d 813, 191 Md. 733.
- N.D.—State v. Seeb, 37 N.W.2d 341, 76 N.D. 473.

Stipulation read into record

Where stipulation was read into record at outset, counsel for one party could not disclaim it in absence of expression of dissent in positive terms, and mere silence or even a statement that he had no power to stipulate was insufficient as basis for disclaimer.—People ex rel. Loft, Inc., v. Sexton, 1 N.Y.S.2d 7, 165 Misc. 564.

Failure to return after service

Where stipulation served on defendant's attorney was not returned, any defects therein were waived.—Evans v. Cannon, 108 N.Y.S.2d 93, 279 App.Div. 667, reargument denied 109 N.Y.S.2d 187, 279 App.Div. 757.

20. Entry of support order on failure to make payments

Where parties had entered into a separation agreement and a separation action was pending, a stipulation made therein under the terms of which the parties consented to the entry ex parte of a certain form of order directing the husband to pay a specified amount to support the wife and child, pendente lite, on his failure to make payments for her support, was available to the wife independently as a matter of law when her husband failed to make such payments, even though the separation agreement was invalid.—Goldfarb v. Goldfarb, 257 N.Y.S. 538, 235 App.Div. 868.

21. Ind.—Weaver v. Ferguson, 117 N.E. 659, 68 Ind.App. 169.
22. Miss.—Rockett v. Finley, 184 So. 78, 183 Miss. 308.
- 60 C.J. p 40 note 25.
23. Ala.—Spencer v. Spencer, 47 So. 2d 252, 254 Ala. 22.

Cal.—Hunt v. United Artists Studio, 180 P.2d 460, 79 Cal.App.2d 619—Fresno City High School Dist. v. Dillon, 94 P.2d 86, 34 Cal.App.2d 636.

Colo.—In re Eder's Estate, 67 P.2d 1030, 100 Colo. 329.

Iowa.—Reppert v. Reppert, 241 N.W. 487, 214 Iowa 17.

La.—Adams v. Perilloux, 44 So.2d 117, 216 La. 566—Elchinger v. Lacroix, 189 So. 572, 192 La. 908.

Mich.—Jorgensen v. Howland, 38 N.W.2d 906, 325 Mich. 440.

N.J.—Prudential Ins. Co. of America v. Kantrowitz, 188 A. 73, 120 N.J. Eq. 549.

N.Y.—David S. Stern Corp. v. Edystone, 35 N.Y.S.2d 300, 264 App. Div. 865—Bower v. Palmer, 17 N.Y.S.2d 61, 258 App.Div. 414—Schwartz v. Leasehold Corp. of New York, 48 N.Y.S.2d 146, 181 Misc. 666—People v. Feltman, 268 N.Y.S. 810, 149 Misc. 633.

Pa.—Britton v. Continental Min. & Smelting Corp., 76 A.2d 625, 366 Pa. 82—Silberman v. Ratner, 157 A. 632, 103 Pa.Super. 424—Bertolacci v. Union Paving Co., 18 Pa. Dist. & Co. 270.

Tex.—Matthews v. Looney, 123 S.W.2d 871, 132 Tex. 313—Park v. Roberts, Civ.App., 219 S.W.2d 598—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571—Piedmont Fire Ins. Co. v. Dunlap, Civ.App., 193 S.W.2d 853, refused no reversible error—Hooe v. Texas Fire & Casualty Underwriters, Civ.App., 151 S.W.2d 310—Armstrong v. State, Civ.App., 122 S.W.2d 662—Billington v. National Standard Life Ins. Co., Civ.App., 68 S.W.2d 239.

Wash.—Hildebrand v. Hildebrand, 201 P.2d 213, 32 Wash.2d 311.

60 C.J. p 41 notes 26, 28.

Court is without power to act on stipulation not meeting requirements.—Park v. Roberts, Tex.Civ.App., 219 S.W.2d 598.

24. N.Y.—Loghry v. Lynaugh, 171 N.Y.S. 686.

Effect of execution of stipulation generally see infra subsection b (4) of this section.

25. N.Y.—Schwartz v. Leasehold Corp. of New York, 48 N.Y.S.2d 146, 181 Misc. 666.

26. U.S.—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, D.C.Mo., 9 F. Supp. 988.

Cal.—Fresno City High School Dist. v. Dillon, 94 P.2d 86, 34 Cal.App.2d 636.

Iowa.—Reppert v. Reppert, 241 N.W. 487, 214 Iowa 17.

N.Y.—David S. Stern Corp. v. Edystone, 35 N.Y.S.2d 300, 264 App.Div. 865.

Pa.—Silberman v. Ratner, 157 A. 632, 103 Pa.Super. 424—General State Authority to Use of Myers v. U. S. Fidelity & Guaranty Co., 40 Pa. Dist. & Co. 259, 49 Dauph. Co. 261. Tex.—Swartzberg v. City of Temple, Civ.App., 212 S.W.2d 1016—Hooe v. Texas Fire & Cas. Underwriters, Civ.App., 151 S.W.2d 310—**Corpus Juris** cited in Armstrong v. State, Civ.App., 122 S.W.2d 662, 664—**Corpus Juris** cited in Thomas v. Smith, Civ.App., 60 S.W.2d 514, 516, error dismissed.

60 C.J. p 41 note 31.

27. Cal.—Borkheim v. North British, etc., Ins. Co., 38 Cal. 623.

28. U.S.—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, D.C.Mo., 9 F. Supp. 988.

Iowa.—Farmers' State Sav. Bank v. Miles, 221 N.W. 449, 206 Iowa 766.

Application of rule. The rule requiring stipulations to be reduced to writing has been applied to a wide variety of stipulations,²⁹ as for instance, stipulations relating to process;³⁰ stipulations to continue a cause³¹ or not to take judgment at a particular term or time;³² to discontinue a cause;³³ to dismiss a criminal prosecution;³⁴ or not to ask for a continuance;³⁵ stipulations with respect to pleadings³⁶ or evidence;³⁷ stipulations as to costs;³⁸ stipulations as to references;³⁹ stipulations as to trial⁴⁰ or new trial;⁴¹ stipulations as to judgments;⁴² stipulations as to executions⁴³ or as to appeals;⁴⁴ and stipulations to abide by the result of another action.⁴⁵

b. Exceptions to Rule

- (1) In general
- (2) Stipulations made in court
- (3) Where stipulation admitted
- (4) Where stipulation executed

(1) In General

The rule requiring stipulations to be in writing is not without exception and does not apply to all agreements, but only to those relating to a pending cause, and by its terms may be limited to agreements between attorneys.

The rule requiring stipulations to be in writing is not without exceptions.⁴⁶ The rule does not apply to all agreements but only to those relating to a pending cause.⁴⁷ It has accordingly been held that an agreement for the settlement out of court of the controversy need not be in writing;⁴⁸ and such is the rule in respect of an agreement having to do with the payment of money out of the proceeds of a foreclosure sale which was independent of the suit in equity pending in court,⁴⁹ or an oral contract made with defendant's attorney by plaintiff before commencement of the suit.⁵⁰ It has also been held that the rule does not apply to a stipulation which, while made pendente lite, had its genesis in the contract sued on, and does not place any obligation

29. Agreement not to appear and permit dismissal for want of prosecution
Ala.—Spencer v. Spencer, 47 So.2d 252, 254 Ala. 22.

Waiver of right to invoke statute governing dismissal
Cal.—Bank of America N. T. & S. A. v. Superior Court of San Francisco, 117 P.2d 932, 47 Cal.App.2d 359.

30. Neb.—Haylen v. Missouri Pac. R. Co., 44 N.W. 873, 28 Neb. 660.

Notice of institution of suit
Pa.—Britton v. Continental Min. & Smelting Corp., 76 A.2d 625, 366 Pa. 82.

31. Neb.—Schmehl v. Buffalo County, 30 N.W.2d 882, 149 Neb. 277, opinion supplemented 32 N.W.2d 915, 149 Neb. 897.
60 C.J. p 42 note 86.

32. Ala.—Norman v. Burns, 67 Ala. 248.

33. N.Y.—Callender v. Dressler-Beard Mfg. Co., 152 N.Y.S. 645.
60 C.J. p 42 note 38.

34. Tex.—Fleming v. State, 12 S.W. 605, 28 Tex.App. 234.

35. Iowa.—Sapp v. Alken, 28 N.W. 24, 68 Iowa 699.

36. N.J.—Prudential Ins. Co. of America v. Kantrowitz, 188 A. 73, 120 N.J.Eq. 549.
Wash.—Hendricks v. Hendricks, 211 P.2d 715, 35 Wash.2d 139.
60 C.J. p 42 note 41.

37. Iowa.—Hardin v. Iowa R., etc., Co., 43 N.W. 543, 78 Iowa 726, 6 L.R.A. 52.
60 C.J. p 42 note 42.

Relieving judge of duty of reducing testimony to writing
N.Y.—People v. Feltman, 268 N.Y.S. 810, 149 Misc. 633.

38. U.S.—Lee v. Simpson, C.C.S.C., 42 F. 434.
N.Y.—Bates v. Norris, 13 N.Y.Civ. Proc. 395.

39. N.Y.—Moore v. Metropolitan El. R. Co., 26 N.Y.S. 858, 74 Hun 639.
60 C.J. p 42 note 44.

40. Mich.—Jorgensen v. Howland, 38 N.W.2d 906, 325 Mich. 440.
60 C.J. p 42 note 45.

Date or time of trial
Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571.
60 C.J. p 42 note 45 [a].

No trial in absence of counsel
Pa.—Silberman v. Ratner, 157 A. 632, 103 Pa.Super. 424.

Issues to be submitted to jury
Mich.—Jorgensen v. Howland, 38 N.W.2d 906, 325 Mich. 440.

41. Mont.—Beach v. Spokane Ranch, etc., Co., 53 P. 493, 21 Mont. 184.
60 C.J. p 42 note 46.

Specific rule

The civil procedure rule that motion for new trial "must" be presented and determined within specified time, in absence of written agreement by parties to postpone determination, is mandatory, so that parol agreements between parties' counsel for such postponement are without effect.—Horwitz v. Finkelstein, Tex. Civ.App., 182 S.W.2d 751, error refused.

42. N.Y.—Bower v. Palmer, 17 N.Y. S.2d 61, 258 App.Div. 414.

Tex.—Matthews v. Looney, 123 S.W. 2d 871, 132 Tex. 313—Park v. Roberts, Civ.App., 219 S.W.2d 598—Behrens v. Behrens, Civ.App., 186 S.W.2d 697.

60 C.J. p 42 note 47.

43. Stay of execution
Nev.—Seawell v. Cohn, 2 Nev. 308.

44. Wash.—Hildebrand v. Hildebrand, 201 P.2d 213, 32 Wash.2d 311.
60 C.J. p 42 note 49.

Filing of abstract
Iowa.—Reppert v. Reppert, 241 N.W. 487, 214 Iowa 17.

45. Tex.—Willis v. Sims, App., 47 S.W. 55.
60 C.J. p 43 note 50.

46. Colo.—In re Eder's Estate, 67 P. 2d 1030, 100 Colo. 329.

47. Wis.—Logemann v. Logemann, 15 N.W.2d 800, 245 Wis. 515.
60 C.J. p 43 note 52.

Subsequent cause of action on contract entered into as part of stipulation ending action was not affected by fact that stipulation did not comply with statutory requirements, since such requirements have reference to stipulations directly affecting the course of an action in court and do not control subsequent causes of action on different issues and were not intended to modify accepted contract law.—Logemann v. Logemann, 15 N.W.2d 800, 245 Wis. 515.

48. N.Y.—Smith v. Bach, 81 N.Y.S. 1057, 82 App.Div. 608.
60 C.J. p 43 note 53.

49. Mass.—See v. Downey, 152 N.E. 67, 256 Mass. 47.

50. Cal.—Ephraim v. Pacific Bank, 86 P. 507, 149 Cal. 222.

on a party which did not already rest on him under the terms of the contract.⁵¹ So the operation of the rule is limited to the ordinary routine of practice, and has no application to agreements made to facilitate or guide officers in the execution of writs;⁵² and it does not apply to an agreement which may give rise to a cause of action in another suit, but only to the conduct and management of a cause before the court in which it is pending.⁵³

Operation limited to agreements between attorneys. Where the operation of the statute or rule of court is limited to agreements between attorneys, an agreement between a party and the attorney for the adverse party is not required to be in writing,⁵⁴ and it has been held that a stipulation by an attorney authorized by the party is the party's agreement and is enforceable although not in writing.⁵⁵

(2) Stipulations Made in Court

The rule requiring stipulations to be in writing does not apply to stipulations made in open court or before a master.

Statutes and court rules requiring stipulations to

be in writing do not apply to stipulations made in open court⁵⁶ or before a master,⁵⁷ although it has been said to be the better practice to have them reduced to writing.⁵⁸ Where the agreement is made in the presence of the court, it has been said that "it is without the purpose or reason, if not without the letter, of the rule."⁵⁹ Stipulations made in open court have been very generally regarded as just as obligatory as though reduced to writing and executed with every legal formality.⁶⁰ On the other hand, it has been held that a stipulation made in the presence of or with the trial court, but not in open court, as where it is made in chambers, is required to be in writing.⁶¹

In presence of clerk. Under a statute so providing, a stipulation made in the presence of the clerk of the court may be enforced.⁶²

(3) Where Stipulation Admitted

The rule requiring stipulations to be in writing has no application to a stipulation which is admitted or is not disputed.

The rule requiring stipulations to be in writing

51. Stipulation for taking insured's deposition

In actions on fire policies obligating insured to submit to examination under oath, a first application by insurers for continuance, in substantial compliance with rule, properly verified and uncontroverted, alleging reliance by insurers on unperformed agreement with opposing counsel for the taking of insured's deposition, was improperly denied, notwithstanding rule that agreement between attorneys or parties will not be enforced unless in writing, since continuance would not enforce agreement but would merely leave the parties where they were prior to the agreement under the terms of the policies. —Piedmont Fire Ins. Co. v. Dunlap, Tex.Civ.App., 193 S.W.2d 853, refused no reversible error.

52. Pa.—Appeal of Reamer, 18 Pa. 510.

53. La.—Johnston v. Yale, 19 La. Ann. 212.

54. Miss.—Rickett v. Finley, 184 So. 78, 183 Miss. 308.

55. Mass.—Palmer v. Lavers, 105 N. E. 1000, 218 Mass. 286.

56. Colo.—In re Eder's Estate, 67 P. 2d 1030, 100 Colo. 329.

Ga.—Langston v. Maryland Casualty Co., 160 S.E. 823, 43 Ga.App. 854.

Mich.—Jorgensen v. Howland, 38 N. W.2d 906, 325 Mich. 440.

Minn.—State ex rel. Bassin v. District Court of Hennepin County, 259 N.W. 542, 194 Minn. 32.

Mo.—Corpus Juris cited in Fair Mercantile Co. v. Union-May-Stern Co., 221 S.W.2d 751, 755, 339 Mo. 385.

Neb.—Schmehl v. Buffalo County, 30 N.W.2d 882, 149 Neb. 277, opinion supplemented 32 N.W.2d 915, 149 Neb. 897.—Le Barron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

N.H.—Perley v. Balley, 199 A. 570, 89 N.H. 359.

N.Y.—Application of Callahan, 28 N. Y.S.2d 980, 262 App.Div. 398, reargument denied In re Callahan, 30 N.Y.S.2d 695, 262 App.Div. 978, appeal dismissed People v. Callahan, 39 N.E.2d 942, 287 N.Y. 743, appeal denied 35 N.Y.S.2d 288, 264 App. Div. 812.—People v. Feltman, 268 N.Y.S. 810, 149 Misc. 633.—De Santolo v. La Porte, 89 N.Y.S.2d 114.—Davis v. Davis, 64 N.Y.S.2d 382.

Okl.—Corpus Juris cited in Yamie v. Willmott, 88 P.2d 325, 326, 184 Okl. 382.

S.C.—Mitchell v. Jones, 78 S.E. 528, 94 S.C. 487.

Tex.—Matthews v. Looney, 123 S.W. 2d 871, 132 Tex. 313.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571.—Piedmont Fire Ins. Co. v. Dunlap, Civ.App., 193 S.W.2d 853, refused no reversible error.—Bilington v. National Standard Life Ins. Co., Civ.App., 68 S.W.2d 239.

Wash.—Hendricks v. Hendricks, 211 P.2d 715, 35 Wash.2d 139.—Corpus Juris cited in Deer v. Deer, 186 P. 2d 619, 625, 29 Wash.2d 202.

Wis.—Corpus Juris cited in City of Milwaukee v. City of West Allis, 294 N.W. 625, 630, 236 Wis. 371, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

60 C.J. p 43 note 60.

By counsel in presence of parties
N.Y.—Prindle v. Dearborn, 291 N.Y.S. 295, 161 Misc. 95.

Statute of frauds not violated

A stipulation made in open court purporting to effect a division of property of parties was not void under statute of frauds because it was not in writing or signed by the parties.—Deer v. Deer, 186 P.2d 619, 29 Wash.2d 202.

A stenographic record of what occurred in open court should be made, if the stipulation is to be made the subject matter of a judicial action to enforce it.—David S. Stern Corp. v. Edelstone, 35 N.Y.S.2d 300, 264 App. Div. 865.

57. Pa.—Black v. Black, 55 A. 847, 206 Pa. 116.

Administrative officer or body

Ga.—Langston v. Maryland Casualty Co., 160 S.E. 823, 43 Ga.App. 854.

Wis.—City of Milwaukee v. City of West Allis, 294 N.W. 625, 236 Wis. 371, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

58. Tenn.—Monger v. Sellers, 7 Tenn.App. 507.

59. Ala.—Frestwood v. Watson, 20 So. 600, 111 Ala. 604.

60. Mo.—Corpus Juris cited in Fair Mercantile Co. v. Union-May-Stern Co., 221 S.W.2d 751, 755, 339 Mo. 385.

60 C.J. p 43 note 63.

61. Mich.—Jorgensen v. Howland, 38 N.W.2d 906, 325 Mich. 440.

62. Wash.—Hendricks v. Hendricks, 211 P.2d 715, 35 Wash.2d 139.

has no application to a stipulation which is admitted or is not disputed by the party against whom it is sought to be enforced;⁶³ and this is especially true where the agreement has been acted on by one of the parties.⁶⁴ Where the facts relied on by the moving party are not controverted, there is no reason for the application of the rule requiring writing.⁶⁵ In applying the rule, it has been held that, where affidavits are made by one party in support of the assertion that an oral stipulation was made and the assertion is not contradicted in the same manner by the opposite party, it must be deemed to be admitted;⁶⁶ and a mere denial by the latter of any knowledge that such a stipulation was made is not a denial of the fact that one was made.⁶⁷ It has similarly been held that, where there is no dispute as to the terms of a stipulation, but only as to its construction and effect, there is no sufficient reason why it should not be considered by the court.⁶⁸

(4) Where Stipulation Executed

The rule requiring stipulations to be in writing has no application to stipulations made out of court which have been executed in whole or in part.

The rule requiring stipulations to be in writing has no application to oral stipulations made out of court which have been executed in whole or in part.⁶⁹ This principle has been most frequently applied where one of the parties, in reliance on a

stipulation, has done, or omitted to do, some act which, except for the stipulation, he would not have done, or omitted to do. In these circumstances the court will hold the stipulation to be effectual so as not to mislead, prejudice, or defraud those who have relied or acted on it in good faith.⁷⁰ If it were otherwise, the rule requiring stipulations to be in writing would be converted into a mere device to promote injustice and wrong,⁷¹ and to permit gross fraud.⁷² Furthermore, all the elements which are necessary to create an estoppel are present.⁷³ Nevertheless, in order to afford relief under an oral agreement, it must clearly and unequivocally appear that one was made.⁷⁴

§ 5. — Signing

When required by statute or rule of court, stipulations made out of court must be signed by the parties to be charged or their attorneys, and a stipulation signed by one of the parties only is of no effect, although it has been held that a stipulation may be valid even though not signed by all the parties to the litigation.

Stipulations made out of court with respect to pending causes, in addition to being put in writing, as discussed supra § 4, must, if so required by statute or rule of court, be signed by the parties to be charged or their attorneys.⁷⁵ Where a party appears in person in the trial court, it has been held that a stipulation consenting to judgment in a high-

63. Tex.—*Armstrong v. State*, Civ. App., 122 S.W.2d 662—*Thomas v. Smith*, Civ.App., 60 S.W.2d 514, error dismissed.

60 C.J. p 43 note 65.

Court may recognize an undisputed oral stipulation.—*Pineapple Orange Co. v. Travelers' Ins. Co.*, 140 So. 471, 104 Fla. 600.

64. Ga.—*Stone Mountain Monumental Assoc. v. Smith*, 153 S.E. 209, 170 Ga. 515.

Estoppel to object to want of writing may be predicated where oral stipulation is not disputed and one of parties has done, or omitted to do, some act in reliance on stipulation.—*Thomas v. Smith*, Tex.Civ.App., 60 S.W.2d 514, error dismissed.

65. Cal.—*Johnson v. Sweeney*, 30 P. 540, 95 Cal. 304.

Pa.—*General State Authority to Use of Myers v. U. S. Fidelity & Guaranty Co.*, 40 Pa.Dist. & Co. 259, 49 Dauph.Co. 261.

66. Cal.—*Robertson v. Williams*, 22 P. 665, 81 Cal. 263.

67. N.Y.—*Brady v. Martin*, 33 N.Y. St. 425, 19 N.Y.Civ.Proc. 134.

68. Conn.—*Woodruff v. Fellowes*, 35 Conn. 105.

69. N.Y.—*Schwartz v. Leasehold*

Corp. of New York, 48 N.Y.S.2d 146, 181 Misc. 666.

60 C.J. p 44 note 72.

Executed oral agreement

General rule that agreement should be in writing and filed does not necessarily imply that parol agreement acted on may not be set up.—*Durham Tropical Land Corporation v. Sun Garden Sales Co.*, 138 So. 21, 106 Fla. 429, rehearing denied 143 So. 758, 106 Fla. 429, reheard 151 So. 327, 106 Fla. 429.

70. U.S.—*Oliver v. City of Shattuck ex rel. Versluis*, C.C.A.Okl., 157 F.2d 150.

Cal.—*Exley v. Exley*, 226 P.2d 662, 101 Cal.App.2d 831.

Ga.—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, 196 S.E. 99, 57 Ga.App. 747.

60 C.J. p 44 note 74.

Court of equity has power to relieve a party who has in good faith relied on and acted on alleged parol agreement between counsel.—*Greenberg v. Kaplan*, 268 N.W. 788, 277 Mich. 1.

71. Mont.—*Bush v. Baker*, 129 P. 550, 46 Mont. 535.

60 C.J. p 45 note 75.

72. Ga.—*Bradshaw v. Gomerly*, 54 Ga. 557.

73. Ga.—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, 196 S.E. 99, 57 Ga.App. 747.

60 C.J. p 45 note 77.

74. N.Y.—*Fort Masonry Co., Inc. v. Hudson View Constr. Co., Inc.*, 169 N.Y.S. 578, 102 Misc. 717.

75. Ga.—*American Surety Co. v. Smith*, 191 S.E. 137, 55 Ga.App. 633. Tex.—*Hickson v. City of Van Alstyne*, Civ.App., 195 S.W.2d 571.

60 C.J. p 45 note 81.

Stipulation signed by parties and not attorneys was not thereby invalidated, where fact that it was not signed by such attorneys was not shown to have prejudiced plaintiff's rights.—*Miller v. Scobie*, 11 So.2d 892, 152 Fla. 328.

Sufficiency of signature

(1) Error or inadvertence on part of attorney in signing stipulation as attorney for plaintiff instead of as attorney for himself as administrator of the estate of one original plaintiff and as attorney for administrator of estate of another original plaintiff was too trifling to render stipulation invalid.—*Hanson v. Rogers*, 32 P.2d 126, 54 Idaho 360.

(2) Other decisions with respect to sufficiency of signature see 60 C.J. p 45 note 81 [a], [b].

er court must be signed by him;⁷⁶ but it has also been held that a litigant who is not an attorney does not come within the purview of a rule requiring all agreements between attorneys to be signed by them.⁷⁷ A stipulation signed by one of the parties only is of no effect;⁷⁸ but, in the absence of a statute or rule of court providing otherwise,⁷⁹ a stipulation may be valid and binding although not signed by all the parties to the litigation,⁸⁰ as where it is of such nature as to affect only the interests of some parties and is signed only by such parties.⁸¹

The requirement of signing has no application to stipulations made in open court,⁸² or which have been acted on.⁸³ Further, it has been held that a stipulation contained in the transcript between depositions filed as a whole, the caption of the first of which referred to in the stipulation showed that counsel for all parties were present when the depositions were taken and purporting to be made "between counsel representing all parties," is binding, although not authenticated by the signature of any counsel.⁸⁴ It has also been held that an appellate court will recognize an unsigned stipulation made in the court below where it appears as a part of the record.⁸⁵

Genuineness of signatures. Genuineness of signatures to stipulations, if not denied, is considered as admitted;⁸⁶ and, in any event, it has been held that one who joins in signing a stipulation with the other parties in the action in effect authenticates the signatures of the others and is not in a position to

dispute them and insist on the court's requiring proof of any of the signatures.⁸⁷

§ 6. — Entry on Minutes, Filing, or Record

- a. In general
- b. Time for filing or entry
- c. Place of filing or entry
- d. Effect

a. In General

There must be a compliance with statutes or rules of court requiring stipulations to be filed with the clerk, or entered in the minutes of the court, or otherwise made a part of the record, unless, as sometimes provided, the stipulation is in writing and duly signed; and failure to comply has been held to deprive the court of power to act on the stipulation, although it has also been said that the requirement is not jurisdictional.

There must be a compliance with statutes and rules of court requiring stipulations to be filed with the clerk, or entered in the minutes of the court, or otherwise made a part of the record,⁸⁸ unless, as sometimes provided, the stipulation is in writing and subscribed by the parties to be bound or their attorneys;⁸⁹ and failure to comply has been held to deprive the court of power to act on the stipulation,⁹⁰ although it has also been said that the requirement is not jurisdictional.⁹¹ Even in the absence of statutes or rules of court so requiring, a written stipulation not on file or of record and not called to the attention of the court,⁹² or an agreement made out of court between the parties which

76. Cal.—*In re Arguello*, 50 Cal. 308.

77. Miss.—*Rockett v. Finley*, 184 So. 78, 183 Miss. 308.

78. Miss.—*Majure v. Johnson*, 7 So. 2d 545, 192 Miss. 810.

Mo.—*Corpus Juris* cited in *Landers Lumber Co. v. Short*, App., 81 S. W.2d 375, 376.

N.Y.—*Hankinson v. Giles*, 29 How. Pr. 478, 17 Abb.Pr. 251.

79. Miss.—*Majure v. Johnson*, 7 So. 2d 545, 192 Miss. 810.

80. Cal.—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328.

81. Cal.—*Capital Nat. Bank of Sacramento v. Smith*, supra.

82. Ala.—*Prestwood v. Watson*, 20 So. 600, 111 Ala. 604.

Neb.—*LeBarron v. City of Harvard*, 262 N.W. 26, 129 Neb. 460, 100 A. L.R. 767.

83. Wash.—*Connor v. Seattle*, 144 P. 52, 82 Wash. 296. 60 C.J. p 45 note 84.

Signature by one; action by both
A stipulation not signed by one of the parties thereto was not thereby

rendered void where stipulation was signed by the other party and was acted on by both parties.—*Morgestern v. Bailey*, 84 P.2d 159, 29 Cal. App.2d 321.

84. Tenn.—*Lewis v. Illinois Cent. R. Co.*, 259 S.W. 903, 150 Tenn. 94. 60 C.J. p 45 note 85.

85. Neb.—*Durrell v. Todd*, 47 N.W. 862, 31 Neb. 256.

86. Cal.—*Cooper v. Gordon*, 57 P. 1006, 125 Cal. 296.

87. Wash.—*Jones v. Wolverton*, 47 P. 36, 15 Wash. 590.

88. Cal.—*Fresno City High School Dist. v. Dillon*, 94 P.2d 86, 34 Cal. App.2d 636—*Skoglund v. Moore Dry-Dock Co.*, 53 P.2d 1001, 11 Cal. App.2d 287—*Jones v. Noble*, 39 P.2d 486, 3 Cal.App.2d 316.

La.—*Adams v. Perilloux*, 44 So.2d 117, 216 La. 566.

Miss.—*Majure v. Johnson*, 7 So.2d 545, 192 Miss. 810—*Mississippi Cent. R. Co. v. Brookhaven Lumber & Mfg. Co.*, 147 So. 814, 165 Miss. 814.

Tex.—*Matthews v. Looney*, 123 S.W. 2d 871, 132 Tex. 313—*Park v. Roberts*, Civ.App., 219 S.W.2d 598—

Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571—*Behrens v. Behrens*, Civ.App., 186 S.W.2d 697—*Thomas v. Smith*, Civ.App., 60 S.W.2d 514, error dismissed. 60 C.J. p 45 note 90.

Notation on docket

Judge by notation on docket that judgment was by agreement probating will and fixing lien on property in favor of contestants and interveners as per decree did not undertake to sanction terms of any particular judgment, but merely recorded intention of parties to settle, and notation was insufficient record of agreement, if any.—*Matthews v. Looney*, 123 S.W.2d 871, 132 Tex. 313.

89. Wash.—*Hendricks v. Hendricks*, 211 P.2d 715, 85 Wash.2d 139.

Wis.—*Logemann v. Logemann*, 15 N. W.2d 800, 245 Wis. 515.

90. Tex.—*Matthews v. Looney*, 123 S.W.2d 871, 132 Tex. 313—*Park v. Roberts*, Civ.App., 219 S.W.2d 598.

91. Mont.—*Bush v. Baker*, 129 P. 550, 46 Mont. 535.

92. Ill.—*Gershenow v. West Chicago St. R. Co.*, 103 Ill.App. 591.

is not put on the record,⁹³ has been held to be of no effect, and it has been declared that oral stipulations made in open court should be made a part of the record.⁹⁴

On the other hand, statutes and rules of court of the character under consideration do not require a construction that in no instance shall a stipulation be binding unless entered in the minutes of the court or filed with the clerk.⁹⁵ They have no application to agreements not relating to steps in the cause, but made before the commencement of the action,⁹⁶ to agreements affecting subsequent causes of action on different issues,⁹⁷ to agreements to settle the matters in controversy by arbitration or in any other amicable manner,⁹⁸ or to stipulations which are admitted.⁹⁹ Moreover, it has been held that a written stipulation that the testimony of a witness on a former trial may be read in the trial of a cause is not of such nature as to require that it be filed in the cause.¹ As a general rule, the requirements have reference to executory agreements only, and not to those which have been wholly or in part executed;² and if, under the terms of a stipulation, one party received the advantage for which he entered into it, and the other party at his instance gives up some right or loses some advantage so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate it on the ground that the requirements as to filing or entry in the minutes of the court have not been complied with,³ but this rule will not be applied where an attorney by oral stipulation has attempted to stipulate away his client's cause of action or defense.⁴

b. Time for Filing or Entry

It seems that a stipulation may be filed or entered of record at any time as long as it is capable of being

properly and conveniently carried into effect by the parties and the court.

There is no fixed rule as to the time for filing or entering a stipulation, but it seems that this may be done at any time as long as it is capable of being properly and conveniently carried into effect by the parties and the court.⁵ Mere delay in filing a stipulation will not prevent its enforcement where no injury results by reason thereof;⁶ and it has been held that a stipulation may be entered nunc pro tunc after trial⁷ or after entry of judgment or decree.⁸ It has also been held that a nunc pro tunc entry may be made at a subsequent term to cover such an omission.⁹ It has further been held, however, that a record entry cannot be made after a dispute has arisen as to the terms of the agreement.¹⁰

c. Place of Filing or Entry

A parol stipulation made in open court and entered on the minutes, agreeing to the discontinuance of an action pending in another court, will be enforced, but when parties enter into agreements affecting causes before an appellate court it has been held that they must be filed there.

A parol stipulation made in open court and entered on the minutes, agreeing to the discontinuance of an action pending in another court, will be enforced.¹¹ However, it has been held that when parties or their counsel enter into agreements affecting any causes before the appellate court, such agreements must be filed there with the record in such cause, otherwise the court cannot consider them or be governed thereby in any manner.¹²

d. Effect

A stipulation duly signed and filed becomes a part of the record of the case, and has the same effect as an order of the court, agreed to by the parties, and may have the effect of a pleading.

93. N.H.—Olcott v. Banfill, 7 N.H. 469.

94. Conn.—Leventhal v. Town of Stratford, 4 A.2d 428, 125 Conn. 215. Stipulation held part of record

A stipulation entered into in open court and before a justice presiding becomes part of the record of the court.—Davis v. Davis, 84 N.Y.S.2d 382.

95. Cal.—Smith v. Whittier, 30 P. 529, 95 Cal. 279—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179.

Wis.—Logemann v. Logemann, 15 N.W.2d 800, 245 Wis. 515.

96. Cal.—Ephraim v. Pacific Bank, 86 P. 507, 149 Cal. 222. 60 C.J. p 46 note 94.

97. Wis.—Logemann v. Logemann, 15 N.W.2d 800, 245 Wis. 515.

98. U.S.—Salinas v. Stillman, Tex., 66 F. 677, 14 C.C.A. 50.

99. Tex.—Corpus Juris cited in Burnaman v. Heaton, Civ.App., 231 S.W.2d 1006, 1008. 60 C.J. p 46 note 96.

1. Mo.—Carroll v. Paul, 19 Mo. 102. 60 C.J. p 46 note 99.

2. Cal.—Smith v. Whittier, 30 P. 529, 95 Cal. 279—Exley v. Exley, 226 P.2d 662, 101 Cal.App.2d 831—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179.

3. Cal.—Webster v. Webster, 14 P.2d 522, 216 Cal. 485—Exley v. Exley, 226 P.2d 662, 101 Cal.App.2d 831—Witaschek v. Witaschek, 132 P.2d 600, 56 Cal.App.2d 277—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179. 60 C.J. p 46 note 98.

4. Cal.—Fresno City High School Dist. v. Dillon, 94 P.2d 86, 34 Cal. App.2d 636.

5. Ky.—Conrad v. Conrad, 160 S.W. 937, 156 Ky. 231. 60 C.J. p 46 note 1.

6. Cal.—Clemens v. Gregg, 167 P. 294, 34 Cal.App. 245. 60 C.J. p 46 note 2.

7. Ky.—Conrad v. Conrad, 160 S.W. 937, 156 Ky. 231.

8. Cal.—Clemens v. Gregg, 167 P. 294, 34 Cal.App. 245. 60 C.J. p 46 note 4.

9. Iowa.—Hiller v. Landis, 44 Iowa 228.

10. Iowa.—Hiller v. Landis, supra.

11. N.Y.—Deen v. Milne, 5 N.Y.St. 319.

12. Fla.—Steele v. State, 14 So. 841, 33 Fla. 354.

A stipulation duly signed and filed becomes a part of the record of the case.¹² It has the same effect and potency as an order of the court, agreed to by the parties, to the same purpose.¹⁴ It may also have the effect of a pleading,¹⁵ and a subsequent pleading inconsistent with its terms should be stricken.¹⁶ The court has a right to rely on an oral stipulation written into the record.¹⁷

Motion to strike from record. After entry of final decree, the court was without jurisdiction to receive and pass on a motion to strike from the record a stipulation previously filed, but not called to the attention of the court.¹⁸

§ 7. — Supervision and Assent of Court

The supervisory power of the court over stipulations made in the course of the proceedings continues as long as it retains jurisdiction, and, in the absence of a controlling statute or rule of court, whether or not a stipulation requires the assent of the court depends in a large measure on its nature.

Generally speaking, a stipulation is a proceeding in the cause and as such is under the supervision of the court, as discussed supra § 1, and the supervisory power of the court continues as long as it

retains jurisdiction of the action in the course of which the stipulation was made.¹⁹ In the absence of a controlling statute or rule of court,²⁰ whether or not a stipulation requires the assent of the court depends in a large measure on its nature. Not all stipulations require the assent of the court. For instance, it has been held that a stipulation extending the time to answer is operative of its own force without an order of court.²¹ On the other hand, some stipulations have been held ineffective unless approved by the court,²² such as a stipulation for a continuance,²³ to set aside a judgment,²⁴ or as to the matter which shall form a part of the record on appeal.²⁵ It has been held that the assent of the court to stipulations affecting the proceedings will be assumed until its dissent therefrom is indicated.²⁶ However, the court can always refuse to sanction such stipulations when right and justice so require,²⁷ as where it appears that the provisions of the stipulation are more likely to complicate than simplify the progress of the action,²⁸ and in so doing can change what appears on the record of a prior ruling, particularly where it is done within the term.²⁹ Further, in a proper case it has been held that the court may on motion of one of the parties modify

13. Ga.—Worsham v. Ligon, 92 S.E. 756, 147 Ga. 39.
60 C.J. p 46 note 9.

14. U.S.—Brookings State Bank v. Federal Reserve Bank of San Francisco, D.C.Or., 291 F. 659.

15. Conn.—New Haven Sand Blast Co. v. Dreisbach, 133 A. 99, 104 Conn. 322.
60 C.J. p 46 note 11.

16. Iowa.—Vall v. Stone, 13 Iowa 284.

17. N.J.—Maisto v. Maisto, 8 A.2d 810, 123 N.J.Law 401, affirmed 12 A.2d 890, 124 N.J.Law 565.

18. Mass.—James v. Columbia Securities Co., 141 N.E. 72, 246 Mass. 210.

19. N.Y.—Goldstein v. Goldsmith, 276 N.Y.S. 861, 243 App.Div. 268.

20. Stipulation in lieu of bill of exceptions

A stipulation filed with the district clerk after hearing, signed by counsel for respective parties, and reciting that no record having been made at the hearing, facts set forth in the stipulation could be taken in lieu of a bill of exceptions, could not be considered on appeal, where stipulation was not certified and approved by district judge as required by supreme court rule.—Quintana v. Quintana, 115 P.2d 1011, 45 N.M. 429.

21. U.S.—Hansford v. Stone-Ordean-Wells Co., D.C.Mont., 201 F. 185.

22. Agreement not to consummate transaction

Ex parte stipulation, filed by defendants in action by United States to enjoin continuing violation of Sherman Anti-Trust Act, whereby defendants agreed not to consummate proposed transaction until final determination of cause would be ineffective unless approved by court and its terms expressly or tacitly adopted by court and defendants required to comply therewith.—U. S. v. Columbia Steel Co., D.C.Del., 71 F.Supp. 734.

Specified claim of patent not in issue

Where court did not approve parties' stipulation that a specified claim of plaintiff's patent was not in issue, such claim was not withdrawn from judicial scrutiny as to its validity.—Loftin v. RCA Mfg. Co., D.C.Del., 53 F.Supp. 519.

23. Ind.—Moulder v. Kempff, 17 N. E. 906, 115 Ind. 459.
60 C.J. p 47 note 15.

24. R.I.—Way v. Superior Court, 108 A. 696, 42 R.I. 444.

25. Conn.—Green v. Brown, 123 A. 435, 100 Conn. 274.

Statement as to contract in answer

Agreement of parties at oral argument that contract under litigation was stated accurately and completely in defendants' answer would not be considered on appeal, in absence of approval of trial judge.—Harpe v. Craig, 97 N.E.2d 741, 327 Mass. 229.

Document referred to in stipulation

Where trial judge did not approve parties' stipulation and entire evidence was not reported, documents referred to in stipulation could not be considered on appeal.—Gordon v. Guernsey, 55 N.E.2d 27, 316 Mass 106.

Stipulation filed after perfection of appeal, on which no approval by trial judge appeared, had no place in the transcript and could not be considered.—Taylor v. Brewster County, Tex.Civ.App., 144 S.W.2d 314, error dismissed, judgment correct.

26. Pa.—McLeod v. Hyman, 116 A. 535, 272 Pa. 582.—Meghiss v. Bartoletta, Com.Pl., 94 Pittsb.Leg.J. 431, affirmed 48 A.2d 18, 159 Pa.Super. 308.

27. Pa.—McLeod v. Hyman, 116 A. 535, 272 Pa. 582.

Stipulation for dismissal denied

Where record owner of land agreed, as part of contract for sale thereof, that suit to cancel outstanding tax deed to others would be necessary and that all costs of such suit should be borne by purchaser, chancery court did not abuse discretion in denying vendor's stipulation for dismissal of suit, brought in his name, to cancel such deed.—Coley v. Hall, 175 S.W.2d 979, 206 Ark. 419.

28. U.S.—Atlantic Leasing Co. v. General Outdoor Advertising Co., D.C.N.Y., 4 F.R.D. 122.

29. Pa.—McLeod v. Hyman, 116 A. 535, 272 Pa. 582.

a stipulation.³⁰ However, it has also been held that the terms of a binding stipulation may not be altered subsequently without the assent of the parties.³¹

§ 8. — Consideration

While it has been held or said that no consideration or mutuality is required to give validity to a stipulation concerning a pending cause, it has also been said that a stipulation imports an agreement based on consideration, and there is authority to the effect that stipulations, or at least some stipulations, without consideration are invalid.

It is held or said in several decisions that no consideration is necessary,³² and no mutuality required,³³ to give validity to a stipulation concerning a pending cause. On the other hand, it has been said that a stipulation imports an agreement based on consideration,³⁴ and there is authority to the effect that stipulations,³⁵ or at least some stipulations,³⁶ without consideration are invalid. In a number of decisions the courts have held that, in the particular case, the consideration was sufficient.³⁷

§ 9. Capacity and Authority to Enter into Stipulation

A valid stipulation may not be entered into by a person purporting to act on behalf of a party without legal capacity or authority to do so, but, where the requisite authority exists, a stipulation may be made by an agent of one of the parties to an action.

A valid stipulation may not be entered into by a person purporting to act on behalf of a party without legal capacity or authority to do so.³⁸ Where the requisite authority exists, a stipulation may be made by an agent of one of the parties to an action.³⁹ A nominal party who has no actual interest in the result of the action cannot, by stipulation, deprive the real parties in interest of their rights.⁴⁰ Also, in an action in the nature of a representative action the nominal plaintiff cannot by stipulation deprive the persons whom he represents of their rights.⁴¹

Persons not parties. Filing in a suit, by one not a party, of a stipulation to be bound by the decree to be entered is irregular; he should be made a party if he is to be affected by the proceeding.⁴² It has been held, however, that the mere fact that a stipulation as made by the parties is signed by others, or its performance guaranteed, or an agreement made to save harmless a party, does not thereby divest the court of its jurisdiction in the action, and the rights of all parties so joining in a stipulation must be held to be dependent on the rights of the parties to the action in which the stipulation is made.⁴³ A party successfully demurring remains a party, where no order dismissing the action as to such party has been entered, and may subsequently stipulate for dismissal.⁴⁴

30. Responsive to issues

Stipulation should have been modified on motion so as to be more specific and responsive to issues arising under pleadings.—Clark v. Hall, 24 N.E.2d 394, 303 Ill.App. 1.

31. Stipulation of settlement in open court

N.Y.—Shapiro v. Danzig, 47 N.Y.S.2d 513, 267 App.Div. 949, affirmed 79 N.Y.S.2d 876, 273 App.Div. 1000, appeal denied 80 N.Y.S.2d 358, 274 App.Div. 763.

32. Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426. 60 C.J. p 40 note 20.

33. Okl.—Evans v. Raper, supra. 60 C.J. p 40 note 21.

Capacity of parties

A stipulation may bind those incapable of binding themselves out of court.

Ill.—People v. Spring Lake Drain, etc., Dist., 97 N.E. 1042, 253 Ill. 479.

Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.

34. Mo.—Goldstein v. Goldstein, 165 S.W.2d 876, 237 Mo.App. 274.

35. N.Y.—Burkard v. Stephan Bldg., etc., Co., 144 N.Y.S. 775, 160 App. Div. 50.

36. Waiver of right to move for new trial and appeal

Cal.—Fowlkes v. Ingraham, 185 P. 2d 379, 81 Cal.App.2d 745.

37. Cal.—Fowlkes v. Ingraham, supra.

N.Y.—Richter v. Joelson, 262 N.Y.S. 143, 237 App.Div. 572. 60 C.J. p 40 note 23.

38. N.J.—Harmon v. Board of Public Utility Com'rs, 163 A. 428, 10 N.J.Misc. 1297, affirmed Harmon v. Board of Public Utility Com'rs of State of New Jersey, 168 A. 303, 111 N.J.Law 238.

S.D.—Wilhelm v. Johnson, 33 N.W. 2d 563, 72 S.D. 316.

Trust estate not bound by beneficiary

Agreed statement of facts not signed by trustee, although signed by beneficiary, will not warrant recovery against trust estate by trustee's creditor, where trustee is not made party.—Shelby v. White, 131 So. 343, 158 Miss. 880.

39. Mo.—Keller v. Keklikian, 244 S.W.2d 1001, 362 Mo. 919.

Authority of attorney to enter into stipulation see Attorney and Client § 100.

40. Wis.—Selleck v. Phelps, 11 Wis. 380.

Sufficient interest

Where plaintiff sought in federal court to recover damage for an alleged injury by defendant to plaintiff's oil royalty interest and sought in state court action against oil royalty pool to rescind pooling agreement under which pool obtained half of plaintiff's royalty interest and plaintiff participated in the income of pool, plaintiff had an interest in pool and defendant had an interest in avoiding double liability to plaintiff and pool so as to authorize stipulation for payment of half of any judgment in favor of plaintiff into registry of court pending outcome of state court action.—Hoyt v. Empire Oil & Refining Co., D.C.Mich., 52 F. Supp. 744.

41. Discontinuance of taxpayer's action

N.Y.—Bergheim v. Hofstatter, 276 N.Y.S. 188, 243 App.Div. 568.

42. Mass.—Hanscom v. Malden, etc., Gaslight Co., 107 N.E. 426, 220 Mass. 1, Ann.Cas.1917A 145.

43. Wis.—State v. St. Croix County Circuit Court, 203 N.W. 923, 187 Wis. 1, 48 A.L.R. 894.

44. Wash.—Shine v. Nabob Silver Lead Co., 1 P.2d 864, 163 Wash. 577.

The representatives of the state or federal government may bind the state or the United States by a stipulation made within the scope of their authority.⁴⁵ Where the county attorney is the legal representative of the state in prosecutions in its behalf, he may bind the state by stipulations as to criminal procedure not directly in conflict with constitutional and statutory provisions.⁴⁶ Commissioners may stipulate in a pending proceeding that which they are authorized to stipulate outside a pending proceeding,⁴⁷ and they may execute a stipulation in behalf of the state when specifically authorized so to do by the legislature.⁴⁸

A proceeding in rem cannot be controlled by a stipulation made by some of the parties interested in the res, even with the consent and approval of the judge.⁴⁹

Representatives of owners of trust fund in general have no authority to stipulate away the subject of the trust in payment of costs and expenses of litigation with respect to the fund, and any such stipulation should not be recognized as a basis for an order or judgment.⁵⁰

§ 10. Matters Which May Be the Subject of Stipulation

a. In general

45. U.S.—U. S. v. Gossler, D.C.Or., 60 F.Supp. 971—Pacific Trading Co. v. U. S., 19 C.C.P.A., Customs, 361.

46. Okl.—Blanchard v. State, 207 P. 96, 21 Okl.Cr. 263, 27 A.L.R. 1032. 60 C.J. p 48 note 30.

47. Reservations in condemnation

Whatever reservations the highway commission could lawfully allow in a deed from an owner of land, the commission may allow and stipulate in a petition for condemnation.—Dantzer v. Mississippi State Highway Commission, 199 So. 367, 190 Miss. 137.

48. U.S.—People v. State, 41 S.Ct. 492, 256 U.S. 296, 65 L.Ed. 937.

49. Propounder and caveator of will

In proceeding for probate of will, judgment on facts agreed on by propounder and caveator and supplemented by facts found by judge with consent of propounder and caveator was erroneous, since proceeding was in rem and could not be controlled by propounder and caveator, even with consent and approval of judge, who had duty to submit issues involved in the proceeding to a jury.—In re Roediger's Will, 184 S.E. 74, 209 N.C. 470.

50. Wis.—In re McNaughton, 118 N. W. 997, 120 N.W. 288, 138 Wis. 179.

51. Cal.—City of Los Angeles v. Cole, 170 P.2d 928, 28 Cal.2d 509—

People v. Cohen, 210 P.2d 911, 94 Cal.App.2d 451.

Ill.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 356 Ill. 186.

Mont.—Commercial Credit Co. v. O'Brien, 146 P.2d 637, 115 Mont. 199, appeal dismissed 65 S.Ct. 75, 323 U.S. 665, 89 L.Ed. 541.

N.Y.—Whalen v. Corsi, 112 N.Y.S.2d 499, 279 App.Div. 1113, reargument and appeal denied 115 N.Y.S. 2d 311, 280 App.Div. 901—Buda v. State, 105 N.Y.S.2d 956, 278 App. Div. 424, reargument and appeal denied 106 N.Y.S.2d 1015—Faruolo v. Faruolo, 300 N.Y.S. 1080, 253 App. Div. 750—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764—Brown v. Brown, 87 N.Y.S.2d 105, 194 Misc. 975—Hollywood Plays v. Columbia Pictures Corp., 77 N.Y.S.2d 568, affirmed 83 N.Y.S.2d 302, 274 App.Div. 912, reversed on other grounds 85 N.E.2d 865, 299 N.Y. 61, 10 A.L.R. 2d 722, reargument denied 87 N.E. 2d 70, 299 N.Y. 683.

Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.

Pa.—Strickler v. Strickler, 10 A.2d 69, 138 Pa.Super. 34. 60 C.J. p 48 note 34.

52. Cal.—In re Howe's Estate, 199 P.2d 59, 88 Cal.App.2d 454.

b. Jurisdiction

c. Benefit of statutes, constitutional provisions, or rules of law

d. Validity or constitutionality of statutes

e. Questions of law

f. Validity of particular stipulations considered

a. In General

Any matter which involves the individual rights or obligations of the parties inter sese may properly be made the subject of a stipulation between them, provided the stipulation is not illegal, unreasonable, or against good morals or sound public policy, and does not interfere with the general powers, duties, and prerogatives of the court.

Any matter which involves the individual rights or obligations of the parties inter sese in an action or proceeding in court may properly be made the subject of a stipulation between them,⁵¹ provided the stipulation is not illegal,⁵² unreasonable, or against good morals or sound public policy,⁵³ and does not impinge on, or interfere with, the general powers, duties, and prerogatives of the court in its relations to litigants other than themselves and to the general public and the state.⁵⁴ These rights may relate to procedural matters⁵⁵ or evidential matters, as dis-

53. Cal.—In re Howe's Estate, supra. Fla.—Corpus Juris cited in Welch v. Gray Moss Bondholders Corporation, 175 So. 529, 535, 128 Fla. 722.

Ill.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 356 Ill. 186.

N.Y.—Faruolo v. Faruolo, 300 N.Y.S. 1080, 253 App.Div. 750—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764—Brown v. Brown, 87 N.Y.S.2d 105, 194 Misc. 975—Hollywood Plays v. Columbia Pictures Corp., 77 N.Y.S. 2d 568, affirmed 83 N.Y.S.2d 302, 274 App.Div. 912, reversed on other grounds 85 N.E.2d 865, 299 N.Y. 61, 10 A.L.R.2d 722, reargument denied 87 N.E.2d 70, 299 N.Y. 683.

60 C.J. p 48 note 34.

Public policy held not offended

N.Y.—Buda v. State, 105 N.Y.S.2d 956, 278 App.Div. 424, reargument and appeal denied 106 N.Y.S.2d 1015.

Rent regulation policy held violated N.Y.—Siegel v. Bowers, 58 N.Y.S. 2d 187, 185 Misc. 684.

54. La.—Wickliffe v. Cooper, 108 So. 791, 161 La. 417.

Pa.—Strickler v. Strickler, 10 A.2d 69, 138 Pa.Super. 34.

55. Ky.—Leslie v. First Huntington Nat. Bank, 191 S.W.2d 204, 301 Ky. 145—World Fire & Marine Ins.

cussed *infra* subdivision f (7) of this section, and they may involve the substantive rights of the parties and the concession of some rights as a consideration for those secured.⁵⁶ On the other hand, stipulations involving matters of public interest,⁵⁷ or which affect the interests of individuals, which cannot be ascertained in advance of the adjudication in the cause,⁵⁸ are invalid. The parties may not, by agreements concerning procedure, take away the discretion of the court to control at all times the procedure and progress of causes to the end that justice may be done,⁵⁹ or waive or abrogate the requirements of statutes or rules of trial or appellate courts adopted to promote the expeditious and orderly hearing of causes;⁶⁰ nor can the parties by stipulation require the court to do something which is not within its power.⁶¹ All stipulations relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein are void, although not open to the actual charge of corruption.⁶²

b. Jurisdiction

Jurisdiction may be questioned, even by a litigant invoking jurisdiction in the first instance, despite a stipulation, and litigants cannot make stipulations the effect of which is to limit jurisdiction or to oust a court of jurisdiction.

While a court may acquire jurisdiction of the person by consent, jurisdiction of the subject matter of an action or other legal proceeding, subject to certain limitations, cannot be conferred by stipulation or consent, as discussed in Courts § 85. Jurisdiction may be questioned even by the litigant invoking jurisdiction in the first instance, despite the most solemn stipulation.⁶³ Since the powers and duties of courts are prescribed by statute,⁶⁴ litigants or their counsel cannot make stipulations the effect of which is to limit or curtail jurisdiction,⁶⁵ or to oust a court of jurisdiction,⁶⁶ or to deprive it of its power to pronounce judgment on all of the material facts in the case.⁶⁷ Litigants cannot be permitted to stipulate jurisdiction to suit their own convenience.⁶⁸ It has been held, however, that by stipulation and for the convenience

Co. v. Tapp, 151 S.W.2d 428, 286 Ky. 650.

N.Y.—Faruolo v. Faruolo, 300 N.Y.S. 1080, 253 App.Div. 750.

Wis.—Paine v. Chicago & N. W. Ry. Co., 258 N.W. 846, 217 Wis. 601.

To a large extent the procedural course through the courts may be charted by the parties themselves.—Stevenson v. News Syndicate Co., 96 N.E.2d 187, 302 N.Y. 81—Matter of Malloy's Estate, 17 N.E.2d 108, 278 N.Y. 429—Salamina v. Tartaglia, 106 N.Y.S.2d 487.

56. N.Y.—Werden v. Werden, 7 N.Y.S.2d 145, 255 App.Div. 795.

Wis.—Thayer v. Federal Life Ins. Co., 258 N.W. 849, 217 Wis. 282.

Matters which may be the subject of adjustment, before or pending suit, by mutual concessions and agreement see Compromise and Settlement § 3.

57. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F.2d 664.

Ill.—National Bank of Colchester v. Murphy, 50 N.E.2d 748, 384 Ill. 61, 60 C.J. p 48 note 36.

In cases involving important public questions, the parties may not stipulate away the rights of the public.—National Bank of Colchester v. Murphy, *supra*.

Extradition proceedings

Public interest is affected by extradition proceedings and court is charged with protection of such interest to same extent as those officers on whom duty is immediately imposed so that stipulations of the parties in such proceedings are not bind-

ing on the court.—Schraver v. Tucker, Fla., 42 So.2d 707.

58. Wis.—In re Dardis, 115 N.W. 332, 135 Wis. 457, 128 Am.S.R. 1033, 23 L.R.A., N.S., 783, 15 Ann.Cas. 740.

Guardian ad litem of unborn illegitimate child and guardian's attorney were without power to enter into, and court was without power to approve, stipulation by which child, after it was born, was to be given blood tests and by which, if tests disclosed that defendant was not the actual father, filiation proceedings against defendant would be dismissed with prejudice, in absence of any evidence that such stipulation was for the best interests of child.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

59. Cal.—Berry v. Chaplin, *supra*. 60 C.J. p 48 note 38.

Counsel may not stipulate away fundamental procedure designed to enable litigant to form issues for judicial determination.—Cummings v. Policemen's Pension Commission of Borough of Belmar, 160 A. 641, 109 N.J.Law 97.

Violation of established procedure

The court desires to give effect to stipulations of counsel, but it is not bound thereby if, in doing so, violence would be done to established principles of procedure.—Economy Cash & Carry Cleaners v. Cleaning, Dyeing & Pressing Board, 174 So. 829, 128 Fla. 408.

60. Mich.—In re Meredith's Estate, 266 N.W. 351, 275 Mich. 278, 104 A.L.R. 348.

60 C.J. p 48 note 39.

61. Vt.—Stone v. Briggs, 26 A.2d 828, 112 Vt. 410.

62. Ohio.—Thompson v. Buffington, 7 Ohio S. & C. P. 557, 7 Ohio N.P. 134.

63. U.S.—Arenas v. U. S., D.C.Cal., 95 F.Supp. 962, affirmed, C.A., 197 F.2d 418.

Estoppel and waiver as to jurisdiction of court see Courts §§ 107–111.

64. Cal.—In re Stuhldreher, 239 P. 859, 74 Cal.App. 226.

Idaho.—Clyne v. Bingham County, 60 P. 76, 7 Idaho 75.

65. Fla.—Economy Cash & Carry Cleaners v. Cleaning, Dyeing & Pressing Board, 174 So. 829, 128 Fla. 408.

Okl.—First Nat. Bank v. City Guaranty Bank of Hobart, 51 P.2d 573, 174 Okl. 545.

60 C.J. p 49 note 45.

66. Mich.—In re Meredith's Estate, 266 N.W. 351, 275 Mich. 278, 104 A.L.R. 348.

60 C.J. p 49 note 46.

A fiduciary, such as an executor, whose administrative acts are by law under the supervision of the orphans' court, may not enter into an extrajudicial stipulation which will effectively remove propriety of his allowance or disallowance of claims from determination of that court.—Duttikin v. Zalenski, 54 A.2d 227, 140 N.J.Eq. 200.

67. Ill.—Clark v. Hall, 24 N.E.2d 394, 303 Ill.App. 1.

60 C.J. p 49 note 47.

68. Nev.—Sweeney v. Sweeney, 179 P. 638, 42 Nev. 431.

of counsel, a motion or petition may, at times, be heard outside the jurisdiction of the county by a judge who heard the main case while acting in such county.⁶⁹

c. Benefit of Statutes, Constitutional Provisions, or Rules of Law

The benefit of a statute or constitutional provision enacted for the protection of a party, or of a rule of law, may be waived by stipulation where it is a matter of private right.

The benefit of a statute or constitutional provision enacted for the protection of a party,⁷⁰ or of a rule of law,⁷¹ may be waived by him by stipulation where it is a matter of private right and no considerations of public policy or morals are infringed by so doing, and, having once consented to forego his right, he cannot afterward assert it.⁷²

d. Validity or Constitutionality of Statutes

It is not within the power of litigants to stipulate as to the validity or constitutionality of a statute.

Since the question of the validity or constitution-

ality of a statute is a judicial question, as discussed in Constitutional Law § 92, it is not within the power of parties litigant to admit or stipulate as to its validity or constitutionality.⁷³ The rights of many others may, and probably do, depend on the decision of the question,⁷⁴ and the public interest involved transcends the rights of the litigants.⁷⁵ Moreover, to uphold such admissions or stipulations would permit litigants to nullify any enactment of the legislature.⁷⁶

e. Questions of Law

It is generally held that it is not competent for the litigants to stipulate as to what the law is so as to bind the court, and that such stipulations will be disregarded; and this rule has found frequent application.

While litigants have the undoubted right to stipulate as to the facts, as discussed infra subdivision f (9) of this section, it is very generally held that it is not competent for them to stipulate as to what the law is so as to bind the court, and that such stipulations will be disregarded.⁷⁷ Decisions of questions of law must rest on the judgment of the

69. Mich.—MacLean v. Harp, 251 N. W. 358, 265 Mich. 172.

70. Neb.—Corpus Juris quoted in In re Mattingly's Estate, 270 N.W. 487, 493, 131 Neb. 891.

Nev.—Garaventa v. Gardella, 169 P. 2d 540, 63 Nev. 304.

N.Y.—In re Malloy's Estate, 17 N.E. 2d 108, 278 N.Y. 429—Buda v. State, 105 N.Y.S.2d 956, 278 App.Div. 424, reargument and appeal denied 106 N.Y.S.2d 1015—Faruolo v. Faruolo, 300 N.Y.S. 1080, 253 App.Div. 750—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App. Div. 764—Brown v. Brown, 87 N.Y. S.2d 105, 194 Misc. 975—Siegel v. Bowers, 58 N.Y.S.2d 187, 185 Misc. 684.

60 C.J. p 49 note 49.

Under a statute providing that anyone may waive the advantage of a law intended solely for his benefit, but that a law established for a public reason cannot be contravened by a private agreement, much latitude is permitted with respect to stipulations involving the private rights of private persons.—Commercial Credit Co. v. O'Brien, 146 P.2d 637, 115 Mont. 199, appeal dismissed 65 S.Ct. 75, 323 U.S. 665, 89 L.Ed. 541.

71. Neb.—Corpus Juris quoted in In re Mattingly's Estate, 270 N.W. 487, 493, 131 Neb. 891.

60 C.J. p 49 note 50.

72. Neb.—Corpus Juris quoted in In re Mattingly's Estate, 270 N.W. 487, 493, 131 Neb. 891.

N.Y.—Faruolo v. Faruolo, 300 N.Y.S. 1080, 253 App.Div. 750—Morse v.

Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764—Siegel v. Bowers, 58 N.Y.S.2d 187, 185 Misc. 684.

60 C.J. p 49 note 51.

73. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F. 2d 664.

Ind.—Yelton v. Plantz, 77 N.E.2d 895, 226 Ind. 155.

Nev.—State ex rel. Bible v. Malone, 231 P.2d 599.

60 C.J. p 49 note 53.

74. Miss.—Jones v. Madison County, 18 So. 87, 72 Miss. 777.

75. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F.2d 664.

76. Tenn.—State v. Thomason, 221 S. W. 491, 142 Tenn. 527.

77. U.S.—Sanford's Estate v. C. I. R., 60 S.Ct. 51, 308 U.S. 39, 84 L. Ed. 20, rehearing denied 60 S.Ct. 258, 308 U.S. 637, 84 L.Ed. 529—Case v. Los Angeles Lumber Products Co., Cal., 60 S.Ct. 1, 308 U.S. 106, 84 L.Ed. 110, rehearing denied 60 S.Ct. 258, 308 U.S. 637, 84 L.Ed. 529—Consolidated Water Power & Paper Co. v. Spartan Aircraft Co., C.A.Del., 185 F.2d 947—Crabb v. C. I. R., C.C.A.Tex., 121 F.2d 1015—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C.C.A.Mo., 107 F.2d 462, certiorari denied Cantley v. Andrews, 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014, rehearing denied 60 S.Ct. 711, 309 U.S. 697, 84 L.Ed. 1036—In re Milburne, C.C.A.N.Y., 77 F.2d 310—Macklin v. Kaiser Co., D.C.Or., 69 F.Supp. 137—Julius Forstmann & Co. v. U. S., 26 C.C.P.A., Customs, 336.

Ariz.—State Consol. Pub. Co. v. Hill, 4 P.2d 668, 39 Ariz. 163.

Cal.—Meier v. Hayes, 67 P.2d 120, 20 Cal.App.2d 451—People v. Singh, 8 P.2d 898, 121 Cal.App. 107.

Ill.—People v. Byrnes, 90 N.E.2d 217, 405 Ill. 103—People v. Levisen, 90 N.E.2d 213, 404 Ill. 574, 14 A.L.R.2d 1364—National Bank of Colchester v. Murphy, 50 N.E.2d 748, 384 Ill. 61—In re Fahnestock's Estate, 50 N.E.2d 733, 384 Ill. 26—Clark v. Hall, 24 N.E.2d 394, 303 Ill.App. 1.

Ind.—Yelton v. Plantz, 77 N.E.2d 895, 226 Ind. 155.

Kan.—State v. Christensen, 199 P.2d 475, 166 Kan. 152.

Ky.—Calveard v. Fitzgerald, 107 S.W. 2d 234, 269 Ky. 506.

Minn.—Kobler v. Heins, 248 N.W. 698, 189 Minn. 213.

Miss.—Board of Levee Com'rs v. Parker, 193 So. 346, 187 Miss. 621.

Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.

Nev.—Gold Circle Crown Min. Co. v. Getchell, 76 P.2d 1097, 58 Nev. 288.

N.J.—Schulz v. State Board of Education, 40 A.2d 663, 132 N.J.Law 345—Bencke v. Weltersbach, 158 A. 752, 108 N.J.Law 430.

N.C.—Moore v. State, 156 S.E. 806, 200 N.C. 300.

Okl.—First Nat. Bank v. City Guaranty Bank of Hobart, 51 P.2d 573, 174 Okl. 545.

Tex.—Travelers' Indemnity Co. v. De Witt, Civ.App., 207 S.W.2d 641.

60 C.J. p 50 note 57.

court, uninfluenced by stipulations of the parties or counsel.⁷⁸ Easily understood applications of the rule are shown in decisions which hold inoperative stipulations as to the existence of a law;⁷⁹ as to its validity or invalidity;⁸⁰ as to what was the intent of a lawmaking body;⁸¹ as to the construction and operation of a constitutional provision;⁸² statute;⁸³ administrative regulation;⁸⁴ or permit;⁸⁵ as to the power of a public officer;⁸⁶ as to the legal conclusion from a given state of facts;⁸⁷ as to the construction of the unambiguous terms of a con-

tract⁸⁸ or the legal effect of a contract;⁸⁹ as to the sufficiency of a petition⁹⁰ or of evidence to prove a given fact;⁹¹ as to the construction to be given a will;⁹² as to lack of notice of a matter as to which the parties have constructive notice from an official record;⁹³ and various other stipulations of a similar nature.⁹⁴ A stipulation which has the effect of violating, abrogating, or waiving the provisions of a mandatory statute is invalid.⁹⁵

On the other hand, stipulations as to the law of another state are as to matters of fact and not of

78. Miss.—Board of Levee Com'rs v. Parker, 193 So. 346, 187 Miss. 621—Jones v. Madison County, 18 So. 87, 72 Miss. 777.

Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.

79. Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.
60 C.J. p 50 note 59.

80. Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.
60 C.J. p 50 note 60.

The invalidity of ordinances may not be stipulated by the parties.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F.2d 664.

81. Tenn.—State v. Thomason, 221 S.W. 491, 142 Tenn. 527.

82. Ariz.—State Consol. Pub. Co. v. Hill, 4 P.2d 668, 39 Ariz. 163.

83. U.S.—Cowles v. U. S., Ct.Cl., 50 F.Supp. 242—Julius Forstmann & Co. v. U. S., 26 C.C.P.A., Customs, 336.

Iowa.—Altman v. Independent School Dist. of Gilmore City, 32 N.W.2d 392, 239 Iowa 635.

Kan.—State v. Christensen, 199 P.2d 475, 166 Kan. 152.

N.J.—Schulz v. State Board of Education, 40 A.2d 663, 132 N.J.Law 345.

Statute established for public reason Mont.—Commercial Credit Co. v. O'Brien, 146 P.2d 637, 115 Mont. 199, appeal dismissed 65 S.Ct. 75, 323 U.S. 665, 89 L.Ed. 541.

84. U.S.—Dairymen's League Co-op. Ass'n v. Brannan, C.A.N.Y., 173 F.2d 57, certiorari denied 70 S.Ct. 73, 338 U.S. 825, 94 L.Ed. 501.

85. U.S.—Golden Gate Bridge & Highway Dist. of California v. U. S., C.C.A.Cal., 125 F.2d 872, certiorari denied 62 S.Ct. 1298, 316 U.S. 700, 86 L.Ed. 1769.

86. Kan.—State v. Christensen, 199 P.2d 475, 166 Kan. 152.

87. U.S.—Estate of Sanford v. C. I. R., 60 S.Ct. 51, 308 U.S. 39, 84 L. Ed. 20, rehearing denied 60 S.Ct. 258, 308 U.S. 637, 84 L.Ed. 529—London-Butte Gold Mines Co. v. C. I. R., C.C.A.10, 116 F.2d 478—Julius Forstmann & Co. v. U. S., 26 C.C.P.A., Customs, 336.

Fla.—Anderson v. Anderson, 44 So. 2d 652.

Ill.—People v. Levisen, 90 N.E.2d 213, 404 Ill. 574, 14 A.L.R.2d 1364—National Bank of Colchester v. Murphy, 50 N.E.2d 748, 384 Ill. 61.
Ind.—App v. Class, 75 N.E.2d 543, 225 Ind. 387.

Mo.—Aubuchon v. Bender, 44 Mo. 560.
Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.

N.J.—Funk & Wagnalls Co. v. Stamm, 88 A. 1050, 85 N.J.Law 301.

N.Y.—People v. Shifrin, 101 N.Y.S. 2d 613, 198 Misc. 348.

Tex.—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Com.App., 49 S.W.2d 726—Ex parte Day, 76 S.W.2d 1060, 127 Tex.Cr. 367.

60 C.J. p 50 note 62.

The court itself must find the ultimate facts on which the conclusions of law are based and the parties may not stipulate such facts.—Platt v. U. S., C.C.A.Okl., 163 F.2d 165.

88. Tex.—Travelers' Indemnity Co. v. De Witt, Civ.App., 207 S.W.2d 641.

89. U.S.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C. C.A.Mo., 107 F.2d 462, certiorari denied Cantley v. Andrews, 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014, rehearing denied 60 S.Ct. 711, 309 U.S. 697, 84 L.Ed. 1036.

Neb.—Corpus Juris quoted in North Platte Lodge, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 314, 125 Neb. 841, 92 A.L.R. 658.

60 C.J. p 50 note 63.

What law governs

Stipulations of parties as to law governing a contract made after litigation will not be given effect.—Consolidated Water Power & Paper Co. v. Spartan Aircraft Co., C.A.Del., 185 F.2d 947.

90. Mo.—Wells v. Covenant Mut. Ben. Assoc., 29 S.W. 607, 126 Mo. 630.

91. Cal.—McCormick v. Woodmen of the World, 207 P. 943, 57 Cal.App. 568.

60 C.J. p 50 note 65.

92. N.Y.—In re Stickels' Estate, 47 N.Y.S.2d 422, modified on other grounds 54 N.Y.S.2d 469.

60 C.J. p 51 note 66.

93. Fla.—Kemp v. Skivesen, 154 So. 688, 114 Fla. 667.

94. Cal.—Meier v. Hayes, 67 P.2d 120, 20 Cal.App.2d 451.

Ill.—People v. Byrnes, 90 N.E.2d 217, 405 Ill. 103—Clark v. Hall, 24 N.E. 2d 394, 303 Ill.App. 1.

Ky.—Calveard v. Fitzgerald, 107 S. W. 234, 269 Ky. 506.

Miss.—Board of Levee Com'rs v. Parker, 193 So. 346, 187 Miss. 621.

Nev.—Gold Circle Crown Min. Co. v. Getchell, 76 P.2d 1097, 58 Nev. 288.
N.J.—Bencke v. Weltersbach, 158 A. 752, 108 N.J.Law 430.

Tex.—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Com.App., 49 S.W.2d 726.

60 C.J. p 51 note 67.

Time of valuation of homestead

Wash.—In re Small's Estate, 179 P. 2d 505, 27 Wash.2d 677.

Validity of trust deed

Minn.—Kobler v. Heins, 248 N.W. 698, 189 Minn. 213.

Whether mandamus should issue

Mass.—Clifford v. School Committee of Lynn, 175 N.E. 634, 275 Mass. 258.

95. Kan.—State v. Christensen, 199 P.2d 475, 166 Kan. 152.

Ky.—Calveard v. Fitzgerald, 107 S. W.2d 234, 269 Ky. 506.

La.—Schneider v. Manion, 46 So.2d 58, 217 La. 118.

N.Y.—People v. Shifrin, 101 N.Y.S.2d 613, 198 Misc. 348.

law and are valid.⁹⁶ There are decisions in which it is said that what is admitted or conceded to be law by plaintiff or defendant, as the case may be, at the trial of a cause is binding on him, and, if it is accepted by the other side, it becomes the law of the particular case;⁹⁷ and there are others in which it is broadly stated that parties may, where there is a stipulation, in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the court is bound to enforce;⁹⁸ but in a number of these last mentioned decisions nothing is actually held which would conflict with the general rule heretofore stated,⁹⁹ although in others, the results reached are apparently in direct conflict therewith.¹

f. Validity of Particular Stipulations Considered

- (1) To abide event of another suit
- (2) As to process
- (3) As to dismissal or discontinuance
- (4) As to parties
- (5) As to pleadings
- (6) As to issues
- (7) As to evidence
- (8) As to admissions
- (9) As to agreed statement of facts
- (10) As to trial
- (11) As to instructions and verdict
- (12) As to judgments and executions
- (13) As to injunctions
- (14) Other stipulations

(1) To Abide Event of Another Suit

Parties may make a valid stipulation that the judg-

ment in one suit shall abide the event of another suit pending involving the same issues or interests, and it is not essential to the validity of such a stipulation that it be mutually beneficial.

Parties may make a valid stipulation that the judgment in one suit shall abide the event of another suit pending involving the same issues or interests,² and such stipulation will be enforced according to its terms.³ Such stipulations tend to prevent a multiplicity of trials and a multiplication of expense of attending them and of court costs,⁴ and are favored by the courts;⁵ and it is not essential to the validity of such stipulations that they be mutually beneficial.⁶ Nevertheless, a stipulation that the judgment in one suit shall abide the event of another suit pending between the same parties is not valid and binding, unless the material facts are the same in both cases;⁷ and, if the questions are entirely dissimilar, and there is no connection between the suits, the stipulation will be held void as a mere wager.⁸ It has also been held that a stipulation to abide the event of another suit which in addition undertakes to curtail administrative action following judicial determination is invalid as attempting to curtail the power of the government to enforce its own laws.⁹

(2) As to Process

Want of service of process or defective service thereof may be obviated by stipulations between the parties themselves, but the parties may not stipulate on the subject of process where the matter is governed by statute and the statute is exclusive.

While, as discussed in Attorney and Client § 83, an attorney, as such, has no power to accept service of process by which the court acquires jurisdiction

96. Ky.—Scharringhaus v. Hazen, 107 S.W.2d 329, 269 Ky. 425.

N.Y.—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392.

97. N.Y.—Siegel v. Bowers, 58 N.Y. S.2d 187, 185 Misc. 684. 60 C.J. p 51 note 68.

Stipulation not considered as involving law

Contention that stipulation that taxpayer's computation in his return of gain or loss resulting from sale of securities received on termination of trust would be accepted as fact agreed on if taxpayer had contingent and not vested interest in corporation of trust before its termination was stipulation as to subsidiary question of law, and therefore not binding on circuit court of appeals, would not be considered where raised for first time in circuit court of appeals, particularly where it was uncertain if statute providing for determining gain or loss was applicable and effect of stipulation was of no concern to anyone

except parties and would not affect the interpretation of the law in any other case.—Forbes v. C. I. R., C.C. A.1, 82 F.2d 204.

98. N.Y.—In re Malloy's Estate, 17 N.E.2d 108, 278 N.Y. 429—Brown v. Brown, 37 N.Y.S.2d 105, 194 Misc. 975—Salamina v. Tartaglia, 106 N. Y.S.2d 487.

Okl.—Corpus Juris cited in Callaway v. Sparks, 89 P.2d 275, 277, 184 Okl. 569—Reeves Realty Co. v. Brown, 147 P. 318, 45 Okl. 737.

60 C.J. p 51 note 69.

99. N.Y.—Crouse v. McVickar, 100 N.E. 697, 207 N.Y. 213, 45 L.R.A., N.S., 1159.

60 C.J. p 51 note 70.

1. N.Y.—Matter of Cullinan, 99 N.Y. S. 374, 113 App.Div. 485.

60 C.J. p 51 note 72.

2. U.S.—Brown v. Arnold, Mo., 131 F. 723, 67 C.C.A. 125.

Mo.—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

Tex.—State Life Ins. Co. v. Duke,

Civ.App., 69 S.W.2d 791, error refused.

60 C.J. p 51 note 75.

Construction, operation, and effect see infra § 19.

Waiver or abandonment of stipulation see infra § 30.

3. Tex.—State Life Ins. Co. v. Duke, supra.

60 C.J. p 52 note 76.

4. Tex.—Mitchell v. Hancock, Civ. App., 196 S.W. 694.

5. Ala.—Jaffray v. Smith, 17 So. 218, 106 Ala. 112.

6. Tex.—Mitchell v. Hancock, Civ. App., 196 S.W. 694.

7. Cal.—Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 106 P. 392, 158 Cal. 539.

60 C.J. p 52 note 80.

8. Ohio.—Gittings v. Baker, 2 Ohio St. 21.

9. U.S.—U. S. ex rel. Hoehn v. Shaughnessy, C.A.N.Y., 175 F.2d 116, certiorari denied 70 S.Ct. 142, 338 U.S. 872, 94 L.Ed. 535.

over the party, unless he has in some manner been sufficiently authorized to do so, an objection for want of service of process,¹⁰ or for defective service,¹¹ may be obviated by stipulations between the parties themselves. Where the statutory method governing process is not exclusive, the parties may stipulate on the subject,¹² but not where the statutory method is deemed exclusive.¹³ Acknowledgment of service of a paper in a suit is in no sense a stipulation that its recitals are true, but is merely for the purpose of supplying evidence of service.¹⁴

(3) As to Dismissal or Discontinuance

A stipulation by the attorney to dismiss or discontinue an action is binding on the client when he expressly assents thereto, or where counsel has acted in accordance with his specific instructions, and, according to some authorities, the plaintiff may enter such a stipulation without the knowledge or consent, or against the protest of, his attorney.

A stipulation by the attorney to dismiss or discontinue an action is binding on the client when he expressly assents thereto,¹⁵ or where counsel has acted in accordance with his specific instructions.¹⁶ So, also, it has been held that plaintiff in an action has the right by stipulation to dismiss or discontinue the action without the knowledge or consent, or against the protest of, his attorney,¹⁷ or although he has expressly agreed not to compromise without the attorney's consent;¹⁸ but other decisions have reached a directly opposite conclusion, and hold that the client has no right to dismiss or discontinue the suit without his attorney's consent, and that a stipulation for that purpose is invalid and inoperative.¹⁹ The rule that, where a release is offered in defense, it is the province of the jury and not of the court to determine whether there has been fraud in obtaining the release does not apply to a case where,

with the release, a stipulation was made to dismiss a pending action without cost to either party, in which case, on a motion to dismiss in accordance with the stipulation, the determination by the court of the question whether the person signing the stipulation knew and understood what he was signing is not erroneous.²⁰

Claim of minor. Where the interests of a minor are involved in an action or proceeding, it has been held that a stipulation by his guardian ad litem and attorney providing for the dismissal of the minor's claim, if not sustained by certain evidence, not otherwise legally conclusive, cannot be upheld unless it is shown to be in the best interests of the minor;²¹ nor can it be sustained as a compromise of the minor's claim without showing a compliance with statutory requirements governing such compromises.²²

(4) As to Parties

Parties cannot bind the court by stipulation with respect to necessary parties; but irregularity in joinder of parties may be waived by stipulation, and a person may stipulate that he is a party.

Parties cannot bind the court by stipulation with respect to necessary parties,²³ and the appellate court is not bound thereby, even though the stipulation was approved by the trial court.²⁴ However, irregularity in joinder of parties may be waived by stipulation,²⁵ and a person may make a binding stipulation that he is a party.²⁶ Where an original order bringing in a party has been entered on stipulation, its terms may be subsequently changed to permit plaintiff to serve a new pleading.²⁷

A qualification to sue may not be supplied by a stipulation of parties or counsel.²⁸

10. Wash.—Gough v. Center, 106 P. 774, 57 Wash. 276.
60 C.J. p 52 note 83.

11. Cal.—Cordes v. Hammond, 203 P. 131, 55 Cal.App. 55.
60 C.J. p 52 note 84.

12. Mich.—Tsingos v. Michigan Packing Co., 260 N.W. 783, 272 Mich. 7.

13. Perfecting attachment by trustee process

Mass.—Kolda v. National Ben Franklin Fire Ins. Co., 195 N.E. 331, 290 Mass. 182—Zani v. Phandor Co., 183 N.E. 500, 281 Mass. 139.

14. Cal.—In re More, 77 P. 407, 143 Cal. 493.

15. Mich.—Chronowski v. Zielinski, 134 N.W. 982, 168 Mich. 590.

83 C.J.S.—2

Wash.—Livesley v. Pler, 39 P. 660, 11 Wash. 268.
60 C.J. p 52 note 88.

Absence of formal order

Written stipulation discontinuing third party action by compensation claimant was good as between parties, even though formal order of discontinuance was not signed and entered.—Burmester v. De Lucia, 189 N.E. 231, 263 N.Y. 315, motion denied Burmester v. Maryland Casualty Co., 188 N.E. 99, 262 N.Y. 637.

16. Minn.—Albee v. Hayden, 25 Minn. 267.

Authority of attorney as to dismissal or discontinuance see Attorney and Client § 87.

17. Wis.—Sullivan v. Bruhling, 36 N. W. 23, 70 Wis. 388.
60 C.J. p 52 note 91.

18. Miss.—Mosely v. Jamison, 14 So. 529, 71 Miss. 456.

19. Cal.—San José Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am.D. 164.

Mich.—Jackson v. Cole, 45 N.W. 826, 81 Mich. 440.

20. Ill.—Mangler v. Maryland Casualty Co., 201 Ill.App. 560.

21. Cal.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

22. Cal.—Berry v. Chaplin, supra.

23. Tex.—Bishop v. Sanford, Civ. App., 35 S.W.2d 800.

24. Tex.—Bishop v. Sanford, supra.

25. U.S.—McCluskey v. Marysville, etc., R. Co., Wash., 37 S.Ct. 374, 243 U.S. 36, 61 L.Ed. 578.

26. Ill.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 356 Ill. 186.

27. N.Y.—Johnson v. Guernsey, 203 N.Y.S. 781, 208 App.Div. 548.

28. Nev.—Gold Circle Crown Min.

(5) As to Pleadings

The parties may, by stipulation, dispense with designated pleadings, waive defects therein, provide for their amendment or withdrawal, and do various other things in connection with the pleadings; but it has been held that a stipulation as to pleadings does not prevent the judge in the exercise of his discretion from striking them out if he is otherwise justified in so doing.

The parties may, by stipulation, dispense with such of the pleadings as are therein designated,²⁹ and may dispense altogether with pleadings and submit the case on an agreed statement of facts.³⁰ Stipulations waiving defects in the pleadings are valid,³¹ and the waiver may be either express or implied.³² Stipulations have been held valid which provide for an amendment of the pleadings,³³ or that pleadings shall be deemed amended,³⁴ or for the withdrawal of certain pleadings and the substitution of others.³⁵ So, also, stipulations have been held valid which provide for an abandonment of part of plaintiff's claim;³⁶ which waive the necessity of demand as a condition precedent to the requirement of a bill of particulars,³⁷ objections in respect of parties,³⁸ or service of a copy of an amended pleading;³⁹ which extend the time to answer or plead;⁴⁰ which provide that a demurrer may be overruled and defendant allowed to answer;⁴¹ which waive irregularity in proceedings to compel an answer;⁴² allow a defense to be set up which

would not otherwise be permissible,⁴³ allow the introduction of evidence on the merits without reference to the pleadings on file,⁴⁴ or the admission of evidence of special defenses without specially pleading them;⁴⁵ or which provide for a trial on the merits without a restoration of lost pleadings,⁴⁶ or authorize a broader relief than the pleadings alone would sustain.⁴⁷ It has been held, however, that an agreement of counsel as to pleadings does not prevent the judge in the exercise of his discretion from striking them out if he is otherwise justified in so doing.⁴⁸

(6) As to Issues

As a general rule, litigants may prescribe the issues to be tried and may limit or broaden the issues made by the pleadings.

While the issues in a case are usually such as are made by the pleadings, litigants are nevertheless at liberty to prescribe the issues to be tried,⁴⁹ provided the issues are within the power of the court to try;⁵⁰ and they may modify or limit the issues made or to be made by the pleadings,⁵¹ or waive the issues made by the pleadings and stipulate for a trial on the merits regardless of such issues,⁵² or they may broaden the issues raised by the pleadings or waive the objection that the issue agreed on is not embraced by the pleadings.⁵³ Similarly, they

Co. v. Getchell, 76 P.2d 1097, 58 Nev. 288.

N.Y.—Thompson v. Wallin, 95 N.Y.S. 2d 784, 276 App.Div. 463, affirmed 95 N.E.2d 806, 301 N.Y. 476, appeal dismissed 72 S.Ct. 92, 342 U.S. 801, 96 L.Ed. 607.

29. Neb.—Corpus Juris quoted in Traill v. Ostermeier, 300 N.W. 375, 377, 140 Neb. 432.

60 C.J. p 53 note 2.
Construction, operation, and effect see infra § 21.

30. Neb.—Corpus Juris quoted in Traill v. Ostermeier, 300 N.W. 375, 377, 140 Neb. 432.

60 C.J. p 53 note 3.
31. Ky.—Scharringhaus v. Hazen, 107 S.W.2d 329, 269 Ky. 425.

60 C.J. p 53 note 4.
32. Iowa.—Goodenow v. Foster, 79 N.W. 288, 108 Iowa 506.

60 C.J. p 53 note 5.
33. U.S.—Pan-American Trading Co. v. Franquiz, D.C.Fla., 8 F.2d 500.

60 C.J. p 53 note 6.
34. N.Y.—Schwemmer v. Supreme Council Catholic Benev. Legion, 176 N.Y.S. 139, 187 App.Div. 673.

35. Mo.—Franklin v. National Ins. Co., 43 Mo. 491.

36. Fla.—Broward v. Roche, 21 Fla. 465.

Splitting cause of action

An agreement not to litigate a portion of claim was not invalid in view of right of a defendant to waive rule prohibiting the splitting of causes of action, since such a rule is for benefit of defendant.—Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas, Tex.Civ.App., 107 S.W.2d 1008, error refused.

37. Minn.—Tuttle v. Wilson, 44 N.W. 10, 42 Minn. 233.

38. N.Y.—Fletcher v. Massachusetts Ben. Life Assoc., 29 N.Y.S. 173, 78 Hun 311.

60 C.J. p 54 note 12.

39. N.C.—Greenlee v. McDowell, 39 N.C. 481.

40. U.S.—Universal Rim Co. v. General Motors Corp., D.C.Mich., 31 F. 2d 969.

60 C.J. p 54 note 14.

41. Cal.—Hitchcock v. Cruthers, 23 P. 48, 32 Cal. 523.

42. N.Y.—People v. Boyd, 2 Edw. 516.

43. Ga.—Henderson v. Merritt, 38 Ga. 232.

44. Ill.—Miller v. McManis, 57 Ill. 126.

45. U.S.—Mutual L. Ins. Co. v. Harris, Md., 97 U.S. 331, 24 L.Ed. 959.

60 C.J. p 54 note 19.

46. N.Y.—Cook v. Allen, 67 N.Y. 573.

47. Ind.—McElwaine v. Hosey, 35 N. E. 272, 135 Ind. 481.

48. Mass.—Lane v. J. W. Lavery & Son, 1 N.E.2d 378, 294 Mass. 288—Murray v. Rossmels, 187 N.E. 622, 284 Mass. 263.

49. Okl.—Bruner v. Burch, 65 P.2d 1215, 179 Okl. 338.

Tex.—Early v. Burns, Civ.App., 142 S.W.2d 260, error refused.

60 C.J. p 54 note 24.

Construction, operation, and effect of stipulations as to issues see infra § 22.

50. Iowa.—Blades v. Des Moines City R. Co., 123 N.W. 1057, 146 Iowa 580.

51. Cal.—Petroleum Midway Co. v. Zahn, 145 P.2d 371, 62 Cal.App.2d 645.

Conn.—City of New Haven v. New Haven Water Co., 172 A. 767, 118 Conn. 389.

Okl.—Bruner v. Burch, 65 P.2d 1215, 179 Okl. 338.

Vt.—Vallancort v. Dutton, 50 A.2d 762, 115 Vt. 36.

60 C.J. p 55 note 26.

52. Ark.—Roy v. O'Connor, 5 Ark. 252.

Ill.—Miller v. McManis, 57 Ill. 126.

53. U.S.—Federal Deposit Ins. Corp. v. Siraco, C.A.N.Y., 174 F.2d 360.

Okl.—Bruner v. Burch, 65 P.2d 1215, 179 Okl. 338.

may change the rules of evidence as to what may be shown by way of defense under a general denial.⁵⁴ However, it has been declared that, as the law of procedure prescribes the method of invoking jurisdiction to determine justiciable issues, the agreement of the parties undertaking to impose on the courts the duty of deciding such issues, without appropriate pleadings, is a practice which cannot be approved.⁵⁵

(7) As to Evidence

Generally speaking, the parties or their counsel may stipulate as to evidential matters, such as the admission, exclusion, or withdrawal of evidence, or as to the necessity of evidence to prove designated facts, but stipulations which are clearly against public policy will not be tolerated.

Generally speaking, the parties or their counsel may stipulate as to evidential matters.⁵⁶ They may enter valid stipulations as to the admission,⁵⁷ exclusion,⁵⁸ or withdrawal⁵⁹ of evidence. They may by stipulation dispense with the necessity of evidence to prove designated facts,⁶⁰ waive objections to evidence,⁶¹ or the necessity for laying a foundation for the admission of evidence;⁶² they may

agree on the manner of taking evidence;⁶³ a they may allow copies of papers to be admitted evidence in place of the originals,⁶⁴ allow the reading from records of title papers,⁶⁵ remedy defects in documents introduced in evidence,⁶⁶ authorize the admission of documentary evidence instead of formal proof,⁶⁷ agree to the use of affidavits of evidence,⁶⁸ allow laws of a foreign state or territory, whether statutory or common, to be considered as evidence,⁶⁹ allow the trial court to take knowledge of decisions of another state brought to its notice,⁷⁰ waive objections to the competency of witnesses,⁷¹ agree as to the qualifications of a witness,⁷² agree that a witness has been impeached,⁷³ limit the evidence on the issues in a case,⁷⁴ as by restricting the number of witnesses to be used on a particular issue,⁷⁵ limit the purpose for which evidence is introduced,⁷⁶ make testimony offered by one party competent as to all of the parties,⁷⁷ or extend the time for taking testimony or proof.⁷⁸ So the parties may by agreement impose the burden of proof on one of the parties to show certain facts,⁷⁹ and they may agree to close the evidence within a designated time,⁸⁰ or to submit

Vt.—*Vaillancourt v. Dutton*, 50 A.2d 762, 115 Vt. 36.
60 C.J. p 55 note 28.

Defenses under general denial

The parties to action have right to agree that all defenses may be admitted under answer of general denial.—*Paxton Realty Corp. v. Peaker*, 9 N.E.2d 96, 212 Ind. 480.

Issue triable without special pleading may be resolved by stipulation.—*Pisano v. Texas & N. O. R. Co.*, Tex.Civ.App., 112 S.W.2d 316, error dismissed.

54. U.S.—*Federal Deposit Ins. Corp. v. Siraco*, C.A.N.Y., 174 F.2d 360.

55. Ala.—*State Tax Commission v. Stanley*, 173 So. 609, 234 Ala. 66.

56. Ky.—*Leslie v. First Huntington Nat. Bank*, 191 S.W.2d 204, 301 Ky. 145.—*World Fire & Marine Ins. Co. v. Tapp*, 151 S.W.2d 428, 286 Ky. 650.

Construction, operation, and effect see *infra* § 23.

57. U.S.—*Arkansas Natural Gas Co. v. Sartor*, C.C.A.La., 78 F.2d 924, certiorari denied *Sartor v. Arkansas Natural Gas Co.*, 56 S.Ct. 381, 296 U.S. 656, 80 L.Ed. 467.
60 C.J. p 55 note 30.

58. Mass.—*Cohen v. Edinberg*, 114 N.E. 294, 225 Mass. 177.
60 C.J. p 55 note 31.

59. Ky.—*Pineville v. Lawson*, 9 S.W.2d 517, 225 Ky. 542.
60 C.J. p 55 note 32.

60. U.S.—*Great Northern R. Co. v.*

U. S., Mont., 62 S.Ct. 529, 315 U.S. 262, 86 L.Ed. 836.—*Platt v. U. S.*, C.C.A.Okl., 163 F.2d 165.—*H. A. Whitacre, Inc. v. U. S.*, 22 C.C.P.A., Customs, 623.

Ind.—*Schreiber v. Rickert*, 50 N.E.2d 879, 114 Ind.App. 55.

Ky.—*Marlon v. Commonwealth*, 108 S.W.2d 721, 269 Ky. 729.

Nev.—*Gottwals v. Rencher*, 98 P.2d 481, 60 Nev. 35, 126 A.L.R. 1262.

Tex.—*Pisano v. Texas & N. O. R. Co.*, Civ.App., 112 S.W.2d 316, error dismissed.
60 C.J. p 55 note 33.

Value of property condemned

Cal.—*McGee v. City of Los Angeles*, 57 P.2d 925, 6 Cal.2d 390.

61. Mich.—*Mettetal v. Hall*, 284 N.W. 698, 288 Mich. 200.

60 C.J. p 55 note 34.

62. Ala.—*Ohme v. Bisimanis*, 132 So. 161, 222 Ala. 262.

60 C.J. p 55 note 35.

63. Okl.—*Hertzel v. Weber*, 120 P. 589, 31 Okl. 5.

64. Wash.—*Skibsaktieselskapet Bestum III v. Duke*, 230 P. 650, 131 Wash. 467.

60 C.J. p 55 note 37.

65. Tex.—*Thomas v. Smith*, Civ. App., 60 S.W.2d 514, error dismissed.
60 C.J. p 56 note 38.

Defect in description in deed

Mont.—*Conner v. Helvik*, 73 P.2d 541, 105 Mont. 437.

67. S.C.—*Beck v. Northwestern R. Co.*, 83 S.E. 335, 99 S.C. 310.

68. N.Y.—*Petition of Serenbetz*, 4 N.Y.S.2d 475, 181 Misc. 4, affirmed, 46 N.Y.S.2d 127, 267 App.Div. 836.

60 C.J. p 56 note 40.

69. Cal.—*McCarty v. More*, 186 P. 140, 181 Cal. 738.

60 C.J. p 56 note 41.

70. Ala.—*Smith v. Blinn*, 127 So. 155, 221 Ala. 24.

71. Nev.—*Garaventa v. Gardella*, 166 P.2d 540, 63 Nev. 304.

60 C.J. p 56 note 43.

72. Cal.—*Brinck v. Bradbury*, 176 P. 690, 179 Cal. 376.

73. Cal.—*People v. Podwys*, 53 P.2d 1043, 11 Cal.App.2d 426.

74. Cal.—*Morrow v. Morrow*, 105 P. 2d 129, 40 Cal.App. 474.

75. N.Y.—*Taber v. New York Bl. R. Co.*, 11 N.Y.S. 584, 58 N.Y.Super. 579.

76. Md.—*Bresnan v. Weaver*, 135 A. 584, 151 Md. 375.
60 C.J. p 56 note 46.

77. Or.—*Stark-Davis Co. v. Fellows*, 277 P. 110, 129 Or. 281, 64 A.L.R. 271.
60 C.J. p 56 note 47.

78. Mich.—*James v. McMillan*, 20 N.W. 826, 55 Mich. 136.
60 C.J. p 56 note 48.

79. Mont.—*R. M. Cobban Realty Co. v. Chicago, etc., R. Co.*, 190 P. 988, 58 Mont. 188.

60 C.J. p 56 note 49.

80. U.S.—*In re Thomas*, D.C.S.C., 35 F. 337.

the cause without further evidence,⁸¹ or agree as to what evidence shall be considered by the trier of facts.⁸² In a proper case the admission of testimony under a stipulation by virtue of which counsel is not required constantly to renew his objections is a proper practice.⁸³

On the other hand, the doctrine upholding the validity of stipulations in respect of evidence is subject to the important limitation that stipulations which are clearly against public policy will not be tolerated.⁸⁴ Further, it has been held that the parties cannot agree to oust the court of jurisdiction to admit all evidence applicable to a cause,⁸⁵ or make evidence conclusive which is not legally conclusive,⁸⁶ or deprive the court of its jurisdiction to admit competent circumstantial evidence by a stipulation requiring direct and positive proof of a fact;⁸⁷ and counsel cannot, by stipulation or otherwise, require a court to admit testimony which, under legal rules, is not admissible as evidence in a case.⁸⁸

Depositions. It is competent by stipulation to waive objections to depositions on the grounds that the causes for taking depositions did not exist,⁸⁹

that there were defects and irregularities in taking the depositions,⁹⁰ that the witnesses were not sworn,⁹¹ that the deposition was not certified in accordance with statutory requirements,⁹² or that the depositions were admitted in lieu of record evidence or a certified copy thereof.⁹³ Where the parties to an action expressly stipulated that a deposition should not be admitted in evidence, its exclusion must follow.⁹⁴

Testimony of absent witnesses. The parties may agree as to what testimony an absent witness would give, if present, and that the facts so stipulated may be used as evidence,⁹⁵ and waive the presence of a witness and agree to have his written testimony read to the jury.⁹⁶ This method of proof, however, is not commended in some cases.⁹⁷

Evidence admitted in other actions or on former trials of same case. Litigants may validly stipulate for the admission in evidence of testimony admitted in other actions, or on former trials of the same cause,⁹⁸ even though the deposition of the witness could have been taken at the later trial,⁹⁹ or the witness is present and is examined at the later trial.¹ A stipulation limiting proofs to testimony

81. Idaho.—Commercial Credit Co. v. Mizer, 296 P. 580, 50 Idaho 388.
W.Va.—Corpus Juris cited in Cole v. State Compensation Com'r, 173 S.E. 263, 114 W.Va. 633.

82. Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 224 Minn. 395.

83. Wis.—State v. Hoffman, 2 N.W. 2d 707, 240 Wis. 142.

Such a stipulation should be entered into with care or counsel may be barred on appeal from raising a point on which he expected to rely.—State v. Hoffman, supra.

84. Mass.—Rubinstein v. Rubinstein, 86 N.E.2d 793, 319 Mass. 568. 60 C.J. p 56 note 52.

85. Cal.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

Unsworn report of expert

A stipulation that a cause be submitted on unsworn report of an expert and that such report should be conclusive will not be tolerated.—Berry v. Chaplin, supra.

86. Cal.—Berry v. Chaplin, supra.

87. Cal.—Berry v. Chaplin, supra.

88. U.S.—Sac, etc., Indians of Iowa v. Sac, etc., Indians of Oklahoma, 45 Ct.Cl. 287, affirmed 31 S.Ct. 473, 220 U.S. 481, 55 L.Ed. 552.

N.Y.—In re Schrier's Estate, 260 N.Y. S. 610, 145 Misc. 593, motion denied 263 N.Y.S. 539, 147 Misc. 539.

89. Minn.—Carlson v. Chicago Great Western R. Co., 131 N.W. 375, 114 Minn. 382.

60 C.J. p 57 note 56.

Construction and effect of stipulations as to depositions see infra § 23.

90. Or.—Grignon v. Shope, 197 P. 317, 100 Or. 611.
60 C.J. p 57 note 57.

91. Minn.—Reagan v. Philadelphia L. Ins. Co., 206 N.W. 162, 165 Minn. 186.

92. U.S.—Stewart v. Townsend, C.C. S.C., 41 F. 121.
60 C.J. p 57 note 59.

93. Tex.—Lewright v. Walls, 119 S. W. 721, 55 Tex.Civ.App. 643.

94. Ky.—Stevenson v. Illinois Cent. R. Co., 163 S.W. 747, 157 Ky. 561.

95. Minn.—Behrens v. Kruse, 155 N. W. 1065, 132 Minn. 69.
60 C.J. p 57 note 62.

Admissions to prevent:

Continuance see Continuances § 107.

Taking of deposition see Depositions § 38.

Waiver of right of confrontation in criminal case see Criminal Law § 1009.

Husband's testimony equivalent of wife's

Plaintiff would be granted an examination before trial with respect to ownership and control of sprinkler system, but, where property was managed by husband of defendant, who was record owner, and to require defendant, who was seriously ill, to submit to examination would be an unnecessary hardship, hus-

band of defendant, as her agent, would be directed to submit to examination and produce books under stipulation of parties that his testimony should be given the same force as though defendant had testified.—Suskin v. Gross, 58 N.Y.S.2d 404.

96. Iowa.—State v. Fooks, 21 N.W. 561, 773, 65 Iowa 136, 452.

97. Proof of value in condemnation
In condemnation proceeding, making proof by stipulation stating what witness, if he were present, would testify to concerning value of land, deprives court of opportunity to pass on credibility of witness in determining what weight shall be given to witness' opinion, and is not commended.—U. S. v. Certain Land in Wayne County, Mo., Known as Tract No. 8, Mingo National Wildlife Refuge Project, D.C.Mo., 70 F.Supp. 730.

98. Cal.—People v. Podwys, 53 P.2d 1043, 11 Cal.App.2d 426.

N.Y.—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764.

60 C.J. p 57 note 65.

Admissibility of former evidence generally see Evidence §§ 384-402.
Construction and effect see infra § 23.

99. Colo.—Magne v. Sioux City Nursery, etc., Co., 59 P. 879, 14 Colo.App. 219.

1. N.Y.—Priolo v. C. H. Southard Wrecking, etc., Co., 91 N.E. 275, 198 N.Y. 528.

submitted on a prior hearing except where the record of such hearing is not clear to the trier of facts, in which event witnesses from the prior hearing may testify, has been held enforceable and not unreasonable, and not to be against good morals or sound public policy.²

(8) As to Admissions

As a general rule, the parties may by stipulation admit or agree on the existence of designated facts, but it has been held that a stipulation as to a factual matter is not controlling where the jurisdiction of a court is involved and the fact has been established in the manner provided by law.

The parties may by stipulation admit or agree on the existence of designated facts for the purposes of the trial.³ This practice, it has been said, is deserving of the encouragement of the courts, and is favored by them,⁴ especially where the proof would consist of the formal introduction of lengthy docu-

mentary evidence with which counsel can thoroughly familiarize themselves prior to the trial.⁵ This practice, it has been said, conduces to simplify the issues to be tried, by narrowing the litigation to the precise matters in controversy; it saves time and expense and avoids delay and surprise.⁶ It has been held, however, that any concession or stipulation as to a factual matter is of no controlling significance where the jurisdiction of a court is involved and the fact has been established in the manner provided by law.⁷

(9) As to Agreed Statement of Facts

Ordinarily, litigants may stipulate as to agreed statement of facts on which to submit their case to the court; such statements must contain every essential element without any omission and be clear and definite.

Ordinarily, litigants may stipulate as to agreed statement of facts on which to submit their case to the court for decision,⁸ and such stipulations

2. N.Y.—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App. Div. 764.

3. U.S.—Crabb v. C. I. R., C.C.A.Tex., 121 F.2d 1015.

Cal.—People v. Hooper, 61 P.2d 870, 16 Cal.App.2d 704.

Ill.—People v. Levisen, 90 N.E.2d 213, 404 Ill. 574, 14 A.L.R. 1364.

Miss.—Board of Levee Com'rs v. Parker, 193 So. 346, 187 Miss. 621.

Mo.—Polk Tp. ex rel. and to Use of Seaton v. Harrison, App., 64 S.W. 2d 738.

Neb.—North Platte Lodge 985, B. P. O. E., v. Board of Equalization of Lincoln County, 252 N.W. 313, 125 Neb. 841, 92 A.L.R. 658.

N.Y.—Penniman v. LaGrange, 52 N. Y.S. 27, 23 Misc. 653.

N.C.—Moore v. State, 156 S.E. 806, 200 N.C. 300.

Okl.—First Nat. Bank v. City Guaranty Bank of Hobart, 51 P.2d 573, 174 Okl. 545.

Va.—Burke v. Gale, 67 S.E.2d 917, 193 Va. 130.

60 C.J. p 57 note 67.

Agreed statement of facts see *infra* subsection f (9) of this section.

Construction, operation, and effect of admissions see *infra* § 24.

There is no limitation on the right to stipulate facts.—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392.

A stipulation of facts is an express waiver made in court or preparatory to trial, by the party or his attorney, conceding for purposes of trial the truthfulness of some alleged fact, and it has effect of a confessional plea.—Schreiber v. Rickert, 50 N.E.2d 879, 114 Ind.App. 55.

4. Minn.—Gelin v. Hollister, 24 N. W.2d 496, 222 Minn. 339, 168 A.L.R. 195.

N.D.—Mongeon v. Burkeville, 55 N.W. 2d 445.

Va.—Mulkey v. Firth Bros. Iron Works, 50 S.E.2d 404, 188 Va. 451. 60 C.J. p 58 note 68.

5. Colo.—Gibson v. Foster, 133 P. 144, 24 Colo.App. 252.

6. Mo.—Hannah v. Baylor, 27 Mo. App. 302.

7. Population of judicial townships Cal.—Shea v. Kerr, 36 P.2d 189, 1 Cal.2d 604.

8. Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323—White v. Reskin, 265 P. 1016, 90 Cal.App. 512.

Fla.—Troup v. Bird, 53 So.2d 717.

Ill.—Plenderleith v. Edwards, 159 N. E. 780, 328 Ill. 431.

Kan.—Noble v. Harter, 49 P. 794, 6 Kan.App. 823.

Ky.—World Fire & Marine Ins. Co. v. Tapp, 151 S.W.2d 428, 286 Ky. 650.

Miss.—Board of Levee Com'rs v. Parker, 193 So. 346, 187 Miss. 621.

Mo.—Gage v. Gates, 62 Mo. 412—Munford v. Wilson, 15 Mo. 540—

Polk Tp. ex rel. and to Use of Seaton v. Harrison, App., 64 S.W.2d 738.

Mont.—Read v. Lewis and Clark County, 178 P. 177, 55 Mont. 412.

Neb.—Ex parte Page, 131 N.W. 820, 89 Neb. 299.

N.Y.—Remy v. Remy, 30 N.Y.S.2d 995, 177 Misc. 460.

Pa.—Vondersmith v. Urban, 165 A. 62, 108 Pa.Super. 103.

Tex.—Rose v. Baker, 183 S.W.2d 438, 143 Tex. 202.

60 C.J. p 58 note 72.

Admission of particular facts see *supra* subsection f (8) of this section.

Construction, operation, and effect of agreed statement of facts see *infra* § 25.

Distinguished from submission of controversy without action

(1) An agreed statement of facts on which a case is submitted in lieu of evidence is not within the purview of the statute providing for the submission of controversies for judicial decision without action, or at common law.

Mo.—Byers v. Essex Inv. Co., 219 S. W. 570, 281 Mo. 375—Treece State Bank v. Wade, App., 283 S.W. 714.

N.Y.—Nott v. Klein, 285 N.Y.S. 1025, 169 Misc. 35.

(2) Submission of controversies to courts for determination on a statement of facts agreed to by the parties without action see Submission of Controversy §§ 1-17.

Compared with, and distinguished from, "case stated"

(1) A stipulation for submission on an "agreed statement of facts" and a stipulation for submission on a "case stated" are similar.—Scaccia v. Boston Elevated R. Co., 57 N.E.2d 761, 317 Mass. 245.

(2) There is, however, a distinction, although not infrequently the words "agreed facts" or "agreed statement of facts" are used where it would be more accurate to speak of a "case stated."—Fratl v. Jannini, 115 N.E. 746, 226 Mass. 430.

(3) An agreement of the parties as to the evidence which shall be considered by the court or jury is strictly speaking an "agreed statement of facts" which merely takes the place of the evidence which would otherwise be introduced in the usual way, and either the jury render a general verdict or the judge makes a general finding founded on that evidence.—Duff v. Town of Southbridge, 90 N. E.2d 12, 325 Mass. 224—Mellen v. Modern Parlor Frame Corp., 73 N.E. 2d 247, 321 Mass. 305—King Features

are, indeed, encouraged by the courts,⁹ subject to some limitations,¹⁰ including the obvious limitations that the parties cannot thus confer jurisdiction on a court which has not jurisdiction of the subject matter of the action in which the agreed statement of facts is made,¹¹ or enter into a stipulation of facts the effect of which is to limit the jurisdiction of the court.¹² The statement must appear to have been made in a case legally before the court for its decision; the parties cannot, by their agreement,

present a case to the court for its decision in a manner not authorized by law.¹³

An agreed statement must contain every essential element without any omission,¹⁴ and should contain nothing but the material facts in issue, anything more being regarded as surplusage.¹⁵ In order to sustain judgment for plaintiff, the statement must show all the facts necessary to his recovery.¹⁶ The facts agreed on should be clearly and definitely stated,¹⁷ according to the decisions on the ques-

Syndicate v. Cape Cod Broadcasting Co., 59 N.E.2d 481, 317 Mass. 652—Cerwonka v. Town of Saugus, 55 N.E.2d 1, 316 Mass. 152—Atlantic Maritime Co. v. City of Gloucester, 117 N.E. 924, 228 Mass. 519—Frati v. Jannini, 115 N.E. 746, 226 Mass. 430.

(4) On the other hand, "case stated" is the accurate phrase to describe an agreement under which the parties agree on all the material ultimate facts on which the rights of the parties are to be determined by the law.—King Features Syndicate v. Cape Cod Broadcasting Co., 59 N.E.2d 481, 317 Mass. 652—Cassie v. City of Cambridge, 58 N.E.2d 169, 317 Mass. 346—Grant v. Aldermen of Northampton, 55 N.E.2d 705, 316 Mass. 432—Cerwonka v. Town of Saugus, 55 N.E.2d 1, 316 Mass. 152—Frati v. Jannini, 115 N.E. 746, 226 Mass. 430.

(5) Under a statute empowering the appellate court as well as other courts to draw inferences of fact from a case stated, unless the parties expressly withhold such power, this distinction becomes important since in the case of an agreed statement of facts, while the trial court could draw inferences from it as it could from other evidence, it has been held that the appellate court can review those inferences only to the extent of seeing whether they were unwarranted as a matter of law.—Scaccia v. Boston Elevated R. Co., 57 N.E.2d 761, 317 Mass. 245—Atlantic Maritime Co. v. City of Gloucester, 117 N.E. 924, 228 Mass. 519.

(6) In a number of decisions particular stipulations have been deemed to be agreements as to evidence and not a case stated.—Maguire v. Hadad, 91 N.E.2d 769, 325 Mass. 590—Duff v. Town of Southbridge, 90 N.E.2d 12, 325 Mass. 224—Mellen v. Modern Parlor Frame Corp., 73 N.E.2d 247, 321 Mass. 305—King Features Syndicate v. Cape Cod Broadcasting Co., 59 N.E.2d 481, 317 Mass. 652—Cerwonka v. Town of Saugus, 55 N.E.2d 1, 316 Mass. 152.

(7) Power of a reviewing court to draw inferences from an agreed statement see Appeal and Error § 1458.

(8) Submission of cause for trial by court on case stated see the C.J.S.

title Trial § 578, also 64 C.J. p 1191 notes 97-7.

Method of determining nature of statement

Whether an agreed statement is a case stated, an agreed statement of facts, or merely a part or whole of the evidence, will be determined by the court from the substance of the thing done, and not from the name or description used.—Scaccia v. Boston Elevated Ry., 32 N.E.2d 253, 308 Mass. 310—Frati v. Jannini, 115 N.E. 746, 226 Mass. 430.

Pleadings, depositions, and exceptions

Where parties stipulated that the court should determine all issues on pleadings, depositions, and exceptions to the depositions, and make an order directing proceedings to be dismissed or directing parties to proceed to arbitration, court had power to adjudicate and make appropriate disposition of petition for arbitration.—Grocery & Food Warehousemen Local Union No. 635 of the Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. of L. v. Kroger Co., 70 A.2d 218, 364 Pa. 195.

Where complaint is completely admitted by answer, it may be treated as the equivalent of an agreed statement of fact.—Security Trust Co. of Rochester v. Bradley, 38 N.Y.S.2d 918, 179 Misc. 338, affirmed Security Trust Co. of Rochester v. Burlew, 46 N.Y.S.2d 222, 266 App.Div. 943.

9. Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323. 60 C.J. p 58 note 72 [a].

10. Suits in which the rights of infant parties are to be resolved on matters of fact are not ordinarily appropriate controversies to be submitted to the court on an agreed statement of facts.—Anderson v. Anderson, 32 A.2d 83, 133 N.J.Eq. 311.

11. U.S.—Willard v. Wood, D.C., 10 S.Ct. 831, 135 U.S. 309, 34 L.Ed. 210. 60 C.J. p 59 note 73.

12. Idaho.—Mills v. Minidoka County, 204 P. 876, 35 Idaho 47. 60 C.J. p 59 note 74.

13. Me.—Hatch v. Allen, 27 Me. 85.

14. Mo.—Goben v. Murrell, 190 S.W. 986, 195 Mo.App. 104, rehearing

denied 197 S.W. 432, 195 Mo.App. 104.

15. Neb.—Ex parte Page, 131 N.W. 820, 89 Neb. 299.

16. Ky.—Tri-County Elec. Membership Corp. v. Meador, 138 S.W.2d 993, 282 Ky. 377.

Mass.—Coffin v. Artesian Water Co., 79 N.E. 262, 193 Mass. 274.

Mo.—Goben v. Murrell, 190 S.W. 986, 195 Mo.App. 104, rehearing denied 197 S.W. 432, 195 Mo.App. 104—Appleman v. American Sporting Goods Co., 64 Mo.App. 71—South Missouri Land Co. v. Combs, 53 Mo. App. 298.

Mont.—Commercial Credit Co. v. O'Brien, 146 P.2d 637, 115 Mont. 199, appeal dismissed 65 S.Ct. 75, 323 U.S. 665, 89 L.Ed. 541—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

Pa.—Meiser v. Donehoo, 22 Pa.Co. 54.

Burden is on party seeking to recover to show his right of recovery from the facts as stipulated.—State v. Hudson, 86 Mo.App. 501—South Missouri Land Co. v. Combs, 53 Mo. App. 298.

Judgment for defendant

(1) Ordinarily, where the agreed statement does not contain facts sufficient to warrant a finding for plaintiff, judgment of necessity must be for defendant.

Mass.—Boston v. Brooks, 73 N.E. 206, 187 Mass. 286.

Mo.—Ozark Plateau Land Co. v. Hays, 16 S.W. 957, 105 Mo. 143—Gage v. Gates, 62 Mo. 412—Appleman v. American Sporting Goods Co., 64 Mo.App. 71—South Missouri Land Co. v. Combs, 53 Mo.App. 298.

(2) However, if it fails to ascertain any element of fact necessary to plaintiff's recovery, and the obvious inference from the facts stated is sufficient to deny judgment to defendant, it is the duty of the court to strike the case stated from the record and order the cause to proceed before a jury as if it had not been submitted.—Klopp v. Bernville Live Stock Ins. Co., Pa., 1 Woodw. 445.

17. U.S.—Air Nitrates Corporation v. U. S., 63 Ct.Cl. 199.

Colo.—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1, 64 Colo. 388, L.

tion, and nothing should be left to inference.¹⁸ It may incorporate exhibits by specific reference.¹⁹ These agreements often contain express reservation of the right to interpose objections to the competency, sufficiency, or legal effect of the facts stated.²⁰ An agreed statement of facts is not the pleadings or the issues, but simply the proofs on which the cause is tried,²¹ unless the terms of the agreement itself gives it a broader scope.²² It must be treated as a special verdict, or as the equivalent of a special finding of fact, as discussed *infra* § 25, and, as such equivalent, there must be an agreement on all ultimate facts and not a mere presentation of evidence from which such facts or any of them may be inferred.²³

Qualification of admissions of fact in the stipulation by the provision that parties do not admit the legal effect of facts admitted is proper, since the ultimate determination of such legal effect rests with the court.²⁴

(10) As to Trial

The parties may make such stipulations as to trial as are not in contravention of peremptory requirements of law or rules of court.

The parties to a cause may make such stipulations as to the trial and hearing thereof as are not in

contravention of peremptory requirements of the law or of rules of court.²⁵ Thus they may stipulate as to the time²⁶ or place²⁷ of trial, or shorten the time for commencing an action within the original jurisdiction of the supreme court, with approval of the court.²⁸ So they may stipulate as to the order of proof;²⁹ that the case be tried and decided by one member of the court, the others being disqualified;³⁰ that the cause may be tried at chambers or in vacation,³¹ or passed without prejudice to any of the parties to the suit;³² that issues of fact may be tried and determined by the court without a jury;³³ that some fact issues are to be left to the jury to determine and others are to be determined by the court;³⁴ that the case be submitted to the court without a jury, and be decided on documents then on file in the court, and the case be taken up by the court at the pleasure of the judge, without reference to the presence of attorneys of either party;³⁵ that the issues in an equity case may be tried by jury and judgment rendered on a general verdict;³⁶ that an action at law be tried as a suit in equity;³⁷ that a case may be transferred from the common law to the equity docket;³⁸ that damages in an equity suit may be ascertained by arbitrators under the direction of the master;³⁹ that the case may be submitted to the

R.A.1918E, 636, followed in *First Nat. Bank of Ft. Collins v. Daniels Mercantile Co.*, 172 P. 3, 64 Colo. 408.

Mo.—*Goben v. Murrell*, 190 S.W. 986, 195 Mo.App. 104, rehearing denied 197 S.W. 432, 195 Mo.App. 104.
Okl.—*Stone v. Ritzinger*, 213 P.2d 467, 202 Okl. 306.

Description of property held sufficient

Cal.—*White v. Reskin*, 265 P. 1016, 90 Cal.App. 512.

18. Okl.—*Stone v. Ritzinger*, Okl., 213 P.2d 467, 202 Okl. 306.

Admissions in the agreed statement of facts, to have that effect, should be expressed in terms and not by indirection.—*Robidoux v. Casseleggi*, 81 Mo. 459.

19. Neb.—*Ex parte Page*, 131 N.W. 820, 89 Neb. 299.

20. Ala.—*Ex parte Hayes*, 9 So. 156, 92 Ala. 120.

21. N.M.—*Teopfer v. Kasufer*, 78 P. 53, 12 N.M. 372, 67 L.R.A. 315.

Agreement merely in lieu of proof
Fla.—*Skivesen v. Brown*, 136 So. 678, 101 Fla. 1389.

22. Fla.—*Skivesen v. Brown*, *supra*.

23. Ky.—*Tri-County Elec. Membership Corp. v. Meador*, 138 S.W.2d 993, 282 Ky. 377.

Mont.—*McCarthy v. Employers' Fire*

Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

60 C.J. p 59 note 81.

24. Colo.—*Hessick v. Moynihan*, 262 P. 907, 83 Colo. 43.

25. N.Y.—*Matter of Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429.

60 C.J. p 59 note 86.

Construction, operation, and effect of stipulation see *infra* § 26.

26. U.S.—*Hanssen v. Pusey, etc.*, Co., D.C.Del., 286 F. 707.

60 C.J. p 59 note 87.

27. N.C.—*Hawkins v. Richmond Cedar Works*, 30 S.E. 13, 122 N.C. 87.

60 C.J. p 59 note 88.

28. Wis.—*In re Exercise of Original Jurisdiction of Supreme Court*, 229 N.W. 643, 201 Wis. 123.

29. N.Y.—*Rockaway Pac. Corporation v. State*, 193 N.Y.S. 62, 200 App.Div. 172.

60 C.J. p 59 note 90.

30. Wis.—*Walker v. Rogan*, 1 Wis. 597.

31. N.Y.—*Matter of Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429.

60 C.J. p 60 note 92.

32. Tex.—*Berwald v. Hamilton-Brown Shoe Co.*, Civ.App., 22 S.W. 2d 760.

33. U.S.—*Judson v. Bradford*, C.C. Mass., 14 F.Cas.No.7,564.

Ga.—*Dumas v. Robinson*, 40 Ga. 349.

Right to waive jury trial see *Juries* § § 84-86.

Discretion of judge

(1) Where the parties stipulate for the trial of issues of fact by the judge, ordinarily the judge will accede to the wishes of the parties.—*McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

(2) However, it has been held that he is not bound to do so, and may refuse without giving any reasons therefor.

Cal.—*Bullock v. Consumers' Lumber Co.*, 31 P. 367, 96 Cal. xvii—*Doll v. Anderson*, 27 Cal. 248.

Mo.—*McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

34. S.D.—*Central Loan & Investment Co. v. Loiseau*, 239 N.W. 487, 59 S.D. 255.

35. Kan.—*Lardner v. Windle*, 45 P. 945, 4 Kan. App. 175.

36. Dak.—*McCormack v. Phillips*, 34 N.W. 39, 4 Dak. 506.

37. Ky.—*Rockcastle Gas Co. v. Endicott*, 64 S.W.2d 578, 251 Ky. 290.
N.Y.—*Mertens v. Roche*, 57 N.Y.S. 349, 39 App.Div. 398.

38. Ark.—*New York Home L. Ins. Co. v. Masterson*, 21 S.W.2d 414, 180 Ark. 170.

Ky.—*Jones v. Northern Assur. Co.*, 207 S.W. 459, 182 Ky. 701.

39. Ohio.—*Conner v. Drake*, 1 Ohio St. 166.

jury without argument;⁴⁰ that the jury be discharged and the case decided by the court on the evidence adduced;⁴¹ that several causes be consolidated;⁴² provided the causes are such as may be properly consolidated;⁴³ and provided the consent of the court is obtained;⁴⁴ that an appeal prayed from the decision of a municipal board may be tried in the circuit court de novo, on such evidence as might be introduced;⁴⁵ and that an order requiring security for costs, which is not required by statute to be recorded, was made on a certain date.⁴⁶ Where a cause was taken under advisement by the court with the understanding that, when the case was decided and judgment rendered, an exception would be entered for the losing party, but by mistake the exception was not entered, the court will, on motion of the losing party, correct the record by entry of the exception.⁴⁷

On the other hand, it has been held that a statutory requirement as to service of notice of trial and filing of notice of issue cannot be evaded by stipulation,⁴⁸ and it is not competent for the parties by stipulation to split up the issues or try them seriatim, reserving the right to have two or more judgments and two or more rights of appeal.⁴⁹ Also, although there is authority to the contrary,⁵⁰ it has been held that the necessity of objections and exceptions cannot be obviated by stipulation in ad-

vance that they shall be considered as made,⁵¹ and that parties cannot stipulate that a member of the bar shall try the case in the place of the judge.⁵² Likewise, it has been held that a stipulation to hold in abeyance an order requiring defendant to answer interrogatories without knowledge or consent of the court is improper.⁵³ A stipulation to set a case for trial at an indefinite time in the future cannot divest the trial court of the right to exercise its discretion to dismiss the action for want of prosecution.⁵⁴

(11) As to Instructions and Verdict

Parties may bind themselves by stipulation as to the instructions and verdict if the stipulation is not in contravention of peremptory statutory requirements.

Parties may bind themselves by stipulation that the cause be submitted to the jury without instructions,⁵⁵ or that proposed instructions be deemed correct as a matter of law.⁵⁶ However, a stipulation to waive the provisions of a statute governing exceptions and objections to a charge, the provisions of which are intended to protect against the commission of error in the court's charge, and to avoid unnecessary appeals and reversals, will not be respected by either appellate or trial courts.⁵⁷ The parties may stipulate that a consent verdict shall be rendered,⁵⁸ that the verdict shall be ren-

40. Neb.—Palmer v. People, 4 Neb. 68.

41. Mich.—Drovers' Nat. Bank v. Blue, 67 N.W. 1105, 110 Mich. 31, 64 Am.S.R. 327.

60 C.J. p 60 note 1.

42. N.Y.—In re Sturmer's Estate, 101 N.Y.S.2d 25, 277 App.Div. 503, reversed on other grounds 100 N.E.2d 155, 303 N.Y. 98.

60 C.J. p 60 note 2.

43. Mich.—Harris v. Sweetland, 11 N.W. 830, 48 Mich. 110.

Mo.—State v. Chicago, etc., R. Co., 47 Mo.App. 212.

44. Iowa.—Miller v. Hinz, 178 N.W. 323, 189 Iowa 123.

45. Miss.—Yalabusha v. Carbry, 11 Miss. 529.

46. Utah.—Douglas v. District Court of Salt Lake County, 146 P. 562, 45 Utah 486.

47. Iowa.—Cable Co. v. Miller, 143 N.W. 94, 162 Iowa 351.

48. N.Y.—Weaver v. Miller, 175 N.Y.S. 609, 187 App.Div. 827.

60 C.J. p 60 note 3.

49. Iowa.—Brill v. Sac County, 191 N.W. 859, 195 Iowa 132.

60 C.J. p 60 note 9.

50. Exceptions to argument

Attorneys could lawfully stipulate that defendant would be entitled to

reserve and have benefit of exceptions that it might be lawful for him to make during course of prosecutor's argument.—Ex parte Hallinan, 14 P.2d 797, 126 Cal.App. 121.

51. Mont.—Herman v. Jeffries, 1 P. 11, 4 Mont. 513, error dismissed 122 U.S. 634, 30 L.Ed. 1242.

60 C.J. p 60 note 10.

General objection to argument

Agreement by attorneys that general objection should stand to all portions of argument was an improper interference with orderly trial procedure.—Eller v. Paul Revere Life Ins. Co., 291 N.W. 866, 228 Iowa 1247.

Practice not recommended

The making of stipulation that all evidence be received by the court subject to any and all objections, including competency of witnesses and documentary evidence, for purpose of saving time required to make objections, is not to be recommended for purposes either of trial or of appeal.—Davis v. Davis, 292 N.W. 804, 228 Iowa 764.

52. Colo.—Haverly Invincible Min. Co. v. Howcutt, 6 Colo. 574.

60 C.J. p 60 note 11.

53. Ind.—Hartford Nat. F. Ins. Co. v. Burton, 168 N.E. 37, 91 Ind.App. 196.

60 C.J. p 60 note 12.

54. Cal.—Sedarovich v. Paul, 60 P.2d 871, 16 Cal.App.2d 452.

Where no stipulation for continuance

Where parties stipulated several times that case might be set for trial at any time after certain stated dates, dismissal of action for want of prosecution where no action was taken to bring case to trial for over five years after action was filed was proper, under statute, where none of the stipulations contained agreement for continuance of trial.—Rosenfelt v. Scholtz, 62 P.2d 381, 17 Cal.App.2d 443.

Dismissal held not abuse of discretion

Cal.—Sedarovich v. Paul, 60 P.2d 871, 16 Cal.App.2d 452.

55. Tex.—Claunch v. Osborn, Civ. App., 23 S.W. 937.

60 C.J. p 60 note 14.

Construction, operation, and effect of stipulations as to instructions and verdict see infra § 26.

56. Md.—Sittig v. Birkenstack, 35 Md. 273.

57. Colo.—Thompson v. Davis, 184 P. 2d 133, 117 Colo. 82.

Tex.—Needham v. Cooney, Civ.App., 173 S.W. 979.

58. Ga.—Webster v. Dundee Mortg., etc., Co., 20 S.E. 310, 93 Ga. 278.

—Jackson v. Stewart, 20 Ga. 120.

dered in a prescribed form,⁵⁹ that a majority verdict may be returned,⁶⁰ that the jury may return a sealed verdict to be opened by the court in their absence,⁶¹ that the jury may award a stated amount of damages,⁶² that the jury may assess damages in currency if they find for plaintiff,⁶³ that, if plaintiff has a recovery, the court may add interest to the verdict, in its discretion,⁶⁴ that the jury may compute values on a basis fixed in the stipulation,⁶⁵ that the jury shall find in their verdict all the facts which certain evidence tends to prove,⁶⁶ that the amount of the verdict may be reduced,⁶⁷ that a verdict may be amended at a subsequent term,⁶⁸ or that the court may set aside a verdict returned by stipulation to the clerk and judgment entered out of the county after the term, if the jury misunderstood the instructions or decided contrary to the weight of the evidence.⁶⁹ On the other hand, it has been held that, where a case is tried by the court without a jury, a statute requiring formal findings of fact or a statement of essential facts cannot be dispensed with by a stipulation of the parties.⁷⁰

(12) As to Judgments and Executions

The parties may stipulate to extend the time for rendition of judgment, as to the character of the judgment or order to be entered, and various other matters in connection with judgment or execution, but they cannot stipulate as to the meaning or effect of the judgment.

The parties may stipulate to extend the time for rendition of judgment,⁷¹ as to the character of the

judgment or order to be entered,⁷² that recovery in attachment proceedings against a third person by plaintiff and defendant in the instant case be distributed ratably between them,⁷³ that a confession of judgment should be held in escrow as long as the debtor performed the conditions imposed on him,⁷⁴ to reduce the amount of the judgment by consent,⁷⁵ and that the court may modify the decree as might be deemed just.⁷⁶ It has been held, however, that a stipulation in conflict with the provisions of a judgment may be properly disregarded,⁷⁷ and that the parties cannot stipulate as to the meaning or effect of the judgment of the court.⁷⁸

The parties may stipulate for a stay of execution;⁷⁹ or that no execution would be taken out pending a motion for new trial;⁸⁰ or that execution shall be stayed until the decision of a certain other case pending in another court;⁸¹ or they may stipulate to postpone an execution issued on a judgment fraudulently entered on condition that no motion be made to set aside the judgment.⁸² It has been held, however, that the parties cannot by stipulation require the court to issue a body execution where it lacks power to do so.⁸³

Judgment notwithstanding verdict. Where the time for making a motion for judgment notwithstanding the verdict is prescribed by a mandatory statute, the time cannot be extended by stipulation of the parties.⁸⁴

59. Cal.—Sexey v. Adkison, 40 Cal. 408.

N.Y.—Jones v. Merchants' Nat. Bank, 21 N.E. 672, 113 N.Y. 629.

60. Ark.—Carpenter v. Wayne, 219 S. W. 735, 143 Ark. 103.

61. U.S.—Koon v. Phoenix Mut. L. Ins. Co., Ill., 104 U.S. 106, 26 L.Ed. 670.

Ill.—St. Louis, etc., R. Co. v. Faltz, 19 Ill.App. 85.

62. Mich.—Thompson v. Walker, 234 N.W. 144, 253 Mich. 126.

60 C.J. p 61 note 22.

63. Cal.—Dreyfous v. Adams, 48 Cal. 131.

64. N.Y.—Nichols v. Coleman, 89 N. Y.S. 234, 96 App.Div. 353.

60 C.J. p 61 note 24.

65. Wis.—Stennett v. Bradley, 35 N. W. 467, 70 Wis. 278.

66. Lally v. Rossman, 51 N.W. 1132, 82 Wis. 147.

67. U.S.—Lewis v. Wilson, Fla., 14 S.Ct. 419, 151 U.S. 551, 38 L.Ed. 267.

68. N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 158 N. E. 29, 246 N.Y. 85, 62 A.L.R. 955.

69. N.C.—Cogburn v. Henson, 103 S. E. 377, 179 N.C. 631.

70. N.Y.—Mason v. Lory Dress Co., 102 N.Y.S.2d 285, 278 App.Div. 660.

71. N.Y.—Ross v. King, 37 N.Y.S. 2d 243.

60 C.J. p 61 note 31.

Construction, operation, and effect of stipulations as to judgments and executions see *infra* § 27.

Judgments by consent see Judgments § § 173-178.

Revival of judgments by agreement see Judgments § 548.

Setting aside judgment by agreement generally see Judgments § 281.

Expiration of judge's term

The parties may not stipulate that a former judge may enter judgment after the expiration of his term of office.—Salina Const. & Supply Co. v. Richards Const. Co., 104 N.Y.S.2d 96, 200 Misc. 796.

72. N.Y.—Remy v. Remy, 30 N.Y.S. 2d 995, 177 Misc. 460.

73. Cal.—Cordes v. Harding, 150 P. 650, 27 Cal.App. 474.

74. N.Y.—London, etc., Bank v. White, 147 N.Y.S. 1009, 162 App. Div. 739.

75. Ala.—Sharp v. Allgood, 14 So. 16, 100 Ala. 183.

Decree of alimony

Pa.—Strickler v. Strickler, 10 A.2d 69, 138 Pa.Super. 34.

76. Pa.—Manufacturers' Natural Gas Co. v. Birmingham & Brownsville Macadamized Turnpike Road Co., 90 A. 134, 243 Pa. 458.

77. Tex.—Giraud v. Reserve Realty Co., Civ.App., 94 S.W.2d 198, error refused.

78. Ill.—People v. Traeger, 171 N.E. 548, 339 Ill. 356.

79. N.Y.—Schlesinger v. Cable Operating Co., 212 N.Y.S. 147, 214 App. Div. 266.

60 C.J. p 61 note 37.

80. Cal.—Hodgkins v. People's Water Co., 171 P. 945, 177 Cal. 780.

81. Cal.—Keys v. Warner, 45 Cal. 60.

82. N.Y.—Read v. French, 28 N.Y. 285.

83. Vt.—Stone v. Briggs, 26 A.2d 828, 112 Vt. 410.

84. Wash.—Hinz v. Crown Willamette Paper Co., 27 P.2d 576, 175 Wash. 315.

Time for motion see Judgments § 61.

(13) As to Injunctions

Parties may by stipulation modify or dissolve an Injunction, and on dissolution may stipulate the amount of damages.

Parties may lawfully by stipulation modify⁸⁵ or dissolve⁸⁶ an injunction; and, although a statute requires the filing of a motion to reinstate an injunction within a designated time after order of dissolution, the parties may make a binding agreement extending the time where such agreement is consented to by the court.⁸⁷ On dissolving a temporary injunction damages may be allowed in the sum consented to under the stipulation of the parties.⁸⁸

(14) Other Stipulations

A variety of stipulations have been held valid; but it has been held that a stipulation that a court record is erroneous is not binding on the trial court, and that a stipulation cannot alter the express statutory conditions of a bond.

Various stipulations, other than those discussed above, have been held valid, including stipulations as to the appointment of an administrator by a foreign court,⁸⁹ as to attorney's fees,⁹⁰ as to costs,⁹¹ as to expenses of administration,⁹² as to payment of designated funds to a party entitled thereto,⁹³ as to the presentation of a claim against a municipality,⁹⁴ as to setting aside an order of the court,⁹⁵ as to permitting the case to proceed in dual char-

acter,⁹⁶ and as to permitting a late filing of a written motion for a new trial.⁹⁷ Where there is a written agreement to the effect that the filing of the briefs in the court below is waived, and that they may be filed in the appellate court, a motion to dismiss for failure to file the briefs in the court below will be overruled.⁹⁸ It has been held that a stipulation that the record of the court trying the case is erroneous,⁹⁹ or that the record of another court is erroneous,¹ is not binding on the trial court, and that a stipulation cannot alter the express statutory conditions of a bond.²

§ 11. Construction in General

- a. In general
- b. Subject matter and surrounding circumstances
- c. Construction as a whole
- d. Implied terms and qualifications

a. In General

In the construction of stipulations the rules applicable to the construction of contracts are generally applicable; the primary rule is to ascertain and give effect to the intention of the parties.

Rules applicable to the construction of contracts, as discussed in Contracts §§ 294-372, have generally been held applicable in the construction of stipulations, and they have been construed in accordance therewith.³ The primary rule in the construction

85. Neb.—Gentle v. Pantel Realty Co., 234 N.W. 574, 120 Neb. 630. 60 C.J. p 61 note 42.

86. Ill.—Brackebush v. Dorsett, 27 N.E. 934, 138 Ill. 167.

Consent to:

Dissolution see Injunctions § 242.

Disobedience see Injunctions § 266

b.

Jurisdiction see Injunctions § 168

d.

87. Ky.—McCreary County v. Bryant, 191 S.W. 119, 173 Ky. 363.

88. Ill.—Litzelman v. Town of Fox, 1 N.E.2d 915, 285 Ill.App. 7.

89. Mo.—Leutzinger v. McNeely, 273 S.W. 241, 216 Mo.App. 699. 60 C.J. p 62 note 51.

90. N.Y.—Petition of Salomon, 111 N.Y.S.2d 684.

60 C.J. p 62 note 52.

91. Mo.—In re McManus' Estate, App., 199 S.W. 422.

60 C.J. p 62 note 53.

Stenographer's fee for transcription N.Y.—People ex rel. Loft, Inc., v. Sexton, 1 N.Y.S.2d 7, 165 Misc. 564.

92. N.Y.—In re Brower, 130 N.Y.S. 191, 71 Misc. 398, 8 Mills Surr. 104. 60 C.J. p 62 note 54.

93. N.Y.—In re Duff's Estate, 257 N.Y.S. 648, 143 Misc. 905.

94. Ala.—Athens v. Miller, 66 So. 702, 190 Ala. 82.

60 C.J. p 62 note 55.

95. Parties may, with the court's approval, enter into a stipulation to set aside a former order, even though it is beyond the time allowed for appeal.—Goostree v. U. S., C.C.A.Ill., 110 F.2d 444.

96. Cal.—In re Arms' Estate, 199 P. 1053, 186 Cal. 554.

60 C.J. p 62 note 56.

97. Ky.—Samuels v. Commonwealth, 49 S.W.2d 312, 243 Ky. 523.

98. Tex.—Adams v. State, 193 S.W. 1067, 81 Tex.Cr. 114.

99. Cal.—Delijan v. Rosenberg, 25 P.2d 228, 134 Cal.App. 264.

1. U.S.—Bledsoe v. Johnston, D.C. Cal., 58 F.Supp. 129.

2. Attachment bond

S.C.—Kimbrell v. Heffner, 161 S.E. 175, 163 S.C. 35, 80 A.L.R. 591.

3. U.S.—Nelson v. Montgomery Ward & Co., Iowa, 61 S.Ct. 593, 312 U.S. 373, 85 L.Ed. 897, rehearing denied Nelson v. Montgomery Ward & Co., 61 S.Ct. 804, 312 U.S. 716, 85 L.Ed. 1145, mandate conformed to Montgomery Ward & Co. v. Nelson, 299 N.W. 401, 230 Iowa 942—Inhabitants of City of Plainfield v.

Palmer, C.C.A.N.J., 72 F.2d 312—Connor v. Yellow Cab Co., D.C.Pa., 72 F.Supp. 442—Bowles v. Greene, D.C.Kan., 65 F.Supp. 875—Pacific Gas & Electric Co. v. Railroad Commission of California, D.C.Cal., 26 F.Supp. 507—Freeman v. Premier Mach. Co., D.C.Mass., 25 F.Supp. 927.

Ariz.—State v. McEuen, 26 P.2d 1005, 42 Ariz. 385.

Cal.—Mathewson v. Naylor, 64 P.2d 979, 18 Cal.App.2d 741.

Ill.—Wilson v. Singleton, 103 N.E.2d 72, 410 Ill. 611.

Kan.—Ensch v. Ensich, 138 P.2d 491, 157 Kan. 107.

Mass.—Eno v. Prime Mfg. Co., 59 N.E.2d 284, 317 Mass. 646—Edinburg v. Allen Squire Co., 12 N.E.2d 718, 299 Mass. 206.

Mo.—Ford v. Louisville & N. R. Co., 196 S.W.2d 163, 355 Mo. 362—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

60 C.J. p 62 note 59.

Ambiguous stipulations

Resort must be had to rules of con-

of stipulations is that the court must, if possible, ascertain and give effect to the intent of the parties.⁴ The construction, however, is not dependent on the secret purposes, motives, or expectations of one of the parties.⁵ Also, the court will not, by construction, extend a stipulation so as to give it an effect beyond its terms and beyond what the parties intended.⁶ Its language will not be so construed as to give it the effect of an admission of a fact

obviously intended to be controverted,⁷ or a waiver of a right not plainly intended to be relinquished.⁸

Reasonable construction. A stipulation will not be given a forced construction.⁹ It should and will receive a fair construction,¹⁰ one which will render it reasonable and just to both parties, rather than unreasonable or unjust,¹¹ and such as will aid a fair trial on the merits.¹²

struction where the stipulation is ambiguous.—*Green v. Loberg*, 237 N. W. 274, 205 Wis. 221.

By court

(1) Where parties cannot agree, court may construe stipulation.—*Pioneer Irr. Dist. v. American Ditch Ass'n*, 1 P.2d 196, 50 Idaho 732.

(2) The inferences to be drawn from stipulated facts are the function of the court.—*Black v. Black*, 204 P.2d 950, 91 Cal.App.2d 328.

Question of law

The construction of a stipulation is a question of law for the court.—*Billingslea v. Billingslea*, 152 P.2d 276, 194 Okl. 400.

Stipulation as including statute

Provisions of Emergency Price Control Act and all regulations thereunder become part of any stipulation pertaining to any matter covered by them.—*Siegel v. Bowers*, 58 N.Y.S. 2d 187, 185 Misc. 684.

4. U.S.—U. S. ex rel. *Hoehn v. Shaughnessy*, C.A.N.Y., 175 F.2d 116, certiorari denied 70 S.Ct. 142, 338 U.S. 872, 94 L.Ed. 535—*Hodgson Oil Refining Co. v. U. S.*, 74 Ct.Cl. 303.

Ariz.—In re *Brandt's Estate*, 190 P. 2d 497, 67 Ariz. 42.

Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134—In re *Howe's Estate*, 199 P.2d 59, 88 Cal. App.2d 454—*Theatrical Enterprises v. Ferron*, 7 P.2d 351, 119 Cal.App. 671.

Fla.—*Federal Land Bank of Columbia v. Brooks*, 190 So. 737, 139 Fla. 506.

Ill.—*General Elec. Co. v. Industrial Commission*, 104 N.E.2d 257, 411 Ill. 401.

Mo.—*Huegel v. Huegel*, 46 S.W.2d 157, 329 Mo. 571.

N.Y.—*Santini Bros. v. Smith*, 293 N. Y.S. 765, 250 App.Div. 53—*Ferguson v. Stebbins*, 32 N.Y.S.2d 73, 177 Misc. 498.

Utah.—*Richlands Irr. Co. v. Westview Irr. Co.*, 80 P.2d 458, 96 Utah 403.

Wis.—*Green v. Loberg*, 237 N.W. 274, 205 Wis. 221.

60 C.J. p 60 note 62.

Form not controlling

The court is concerned with substance and intent, rather than the form of a stipulation.—*Central Nat. Bank of Richmond v. First & Mer-*

chants Nat. Bank of Richmond, 198 S.E. 883, 171 Va. 289.

5. Ala.—*Ex parte Hayes*, 9 So. 156, 92 Ala. 120.

Tex.—*Heirs of Watrous v. McKie*, 54 Tex. 65.

6. U.S.—U. S. ex rel. *Hoehn v. Shaughnessy*, C.A.N.Y., 175 F.2d 116, certiorari denied 70 S.Ct. 142, 338 U.S. 872, 94 L.Ed. 535—*Benz v. Celeste Fur Dyeing & Dressing Corp.*, C.C.A.N.Y., 136 F.2d 845—*Kraft v. Cohen*, C.C.A.Pa., 117 F. 2d 579—*International Ry. Co. v. Prendergast*, D.C.N.Y., 52 F.2d 293—*Fairbanks, Morse & Co. v. Harrison*, D.C.Ill., 63 F.Supp. 495—U. S. v. *Globe Indemnity Co.*, D.C. N.Y., 17 F.Supp. 838, affirmed, C.C. A., 94 F.2d 578, certiorari denied *Globe Indemnity Co. v. U. S.*, 58 S. Ct. 1047, 304 U.S. 575, 82 L.Ed. 1538. Ky.—*Samuels v. Commonwealth*, 49 S.W.2d 312, 243 Ky. 523. Mich.—*Eston v. Robert Brown, Limited*, 282 N.W. 895, 287 Mich. 44. W.Va.—*Gilkerson v. Baltimore & O. R. Co.*, 51 S.E.2d 767, 132 W.Va. 133.

60 C.J. p 62 note 61.

Inclusion of others

In action by corporation to recover excise taxes alleged to have been erroneously imposed on cash distributions to stockholders, where stipulation, filed after statute of limitations had expired, stated that consent to maintain action had been given by one stockholder only and that consent of others would be obtained, action could not be maintained on behalf of stockholders who had not consented thereto, notwithstanding stipulation, since as to them action was barred.—*Sharp & Dohme v. U. S.*, C.C. A.Pa., 144 F.2d 456.

Remarks of judge

Where it was necessary for the court to make findings, even though the parties stipulated for appointment of appraiser of property, remarks of trial judge that judgment would be entered in accordance with stipulation, even if construable as disclosing trial judge's understanding that findings were unnecessary to entry of judgment, did not estop either party to insist that stipulation be understood according to its terms.—*Petroleum Midway Co. v. Zahn*, 145 P.2d 371, 62 Cal.App.2d 645.

7. Ariz.—In re *Brandt's Estate*, 190 P.2d 497, 67 Ariz. 42.

Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134.

Mo.—*Huegel v. Huegel*, 46 S.W.2d 157, 329 Mo. 571.

N.J.—*Corpus Juris* cited in *Baumann v. Munn*, 49 A.2d 143, 144–145, 134 N.J.Law 548.

Ohio.—*Beyer v. Miller*, 103 N.E.2d 588, 90 Ohio App. 66.

Wash.—*Corpus Juris* cited in *State v. Wehinger*, 47 P.2d 35, 39, 182 Wash. 360.

60 C.J. p 62 note 62.

8. Ariz.—In re *Brandt's Estate*, 190 P.2d 497, 67 Ariz. 42.

Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134—*Record v. Indemnity Ins. Co. of North America*, 229 P.2d 851, 103 Cal.App. 2d 434.

Mo.—*Huegel v. Huegel*, 46 S.W.2d 157, 329 Mo. 571.

Ohio.—*Beyer v. Miller*, 103 N.E.2d 588, 90 Ohio App. 66.

Wash.—*Corpus Juris* cited in *State v. Wehinger*, 47 P.2d 35, 39, 182 Wash. 360.

60 C.J. p 62 note 63.

Right to object

A stipulation as to proper amount of attorney's fees, if any were allowable, did not waive right to object to allowance of attorney's fees.—*Brite v. Orange Belt Securities Co.*, 182 So. 892, 133 Fla. 266.

9. Cal.—In re *Howe's Estate*, 199 P. 2d 59, 88 Cal.App.2d 454.

60 C.J. p 62 note 63 [b].

10. Cal.—*Collier v. Merced Irr. Dist.*, 2 P.2d 790, 213 Cal. 554—*Theatrical Enterprises v. Ferron*, 7 P.2d 351, 119 Cal.App. 671.

N.Y.—*Isler v. Isler*, 24 N.Y.S.2d 401, 260 App.Div. 1032, reargument denied 25 N.Y.S. 998, 261 App.Div. 827.

11. Cal.—In re *Howe's Estate*, 199 P.2d 59, 88 Cal.App.2d 454.

Mo.—*Huegel v. Huegel*, 46 S.W.2d 157, 329 Mo. 571.

Utah.—*Deseret Sav. Bank v. Walker*, 2 P.2d 609, 78 Utah 241.

60 C.J. p 63 note 64.

12. Ariz.—In re *Brandt's Estate*, 190 P.2d 497, 67 Ariz. 42.

Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134—*Theatrical Enterprises v. Ferron*, 7 P.2d 351, 119 Cal.App. 671.

Liberal construction. While as a general rule stipulations are to be construed liberally¹³ and in furtherance of justice,¹⁴ and not in a narrow and technical manner,¹⁵ construction can be had only where there is room for construction; and, in the absence of a showing as to surrounding circumstances, it is the duty of the courts to ascertain the intent of the parties from the stipulation as evidenced by the writing, and no words are to be added to it or substituted in its stead.¹⁶ The court will not write into the stipulation something which the parties did not see fit to include therein.¹⁷

Favorable construction. In cases of doubt, that construction will be adopted which is most favorable to the party in whose favor the stipulation was made.¹⁸

Meaning of words and phrases. Words or phrases are to be given their ordinary and popular meaning if the context does not show that they are used in

a peculiar sense.¹⁹ Technical words and phrases are to be given their technical meaning,²⁰ and terms having a well defined legal meaning are to be given that meaning.²¹ Such terms, however, should not be permitted to vitiate the plain terms of the stipulation,²² unless they were evidently used in a different sense.²³

Expressio unius. The doctrine that an express mention of one thing implies the exclusion of another has frequently been applied to stipulations.²⁴

Recitals in stipulation. Recitals of the cause and occasion of the stipulation are to be considered,²⁵ but they cannot be used for the purpose of enlarging the specific undertaking.²⁶

In favor of effectiveness. A construction will be avoided, if possible, which will make the stipulation frivolous or ineffectual.²⁷

Effect given to entire stipulation. A stipulation should not be construed so as to make a portion of

13. U.S.—North American Mercantile Co. v. U. S., 18 C.C.P.A., Customs, 74.

Ariz.—In re Brandt's Estate, 190 P.2d 497, 67 Ariz. 42.

Cal.—Palmer v. City of Long Beach, 199 P.2d 952, 33 Cal.2d 134—Theatrical Enterprises v. Ferron, 7 P.2d 351, 119 Cal.App. 671.

Mo.—Bradford v. Kurn, 146 S.W.2d 644, 235 Mo.App. 1282.

Tex.—**Corpus Juris** cited in Firestone Tire & Rubber Co. v. Chipman, Civ. App., 194 S.W.2d 609, 610—American Fidelity & Casualty Co. v. Newman, Civ.App., 60 S.W.2d 482, mandamus granted on other grounds American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493, 125 Tex. 41, and set aside on other grounds American Fidelity & Casualty v. Newman, Civ.App., 83 S.W.2d 710.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

W.Va.—Gilkerson v. Baltimore & O. R. Co., 51 S.E.2d 767, 132 W.Va. 133.

60 C.J. p 63 note 65.

14. Ariz.—In re Brandt's Estate, 190 P.2d 497, 67 Ariz. 42.

Fla.—Federal Land Bank of Columbia v. Brooks, 190 So. 737, 139 Fla. 506.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

60 C.J. p 63 note 65.

15. Ariz.—In re Brandt's Estate, 190 P.2d 497, 67 Ariz. 42.

Cal.—Theatrical Enterprises v. Ferron, 7 P.2d 351, 119 Cal.App. 671.

Fla.—Federal Land Bank of Columbia v. Brooks, 190 So. 737, 139 Fla. 506.

16. Mo.—Hanchett Bond Co. v. Glore, 232 S.W. 159, 208 Mo.App. 169.

17. Cal.—In re Howe's Estate, 199 P.2d 59, 88 Cal.App.2d 454.

18. Ariz.—In re Brandt's Estate, 190 P.2d 497, 67 Ariz. 42.

Mo.—Bradford v. Kurn, 146 S.W.2d 644, 235 Mo.App. 1282.

60 C.J. p 63 note 67.

Stipulant a layman without counsel

The fact that stipulant was a layman appearing without counsel will not require his stipulation, made in open court, to be given a narrow construction, where he was a man of affairs with experience in business matters and nothing is made to appear that he was either ignorant or inexperienced, or that any advantage was taken of him, or that he did not fully comprehend the full meaning of his stipulation and the implications necessarily arising therefrom.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

19. U.S.—Sunde & D'Evers Co. v. U. S., 17 C.C.P.A., Customs, 24.

N.J.—Wyckoff v. Monmouth County, 21 A.2d 791, 127 N.J.Law 268.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

60 C.J. p 63 note 68.

Investment

The use of the term "investment" in a stipulation with one of the parties to a suit of the manner of the making of the investment implies an actual investment and is inconsistent with the idea of a merely colorable transfer designed to conceal the misappropriation of the money.—Butler v. Walsh, 62 N.Y.S. 913, 48 App.Div. 459, 462.

"Until"

Whether the word "until" as used in a stipulation is a word of inclu-

sion or exclusion cannot be determined by any general rule.—Bantuelle v. Bantuelle, Tex.Civ.App., 195 S.W.2d 686.

20. Wis.—Steele v. Moss, 34 N.W. 237, 69 Wis. 496, 2 Am.S.R. 756.

60 C.J. p 63 note 69.

21. Ark.—Bride v. Walker, 176 S.W. 2d 148, 206 Ark. 498.

Where term not defined

Where the supreme court has not defined the terms "Record" and "Records," as applied to proceedings before the secretary of state to test the sufficiency of an initiative petition, it cannot be said as a matter of law what the parties to a stipulation meant when they used those terms.—In re Initiative Petition No. 158, State Question No. 229, 106 P.2d 786, 188 Okl. 111.

22. Ill.—Christ v. Pacific Mut. L. Ins. Co., 231 Ill.App. 439, affirmed 144 N.E. 161, 321 Ill. 525.

23. Mich.—Wilkins v. Hukill, 73 N.W. 898, 115 Mich. 594.

60 C.J. p 63 note 71.

24. Ga.—Evans v. Thompson, 84 S.E. 128, 143 Ga. 61.

60 C.J. p 65 note 94.

Expressio unius est exclusio alterius defined see 35 C.J.S. p 283 note 57.

25. Mo.—Hannah v. Baylor, 27 Mo. App. 302.

N.Y.—Matter of Rochester, 32 N.E. 702, 136 N.Y. 83, 19 L.R.A. 161.

26. Mo.—Guilford Bank of Guilford v. Hubbell, App., 138 S.W.2d 690.

27. Pa.—Smith v. Pennsylvania R. Co., 156 A. 89, 304 Pa. 294.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

60 C.J. p 63 note 74.

it meaningless,²⁸ but every word, clause, and provision thereof should be given effect if possible.²⁹

Good faith. The court will strive to avoid a construction which would make the stipulation deceptive or misleading,³⁰ and will seek an interpretation which is consonant with good faith and honest purpose on the part of the attorneys;³¹ and a construction will not be adopted which will permit of its being used as a trap to the disadvantage of one of the parties.³²

Understanding of one party presumptively known to other. Where the language of one party may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party.³³

Practical construction by acts of parties. Where the parties to a stipulation have given a practical construction to it by their acts and conduct, such construction is entitled to great, if not controlling, weight in determining its proper meaning.³⁴

Grammatical construction. Strict grammatical construction will not be permitted to override the manifest intention of the parties.³⁵

Clerical errors and omissions. The stipulation must be read according to the intention of the parties in spite of clerical errors and omissions,³⁶ or the inadvertent use of words.³⁷

Stipulation contradicting evidence in the case will not be construed to mean that the parties agreed to something which was not true.³⁸

Application to situation then existing. Ordinarily a stipulation is to be construed as covering the situation then existing, and not as controlling future conditions not in contemplation.³⁹

b. Subject Matter and Surrounding Circumstances

Stipulations are to be construed with reference to their subject matter and in the light of the surrounding circumstances.

The stipulation is to be interpreted with reference to its subject matter,⁴⁰ and is to be read and construed in the light of the surrounding circumstances⁴¹ and the whole record,⁴² including the state of the pleadings,⁴³ the allegations therein,⁴⁴ the issues involved,⁴⁵ the attitude of the parties in respect of the issues,⁴⁶ and the statutory provisions affecting

28. U.S.—Barnhart-Morrow Consol. v. C. I. R., C.C.A.9, 150 F.2d 285.

29. Kan.—Korb v. Minneapolis Threshing Mach. Co., 3 P.2d 502, 133 Kan. 783.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

30. U.S.—Citizens' Bank of Wichita v. Farwell, Kan., 56 F. 570, 6 C.C.A. 24, reheard 63 F. 117, 11 C.C.A. 108. N.Y.—Van Aernam v. Bleistein, 7 N. E. 537, 102 N.Y. 355.

31. Colo.—Keator v. Colorado Coal, etc., Co., 32 P. 857, 3 Colo.App. 188. 60 C.J. p 63 note 76.

32. Colo.—Riley v. Lemieux, 132 P. 699, 24 Colo.App. 184.

Ill.—Joseph Denunzi Fruit Co. v. Pennsylvania Co., 172 Ill.App. 277.

33. Cal.—People v. Nolan, 165 P. 715, 33 Cal.App. 493. 60 C.J. p 64 note 78.

34. Cal.—U. S. Fidelity & Guaranty Co. v. Industrial Accident Commission of California, 23 P.2d 306, 132 Cal.App. 655.

N.Y.—In re Sutta's Estate, 54 N.Y.S. 2d 572, affirmed In re Lubman, 39 N.Y.S.2d 998, 265 App.Div. 994, appeal denied In re Sutta's Will, 41 N.Y.S.2d 192, 265 App.Div. 1053. 60 C.J. p 64 note 79.

35. Miss.—Saffold v. Horne, 18 So. 433, 72 Miss. 470. 60 C.J. p 64 note 80.

36. Neb.—Gentle v. Pantel Realty Co., 234 N.W. 574, 120 Neb. 630.

37. U.S.—Hodgson Oil Refining Co. v. U. S., 74 Ct.Cl. 303.

38. Ky.—Globe, etc., F. Ins. Co. v. Porter, 291 S.W. 6, 218 Ky. 163.

39. Cal.—Record v. Indemnity Ins. Co. of North America, 229 P.2d 851, 103 Cal.App.2d 434.

Minn.—Wade v. St. Paul Citizens' State Bank, 206 N.W. 728, 165 Minn. 396.

40. Cal.—Orr v. Forde, 282 P. 429, 101 Cal.App. 694. 60 C.J. p 64 note 84.

Secundum subjectam materiam

Words or phrases used with reference to extrinsic facts or circumstances are to be construed secundum subjectam materiam.—Hodges v. Pin-gree, 108 Mass. 535.

41. U.S.—Hodgson Oil Refining Co. v. U. S., 74 Ct.Cl. 303.

Ariz.—In re Brandt's Estate, 190 P.2d 497, 67 Ariz. 42.

Cal.—In re Howe's Estate, 199 P.2d 59, 88 Cal.App.2d 454—People v. Church, 136 P.2d 139, 57 Cal.App.2d Supp. 1032.

Minn.—Anderson v. Connecticut Fire Ins. Co., 43 N.W.2d 807, 231 Minn. 469.

Mo.—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

N.D.—Bothum v. Bothum, 10 N.W.2d 603, 72 N.D. 649.

60 C.J. p 64 note 85.

Conditions existing at time stipulation entered into

Cal.—Record v. Indemnity Ins. Co. of North America, 229 P.2d 851, 103 Cal.App.2d 434.

Utah.—Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., 195 P.2d 249, 113 Utah 356.

Oral proof

Stipulation was held sufficiently ambiguous to require oral proof of surrounding facts and circumstances, in order to determine true meaning and intention of parties.—Santini Bros. v. Smith, 293 N.Y.S. 765, 250 App.Div. 53.

42. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

43. N.J.—Baumann v. Munn, 49 A.2d 143, 134 N.J.Law 548.

Tex.—J. W. Gaddy Butane Co. v. Almanza, Civ.App., 252 S.W.2d 489.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

60 C.J. p 64 note 86.

44. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

60 C.J. p 64 note 87.

In light of negligence charged

Mo.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 48 S.W.2d 158, 226 Mo.App. 916.

45. N.J.—Baumann v. Munn, 49 A. 2d 143, 134 N.J.Law 548.

Tenn.—Brown v. McCulloch, 144 S. W.2d 1, 24 Tenn.App. 324.

46. Cal.—People v. Nolan, 165 P. 715, 33 Cal.App. 493.

60 C.J. p 64 note 88.

the subject matter.⁴⁷

c. Construction as a Whole

Stipulations are to be construed as a whole.

A stipulation must be construed as a whole and the intention of the parties collected from the entire instrument, and not from detached or isolated portions.⁴⁸

Several instruments. All the writings, if there are more than one, are to be treated as parts of one instrument and construed together.⁴⁹ Where there is no conflict between them effect will be given to all.⁵⁰

d. Implied Terms and Qualifications

Stipulations are construed according to their terms and the fair implications arising therefrom, but the courts are disinclined to imply reservations or qualifications which could readily have been inserted if the parties had so intended.

When the language is plain and free from ambiguity, the understanding of the parties must be ascertained from its terms,⁵¹ and then whatever those terms fairly imply will be deemed embraced within it.⁵² However, the courts are strongly disinclined to import into an unqualified stipulation reservations or qualifications which might readily

have been inserted by the parties if such had been their intention.⁵³ In any event it is never permissible for a court to do violence to a stipulation and indulge an inference of fact in direct contradiction to its express terms.⁵⁴

§ 12. Operation and Effect in General

Stipulations are the equivalent of proof and prevent an independent examination by a judicial officer or body with respect to the matters stipulated; they may be controlling in a subsequent action or trial of the cause and on appeal.

A stipulation, although it is not itself evidence,⁵⁵ is the equivalent of, and may be relied on as, proof,⁵⁶ and to the extent that it is given effect it prevents any independent examination by a judicial officer or body with respect to the matters stipulated.⁵⁷

In subsequent action or trial or other cause. It has been held that stipulations may be made for a single trial or made generally.⁵⁸ There is considerable diversity of holding as to the effect of stipulations on a subsequent trial of the same cause. This diversity of holding is due to some extent, but not altogether, to the nature of the subject matter and to the provisions of the particular stipulation in suit.⁵⁹ A stipulation by an attorney in one

47. Minn.—*Rolfe v. Burlington, etc.*, R. Co., 40 N.W. 267, 39 Minn. 398. 60 C.J. p 64 note 89.

48. Pa.—*Northern Trust Co. v. Kahn*, 34 A.2d 329, 153 Pa.Super. 461. 60 C.J. p 64 note 91.

49. Ariz.—*State v. McEuen*, 26 P.2d 1005, 42 Ariz. 385. 60 C.J. p 65 note 92.

50. Tex.—*Combes v. Stringer*, 167 S.W. 217, 106 Tex. 427.

51. Cal.—*Little v. Jacks*, 8 P. 856, 9 P. 264, 11 P. 128, 68 Cal. 343. N.Y.—*Schroeder v. Frey*, 21 N.E. 410, 114 N.Y. 266, 23 Abb.N.Cas. 96.

52. N.Y.—*Schroeder v. Frey*, supra. Pa.—*Snyder v. Lebo*, 23 Pa.Dist. & Co. 465.

Contract properly entered into

A stipulation that a contract has been entered into implies that it was properly entered into.—*Moore v. City of Kokomo*, 60 N.E.2d 530, 223 Ind. 293.

Place of recording instrument

Stipulation admitting instrument was duly recorded was admission that instrument was recorded in proper place, since phrase "duly recorded" means recorded according to law.—*Blaisdell Automobile Co. v. Nelson*, 154 A. 184, 130 Me. 167.

Reason claims not lienable

Where the parties stipulated that claims of a company were not lienable under statute giving lien for serv-

ices or materials to be used or consumed in making public improvements or performing public work, the court would assume either that the parties regarded the claims as without the statute, or that claims arose before amendment of statute.—*Morris F. Fox & Co. v. State*, 281 N.W. 666, 229 Wis. 44.

53. Md.—*Lanahan v. Heaver*, 26 A. 866, 77 Md. 605. 60 C.J. p 65 note 98.

54. S.D.—*Scovel v. Pennington County*, 282 N.W. 524, 66 S.D. 311.

55. U.S.—*Skidmore v. John J. Cassale, Inc.*, D.C.N.Y., 66 F.Supp. 282, affirmed in part and reversed in part on other grounds, C.C.A., 160 F.2d 527, certiorari denied 67 S.Ct. 1205, 331 U.S. 812, 91 L.Ed. 1832.

56. Cal.—*Rubattino v. Industrial Accident Commission*, 150 P.2d 538, 65 Cal.App.2d 288.

Ga.—*Commercial Bank of Crawford v. Pharr*, 43 S.E.2d 439, 75 Ga.App. 364.

Agreement of parties to settlement of claim

Approval by court without testimony of contract settling claim asserted by administrator was proper where the matter was submitted to the court with a stipulation by all the interested parties agreeing thereto, since, if evidence was required, the stipulation would be deemed its

equivalent.—*In re Shultz' Estate*, 85 P.2d 736, 103 Colo. 184.

A substitute for evidence

N.Y.—*Brown v. Brown*, 87 N.Y.S.2d 105, 194 Misc. 975.

Effect of confessional pleading

Ind.—*Schreiber v. Rickert*, 50 N.E.2d 879, 114 Ind.App. 55.

57. N.J.—*Phi Zeta of Lambda Chi Alpha Fraternity v. City of New Brunswick*, 8 A.2d 553, 123 N.J.Law 237.

58. Ind.—*App v. Class*, 75 N.E.2d 543, 225 Ind. 387.

Extrinsic facts may determine

Although a stipulation itself is not limited to a single trial, facts may be placed before the court in a second trial to show the circumstances under which stipulation was made in order to determine whether stipulation was for a limited or general use.—*App v. Class*, supra.

59. Labor board proceeding

A representation proceeding conducted by National Labor Relations Board and proceeding on board's complaint subsequently filed could not be separated, and a stipulation which was filed in representation proceeding and formed basis of board's finding therein concerning interstate activities of employer could be considered in determining board's jurisdiction in complaint proceeding.—*National Labor Relations Board v. Bot-*

action will not bind his client or assignee in another, unless there is express acquiescence in the stipulation in the second action.⁶⁰ Also a stipulation by a party in one proceeding will not bind him in a different proceeding in which the parties are not the same.⁶¹ A stipulation, however, may be available against a party in another action or proceeding, although not conclusive of the matter involved.⁶²

On appeal. When a party by a stipulation makes a concession or adopts a theory on which his cause

of action is determined, he must abide by it on appeal.⁶³

§ 13. Conclusiveness in General

Valid stipulations are controlling and conclusive as to all matters properly contained, and necessarily included, therein, but they are not controlling as to matters not covered thereby or matters which are not the proper subject of stipulation.

As a general rule stipulations are conclusive as to all matters properly contained, and necessarily included, therein,⁶⁴ and which are an essential part

any *Worsted Mills, C.C.A.3, 133 F.2d 876*, certiorari denied *Botany Worsted Mills v. National Labor Relations Board, 63 S.Ct. 1164*, two cases, 319 U.S. 751, 87 L.Ed. 1705.

Held binding on subsequent trial

(1) In general.
Ala.—*Sovereign Camp, W. O. W. v. Jones, 178 So. 891, 235 Ala. 378*.
Cal.—*Gonzales v. Pacific Greyhound Lines, 214 P.2d 809, 34 Cal.2d 749—Crenshaw v. Smith, 168 P.2d 752, 74 Cal.App.2d 255*.
Neb.—*Le Barron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767*.
Okla.—*Atlas Life Ins. Co. v. Unger, 177 P.2d 98, 198 Okl. 234*.
Tex.—*Leach v. Brown, Civ.App., 251 S.W.2d 553, error refused*.
60 C.J. p 66 note 8 [a].

(2) Where during first trial on notes it was stipulated that judgment should be entered for plaintiff in another pending action, and referee should be appointed to state account in present action, trial court properly ordered reference again during second trial after reversal of judgment rendered on first trial.—*First Nat Bank v. Stansbury, 5 P.2d 13, 118 Cal. App. 80*.

(3) A stipulation of the parties as to the interpretation of a will, made at the first trial of the case, may be received in evidence at a subsequent trial of the same suit, unless it is clear that the stipulation was made only for the pending trial or was withdrawn, or unless the court, in the exercise of its discretion, deems it proper to relieve the party therefrom.—*In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504*.

(4) Agreement that money should be held by trustee pending specified litigation or any other suit involving ownership of money applied to litigation subsequently instituted.—*Ex parte Williams, 148 So. 323, 226 Ala. 619*.

Held not binding on subsequent trial

(1) In general.
D.C.—*Santucci v. Mancuso, Mun.App., 78 A.2d 671*.
Wis.—*Paine v. Chicago & N. W. Ry. Co., 258 N.W. 846, 217 Wis. 601, 60 C.J. p 66 note 8 [b]*.

(2) A stipulation by an attorney for a town at the first trial that notice of injury to the town was valid was held not binding on the second trial.—*Brown v. Town of Winthrop, 175 N.E. 50, 275 Mass. 43*.

(3) Where facts received in evidence in second trial obviated, with one exception, use of stipulation entered into by parties in prior trial, and that exception was as to a conclusion of law beyond power of agreement by attorneys or parties, court properly excluded stipulation in the second trial.—*App v. Class, 75 N.E.2d 543, 225 Ind. 387*.

Availability on subsequent trial of same cause of stipulation:

Admitting designated facts see *infra* § 24.
As to pleadings on first trial see *infra* § 21.
For trial of cause on agreed statement of facts see *infra* § 25.
Limiting and defining issues on which controversy depends see *infra* § 22.

Stipulation as admissible in evidence against party as judicial admission on subsequent trial of cause or in another action see *Evidence* § 307.

60. U.S.—*Board of Com'rs of Lake County, Colo. v. Sutliff, Colo., 97 F. 270, 38 C.C.A. 167*.

Cal.—*Davis v. Robinson, 123 P.2d 894, 50 Cal.App.2d 700*.

Companion case in another court

Parties in an action in a federal court are not bound by concessions made in a companion case in a state court, which concessions were made solely with reference to the action in the state court.—*Gorham v. Mut. Ben. Health & Acc. Ass'n of Omaha, C.C.A.N.C., 114 F.2d 97, certiorari denied 61 S.Ct. 615, 312 U.S. 688, 85 L.Ed. 1125*.

61. U.S.—*Nachman Spring-Filled Corporation v. Spring Products Corporation, C.C.A.N.Y., 74 F.2d 710*.
Ark.—*Beene v. Hutto, 105 S.W.2d 530, 106 S.W.2d 170, 194 Ark. 107*.

Patent infringement action

Where assignee of design patent waived proof of authenticity of reference article and consented to have it considered as prior art in patent

infringement action, the assignee was not bound to make a similar waiver in subsequent patent infringement action against another alleged infringer, and the assignee was entitled to have the prior art established by proof.—*Gold Seal Importers v. Westernman-Rosenberg, Inc., C.C.A.N.Y., 133 F.2d 192*.

62. Colo.—*Melnick v. Bowman, 79 P.2d 368, 102 Colo. 384*.

63. Minn.—*Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353*.

Tenn.—*Stearns v. Williams, 12 Tenn. App. 427*.

64. U.S.—*Sadler v. Sadler, C.C.A. Nev., 167 F.2d 1—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, Mo., C.C.A.Mo., 127 F.2d 799—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282, affirmed in part and reversed in part on other grounds, C.C.A., 160 F.2d 527, certiorari denied 67 S.Ct. 1205, 331 U.S. 812, 91 L.Ed. 1832*.

Cal.—*Trozera v. McDonnell, 21 P.2d 706, 131 Cal.App. 473*.

Idaho.—*Hahn v. Nat. Cas. Co., 136 P.2d 739, 64 Idaho 684*.

Ill.—*General Elec. Co. v. Industrial Commission, 104 N.E.2d 257, 411 Ill. 401—Wilson v. Singleton, 103 N.E.2d 72, 410 Ill. 611—Waterman v. Hall, 270 Ill.App. 558*.

Ind.—*McFarland v. Christoff, 92 N.E.2d 555, 120 Ind.App. 416, rehearing denied 92 N.E.2d 867, 120 Ind.App. 416*.

Minn.—*Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353*.

N.Y.—*Isler v. Isler, 24 N.Y.S.2d 401, 260 App.Div. 1032, reargument denied 25 N.Y.S.2d 998, 261 App.Div. 827*.

Pa.—*Aldrich v. Geahry, 80 A.2d 59, 367 Pa. 252*.

Utah.—*Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403*.

60 C.J. p 65 note 5.

Evidence to disprove stipulated facts not admissible see *infra* § 24.

Based on authority of court

A stipulation between litigants disposing of questions involved and made under supervision of court or

of the stipulation.⁶⁵ Ordinarily a party will not be permitted to contradict a stipulation,⁶⁶ even though it is contrary to fact,⁶⁷ and even though the stipulation affects the statutory and constitutional rights of the parties thereto.⁶⁸ The court may dispose of a pending cause on the basis of a stipulation for the compromise and settlement of the issues thereof,⁶⁹ and a stipulation is binding with whatever force and effect a proceeding in court may have.⁷⁰ It has been stated that whether a stipulation in open court becomes binding and controlling depends on the circumstances under which it is made.⁷¹ If parties stipulate to do or not to do a thing they ordinarily

are bound thereby,⁷² and a stipulation authorizing the court to determine all issues on the pleadings, depositions, and exceptions to the depositions, binds the parties thereto.⁷³

Stipulations are not binding on the parties and are not controlling as to matters which are not necessarily included therein,⁷⁴ or as to matters which are expressly excluded therefrom;⁷⁵ and a stipulation wholly prospective in its operation will not constitute a waiver of any rights or claims accruing prior to its execution.⁷⁶ Also a stipulation which exceeds the power of the parties will not control their rights.⁷⁷ Generally a stipulation is not

of court's representative derives effect from the control of the court rather than from any virtue in the stipulation itself.—*Perley v. Bailey*, 199 A. 570, 80 N.H. 359.

Controls remedies

Where action is settled by stipulation which provides for payment when fees are collected or the estate is settled the parties' remedies are required to be based on that stipulation.—*Simon v. Sugarman*, 6 N.Y. S.2d 19.

Particular stipulations

(1) Stipulation authorizing court to determine heirs.—*In re Moore's Estate*, 16 N.W.2d 730, 310 Mich. 206.

(2) Stipulation limiting insurer's liability.—*Green v. Hawkeye Cas. Co.*, 99 N.E.2d 638, 343 Ill.App. 523.

(3) Where, after municipality voted to acquire utility's property, Public Service Commission, on stipulation of parties, included property which commission thought not to be within calls of statute, neither municipality nor utility could complain, since they had consented thereto.—*Wisconsin Power & Light Co. v. Public Service Commission*, 284 N.W. 586, 231 Wis. 390, rehearing denied *Wisconsin Power & Light Co. v. Public Service Commission of Wisconsin*, 286 N.W. 392, 231 Wis. 390.

Matters concluded

(1) Generally.—*U. S. v. State of Okl.*, ex rel. State Highway Commission of Okl., C.C.A.Okl., 168 F.2d 858.

(2) In action to set aside cease and desist order issued in proceeding to protect public against fraud and deception, and to prevent petitioners from using three proper names, evidence in companion case that corporations other than those allegedly entitled to exclusive use of the names used the names did not indicate that stipulation entered into between parties was erroneous in stating that witnesses were available who would testify that they had been or would be misled and induced, as a consequence of use of names, to buy petitioner's products.—*Galter v. Federal Trade Commission*, C.A.7, 186

F.2d 810, certiorari denied 72 S.Ct. 34, 342 U.S. 818, 96 L.Ed. 619.

65. Cal.—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328.

Immaterial stipulations disregarded
Paragraph of stipulation of facts was disregarded where it was immaterial in view of other facts admitted.—*In re Lombardi's Estate*, 39 N.Y.S.2d 62.

66. Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134.

Contradiction by pleading

U.S.—*Gans S. S. Line v. U. S.*, C.C.A. N.Y., 105 F.2d 955, certiorari denied 60 S.Ct. 179, 308 U.S. 613, 84 L.Ed. 512, motion denied 60 S.Ct. 1092, 310 U.S. 658, 84 L.Ed. 1421.

67. Ky.—*Young v. Porter-Leach Hardware Co.*, 148 S.W.2d 718, 285 Ky. 625.

68. N.Y.—*Siegel v. Bowers*, 58 N.Y. S.2d 187, 185 Misc. 684.

69. Mo.—*Hansen v. Ryan*, 186 S.W. 2d 595.

70. Mo.—*Keller v. Keklikian*, 244 S.W.2d 1001, 362 Mo. 919.

Judgment entered in accordance with stipulation as binding as though rendered after trial see Judgments § 630.

71. Cal.—*Asher v. Johnson*, 79 P.2d 457, 26 Cal.App.2d 403.

72. Ind.—*State ex rel. Burdge v. Cummings*, 195 N.E. 879, 208 Ind. 292, 104 A.L.R. 1492.

Pa.—*Sacchone v. City of Scranton*, Com.Pl., 40 Lack.Jur. 115.

To make improvement

Where a stipulation of the nature of improvement intended was made into the record in condemnation proceeding by counsel for park district and landowners, stipulation bound district to make improvement as stipulated or become liable in damages.—*Forest Preserve Dist. of Cook County v. Eckhoff*, 24 N.E.2d 52, 372 Ill. 391.

73. Pa.—*Grocery & Food Warehousemen Local Union No. 635 of the Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Help-*

ers of America, A. F. of L. v. *Kroger Co.*, 70 A.2d 218, 364 Pa. 195.

74. U.S.—*U. S. v. New York Tel. Co.*, N.Y., 66 S.Ct. 393, 326 U.S. 638, 90 L.Ed. 371.

Ariz.—*State v. McEuen*, 26 P.2d 1005, 42 Ariz. 385.

Miss.—*Smith v. Mills*, 24 So.2d 864, 199 Miss. 367.

N.Y.—*People v. Sack*, 110 N.Y.S.2d 556, 202 Misc. 571—*Adrian Steel Products Co. v. Rogers*, 85 N.Y.S.2d 838.

Okl.—*Dailey v. Sawatzky*, 211 P.2d 798, 202 Okl. 194.

Tex.—*Walker v. State*, 163 S.W.2d 207, 144 Tex.Cr. 363.

Wis.—*Chitek v. Horn*, 42 N.W.2d 162, 257 Wis. 9.

60 C.J. p 66 note 6.

Matters held not established by stipulation

(1) In general.—*Mellink Steel Safe Co. v. Vaughn*, C.C.A.Ohio, 141 F.2d 389.

(2) Where the facts contained in a stipulation are either insufficient or immaterial to a determination of the issues, the stipulation itself cannot endow such facts with materiality or sufficiency.—*Rubattino v. Industrial Accident Commission*, 150 P.2d 538, 65 Cal.App.2d 288.

75. U.S.—*C. I. R. v. Boston Elevated Ry. Co.*, C.A.1, 196 F.2d 923.

76. Mass.—*Heywood v. Miner*, 102 Mass. 466.

77. Cal.—*In re Beville's Estate*, 152 P.2d 229, 66 Cal.App.2d 271.

Basis of tax

An agreement among heirs or beneficiaries under a will cannot change basis on which inheritance tax is to be computed, and same rule applies to those taking by operation of law because of intestacy.—*In re Beville's Estate*, supra.

Matter held not legal conclusion

Portion of stipulation of corporations that they were controlled by one person was not a conclusion of law so as not to be binding on corporations in determining whether they constituted an employer under common control provisions of Unemploy-

conclusive as to matters of law contained therein;⁷⁸ but a stipulation as to the law of another state has been held binding on the parties, on the basis that the laws of another state are facts and, hence, the stipulation was one of fact, not of law.⁷⁹ In various instances stipulations as to the nature of a transaction have been held not to be binding on the parties.⁸⁰ It has also been held that a stipulation of counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice on one of the contracting parties.⁸¹

A final judgment of a federal court in a case involving title to realty, rather than a stipulation in the record in that case, will be looked to in order to determine the rights of the parties.⁸² Where it appears that the parties have stipulated or acquiesced in the proceedings in a court of general jurisdiction they become bound by the judgment entered.⁸³ In a prosecution of two persons accused

of crime, represented by different attorneys, a stipulation whereby it is agreed that the stipulations, motions, and objections of each attorney on behalf of one accused shall be considered as made on behalf of the other is applicable to the ordinary procedure of the trial, and not to constitutional rights of those accused.⁸⁴ Parties in probate proceedings who through counsel have stipulated for the time and manner of examination of subscribing witnesses are not thereby disabled from moving that the appearance of one of the parties be stricken from the record because of such party's lack of interest in the litigation.⁸⁵

§ 14. Persons Concluded

A valid stipulation is binding on the parties thereto, but persons not parties to the stipulation are not bound thereby.

As a general rule a valid stipulation is binding on the parties thereto,⁸⁶ and acts as an estoppel on

ment Compensation Act.—*McGrew Paint & Asphalt Co. v. Murphy*, 56 N.E.2d 416, 387 Ill. 241, 158 A.L.R. 1229, certiorari denied 65 S.Ct. 561, 323 U.S. 801, 89 L.Ed. 639, *Railway Paint Co. v. Murphy*, 65 S.Ct. 561, 323 U.S. 801, 89 L.Ed. 639, *Dednox Inc. v. Murphy*, 65 S.Ct. 561, 323 U.S. 801, 89 L.Ed. 639, and *Insul-Mastic Roofing & Siding Co. v. Murphy*, 65 S.Ct. 561, 323 U.S. 801, 89 L.Ed. 639.

78. Idaho.—*Hahn v. Nat. Cas. Co.*, 136 P.2d 739, 64 Idaho 684.

Stipulation of fact

Stipulation that merchandise involved is of the same dutiable character as certain goods which were found dutiable should be accepted as stipulation of fact merely identifying merchandise.—*North American Mercantile Co. v. U. S.*, 18 C.C.P.A. Customs, 74.

79. N.Y.—*Keeler v. Templeton*, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392.

Notwithstanding contra state decision

A stipulation as to the law of a foreign state was held binding on the parties notwithstanding a decision of the highest court of such state to the contrary made after the stipulation was entered.—*Keeler v. Templeton*, supra.

80. Particular transactions

(1) Stipulation by government that transaction was a loan in proceeding to determine whether it was a loan or a sale for purpose of taxation was held not to bind government where its intention in conceding that transaction was a loan was merely a concession that it was such merely in form.—*Old Colony Trust Associates v. Hasset*, C.C.A.Mass., 150 F.2d 179.

(2) Stipulation of counsel that contract is a conditional sale contract was held not to preclude it being considered a bailment lease where on its face and by its terms it clearly is such.—*W. K. Wetherill & Co. v. Scheffel*, 18 A.2d 680, 144 Pa.Super. 165.

81. U.S.—*Maryland Cas. Co. v. Rick-enbaker*, C.C.A.S.C., 146 F.2d 751.

82. Ky.—*Triplett v. Bays*, 149 S.W. 2d 723, 285 Ky. 822.

83. N.Y.—*Powley v. Dorland Bldg. Co.*, 24 N.E.2d 109, 281 N.Y. 423—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429.

84. U.S.—*Himmelfarb v. U. S.*, C.A. Cal., 175 F.2d 924, certiorari denied 70 S.Ct. 103, 338 U.S. 860, 94 L.Ed. 527, and *Ormont v. U. S.*, 70 S.Ct. 103, 338 U.S. 860, 94 L.Ed. 527.

85. N.Y.—*In re Browning's Estate*, 276 N.Y.S. 262, 153 Misc. 564.

86. U.S.—*H. Hackfeld & Company v. U. S.*, Hawaii, 25 S.Ct. 456, 197 U.S. 442, 49 L.Ed. 826—*Westinghouse Elec. Corp. v. Bulldog Elec. Products Co.*, C.A.W.Va., 179 F.2d 139—*Sadler v. Sadler*, C.C.A.Nev., 167 F.2d 1—*Andrews v. St. Louis Joint Stock Land Bank of St. Louis, Mo.*, C.C.A.Mo., 127 F.2d 799—*Ahles Realty Corporation v. Commissioner of Internal Revenue*, C.C.A., 71 F.2d 150, certiorari denied *Ahles Realty Corporation v. Helvering*, 55 S.Ct. 141, 293 U.S. 611, 79 L.Ed. 701—*Agnew v. American President Lines*, D.C.Cal., 73 F.Supp. 944, affirmed in part and reversed in part on other grounds, C.A., 177 F.2d 107, certiorari denied *American President Lines v. Agnew*, 70 S.Ct. 838, 339 U.S. 951, 94 L.Ed. 1364, followed in, C.A., *Federer v. American*

President Lines, 177 F.2d 111, certiorari denied *American President Lines v. Federer*, 70 S.Ct. 838, 339 U.S. 951, 94 L.Ed. 1364, affirmed in part and reversed in part on other grounds, C.A., *Griffin v. American President Lines*, 177 F.2d 111, certiorari denied *American President Lines v. Griffin*, 70 S.Ct. 838, 339 U.S. 951, 94 L.Ed. 1364—*Skidmore v. John J. Casale, Inc.*, D.C.N.Y., 66 F.Supp. 282, affirmed in part and reversed in part on other grounds, C.C.A., 160 F.2d 527, certiorari denied 67 S.Ct. 1205, 331 U.S. 812, 91 L.Ed. 1832—*Reed v. Hardt*, D.C.Pa., 52 F.Supp. 42, affirmed, C.C.A., 137 F.2d 705—*Webster v. State Mut. Life Assur. Co. of Worcester, Mass.*, D.C.Cal., 50 F.Supp. 11, modified on other grounds, C.C.A., 148 F.2d 815—*Bunte Bros. v. Standard Chocolates*, D.C.Mass., 45 F.Supp. 478—*Frigorifico Wilson De La Argentina v. Weirton Steel Co.*, D.C.W.Va., 31 F.Supp. 214.

Ala.—*Sovereign Camp, W. O. W. v. Jones*, 178 So. 891, 235 Ala. 378. Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134—*City of Los Angeles v. Cole*, 170 P.2d 928, 28 Cal.2d 509—*McGuire v. Baird*, 70 P.2d 915, 9 Cal.2d 353—*Coillier v. Merced Irr. Dist.*, 2 P.2d 790, 213 Cal. 554—*Sterling Drug v. Benatar*, App., 221 P.2d 965, 99 Cal.App.2d 393—*In re Howe's Estate*, 199 P.2d 59, 88 Cal.App.2d 454—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328—*Metropolitan Water Dist. of Southern California v. Adams*, 134 P.2d 882, 57 Cal.App.2d 574—*Partch v. Adams*, 130 P.2d 244, 55 Cal.App.2d 1—*Burdick v. Wittich*, 116 P.2d 90, 46 Cal.App.2d 456—*Trozera v. McDonnell*, 21 P.2d 706, 131 Cal.App.

them.⁸⁷ This rule includes a stipulation made by an agent,⁸⁸ a stipulation by an attorney⁸⁹ made during a trial,⁹⁰ a stipulation made in open court⁹¹ and

473—Corbett v. Benioff, 14 P.2d 1028, 126 Cal.App. 772.
 Fla.—Troup v. Bird, 53 So.2d 717—State ex rel. Laney v. Walker, 19 So.2d 507, 155 Fla. 41—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722—Esch v. Forster, 168 So. 229, 123 Fla. 905—Swann v. L. Maxcy, Inc., 162 So. 696, 120 Fla. 283—Penney v. First Trust & Savings Bank, 135 So. 805, 102 Fla. 185.
 Idaho.—Hahn v. Nat. Cas. Co., 136 P. 2d 739, 64 Idaho 684.
 Ill.—Wilson v. Singleton, 103 N.E.2d 72, 410 Ill. 611—Shell Oil Co. v. Industrial Commission, 94 N.E.2d 888, 407 Ill. 186—People v. Rave, 65 N.E.2d 23, 392 Ill. 435—Gietl v. Commissioners of Drainage Dist. No. 1 of Town of Bois D'Arc, 51 N.E.2d 512, 384 Ill. 499—Plenderleith v. Edwards, 159 N.E. 780, 328 Ill. 431—Waterman v. Hall, 270 Ill.App. 558.
 Ind.—Gilbert v. Lusk, App., 106 N.E. 2d 404—McFarland v. Christoff, 92 N.E.2d 555, 120 Ind.App. 416, rehearing denied 92 N.E.2d 867, 120 Ind.App. 416—Cole v. Sheehan Const. Co., 57 N.E.2d 625, 115 Ind. App. 303—Schreiber v. Rickert, 50 N.E.2d 879, 114 Ind.App. 55.
 Iowa.—Burnett v. Poage, 29 N.W.2d 431, 239 Iowa 31.
 Ky.—Young v. Porter-Leach Hardware Co., 148 S.W.2d 718, 285 Ky. 625—Reliance Life Ins. Co. of Pittsburgh, Pa., v. Curlin, 126 S.W. 2d 847, 277 Ky. 533—Pendleton v. City Nat. Bank of Mayfield, 106 S.W.2d 977, 269 Ky. 250.
 Mass.—Whitcomb v. Hearst Corp., 107 N.E.2d 295—Abbott v. Link-Belt Co., 88 N.E.2d 551, 324 Mass. 673—Edinburg v. Allen Squire Co., 12 N.E.2d 718, 299 Mass. 206.
 Mich.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A.L.R. 699.
 Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 224 Minn. 395—Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353—Lichterman v. Laundry and Dry Cleaning Drivers Union, Local No. 131, 283 N.W. 752, 204 Minn. 75.
 Miss.—Dantzler v. Mississippi State Highway Commission, 199 So. 367, 190 Miss. 137.
 Mo.—Keller v. Keklikian, 244 S.W.2d 1001, 362 Mo. 919—Hansen v. Ryan, 186 S.W.2d 595—McCrary v. Kurn, App., 101 S.W.2d 114—Hadley Bros.—Uhl Co. v. Scott, App., 93 S.W.2d 276.
 Mont.—Espeland v. Espeland, 109 P. 2d 792, 111 Mont. 365.
 Neb.—In re Wortman's Estate, 12 N.W.2d 701, 144 Neb. 141—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

N.J.—Wyckoff v. Monmouth County, 21 A.2d 791, 127 N.J.Law 268—Altshul v. Astor Coal Distributors, 16 A.2d 619, 125 N.J.Law 543—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 628, 122 N.J. Law 189—Bernstein & Loubet v. Minkin, 191 A. 733, 118 N.J.Law 203.
 N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.
 N.Y.—Foley v. Equitable Life Assur. Soc., of U. S., 49 N.E.2d 511, 290 N.Y. 424—In re Maflay's Estate, 17 N.E.2d 108, 278 N.Y. 429—Burmester v. De Lucia, 189 N.E. 231, 263 N.Y. 315—People ex rel. Bryant Park Building v. Miller, 35 N.Y.S. 2d 903, 264 App.Div. 912, affirmed 50 N.E.2d 652, 291 N.Y. 528—Isler v. Isler, 24 N.Y.S.2d 401, 260 App. Div. 1032, reargument denied 25 N.Y.S.2d 998, 261 App.Div. 827—Santini Bros. v. Smith, 293 N.Y.S. 765, 250 App.Div. 53—Brown v. Brown, 87 N.Y.S.2d 105, 194 Misc. 975—Siegel v. Bowers, 58 N.Y.S.2d 187, 185 Misc. 684—Winthrop Chemical Co. v. Blackman, 288 N.Y.S. 389, 159 Misc. 451—In re Melzak's Estate, 275 N.Y.S. 607, 153 Misc. 600—Stoner v. Onside Motor Car Co., 275 N.Y.S. 426, 154 Misc. 97—Salamina v. Tartaglia, 106 N.Y.S. 2d 487—Empire Trust Co. v. Raynolds, 100 N.Y.S.2d 930—In re Riley's Will, 85 N.Y.S.2d 879—Hollywood Plays v. Columbia Pictures Corp., 77 N.Y.S.2d 568, affirmed 83 N.Y.S.2d 302, 274 App.Div. 912, reversed on other grounds 85 N.E.2d 869, 299 N.Y. 61, 10 A.L.R.2d 722, reargument denied 87 N.E.2d 70, 299 N.Y. 683—Nostdahl v. Finnegan, 68 N.Y.S.2d 466.
 N.C.—Gorham v. Pacific Mut. Life Ins. Co. of California, 1 S.E.2d 569, 215 N.C. 195—Wolfe v. Galloway, 190 S.E. 213, 211 N.C. 361.
 N.D.—Schott v. Enander, 15 N.W.2d 303, 73 N.D. 352.
 Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569—Silmon v. Rahhal, 62 P.2d 501, 178 Okl. 244.
 Pa.—McRoberts v. Burns, 88 A.2d 741, 371 Pa. 129—Aldrich v. Geahry, 80 A.2d 59, 367 Pa. 252.
 S.C.—Trustees of Wofford College v. Burnett, 39 S.E.2d 155, 209 S.C. 92—American Sur. Co. v. Hamrick Mills, 9 S.E.2d 433, 194 S.C. 221.
 Tex.—Jeter v. Radcliff Finance Corp., Civ.App., 247 S.W.2d 186, error refused no reversible error—Laird v. Brown, Civ.App., 210 S.W.2d 276—Antone v. Stiles, Civ.App., 177 S.W. 2d 246—Heidingsfelder v. Rogers, Civ.App., 96 S.W.2d 147.
 Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah

403—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.
 Wis.—Haueter v. Budlow, 42 N.W.2d 261, 256 Wis. 561—City of Wauwatosa v. Union Free High School Dist. of Town and City of Wauwatosa, 37 N.W.2d 855, 255 Wis. 87.
 60 C.J. p 65 note 5.
Consent made part of record
 The parties are bound by their stipulations, once their consent has been made a part of the record, until relieved from them by judicial action.—Kalika v. Munro, 83 N.E.2d 172, 323 Mass. 542.
Passive parties
 Active parties to litigation may bind passive parties by stipulation.—In re Kent's Estate, 57 P.2d 901, 6 Cal.2d 154.
 87. Cal.—Partch v. Adams, 130 P.2d 244, 55 Cal.App.2d 1.
 S.C.—Trustees of Wofford College v. Burnett, 39 S.E.2d 155, 209 S.C. 92.
 Wis.—City of Wauwatosa v. Union Free High School Dist. of Town and City of Wauwatosa, 37 N.W.2d 855, 255 Wis. 87.
 60 C.J. p 65 note 5.
 88. Ky.—Blight v. Banks, 6 H.B. Mon. 192, 17 Am.D. 136.
 60 C.J. p 66 note 9 [a].
 89. U.S.—American Chemical Paint Co. v. Dow Chemical Co., C.C.A. Mich., 164 F.2d 208.
 90. U.S.—Maryland Cas. Co. v. Rick-enbaker, C.C.A.S.C., 146 F.2d 751.
 Cal.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.
 Minn.—Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353.
Until final judgment
 A stipulation entered into during course of a trial is binding on the parties until recovery of final judgment.—Bazer v. Vigdor, 9 N.Y.S.2d 906.
 91. Mich.—Powell v. Martone, 83 N.W.2d 914, 322 Mich. 441—In re Moore's Estate, 16 N.W.2d 720, 310 Mich. 206.
 Minn.—Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353.
 N.Y.—Cost v. Benetos, 95 N.Y.S.2d 342, 276 App.Div. 975—Appeal of Sember, 79 N.Y.S.2d 156, 193 Misc. 573—De Santolo v. La Porte, 89 N.Y.S.2d 114.
 Okl.—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569.
 Pa.—Munch v. Wugliotta, Com.Pl., 25 Erie Co. 303.
 Tex.—Messerole v. Messerole, Civ. App., 154 S.W.2d 189.
 Utah.—Deseret Sav. Bank v. Walker, 2 P.2d 609, 78 Utah 241.

acted on by the judge,⁹² and a stipulation which appears fair and reasonable and is spread on the record with the consent and approval of the court.⁹³ A stipulation has been held binding on the government,⁹⁴ on assignees of the parties,⁹⁵ on parties by class representation,⁹⁶ and on persons accused of crime.⁹⁷ Where an administrator represents the heirs, a stipulation to which the administrator is a party is binding on the heirs.⁹⁸ Although a stipulation provides that neither party shall be prejudiced thereby, the court may consider it where both parties in their evidence and in their arguments refer to it and its effect.⁹⁹

The general rule is well settled, however, that

parties cannot by stipulation affect any rights but their own,¹ and that persons not parties to the stipulation are not bound thereby.² The rights of parties to the action who do not join in the stipulation,³ or of persons not parties to the action,⁴ or of parties the stipulation does not purport to bind,⁵ or whose rights are expressly reserved by its terms,⁶ are not bound by the stipulation; and this is especially true where the rights of those not made parties involve a matter of public interest.⁷ Stipulations between the state and those accused in criminal cases will not affect the rights of third persons in civil proceedings.⁸

In an action against one of two joint tort-feasors,

92. Mass.—*Dalton v. Post Pub. Co.*, 105 N.E.2d 385, 328 Mass. 595.
Okl.—*Callaway v. Sparks*, 89 P.2d 275, 184 Okl. 569.

93. Mo.—*Hansen v. Ryan*, 186 S.W. 2d 595.

94. U.S.—*U. S. v. Davison*, D.C.Pa., 1 F.2d 465, affirmed, C.C.A., U. S. by *Lewellyn v. Davison*, 9 F.2d 1022, certiorari denied 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.

95. Ill.—*Shepard v. Wheaton*, 60 N.E.2d 47, 325 Ill.App. 269.
N.Y.—*Junco v. La Cabana, Inc.*, 20 N.Y.S.2d 781, affirmed 25 N.Y.S.2d 779, 261 App.Div. 803.

96. Fla.—*Dunscombe v. Smith*, 190 So. 796, 139 Fla. 497.
60 C.J. p 66 note 11.

97. Ohio.—*State v. Baer*, 134 N.E. 786, 103 Ohio St. 585.
Right of accused to waive jury trial see *Juries* § 86.

98. Cal.—*In re Kent's Estate*, 57 P. 2d 901, 6 Cal.2d 154.

99. Iowa.—*Miller v. Perkins*, 216 N.W. 27, 204 Iowa 782.

1. Mich.—*Pittsburgh Plate Glass Co. v. Charles Klein Co.*, 140 N.W. 484, 177 Mich. 399.

Pa.—*Mills Automatic Merchandising Co. v. Brown*, 47 Pa.Dist. & Co. 169.

2. Mo.—*City of St. Louis v. Gottschall*, App., 121 S.W.2d 239.

N.Y.—*Thomas v. Loomis*, 80 N.Y.S. 2d 309, 273 App.Div. 680.

Pa.—*Pirri v. Clark*, Com.Pl., 32 Del. Co. 391, 57 York Leg.Rec. 17.

Sheriff's right to fees

A stipulation, requiring judgment debtor to save creditor harmless from payment of sheriff's fees and poundage as part of settlement of parties' differences, did not impair sheriff's statutory rights to such fees and poundage on value of debtor's property, levied on by him under execution.—*Nostdahl v. Finnegan*, 68 N.Y. S.2d 466.

3. Ga.—*Evans v. Citizens & South-*

ern Nat. Bank, 57 S.E.2d 541, 206 Ga. 441.

Mich.—*Specialties Distributing Co. v. Whitehead*, 21 N.W.2d 926, 313 Mich. 696.

N.Y.—*Bowler v. Apex Builders*, 19 N.Y.S.2d 501, 259 App.Div. 834—*Lansdell Co. v. Morrison*, 89 N.Y.S.2d 870.

60 C.J. p 67 note 15.

Creditors of bankrupt not joining in stipulation

U.S.—*Southern Ry. Co. v. U. S. Fidelity & Guaranty Co.*, C.C.A. Ala., 87 F.2d 118.

Colo.—*Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 88 Colo. 461, followed in *Myers v. Beck*, 299 P. 50, 88 Colo. 457, and *Myers v. Colorado Pulp & Paper Co.*, 299 P. 50, 88 Colo. 459.

Persons not interested in subject matter

A written stipulation of facts with respect to distribution of funds did not bind parties who were not asked to sign the document and who were not interested in such funds.—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328.

4. U.S.—*Strand v. Garden Valley Telephone Co.*, D.C.Minn., 51 F. Supp. 898.

Cal.—*Tanner v. Title Insurance & Trust Co.*, 129 P.2d 383, 20 Cal.2d 814.

Ga.—*Puckett v. Walker*, 21 S.E.2d 713, 194 Ga. 401.

Ill.—*Thorsch v. Haley*, 35 N.E.2d 822, 311 Ill.App. 295.

N.J.—*Breitman v. Jaehnel*, 132 A. 291, 99 N.J.Eq. 243, affirmed *Breitman v. Jaehnel*, 135 A. 915, 100 N.J.Eq. 559.

N.Y.—*Baksi v. Wallman*, 65 N.Y.S.2d 894, 271 App.Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456—*Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina S. A.*, 279 N.Y.S. 257, 154 Misc. 788, affirmed 257 N.Y.S. 908, 235 App.Div. 841, affirmed 185 N.E. 698, 261 N.Y. 455, reargument denied 188 N.E. 47, 262 N.Y. 521, certiorari denied *Moran*

Towing & Transp. Co. v. Robins Dry Dock & Repair Co., 54 S.Ct. 72, 290 U.S. 656, 78 L.Ed. 568, and 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569.

Okl.—*Turk v. Wood*, 210 P.2d 662, 202 Okl. 112.

60 C.J. p 67 note 18.

Stipulation by predecessor in title
Pa.—*In re Private Road in Juniata Tp.*, 61 Pa.Dist. & Co. 418.

Stipulations made in another action
Ark.—*Beene v. Hutto*, 105 S.W.2d 530, 106 S.W.2d 170, 194 Ark. 107.

5. Mass.—*Boston Safe Deposit, etc., Co. v. Stratton*, 156 N.E. 885, 259 Mass. 465.

N.Y.—*Duncan Building & Loan Ass'n v. Liverpool, London & Globe Ins. Co.*, 174 A. 350, 12 N.J.Misc. 691.

6. Cal.—*Richardson v. Chicago Packing & Provision Co.*, 63 P. 74, 6 Cal.Unrep. 606.

60 C.J. p 67 note 17.

7. Colo.—*Lockhard v. People*, 178 P. 565, 65 Colo. 553.

60 C.J. p 67 note 19.

Rate for unemployment contributions

A stipulation that new units of original partnership which split into several units, corporate and partnership, were being conducted as one employing unit and one employer was not binding on state official in assigning rate for unemployment contributions, and did not permit him to assign to any of the units involved a rate different from that prescribed by statute for concerns commencing business.—*El Queeno Distributing Co. v. Christgau*, 21 N.W.2d 601, 221 Minn. 197.

Tax commission

A stipulation between attorney general for the state and attorney for estate that if administratrix' petition for final distribution were granted by court no inheritance tax would be due did not bind tax commission.—*In re Jones' Estate*, 104 P.2d 210, 99 Utah 373.

8. Ariz.—*State v. McEuen*, 26 P.2d 1005, 42 Ariz. 385.

it is proper to refuse to allow a stipulation that plaintiff had received a certain sum of money from the other tort-feasor in consideration of plaintiff's execution of a covenant not to sue to be read to the jury.⁹

Attorney. Where a client changes attorneys during the progress of a proceeding, the successor attorney is not bound with respect to attorney's fees by a stipulation entered into by his predecessor.¹⁰ A person signing a stipulation as attorney for one of the parties is bound not to interfere with the performance of it.¹¹

Interveners. Stipulations entered into by the original parties have been held binding not only on them, but on others coming into the case by intervention.¹²

Purchasers of realty. In an action to recover land, a stipulation between the original parties is binding on those who purchase from defendants pending suit, and later become parties thereto.¹³ Also, one who purchases realty from the purchaser at a mortgage foreclosure sale is bound by a stipulation of the grantors with respect to the boundary made in open court in a prior mechanic's lien suit affecting the realty.¹⁴

Authenticity of writings. Where certain defendants by a stipulation admit the authenticity and genuineness of particular writings, it has been held that nonstipulating defendants are bound by such admissions until they disprove authenticity.¹⁵

§ 15. — Persons under Disability

Generally stipulations which are favorable to a person under disability or which merely facilitate the determination of the case will be enforced, but stipulations which surrender substantial rights or are adverse or disadvantageous to his interests will not be enforced.

It has been stated broadly in some decisions that stipulations may be binding on persons who are incapable of binding themselves by contract out of court,¹⁶ but the decisions are not in entire harmony as to the character of stipulations which will be upheld and the circumstances under which they will be upheld.

Persons non compos mentis. A stipulation of settlement, made in the course of litigation, will be enforced against a mentally incompetent defendant, where it was the result of considerable negotiation and the interests of defendant were well cared for.¹⁷ Also, it has been held that, where a review is granted on the petition of a guardian of a party who became insane after the trial, on a stipulation entered into by the guardian that no objection would be made to defendant's testifying generally on the trial of the case in review, the stipulation is binding on the legal representatives of petitioner after his decease.¹⁸

Infants. While it has been broadly stated that no person has any authority to stipulate in behalf of a minor,¹⁹ and that infant defendants are not bound by a stipulation as to facts,²⁰ the general rule is that the next friend or guardian ad litem of an infant may give a binding assent to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved,²¹ this rule being subject to the limitation that the stipulation be approved and ratified by the court, on a showing that it is for the interest, or, at least, not prejudicial to the interest, of the infant.²² However, a guardian ad litem or next friend cannot, in any event, by stipulations, surrender substantial rights of the infant;²³ and stipulations and admissions of fact which are adverse

9. Ill.—Puck v. City of Chicago, 281 Ill.App. 6.

10. Cal.—Berry v. Chaplin, 169 P.2d 453, 74 Cal.App.2d 652.

11. N.Y.—In re Fred, 151 N.Y.S. 276.

12. Idaho.—Pioneer Irr. Dist. v. American Ditch Ass'n, 1 P.2d 196, 50 Idaho 732, 60 C.J. p 67 note 21.

Parties subsequently intervening

Where on appeal from decision on application for liquor license, parties made valid stipulation as to the judge before whom appeal should be heard, such stipulation was required to be honored although stipulation was not signed by protestants objecting to the granting of the license, who subsequently intervened.—Lane v. Ferguson, 156 P.2d 236, 62 Ariz. 184.

13. Tex.—Delk v. Punched, 64 Tex. 360.

14. Minn.—Lobnitz v. Fairchild, 243 N.W. 62, 186 Minn. 215.

15. U.S.—U. S. v. Vehicular Parking, D.C.Del., 52 F.Supp. 751.

16. Fla.—Esch v. Forster, 168 So. 229, 123 Fla. 905, 60 C.J. p 68 note 22.

17. Minn.—Fletcher v. James, 182 N.W. 437, 148 Minn. 366.

18. Me.—Austin v. Dunham, 65 Me. 533, 60 C.J. p 68 note 24.

19. Ill.—Askins v. Hott, 188 Ill.App. 235.

20. Ill.—Anderson v. Anderson, 60 N.E. 810, 191 Ill. 100.

21. U.S.—Kingsbury v. Buckner, Ill., 10 S.Ct. 638, 134 U.S. 650, 33 L.Ed. 1047, 69 C.J. p 68 note 27.

22. Minn.—Eldam v. Finnegan, 50 N.W. 933, 48 Minn. 53, 16 L.R.A. 507.

23. U.S.—Kingsbury v. Buckner, Ill., 10 S.Ct. 638, 134 U.S. 650, 33 L.Ed. 1047.

Cal.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

Guardian ad litem or next friend not authorized to concede, waive, or admit away any substantial rights of infant see Infants § 111 d.

Distribution of fund from death claim

In distribution of sum realized in settlement without court approval of a claim arising from death under the provisions of the Federal Employers' Liability Act, the court is not bound by an agreement between counsel for administratrix and counsel for guardian of decedent's child as to the share of the fund which should go to the child.—In re Walker's Estate, 94 Pittsb.Leg.J. 179, 57 Pa.Dist. & Co. 496.

and disadvantageous to the interests of infant defendants are not authoritative with respect to the determination of their rights.²⁴

Married women. It has been held that counsel representing a party litigant may represent his client in stipulating for a consent verdict, although the client is a married woman,²⁵ and also that a married woman defendant, who, by statute, can appear in person, or by attorney, and defend herself, or in conjunction with her husband, as the case may be, is bound by a stipulation to abide the event of another suit.²⁶

§ 16. Persons in Whose Favor Operative

A stipulation is available to the parties thereto, unless by its terms it is restricted to the benefit of only some of the parties, but is not available to parties to the action who are not parties to it, or to persons who are not parties to the action.

A stipulation is equally available to all of the parties thereto,²⁷ unless the stipulation by its terms restricts its benefit to one of the parties alone,²⁸ but is not available in favor of a party to the action who is not a party to the stipulation,²⁹ or to persons who are not parties to the action;³⁰ and a

stipulation between plaintiff and some of defendants does not affect his rights as to the other defendants.³¹ Ordinarily the courts should enforce an agreement between accused in a criminal case and a county attorney, where accused, in good faith and in reliance on the county attorney's representations, has executed his part of the agreement.³² Where, in proceedings against the state board of tax commissioners to review assessments, it was stipulated that the successful party should be entitled to tax as costs the stenographer's fees, a motion by a city as intervener, which was awarded costs in the final order, for a retaxation of costs for copies of the stenographer's minutes furnished to counsel for the intervener and to the attorney-general should be granted.³³

§ 17. Conclusive Effect on Court

Ordinarily courts are bound by, and must enforce, stipulations in respect of matters which may validly be made the subject matter of stipulations.

In the absence of grounds which will authorize a party to a stipulation to rescind or withdraw from it, discussed *infra* § 30, or the court to set it aside, *infra* § 35, the courts,³⁴ both trial³⁵ and appellate,³⁶

24. N.J.—Fidelity-Philadelphia Trust Co. v. Jameson, 45 A.2d 134, 137 N.J.Eq. 385—Anderson v. Anderson, 32 A.2d 83, 133 N.J.Eq. 311.

25. Ga.—Webster v. Dundee Mortg., etc., Co., 20 S.E. 310, 93 Ga. 278.

26. Mo.—Galbreath v. Rogers, 30 Mo. App. 401.

27. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

60 C.J. p 68 note 32.

28. Iowa.—Borland v. Chicago, etc., R. Co., 42 N.W. 590, 78 Iowa 94.

29. U.S.—Metal Associates v. East Side Metal Spinning & Stamping Corp., C.C.A.N.Y., 165 F.2d 163.

60 C.J. p 68 note 34.

30. U.S.—Nachman Spring-Filled Corporation v. Spring Products Corporation, C.C.A.N.Y., 74 F.2d 710.

60 C.J. p 68 note 35.

31. U.S.—Metal Associates v. East Side Metal Spinning & Stamping Corp., C.C.A.N.Y., 165 F.2d 163.

Cal.—Staples v. Hawthorne, 283 P. 67, 208 Cal. 578.

32. Okl.—Hughes v. James, 190 P.2d 824, 86 Okl.Cr. 231.

33. N.Y.—People ex rel. New York Cent. & H. R. R. Co. v. State Board of Tax Com'rs, 142 N.Y.S. 583, 80 Misc. 557.

60 C.J. p 68 note 37.

34. Ill.—Rooth v. Kusel, 273 Ill.App. 526.

N.Y.—Harris Structural Steel Co. v. Chapman, 295 N.Y.S. 443, 162 Misc. 709.

Okl.—Silmon v. Rahhal, 62 P.2d 501, 178 Okl. 244.

Pa.—McRoberts v. Burns, 88 A.2d 741, 371 Pa. 129.

Probate Court

Cal.—In re Howe's Estate, 199 P.2d 59, 88 Cal.App.2d 454.

Customs court

Stipulation that paintings are oil paintings and original works of artists must be accepted as fact by customs court on importer's protest against classification.—Progressive Fine Arts Co. v. U. S., 18 C.C.P.A., Customs, 306.

35. U.S.—H. Hackfeld & Company v. U. S., Hawaii, 25 S.Ct. 456, 197 U. S. 442, 49 L.Ed. 826.

Cal.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal. App.2d 328.

Conn.—Peiter v. Degenrign, 71 A.2d 87, 136 Conn. 331.

Fla.—Troup v. Bird, 53 So.2d 717—**Corpus Juris cited in** Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722—**Corpus Juris cited in** Esch v. Forster, 168 So. 229, 231, 123 Fla. 905—Lester v. Schutt, 152 So. 726, 113 Fla. 659.

Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 224 Minn. 395.

N.J.—Sharff v. Tostl, 154 A. 825, 108 N.J.Eq. 270.

Pa.—McRoberts v. Burns, 88 A.2d 741, 371 Pa. 129.

Philippine.—Siping v. Cacob, 10 Philippine 717.

Tex.—Jeter v. Radcliff Finance Corp., Civ.App., 247 S.W.2d 186, error refused no reversible error—Lloyd v. Pierce, Civ.App., 89 S.W.2d 1035, reversed on other grounds Pierce v. Lloyd, 114 S.W.2d 867, 131 Tex. 401—Texas Sporting Goods Co. v. Texas Gulf Sulphur Co., Civ.App., 81 S.W.2d 805.

Wis.—Town of Fox Lake v. Town of Trenton, 12 N.W.2d 679, 244 Wis. 412.

60 C.J. p 69 note 40.

36. U.S.—H. Hackfeld & Company v. U. S., Hawaii, 25 S.Ct. 456, 197 U. S. 442, 49 L.Ed. 826.

Fla.—Troup v. Bird, 53 So.2d 717—**Corpus Juris cited in** Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722—**Corpus Juris cited in** Esch v. Forster, 168 So. 229, 231, 123 Fla. 905.

Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 224 Minn. 395.

Miss.—Doolittle v. Adams, 43 So. 951, 90 Miss. 255.

Mont.—Espeland v. Espeland, 109 P. 2d 792, 111 Mont. 365.

N.C.—Gorham v. Pacific Mut. Life Ins. Co. of California, 1 S.E.2d 569, 215 N.C. 195.

Tex.—Jeter v. Radcliff Finance Corp., Civ.App., 247 S.W.2d 186, error refused no reversible error—Lloyd v.

and official referees to whom the cases are referred,³⁷ are bound by stipulations in respect of matters which may validly be made the subject matter of stipulations. Courts are bound to enforce stipulations which parties may validly make,³⁸ where they are not unreasonable or against good morals or sound public policy.³⁹ Ordinarily they have no power to strike out stipulations on their own motion without consent of the parties,⁴⁰ or to abridge or amend such stipulations,⁴¹ or modify or alter them in any material detail against objection

of the parties,⁴² or go beyond the terms thereof,⁴³ or to make findings contrary to the terms of a stipulation,⁴⁴ or render a judgment not authorized by its terms.⁴⁵

On the other hand, all stipulations are not necessarily binding on the courts, and under the circumstances of a particular case they may be justified in disregarding them.⁴⁶ A court cannot be deprived by stipulation of its power to give equitable relief,⁴⁷ and where the stipulation relates to matters

Pierce, Civ.App., 89 S.W.2d 1035, reversed on other grounds Pierce v. Loyd, 114 S.W.2d 867, 131 Tex. 401. 60 C.J. p 69 note 41.

Law of case.

Where parties to appeal stipulate that court of appeals shall be bound by facts cited in previous supreme court opinion, court of appeals is likewise bound by law of such case.—Blythin v. Zangerle, 77 N.E.2d 379, 83 Ohio App. 355.

37. N.Y.—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764.

38. Fla.—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722—Penney v. First Trust & Savings Bank, 135 So. 805, 102 Fla. 185.

Minn.—Amundson v. Cloverleaf Memorial Park Ass'n, 22 N.W.2d 170, 221 Minn. 353.

N.Y.—In re Malloy's Estate, 17 N.E.2d 108, 278 N.Y. 429—Cost v. Benetos, 97 N.Y.S.2d 799, 277 App.Div. 880, reargument and appeal denied 98 N.Y.S.2d 590, 277 App.Div. 900, motion denied 101 N.Y.S.2d 233, 277 App.Div. 1047—William Randall & Sons v. Garfield Worsted Mills, 165 N.Y.S. 125, 178 App.Div. 196 reargument denied 166 N.Y.S. 1118, 179 App.Div. 931—Brown v. Brown, 87 N.Y.S.2d 105, 194 Misc. 975—Salamina v. Tartaglia, 106 N.Y.S.2d 487—De Santolo v. La Porte, 89 N.Y.S.2d 114.

Pa.—McRoberts v. Burns, 88 A.2d 741, 371 Pa. 129.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

Division of damages

Under stipulation between parties to wrongful death action, providing that court should determine ownership of sum paid into court in settlement, court's duty was to determine the relative or comparative loss suffered by the parties, rather than actual compensation payable to each in absence of the stipulation.—Fyfe v. Great Northern Ry. Co., 27 N.W.2d 147, 223 Minn. 339.

39. Fla.—Esch v. Forster, 168 So. 229, 123 Fla. 905.

N.Y.—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.

Div. 764—Brown v. Brown, 87 N.Y.S.2d 105, 194 Misc. 975—In re Melzak's Estate, 275 N.Y.S. 607, 153 Misc. 600.

40. N.Y.—Bump v. Hanigan, 152 N.Y.S. 966.

41. Iowa.—Clayton County v. Thein, 216 N.W. 276, 204 Iowa 911.

42. Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

60 C.J. p 69 note 45.

43. U.S.—Kannel v. Kennedy, C.C.A. Pa., 94 F.2d 487.

N.Y.—Mann v. R. Simpson & Co., 36 N.E.2d 658, 286 N.Y. 450.

60 C.J. p 69 note 46.

44. Cal.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 685, 62 Cal.App.2d 328.

Pa.—In re Hudson Coal Co., 193 A. 8, 327 Pa. 247.

Tex.—Texas Sporting Goods Co. v. Texas Gulf Sulphur Co., Civ.App., 81 S.W.2d 805.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

Wis.—Haueter v. Budlow, 42 N.W.2d 261, 256 Wis. 561.

60 C.J. p 69 note 47.

Held sufficient to support findings

Stipulation in workmen's compensation proceedings that employer had three or more employees in its employ in the state on the date of accident, and that employer had not procured workmen's compensation insurance to cover its employees was sufficient to support finding that employer was subject to the provisions of the Workmen's Compensation Act.—Buckingham Transp. Co. v. Industrial Commission, 72 P.2d 1077, 93 Utah 342.

45. Cal.—Mishkind v. Superior Court in and for Fresno County, 183 P.2d 915, 81 Cal.App.2d 360.

Wis.—Town of Fox Lake v. Town of Trenton, 12 N.W.2d 679, 244 Wis. 412.

60 C.J. p 69 note 48.

Default judgment

Action of court in entering default judgment at the request of third persons who were not directly interested in the matter, and in violation of the stipulation of the parties directly in-

terested was held unauthorized as in excess of jurisdiction.—Mishkind v. Superior Court in and for Fresno County, 183 P.2d 915, 81 Cal.App.2d 360.

46. Conn.—Pelter v. Degenring, 71 A.2d 87, 136 Conn. 331.

Pa.—Appeal of Zimmer, Com.Pl., 83 Erie Co. 132.

Party not entitled to complain

If a fair opportunity is given to meet any change of front which arises out of repudiating agreed interpretation of regulation having the force of law, party who suffers from the repudiation may not complain, especially where the repudiation is by a succeeding official who differs with his predecessor.—Dairymen's League Co-op. Ass'n v. Brannan, C.A.N.Y., 173 F.2d 57, certiorari denied 70 S.Ct. 73, 338 U.S. 825, 94 L.Ed. 501.

Truth of stipulated fact

(1) A court examining questions may properly, and at times is duty bound to, find the fact set up in a stipulation to be untrue.—Macklin v. Kaiser Co., D.C.Or., 69 F.Supp. 137.

(2) Conclusiveness of stipulation in general see supra § 13.

Life expectancy

In determining whether jury's verdict, awarding damages for wrongful death, was excessive, trial court had right to compute life expectancy in accordance with federal census bureau's mortality table, printed in World Almanac, despite parties' stipulation that earlier American mortality table allotted shorter life expectancy.—Foerster v. Direito, 170 P.2d 986, 75 Cal.App.2d 328.

Stipulation held not controlling

Supreme court is not controlled by stipulation of parties that if court should direct writ of certiorari to issue, record before court should be considered as returned pursuant to writ, so that merits of controversy may be immediately determined.—Grant Lunch Corporation v. Driscoll, 29 A.2d 888, 129 N.J.Law 408, affirmed 33 A.2d 900, 130 N.J.Law 554, certiorari denied 64 S.Ct. 431, 320 U.S. 801, 88 L.Ed. 484.

47. D.C.—Laughlin v. Berens, 118 F.2d 193, 73 App.D.C. 136.

in which the court has discretion and for which it is responsible it will carefully consider the matter and decide on the basis of the facts and the law.⁴⁸ A stipulation entered into between counsel which materially affects the conduct of litigation, the relevancy of testimony, the number of witnesses used, and the time to be consumed in trying the matter is subject to the consent of the judge of the court involved.⁴⁹ A court is not bound by, and will not enforce, a stipulation which the parties cannot validly make,⁵⁰ which imposes a nonjudicial function on the court,⁵¹ which purports to confer jurisdiction not otherwise possessed,⁵² which is contrary to statutes intended to promote the public safety,⁵³ or which will violate established principles of procedure.⁵⁴ A stipulation for the submission of a cause as though arguments had been prepared and filed on certiorari is not binding on the reviewing court,⁵⁵ since the court is entitled to know what propositions are relied on by petitioner to sustain the writ directed to the reviewing court and to have such propositions supported by brief in argument.⁵⁶ Further, courts ordinarily are not controlled or bound by agreements of counsel on questions of law,⁵⁷ although in some instances courts have been

held bound thereby.⁵⁸

A court is not precluded from adopting findings on issues not determined by a stipulation of facts,⁵⁹ and, hence, it is authorized to adopt findings not in conflict with a stipulation on other issues necessary to the determination of the rights of other litigants who failed to sign the stipulation.⁶⁰ A stipulation by the parties in probate proceedings as to the time and manner of examination of subscribing witnesses will not bar the court from excluding a party from the proceedings who has no interest in the litigation.⁶¹ It has been held that an appellate court cannot take judicial notice of estate proceedings, even though under a stipulation the lower court was enabled to do so.⁶²

§ 18. Conclusiveness and Effect of Particular Stipulations

The general principles discussed supra §§ 1-17 have been applied in determining the conclusiveness and effect of particular stipulations or types of stipulations, as considered infra §§ 19-29.

Examine Pocket Parts for later cases.

48. Injunction

(1) On application for injunction, court will carefully consider language of injunction, even though stipulated, and may sign injunction as stipulated or may require testimony.—Bowles v. Hudspeth, D.C.Or., 62 F.Supp. 803.

(2) On price administrator's application for entry of judgment for stipulated sum and injunction, money judgment was entered and jurisdiction and decision as to injunction would be reserved pending determination of peacetime policy with respect to continuance of price control in lumber industry.—Bowles v. Hudspeth, supra.

49. W.Va.—Gilkerson v. Baltimore & O. R. Co., 51 S.E.2d 767, 132 W.Va. 133.

50. U.S.—Sac & Fox Indians of Iowa v. Sac & Fox Indians of Oklahoma, 45 Ct.Cl. 287, affirmed 31 S.Ct. 473, 220 U.S. 481, 55 L.Ed. 552.

Wis.—State v. McArthur, 23 Wis. 427.

Matters which may be subject of stipulation see supra § 10.

51. Wis.—State v. McArthur, supra. 60 C.J. p 69 note 50.

Duty of court is to administer rights and obligations as they exist, not as parties may choose to substitute others.—Dairymen's League Cop. Ass'n v. Brannan, C.A.N.Y., 173 F.2d 57, certiorari denied 70 S.Ct. 73, 338 U.S. 825, 94 L.Ed. 501.

52. U.S.—Chickasaw Nation v. U. S., 121 Ct.Cl. 41.

53. Wis.—State v. Wetzel, 243 N.W. 768, 208 Wis. 603, 86 A.L.R. 274.

Reasonableness of statute

In prosecution for violating statute regulating length of truck-semi-trailer combination, parties' stipulation that combination used was safer than that permitted, and testimony on which stipulation was based could be considered only in determining whether statute reasonably related to safety.—State v. Wetzel, supra.

54. Fla.—Economy Cash & Carry Cleaners v. Cleaning, Dyeing & Pressing Board, 174 So. 829, 128 Fla. 408.

55. Iowa.—Touche v. Franklin, 207 N.W. 337, 201 Iowa 480.

56. Iowa.—Touche v. Franklin, supra.

57. U.S.—American Chemical Paint Co. v. Dow Chemical Co., C.C.A. Mich., 164 F.2d 208.

Questions of law as not matters which may be the subject of stipulation see supra § 10.

Incidental questions of law

Incidental questions of law relating to relevancy determined by counsel in arriving at facts and stipulations should not cause rejection of stipulations.—North American Mercantile Co. v. U. S., 18 C.C.P.A. 74.

Subsidiary questions of law

Court cannot be controlled by agreement of counsel on subsidiary

question of law, even though parties have so stipulated.—U. S. v. One 1935 Model Pontiac Sedan Automobile, Motor No. 6-11834, D.C.Ky., 15 F. Supp. 604, reversed on other grounds, C.C.A., U. S. v. One 1935 Model Pontiac Sedan Automobile, 105 F.2d 149.

Commencement of life sentence

District attorney's erroneous stipulation that life sentence as an habitual criminal actually commenced at termination of prior unexpired sentence was held not binding on court.—People v. Jones, 59 P.2d 89, 6 Cal.2d 554.

58. Interpretation of statute

Where counsel for all parties to action to enjoin air carrier from engaging in transportation in violation of Civil Aeronautics Act agreed that subdivision of act permitting air carriers to make charter trips and perform special services under regulations prescribed by civil aeronautics board embraced only common carriage operations, such view must be adopted by district court.—Pacific Northern Airlines v. Alaska Airlines, D.C.Alaska, 80 F.Supp. 592.

59. Cal.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.

60. Cal.—Capital Nat. Bank of Sacramento v. Smith, supra.

61. N.Y.—In re Browning's Estate, 276 N.Y.S. 262, 153 Misc. 564.

62. Nev.—Dondero v. Turrillas, 94 P.2d 276, 59 Nev. 374.

§ 19. — To Abide Event

As a general rule a stipulation to abide the event of another suit is binding as long as the causes of action remain the same; it operates as a waiver of the right of trial by jury, and forecloses all questions which might have been, but were not, presented in the other case. "Final judgment," in such a stipulation, means final determination of the action.

General rules governing the construction of stipulations, discussed supra § 11, apply in determining the construction of a stipulation to abide the event of another suit.⁶³ Likewise, general rules as to the operation and effect of stipulations, discussed supra §§ 12-17, apply in determining the operation and effect of such a stipulation.⁶⁴ The stipulation is binding as long as the causes of action remain the same, although the pleadings are amended;⁶⁵ but the parties may, by their subsequent actions, in-

dicating that they have ceased to rely on the stipulation.⁶⁶ The stipulation operates as a waiver of the right of trial by jury,⁶⁷ cuts off all defenses to the suit in which the stipulation is made,⁶⁸ except as defendant may question the amount to be adjudged against him,⁶⁹ and forecloses all questions which might have been, but were not, presented in the other case.⁷⁰ On the other hand, a stipulation providing for following the judgment in another pending suit should not be sustained where such other suit presents wholly extraneous and irrelevant issues, unless such result was clearly intended.⁷¹ Where a stipulation is made to abide the result of a cause without requiring it to be determined on the merits, a judgment in the cause will operate as an estoppel between the parties to the agreement, although the judgment was one as in case of nonsuit.⁷²

63. Ga.—Loeb v. May, 5 S.E.2d 432, 60 Ga.App. 862.

Ill.—Brodek v. Indemnity Ins. Co. of North America, 11 N.E.2d 228, 292 Ill.App. 363.

60 C.J. p 69 note 54.

Validity of stipulation see supra § 10.

Assumption of identity of facts in cases

Tex.—Laird v. Dixie Motor Coach Corp., Civ.App., 122 S.W.2d 244, error refused.

Agreement and stipulation as to test case approved

Pa.—In re Hudson Coal Co., 193 A. 8, 327 Pa. 247.

64. U.S.—Lauterbach Bakery v. C. I. R., C.C.A.3, 118 F.2d 898—Milbank v. Duggan, D.C.N.Y., 54 F. Supp. 555.

Cal.—Taylor v. Western States Land & Mortgage Co., 147 P.2d 36, 63 Cal.App.2d 401.

Ga.—Hendricks v. Rogers, 163 S.E. 204, 174 Ga. 423.

La.—Folse v. Burg, App., 194 So. 10—La Hood v. Home Ins. Co., App., 156 So. 366, followed in La Hood v. Aetna Ins. Co., 156 So. 367, La Hood v. National Fire Ins. Co., 156 So. 367, La Hood v. People's Nat. Fire Ins. Co., 156 So. 367, La Hood v. Springfield Fire & Marine Ins. Co., 156 So. 368, La Hood v. Orient Ins. Co., 156 So. 368, La Hood v. New Jersey Ins. Co., 156 So. 368, and La Hood v. Virginia Fire Ins. Co., 156 So. 368.

N.J.—Blonder v. United Retail Employees of Newark, N. J., Local No. 108, 8 A.2d 766, 126 N.J.Eq. 322.

N.Y.—Molander v. City of New York, 292 N.Y.S. 719, 249 App.Div. 861.

Ohio.—State ex rel. Fulton v. Ach, 24 N.E.2d 462, 62 Ohio App. 439. 60 C.J. p 69 note 55.

Offer of evidence

Where agreement by defendants'

counsel that decision in one case should control other cases admitted similarity of facts, plaintiff, in order to recover, was not required to offer evidence, where plaintiff in first case prevailed.—Savage v. Dorn, Tex.Civ. App., 60 S.W.2d 312, error refused.

Counterclaim

Where parties agreed that decision on counterclaim should follow decision on counterclaim in another case, and counterclaim in latter case was decided adversely to counterclaimant, counterclaim must be dismissed in pending case.—Aluminum Co. of America v. U. S., Ct.Cl., 30 F.Supp. 686—Aluminum Co. of America v. U. S., Ct.Cl., 30 F.Supp. 676, opinion supplemented on other grounds 32 F. Supp. 767.

Deprivation of defense in admiralty

Where admiralty suits were consolidated, to be tried with another suit arising out of same collision, and proctors stipulated that consolidated case should abide decision of such other case, party in consolidated action was not deprived of defense under Harter Act.—The Cockatoo, C.C. A.N.Y., 61 F.2d 889, certiorari denied Howard v. Randall & McAllister, 53 S.Ct. 292, 287 U.S. 669, 77 L.Ed. 576.

Waiver of garnishee's legal rights

Correspondence between parties to garnishment proceeding with respect to holding it in abeyance until determination of question whether garnishee would be required to pay damages in tort to judgment debtor, which correspondence provided that neither party should waive any rights, did not carry over effect of garnishment summons until judgment was rendered on tort claim, since that would be a decided waiver of one of the garnishee's legal rights.—Lewis v. Barnett, 33 P.2d 331, 139 Kan. 821, 93 A.L.R. 1082.

65. Cal.—Gilmore v. American Cent. Ins. Co., 7 P. 781, 67 Cal. 366.

Mo.—Galbreath v. Rogers, 45 Mo.App. 324.

66. Idaho.—North Side Canal Co. v. Idaho Farms Co., 96 P.2d 232, 60 Idaho 748.

67. Me.—Cummings v. Smith, 50 Me. 568, 79 Am.D. 629.

68. Tex.—Shropshire v. Jones, Civ. App., 129 S.W.2d 480.

69. Cal.—American Trust Co. v. Greuner, 78 P.2d 204, 25 Cal.App. 2d 587.

Tex.—Shropshire v. Jones, Civ.App., 129 S.W.2d 480.

70. Mo.—St. Joseph v. Hax, 55 Mo. App. 293.

60 C.J. p 70 note 58.

71. Mo.—Huegel v. Huegel, 46 S.W. 2d 157, 329 Mo. 571.

Only similar issues controlled

Stipulation that issues in suit for cargo damage should be controlled by appellate court decision in suit for other cargo damage on same voyage was held to control similar issues only and did not preclude admission of any evidence or limit recovery to percentage of damages.—The Carso, C.C.A.N.Y., 69 F.2d 824, certiorari denied Navigazione Libera Triestina Societa Anonyme v. Monahos, 54 S.Ct. 781, 292 U.S. 647, 78 L.Ed. 1497, and Navigazione Libera Triestina Societa Anonyme v. F. Romeo & Co., 54 S.Ct. 782, 292 U.S. 647, 78 L.Ed. 1497.

Stipulation, in will contest, for following judgment in pending companion suit to set aside testator's transfer of stock, should not be given effect where judgment in companion suit was based, not on undue influence, but on subsequent amendment asserting trust.—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

72. N.Y.—Brown v. Sprague, 5 Den. 545.

To abide "final judgment" or "final decision." The expression "final judgment," as used in a stipulation to abide the event, is synonymous with the expression "final determination of the action," and such determination is not reached until the final settling of the rights of the action of the parties beyond all appeal.⁷³ Where a stipulation is made that on final judgment in a case appealed either party might enter judgment in another case corresponding to the final judgment in the case appealed, the stipulation does not become functus officio when the judgment in the case appealed was reversed on the ground of error in overruling a demurrer to the complaint, and, where the pleadings in that case are thereupon amended without making any substantial change in the issues and a final judgment obtained on the merits, a judgment corresponding thereto may be entered in the other case.⁷⁴ Within an agreement that final decision in an interference proceeding shall be controlling between the parties thereto with respect to the issues involved therein, the decision of the court of customs and patent appeals, to which the decree of the board of appeals of the patent office is appealed, is a final decision.⁷⁵

Determination of cause in appellate court. Where it is stipulated that a suit shall abide the "determination" of another cause in the appellate court, there is a determination of the other suit, within the meaning of the stipulation, where the appeal was dismissed because appellant's brief did not comply with the rules of court.⁷⁶ A stipulation that, in the event that the court reverses judgment in a similar case pending appeal and the higher court denies a hearing, the court shall reverse the judgment in the present case will be given effect.⁷⁷ So, a judgment should be reversed in accordance with the court's views expressed in another case, where the parties stipulate that the cases involve the same questions and that the decision in such other case shall control, and the record supports the

stipulation.⁷⁸ Where parties have two suits pending in the same court at the same time, and they file a stipulation of record that the same judgment shall be entered in the second suit as shall have been entered in the first suit, and that in the event of an appeal the same disposition may be made of the second suit as is made of the first suit, and on appeal the judgment in the first suit is reversed, the appellate court will reverse the judgment in the second suit.⁷⁹ Where an appeal has been taken, and the parties stipulate that the opinion of the court in another case, pending the appeal, is decisive of the questions involved, the court may, where the authorities agreed on reasonably support the action, render an opinion in accordance with the stipulation.⁸⁰ In an action on a claim against an estate, a stipulation that the trial shall remain in abeyance until a decision is rendered on the appeal from the judgment obtained by claimant against deceased waives defendant's right to claim that the judgment on which the claim is based is not final, and that hence the suit was premature.⁸¹

Matters excepted from agreement. Where there are two or more actions pending, and pleadings are made up as to certain issues, and the parties stipulate that the law as finally held in the one case tried shall control in the other cases, and be conclusive as to all matters in the cases not yet tried, "except as to matters of fact upon which issue may be joined therein," such stipulation does not preclude either party, after the one case has been finally disposed of, from raising other issues of fact by proper pleadings, on leave of the court.⁸²

Judgment may be entered without notice by trial judge, on learning the result of a test case, under a stipulation suspending the decision of a case tried before him, until the decision of an appellate court can be had in a pending case, and it is not necessary that he should have read the decision in such pending case.⁸³

Effect of failure of stipulated test. Where the

73. N.Y.—Dean v. Marschall, 35 N.Y. S. 724, 90 Hun 335.
60 C.J. p 70 note 60.

Dismissal of application for writ of error to review judgment renders judgment final, within stipulation.—Shropshire v. Jones, Tex.Civ.App., 129 S.W.2d 480.

74. Cal.—Gilmore v. American Cent. Ins. Co., 7 P. 781, 67 Cal. 366.

75. U.S.—Arcless Contact Co. v. General Electric Co., C.C.A.N.Y., 87 F. 2d 340.

76. Mo.—Hanchett Bond Co. v. Gloré, 232 S.W. 159, 208 Mo.App. 169.
60 C.J. p 70 note 62.

77. Cal.—Pacific Gas & Elec. Co. v. Davis, 209 P.2d 12, 93 Cal.App.2d 869.

78. Fla.—Daffin v. Board of Public Instruction for Jackson County, 155 So. 119, 114 Fla. 875.

79. Pa.—Weisberger v. Safety Mut. Fire Ins. Co., 61 Pa.Super. 608.

80. Okl.—Lowden v. Excise Board of Pittsburg County, 40 P.2d 16, 170 Okl. 181, followed in Lowden v. Excise Board of Caddo County, 40 P. 2d 17, 170 Okl. 182—Lowden v. Excise Board of Cotton County, 40 P.

2d 18, 170 Okl. 182, Chicago, R. I. & P. Ry. Co. v. Excise Board of Pottawatomie County, 40 P.2d 18, 170 Okl. 184, and Chicago, R. I. & P. Ry. Co. v. Excise Board of Stephens County, 40 P.2d 19, 170 Okl. 184.

81. Cal.—American Trust Co. v. Greuner, 78 P.2d 204, 25 Cal.App. 2d 587.

82. Ohio.—Swisher v. McWhinney, 60 N.E. 565, 64 Ohio St. 343.

83. Ala.—Stein v. Burden, 30 Ala. 270.

test of their rights provided for by stipulation of the parties fails without fault of either of them, they are limited to their respective rights as they existed before the stipulation was made.⁸⁴

§ 20. — For Dismissal, Discontinuance, Reinstatement, or Revival

Stipulations for dismissal or discontinuance must be fairly and reasonably construed, in the light of the surrounding circumstances and the result sought. A formal order by the court is not necessary to the efficacy of such a stipulation.

Stipulations for the dismissal or discontinuance of a suit must be given a fair and reasonable construction,⁸⁵ and interpreted in the light of the circumstances surrounding the parties and in view of the result which the parties were attempting to accomplish.⁸⁶ So, where plaintiff suing for personal injuries and defendant's insurer stipulate to discontinue the action on payment of a certain sum, and subsequently judgment is entered for plaintiff, the stipulation is binding on the parties, and plaintiff cannot recover on the judgment.⁸⁷ A stipulation for dismissal of a suit for specific performance of a contract ends the suit;⁸⁸ and, where the parties to an action in which judgment is rendered enter into an agreement, while an appeal is pending, for

the execution of papers discontinuing the appeal and the action, all previous proceedings are annulled and the judgment is not res judicata in a subsequent action.⁸⁹ A stipulation for the dismissal of an action does not affect any rights not asserted in the complaint.⁹⁰ A stipulation for discontinuance entered into before trial does not authorize the entry of a judgment as on the merits, such as would bar a subsequent action for the same cause;⁹¹ but it has been held that a stipulation for a discontinuance entered into after judgment includes by consequence the vacation of the judgment.⁹²

Necessity of order of discontinuance or dismissal. Where a stipulation for discontinuance is filed, it operates as a discontinuance until set aside, without any formal order of discontinuance by the court;⁹³ and where, in an action against several, a stipulation is entered into whereby the interests of all defendants except one are adjusted, no formal order of dismissal as to the parties to the stipulation is necessary to make a judgment against the one defendant valid.⁹⁴

*Stipulation for reinstatement of a case signed by respective counsel may properly be considered by the chancellor as a motion for rehearing.*⁹⁵

84. Miss.—Moore v. Martin, 18 So. 119.

60 C.J. p 70 note 66.

85. Tenn.—Jones v. Kimbro, 6 Humphr. 319.

Validity see supra § 10.

Practice and rules governing motion

Where the court and counsel had an understanding, at argument of motion to dismiss, that decision would be under the federal court practice then prevalent, new procedural rules governing the motion, which became effective before motion was ruled on, would not be made applicable by the court's delay in deciding it.—Leach v. Ross Heater & Manufacturing Co., C.C.A.N.Y., 104 F.2d 88.

86. Ill.—Fields v. Berg, 76 N.E.2d 554, 333 Ill.App. 46.

N.Y.—Nordred Realities v. Langley, 7 N.Y.S.2d 903, 169 Misc. 659, affirmed 18 N.E.2d 38, 279 N.Y. 636, certiorari denied 59 S.Ct. 644, 306 U.S. 655, 83 L.Ed. 1053.

60 C.J. p 70 note 69.

Withdrawal of counterclaim and defenses thereto

(1) Withdrawal of counterclaim pursuant to stipulations was as binding as though counterclaim had been dismissed on merits.—Salamina v. Tartaglia, 106 N.Y.S.2d 487.

(2) Order denying defendants' motion to place cause on calendar for

trial by jury was reversed and motion granted, where parties stipulated that counterclaim for declaratory judgment, and defenses to such counterclaim, be withdrawn on the merits and that certain defendants be withdrawn as parties.—De Puy v. Miller, 77 N.Y.S.2d 266, 273 App.Div. 905.

Effect of question as to release

Where injured employee signed stipulation for dismissal of his action in connection with a release, and there was a jury question as to whether release was signed on a condition which was not fulfilled, and employee's attorney filed release and dismissal with the clerk for purpose of tendering documents to employer and using them as exhibits in case, employer could not rely on such stipulation to sustain a motion to dismiss.—Kelley v. Illinois Cent. R. Co., 177 S.W.2d 435, 352 Mo. 301, certiorari denied 64 S.Ct. 1055, 322 U.S. 738, 88 L.Ed. 1572.

Discontinuance on merits

Stipulation to settle and discontinue cause on merits rests on no better basis than receipt or release, and its validity may be determined in action to enforce original cause of action, notwithstanding stipulation is annexed to order discontinuing action and does not recite that it is on merits.—Johnson v. Antonopoulos, 210 N.Y.S. 589, 213 App.Div. 324.

Person not party or privy to stipu-

lation was not bound thereby.—Lansdell Co. v. Morrison, 89 N.Y.S.2d 870.

Stipulation discontinuing third-party action by compensation claimant was held enforceable as contract.—Burmester v. De Lucia, 189 N.E. 231, 263 N.Y. 315.

87. N.Y.—Fornagiel v. Wacholder, 285 N.Y.S. 1015, 247 App.Div. 793.

88. Wis.—Logemann v. Logemann, 15 N.W.2d 800, 245 Wis. 515.

Contents of order

The text rule is true, although the order dismissing the suit, entered on the stipulation, did not set forth the terms inducing the dismissal, as is required by statute with respect to a stipulation as to proceedings in an action.—Logemann v. Logemann, supra.

89. N.Y.—Foss v. Riordan, 84 N.Y.S. 2d 224, affirmed 79 N.Y.S.2d 515, 273 App.Div. 982, appeal dismissed 80 N.E.2d 658, 298 N.Y. 509.

90. Or.—Tallman v. Havill, 291 P. 387, 133 Or. 407.

91. Minn.—Rofe v. Burlington, etc., R. Co., 40 N.W. 267, 39 Minn. 398.

92. N.Y.—Deen v. Milne, 20 N.E. 861, 113 N.Y. 303.

93. Mich.—Chronowski v. Zielinski, 134 N.W. 982, 168 Mich. 590.

94. Mo.—Bailey v. McWilliams, 85 S.W. 618, 111 Mo.App. 35.

95. Fla.—State v. Bird, 133 So. 84, 101 Fla. 1229.

Stipulation for revival. Where a verdict was rendered for plaintiff, and judgment entered thereon, and pending a motion for a new trial he died, a stipulation suggesting his death, consenting to the revival in the name of his administratrix, reserving to defendant the same objections to the revivor that he might make if it had been "pursuant to statute" instead of stipulation, it has been held that, under the stipulation which is to be taken in its broadest significance when objected to for the first time on appeal, no objections are saved to defendant.⁹⁶

§ 21. — As to Pleadings

- a. In general
- b. Amendments
- c. Extending time to plead

a. In General

Stipulations as to pleadings are to be construed in accordance with their spirit and in furtherance of justice, and are conclusive of all matters necessarily included therein.

As in the case of stipulations generally, discussed supra § 11, stipulations relating to pleadings are

not to be construed technically, but rather in accordance with their spirit and in furtherance of justice.⁹⁷ Subject to limitations applicable to stipulations generally, discussed supra § 12, a stipulation with regard to the pleadings operates by way of estoppel against the parties thereto and is conclusive of all matters necessarily included therein,⁹⁸ but not of matters not so included,⁹⁹ such as a mere legal conclusion not warranted by the facts pleaded;¹ and a stipulation as to the pleadings on the first trial has been held not to be binding on the hearing after the cause is remanded.² After a ruling by the trial judge, the parties cannot make a new case for themselves by a "stipulation on appeal," seeking to incorporate matter into the bill.³

Grounds of demurrer which are cured by a stipulation of the parties should be overruled.⁴

Matters admissible under general issue or general denial. Where the parties stipulate that defendant may, under the general issue or general denial, introduce any evidence admissible under proper pleadings, the stipulation will be held to include both affirmative and negative pleas;⁵ and under such a

96. Mo.—Sterling v. Parker-Washington Co., 170 S.W. 1156, 185 Mo. App. 192.

97. U.S.—Mutual Life Ins. Co. v. Harris, Md., 97 U.S. 331, 24 L.Ed. 959.

Validity of stipulation see supra § 10.

98. Mo.—Carpenter v. City of Versailles, App., 65 S.W.2d 957.

Ohio.—Newell v. Merkle, Mun., 68 N.E.2d 93.

Pa.—City of McKeesport v. Sharp, 31 A.2d 914, 151 Pa.Super. 49.

60 C.J. p 71 note 81.

Admissions by stipulations as to pleadings see infra § 24.

Petition as complaint demurred to

Where party stipulated that in event court granted leave to citizen to commence action to test legality of appointment of state officer petition should be considered as a complaint to which opposing party demurred, on determination that action was properly brought, stipulation became effective and petition would be so considered.—State ex rel. Martin v. Ekern, 280 N.W. 393, 228 Wis. 645.

Stipulation as equivalent to personal service

(1) In proceeding wherein defendants were not served with summons, a stipulation under which they were allowed a certain length of time to answer was equivalent to personal service and return of the summons as of the date the stipulation was filed.—Merner Lumber Co. v. Silvey, 84 P.2d 1062, 29 Cal.App.2d 426.

(2) Where stipulation making successor administrator a party defendant declared that pleadings and issues as joined should govern trial and that all the allegations of the complaint should apply to successor administrator, in so far as the interests of the estate were concerned, it was not necessary to serve summons and complaint on him.—Funston v. Little, 25 N.W.2d 92, 75 N.D. 60.

Allegations deemed denied or controverted

Cal.—Webster v. Webster, 14 P.2d 522, 216 Cal. 485.

Ky.—Little v. Citizens' Sav. Bank of Paducah, 57 S.W.2d 15, 247 Ky. 287.

Facts stipulated as part of petition

Material facts disclosed by zoning ordinance and map, stipulated to be considered as part of petition in mandamus proceedings, would be considered as true on demurrer to petition.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Sufficiency of petition

In view of agreement, sufficiency of petition was required to be determined by facts shown by evidence and defendants' pleadings; truth of allegation could not be presumed, as against general demurrer, where plaintiffs agreed that sufficiency of petition should be determined on evidence and all pleadings.—Murski v. Kowalski, Tex.Civ.App., 45 S.W.2d 747.

Objection to incorrect use of "alleged" in complaint is eliminated by stipulations of counsel that the word

be stricken from the complaint.—Saypol v. Wolf, 1 N.Y.S.2d 199, 165 Misc. 517.

99. U.S.—Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., D.C. N.Y., 285 F. 73, reversed on other grounds, C.C.A., 290 F. 625, rehearing denied 292 F. 861, certiorari denied 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.

60 C.J. p 71 note 82.

Sufficiency of prior pleadings and proceedings

Stipulation that court, in ruling on demurrer, might consider pleadings and proceedings in a previous action without prejudice to plaintiff's right to object to legal irrelevancy and insufficiency of the former pleadings and proceedings did not preclude him from raising question that former pleadings and proceedings were insufficient to justify any ruling on the instant demurrer.—Pierce v. Schroeder, 232 P.2d 460, 171 Kan. 259.

1. U.S.—Corbett v. Printers & Publishers Corp., C.C.A.Cal., 127 F.2d 195.

Inadequacy of statutory remedy

U.S.—Corbett v. Printers & Publishers Corp., supra.

2. Ill.—People v. Lord, 146 N.E. 506, 315 Ill. 603.

3. Mass.—Becker v. Calnan, 48 N.E. 2d 668, 313 Mass. 625.

4. Ga.—Cordell v. Metropolitan Life Ins. Co., 187 S.E. 292, 54 Ga.App. 178.

5. Ky.—People v. Porter, 7 T.B.Mon. 609.

stipulation it is the duty of the court to permit any matter of fact to go to the jury which tends to establish any proper defense.⁶ It has similarly been held that, where the parties pleaded in short, by consent, the general issue, "with leave to give in evidence any matter which, if well pleaded, would be admissible in defense of the action," a special plea of waiver is not required to authorize the admission in evidence of waiver;⁷ but a stipulation that defendant be permitted to have "all competent defenses under the general denial" embraces only such defenses as were competent in bar, and does not authorize a defense in abatement for a defect of parties plaintiff not appearing on the face of the complaint.⁸ A stipulation that defendant might introduce proof of all matters under the plea of the general issue that might be offered had they been specially pleaded does not cover such pleas as are required by special practice statutes to be verified by affidavit.⁹

Particular stipulations in respect of pleadings. In addition to the stipulations relating to pleadings already discussed, or to be discussed, in this section, among others¹⁰ that have received construction by the courts are stipulations eliminating a claim of variance;¹¹ withdrawing particular allegations, so as to change the nature of the action;¹² submitting a case on an affidavit of defense;¹³ submitting issues in consolidated actions;¹⁴ withdrawing a plea of the general issue, so that trial may be had on the issue raised by a special plea;¹⁵ or waiving pleadings¹⁶ or their sufficiency.¹⁷ A stipulation that, if the court should take jurisdiction of the controversy, it should determine the case on the facts stated in the petition and the return thereto has the effect of a motion for judgment on the pleadings.¹⁸

b. Amendments

Stipulations as to amendments to pleadings, as with respect to the time for, or withdrawal of, amendments, have been construed, or given effect, in accordance with principles governing stipulations generally.

Where, after the cause is placed on the trial calendar, the parties stipulate that all parties may file amended pleadings as they desire, the stipulation constitutes a waiver of objection to the amendment of the complaint so as to set up an action based on fraud instead of one for an accounting pursuant to contract;¹⁹ and under a stipulation allowing defendant to amend a plea after judgment overruling his demurrer, and providing that such leave shall not embrace the right to file new pleas, defendant is not precluded from asking leave of the court to file new pleas.²⁰ Where defendant proceeds to trial and agrees that all objections to the pleadings shall be taken under advisement by the court, such course reserves to either party the right to file trial amendments, within the discretion of the trial court, necessary to conform to the issues as made by the pleadings and proof.²¹ Under a stipulation providing that the declaration should be considered as amended by the addition of such counts in tort as the state of facts brought out at the trial should justify, the amendments were limited to counts in tort.²² A stipulation that the pleadings shall be deemed amended to conform to the facts as found by the court will not preclude the losing party from questioning the sufficiency of the findings or of the evidence to support them.²³ Where evidence was inadmissible under the original answer, but the court at the trial gave leave to defendant to file an amended answer, which was not then filed, and no leave was granted to file it later, the parties could not bind the court by a provision,

6. Ill.—Truman's Pioneer Stud Farm v. Baker, 176 Ill.App. 524.

7. Ala.—Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 103 So. 670, 212 Ala. 588.

8. Ind.—Moore v. Harmon, 41 N.E. 599, 142 Ind. 555.

9. Ill.—Schuyler County v. Missouri Bridge, etc., Co., 100 N.E. 239, 256 Ill. 348—Supreme Lodge A. O. U. W. v. Zuhlke, 21 N.E. 789, 129 Ill. 298.

10. Ky.—Morgan v. Lewis, 189 S.W. 1118, 172 Ky. 813.
60 C.J. p 72 note 13.

11. Ky.—Garriott v. Brandenburg Constr. Co., 251 S.W. 935, 199 Ky. 678.
60 C.J. p 72 note 14.

12. N.C.—McNeill v. Thomas, 165 S. E. 712, 203 N.C. 219.

13. Pa.—Collins v. London Assur. Corp., 30 A. 924, 165 Pa. 298.
60 C.J. p 72 note 15.

14. Wash.—First Nat. Bank v. Fowler, 102 P. 1038, 54 Wash. 65.
60 C.J. p 72 note 16.

15. R.I.—Darman v. Zilch, 7 A.2d 699, 63 R.I. 127.

Statutes held inapplicable and not to validate proceedings.—Darman v. Zilch, *supra*.

16. Wyo.—Acme Coal Co. v. Northrup Nat. Bank, 146 P. 593, 23 Wyo. 66, L.R.A.1915D 1084, Ann.Cas. 1917B 564.
60 C.J. p 72 note 17.

Dispensing with reply

Where the effect of a stipulation is to dispense with the filing of a reply, no objection can thereafter be based on its absence, even though it might otherwise have been required

by statute.—Traill v. Ostermeier, 300 N.W. 375, 140 Neb. 432.

17. Or.—Radford v. First Nat. Bank, 142 P. 362, 71 Or. 84.
60 C.J. p 73 note 18.

18. Wis.—State ex rel. Coykendal v. Karel, 255 N.W. 132, 215 Wis. 505.

19. Ariz.—Smith v. Pinner, 201 P. 2d 741, 68 Ariz. 115.

20. N.J.—Hale v. Lawrence, 22 N.J. Law 72.
60 C.J. p 71 note 87.

21. Tex.—National Mut. Ben. Ass'n v. Aaron, Civ.App., 45 S.W.2d 371, modified on other grounds, Com. App., 67 S.W.2d 855.

22. Md.—Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am.D. 779.

23. Idaho.—Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist., 102 P. 481, 16 Idaho 525.

in a stipulation subsequently made that a supplemental answer materially changing the issues might be filed, and considered as filed prior to the trial, and thereby require the appellate court to determine questions never determined by the trial court.²⁴

The agreement of defendant's counsel, in a bail trover action, to waive objection to a proffered amendment of the suit to include proper parties does not constitute a waiver of defendant's right to move for a restitution judgment on voluntary dismissal of the action by plaintiff.²⁵ A stipulation not to amend a pleading, when clearly intended only to avoid delaying the trial, does not prevent the court from granting an amendment at the trial in furtherance of justice.²⁶

Amendment of a libel may be held permissible under a stipulation.²⁷ So, a libellant will be given leave to file an amended libel in accordance with the terms of an agreement, at a conference in chambers, between libellant and claimants of the vessel.²⁸

A statement of claim may, in accordance with a stipulation, be treated as amended.²⁹

Time for amendment. A stipulation that an amendment may be made at any time before the cause is set for trial, subject to any legal objections, does not cover an amendment not tendered until after the cause has been set for trial.³⁰ Where the parties stipulate that plaintiff may have as much time as he may require to file an amended declaration, defendant, feeling that plaintiff is taking too much time, should appeal to the court to fix a time limit, and notify plaintiff of such request, or notify plaintiff of the time when he would request the court to enter judgment.³¹

Withdrawal of amendments. A stipulation to the effect that amendments to the declaration are

withdrawn and excluded from the record, and will not be interposed on a jury retrial ordered by the court, and that the declaration will remain in full force and effect for the retrial, does not provide for a retrial without regard to the sufficiency of the declaration.³²

Effect of amendment on motion to strike. Where plaintiff moves to strike out part of the answer, and defendant's counter motion to amend is granted, plaintiff's request that the answer as amended be deemed one of the pleadings, as though specified in his notice of motion, will be regarded as a stipulation, so that no new motion is necessary, the amended answer being regarded as defendant's pleading on the motion.³³

c. Extending Time to Plead

A stipulation extending the time to plead will be given effect according to its terms.

A stipulation extending time to "answer" gives defendant the right, within that time, to demur,³⁴ or to make a motion to dismiss³⁵ or to strike;³⁶ but a stipulation extending the time to plead, provided defendant pleads on the merits, does not give the right to demur.³⁷ If a stipulation extending the time to answer includes a provision that defendant may make such application as he may be advised, a motion to strike out parts of the complaint is proper.³⁸ A stipulation that defendant would file an answer in a few days after default day, containing a general demurrer and a general denial, does not preclude him on the same day and before the filing of such answer from filing a plea of privilege.³⁹ A stipulation extending the time to answer gives the time stipulated in addition to the unexpired period existing when the agreement is executed;⁴⁰ and a stipulation not expressly extending the time to file an answer, but providing that it may be filed on

24. U.S.—Great Northern R. Co. v. U. S., Minn., 218 F. 302, 134 C.C.A. 98, L.R.A.1915D 408.

25. Ga.—Stewart v. Hasty, 48 S.E. 2d 757, 77 Ga.App. 524.

26. N.Y.—Hennequin v. Clews, 46 N. Y.Super. 330, affirmed 84 N.Y. 676, affirmed 4 S.Ct. 576, 111 U.S. 676, 28 L.Ed. 565.

27. U.S.—The Carso, C.C.A.N.Y., 69 F.2d 824, certiorari denied Navigazione Libera Triestina Societa Anonyme v. Monabos, 54 S.Ct. 781, 292 U.S. 647, 78 L.Ed. 1497, and Navigazione Libera Triestina Societa Anonyme v. F. Romeo & Co., 54 S.Ct. 782, 292 U.S. 647, 78 L.Ed. 1497.

28. U.S.—Murray v. The Meteor, D. C.N.Y., 91 F.Supp. 322.

29. Pa.—Lit Bros., to Use of Kaplan v. Goodman, 18 A.2d 519, 144 Pa.Super. 43.

Amendment to show transfer of notes to use plaintiff

Pa.—Lit Bros., to Use of Kaplan v. Goodman, supra.

30. Cal.—Cooper v. Burch, 74 P. 37, 140 Cal. 548.

31. Fla.—State ex rel. Alfred E. Destin Co. v. Heffernan, 47 So.2d 15.

32. Mich.—Rumbos v. Singos, 44 N. W.2d 899, 329 Mich. 123.

33. N.Y.—Nassau County v. Kensington Ass'n, 21 N.Y.S.2d 208.

34. Ill.—Woods v. First Nat. Bank of Chicago, 41 N.E.2d 235, 314 Ill. App. 340.

60 C.J. p 71 note 92. Validity see supra § 10.

35. U.S.—Universal Rim Co. v. General Motors Corp., C.C.A.Mich., 31 F.2d 969.

Delay in making motion was held excused by indefiniteness of stipulation.—Terwilliger v. Secor, 106 N.Y.S. 2d 485—Terwilliger v. Terwilliger, 106 N.Y.S.2d 481, 201 Misc. 453.

36. Ill.—Woods v. First Nat. Bank of Chicago, 41 N.E.2d 235, 314 Ill. App. 340.

37. Wis.—Doty v. Strong, 1 Pinn. 313, 40 Am.D. 773.

38. N.Y.—Lackey v. Vanderbilt, 10 How.Pr. 155.

39. Tex.—Ozbolt v. Lumbermen's Indemnity Exch., Civ.App., 205 S.W. 158.

40. N.Y.—Pattison v. O'Connor, 13 Hun 307, 60 How.Pr. 141.

being signed by defendant's attorney in fact, gives defendant a reasonable time to file his answer.⁴¹

Where a defendant signs a stipulation purporting to extend his time to answer, but actually requiring answer in less than the statutory time, and there is no consideration for the stipulation, he has the right to avail himself of the full statutory time.⁴² The last day is included, under a stipulation extending the time to plead "until" a certain date, if, from the context, it appears to have been intended as inclusive of the last date.⁴³ Where a stipulation provided that plaintiff's time to reply or demur to any of the defenses set up in the answer served, which contained a counterclaim and special matter in defense, and to make any motion with reference to the answer, should be extended if defendant should elect not to serve an amended answer, no amended answer having been served, plaintiff is entitled to reply to defendant's counterclaim and to make any proper motion with respect to the other defenses set up in the answer within the time specified.⁴⁴

Acts of parties as aiding construction. If a stipulation extending the regular time to plead is of

doubtful meaning, the acts of the parties in the further conduct of the proceedings may be resorted to in determining the intent of the parties.⁴⁵

Court rule inapplicable. A court rule providing the conditions on which a private agreement between parties as to the proceedings shall be binding if either party denies the agreement does not apply where plaintiff does not deny at least some manner of agreement for extension of time for defendant to answer or plead.⁴⁶

§ 22. — As to Issues

- a. In general
- b. As eliminating other issues

a. In General

The parties and the court are bound by stipulations fixing or limiting the issues, and cannot depart therefrom; evidence of facts not within the issues agreed on is not admissible.

The rules governing the construction⁴⁷ and operation and effect⁴⁸ of stipulations generally apply to stipulations with respect to the issues. Accordingly, the parties are bound by stipulations fixing the issues, or eliminating particular issues, and will

41. Wis.—Maxwell v. Jarvis, 14 Wis. 506.

42. N.Y.—Olson v. Jordan, 43 N.Y.S. 2d 348, 181 Misc. 942.

43. Minn.—Barker v. Keith, 11 Minn. 65.

44. N.Y.—Sheridan v. Tucker, 122 N.Y.S. 800, 138 App.Div. 436.

45. Cal.—Elmhurst Packers v. Superior Court of Alameda County, 116 P.2d 487, 46 Cal.App.2d 648.

46. Mich.—Kruizenga v. Fuller, 299 N.W. 787, 299 Mich. 9.

47. U.S.—Denver Union Stock Yard Co. v. U. S., Colo., 58 S.Ct. 990, 304 U.S. 470, 82 L.Ed. 1469.

Ala.—O'Bar v. Southern Life & Health Ins. Co., 168 So. 580, 232 Ala. 459.

Ariz.—In re Brandt's Estate, 190 P. 2d 497, 67 Ariz. 42.

N.J.—Whelan v. Borough of Chatham, 74 A.2d 429, 9 N.J.Super. 341.

Or.—McLean v. Porter, 35 P.2d 664, 148 Or. 282.

Pa.—In re Jones' Estate, 60 A.2d 366, 163 Pa.Super. 129.

60 C.J. p 73 note 21.
General rules of construction of stipulations see supra § 11.

Particular terms construed

(1) In general.

La.—Nichols v. Tall Timber Lumber Co. of Louisiana, App., 145 So. 691.

Mo.—City of St. Louis v. Senter Commission Co., 82 S.W.2d 87, 336 Mo. 820.

N.Y.—Svenska Taendsticks Fabrik

Aktiebolaget v. Bankers Trust Co., 196 N.E. 748, 268 N.Y. 73.

(2) Term "all defenses" entitled defendant to present any defense available.—Shine v. Nabob Silver Lead Co., 1 P.2d 864, 163 Wash. 577.

Particular stipulations construed

U.S.—S. C. Johnson & Son v. Johnson, D.C.N.Y., 28 F.Supp. 744.

Tex.—Peavy-Moore Lumber Co. v. Spreckles, Civ.App., 153 S.W.2d 325, error refused.

Wis.—Costello v. Polenska, 8 N.W.2d 307, 242 Wis. 204.

60 C.J. p 73 note 21 [a], [b].

48. U.S.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A.Ill., 179 F.2d 133.

Cal.—Hadden v. Moran, 232 P.2d 594, 104 Cal.App.2d 777.

Iowa.—In re Mattes' Estate, 300 N.W. 639, 231 Iowa 101.

Mich.—Sunday Lake Iron Co. v. City of Wakefield, 35 N.W.2d 470, 323 Mich. 497.—McDivitt v. Mapes, 300 N.W. 107, 299 Mich. 329.

Minn.—Anderson v. Hawthorn Fuel Co., 270 N.W. 146, 198 Minn. 509.

N.Y.—McKenna v. Williamsburgh Sav. Bank, 16 N.Y.S.2d 206, 258 App.Div. 894, reargument denied In re Lamerdin's Estate, 17 N.Y.S.2d 480, 258 App.Div. 907.

Pa.—Fisher v. Diehl, 40 A.2d 912, 156 Pa.Super. 476.—Huron v. Schomaker, 1 A.2d 537, 132 Pa.Super. 462.

Tex.—Gambill v. Snow, Civ.App., 189 S.W.2d 33, refused for want of merit.

Operation and effect of stipulations generally see supra §§ 12-17.

Elimination of issues

(1) Stipulations of counsel may have the effect of eliminating from the trial of a cause issues that otherwise might be presented.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C.C.A.Mo., 127 F.2d 799.

(2) Issues tendered by pleadings held not withdrawn from jurisdiction of court by stipulation.—Brandt v. Brandt, 89 P.2d 171, 32 Cal.App.2d 99.

Burden of proof held not affected

U.S.—U. S., to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co. of New York, C.C. A.N.Y., 142 F.2d 726.

Defense of incapacity to sue barred

Defendant was estopped to defend action specifically to enforce contract on ground that plaintiff had no legal capacity to sue, by stipulation which provided that action should be tried on its merits.—J. W. Seavey Hop Corp. of Portland, Or., v. Pollock, 147 P.2d 310, 20 Wash.2d 337.

Claim of limitations barred

Where brothers in partition suit stipulated to have chancellor hear their claims pertaining to mother's estate, and the chancellor had jurisdiction of the subject matter and the parties, stipulation barred any claim that notes were barred by limitations.—Herbolsheimer v. Herbolsheimer, 53 N.E.2d 18, 321 Ill.App. 285.

not be permitted to depart therefrom.⁴⁹ So, the court is without power to go beyond the stipulation of issues made by the parties,⁵⁰ and undertake to pass on⁵¹ or submit⁵² issues withdrawn or excluded from consideration; nor can error be predicated on the failure of the court to submit to the jury an issue covered by a stipulation.⁵³ On the other hand, neither party may complain of the action of the court in submitting any of the issues agreed on;⁵⁴ and a stipulation of counsel, in the course of a trial, with relation to a valid issue in the case may be accepted as foundation for a finding of fact.⁵⁵ If defendant binds himself to defend only on a certain ground, plaintiff need not prove facts not essential to entitle him to recover as against the defense so limited.⁵⁶ A stipulation that only one issue, or only particular issues, are involved authorizes entry of judgment for the one party or the other according as the fact and the issues are decided.⁵⁷ Where parties stipulated that a plea of privilege should be determined on contract and petition, al-

legations of the petition were admitted as established only for the purpose of determining venue.⁵⁸ Where the parties stipulated that all the issues presented by the pleadings may be submitted for trial and determination, the court properly tried all the issues presented by the complaint and by the cross complaint, although the cross complaint was an improper pleading and could have been eliminated.⁵⁹

Issues litigated by consent. Where the facts are stipulated and no objection is made to the consideration of any of such facts under the pleadings, whatever issues are presented by the stipulated facts must be considered as having been litigated by consent.⁶⁰

As waiver of questions as to pleading. An issue presented by a stipulation has been held subject to determination, even though not presented by the pleadings,⁶¹ and all questions of pleading are waived by a stipulation that the case shall be considered at issue on a particular question;⁶² but under other

49. U.S.—*Gatliff v. Helburn*, D.C. Ky., 31 F.Supp. 495.

Cal.—*Williams v. General Ins. Co. of America*, 63 P.2d 289, 8 Cal.2d 1. Colo.—*Craft v. Stumpf*, 170 P.2d 779, 115 Colo. 181.

Ill.—*Shell Oil Co. v. Industrial Commission*, 94 N.E.2d 888, 407 Ill. 186.

Iowa.—*Koch v. Abramson*, 275 N.W. 58, 223 Iowa 1356.

Mass.—*R. Dunkel, Inc. v. V. Barletta Co.*, 18 N.E.2d 377, 302 Mass. 7.

N.Y.—*Kemp v. Kemp*, 16 N.Y.S.2d 26, 172 Misc. 738.

N.C.—*Austin v. Hopkins*, 43 S.E.2d 849, 227 N.C. 638.

N.D.—*Trott v. State*, 171 N.W. 827, 41 N.D. 614, 4 A.L.R. 1372.

Okl.—*Bruner v. Burch*, 65 P.2d 1215, 179 Okl. 338.

S.C.—*Williamsburg County v. Graham*, 196 S.E. 547, 190 S.C. 233.

Relief from stipulation see *infra* §§ 34-37.

Terms appearing plainly in record

Parties were bound by their agreement regarding issue to be tried, where the terms thereof clearly appeared in the record.—*D. S. Pate Lumber Co. v. Weathers*, 146 So. 433, 167 Miss. 228.

Limitation of issues held binding throughout trial

Conn.—*City of New Haven v. New Haven Water Co.*, 172 A. 767, 118 Conn. 389.

Issue of title by acquiescence not involved.—*Oaks v. Renshaw*, 168 P. 2d 199, 74 Cal.App.2d 144.

Waiver of special grounds of demurrer

Where one of defendants, after interposing special demurrers, joined in stipulation of all parties which

eliminated one issue, such defendant, by accepting benefit of such stipulation, waived right to insist on special grounds of demurrer.—*Albany Federal Savings & Loan Ass'n v. Henderson*, 31 S.E.2d 20, 198 Ga. 116.

50. Ala.—*McCall v. Morgan*, 14 So. 2d 374, 244 Ala. 472.

Fla.—*Sunseald Products v. Domino Canning Ass'n*, 3 So.2d 377, 147 Fla. 700.

Or.—*Kitterman v. Eagle Pine Co.*, 257 P. 815, 122 Or. 137.

Mortgage foreclosure

However, in mortgage foreclosure action, stipulation that only question to be tried was effect of the release of part of the mortgaged premises was held not to limit court in determining other questions involved.—*Malinoski v. Mekody*, 48 N.Y.S.2d 940, affirmed *Kuehne v. Malinoski*, 53 N.Y.S.2d 758, 269 App.Div. 717, appeal denied 55 N.Y.S.2d 847, 269 App.Div. 791.

51. Fla.—*Sunseald Products v. Domino Canning Ass'n*, 3 So.2d 377, 147 Fla. 700.

La.—*Succession of Cambre*, 27 So.2d 296, 210 La. 451.

Pa.—*Chadwick v. Hepburn*, 30 A.2d 235, 151 Pa.Super. 459.

Utah.—*Taylor v. Murray*, 232 P.2d 367.

Wis.—*Town of Fox Lake v. Town of Trenton*, 12 N.W.2d 679, 244 Wis. 412.

60 C.J. p 73 note 24.

Academic questions will not be decided.—*Leake v. New York Cent. R. R.*, D.C.N.Y., 28 F.Supp. 565.

Issues held not before reviewing court on appeal

Colo.—*Montgomery v. City and Coun-*

ty of Denver, 80 P.2d 434, 102 Colo. 427.

N.Y.—*Morrall v. Monroe County*, 2 N.E.2d 40, 271 N.Y. 48.

Conclusions erroneous and nugatory

Conclusions of trial court on issue eliminated at trial by agreement or conduct of counsel, and not pursued on trial or available in decision of case, were erroneous and nugatory.—*City of New Haven v. New Haven Water Co.*, 172 A. 767, 118 Conn. 389.

52. Colo.—*Honska v. Denning*, 127 P.2d 279, 109 Colo. 503.

53. Tex.—*Coleman Mut. Aid Ass'n v. Muse*, Civ.App., 67 S.W.2d 393, error refused.

54. Ky.—*Bryant v. Bullock*, 218 S.W.2d 381, 309 Ky. 590.

Tex.—*Mecca F. Ins. Co. v. Wilderspin*, Civ.App., 118 S.W. 1131.

55. Cal.—*Asher v. Johnson*, 79 P.2d 457, 26 Cal.App.2d 403.

56. Mass.—*Leonard v. White*, 5 Allen 177.

57. N.Y.—*Wasserstein v. Aronowitz & Sons*, 63 N.Y.S.2d 549.

60 C.J. p 73 note 29.

58. Tex.—*O'Neal v. Jones*, Civ.App., 34 S.W.2d 689.

59. Cal.—*Pierson v. Smith*, 148 P. 801, 27 Cal.App. 48.

60. Minn.—*Engel v. Swenson*, 254 N.W. 2, 191 Minn. 324.

61. Minn.—*Miller v. Phoenix Ins. Co. of Hartford, Conn.*, 254 N.W. 915, 191 Minn. 586.

62. Ill.—*People ex rel. Hughes v. Universal Service Ass'n*, 7 N.E.2d 310, 365 Ill. 542.

Rate as basis of recovery

Where complaint sought recovery

authority a stipulation by the parties as to the issues in the case does not waive the objection that the complaint is insufficient to state a cause of action, this being a question of law as to which no valid agreement can be made.⁶³

Effect of amendment of pleadings. A stipulation, in extending the time to answer that the issue was to date as if no extension had been granted, did not prevent the issue from being destroyed by a subsequent amendment of the pleadings, or obviate the necessity of giving a new notice of trial and of filing a new note of issue.⁶⁴ After defendant moves for summary judgment, the service of an amended complaint and an amended answer does not prevent consideration of the motion, where the parties stipulate that the motion is deemed to be made against the amended complaint.⁶⁵ Where the parties stipulate that a single issue shall be the sole one, and the court grants a party leave to amend so as to inject a new and independent issue, the court may nevertheless, in the particular circumstances, not err in restricting the parties to the single issue agreed on.⁶⁶

Availability on subsequent trial or in another case. According to some decisions, a stipulation limiting and defining the issues on which the controversy depends applies only to the trial at which the stipulation is made;⁶⁷ but it has also been held that, unless otherwise provided, the stipulation will govern subsequent trials of the cause.⁶⁸ Where the

parties agree that the same issues are presented as were involved in another case, the court may assume a particular fact in view of such agreement.⁶⁹ A broker's stipulation, in his suit for damages for wrongful discharge, that he claims no commission on sales made after a certain date, bars his subsequent suit to recover on sales made after that date to persons whom he allegedly solicited before his discharge.⁷⁰

Evidence admissible under issues. Evidence of facts not within the issues agreed on is not admissible,⁷¹ and cannot be considered on a motion for new trial;⁷² and evidence may be admissible for one purpose, but not for another, according to the issues made by the stipulation.⁷³

b. As Eliminating Other Issues

A stipulation to eliminate a single issue, or particular issues, has no effect on other issues in the case; but a stipulation prescribing the issues on which the case is to be tried waives or eliminates all issues not included.

If the parties stipulate merely to eliminate a single issue, or particular issues, the stipulation has no effect on other issues in the case.⁷⁴ On the other hand, where parties by stipulation prescribe the issues on which the case is to be tried, they are estopped from thereafter asserting that the case was tried or submitted on the wrong theory;⁷⁵ and a stipulation of this nature, unlike a stipulation which merely eliminates a single issue, amounts to a bind-

on particular rate, but trial proceeded on theory, as disclosed by written stipulation of facts constituting entire evidence in cause, that one or the other of two rates was applicable, permitting of plaintiff to recover at rate not sued on in its complaint was not error, notwithstanding general rule that party must recover on theory of his complaint or not at all.—*Seymour Water Co. v. City of Seymour*, 197 N.E. 701, 102 Ind.App. 56.

63. Mo.—*Wells v. Covenant Mut. Ben. Assoc.*, 29 S.W. 607, 126 Mo. 630.

64. N.Y.—*Pelzer v. Perry*, 196 N.Y.S. 342, 203 App.Div. 58.

65. N.Y.—*Timmerman v. City of New York*, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758.

66. N.M.—*First Nat. Bank in Albuquerque v. Rowe*, 199 P.2d 987, 52 N.M. 366.

67. Iowa.—*Mills v. Bills*, 66 N.W. 881, 97 Iowa 684.

Mo.—*Murphy v. Gillum*, 79 Mo.App. 564.

68. Mo.—*Hammontree v. Huber*, 39 Mo.App. 326.

69. U.S.—*C. I. R. v. Lawrence Operating Co.*, C.C.A.2, 152 F.2d 938.

Nonresidency of party's vendor in tax district

U.S.—*C. I. R. v. Lawrence Operating Co.*, *supra*.

70. D.C.—*Chapman v. Potomac Chemical Co.*, 159 F.2d 459, 81 U.S.App.D.C. 406.

71. Tex.—*Long v. Shelton*, Civ.App., 155 S.W. 945.

60 C.J. p 73 note 26.

Scope of pleadings held not enlarged by stipulation, so as to permit introduction of evidence.—*Federal Deposit Ins. Corp. v. Siraco*, C.A.N.Y., 174 F.2d 360.

72. Cal.—*Conwell v. Varain*, 130 P. 23, 20 Cal.App. 521.

60 C.J. p 73 note 27.

73. N.C.—*Austin v. Hopkins*, 43 S.E. 2d 849, 227 N.C. 638.

74. Cal.—*Indemnity Ins. Co. of North America v. American Auto. Ins. Co.*, 180 P.2d 917, reheard 184 P.2d 316, 81 Cal.App.2d 521.

Ind.—*Yelton v. Plantz*, 77 N.E.2d 895, 226 Ind. 155.

S.C.—*Conyers v. Atlantic Coast Line R. Co.*, 62 S.E.2d 478, 218 S.C. 278. 60 C.J. p 74 note 37.

Particular issues

(1) In general.—*David v. Fidelity-Phoenix Fire Ins. Co. of New York*, 145 P. 199, 83 Wash. 242—60 C.J. p 74 note 37 [a].

(2) Stipulation, in action of replevin, as to the value of the property involved, did not obviate the necessity of proof that property belonged to plaintiff or that, at the commencement of the action, it was in the possession of defendant, who wrongfully withheld it.—*Ylivich v. Kalafate*, 92 P.2d 178, 162 Or. 365.

(3) Stipulation that policy with total and permanent disability clause was in force at time insured contracted typhoid fever did not relieve him from burden of proving that his total and permanent disability resulted from typhoid fever.—*Equitable Life Assur. Soc. of U. S. v. Green*, 83 S.W.2d 478, 259 Ky. 773.

75. Fla.—*Corpus Juris cited in Esch v. Forster*, 168 So. 229, 231, 123 Fla. 905.

Iowa.—*Koch v. Abramson*, 275 N.W. 58, 223 Iowa 1356.

Minn.—*Olson v. Moulster*, 162 N.W. 1068, 137 Minn. 96.

ing waiver or elimination of all issues not included.⁷⁶

§ 23. — As to Evidence

- a. In general
- b. Conclusiveness on court
- c. Documents in general
- d. Use of copies, records, transcripts, or abstracts of title
- e. Depositions
- f. As to what witnesses would testify

g. As to testimony of witnesses on former trial

a. In General

Stipulations relating to evidence should be fairly and liberally construed, and the parties are bound thereby.

General rules governing the construction, operation, and effect of stipulations, discussed supra §§ 11-17, apply to stipulations relating to, or affecting, evidence.⁷⁷ Parties by their conduct, and especially by their agreements, may make that admissible which might otherwise not have been.⁷⁸ These

76. U.S.—State ex rel. Williams v. Neustadt, C.C.A.Okl., 149 F.2d 143. Ark.—Orr v. Weaver, 158 S.W.2d 272, 203 Ark. 1147.

Cal.—Williams v. General Ins. Co. of America, 63 P.2d 289, 8 Cal.2d 1. Fla.—Corpus Juris cited in Esch v. Forster, 168 So. 229, 231, 123 Fla. 905.

Ill.—Banner Tailoring Co. v. Industrial Commission, 188 N.E. 548, 354 Ill. 513.—In re Whipple's Estate, 2 N.E.2d 366, 285 Ill.App. 491.

Mich.—Mueller v. Kaufman, 270 N.W. 226, 278 Mich. 87.

Miss.—D. S. Pate Lumber Co. v. Weathers, 146 So. 433, 167 Miss. 228.

Neb.—Boomer v. Olsen, 10 N.W.2d 507, 143 Neb. 579.

N.Y.—Heath v. State, 103 N.Y.S.2d 397, 278 App.Div. 8, affirmed 101 N.E.2d 764, 303 N.Y. 658.

Okl.—Bruner v. Burch, 65 P.2d 1215, 179 Okl. 338.

Tex.—Peal v. Luling Oil & Gas Co., Civ.App., 137 S.W.2d 848, error dismissed, judgment correct. 60 C.J. p 74 note 40.

Amount of damages

Agreement that only issue was amount of damages recoverable constituted acknowledgment that all other matters relating to recovery sufficiently appeared.—Fire Ass'n of Philadelphia v. Crawford, Tex.Civ. App., 54 S.W.2d 181.

Waiver of proof as to other questions

Ill.—Shell Oil Co. v. Industrial Commission, 94 N.E.2d 888, 407 Ill. 186.

77. U.S.—McGrath v. Tadayasu Abo, C.A.Cal., 186 F.2d 766.

Cal.—Loving v. Anglo Cal. Nat. Bank of San Francisco, App., 243 P.2d 561.

Ill.—Landis, for Use of Talley v. New Amsterdam Cas. Co., 107 N.E. 2d 187, 347 Ill.App. 560.

Ind.—Pettit v. Continental Baking Co., 180 N.E. 607, 94 Ind.App. 250.

S.C.—Corpus Juris cited in Turbeville v. Morris, 26 S.E.2d 821, 830, 203 S.C. 287.

Validity of such stipulation see supra § 10.

Best evidence rule held not to bar evidence admissible under stipulation.—Larson v. A. W. Larson Const. Co., 217 P.2d 789, 36 Wash.2d 271.

Evidence to be considered by trier of facts

A stipulation as to what evidence shall be considered by the trier of facts in deciding a particular question excludes the consideration of other evidence, which may not be considered, even though it may find its way into the record, except where it clearly appears that the parties have abandoned the stipulation.—Lappinen v. Union Ore Co., 29 N.W. 2d 8, 224 Minn. 395.

Purpose for which evidence admitted

Error in limiting purpose for which evidence was admitted was cured where, before close of trial, the successful party agreed that such evidence should be considered as admitted for all purposes, and the judge asked that the record show such agreement.—Traders & General Ins. Co. v. Weatherford, Tex.Civ. App., 124 S.W.2d 423, error dismissed, judgment correct.

Proceedings in prior action

Where counsel stipulated that court should consider part of proceedings in prior action as evidence in determining questions of law before impaneling jury, court could consider entire proceedings.—Stone v. Siegel, 17 Ohio Supp. 131.

Particular stipulations

(1) In general.

U.S.—Galter v. Federal Trade Commission, 186 F.2d 810, certiorari denied 72 S.Ct. 34, 342 U.S. 818, 96 L.Ed. 619.—U. S. v. Canadian American Co., D.C.N.Y., 108 F.Supp. 206.—Holmberg v. Southern Minnesota Joint Stock Land Bank of Minneapolis, D.C.Minn., 10 F.Supp. 795.

Ala.—O'Rear v. O'Rear, 150 So. 502, 227 Ala. 403.

Ark.—Person v. Johnson, 285 S.W.2d 876, 218 Ark. 117.

Cal.—Sterling Drug v. Benatar, 221 P.2d 965, 99 Cal.App.2d 492.—U. S. Fidelity & Guaranty Co. v. Industrial Accident Commission of Cali-

fornia, 23 P.2d 306, 132 Cal.App. 655.

Ky.—Herd v. Lyttle, 222 S.W.2d 834, 310 Ky. 788.

Me.—Dolloff v. Gardiner, 91 A.2d 320. Md.—Wood v. State, 44 A.2d 859, 185 Md. 280.

Miss.—Campbell v. State, 12 So.2d 151, 194 Miss. 360.

Ohio.—Chastang v. Mutual Life Ins. Co. of N. Y., 65 N.E.2d 873, 77 Ohio App. 433, rehearing denied 68 N.E.2d 240, affirmed 71 N.E.2d 270, 147 Ohio St. 341.

S.C.—Turbeville v. Morris, 26 S.E.2d 821, 203 S.C. 287.

Tex.—Jeffersonian Club v. Waugh, Civ.App., 217 S.W.2d 103, refused no reversible error. 60 C.J. p 77 note 99.

(2) In action for accounting.

Cal.—Griffeth v. Fehsel, 143 P.2d 522, 61 Cal.App.2d 600.

Mo.—Robert v. Davis, 142 S.W.2d 1111, 235 Mo.App. 974.

(3) In proceedings involving construction of will.—In re Hollingsworth's Estate, 99 P.2d 599, 37 Cal. App.2d 432.

(4) In action in trespass to try title.—Mauldin v. Crider, Tex.Civ. App., 123 S.W.2d 472.

(5) Stipulation that prior opinion of supreme court on certiorari should be considered as evidence.—Viator v. Stone, 29 So.2d 274, 201 Miss. 487, suggestion of error overruled 29 So. 2d 658, 201 Miss. 487.

(6) Stipulation for taking of additional testimony in court instead of remand to commissioner.—Langer v. State, 28 N.W.2d 523, 75 N.D. 435.

(7) Agreement to receive physician's report as evidence without subjecting him to examination as witness.—Langston v. Maryland Casualty Co., 160 S.E. 823, 43 Ga.App. 854.

(8) Stipulation as to what records would show if produced.—Gray Telephone Pay Station Co. v. Western Electric Co., C.C.A.Ill., 101 F.2d 853.

78. U.S.—Cervin v. W. T. Grant Co., C.C.A.Tex., 100 F.2d 153.

stipulations should be construed in the furtherance of justice.⁷⁹ They should not be given a narrow, strict, or technical construction,⁸⁰ but should be given a fair and liberal one,⁸¹ so as to carry out the apparent intention of the parties and permit a fair trial on the merits.⁸² Such a stipulation may, for all practical purposes, be equivalent to the formal introduction of an article in evidence.⁸³

The parties are bound by such stipulations,⁸⁴ as far as they purport to stipulate facts.⁸⁵ Where the parties have given a practical construction to the stipulation by their acts, such construction is entitled to great weight in determining its meaning.⁸⁶ Grammatical construction will not be allowed to override the manifest intent of an instrument.⁸⁷ The principle that the express mention of one thing implies the exclusion of another has sometimes been applied.⁸⁸

Limiting, or dispensing with, proofs. Courts look with favor on a stipulation of parties to limit proofs,⁸⁹ and such a stipulation becomes the law of the case.⁹⁰ There is no reason why proof of a judgment by an exemplified copy may not be dispensed with by the parties;⁹¹ but relevant evidence cannot be kept from the jury by waiver of proof on

the point involved.⁹² A stipulation by one accused of crime that there was no form of coercion in a confession excuses the district attorney from proving the voluntariness of the confession.⁹³

Judicial notice. Effect will be given to an informal or tacit agreement of the parties that judicial notice shall be taken of the common law and statutes of another state, including the opinions of the supreme court of that state declaring the common law and construing the statutes.⁹⁴

Exhibits referred to in a stipulation have been held properly considered by the trial court and on appeal.⁹⁵ Where a stipulation that schedules and a statement filed as exhibits with an answer are correct would amount to nothing more than a self-serving declaration, such stipulation is not of itself sufficient to establish the truth of the exhibits.⁹⁶

Expert testimony. A stipulation as to the qualifications of an expert witness is binding on the parties.⁹⁷ Where a party admits the qualifications of witnesses to testify as experts, but does not stipulate that their judgment is to be taken as conclusive, the question of their credibility and the weight to be accorded their testimony remains to

Hearsay

Cal.—Nelson v. Fernando Nelson & Sons, 55 P.2d 859, 5 Cal.2d 511—Blume v. MacGregor, 148 P.2d 656, 64 Cal.App.2d 244—Switzer v. Mul-laly, 46 P.2d 215, 7 Cal.App.2d 444.

Death of witness; deposition

(1) This is especially true after the death of the witness renders a more regular taking of his evidence impossible; and rule applies to deposition of plaintiff, taken in accordance with stipulation, where defendant removed cause from state to federal court and plaintiff died before trial.—Cervin v. W. T. Grant Co., C.C.A.Tex., 100 F.2d 153.

(2) Stipulations as to depositions generally see *infra* subdivision e of this section.

79. U.S.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A.III., 179 F.2d 133.

80. Iowa.—Swiger v. Eden, 24 N.W. 2d 793, 238 Iowa 44.
60 C.J. p 74 note 44.

81. Vt.—Foster v. Dickerson, 24 A. 253, 64 Vt. 233.
60 C.J. p 74 note 45.

82. Nev.—O'Neale v. Cleaveland, 3 Nev. 485.

83. U.S.—Gormley v. U. S., C.C.A. Va., 167 F.2d 454.

Bulky object not brought into courtroom

U.S.—Gormley v. U. S., *supra*,

84. U.S.—Draeger v. Bradley, 156 F.2d 64, 33 C.C.P.A., Patents, 1130.
Cal.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353—Sterling Drug Co. v. Benatar, 221 P.2d 965, 99 Cal.App. 2d 393—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328—Corbett v. Benioff, 14 P.2d 1028, 126 Cal.App. 772.

D.C.—Johnson v. Hawkins, Mun.App., 81 A.2d 467.

Fla.—Penney v. First Trust & Savings Bank, 135 So. 805, 102 Fla. 185.

Ind.—Pettit v. Continental Baking Co., 180 N.E. 607, 94 Ind.App. 250.

N.J.—Burger v. Burger, 69 A.2d 741, 6 N.J.Super. 52.

Implied agreement

Stipulation that only hotel register would be offered in evidence did not imply an agreement that no objection would be made to it when offered.—Darnall v. U. S., Mun.App.D.C., 33 A. 2d 734.

85. U.S.—U. S. v. S. Schapiro & Sons, 24 C.C.P.A., Customs, 343.

86. Miss.—Saffold v. Horne, 18 So. 433, 72 Miss. 470.

87. Miss.—Saffold v. Horne, *supra*.

88. Tex.—White v. McFarlin, 14 S. W. 200, 77 Tex. 596.
60 C.J. p 75 note 49.

89. N.Y.—Morse v. Morse Dry Dock & Repair Co., 291 N.Y.S. 995, 249 App.Div. 764.

Favorable attitude of courts toward

stipulations generally see *supra* § 2.

90. N.Y.—Morse v. Morse Dry Dock & Repair Co., *supra*.

Proof of foreign law

Stipulation dispensing with offering in evidence of decisions of courts of foreign state as to law of such state held limited in effect.—Platt v. Bender, La.App., 178 So. 678.

91. Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441.

92. Ga.—Watkins v. State, 33 S.E.2d 325, 199 Ga. 81.

93. Cal.—People v. Barnes, 183 P.2d 654, 30 Cal.2d 524.

94. Md.—Staley v. Safe Deposit & Trust Co. of Baltimore, 56 A.2d 144, 189 Md. 447.

95. Ill.—Landis for Use of Talley v. New Amsterdam Casualty Co., 107 N.E.2d 187, 347 Ill.App. 560.

Iowa.—Swiger v. Eden, 24 N.W.2d 793, 238 Iowa 44.

Absence of tampering

Stipulation waived requirement that, before admission of testimony concerning an exhibit, it must be proved that it has not been tampered with between time of its original receipt and the analysis.—People v. Coleman, 224 P.2d 837, 100 Cal.App.2d 797.

96. Ky.—Richardson v. Monroe County, 112 S.W.2d 47, 271 Ky. 368.

97. Cal.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353.

be considered by the jury and, later, by the court in passing on motions for a new trial.⁹⁸ A party's agreement to be bound by the testimony of an expert, to be given in the form of a report, does not mean that it is to be accepted as conclusive, but only that he will accept the report for what it is worth, without further examination of the expert.⁹⁹

Testimony of one accused competent against all.

Where two persons were jointly tried for an offense and it was stipulated that all testimony in behalf of either should inure to the benefit of both, evidence in rebuttal that certain evidence given by a witness for one of them was untrue, and that the fact led to an incriminatory inference, was available against the other.¹

Physical examination. Counsel's agreement to examination by two physicians does not preclude defendants from calling other physicians as witnesses.²

Availability on second trial. Where there is nothing in a stipulation relating to the admission of evidence which limits its use to any particular trial, it will be available on a second trial.³

b. Conclusiveness on Court

Valid stipulations as to evidence are binding on the court.

Valid stipulations as to evidence are binding on the court, which is bound to enforce them;⁴ and the court cannot go beyond the terms of the stipu-

lation.⁵ On the other hand, the court is not bound by, and will not enforce, a stipulation which the parties cannot validly make.⁶ So, a stipulation that only such evidence as shall be agreed on by the parties shall be admissible will not be allowed to control the action of the court in the reception of other evidence or to determine the effect to be given to it.⁷

c. Documents in General

The construction and effect of stipulations relating to letters and other documents have been determined in accordance with principles governing stipulations as to evidence generally.

By stipulating for the production of certain documents, parties must be deemed to have waived any showing of reasonable probability of materiality or else to have concluded that this requirement has been met.⁸ An instrument is not rendered admissible by a stipulation referring to instruments which do not include the one in question.⁹ A letter¹⁰ or a surgeon's written report,¹¹ even though hearsay, may be competent evidence where admitted by stipulation. A stipulation that a letter may be read in evidence does not admit it to be genuine;¹² but a physician's written report, read in evidence pursuant to a stipulation, has been held to have the same effect as if he had testified to the facts therein stated.¹³ The construction, operation, or effect of other stipulations has been considered,¹⁴ including stipulations as to a handwriting expert,¹⁵ a written report of a member of the county probation staff,¹⁶ and a judgment in a prior case.¹⁷

98. Cal.—Southern California Edison Co. v. Gemmill, 85 P.2d 500, 30 Cal.App.2d 23.

99. N.Y.—People on Complaint of DeAngelis v. Guiseppa, 97 N.Y.S.2d 486, affirmed 96 N.Y.S.2d 848, 276 App.Div. 1102, appeal denied 98 N.Y.S.2d 220, 277 App.Div. 879.

1. N.Y.—People v. Walter, 149 N.Y.S. 365, 164 App.Div. 25, 32 N.Y.Cr. 61, certificate of reasonable doubt denied 149 N.Y.S. 390, reversed on other grounds People v. Cassidy, 107 N.E. 713, 213 N.Y. 388.

2. Mo.—Plater v. W. C. Mullins Constr. Co., 17 S.W.2d 658, 223 Mo. App. 650.

3. Mass.—Central Bridge Corp. v. Lowell, 15 Gray 106.

N.Y.—Schiff v. American R. Express Co., 182 N.Y.S. 679.

4. U.S.—McGrath v. Tadayasu Abo, C.A.Cal., 186 F.2d 766.

Cal.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.

Ind.—Pettit v. Continental Baking Co., 180 N.E. 607, 94 Ind.App. 250, 60 C.J. p 75 note 50.

Conclusive effect of stipulations on court generally see supra § 17.

Enforcement of stipulation in general see infra § 31.

Finding held not contrary to stipulated facts

W.Va.—Larzo v. Swift & Co., 40 S.E. 2d 811, 129 W.Va. 436.

Reversible error

Refusal to admit evidence in accordance with a stipulation may constitute reversible error.—Pacific Mut. Life Ins. Co. of California v. Butler, 93 S.W.2d 329, 192 Ark. 614.

Admission of decision of supreme court into evidence would have been erroneous except for stipulation of counsel that it might be so received.—City of Tucson v. Apache Motors, 245 P.2d 255, 74 Ariz. 98.

5. U.S.—Pennsylvania Steel Co. v. Washington, etc., Bridge Co., D.C. W.Va., 194 F. 1011.

6. U.S.—Sac & Fox Indians of Iowa v. Sac & Fox Indians of Oklahoma, 45 Ct.Cl. 287, affirmed 31 S.Ct. 473, 220 U.S. 481, 55 L.Ed. 552.

W.Va.—Gilkerson v. Baltimore & O.

R. Co., 51 S.E.2d 767, 132 W.Va. 133.

7. Cal.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

8. U.S.—Belser v. Savarona Ship Corp., D.C.N.Y., 26 F.Supp. 599.

9. Tex.—Gordon v. Mortgage Realty Co., Civ.App., 153 S.W.2d 707.

10. Cal.—Blume v. MacGregor, 148 P.2d 656, 64 Cal.App.2d 244.

11. Cal.—Switzer v. Mullally, 46 P. 2d 215, 7 Cal.App.2d 444.

12. Or.—Osmun v. Winters, 46 P. 780, 30 Or. 177.

60 C.J. p 75 note 53.

13. Ind.—Pettit v. Continental Baking Co., 180 N.E. 607, 94 Ind.App. 250.

14. Cal.—Walpole v. Prefab Mfg. Co., 230 P.2d 36, 103 Cal.App.2d 472.

15. Cal.—Clyne v. Brock, 188 P.2d 263, 82 Cal.App.2d 958.

16. N.J.—Burger v. Burger, 69 A.2d 741, 6 N.J.Super. 52.

17. Wyo.—Bowman v. Bowman, 82 P.2d 357, 53 Wyo. 298.

d. Use of Copies, Records, Transcripts, or Abstracts of Title

The construction and effect of stipulations as to the use of copies, records, transcripts, or abstracts of title have been determined in accordance with principles governing stipulations as to evidence generally.

Where the parties stipulate that an instrument offered is a true copy, the stipulation must be taken to refer to the copy as it read on its face, and, therefore, to contemplate an erasure actually appearing therein.¹⁸ Where a copy of an instrument is certified in conformity with the requirements of the stipulation for its admission, no objection can be made to its admission on any ground of lack of identification or authentication.¹⁹ A stipulation that copies of original papers or of records thereof may be used in lieu of originals overcomes the objection that the originals should be offered.²⁰ Such a stipulation merely dispenses with the necessity for laying the foundation for the introduction of secondary evidence,²¹ and does not estop the party from proving that the originals are forgeries²² or invalid in legal effect.²³ A stipulation admitting as evidence a copy of a lease instead of the original does not admit as a fact the relation of lessor and lessee.²⁴

A plaintiff's stipulation that he does not seek to deprive defendant of any term or provision which appears in plaintiff's copy of a contract which plaintiff has placed in evidence waives any objection to defendant's acknowledged and recorded copy of the same contract.²⁵ Where it is stipulated that copies of certain archives of a foreign government may be admitted in evidence in support of defendant's title, there is nothing prejudicial to plaintiff in admitting the application of a third person to that government for such copies, since it is considered merely as introductory to the copies themselves.²⁶

Records; transcripts. Where it is agreed that no evidence will be offered on a particular question, records introduced may not be looked to for such

purpose.²⁷ A stipulation that records of the clerk of court might be used in any instance in which a certified copy would be admissible does not authorize the introduction in evidence of a deed book containing a copy of a deed not properly attested.²⁸ A stipulation that a commissioner's summary of the record evidence relating to plaintiff in government files is correct does not preclude defendant from objecting to the admissibility of any part thereof; the summary, or report, is subject to all objections that could properly be made to the admissibility of the original records.²⁹ In a final hearing in a proceeding for injunction, a stipulation by the parties that the proceedings on previous hearings be made part of the record means that all evidence previously taken is to be considered in the final hearing.³⁰

Under a stipulation by a defendant insurer that the record of an employee's action against the employer may be received in evidence for any purpose that is appropriate and material to the issues, the record is in evidence for the purpose of determining whether the injury to the employee was accidental.³¹ A stipulation that a criminal case be tried on the transcript of the preliminary and the exhibits introduced at the time thereof does not deprive accused of the right to have the trial court observe the demeanor of the witnesses on the stand;³² and where, by stipulation, the people's case is submitted on the transcript of the proceedings at the preliminary hearing, accused may not complain that the trial court is without jurisdiction to proceed, on the ground that accused is not confronted with the witnesses against him.³³ A stipulation may be such as to render admissible a transcript of testimony taken in another court.³⁴

Hospital records may be rendered admissible by stipulation, regardless of their admissibility under general rules of evidence;³⁵ and an agreement for

18. Cal.—Pacific Coast Casualty Co. v. Industrial Accident Commission, 167 P. 539, 176 Cal. 24.

19. S.D.—J. F. Anderson Lumber Co. v. National Surety Co., 207 N. W. 53, 49 S.D. 235.

20. Ariz.—Turley v. State, 59 P.2d 312, 48 Ariz. 61.

21. Ga.—Patterson v. Collier, 75 Ga. 419, 58 Am.R. 472.

22. Ga.—Patterson v. Collier, *supra*.

23. Ill.—Supreme Lodge K. P. v. Trebbe, 74 Ill.App. 545, reversed on other grounds 53 N.E. 730, 179 Ill. 348, 70 Am.S.R. 120.

60 C.J. p 76 note 74.

24. Ga.—Central R., etc., Co. v. Gamble, 3 S.E. 287, 77 Ga. 584.

25. Tex.—Davis v. Trenholm, Civ. App., 217 S.W.2d 167.

26. Tex.—Mackey v. Armstrong, 19 S.W. 463, 84 Tex. 159.

27. Tex.—Shaw v. Lewis, Civ.App., 56 S.W.2d 1091, reversed on other grounds 86 S.W.2d 741, 126 Tex. 248.

28. Ga.—Turner v. Neisler, 80 S.E. 461, 141 Ga. 27.

29. D.C.—U. S. v. Balance, 59 F.2d 1040, 61 App.D.C. 226.

30. U.S.—Randolph v. Missouri-Kansas-Texas R. Co., D.C.Mo., 100 F.Supp. 139.

31. U.S.—Globe Indemnity Co. of New York v. Banner Grain Co., C.C.A.Minn., 90 F.2d 774.

32. Cal.—People v. Hamilton, 216 P. 2d 84, 96 Cal.App.2d 777.

33. Cal.—People v. Dessauer, 241 P.2d 238, 38 Cal.2d 547, certiorari denied Dessauer v. People of State of California, 73 S.Ct. 96, 344 U.S. 858, 97 L.Ed. — —People v. Noorlander, 172 P.2d 766, 76 Cal.App.2d 274, certiorari denied 67 S.Ct. 1084, 330 U.S. 846, 91 L.Ed. 1291.

34. Kan.—In re Davis' Estate, 237 P.2d 396, 171 Kan. 640.

Probate court

Kan.—In re Davis' Estate, *supra*.

35. Ark.—Progressive Life Ins. Co. v. Hulbert, 118 S.W.2d 268, 196 Ark. 352.

the admission of the whole record precludes objection to a part which would otherwise have been admissible.³⁶ On the other hand, a stipulation limiting the records to be read in evidence may be such as to exclude particular portions of hospital records.³⁷

Abstracts of title. Where the parties stipulate that an abstract of title may be used as evidence, and it is so used, such evidence is not exclusive, and a mistake in the abstract may be corrected by introducing the record.³⁸ A stipulation to use abstracts instead of obtaining certified copies of deeds, etc., and filing them, does not require defendants to furnish plaintiff their private abstracts, and there is no error in the trial court in refusing to require them to furnish plaintiff their private papers for examination or to use as evidence.³⁹

e. Depositions

The construction and effect of stipulations as to depositions have been determined with respect to such matters as the time for taking, violation of the stipulation, reservation of the right to objection, and waiver of objections or formalities.

Depositions taken before a certain officer by stipulation of the parties are evidence, not by virtue of any authority of the notary to act as commissioner, but by force of the stipulation and his power to administer oaths under the statute.⁴⁰ Where depositions are taken under a stipulation that they could be taken before a certain person, or any other person qualified by the law of the states, a further agreement that they may be read free from objections, "except the certificate of magistracy," means that the certificate of magistracy should be affixed only if the deposition is taken before any person qualified by the laws of the state other than the particular person named.⁴¹ A stipulation authorizing the taking of depositions of a designated person "and other witnesses" authorizes the taking of depositions of witnesses not named.⁴² An agreement that testimony taken by deposition "shall be

considered as regularly taken" is not broad enough to admit illegal evidence.⁴³ A stipulation that a juror's *ex parte* affidavit as to proceedings in the jury room might be read as if taken on deposition, with reservation as to competency of witness, does not require the affidavit to be considered on motion for new trial, it being conceded that it is against public policy for a juror to reveal proceedings in the jury room.⁴⁴

Time for taking. A party agreeing that a deposition may be taken before trial may not complain that it is so taken.⁴⁵

Conditions; statutory provisions. Where a deposition is taken under a stipulation which provides for the admission of the deposition without conditions, it is to be governed by the stipulation and not by statutory provisions.⁴⁶ A stipulation that a deposition may be taken and read in evidence as though all statutory requirements had been followed will be given effect, so as to permit an individual defendant's statutory deposition to be read in evidence against a corporate codefendant.⁴⁷ Substantial compliance with a stipulation under which a witness is to read over his deposition and subscribe and swear to it has been held sufficient.⁴⁸

Violation of stipulation. Where a party's attorney, in taking a deposition, materially violates the terms of a stipulation between the attorneys for the parties, the deposition is properly excluded.⁴⁹ Where a deposition is taken under a stipulation providing that it may be read in evidence subject only to objection as to the competency, materiality, or relevancy of the testimony set forth therein, the exclusion of deposition testimony on other grounds is improper.⁵⁰

Reservation of right of objection. Where it is agreed that a deposition is to be taken with counsel reserving all rights of objection to be made at the time the testimony is offered in evidence, the objections referred to are objections to the admissibility

Hospital chart

Cal.—People v. Bjornsen, 130 P.2d 443, 79 Cal.App.2d 519.

36. Ohio.—Estes v. Goodyear Tire & Rubber Co., Com.Pl., 99 N.E.2d 619.

37. Pa.—Minner v. City of Pittsburgh, 69 A.2d 384, 363 Pa. 199.

38. Tex.—Taffinder v. Merrell, 65 S.W. 177, 95 Tex. 95, 93 Am.S.R. 814—Corpus Juris cited in Thomas v. Smith, Civ.App., 60 S.W.2d 514, 516, error dismissed.

39. Tex.—Campbell v. Jones, Civ. App., 230 S.W. 710.

40. Mich.—Crone v. Angell, 14 Mich. 340.

Depositions used in another case see *infra* subdivision g of this section.

41. Ill.—Schwinger v. Redman, 187 Ill.App. 254.

42. S.D.—Farmers' Loan, etc., Co. v. De Moulin, 195 N.W. 444, 46 S.D. 576.

43. Ala.—Millard v. Hall, 24 Ala. 209.

60 C.J. p 76 note 83.

44. Pa.—Groner v. Supreme Tent of Knights of Maccabees of the World, 108 A. 437, 265 Pa. 129.

45. Okl.—Buttrick v. Gardner, 37 P.2d 979, 169 Okl. 566.

46. Cal.—People v. Grundell, 17 P. 214, 75 Cal. 301.

18 C.J. p 734 note 24.

47. Ill.—Randall Dairy Co. v. Pevely Dairy Co., 9 N.E.2d 657, 291 Ill. App. 380.

48. Tex.—McCrary v. Greer, Civ. App., 242 S.W.2d 652.

49. N.Y.—Spatz v. Pulensky, 52 N.Y. S.2d 27, 268 App.Div. 1012, appeal denied 52 N.Y.S.2d 959, 268 App. Div. 1076.

50. U.S.—Order of United Commercial Travelers of America v. Tripp, C.C.A.Colo., 63 F.2d 37.

or relevancy of the testimony and not for the purpose of reserving any right to file exceptions or other pleadings in the case.⁵¹

Waiver of objections or formalities. If the stipulation waives designated objections to depositions, no objections are waived other than those so designated.⁵² Where a stipulation waives irregularities and informalities in the taking of depositions and reserves the right to object to matters of substance, the parties are entitled to object to improper matter contained in the depositions,⁵³ but such reservation cannot have the effect to prevent their introduction in evidence.⁵⁴ A party who, at the conclusion of the taking of a deposition, enters into a stipulation for an adjourned hearing at which the witness is to produce certain documents, thereby waives any objection to the taking of the deposition.⁵⁵

Effect of presence of witnesses. Where the parties stipulate that the depositions of certain witnesses may be read and used as depositions taken in any one of three named cases, the use of the depositions in one of the cases is proper, although the witnesses are present in court and there is no proof that they are within any provisions of the statute authorizing the use of depositions.⁵⁶

Cross-examination by new counsel. A deposition taken pursuant to the stipulation of an attorney

of record is admissible, although he withdraws and the new counsel does not have the opportunity to cross-examine the witness or to submit cross interrogatories.⁵⁷

f. As to What Witnesses Would Testify

A stipulation as to the testimony a witness would give, if called, may constitute evidence of the fact involved, but is not an admission of the truth of such evidence and does not prevent a party from attacking it.

Where a party agrees that the other party's next witnesses would testify substantially the same as the witnesses previously heard, and the next witnesses so referred to do not testify, the trial court and the jury are justified in assuming that their testimony would have been the same as that heard.⁵⁸ Where parties by stipulation admit without reservation what testimony a witness would give, if called, as in the case of an absent witness, such stipulation may constitute evidence of the fact involved in the testimony,⁵⁹ and may support a finding of the fact involved;⁶⁰ and, if the parties further stipulate that that admission may be used as evidence as though the witness had so testified, the stipulated testimony may be used in the form in which the parties themselves have stated it, although in the form of conclusions.⁶¹

A stipulation of this character does not, however, amount to an admission of the truth⁶² or com-

51. La.—Stanley v. Jones, 2 So.2d 45, 197 La. 627.

52. Wash.—Nasser v. Gaston, 127 P. 470, 70 Wash. 685.
60 C.J. p 76 note 84.

Hearsay

A stipulation waiving objections to the introduction of depositions expressly stating that "no objection is waived as to the competency, relevancy, or materiality of said depositions in any of said cases, or their admission under the rules of evidence," does not preclude a party from objecting to testimony contained in a deposition on the ground that it was hearsay.—McDonald v. Mulkey, 231 P. 662, 32 Wyo. 144.

Offer in evidence

A stipulation that depositions should be received in evidence without any formality, and subject only to rules of evidence as to materiality and admissibility, waives the formality of taking a rule to show cause why the depositions should not be used as evidence, but does not include the necessity of offering depositions formally in evidence.—Vacaro v. Louisville, etc., R. Co., 123 So. 353, 11 La.App. 345.

53. Wis.—Douglass v. Rogers, 4 Wis. 304.

54. Wis.—Douglass v. Rogers, supra.

55. U.S.—Bergstrom Paper Co. v. Continental Ins. Co. of City of New York, D.C.Wis., 7 F.R.D. 548.

56. Mo.—Flint v. Chicago, B. & Q. R. Co., 207 S.W.2d 474, 357 Mo. 215.

57. Colo.—Middleton v. Stavely, 235 P.2d 596, 124 Colo. 88.

58. Tex.—Southwestern Gas & Elec. Co. v. Anderson, Civ.App., 217 S.W. 2d 47.

59. Cal.—People v. Newman, 227 P. 2d 470, 102 Cal.App.2d 302.

Idaho.—State v. Newman, 214 P.2d 159, 70 Idaho 184.

Ill.—McKay Engineering & Const. Co. v. Sanitary Dist. of Chicago, 81 N.E.2d 268, 335 Ill.App. 224.

Neb.—Wells v. Tietge, 9 N.W.2d 180, 143 Neb. 230.

Validity see supra § 10.

Concession held not to establish

(1) Absence of proof of corpus delicti.—People v. Watt, 44 N.E.2d 580, 380 Ill. 610.

(2) Qualification of witnesses as electors.—Ptak v. Jameson, 220 S.W. 2d 592, 215 Ark. 292.

Allegations not admitted in answer

Stipulation that plaintiff's officer would testify to all facts alleged in

bill and not admitted in answer was agreement as to evidence to be considered by court.—Lowell Co-op. Bank v. Sheridan, 188 N.E. 636, 284 Mass. 594, 91 A.L.R. 1176.

In libel proceeding, stipulations as to what witnesses would testify to was held to establish particular facts as to lien and liability for supplies, but not other facts.—The Everosa, D.C.N.Y., 20 F.Supp. 8.

60. Cal.—O'Hare v. Peacock Dairies, 110 P.2d 90, 42 Cal.App.2d 788 —Citizens' Nat. Trust & Savings Bank of Los Angeles v. Arrowhead Springs Beverage Co., 14 P.2d 821, 126 Cal.App. 550.

Amount of damages

Cal.—R. H. Geoffroy & Co. v. Faria, 144 P.2d 402, 62 Cal.App.2d 165.

61. Minn.—Behrens v. Kruse, 155 N.W. 1065, 132 Minn. 69.
Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924.

62. U.S.—Goess v. Lucinda Shops, Inc., C.C.A.N.Y., 93 F.2d 449, 115 A.L.R. 264.

Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924—Ramirez v. Castro, Civ.App., 121 S.W.2d 652, 60 C.J. p 77 note 93.

petency⁶³ of such testimony, and does not prevent a party from proving conflicting statements made by the witness,⁶⁴ or that the testimony which he would give is untrue,⁶⁵ constitutes a mere opinion or conclusion,⁶⁶ invades the province of the trier of facts,⁶⁷ has no probative value as evidence,⁶⁸ or is contrary to an admitted fact.⁶⁹ Such a stipulation is not necessarily conclusive as against a party;⁷⁰ nor does it prevent the court from rendering a decision for one of the parties on the ground that the testimony is untrue,⁷¹ or commit a party to the trial court's views of the legal significance of the testimony.⁷² Where the stipulation is made for the purpose of excusing the witness from attendance at court in that cause, the evidence stipulated cannot be used in a subsequent cause between the parties.⁷³

Affidavit in lieu of testimony. Where a party agrees to admit, in lieu of testimony, an affidavit as to the amount of work done by affiant, the trial court may properly use the figures in the affidavit in awarding judgment for plaintiff.⁷⁴

g. As to Testimony of Witnesses on Former Trial

Stipulations as to the use or admission of testimony of witnesses at former trials have been variously construed and given effect according to their terms. Authorities differ as to whether such a stipulation precludes objections to the competency or materiality of the testimony.

According to some decisions, a stipulation in general terms, and without qualification, that testimony of witnesses on a former trial may be read in evidence, precludes objections to its competency or materiality;⁷⁵ and if, by stipulation, testimony taken

in another case is read, no objection can be taken to it that was not taken on the trial at which it was admitted.⁷⁶ On the other hand, it has been held that a stipulation that the testimony of a witness in another case might be used to establish certain facts does not waive the right to object that certain of the testimony is incompetent.⁷⁷ Similarly, it has been held that a stipulation that testimony of witnesses on the former trial of a case should be taken and considered as if delivered on the second trial permits the admission of the testimony of such witnesses but subject to the objections and exceptions taken on the former trial.⁷⁸ It has also been held that, where two actions are tried together, and the testimony objected to is taken in one action only and exception reserved in that case only, a stipulation by which such testimony is to be considered in the other case as though repeated in that case will be regarded as preserving the exception in the other case.⁷⁹

A stipulation that either party may use the testimony given by any witness at a former trial, in order to save the cost of taking depositions to perpetuate testimony, does not give a party the unlimited right to introduce the transcript of the testimony at the former trial, particularly with respect to a witness who had testified at the former trial and is present at the subsequent one.⁸⁰ Where a stipulation agreeing to the admission of testimony given in another case reserves the right to both parties to object to it for immateriality, irrelevancy, or other matter of substance, no objection can be made on the ground that the witnesses were incompetent.⁸¹ Where defendant had stipulated that testi-

63. Ark.—*Martin v. State*, 72 S.W. 2d 539, 189 Ark. 408.

Jurors' testimony as to method of determining sentence
Ark.—*Martin v. State*, supra.

64. Mass.—*Lewis v. Mason*, 109 Mass. 169.

Tex.—*Corpus Juris* quoted in *Texas Indemnity Ins. Co. v. Dunn*, Civ. App., 221 S.W.2d 922, 924.

65. Ark.—*Burton v. Brooks*, 25 Ark. 215.

Ill.—*Shields v. Stickel*, 55 N.E.2d 532, 323 Ill.App. 362.

Tex.—*Corpus Juris* quoted in *Texas Indemnity Ins. Co. v. Dunn*, Civ. App., 221 S.W.2d 922, 924.

Wis.—*Kundert v. Riese*, 274 N.W. 286, 225 Wis. 276.

66. Colo.—*Royal Tiger Mines Co. v. Ahearn*, 47 P.2d 692, 97 Colo. 116.
Mo.—*Monroe v. Lyons*, 98 S.W.2d 544, 339 Mo. 515.

67. Mo.—*Monroe v. Lyons*, supra.

68. Mo.—*Monroe v. Lyons*, supra.

69. La.—*Daugherty v. Canal Bank & Trust Co. in Liquidation*, App., 154 So. 681, reversed in part and affirmed in part on other grounds 158 So. 366, 180 La. 1003.

70. U.S.—*Goess v. Lucinda Shops*, C.C.A.N.Y., 98 F.2d 449, 115 A.L.R. 264.

Tex.—*Bernard River Land Development Co. v. Sweeny*, Civ.App., 216 S.W.2d 597, refused no reversible error—*Lindsey v. State*, Civ.App., 194 S.W.2d 413, refused no reversible error.

71. N.Y.—*Lebedinsky v. Brimberg*, 198 N.Y.S. 595.

Tex.—*Corpus Juris* quoted in *Texas Indemnity Ins. Co. v. Dunn*, Civ. App., 221 S.W.2d 922, 924.

72. Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134.

73. Ala.—*Sibley v. Smith*, 52 So. 27, 167 Ala. 158.

74. La.—*Wood v. Becker Welding Shop*, App., 34 So.2d 924.

75. N.Y.—*Carroll v. New York El. R. Co.*, 43 N.Y.S. 524, 14 App.Div. 278, 281, affirmed 57 N.E. 1106, 162 N.Y. 603.

60 C.J. p 75 note 59.
Validity of such stipulations see supra § 10.

76. N.Y.—*Burgess v. New York Cent., etc., R. Co.*, 34 Hun 233, affirmed 98 N.Y. 641.

77. Ga.—*Mobley v. Baxter & Co.*, 35 S.E. 859, 143 Ga. 565.
60 C.J. p 75 note 60.

Right to object reserved

Okl.—*Butterick Co. v. Molen*, 175 P.2d 311, 198 Okl. 92.

78. S.D.—*Davis v. Davis*, 137 N.W. 283, 29 S.D. 420.

79. Wis.—*Brey v. Forrestal*, 138 N.W. 645, 151 Wis. 245.

80. W.Va.—*Gilkerson v. Baltimore & O. R. Co.*, 51 S.E.2d 767, 132 W.Va. 133.

81. Vt.—*Weldon Hotel Co. v. Seymour*, 54 Vt. 582.

mony of certain witnesses in another case might be used in the trial against him at a succeeding term of court, an objection to reading of testimony of one of such witnesses, for the reason that his name had not been indorsed on the information, may be properly overruled, since the object of indorsing names of state's witnesses on the information is to apprise defendant of witnesses whose testimony he may have to meet.⁸² In a proceeding to determine adverse claims, where the parties stipulated that testimony taken in one of several cases may be used in any other case, it has been held that testimony given by a witness, dead at the time of the trial, in a prior case, and read in evidence by one of the parties, is admissible as to all parties whose interests were affected by the prior case.⁸³ A stipulation filed in support of a demurrer to a declaration, authorizing the court in passing on the demurrer to consider the record in a prior action against plaintiff with the evidence and contract introduced therein, does not authorize the court to determine questions of fact tendered by the declaration.⁸⁴ A stipulation that testimony at a former trial may be read in evidence may be given effect where the testimony is in the form of an exhibit attached to the stipulation.⁸⁵

Testimony of party. An agreement by an accused that his testimony in a prior prosecution of another should be considered by the court as his testimony in the plea of guilty in the prosecution against him bars him from claiming that the trial judge erred in making his finding and entering judgment on that testimony.⁸⁶ In an action to determine whether a decedent's property is separate or community property, under a stipulation that evidence in a will contest may be used, the trial court has the right to use the evidence of the widow as to her transac-

tions with deceased.⁸⁷

Depositions. A stipulation that "any and all testimony taken in another case may be used in this" embraces a deposition taken in such other case after the date of the agreement, it appearing that this was the construction acted on by the counsel then engaged in the cause;⁸⁸ but a deposition taken in a former action pursuant to a stipulation specifying the action in which it might be used cannot be admitted in an action other than that specified;⁸⁹ and an agreement that one party may use a deposition taken in his behalf in another suit does not authorize the other party to use it.⁹⁰ Where a deposition contains principally competent testimony, a stipulation that it may be used at any other trial of the same case does not imply that a portion of the deposition containing incompetent testimony is to be received if objected to.⁹¹ A stipulation for the receipt in evidence of "properly authenticated" copies of depositions filed in a former suit has been held not to require technical authentication.⁹²

§ 24. — As to Admissions

- a. In general
- b. Operation and effect

a. In General

A stipulation admitting, or agreeing on the existence of, designated facts for the purpose of trial is to be fairly and reasonably construed as a whole in order to effectuate the parties' intention, and in the light of the whole record and the surrounding circumstances.

Rules applicable to the construction of stipulations generally, as discussed supra § 11, apply to the construction of stipulations which admit, or agree on the existence of, designated facts for the purpose of the trial.⁹³ The primary rule in construing these

82. S.D.—State v. Steensland, 229 N. W. 395, 56 S.D. 534.

83. Or.—In re Silvies River Water Rights, 237 P. 322, 115 Or. 27.

84. U.S.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., D.C.W.Va., 194 F. 1011.

85. Ill.—Landis, for Use of Talley v. New Amsterdam Casualty Co., 107 N.E.2d 187, 347 Ill. 560.

86. Ohio.—State ex rel. Christopher v. Amrine, App., 94 N.E.2d 204.

87. Ariz.—In re Monaghan's Estate, 138 P.2d 292, 60 Ariz. 366.

88. Miss.—Saffold v. Horne, 18 So. 433, 72 Miss. 470.

Stipulations as to depositions generally see supra subdivision e of this section.

89. Neb.—Hartford v. Pinnie, 260 N. W. 371, 128 Neb. 771.

90. Iowa.—Borland v. Chicago, etc., R. Co., 42 N.W. 590, 78 Iowa 94.

91. Me.—In re Bridgham, 19 A. 824, 82 Me. 323.

92. Ky.—Cooper v. Cooper, 248 S.W. 2d 702, certiorari denied 73 S.Ct. 171, 344 U.S. 876, 97 L.Ed. —.

93. Cal.—White v. McManus, 230 P. 472, 69 Cal.App. 50. 60 C.J. p 77 note 3.

Particular stipulations construed

U.S.—Galter v. Federal Trade Commission, C.A.7, 186 F.2d 810, certiorari denied 72 S.Ct. 34, 342 U.S. 818, 96 L.Ed. 619—Fleming v. Harrison, C.C.A.Mo., 162 F.2d 789—U. S. v. Heffer, C.C.A.N.Y., 159 F.2d 831, certiorari denied 67 S.Ct. 1202, 331 U.S. 811, 91 L.Ed. 1831, rehearing denied 67 S.Ct. 1530, 331 U.S. 867, 91 L.Ed. 1871—L. A. Wood & Co. v. Taylor, C.C.A.Ga., 154 F.2d

548—Bahr v. C. I. R., C.C.A.Tex., 119 F.2d 371, certiorari denied 62 S.Ct. 95, 314 U.S. 650, 86 L.Ed. 521—Frigorifico Wilson De La Argentina v. Weirton Steel Co., D.C.W. Va., 31 F.Supp. 214.

Fla.—Roux v. Indian Lumber Co., 161 So. 270, 119 Fla. 280.

Ill.—McManaman v. Johns-Manville Products Corp., 81 N.E.2d 137, 400 Ill. 423.

Iowa.—State v. Otterholt, 15 N.W.2d 529, 234 Iowa 1286.

Mass.—Mayor of Haverhill v. Water Com'rs of Haverhill, 68 N.E.2d 188, 320 Mass. 63.

Mich.—Justin v. Ketcham, 298 N.W. 294, 297 Mich. 592.

N.Y.—Rothbaum v. R. H. Macy & Co., 115 N.Y.S.2d 197, 280 App.Div. 530—People v. Silver, 269 N.Y.S. 765, 240 App.Div. 259—In re Ryle's Estate, 12 N.Y.S.2d 337, 171 Misc.

stipulations is that the court must, if possible, ascertain and give effect to the intent of the parties.⁹⁴ The stipulation must be given a fair and reasonable construction,⁹⁵ and not a strained one,⁹⁶ and should be construed broadly in the interest of justice.⁹⁷ Such a stipulation must be construed as a whole and the intent of the parties collected from the entire instrument,⁹⁸ and, if there are two stipulations, they must be construed together as parts of one agreement.⁹⁹ A stipulation of this nature is to be construed in the light of the whole record,¹ including the state of the pleadings and the allegations therein,² and the attitude of the parties in respect of the issues;³ and it is also to be construed in the light of surrounding circumstances⁴ or the situation at the time of its execution.⁵

Where the language of one party may be understood in more senses than one, the stipulation is to be interpreted in the sense in which he had reason to suppose it was understood by the other party.⁶ A construction should be avoided, if possible, which will make the stipulation frivolous or ineffectual;⁷ and a construction will not be adopted which will permit of its being used as a trap to the disadvan-

tage of one of the parties.⁸ Generally, words employed will be given their ordinary and popular meaning.⁹ Technical words will be given their technical meaning,¹⁰ but should not be permitted to vitiate the plain terms of the stipulation.¹¹ If ambiguous, the stipulation will be construed most strongly against the party relying on it.¹²

b. Operation and Effect

- (1) As to facts specifically admitted
- (2) As to facts not specifically admitted
- (3) As affecting necessity for, or admissibility of, other evidence
- (4) Requirement or propriety of findings
- (5) Admissions by, or as affecting, pleadings
- (6) Effect with respect to instructions

(1) As to Facts Specially Admitted

- (a) In general
- (b) On subsequent trial of same or different cause

(a) In General

In the absence of fraud, mistake, or imposition, a

291—Eisenhut v. Marion De Vries, Inc., 269 N.Y.S. 483, 150 Misc. 804, affirmed 276 N.Y.S. 602, 243 App. Div. 539.

Ohio.—Cohen v. I. B. Goodman Mfg. Co., 87 N.E.2d 370, 85 Ohio App. 85.

Or.—Cole v. School Dist. No. 30 of Clatsop County, 47 P.2d 229, 151 Or. 12—Weyerhaeuser Timber Co. v. First Nat. Bank, 38 P.2d 48, 150 Or. 172, reheard 43 P.2d 1078, 150 Or. 172.

Pa.—R. K. O. Distributing Corporation v. Shook, 164 A. 855, 108 Pa. Super. 383, followed in Metro Goldwyn Mayer Distributing Corporation v. Shook, 164 A. 858, 108 Pa. Super. 391.

Tenn.—Monroe County Motor Co. v. Tennessee Odin Ins. Co., 231 S.W. 2d 386, 33 Tenn.App. 223.

Tex.—Firestone Tire & Rubber Co. v. Chipman, Civ.App., 194 S.W.2d 609.

Va.—Central Nat. Bank of Richmond v. First & Merchants Nat. Bank of Richmond, 198 S.E. 883, 171 Va. 289.

60 C.J. p 77 note 3 [a].

94. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind. App. 508.

Pa.—Commonwealth v. Eastern Securities Co., 163 A. 157, 309 Pa. 44.

Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924.

60 C.J. p 77 note 4.

95. D.C.—Alabama Power Co. v. Mc-

Ninch, 94 F.2d 601, 68 App.D.C. 132.

Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924.

60 C.J. p 77 note 5.

96. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

97. U.S.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A.III, 179 F.2d 133.

Ill.—Joseph Denunzio Fruit Co. v. Pennsylvania Co., 172 Ill.App. 277.

Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924.

98. Tex.—Texas Indemnity Ins. Co. v. Dunn, Civ.App., 221 S.W.2d 922.

60 C.J. p 77 note 7.

99. Tex.—Combes v. Stringer, 167 S.W. 217, 106 Tex. 427.

60 C.J. p 78 note 8.

1. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind. App. 508.

2. Ind.—Pittman-Rice Coal Co. v. Hansen, supra.

Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, Civ. App., 221 S.W.2d 922, 924.

60 C.J. p 78 note 10.

3. Tex.—Corpus Juris quoted in Texas Indemnity Ins. Co. v. Dunn, supra.

60 C.J. p 78 note 10.

4. Tex.—Corpus Juris quoted in Tex-

as Indemnity Ins. Co. v. Dunn, supra.

60 C.J. p 78 note 9.

Applicable statute

Ind.—Louisville, N. A. & C. R. Co. v. Emily, 12 N.E.2d 1002, 105 Ind. App. 123.

5. Utah.—Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., 195 P.2d 249, 113 Utah 356.

6. Cal.—People v. Nolan, 165 P. 715, 33 Cal.App. 498.

7. Cal.—People v. Nolan, supra.

60 C.J. p 78 note 12.

8. Colo.—Riley v. Lemieux, 132 P. 699, 24 Colo.App. 184.

Ill.—Joseph Denunzio Fruit Co. v. Pennsylvania Co., 172 Ill.App. 277.

9. Colo.—Riley v. Lemieux, 132 P. 699, 24 Colo.App. 184.

60 C.J. p 78 note 14.

Meaning of words and phrases generally see supra § 11.

"Selected" held legal equivalent of "elected"

Tenn.—Alperin v. Eagle Indemnity Co., 84 S.W.2d 101, 103, 169 Tenn. 215.

10. Iowa.—Andrew v. People's State Bank of Humboldt, 234 N.W. 542, 211 Iowa 649.

11. Ill.—Christ v. Pacific Mut. Life Ins. Co., 231 Ill.App. 439, affirmed 144 N.E. 161, 321 Ill. 525.

60 C.J. p 78 note 16.

12. U.S.—Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, Philippine, 49 S. Ct. 804, 279 U.S. 306, 73 L.Ed. 704.

stipulation admitting, or agreeing on the existence of, designated facts for the purpose of trial is binding on the parties and the court; it estops the parties to deny the existence of such facts, or to maintain a contention inconsistent therewith, and the jury or court cannot find contrary to the stipulated admissions.

In the absence of fraud,¹³ mistake,¹⁴ or imposition,¹⁵ stipulations admitting, or agreeing on the existence of, designated facts for the purpose of trial are binding and conclusive on the parties as to the facts so designated,¹⁶ and on the court¹⁷ or

13. N.H.—Burbank v. Rockingham Mut. Fire Ins. Co., 24 N.H. 550, 57 Am.D. 300.
60 C.J. p 78 note 19.
Fraud as ground for relief from stipulation see *infra* § 35.

14. Va.—Rust v. Indiana Flooring Co., 145 S.E. 321, 151 Va. 845.

15. Ark.—Webster v. Goolsby, 197 S. W. 286, 130 Ark. 141.
N.H.—Dinsmore v. Manchester, 81 A. 533, 76 N.H. 187.

16. U.S.—Nelson v. U. S., C.C.A. Minn., 131 F.2d 301—Ringling Bros.—Barnum & Bailey Combined Shows v. Olvera, C.C.A. Cal., 119 F.2d 584—Jones v. U. S., C.C.A. Ill., 72 F.2d 873—Bradstreet Co. of Maine v. Commissioner of Internal Revenue, C.C.A., 65 F.2d 943—Peters v. Alsop, D.C. Hawaii, 95 F. Supp. 684—John Rissman & Son v. Gordon & Ferguson, D.C. Minn., 78 F. Supp. 195—H. A. Whitacre, Inc., v. U. S., 22 C.C.P.A., Customs, 623.
Ark.—Worsley v. Burks, 218 S.W.2d 717, 214 Ark. 942—Singer Sewing Mach. Co. v. Cole, 63 S.W.2d 977, 187 Ark. 1017.

Cal.—*Corpus Juris* cited in Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 673, 62 Cal.App.2d 328—*Corpus Juris* cited in People v. Gabriel, 135 P.2d 378, 380, 57 Cal. App.2d 788—Reichle v. Hazle, 71 P.2d 849, 22 Cal.App.2d 543—Hooker v. American Indem. Co., 54 P.2d 1128, 12 Cal.App.2d 116.

Ga.—Acme Fast Freight v. Southern Ry. Co., 21 S.E.2d 493, 67 Ga.App. 885.

Idaho.—Randall v. U. S. Fidelity & Guaranty Co., 23 P.2d 319, 53 Idaho 310.

Ill.—People ex rel. Brenza v. Anderson, 103 N.E.2d 629, 411 Ill. 252—Shell Oil Co. v. Industrial Commission, 94 N.E.2d 888, 407 Ill. 186—People v. Rave, 65 N.E.2d 23, 392 Ill. 435—Gietl v. Commissioners of Drainage Dist. No. 1 of Town of Bois D'Arc, 51 N.E.2d 512, 384 Ill. 499—People ex rel. Batman v. Illinois Cent. R. Co., 17 N.E.2d 25, 369 Ill. 432—People v. Hopper, 72 N. E.2d 648, 331 Ill.App. 173—Stevens v. Moore, 47 N.E.2d 498, 318 Ill. App. 228—Waterman v. Hall, 270 Ill.App. 558.

Ind.—Montgomery Ward & Co. v. Thalman, 93 N.E.2d 352, 130 Ind. App. 473—Barker v. Reynolds, 179 N.E. 396, 94 Ind.App. 29.

Ky.—Herd v. Lyttle, 222 S.W.2d 834, 310 Ky. 788—Young v. Porter-Leach Hardware Co., 148 S.W.2d

718, 285 Ky. 625—Pendleton v. City Nat. Bank of Mayfield, 106 S.W.2d 977, 269 Ky. 250.

Mass.—Lynch v. Kaufman, 105 N. E.2d 848—Emery v. New York, N. H. & H. R. Co., 20 N.E.2d 563, 302 Mass. 578—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.
Mich.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A. L.R. 699—National Bank of Detroit v. State Land Office Board, 1 N.W.2d 525, 300 Mich. 240.

Mo.—General Motors Acceptance Corp. v. Vanausdall, App., 249 S. W.2d 1003.

Neb.—Trebelhorn v. Bartlett, 47 N. W.2d 374, 154 Neb. 113—In re Sauter's Estate, 5 N.W.2d 263, 142 Neb. 42—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L. R. 767.

N.J.—Motorlease Corp. v. Mulroony, 86 A.2d 765, 9 N.J. 82—Watkins Realty Co. v. Hyman, 157 A. 675, 9 N.J.Misc. 1317.

N.Y.—Darnet Realty Corp. v. Oboda, 103 N.Y.S.2d 734, 199 Misc. 478—Rosmor Realty Corp. v. Caviness, 66 N.Y.S.2d 588, 187 Misc. 888.

Okl.—Wasson v. Collett, 242 P.2d 703, 206 Okl. 248—*Corpus Juris* cited in Yarnie v. Willmott, 88 P.2d 325, 326, 184 Okl. 382.

Or.—National Surety Corp. v. Smith, 114 P.2d 118, 168 Or. 265, reheard 123 P.2d 203, 168 Or. 265.

Tex.—Golasinski v. Warren Refrigerator Co., Civ.App., 226 S.W.2d 220—McGregor v. Allen, Civ.App., 195 S.W.2d 945, error dismissed—Antone v. Stiles, Civ.App., 177 S.W. 2d 246—Sloan v. Sloan's Adm'r, Civ. App., 117 S.W.2d 803.

Wis.—Mitchell v. Williams, 46 N.W. 2d 325, 258 Wis. 351.

60 C.J. p 78 note 22.
Stipulations as judicial admissions see Evidence § 307.

A stipulation of an ultimate fact must be treated as if established by the clearest proof.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A. Ill., 179 F.2d 138.

Party preparing stipulation

N.J.—Motorlease Corp. v. Mulroony, 86 A.2d 765, 9 N.J. 82.

Question previously controverted

Where party, in open court, agrees that question previously controverted by pleadings or evidence is as contended by opponent, it is no longer a controverted question, and court may rule on it as conceded.—Clark v. Missouri Pac. R. Co., 8 P.2d 359, 134 Kan. 769.

Stipulation held binding as to material facts

Cal.—Los Angeles Athletic Club v. Board of Harbor Com'rs of Los Angeles, 20 P.2d 130, 130 Cal.App. 376.

Particular facts or admissions

(1) Amount of claimed commissions.—McConville v. Remington Rand, 270 N.W. 701, 278 Mich. 333.

(2) Value of property in dispute.—Higgins v. Guerin, 245 P.2d 956, 74 Ariz. 187.

(3) Value of stolen article.—State v. Page, Mo.App., 192 S.W.2d 577.

(4) Fair market value of property.—C. I. R. v. West Production Co., C.C.A. Tex., 121 F.2d 9, certiorari denied West Production Co. v. C. I. R., 62 S.Ct. 186, 314 U.S. 682, 86 L.Ed. 546.

(5) Date of filing of tax list.—Gietl v. Commissioners of Drainage Dist. No. 1 of Town of Bois D'Arc, 51 N.E. 2d 512, 384 Ill. 499.

(6) Legality of all tenders referred to.—McFarland v. Christoff, 92 N.E. 2d 555, 120 Ind.App. 416, rehearing denied 92 N.E.2d 867, 120 Ind.App. 416.

(7) Plaintiff's ownership of bonds in suit.—Mefford v. Oklahoma City ex rel. Simpson, 155 P.2d 523, 195 Okl. 45.

(8) Facts of accident as set forth in employee's statement.—Flanagan v. Charles E. Green & Son, 2 A.2d 180, 121 N.J.Law 327, affirmed 5 A.2d 742, 122 N.J.Law 424.

(9) Facts establishing agency of defendant's employee.—Mitchell v. Walton Lunch Co., 25 N.E.2d 151, 305 Mass. 76.

(10) Place of seizure of intoxicating liquor; venue.—Bowdry v. State, 166 P.2d 1018, 82 Okl.Cr. 119.

(11) Property not susceptible of partition.—Messerole v. Messerole, Tex.Civ.App., 154 S.W.2d 189.

17. U.S.—Nelson v. U. S., C.C.A. Minn., 131 F.2d 301—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282, affirmed in part and reversed in part on other grounds, C.C.A., 160 F.2d 527, certiorari denied 67 S.Ct. 1205, 331 U.S. 812, 91 L.Ed. 1832.

Cal.—*Corpus Juris* cited in People v. Gabriel, 135 P.2d 378, 380, 57 Cal. App.2d 788—People v. Beggs, 160 P.2d 600, 69 Cal.App.2d Supp. 819.
Mo.—McCrory v. Kurn, App., 101 S. W.2d 114.

an industrial board or commission,¹⁸ as long as the stipulations stand.¹⁹ These stipulations estop the parties to deny the existence of such facts,²⁰ or to maintain a contention contrary thereto, or incon-

sistent therewith,²¹ and the jury or court cannot find contrary to the stipulated admissions of the parties.²² Where the facts are admitted by the pleading, the proper judgment to be rendered has

N.J.—O'Brien v. Baldwin, 65 A.2d 65, 2 N.J.Super. 134.

60 C.J. p 79 note 24.

Conclusive effect on court generally see *supra* § 17.

Stipulations regarded in decision

(1) Stipulations of material facts made with authority must be regarded in the decision of cases.—Commissioner of Internal Revenue v. Cummings, C.C.A.Ala., 77 F.2d 670.

(2) Where the parties stipulate as to a fact, the case must be disposed of on such stipulation.—Moore v. U. S., C.C.A.Wash., 157 F.2d 760, certiorari denied 67 S.Ct. 867, 330 U.S. 827, 91 L.Ed. 1277.

Stipulated facts as found by court

Where parties file stipulation of facts and no additional evidence is offered, facts set out in stipulation are to be taken as those found by the court.—National Fruit Product Co. v. U. S., D.C.Va., 105 F.Supp. 658, affirmed, C.A., 199 F.2d 754.

Amount of judgment

It is error for a court to enter judgment for an amount greater than that which is stipulated to be the value of the property in dispute.—Higgins v. Guerin, 245 P.2d 956, 74 Ariz. 187.

18. Ill.—City of Evanston v. Industrial Commission, 10 N.E.2d 644, 367 Ill. 155.

Ind.—Barker v. Reynolds, 179 N.E. 396, 94 Ind.App. 29.

19. Ill.—General Elec. Co. v. Industrial Commission, 104 N.E.2d 257, 411 Ill. 401—Shell Oil Co. v. Industrial Commission, 94 N.E.2d 888, 407 Ill. 186—Gietl v. Commissioners of Drainage Dist. No. 1 of Town of Bois D'Arc, 51 N.E.2d 512, 384 Ill. 499—Stevens v. Moore, 47 N.E.2d 498, 318 Ill.App. 228.

Neb.—In re Sautter's Estate, 5 N.W. 2d 263, 142 Neb. 42—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

60 C.J. p 79 note 23.

Rescission, withdrawal, abrogation, waiver, or abandonment see *infra* § 30.

Throughout litigation unless court relieves parties

Ariz.—Higgins v. Guerin, 245 P.2d 956, 74 Ariz. 187.

N.Y.—Rosmor Realty Corp. v. Cavinness, 66 N.Y.S.2d 588, 187 Misc. 888.

During progress of trial and on appeal

Okl.—Yamie v. Willmott, 88 P.2d 325, 184 Okl. 382.

No request for relief from stipulation

(1) Where neither party has even asked to be relieved from terms of stipulation which they have formerly entered into, they must be held still bound by their agreement to admit facts stated in the agreement.—American Surety Co. v. Hamrick Mills, 9 S.E.2d 433, 194 S.C. 221—Brown v. Pechman, 33 S.E. 732, 55 S.C. 555.

(2) Relief from stipulation generally see *infra* §§ 34–37.

20. U.S.—U. S. v. Monroe, C.C.A.N.Y., 164 F.2d 471, certiorari denied 68 S.Ct. 452, 333 U.S. 828, 92 L.Ed. 1113.

Ill.—People v. Kasallis, 52 N.E.2d 209, 385 Ill. 158.

Tex.—Antone v. Stiles, Civ.App., 177 S.W.2d 246.

60 C.J. p 79 note 26.

Jurisdiction of court

Kan.—State ex rel. State Labor Com'r v. Garlinghouse, 138 P.2d 421, 157 Kan. 91.

General and specific denials of allegations of petition would not militate against stipulated facts.—Crawford v. Walrath, 247 P.2d 457, 173 Kan. 409.

Delivery of deeds

U.S.—U. S. v. 12,800 Acres of Land in Hall County, D.C.Neb., 69 F.Supp. 767.

Date of rejection of claim

U.S.—U. S. v. Elgin Nat. Watch Co., C.C.A.Ill., 66 F.2d 344.

21. U.S.—W. W. Clyde & Co. v. Dyess, C.C.A.Utah, 126 F.2d 719, certiorari denied 63 S.Ct. 29, 317 U.S. 638, 87 L.Ed. 514—John Rissman & Son v. Gordon & Ferguson, D.C. Minn., 78 F.Supp. 195—Bunte Bros. v. Standard Chocolates, D.C.Mass., 45 F.Supp. 478.

Ariz.—Stewart v. Schnepf, 158 P.2d 529, 62 Ariz. 440.

Cal.—Belt-Casualty Co. v. Furman, 23 P.2d 293, 218 Cal. 359—Buckley v. Roche, 4 P.2d 929, 214 Cal. 241—Goldman v. House, 209 P.2d 639, 93 Cal.App.2d 572—Morrison v. Jose, 135 P.2d 586, 57 Cal.App.2d 795.

Colo.—Powerline Co. v. Crown Service Co., 158 P.2d 732, 113 Colo. 450. Ill.—City of Highland Park v. Calder, 269 Ill.App. 255.

Kan.—Tamsk v. Continental Oil Co., 150 P.2d 326, 158 Kan. 747.

Ky.—French v. Gardeners & Farmers Market Co., 122 S.W.2d 487, 275 Ky. 660.

Mass.—Turkowska v. Dielendick, 76 N.E.2d 556, 321 Mass. 754—Fire-

man's Fund Ins. Co. v. Shapiro, 190 N.E. 741, 286 Mass. 577.

N.M.—Madrid v. Borrego, 221 P.2d 1058, 54 N.M. 276.

N.C.—Crook v. Warren, 192 S.E. 684, 212 N.C. 93.

N.D.—Muhlhauser v. Becker, 37 N.W. 2d 352, 76 N.D. 402.

Okl.—Smith v. Ogle, 164 P.2d 992, 196 Okl. 295—Cordonnier v. State, 192 P.2d 298, 86 Okl.Cr. 291.

Pa.—Miller v. Jacobs, 65 A.2d 362, 361 Pa. 492—Reid v. Sovereign Camp, W. O. W., 17 A.2d 890, 340 Pa. 400—In re Bullitt's Estate, 162 A. 288, 308 Pa. 413.

S.D.—State ex rel. Crane Co. of Minnesota v. Stokke, 272 N.W. 811, 65 S.D. 207, 110 A.L.R. 761.

Tenn.—State ex rel. Doty v. Styke, 199 S.W.2d 468, 29 Tenn.App. 620.

Tex.—Stewart v. Shoemaker, Civ.App., 225 S.W.2d 873, refused no reversible error—Rotge v. Murphy, Civ. App., 198 S.W.2d 932, refused no reversible error—Hughes Production Co. v. Hagan, Civ.App., 114 S.W.2d 326, error dismissed.

On appeal

Mo.—General Motors Acceptance Corp. v. Vanausdall, App., 249 S.W.2d 1008.

Voluntary character of bond

Tenn.—Brown v. McCulloch, 144 S.W.2d 1, 24 Tenn.App. 324.

Mistaken contention as to common source of title

Tex.—Garza v. Cavazos, 221 S.W.2d 549, 148 Tex. 138.

Requirements for recovery on policy

Amount of recovery, under insurance policy, having been agreed on at close of evidence, objection that filing of proof of loss and due starting of suit had not been shown was not available to insurer.—McKerley v. Commercial Casualty Ins. Co., 160 S.E. 576, 201 N.C. 502.

22. La.—Hudnall v. Hailey, App., 30 So.2d 774.

Mich.—Russ Dawson, Inc. v. Michigan Unemployment Compensation Commission, 53 N.W.2d 693, 334 Mich. 82.

N.J.—Galbierczyk v. Galbierczyk, 76 A.2d 905, 10 N.J.Super. 206.

60 C.J. p 79 notes 24 [a], 25.

"We are not permitted to speculate and indulge unreasonable inferences . . . when to do so would manifestly conflict with and torture the plain language and meaning of the stipulation."—McDaniel v. California-Western States Life Ins. Co., C.A. Tex., 181 F.2d 606, 609, 17 A.L.R.2d 1036, certiorari denied 71 S.Ct. 56, 340 U.S. 822, 95 L.Ed. 604.

been held to be a mere legal conclusion.²³ So, a party plaintiff may even "stipulate himself out of court," where he admits facts which conclusively bar his right to recovery;²⁴ and, on the other hand, a party defendant may, by stipulation, admit every fact essential to a valid cause of action against him,²⁵ or foreclose himself from relying on a particular ground of defense.²⁶

The general rule that stipulations admitting the existence of facts for the purpose of the trial are conclusive on the parties does not apply where it appears from the manner in which the case was tried that the stipulation was ignored,²⁷ as where the party relying thereon introduces evidence inconsistent therewith.²⁸ Likewise, the court is not bound where the stipulation is contrary to a fact in evidence.²⁹

As affecting jurisdiction. Where jurisdiction of the court has attached by virtue of the pleadings, jurisdiction cannot be detached by a subsequent stipulation in the course of the trial on some question of fact.³⁰

Effect of conclusions of law or fact contained in stipulation. The parties are not necessarily bound by conclusions of law³¹ or fact³² contained in the stipulation, and are not so bound where the conclusions are not warranted by the facts stated.³³ A stipulation of conclusion, without basis in the facts, but contrary to them, may not be regarded in the decision of the case,³⁴ and the court is not bound thereby.³⁵

(b) On Subsequent Trial of Same or Different Cause

Authorities differ as to whether admission of facts by stipulation for the purpose of trial is available in a subsequent trial.

According to some decisions, stipulations admitting facts for the purpose of trial are always understood as having reference to the trial then pending, and not as stipulations which shall bind the parties at any future trial;³⁶ and others hold that such a stipulation, if objected to by either party, will not be binding on another trial.³⁷ Thus, it has been said that if a stipulation offered in evidence

Criminal case

When attorneys on both sides in criminal case stipulate or agree as to existence of a fact, jury must accept stipulation as evidence and regard such fact as conclusively proved.—*U. S. v. Schneiderman*, D.C.Cal., 106 F.Supp. 906.

Oral evidence superseded by stipulation

Conn.—*Spicer v. Hincks*, 155 A. 508, 113 Conn. 366, 76 A.L.R. 1519.

Findings held supported by stipulation

(1) Finding of agency.—*Dabney v. Edwards*, 53 P.2d 962, 5 Cal.2d 1, 103 A.L.R. 822.

(2) Finding as to removal of trade-in automobile without consent of mortgagee.—*Snyder v. McCain*, 89 P.2d 613, 43 N.M. 231.

(3) Other findings.

Cal.—*Pacific States Savings & Loan Co. v. Stowell*, 46 P.2d 780, 7 Cal. App.2d 280.

Iowa.—*Bates v. Farmers' & Merchants' Sav. Bank of Durant*, 257 N.W. 578, 219 Iowa 78.

23. Mo.—*Union Nat. Bank of Wichita, Kan., v. Lamb*, 227 S.W.2d 60, 360 Mo. 81.

24. Iowa.—*Dwight v. Des Moines*, 156 N.W. 338, 174 Iowa 178. 60 C.J. p 79 note 27.

No valuable consideration for note

A stipulation that the only consideration for note, on which claim against deceased maker's estate was based, was love and affection eliminated statutory presumption of valuable consideration.—*In re Smith's Estate*, 277 N.W. 141, 226 Wis. 556.

Stipulation of divorce; issue of annulment

Party, by stipulating that he had already been awarded a divorce decree, put himself out of court on issue as to annulment of marriage of the parties.—*Noble v. Noble*, 189 P.2d 502, 83 Cal.App.2d 775.

Right to tax reduction

In proceeding to secure reduction in tax assessment, stipulation conceding that assessments were equal and proportionate with other assessments in city showed that relator was not aggrieved and hence could not secure relief.—*People ex rel. Rickey v. Hunt*, 271 N.Y.S. 842, 241 App.Div. 261.

25. Ohio.—*State ex rel. Johnson v. Washburn*, 16 Ohio Supp. 31. 60 C.J. p 79 note 28.

Stipulation held in effect plea of guilty

Utah.—*State v. Barlow*, 153 P.2d 647, 107 Utah 292, appeal dismissed 65 S.Ct. 916, 324 U.S. 829, 89 L.Ed. 1396, rehearing denied 65 S.Ct. 1026, 324 U.S. 891, 89 L.Ed. 1438.

Stipulation held to make prima facie case

U.S.—*Scarburgh v. Compania Sud-Americana De Vapores, C.A.N.Y.*, 174 F.2d 423.

Tex.—*J. M. Radford Grocery Co. v. Speck, Civ.App.*, 152 S.W.2d 787, error refused.

26. Tenn.—*Margaret Mill v. Aycock Hosley Mills*, 101 S.W.2d 154, 20 Tenn.App. 533.

27. Idaho.—*Hart v. Turner*, 226 P.2d 39 Idaho 50.

Kan.—*Lyon v. Robert Garrett Lumber Co.*, 92 P. 589, 77 Kan. 823.

28. Idaho.—*Hahn v. National Casualty Co.*, 136 P.2d 739, 64 Idaho 684—*Hart v. Turner*, 226 P. 282, 39 Idaho 50.

Okl.—*Gorman v. Wilson*, 98 P.2d 600, 186 Okl. 435.

29. U.S.—*Wilson & Co. v. U. S.*, Ct.Cl., 15 F.Supp. 332.

30. Ohio.—*Fitzgerald v. Cleveland Cadillac Co.*, 17 Ohio App. 12.

Jurisdiction of subject matter as subject of stipulation see supra § 10.

31. Idaho.—*Hahn v. National Casualty Co.*, 136 P.2d 739, 64 Idaho 684.

Okl.—*Gorman v. Wilson*, 98 P.2d 600, 186 Okl. 435.

60 C.J. p 83 note 58.

32. Wash.—*U. S. Whaling Co. v. King County*, 165 P. 70, 96 Wash. 434, followed in *North Pac. Sea Products Co. v. King County*, 165 P. 656, 96 Wash. 699.

33. U.S.—*U. S. Whaling Co. v. King County*, 165 P. 70, 96 Wash. 434.

34. U.S.—*Commissioner of Internal Revenue v. Cummings, C.C.A.Ala.*, 77 F.2d 670.

35. Okl.—*Kansas City Life Ins. Co. v. Bancroft*, 36 P.2d 288, 169 Okl. 139.

36. Wis.—*Weisbrod v. Chicago, etc., R. Co.*, 20 Wis. 419.

Admissions to shorten trial

Wis.—*Paine v. Chicago & N. W. Ry. Co.*, 258 N.W. 846, 217 Wis. 601.

37. Ill.—*Rigdon v. More*, 89 N.E. 992, 242 Ill. 256, 134 Am.S.R. 328.

60 C.J. p 80 note 32.

was intended to be only evidential for the purpose alone of the particular proceeding then pending, and as to which it was made merely to save time, and for convenience to avoid calling witnesses, it should be regarded only as evidentiary, and not conclusive of the facts therein recited; but, if it was intended as a stipulation of ultimate facts in the cause, and applicable alike to all proceedings and trials thereof, it should be regarded as conclusive as to all such facts, unless on sufficient grounds it is shown to the court why either or both of the parties should be relieved from its effects or be allowed to withdraw it.³⁸

Nevertheless, the weight of authority is to the effect that a stipulation admitting facts for the purpose of trial, where there is nothing expressed in the agreement limiting its operation to the particular trial at which it is made, and nothing in the surrounding circumstances to demand such limitation, is equally binding on any subsequent trial of the same cause between the same parties, although the agreement does not specifically refer to more than one trial,³⁹ unless the court permits the withdrawal of the stipulation on proper application therefor;⁴⁰ but, where the admission is obviously intended for one trial alone,⁴¹ as where it is expressly limited by the agreement to the trial then pending,⁴² or

where the language of the stipulation is such as to show that the parties contemplated only one trial from which there might be an appeal,⁴³ it is not admissible on a subsequent trial of the same cause between the same parties. Also, it has been held that a stipulation as to the existence of a certain fact is not binding on a second trial when the stipulation plainly showed that in the course of time such fact would cease to exist and where it had ceased to exist before the second trial.⁴⁴ The circumstances surrounding the admission may be such as to show that it was not intended to be used on a subsequent trial.⁴⁵

Effect in different action. Admissions of fact made by counsel in one case has no binding effect in another and different action,⁴⁶ unless the client expressly authorized or ratified the admission.⁴⁷

(2) As to Facts Not Specifically Admitted

Stipulations admitting or agreeing on the existence of designated facts do not admit facts not so designated, and not necessarily inferable from the facts designated; but such a stipulation is conclusive of the existence of facts necessarily inferred from those admitted or agreed on.

Stipulations admitting or agreeing on the existence of designated facts do not admit facts not so designated,⁴⁸ and not necessarily inferable from the facts so designated.⁴⁹ Accordingly, a stipulation

38. Utah.—Volker-Scowcroft Lumber Co. v. Vance, 103 P. 970, 36 Utah 348, 24 L.R.A., N.S., 321, Ann. Cas. 1912A 124.

39. Cal.—Gonzales v. Pacific Greyhound Lines, 214 P.2d 809, 34 Cal. 2d 749—Crenshaw v. Smith, 168 P.2d 752, 74 Cal.App.2d 255—Andrew v. Bankers' & Shippers' Ins. Co., 13 P.2d 515, 125 Cal.App. 24. Okl.—Atlas Life Ins. Co. v. Unger, 177 P.2d 98, 198 Okl. 234. 60 C.J. p 80 note 34.

40. Cal.—Gonzales v. Pacific Greyhound Lines, 214 P.2d 809, 34 Cal. 2d 749.

Withdrawal generally see *infra* § 30.

41. Kan.—Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 394, 42 Am.R. 163.

42. N.Y.—Onward Constr. Co. v. Tiffany Studios, 173 N.Y.S. 759, 185 App.Div. 850. 60 C.J. p 80 note 36.

43. Mo.—Pioneer Trust Co. v. Missouri Pac. R. Co., 224 S.W. 106, 204 Mo.App. 289.

44. Okl.—Capital Townsite Co. v. Brown, 126 P. 722, 34 Okl. 568. 60 C.J. p 80 note 38.

45. Cal.—Sacre v. Chalupnik, 205 P. 449, 188 Cal. 386.

Conn.—Perry v. Simpson Waterproof Co., 40 Conn. 313.

46. U.S.—Board of Com'rs of Lake County, Colo., v. Sutliff, Colo., 97 F. 270, 38 C.C.A. 167.

Cal.—Davis v. Robinson, 123 P.2d 894, 50 Cal.App.2d 700.

47. D.C.—Berry v. Littlefield, Alvord & Co., 296 F. 285, 54 App.D.C. 195.

48. U.S.—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F.2d 144.

Cal.—Charach v. Lansing, 236 P.2d 1, 106 Cal.App.2d 735—Waterford Irr. Dist. v. Modesto Irr. Dist., 16 P.2d 275, 127 Cal.App. 544.

Ky.—Tankersley v. Sell, 226 S.W.2d 17, 311 Ky. 832.

Ohio.—Rice v. Campbell, 50 N.E.2d 430, 71 Ohio App. 477.

S.C.—*Corpus Juris* cited in Turbeville v. Morris, 26 S.E.2d 821, 830, 203 S. C. 287.

Wis.—Rutta v. Industrial Commission, 257 N.W. 15, 216 Wis. 238. 60 C.J. p 80 note 40.

Admission of liability; amount of damages

Where defendant insurance company stipulates to liability and agrees to pay damages to extent of its coverage, it is not precluded from complaining that damages are excessive, even though not above policy limits; stipulation puts plaintiff to proof of damages, and liability is admitted

only for legitimate proof of damages which flow from injuries sustained.—Chitek v. Horn, 42 N.W.2d 162, 257 Wis. 9.

49. U.S.—The George W. Pratt, C.C. A.N.Y., 76 F.2d 902—Clifford v. Merritt-Chapman & Scott Corporation, C.C.A.Fla., 57 F.2d 1021—B. B. Chemical Co. v. Cataract Chemical Co., D.C.N.Y., 35 F.Supp. 586, second case, reversed on other grounds, C.C.A., 122 F.2d 526.

Ark.—Ciscell v. Brazil, 178 S.W.2d 250, 206 Ark. 1019.

Cal.—Walpole v. Prefab Mfg. Co., 230 P.2d 36, 103 Cal.App.2d 472—Casaretto v. DeLucchi, 174 P.2d 328, 76 Cal.App.2d 800.

Ga.—Pullman Co. v. Suttles, 199 S. E. 821, 187 Ga. 217.

Idaho.—Wells v. Robinson Const. Co., 16 P.2d 1059, 52 Idaho 562.

Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

Iowa.—Inter-Ocean Reinsurance Co. v. Morrison, 283 N.W. 909, 225 Iowa 1386.

Ky.—Le Sage v. Pitts, 223 S.W.2d 347, 311 Ky. 155.

Me.—Pennock v. Smith, 25 A.2d 227, 138 Me. 303.

Mass.—Harnden v. Smith, 26 N.E.2d 310, 305 Mass. 485.

admitting that a proof of claim contains a particular averment does not admit that the averment is true.⁵⁰ On the other hand, a stipulation of this character is conclusive of the existence of such facts as are necessarily inferred from the facts admitted or agreed on,⁵¹ and as to a fact so inferred a finding

Tenn.—Jones v. Equitable Life Assur. Soc. of U. S., 152 S.W.2d 249, 177 Tenn. 644—Third Nat. Bank of Nashville v. Keathley, App., 242 S.W.2d 760—Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn.App. 36.

Tex.—Lessing v. Russek, Civ.App., 234 S.W.2d 891, refused no reversible error—Burgess v. Hatton, Civ. App., 209 S.W.2d 999, error refused—Capetillo v. Burress & Rogers, Civ.App., 203 S.W.2d 953, refused no reversible error—Sun Oil Co. v. Gunter, Civ.App., 125 S.W.2d 338—Thompson v. Mayhew Lumber Co., Civ.App., 103 S.W.2d 1005—Green v. State, 158 S.W.2d 771, 143 Tex.Cr. 337.

Wis.—Rutta v. Industrial Commission, 257 N.W. 15, 216 Wis. 238. 60 C.J. p 80 note 41.

Stipulation held insufficient to make out prima facie case

Tex.—Texas Co. v. Turner, Civ.App., 138 S.W.2d 861, reversed on other grounds Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380.

Facts stated in hypothetical question
Cal.—Lundrigan v. City of Los Angeles, 186 P.2d 12, 82 Cal.App.2d 238.

Cause and nature of injury

Admission, in compensation hearing, that claimant was injured on named day was not admission that injury arose out of, and in course of, claimant's employment, or that it was compensable.—Payton v. Fidelity & Casualty Co. of New York, 171 S.E. 392, 47 Ga.App. 747.

Employee's engagement in interstate commerce when injured

Ill.—Day v. Chicago & N. W. Ry. Co., 188 N.E. 540, 354 Ill. 469.

Voluntary character of confession

Stipulation that confession was voluntary was not a stipulation as to truth of confession.—People v. Barnes, 183 P.2d 654, 30 Cal.2d 524.

Validity of ordinance

Stipulation that contract with city was made and approved by ordinance is not a stipulation as to validity of ordinance, which is a question of law and not a proper matter for agreement of the parties.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

Insolvency

A stipulation that executor was insolvent on certain date did not prove that claim of tax commission against him personally for inheritance taxes for which he was personally liable was worthless.—In re Shafer's Estate, 56 N.E.2d 926, 74 Ohio App. 33.

Purpose of book of account

In action to rescind purchase of

business for misrepresentation of income, stipulation that seller's book of account was intended to show actual receipts would not preclude impeachment of account.—Theatrical Enterprises v. Ferron, 7 P.2d 351, 119 Cal. App. 671.

50. U.S.—First-Mechanics Nat. Bank of Trenton v. C. I. R., C.C.A.3, 117 F.2d 127, 132 A.L.R. 1459.

51. U.S.—U. S. v. Heffer, C.C.A.N.Y., 159 F.2d 831, certiorari denied 67 S.Ct. 1202, 331 U.S. 811, 91 L.Ed. 1831, rehearing denied 67 S.Ct. 1530, 331 U.S. 867, 91 L.Ed. 1871—Am-torg Trading Corporation v. Commissioner of Internal Revenue, C. C.A., 65 F.2d 583.

Ark.—Bride v. Walker, 176 S.W.2d 148, 206 Ark. 498.

Cal.—George v. Colvin, 219 P.2d 64, 98 Cal.App.2d 57.

Conn.—Foster v. Hartford Buick Co., 39 A.2d 884, 131 Conn. 348.

Ga.—Louisville & N. R. Co. v. Meredith, 21 S.E.2d 101, 194 Ga. 106. Idaho.—Hahn v. National Casualty Co., 136 P.2d 739, 64 Idaho 684.

Ill.—People ex rel. Yohe v. Hubble, 38 N.E.2d 38, 378 Ill. 377—Hish v. Shelby County, 47 N.E.2d 107, 317 Ill.App. 540.

Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

Ky.—Brown v. Town of Dover, 120 S.W.2d 225, 274 Ky. 692.

Mo.—Guaranty Savings & Loan Ass'n v. City of Springfield, App., 113 S.W.2d 147, affirmed 139 S.W.2d 955, 346 Mo. 79.

N.J.—Watkins Realty Co. v. Hyman, 157 A. 675, 9 N.J.Misc. 1317.

N.Y.—Pollard v. Trivia Bldg. Corp., 50 N.E.2d 287, 291 N.Y. 19—Arundel Corp. v. Federal Ins. Co., 94 N.Y.S.2d 772, 197 Misc. 284, affirmed 100 N.Y.S.2d 205, 198 Misc. 884—Levitt v. Prudential Ins. Co. of America, 270 N.Y.S. 39, 150 Misc. 754.

Tex.—Moore v. Ashbrook, Civ.App., 197 S.W.2d 516, error refused—Holland v. Commonwealth Finance Corp., Civ.App., 118 S.W.2d 364—McLaughlin v. State, Cr.App., 249 S.W.2d 221.

60 C.J. p 81 note 42.

Giving of written notice

U.S.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A.Ill., 179 F.2d 133.

Driver as employee, servant, or agent of defendant

Ill.—McCarty v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill.App. 474.

Date of presenting check

Finding that check was not presented for payment until a certain date was held justified under stipula-

tion that it was presented for payment on that date.—Steinmetz v. Schultz, 241 N.W. 734, 59 S.D. 603.

Execution and recording of conveyances

In ejectment action, defendant's stipulation that plaintiff and his predecessors had a title of record back to a specified year obviated the necessity of proving due execution and recording of conveyances.—Pennington v. Anglin, 155 S.W.2d 860, 288 Ky. 226.

Absence of fraud or undue influence

Stipulation that joint tenancies were complete, that they were in full effect, and that all steps necessary to set forth and establish them as joint tenancies had been taken conceded that there was no fraud or undue influence in connection with their creation.—Brown v. MacDougall, 112 P.2d 678, 44 Cal.App.2d 491.

Qualification of expert witness

In malpractice action, stipulation by defendant that physician was a qualified expert witness indicated intention to stipulate that witness was qualified to testify as to whether defendant's treatment of plaintiff was consistent with what other physicians in locality, in the exercise of reasonable care, might have done under similar circumstances, since witness, in order to have been a qualified expert, must have known such matters.—McGuire v. Baird, 70 P.2d 915, 9 Cal.2d 353.

Treasurer having customary duties

Where it was stipulated that person was treasurer of corporate owner, and nothing was said about any limitation as to his duties or title prior to trial, corporate owner was estopped to claim that such person did not have usual and customary duties of a treasurer.—The Marguerite W., D.C.Wis., 49 F.Supp. 929, affirmed, C.C.A., 140 F.2d 491.

Physician satisfactory to insurer

(1) In action on insurance policy requiring submission of proofs of insured's injury by "physician satisfactory to insurer," stipulation showing that physician who signed proofs, in filling out certificate of death of insured in another case, did not mention tuberculosis from which insured suffered, showed reasonable basis for insurer's rejection of such proofs on ground that physician was unsatisfactory to insurer.—Murphy v. National Life & Accident Ins. Co., 150 S.W.2d 1073, 177 Tenn. 449.

(2) In such action, stipulation that one who signed proofs of insured's illness was a duly licensed and practicing physician established prima facie that such person was worthy

by the jury is not necessary.⁵²

(3) As Affecting Necessity for, or Admissibility of, Other Evidence

No proof of stipulated facts is necessary. Evidence to disprove the facts admitted, or inconsistent therewith, is inadmissible.

No proof of stipulated or admitted facts, or of matters necessarily implied thereby, is necessary,⁵³ the stipulations being substituted for proof and dispensing with evidence;⁵⁴ so, it is not error to exclude evidence of a fact which has been stipulated.⁵⁵ However, relevant evidence cannot be kept

from the jury by an admission of the fact,⁵⁶ the admission of evidence tending to establish a stipulated fact is not prejudicial error;⁵⁷ and a stipulation of facts will not be given an effect which would necessitate the disregarding of facts established by uncontradicted testimony.⁵⁸ A stipulation admitting designated facts does not relieve the parties of the necessity of proving facts not admitted either in terms or by necessary implication and which are essential elements of a valid cause of action or defense.⁵⁹

Admissibility. Evidence to disprove,⁶⁰ or which

and had not been guilty of any unprofessional conduct.—*Murphy v. National Life & Accident Ins. Co.*, 140 S.W.2d 156, 176 Tenn. 202.

52. Tex.—*McLaughlin v. State*, Cr. App., 249 S.W.2d 221.

53. U.S.—*Southern California Freight Lines v. Davis*, C.C.A.Cal., 167 F.2d 708—*Joseph v. U. S.*, C.C.A.Cal., 145 F.2d 74, certiorari denied 65 S.Ct. 188, 323 U.S. 776, 89 L.Ed. 620.

Cal.—*Reichle v. Hazle*, 71 P.2d 849, 22 Cal.App.2d 543—*Keefer v. Portersfield*, 55 P.2d 931, 12 Cal.App.2d 403.

Ga.—*Crowder v. State*, 73 S.E.2d 85, 87 Ga.App. 37.

Ill.—*People v. Hopper*, 72 N.E.2d 648, 331 Ill.App. 173.

Ind.—*Schreiber v. Rickert*, 50 N.E.2d 879, 114 Ind.App. 55.

N.Y.—*Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 263 N.Y.S. 854, 146 Misc. 819, modified on other grounds 266 N.Y.S. 753, 239 App.Div. 100, reversed on other grounds 190 N.E. 330, 264 N.Y. 159.

Okl.—*Corpus Juris cited in Yamie v. Willmott*, 88 P.2d 325, 326, 184 Okl. 382—*Cordonnier v. State*, 192 P.2d 298, 86 Okl.Cr. 291.

Pa.—*In re Mellier's Estate*, 167 A. 358, 312 Pa. 157, 92 A.L.R. 430.

Tex.—*Flowers v. Pan American Refining Corp.*, Civ.App., 154 S.W.2d 982, error refused.

Wyo.—*Marcante v. Hein*, 67 P.2d 196, 51 Wyo. 389.

60 C.J. p 81 note 43.

Necessity and scope of proof as affected by stipulations and agreed statements generally see the C.J.S. title Trial § 57, also 64 C.J. p 111 note 18—p 112 note 27.

Nonpayment of insurance premiums
Mont.—*Johnson v. Metropolitan Life Ins. Co.*, 83 P.2d 922, 107 Mont. 133.

Office held by defendant

Ky.—*Sanders v. Commonwealth*, 60 S.W.2d 586, 249 Ky. 225.

Value of chattel

N.Y.—*Hunt Aylmer Corporation v. Landy*, 269 N.Y.S. 465, 241 App. Div. 682.

Proof of incidental facts which would tend to establish the facts stipulated is dispensed with by stipulation.—*Brown v. McCulloch*, 144 S.W.2d 1, 24 Tenn.App. 324.

54. Cal.—*Crenshaw v. Smith*, 168 P.2d 752, 74 Cal.App.2d 255.

Tex.—*Spencer v. State*, 227 S.W.2d 552, 154 Tex.Cr. 427.
60 C.J. p 82 note 44.

In different proceedings

A concession by counsel, in consenting to an order to strike the allegations of an interpleader relating to bonuses and rentals for mineral rights warrants the rejection of such evidence in a condemnation proceeding.—*Murdock v. U. S.*, C.C.A.Ark., 160 F.2d 358.

Stipulation as evidence

(1) A stipulation with respect to a valid issue may be treated by the court as evidence on which a finding may be adequately supported.—*Back v. Farnsworth*, 77 P.2d 295, 25 Cal.App.2d 212.

(2) Stipulation as to benefits received by plaintiff from sales of securities purchased for him by brokers were properly treated as evidence.—*Birch v. Arnold & Sears*, 192 N.E. 591, 288 Mass. 125.

Ordinance

A defendant who waived the production and preliminary proof of a municipal ordinance fully pleaded in petition, and reserved only the right to object to it on ground of incompetency, irrelevancy, and immateriality, was bound as fully as if sufficient preliminary proof had been made and the ordinance offered in evidence; a competent, relevant, and material ordinance, when admitted by the parties to be in force and to be accurately pleaded, becomes the law of the case and is not required to be formally offered in evidence.—*Page v. Wieland*, 28 N.E.2d 583, 137 Ohio St. 198, certiorari denied *Wieland v. Page*, 61 S.Ct. 614, 312 U.S. 687, 85 L.Ed. 1124.

55. Tex.—*S. H. Kress & Co. v. Selph*, Civ.App., 250 S.W.2d 883, error refused, no reversible error.

Refusal to submit to examination by physician

Tex.—*S. H. Kress & Co. v. Selph*, supra.

56. Ga.—*Watkins v. State*, 33 S.E.2d 325, 199 Ga. 81.

57. Tex.—*Silliman v. Oliver*, Civ. App., 247 S.W. 902.

Illegality of search held immaterial in view of stipulation.—*City of Janesville v. Heiser*, 246 N.W. 701, 210 Wis. 526.

58. Ind.—*Louisville, N. A. & C. R. Co. v. Emily*, 12 N.E.2d 1002, 105 Ind.App. 123.

59. U.S.—*B. B. Chemical Co. v. Cata-ract Chemical Co.*, D.C.N.Y., 35 F. Supp. 586, second case, reversed on other grounds, C.C.A., 122 F.2d 526.
Ga.—*Commercial Bank of Crawford v. Pharr*, 43 S.E.2d 439, 75 Ga.App. 364.

Me.—*Pennock v. Smith*, 25 A.2d 227, 138 Me. 303.

Mass.—*Shurdut v. John Hancock Mut. Life Ins. Co.*, 71 N.E.2d 391, 320 Mass. 728.

Tex.—*Exum v. Alexander*, Civ.App., 207 S.W.2d 995, refused no reversible error—*Walker v. State*, 163 S.W.2d 207, 144 Tex.Cr. 363.

Utah.—*Anson v. Ellison*, 140 P.2d 653, 104 Utah 576.

60 C.J. p 82 note 46.

60. Ark.—*Singer Sewing Mach. Co. v. Cole*, 63 S.W.2d 977, 187 Ark. 1017.

Cal.—*Corpus Juris quoted in People v. Gabriel*, 135 P.2d 378, 380, 57 Cal.App.2d 788—*Dorothy v. Drapeau*, 49 P.2d 343, 9 Cal.App. 280.

Ill.—*Gietl v. Commissioners of Drainage Dist. No. 1 of Town of Bois D'Arc*, 51 N.E.2d 512, 384 Ill. 490—*Stevens v. Moore*, 47 N.E.2d 498, 318 Ill.App. 228.

Ind.—*McFarland v. Christoff*, 92 N.E.2d 555, 120 Ind.App. 416, rehearing denied 92 N.E.2d 867, 120 Ind.App. 416—*Schreiber v. Rickert*, 50 N.E.2d 879, 114 Ind.App. 55.

Tex.—*Holland v. Commonwealth Finance Corp.*, Civ.App., 118 S.W.2d 364.

60 C.J. p 82 note 47.

has a tendency to disprove,⁶¹ the facts admitted, or which is inconsistent therewith, or contradictory thereof,⁶² is not admissible, unless and until the stipulation is nullified by consent or order of court;⁶³ nor is evidence admissible which has a tendency to limit or destroy the effect of the stipulation.⁶⁴ However, the stipulation does not bar the admission of evidence of facts not admitted and which are pertinent and necessary to establish a cause of action or defense.⁶⁵

(4) Requirement or Propriety of Findings

No finding is required as to stipulated facts, and findings in conflict therewith are improper.

No finding is required with respect to facts which

have been settled by stipulation of the parties;⁶⁶ nor may a court adopt findings in conflict with stipulated facts.⁶⁷

(5) Admissions by, or as Affecting, Pleadings

A stipulation as to facts incorporates into the pleadings all the facts agreed on, and may cure a defect in the pleadings.

If parties stipulate or admit facts into the record, it has been held that it is unnecessary to plead them.⁶⁸ So, the legal effect of a stipulation as to facts is to incorporate into the pleadings all the facts agreed on as one of the allegations thereof;⁶⁹ a stipulation may cure a defect in the plead-

61. U.S.—*H. A. Whitacre, Inc., v. U. S.*, 22 C.C.P.A., Customs, 623.

Cal.—*Corpus Juris* quoted in *People v. Gabriel*, 135 P.2d 378, 380, 57 Cal. App.2d 788.

Ill.—*Shell Oil Co. v. Industrial Commission*, 94 N.E.2d 888, 407 Ill. 186.

Mont.—*Lewis v. Lambros*, 194 P. 152, 58 Mont. 555.

Neb.—*In re Sautter's Estate*, 5 N.W. 2d 263, 142 Neb. 42—*LeBarron v. City of Harvard*, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

62. Kan.—*Crawford v. Walrath*, 247 P.2d 457, 173 Kan. 409.

Mass.—*Lynch v. Kaufman*, 105 N.E. 2d 848.

Neb.—*Trebelhorn v. Bartlett*, 47 N.W. 2d 374, 154 Neb. 113.

Ohio.—*Provident Sav. Bank & Trust Co. v. Western & Southern Life Ins. Co.*, 179 N.E. 815, 41 Ohio App. 261.

Tex.—*Wilson v. West*, Civ.App., 149 S.W.2d 1026, error dismissed, judgment correct.

Evidence confusing to jury and prejudicial to party

Ga.—*Williams v. Whitt*, 53 S.E.2d 129, 79 Ga.App. 178.

Evidence as to value of property in dispute

Ariz.—*Higgins v. Guerin*, 245 P.2d 956, 74 Ariz. 187.

63. Tex.—*Wilson v. West*, Civ.App., 149 S.W.2d 1026, error dismissed, judgment correct.

Error in stipulation based on misinformation

U.S.—*First Nat. Bank & Trust Co. of Tulsa v. Jones*, D.C.Okla., 61 F. Supp. 364.

64. U.S.—*Du Val's Estate v. C. I. R.*, C.C.A.9, 152 F.2d 103, certiorari denied 66 S.Ct. 1013, 328 U.S. 838, 90 L.Ed. 1613—*Richardson v. U. S.*, C.C.A.Tenn., 150 F.2d 58.

Ala.—*Sovereign Camp, W. O. W., v. Jones*, 178 So. 891, 235 Ala. 378.

Cal.—*Abalian v. Townsend Social Center*, 246 P.2d 965, 112 Cal.App.2d 441.

Tex.—*Cherry v. Magnolia Petroleum Co.*, Civ.App., 24 S.W.2d 549.

Identity of article examined by witness

Where the parties had stipulated that respirator issued by defendant employer to deceased employee had been delivered to expert witness, latter's testimony relating to respirator was improperly excluded on ground that it was not shown that respirator examined by him was respirator furnished employee by employer.—*Coburn v. North American Refractories Co.*, 174 S.W.2d 757, 295 Ky. 566.

65. U.S.—*Southern California Freight Lines v. Davis*, C.C.A.Cal., 167 F.2d 708.

Ark.—*Singer Sewing Mach. Co. v. Cole*, 63 S.W.2d 977, 187 Ark. 1017.

N.J.—*Armstead v. Schletter Full Fashion Silk Hosiery*, 76 A.2d 28, 9 N.J.Super. 270.

N.Y.—*Witschger v. Kamages*, 92 N.Y.S.2d 165, 275 App.Div. 1053.

60 C.J. p 82 note 50.

66. Cal.—*Alderson v. Cutting*, 126 P. 157, 163 Cal. 503.

60 C.J. p 82 note 51.

Value; quantities

In replevin to recover possession of crops grown on a leased farm, submitting to jury issue as to quantity and value of portion of crops belonging to plaintiff was not error, notwithstanding parties had stipulated as to value at the outset of the case, where the quantities of crops were not covered by the stipulations, and such factors were necessary to be known in order to render judgment.—*Kunz v. Nelson*, 100 P.2d 217, 98 Utah 421.

67. Cal.—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 Cal.App.2d 328.

68. Wyo.—*Marcante v. Hein*, 67 P. 2d 196, 51 Wyo. 389.

Debt owed by estate

In suit by widow to settle estate of deceased husband, allowance of debt owed to bank, although bank had filed

no pleading setting up debt, was not erroneous where amount of debt was stipulated.—*Wyrick v. Wyrick*, Ky., 243 S.W.2d 1004.

69. Cal.—*Corpus Juris* quoted in *Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 674, 62 Cal. App.2d 328.

Ky.—*Corpus Juris* quoted in *Cowan v. Pursifull*, 63 S.W.2d 788, 789, 250 Ky. 670.

Wyo.—*Claughton v. Johnson*, 41 P.2d 527, 47 Wyo. 536.

60 C.J. p 82 note 54.

For purposes of consideration of a demurrer, the parties cannot, by stipulation, cause facts not pleaded to be treated as though they had been.—*Utz v. Board of Education of Brooke County*, 30 S.E.2d 342, 126 W. Va. 823.

Petition to establish preference against insolvent

Mo.—*Mann v. Farmers' Exchange Bank of Gallatin*, 50 S.W.2d 146, 227 Mo.App. 1.

Stipulation held not intended to serve as amendment of petition

Cal.—*Agnew v. City of Los Angeles*, 221 P.2d 340, 99 Cal.App.2d 105.

In Texas

(1) A stipulation of parties satisfies any lack of pleading of facts agreed to in stipulation.—*City of Fort Worth v. Lee*, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125.

(2) Where a fact, not alleged in petition, was adduced and parties agreed to its truth and that it could be considered by court in ruling on demurrer to the petition, it had the same effect as if it had been expressly alleged in the petition, and the court could consider the fact in ruling on the demurrer.—*Bigfoot Independent School Dist. v. Genard*, Civ. App., 116 S.W.2d 804, affirmed 129 S.W.2d 1213, 133 Tex. 368.

(3) It has been held, however, that a written stipulation between the parties, reciting facts not contained in the petition, not filed in the trial

ings;⁷⁰ and a stipulation and evidence may be sufficient to bring an action within the provisions of a statute, even though such provisions are not referred to in the pleadings.⁷¹ A defendant entering into an agreement and stipulation with plaintiff that the pleadings be taken and considered as a stipulation of fact thereby admits that all the allegations of the declaration are true.⁷² A stipulation which admits facts set forth in a pleading is subject to the qualification that it is limited to facts properly pleaded.⁷³

A stipulation may be equivalent to a failure to deny the specific allegations of the petition on the subject involved;⁷⁴ and it has been held that stipulated evidence received on motion to dismiss a petition modifies and largely obviates what would otherwise be an admission by the motion of allegations of the petition.⁷⁵ A stipulation limited by the parties to a consideration by the trial court of special exceptions urged against the petition does not extend to any other portion of the pleadings, or to what may or may not be established on a trial on the merits.⁷⁶ Where judgment is based not on the pleadings alone, but on pleadings and a stipulation admitting a designated fact, the stipulation is controlling, regardless of any allegations of denial thereof in the pleadings.⁷⁷

(6) Effect with Respect to Instructions

Instructions must be given or refused in accordance with stipulated or admitted facts.

An instruction which would deny effect to a stipulation or admission of a fact is properly refused or improperly given;⁷⁸ conversely, it is error to fail or refuse to instruct in accordance with such stipulation or admission.⁷⁹ Admissions, by stipulation, in the course of a trial of facts to which the issues relate, preclude exceptions after the trial to instructions to the jury to answer the issues in accordance with such admissions.⁸⁰

§ 25. — As to Agreed Statement of Facts

- a. In general
- b. Operation and effect

a. In General

A stipulation for trial on an agreed statement of facts is to be reasonably construed, as a whole, in the light of the language used and the object or purpose to be attained, and with the view to carrying out the parties' intent.

The purpose of an agreed statement of facts is to facilitate the hearing, save the time, trouble, and expense of examination of witnesses, and at the same time present to the court the essential facts on which the decision is to turn.⁸¹ The circumstance that the facts are stipulated does not make an issue of fact less factual in nature.⁸²

Rules governing the construction of stipulations generally, discussed supra § 11, apply to stipulations pendente lite for trial on an agreed statement of facts.⁸³ Such an agreement or stipulation is not to

court, would at most be material only on a trial on the merits, and could not be regarded as a pleading, and could not be considered in the determination of a demurrer to the petition for failure to state a cause of action.—*State v. Jasper, etc., R. Co., Tex.Civ.App.*, 154 S.W. 331, followed in *State v. Gulf, etc., R. Co., Tex.Civ.App.*, 154 S.W. 335.

70. *Ky.—Pendleton v. City Nat. Bank of Mayfield*, 106 S.W.2d 977, 269 Ky. 250.

71. *Okl.—Davis v. Midland Valley R. Co.*, 153 P.2d 823, 194 Okl. 619.

Engagement of defendant in interstate commerce

Okl.—Davis v. Midland Valley R. Co., supra.

72. *Miss.—Stone v. M. L. Virden Lumber Co.*, 39 So.2d 498, 205 Miss. 841.

73. *Ill.—Magner v. Muslin*, 100 N.E. 2d 344, 344 Ill.App. 475.

74. *Cal.—Randall v. Wolff*, 214 P.2d 58, 95 Cal.App.2d 795.

75. *Iowa.—Panther v. Iowa Agriculture Department*, 234 N.W. 560, 211 Iowa 368.

76. *Tex.—Hommel v. Southwestern*

Grayhound Lines, Civ.App., 195 S.W.2d 803.

77. *Cal.—Corpus Juris* quoted in *Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 674, 62 Cal.App.2d 328.

Or.—Schevchuk v. Kotchik, 189 P. 399, 96 Or. 181.

78. *Cal.—Reichle v. Hazle*, 71 P.2d 849, 22 Cal.App.2d 543.

79. *Ill.—Palmer v. Gillarde*, 38 N.E.2d 352, 312 Ill.App. 230.

Measure of damages

Ill.—Palmer v. Gillarde, supra.

79. *Wis.—Mitchell v. Williams*, 46 N.W.2d 325, 258 Wis. 351.

80. *N.C.—Fleming v. Wilmington, etc., R. Co.*, 20 S.E. 714, 115 N.C. 676.

81. *Ala.—Birmingham Post Co. v. Sturgeon*, 149 So. 74, 227 Ala. 162.

82. *U.S.—Mine Hill & Schuylkill Haven R. Co. v. Smith, C.A.Pa.*, 184 F.2d 422, certiorari denied 71 S.Ct. 496, 340 U.S. 932, 95 L.Ed. 673.

83. *Cal.—White v. Reskin*, 265 P. 1016, 90 Cal.App. 512.

Agreed statement of facts as judicial admission see *Evidence* § 307.

Review of trial on agreed statement

of facts see *Appeal and Error* § 1458.

Submission of cause on case stated see the C.J.S. title Trial § 578, also 64 C.J. p 1191 notes 96-7.

Particular statements of facts construed

U.S.—Fleming v. Myers, C.C.A.Ariz., 159 F.2d 210—*U. S. v. Bennett, C.C. A.N.Y.*, 152 F.2d 342, reversed on other grounds *Bihn v. U. S.*, 66 S.Ct. 1172, 328 U.S. 633, 90 L.Ed. 1485—*Southern Underwriters v. Dunn, C.C.A.Tex.*, 96 F.2d 224—*Boston Mach. Works Co. v. Prime Mfg. Co., C.C.A.Mass.*, 93 F.2d 594, certiorari denied 58 S.Ct. 764, 303 U.S. 660, 82 L.Ed. 1119—*Federal Trade Commission v. Cassoff, C.C.A.*, 38 F.2d 790.

Alaska.—U. S. v. Rogge, 10 Alaska 130.

Cal.—Foster v. Butler, 130 P. 6, 164 Cal. 623—*Sutter Inv. Co. v. Keeling*, 11 P.2d 418, 123 Cal.App. 323.

Ill.—Commercial Credit Corp. v. Fatz, 105 N.E.2d 789, 346 Ill.App. 541—*Trustees of Danvers Literary and Library Ass'n v. Skaggs*, 280 Ill. App. 125.

Me.—Benjamin Shaw & Co. v. Moody, 107 A. 129, 118 Me. 489.

be given any strained or unnatural interpretation,⁸⁴ but is to be reasonably construed in the light of the language used,⁸⁵ and the object or purpose to be attained,⁸⁶ and with the view to carrying out the intent of the parties.⁸⁷ It must be construed as a whole and the intent of the parties collected from the entire instrument.⁸⁸ The agreement presumably sets out all pertinent facts,⁸⁹ or all facts having a material bearing on the case.⁹⁰ The language of an agreed statement of facts will not be so construed

as to give it the effect of an admission of a fact which is obviously intended to be controverted,⁹¹ or a waiver of a right not plainly intended to be relinquished.⁹²

Record in suit as part of statement. Where the record in a former suit, including process and decrees, is included in an agreed statement of facts, such record must control in the event of any inconsistency between it and other parts of the statement.⁹³

Mass.—Pequod Realty Corp. v. Jeffries, 51 N.E.2d 308, 314 Mass. 713—Friedman v. Jaffe, 92 N.E. 704, 206 Mass. 454.

Mich.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106.

Minn.—In re Monfort's Estate, 259 N.W. 554, 193 Minn. 594, 98 A.L.R. 280.

Mo.—Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768—Farmers' Trust Co. of Grant City v. Burnes Nat. Bank of St. Joseph, App., 285 S.W. 110—Wichita Poultry Co. v. Southern Pac. Ry. Co., 198 S.W. 82, 197 Mo.App. 578.

Mont.—Commercial Credit Co. v. O'Brien, 146 P.2d 637, 115 Mont. 199, appeal dismissed 65 S.Ct. 75, 323 U.S. 665, 89 L.Ed. 541.

N.Y.—Rothbaum v. R. H. Macy & Co., 115 N.Y.S.2d 197, 280 App.Div. 530.

N.C.—Nivens v. Justice, 186 S.E. 237, 210 N.C. 349.

Ohio.—Cook v. Western & Southern Life Ins. Co., 30 Ohio N.P., N.S., 247.

Tex.—Taylor v. Brewster County, Civ.App., 144 S.W.2d 314, error dismissed, judgment correct—Galveston H. & S. A. Ry. Co. v. American Salvage & Supply Co., Civ.App., 15 S.W.2d 25.

Vt.—Resource Holding Corporation v. Schoff's Estate, 163 A. 768, 105 Vt. 144—Huntley v. Houghton, 81 A. 452, 85 Vt. 200.

60 C.J. p 83 note 63 [a].

Agreed statements held sufficient to show certain facts

(1) Existence and loss of required record.—People ex rel. Yohe v. Hubble, 38 N.E.2d 38, 378 Ill. 377.

(2) State of which insured was citizen.—Bowen v. New York Life Ins. Co., C.C.A.Mo., 117 F.2d 298, certiorari denied 61 S.Ct. 1102, 313 U.S. 588, 85 L.Ed. 1539.

(3) That road was a public road.—Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 149 Kan. 114.

(4) That contract price was not paid in money.—Employers' Liability Assur. Corporation v. Eckert, Tex. Civ.App., 46 S.W.2d 464, affirmed Mingus v. Employers' Liability Assur. Co., Com.App., 65 S.W.2d 292.

(5) That Sherman Anti-Trust Act, rather than state fair trade act, was applicable.—Rothbaum v. R. H. Macy & Co., 115 N.Y.S.2d 197, 280 App.Div. 530.

(6) Other facts.

Ga.—Federal Land Bank of Columbia v. Moultrie Banking Co., 172 S.E. 455, 178 Ga. 150, followed in 172 S.E. 456, 178 Ga. 152.

Mass.—City of Cambridge v. Town of West Springfield, 20 N.E.2d 432, 303 Mass. 63.

Mo.—Municipal Securities Corp. v. Metropolitan Street Ry. Co., 196 S.W. 400, 196 Mo.App. 518.

Tenn.—State ex rel. Loudy v. Sell, 133 S.W.2d 455, 175 Tenn. 130.

Tex.—Gulf, C. & S. F. Ry. Co. v. Candler, Civ.App., 40 S.W.2d 915. 60 C.J. p 83 note 63 [c].

Agreed statements held insufficient

(1) To show particular facts.

U.S.—Elbee Chocolate Co. v. U. S., C.C.A.N.Y., 64 F.2d 117.

Ill.—Zweig v. Goldreich, 59 N.E.2d 316, 325 Ill.App. 331.

60 C.J. p 83 note 63 [d].

(2) To constitute a basis for determination of issues presented by the pleadings.—Central Hudson Gas & Electric Corp. v. Denniston, 24 N.Y. S.2d 431, 280 App.Div. 1030.

Particular terms construed

(1) "Also" as meaning "in like manner."—George v. Dutton's Estate, 108 A. 515, 94 Vt. 76, 8 A.L.R. 1014.

(2) "Cohabit."—State v. Barlow, 153 P.2d 647, 651, 107 Utah 292, appeal dismissed 65 S.Ct. 916, 324 U.S. 829, 89 L.Ed. 1396, rehearing denied 65 S.Ct. 1026, 324 U.S. 891, 89 L.Ed. 1438.

(3) "Compelled."—Strassburg v. Montgomery, 47 P.2d 859, 860, 56 Nev. 183.

(4) "Is."—Rising v. Hoffman, 179 P.2d 430, 432, 116 Colo. 63, 171 A.L.R. 1024.

(5) "Required." "permitted."—Birmingham Post Co. v. Sturgeon, 149 So. 74, 227 Ala. 162.

(6) "Residence" and "home" synonymous in pauper law.—Inhabitants of Friendship v. Inhabitants of Bristol, 170 A. 496, 497, 132 Me. 285.

(7) "Within the said county."—State v. Western Union Telegraph Co., 117 P. 93, 94, 43 Mont. 445.

84. Ala.—Birmingham Post Co. v. Sturgeon, 149 So. 74, 227 Ala. 162.

85. Ala.—Birmingham Post Co. v. Sturgeon, supra.

86. Ala.—Birmingham Post Co. v. Sturgeon, supra.

Cal.—Sutter Inv. Co. v. Keeling, 11 P.2d 418, 123 Cal.App. 323.

87. Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

Tenn.—Provident Loan Bank v. Parham, 194 S.W. 570, 137 Tenn. 483.

88. Miss.—Norton v. Graham, 187 So. 510, 185 Miss. 164, suggestion of error overruled 188 So. 314, 185 Miss. 164.

Vt.—Resource Holding Corporation v. Schoff's Estate, 163 A. 768, 105 Vt. 144.

60 C.J. p 83 note 65.

89. U.S.—Pelham Hall Co. v. Hassett, C.C.A.Mass., 147 F.2d 63.

Ala.—Birmingham Post Co. v. Sturgeon, 149 So. 74, 227 Ala. 162.

Fla.—Troup v. Bird, 53 So.2d 717.

Minn.—In re Monfort's Estate, 259 N.W. 554, 193 Minn. 594, 98 A.L.R. 280.

Facts not in existence when action begun

Court can look to agreed statement for facts necessary to decision on merits, even though not in existence when action was begun and not pleaded.—Kirschbaum v. Mayn, 246 P. 953, 76 Mont. 320, 48 A.L.R. 1425.

Employee relationship

Where issue was whether relationship of master and servant existed between publisher and newsboy, omission of statement that any district manager supervised newsboys justified conclusion that there was none.—Birmingham Post Co. v. Sturgeon, 149 So. 74, 227 Ala. 162.

90. Wyo.—Board of Com'rs of Big Horn County v. Byron Drainage Dist., 75 P.2d 759, 52 Wyo. 417.

91. Wash.—State v. Wehinger, 47 P. 2d 35, 182 Wash. 360.

92. Wash.—State v. Wehinger, supra.

93. Miss.—Norton v. Graham, 187 So. 510, 185 Miss. 164, suggestion of error overruled 188 So. 314, 185 Miss. 164.

b. Operation and Effect

- (1) In general .
- (2) Availability on subsequent trial of same cause
- (3) As affecting necessity or admissibility of other evidence
- (4) As affecting pleadings and form of action
- (5) Inferences from agreed statement and conclusions drawn by stipulations

(1) In General

An agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them and on the court, and is equivalent to a special verdict or finding of facts; and only questions of law are submitted for the court's decision.

The proceeding in a trial on an agreed statement

of facts is equivalent to motions by the respective parties for directed verdicts or judgments,⁹⁴ and constitutes an admission that only questions of law are involved, and that there are no disputed or controverted questions of fact in the case.⁹⁵ In the absence of grounds sufficient to authorize a party to withdraw from, or rescind, the stipulation, as discussed *infra* § 30, or the court to set it aside, *infra* § 35, an agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them,⁹⁶ and the facts stated are not subject to subsequent variation.⁹⁷ So, the parties will not be permitted to deny the truth of the facts stated,⁹⁸ or the truth, competency, or sufficiency of any admission contained in the agreed statement,⁹⁹ or to maintain a contention contrary to the agreed statement,¹ or be heard to claim that there are other facts that the court may presume to exist,²

94. N.Y.—Williamsburgh Sav. Bank v. Solon, 20 N.Y.S. 27, 65 Hun 166, modified on other grounds 32 N.E. 1058, 136 N.Y. 465.

S.C.—Straus v. Fidelity & Deposit Co. of Maryland, 141 S.E. 683, 143 S.C. 422.

95. La.—Golts v. His Creditors, 2 Mart., N.S., 108.

N.Y.—Williamsburgh Sav. Bank v. Solon, 20 N.Y.S. 27, 65 Hun 166, modified on other grounds 32 N.E. 1058, 136 N.Y. 465.

96. Cal.—Corpus Juris quoted in Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 673, 62 Cal. App.2d 328.

Fla.—Troup v. Bird, 53 So.2d 717—Corpus Juris quoted in Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673—Dunscombe v. Smith, 190 So. 796, 139 Fla. 497.

Ga.—Walden v. Camp, 58 S.E.2d 175, 206 Ga. 593—Dunn v. Meyer, 17 S.E.2d 275, 193 Ga. 91—U. S. Fidelity & Guaranty Co. v. Clarke, 2 S.E.2d 608, 187 Ga. 774—Traylor v. Gormley, 169 S.E. 850, 177 Ga. 185—Southern Ry. Co. v. Hodgson Bros. Co., 98 S.E. 541, 148 Ga. 851, opinion conformed to 99 S.E. 41, 25 Ga. App. 536.

Ill.—Plenderleith v. Edwards, 159 N.E. 780, 328 Ill. 431.

Iowa.—O'Donnell v. Davis, 205 N.W. 347, 201 Iowa 214.

Ky.—Board of Education of Bath County v. Hogge, 239 S.W.2d 459.

Mich.—Nat. Bank of Detroit v. State Land Office Board, 1 N.W.2d 525, 300 Mich. 240—Thomas Canning Co. v. Johnson, 180 N.W. 391, 212 Mich. 243.

Miss.—Mid-South Paving Co. v. State Highway Commission, 22 So.2d 497, 197 Miss. 751.

Mo.—Byers v. Essex Inv. Co., 219 S.W. 570, 281 Mo. 375.

N.J.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J.Eq. 311.

N.M.—Wilson v. Rowan Drilling Co., 227 P.2d 365, 55 N.M. 81.

N.Y.—In re Roney's Estate, 265 N.Y.S. 43, 148 Misc. 70—Moore v. Blanck, 129 N.Y.S. 1105, 71 Misc. 257—W. J. Farrell Co. v. Ruggiero, 174 N.Y.S. 193.

N.C.—Hood ex rel. Page Trust Co. v. Johnson, 182 S.E. 709, 209 N.C. 112. Okl.—Silmon v. Rahhal, 62 P.2d 501, 178 Okl. 244.

Pa.—Utica Mut. Ins. Co. v. Easton Structural Steel Co., 193 A. 56, 327 Pa. 241.

Tex.—Taylor v. Tod, Civ.App., 185 S.W.2d 772, refused for want of merit—Gaines v. State, Cr.App., 247 S.W.2d 251.

Wash.—McGillivray v. Nielson, 192 P.2d 369, 30 Wash.2d 589.

Wis.—Thayer v. Federal Life Ins. Co., 258 N.W. 849, 217 Wis. 282.

Wyo.—Board of Com'rs of Big Horn County v. Byron Drainage Dist., 75 P.2d 759, 52 Wyo. 417—Corpus Juris quoted in Hudson Oil Co. v. Board of County Commissioners of Fremont County, 52 P.2d 683, 685, 49 Wyo. 1.

60 C.J. p 83 note 68.

Agreement as evidence

U.S.—Chicago & N. W. Ry. Co. v. Froehling Supply Co., C.A.Ill., 179 F.2d 133.

Ga.—MacNeill v. McElroy, 17 S.E.2d 169, 137 A.L.R. 670.

Objection to proceedings by losers

Where agreement as to facts was filed before case was tried, and facts were plainly set forth and were fully agreed on, both parties are bound thereby, and losers in the action should not be heard to object to the proceedings.—General Motors Acceptance Corp. v. Vanausdall, Mo.App., 249 S.W.2d 1003.

On motion for rehearing and for additional findings, it is too late to call in question an agreement as to facts on which the case was tried, for the purpose of making a finding as to whether it appears from the other evidence that the agreement does not state the truth.—Long v. City Nat. Bank of Commerce, Tex.Civ. App., 256 S.W. 1006.

97. N.Y.—In re Roney's Estate, 265 N.Y.S. 43, 148 Misc. 70.

98. Cal.—Corpus Juris quoted in Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 673, 62 Cal. App.2d 328.

Fla.—Corpus Juris quoted in Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673.

N.J.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J.Eq. 311.

Wyo.—Corpus Juris quoted in Hudson Oil Co. v. Board of County Commissioners of Fremont County, 52 P.2d 683, 685, 49 Wyo. 1. 60 C.J. p 83 note 69.

99. Mo.—Hinkle v. Kerr, 49 S.W. 864, 148 Mo. 43.

Estoppel to deny existence of facts admitted generally see *supra* § 24.

1. U.S.—Ransbottom's Estate v. C. I. R., C.C.A.6, 148 F.2d 280.

Ariz.—Dunshee v. Manning, 129 P.2d 924, 59 Ariz. 430.

Ga.—Dunn v. Meyer, 17 S.E.2d 275, 193 Ga. 91.

Mass.—Commonwealth v. Certain Gaming Implements and Personal Property, 47 N.E.2d 939, 313 Mass. 409.

N.J.—American Oil & Supply Co. v. U. S. Casualty Co., 18 A.2d 257, 19 N.J.Misc. 7.

Pa.—A. Joseph Baltin & Co. v. Griffith, Com.Pl., 52 Lanc.Rev. 35.

Va.—Chambers v. Higgins, 193 S.E. 531, 169 Va. 345.

2. Cal.—Corpus Juris quoted in Cap-

or to suggest, on appeal, that the facts were other than as stipulated³ or that any material fact was omitted.⁴ The burden is on the party seeking to recover to show his right from the facts agreed on;⁵ the decision is to be made on the facts actually

stated.⁶

So, also, the court is conclusively bound by the facts stated,⁷ and, in the absence of an agreement to the contrary,⁸ is limited, or confined, to those facts.⁹ The court may not conjecture anything to

ital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 673, 62 Cal. App.2d 328.

Fla.—**Corpus Juris** quoted in Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673.

Okl.—Williams v. Hirschfeld, 122 P. 539, 32 Okl. 598.

Pa.—McGugin v. Berryman, Com.Pl., 23 Wash.Co. 21.

Tex.—Bennett v. Romos, 252 S.W.2d 442.

Wyo.—**Corpus Juris** quoted in Hudson Oil Co. v. Board of County Commissioners of Fremont County, 52 P.2d 683, 685, 49 Wyo. 1.

3. Minn.—In re Monfort's Estate, 259 N.W. 554, 193 Minn. 594, 98 A.L.R. 280.

4. Minn.—In re Monfort's Estate, *supra*.

5. Cal.—**Corpus Juris** quoted in Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 673, 62 Cal. App.2d 328.

Fla.—**Corpus Juris** quoted in Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673.

Ill.—Zweig v. Goldreich, 59 N.E.2d 316, 325 Ill.App. 331.

Me.—Pennock v. Smith, 25 A.2d 227, 138 Me. 303.

Wyo.—**Corpus Juris** quoted in Hudson Oil Co. v. Board of County Commissioners of Fremont County, 52 P.2d 683, 685, 49 Wyo. 1.

60 C.J. p 84 note 71.

Agreement held not to relieve state of burden of proof in a criminal prosecution.—James v. Commonwealth, 16 S.E.2d 296, 178 Va. 28.

6. Mass.—Kane v. School Committee of Woburn, 59 N.E.2d 10, 317 Mass. 436—Koppel v. Massachusetts Brick Co., 78 N.E. 128, 192 Mass. 223.

Or.—Crouch v. Central Labor Council of Portland and Vicinity, 293 P. 729, 134 Or. 612.

Findings of fact by court where facts are agreed or stipulated see the C. J.S. title Trial § 612, also 64 C.J. p 1229 note 42—p 1230 note 51.

Where the facts stated are in conflict, the court is authorized to resolve the conflict according to the dictates of its judicial conscience.—Fuller v. Cameron, Tex.Civ.App., 209 S.W. 711.

7. U.S.—O'Malley v. Yost, C.A.Neb., 189 F.2d 331.

Cal.—**Corpus Juris** quoted in Capital Nat. Bank of Sacramento v. Smith,

144 P.2d 665, 673, 62 Cal.App.2d 328. Fla.—Troup v. Bird, 53 So.2d 717—**Corpus Juris** quoted in Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So.2d 670, 673.

Mass.—Coral Gables v. Granara, 189 N.E. 604, 285 Mass. 565.

Mich.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106.

Mo.—Baker v. National Home Life Ins. Co., 195 S.W.2d 912, 239 Mo. App. 990.

Mont.—State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County, 81 P. 2d 699, 107 Mont. 167—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

Okl.—Silmon v. Rahhal, 62 P.2d 501, 178 Okl. 244.

Or.—Crouch v. Central Labor Council of Portland and Vicinity, 293 P. 729, 134 Or. 612.

Wis.—Thayer v. Federal Life Ins. Co., 258 N.W. 849, 217 Wis. 282.

Wyo.—**Corpus Juris** quoted in Hudson Oil Co. v. Board of County Commissioners of Fremont County, 52 P.2d 683, 685, 49 Wyo. 1.

60 C.J. p 84 note 72.

Conclusive effect on court generally see *supra* § 17.

The only duty of the judge is to order the correct decree on the agreed facts without reference to rulings.—Reeves v. Reeves, 61 N.E.2d 654, 318 Mass. 381.

Appeal

(1) Jurisdiction of court on appeal may be shown by agreed statement entered into by parties.—Maul v. Williams, 69 S.W.2d 1107, motion granted Maul v. Williams, 78 S.W.2d 164, 124 Tex. 408, mandate conformed to, Civ.App., 88 S.W.2d 1087.

(2) On appeal, court is confined to stipulation of facts agreed to by parties as substitute for evidence.—Commonwealth v. Pittsburgh & Weirton Bus Co., 173 A. 887, 114 Pa. Super. 290.

The referee and board in a compensation case are bound by the stipulation of facts agreed on by the parties and filed of record, and any finding of fact which is opposed to the facts as stipulated will be disregarded by the court.—Thomas v. Bache, 38 A.2d 551, 155 Pa.Super. 224, reversed on other grounds 40 A.2d 495, 351 Pa. 220.

8. Tex.—Abilene Hotel Corp. v. Gill, Civ.App., 187 S.W.2d 708, refused for want of merit.

9. U.S.—Kannel v. Kennedy, C.C.A. Pa., 94 F.2d 487.

Miss.—Mid-South Paving Co. v. State Highway Commission, 22 So.2d 497, 197 Miss. 751.

Mont.—Billings Hardware Co. v. Bryan, 206 P. 418, 63 Mont. 14—Yellowstone County v. First Trust & Savings Bank of Billings, 128 P. 596, 46 Mont. 439—Jenkins v. Newman, 101 P. 625, 39 Mont. 77.

N.Y.—Neivel Realty Corporation v. Prudence Bonds Corporation, 271 N.Y.S. 209, 151 Misc. 737.

Pa.—City of Philadelphia v. Burk, 135 A. 635, 288 Pa. 383—Commonwealth v. Jacob Reed's Sons, 118 A. 543, 275 Pa. 20.

Tex.—Hutcherson v. Sovereign Camp, W. O. W., 251 S.W. 491, 112 Tex. 551, 28 A.L.R. 823—Cousins v. Cousins, Civ.App., 42 S.W.2d 1043—Darr v. Johnson, Civ.App., 257 S. W. 682, affirmed Johnson v. Darr, 272 S.W. 1098, 114 Tex. 516.

"The stipulated facts cannot be questioned or enlarged by the court."—Feniger v. American Ry. Express Co., 197 N.W. 550, 552, 226 Mich. 106.

Issues

(1) The issues must be confined to the agreed statement of facts; the trial court cannot go outside of the record and decide questions neither pleaded nor argued.—Clegghorn v. Benjamin, 31 N.W.2d 887, 239 Iowa 455.

(2) Where a case is submitted for trial without a jury on a stipulation of facts, the issue for the court to decide is that set forth in the stipulation, and not such issues as may be raised by way of written argument or brief.—Shepard v. Hilton, 163 A. 805, 11 N.J.Misc. 8.

Grounds of recovery

In a case heard on agreed facts, without power in the court to draw inferences, plaintiff cannot recover on grounds not set out in the statement.—Norfolk Hardwood Co. v. New York Cent. & H. R. R. Co., 88 N.E. 664, 202 Mass. 160.

Judgment on other facts held improper

Tex.—Texas Sporting Goods Co. v. Texas Gulf Sulphur Co., Civ.App., 81 S.W.2d 805.

Subsequent transactions

Stipulated facts relating to transactions which occurred after the date on which taxes involved in suit accrued were properly excluded from consideration in suit to recover taxes paid under protest.—Stone v. Reichman-Crosby Co., Miss., 43 So.2d 184,

the disadvantage of a party;¹⁰ and its conclusion or inference cannot stand if in conflict with the agreed facts.¹¹ Such an agreement operates as proof of the facts admitted to the extent that such admitted facts are competent as evidence received by consent under the issues made by the pleadings.¹² A stipulation or an agreed statement of this nature does not embrace or include the law of the case, but only the facts.¹³ It is equivalent to, or stands in lieu of, a special verdict¹⁴ or a special finding of facts¹⁵ by the trial

court,¹⁶ and is tantamount to testimony which would support a finding by the court by way of a determination, decision, or judgment.¹⁷ An agreed statement of ultimate facts is at least equivalent to an admission in the pleadings.¹⁸

Only questions of law are made or submitted for the decision of the court,¹⁹ and the only question to be determined is what judgment shall be entered.²⁰ The proper judgment to be rendered is a

appeal dismissed certiorari denied 70 S.Ct. 625, 339 U.S. 917, 94 L.Ed. 1342.

Fraud

Although bill to annul marriage alleged fraud, the element of fraud could not be considered where agreed statement of facts omitted mention of fraudulent acts.—*McLaughlin v. McLaughlin*, 78 So. 388, 201 Ala. 482.

10. Del.—*Atlas Mut. Ben. Ass'n v. Portscheller*, 46 A.2d 643, 4 Terry 298.

11. Mich.—*Feniger v. American Ry. Express Co.*, 197 N.W. 550, 226 Mich. 106.

Mont.—*Warren v. Chouteau County*, 265 P. 676, 82 Mont. 115.

12. Fla.—*Skivsen v. Brown*, 136 So. 678, 101 Fla. 1389.

13. Cal.—*Corpus Juris* quoted in *Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 673, 62 Cal. App.2d 328.

Iowa.—*Huff v. Cook*, 44 Iowa 639.

Construction of statute

Statement of facts cannot be received to contest question of law involved in construction of statute.—*Hitchins v. Mayor and City Council of Cumberland*, 8 A.2d 626, 177 Md. 72.

The effect of the facts stipulated is a question of law for the court.—*National Bank of Colchester v. Murphy*, 50 N.E.2d 748, 384 Ill. 61.

14. U.S.—*Northern Pac. Ry. Co. v. Van Dusen Harrington Co.*, D.C. Minn., 34 F.2d 786.

Ala.—*Jaques v. Horton*, 76 Ala. 238.
Mich.—*Feniger v. American Ry. Express Co.*, 197 N.W. 550, 226 Mich. 106.—*Thomas Canning Co. v. Johnson*, 180 N.W. 391, 212 Mich. 243.—*Goodrich v. City of Detroit*, 12 Mich. 279.

Mo.—*Byers v. Essex Inv. Co.*, 219 S.W. 570, 281 Mo. 375.—*Hinkle v. Kerr*, 49 S.W. 864, 148 Mo. 43.—*City of Stanberry v. Jordan*, 46 S.W. 1093, 145 Mo. 371.—*Ozark Plateau Land Co. v. Hays*, 16 S.W. 957, 105 Mo. 143.—*Wichita Poultry Co. v. Southern Pac. Ry. Co.*, 198 S.W. 82, 197 Mo.App. 578.—*Goben v. Murrell*, 190 S.W. 986, 195 Mo.App. 104, rehearing denied 197 S.W. 432, 195 Mo.App. 104.—*State v. Hudson*, 86 Mo.App. 501.—*Jackson v. Kansas City, etc., R. Co.*, 66 Mo.App. 506.

Mont.—*State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County*, 81 P.2d 699, 107 Mont. 167.—*McCarthy v. Employers' Fire Ins. Co.*, 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

Tex.—*Hutcherson v. Sovereign Camp, W. O. W.*, 251 S.W. 491, 112 Tex. 551, 28 A.L.R. 823.—*Ocean Accident & Guarantee Corporation v. Riggins, Civ.App.*, 291 S.W. 276.—*Darr v. Johnson, Civ.App.*, 257 S.W. 682, affirmed *Johnson v. Darr*, 272 S.W. 1098, 114 Tex. 516.

60 C.J. p 59 note 79—17 C.J. p 152 note 24 [b].

Agreed case and agreed state of facts are the same in this respect.—*Riley v. State Bank of De Pere*, 269 N.W. 722, 223 Wis. 16.

If the statement is lost or destroyed, and the parties cannot agree on a new one, the cause goes to a jury as if none had ever been made.—*Cook v. Shrauder*, 25 Pa. 312.

Where stipulated facts are ultimate facts

U.S.—*Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont.*, 61 F.2d 14.

15. Mont.—*State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County*, 81 P.2d 699, 107 Mont. 167.—*Yellowstone County v. First Trust & Savings Bank of Billings*, 128 P. 596, 46 Mont. 439.—*Jenkins v. Newman* 101 P. 625, 89 Mont. 77.

S.D.—*Brown v. Brown*, 81 N.W. 883, 12 S.D. 506.

60 C.J. p 59 note 80.

16. Mich.—*Feniger v. American Ry. Express Co.*, 197 N.W. 550, 226 Mich. 106.—*Thomas Canning Co. v. Johnson*, 180 N.W. 391, 212 Mich. 243.

Mont.—*McCarthy v. Employers' Fire Ins. Co.*, 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

"Such an agreed statement of facts takes the place of, and has the force and effect of, an unattacked finding of facts made by the court."—*Robinson v. El Centro Grain Co.*, 24 P.2d 554, 556, 133 Cal.App. 567.—*In re Davidson's Estate*, 131 P. 67, 68, 21 Cal. App. 113.

Findings as if from evidence

Where the parties enter into an

agreement as to the facts, and the court finds the facts to be as agreed on, its findings have the same effect as if independently found by it from evidence introduced at a trial.—*Willumsen v. Soule*, 28 A.2d 631, 113 Vt. 5.

Additional statements of fact in opinion

Facts set forth in agreed statement of facts or formal stipulation are to be deemed findings of fact together with additional statements of facts contained in opinion of trial court.—*Evale v. Tremaine, D.C.N.Y.*, 22 F.Supp. 171.

17. N.Y.—*Place v. Place*, 99 N.Y.S. 2d 266.

18. U.S.—*Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont.*, 61 F.2d 14.

19. Ill.—*Plenderleith v. Edwards*, 159 N.E. 780, 323 Ill. 431.

Mass.—*Langdoc v. Gevaert Co. of America*, 51 N.E.2d 780, 315 Mass. 8.

N.Y.—*Commercial Credit Corporation v. Northern Westchester Bank*, 177 N.E. 12, 256 N.Y. 482.

Okl.—*McGaffey v. Mulky*, 241 P. 480, 115 Okl. 44.

Tex.—*Ocean Accident & Guarantee Corporation v. Riggins, Civ.App.*, 291 S.W. 276.

Whether plaintiff entitled to judgment as matter of law

Mass.—*Friedman v. Jaffe*, 92 N.E. 704, 206 Mass. 454.—*Berton v. Atlas Assur. Co.*, 89 N.E. 244, 203 Mass. 134.

Okl.—*Goodwin v. Kraft*, 101 P. 856, 23 Okl. 329.

Submission on, and sufficiency of, complaint

Where the answer was withdrawn and by stipulation the case was submitted on the facts stated in the complaint, the question before the court is whether the complaint sets forth a cause of action in view of the facts appearing therein.—*Whiteside v. North American Accident Ins. Co. of Chicago*, 93 N.E. 948, 200 N.Y. 320, 35 L.R.A., N.S., 696.

20. U.S.—*Northern Pac. Ry. Co. v. Van Dusen Harrington Co.*, D.C. Minn., 34 F.2d 786.

mere conclusion or question of law,²¹ and the judgment is to be pronounced precisely as if a jury had found a verdict in that form.²² The submission of an issue to the jury is error.²³

Statement of agreed facts with right of objection reserved is properly excluded by the court where there is nothing in the statement of a material character that was not before the court.²⁴ A reservation, in an agreed statement of facts, of the right to object to the admission of any agreed fact on the ground of immateriality does not apply so as to exclude evidence which cannot be regarded as immaterial.²⁵

Agreed statement and other evidence. The language of an agreed statement of facts may be such that the court is not confined to the facts recited as agreed, but is at liberty to hear and pass on other competent evidence calculated to assist it in deciding the question.²⁶ In such a case, the court is bound to make its conclusions on the stipulation in

so far as the facts necessary are agreed on, but as to the facts not stipulated it can refer to the evidence for their determination.²⁷ Where a case is tried on agreed stipulation of facts and other evidence, it is proper for the jury to consider all the evidence, even though part of it may be inconsistent with the statement of facts.²⁸ In such a case, the testimony of the commonwealth's witnesses and the exhibits received in evidence as part of its case have been held to control over the agreed statement of facts, where they clash.²⁹

Agreed statement of facts and other stipulations. A stipulation that an action in which defendant prayed affirmative relief shall be submitted on an agreed statement of facts, and that if the defendant "prevails" a certain judgment shall be rendered does not prevent plaintiff from having a dismissal without prejudice, in which case defendant, although obtaining judgment, will not have prevailed within the meaning of the stipulation.³⁰

21. Mo.—Union Nat. Bank of Wichita, Kan., v. Lamb, 227 S.W.2d 60, 360 Mo. 81—Jackson v. Kansas City, etc., R. Co., 66 Mo.App. 506—Appleman v. American Sporting Goods Co., 64 Mo.App. 71.

Okl.—Goodwin v. Kraft, 101 P. 856, 23 Okl. 329.

Tex.—Southwestern Life Ins. Co. v. Sanguinet, Civ.App., 231 S.W.2d 727.

Judgment on agreed statement of facts generally see Judgments § 186.

Request for judgment

An agreed statement of facts admits there is no dispute as to the facts, and constitutes a request by each of the litigants for a judgment, which each contends arises as matter of law from the agreed facts.—Hutcherson v. Sovereign Camp, W. O. W., 251 S.W. 491, 112 Tex. 551, 28 A.L.R. 823.

Agreement on facts and amount of recovery

Tenn.—Bridgeport Wooden-Ware Mfg. Co. v. Louisville, etc., R. Co., 53 S.W. 739, 193 Tenn. 490.

A conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment.—Birney v. Warren, 72 P. 293, 28 Mont. 64.

A demurrer to evidence is not proper practice when the parties have agreed on the facts.—Bridgeport Wooden-Ware Mfg. Co. v. Louisville, etc., R. Co., 53 S.W. 739, 103 Tenn. 490.

Instructed verdict against defendant insurer held proper.—St. Louis & S. F. R. Co. v. Royal Ins. Co., 227 P. 410, 100 Okl. 11.

22. Mo.—Hinkle v. Kerr, 49 S.W. 864, 148 Mo. 43—City of Stanberry

v. Jordan, 46 S.W. 1093, 145 Mo. 371—Gage v. Gates, 62 Mo. 412—State v. Hudson, 86 Mo.App. 501.

23. N.C.—Hood ex rel. Page Trust Co. v. Johnson, 182 S.E. 709, 209 N.C. 112.

24. Cal.—In re McCurdy, 240 P. 498, 197 Cal. 276.

25. U.S.—City of Dalhart v. Childers, D.C.Tex., 18 F.Supp. 903.

Parol evidence of payment of premium on bond

U.S.—City of Dalhart v. Childers, supra.

26. Mass.—Coral Gables v. Granara, 189 N.E. 604, 285 Mass. 565.

N.Y.—Nott v. Klein, 285 N.Y.S. 1025, 159 Misc. 35.

Where no other competent evidence is offered, the court can consider as evidence only the agreed statement of facts.—State ex rel. Farrel v. City of Cleveland, 187 N.E. 317, 45 Ohio App. 460.

Additional proof; discretion of court

(1) Generally.—Foster v. U. S., D.C.Tex., 85 F.Supp. 447—In re Mossler Co., Ill., 239 F. 262, 152 C.C.A. 250.

(2) When it appeared on the argument that plaintiff had omitted to include in the stipulation a fact on which his right of recovery depended, and which in no way tended to modify any fact agreed on, it was discretionary with the court to permit proof of such fact to be received.—Thomas Canning Co. v. Johnson, 180 N.W. 391, 212 Mich. 243.

(3) Where, by consent of counsel, evidence is presented to trial judge, in action without a jury, in form of a stipulation consisting of a statement of facts intermingled with im-

pressions derived from those facts by witnesses, whether to consider such evidence is discretionary.—Jarrett v. U. S., C.A.Va., 184 F.2d 532.

(4) Where parties stipulated the facts on which action should be tried, and agreed that such facts constituted all the facts, and should be considered proved, and after submission of the case, plaintiff moved for leave to take further testimony, which was granted without giving defendant the right to rebut such new evidence, no fraud or deceit by defendant being shown relative to the stipulation, the permission to plaintiff to take such additional evidence, without even affording defendant an opportunity to rebut it, was erroneous.—Adams v. Hartzell, 119 N.W. 635, 18 N.D. 221.

27. Mont.—State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County, 81 P.2d 699, 107 Mont. 167.

28. Neb.—Corpus Juris cited in State ex rel. Sorensen v. Nebraska State Sav. Bank, 269 N.W. 46, 47, 128 Neb. 479—Hunt v. Van Burg, 106 N.W. 329, 75 Neb. 304.

Contradiction of agreed statement by instrument annexed

The provisions of a copy of an instrument annexed to an agreed statement of facts, which contradict the agreed facts, control.—Hollywood v. Brockton First Parish, 78 N.E. 124, 192 Mass. 269.

29. Pa.—Commonwealth v. Pent, 170 A. 401, 112 Pa.Super. 401, reversed on other grounds Commonwealth v. Robinson, 176 A. 908, 317 Pa. 321.

30. Kan.—Steele v. Dye, 105 P. 700, 81 Kan. 286.

Consideration on motions for summary judgment.

A stipulation of all the material facts to be used in the consideration of plaintiff's motion for summary judgment should also be used in determining a similar motion on behalf of defendant, unless it is limited by plain and unambiguous language, and in the absence of any suggestion that the facts were colored or adjusted so as to be applicable only to a motion by plaintiff.³¹

(2) Availability on Subsequent Trial of Same Cause

Under most authorities, an agreed statement of fact not limited by its terms to the trial at which it is made is admissible on a subsequent trial of the same cause between the same parties.

While there is authority to the contrary,³² according to the weight of authority, where the parties agree on a statement of facts, and that the case shall be determined thereon, and there is nothing expressed in the terms of the agreement limiting its operation to the particular trial at which it is made, the agreed statement of facts is admissible on a subsequent trial of the same cause between the same parties,³³ especially where it consists largely of record matters.³⁴ It has been held, however, that a stipulation of an agreed statement of facts, to be used in the trial of a cause, that it "shall constitute the evidence in the trial of said cause," does not prevent the introduction of further evidence on a second trial.³⁵

(3) As Affecting Necessity or Admissibility of Other Evidence

After agreement on a statement of facts, no further proof is necessary; and evidence to contradict the facts agreed on is inadmissible.

31. U.S.—*Woods v. Golt*, D.C.Del., 92 F.Supp. 325.

32. Ill.—*Alton v. Foster*, 69 N.E. 783, 207 Ill. 150.
60 C.J. p 84 note 79.

33. Ala.—*Sovereign Camp, W. O. W., v. Jones*, 178 So. 891, 235 Ala. 378.

Cal.—*Andrew v. Bankers' & Shippers Ins. Co. of New York*, 13 P.2d 515, 125 Cal.App. 24.

Neb.—*Corpus Juris cited in LeBaron v. City of Harvard*, 262 N.W. 26, 31, 129 Neb. 460, 100 A.L.R. 767.
60 C.J. p 84 note 80.

On new trial, agreed statement had at former trial is admissible against party making it, in favor of opposite party, but is not absolutely binding on party making it, and any statement therein contained can be disproved, rebutted, or explained by such party.—U. S. *Fidelity & Guaranty Co. v. Clarke*, 2 S.E.2d 608, 187 Ga. 774.

34. Okl.—*Consolidated Steel, etc., Co. v. Burnham*, 58 P. 654, 8 Okl. 514.

35. Tex.—*Imhoff v. Whittle*, Civ. App., 84 S.W. 243.

36. U.S.—*Fleming v. Myers*, C.C.A. Ariz., 159 F.2d 210.

N.Y.—*Nott v. Klein*, 285 N.Y.S. 1025, 159 Misc. 35.

"It conclusively relieves them of the necessity of countervailing proof."—*Thomas v. Bache*, 38 A.2d 551, 556, 155 Pa.Super. 224, reversed on other grounds 40 A.2d 495, 351 Pa. 220.

37. Ga.—*Walden v. Camp*, 58 S.E.2d 175, 206 Ga. 641.—U. S. *Fidelity & Guaranty Co. v. Clarke*, 2 S.E.2d 608, 187 Ga. 774.

Mo.—*Corpus Juris cited in Polk Tp. ex rel. and to Use of Seaton v. Harrison*, App., 64 S.W.2d 738, 743.
60 C.J. p 84 note 83.

Where the parties have agreed on a statement of facts on which to try the case, no further proof is necessary,³⁶ and no evidence to contradict the facts agreed on is admissible or can be considered.³⁷ Where the statement provides that it is a complete statement of all the facts, with a particular exception, evidence as to matters other than that excepted is inadmissible;³⁸ but it has been held that a party is not precluded by the stipulation from giving other pertinent evidence in the absence of a provision, express or implied, to that effect in the stipulation,³⁹ or where the agreed statement of facts provided that facts therein should be taken as and for facts on which judgment should be rendered, but did not state that those were all the facts.⁴⁰ Also, a stipulation that an agreed statement of facts should constitute the facts of the case, with reservation of right to the parties to produce testimony to show a certain conversation had on a specified date, does not prevent proof of the conversation referred to, although it actually occurred on another date.⁴¹ If it is stipulated that evidence may be added at the trial, only such evidence as is pertinent to the issue made, and which was in existence at the date of the stipulation, is admissible.⁴²

(4) As Affecting Pleadings and Form of Action

By submission of a case on an agreed statement of facts, all questions of pleading, or objections to the form of action or procedure, are waived, or are immaterial, unless expressly reserved.

By the submission of a case to the court on an agreed statement of facts, all questions of pleading, at least unless expressly reserved,⁴³ are waived,⁴⁴

38. Tex.—*Ætna Life Ins. Co. v. Smith*, Civ.App., 293 S.W. 243.

39. N.Y.—*Dillon v. Cockcroft*, 90 N. Y. 649.

S.C.—*Corpus Juris cited in Turbeville v. Morris*, 26 S.E.2d 821, 830, 203 S.C. 287.

40. Ga.—*Bankers' Trust, etc., Co. v. Hanover Nat. Bank*, 134 S.E. 195, 35 Ga.App. 619.

60 C.J. p 84 note 85.

41. Mich.—*Weinberg v. Stratton*, 137 N.W. 676, 172 Mich. 55.

42. Cal.—*Donner v. Palmer*, 51 Cal. 629.

43. Mass.—*Commonwealth v. Worcester, etc., R. Co.*, 124 Mass. 561.—*Ellsworth v. Brewer*, 11 Pick. 316.

44. Fla.—*Skivesen v. Brown*, 136 So. 678, 101 Fla. 1389.

Ga.—*Dunn v. Meyer*, 17 S.E.2d 275, 193 Ga. 91.

Mass.—*Miner v. Coburn*, 4 Allen 136.

or are immaterial,⁴⁵ including any error in the action of the court in its rulings on the pleadings.⁴⁶ The case is to be decided on the merits as if the questions had been presented by proper pleadings,⁴⁷ or the statement as a whole can be received or accepted as supplemental to, or as amplifying, the allegations of both bill and answer.⁴⁸ In a suit to set aside succession proceedings and judgment on the ground that the court had no jurisdiction, averments in plaintiff's petition that the succession had been previously opened and administered in another parish could not be considered, where such allegations were not admitted in the agreed statement of facts, and no reference to the former proceedings was made in the proceedings sought to be set aside.⁴⁹

Conflict between pleadings and statement. A defendant agreeing to a statement of facts which contradicts incidental averments of the bill has been

held unable, thereafter, to take advantage of the variance between the bill and the agreed facts.⁵⁰ So, where a case is tried on facts stated by the parties and agreed on by them to be true, the facts must be accepted as true and binding on both parties, notwithstanding they are contradicted by admissions in the answer of one party, favorable to his adversary.⁵¹ Where a stipulation of facts is entered into only for the purpose of standing "in lieu of taking testimony," and there is a conflict between the effect of admissions made in the pleadings and in the stipulation, the stipulation will not be construed as having the effect of standing in place, and overruling the effect, of the pleadings,⁵² but is to be given the same effect as would be given where the admissions made by the pleadings and the proof afforded by the evidence are contradictory.⁵³

Form of action or procedure. Objections to the form of an action or procedure are not open in a

Wash.—National Cash Register Co. v. Seattle Ass'n of Credit Men, 137 P.2d 503, 18 Wash.2d 1.

Wyo.—Claughton v. Johnson, 41 P.2d 527, 47 Wyo. 536.

60 C.J. p 85 note 89.

Waiver of, or estoppel to assert, objections to pleadings generally see Pleadings §§ 562-586.

All technical questions

Me.—Cooper v. Fidelity Trust Co., 170 A. 726, 132 Me. 260.

Leading case

U.S.—Saltonstall v. Russell, Mass., 14 S.Ct. 733, 152 U.S. 628, 38 L.Ed. 576.

Formal pleadings held waived by both sides

Ky.—Swiss Oil Corporation v. Hupp, 69 S.W.2d 1037, 253 Ky. 552—Cities Service Oil Co. v. Taylor, 45 S.W.2d 1039, 242 Ky. 157, 79 A.L.R. 1374.

Defect in complaint held waived

(1) Generally.—City of Litchfield v. Hart, 29 N.E.2d 678, 306 Ill.App. 621.

(2) By joining in an agreed statement of facts, defendant waived any defects in the complaint which can be cured by the agreed statement of facts, but did not waive a claim that these facts constitute no cause of action.—Quel v. Goldstein, 198 N.Y.S. 586, 120 Misc. 384.

Demurrer to petition held waived

Mass.—Grant v. Aldermen of Northampton, 55 N.E.2d 705, 316 Mass. 432.

Defect in petition held supplied by statement of facts

Wyo.—Board of Com'rs of Big Horn County v. Byron Drainage Dist., 75 P.2d 759, 52 Wyo. 417.

Pleading after answer held not required

Ky.—Lindsey v. Home Ins. Co., 51 S.W.2d 924, 244 Ky. 580.

60 C.J. p 85 note 89 [a] (3).

Notice of filing of supplemental petition

Where agreement of the parties as to the facts was filed, there was no occasion for notice to any party of filing of a new petition setting forth transactions, occasions, or events which had happened since date of pleading sought to be supplemented.—General Motors Acceptance Corp. v. Vanausdall, Mo.App., 249 S.W.2d 1003.

Amendment

(1) Although a case is heard on stipulated facts, the trial judge may, in his discretion, permit amendment of the pleadings in conformity therewith.—In re Mossler Co., Ill., 239 F. 262, 152 C.C.A. 250.

(2) Amendment of answer held permissible under stipulation.—Smith v. Slimak, 214 N.Y.S. 386, 215 App.Div. 637.

45. Mont.—Barkemeyer Grain & Seed Co. v. Hannant, 213 P. 208, 66 Mont. 120.

Tex.—Cobb v. Harrington, 190 S.W. 2d 709, 144 Tex. 360, 172 A.L.R. 837—Patton v. Wilson, Civ.App., 220 S.W.2d 184, refused no reversible error.—The Praetorians v. Simons, Civ.App., 187 S.W.2d 238—Shamrock Oil & Gas Co. v. Williams, Civ.App., 63 S.W.2d 570, reversed on other grounds Williams v. Shamrock Oil & Gas Co., 95 S.W. 2d 1292, 128 Tex. 146, 107 A.L.R. 269—Cousins v. Cousins, Civ.App., 42 S.W.2d 1048.

Questions of sufficiency of pleadings held immaterial

Tex.—Griggs v. Reed, Civ.App., 233 S.W.2d 907.

Want of answer held immaterial

Fla.—Skivesen v. Brown, 136 So. 678, 101 Fla. 1389.

60 C.J. p 85 note 89 [a] (2).

46. Okl.—McGrath v. Rorem, 252 P. 418, 123 Okl. 163—Powell v. Crittenden, 156 P. 661, 57 Okl. 1.

47. Ill.—Woodruff v. City of Chicago, 69 N.E.2d 287, 394 Ill. 542. Minn.—In re Monfort's Estate, 259 N.W. 554, 193 Minn. 594, 98 A.L.R. 280.

60 C.J. p 85 note 91.

"The presence of all appropriate pleadings may be presumed for the purposes of the submission."—Cities Service Oil Co. v. Taylor, 45 S.W.2d 1039, 1040, 242 Ky. 157, 79 A.L.R. 1374.

48. Md.—Hitchens v. Mayor and City Council of Cumberland, 8 A.2d 626, 177 Md. 72.

49. La.—Gravet v. Gonsoulin, 119 So. 785, 10 La.App. 553, rehearing denied 120 So. 643, 10 La.App. 553.

50. Va.—Zimmerman Co. v. Dey, 93 S.E. 597, 121 Va. 709.

51. Ga.—Traylor v. Gormley, 169 S.E. 850, 177 Ga. 185—Southern Ry. Co. v. Hodgson Bros. Co., 98 S.E. 541, 148 Ga. 851, opinion conformed to 99 S.E. 41, 25 Ga.App. 536.

52. Fla.—Skivesen v. Brown, 136 So. 678, 101 Fla. 1389.

Admissions and omissions in pleading in equity

Such stipulation cannot disturb effect of admissions and omissions in pleadings in equity.—Skivesen v. Brown, supra.

53. Fla.—Skivesen v. Brown, supra.

case submitted on an agreed statement of facts,⁵⁴ unless they affect the jurisdiction of the court,⁵⁵ or unless they are expressly reserved;⁵⁶ and this is true although the pleadings are referred to as part of the case.⁵⁷ The only question open is whether plaintiffs can recover on any form of declaration or in any form of action.⁵⁸

(5) Inferences from Agreed Statement and Conclusions Drawn by Stipulations

While, on an agreed statement of facts, all necessary inferences may be drawn and considered, authorities are not uniform as to whether any inferences other than necessary ones may be so drawn.

On an agreed statement of facts, all necessary inferences may be drawn and considered,⁵⁹ because the necessary inferences are in legal effect a part of the facts agreed.⁶⁰ Also, it has been held that, in an action submitted on an agreed statement

of facts, the court may make any legitimate⁶¹ or reasonable⁶² inferences, or any inferences of which the facts may rightly be susceptible,⁶³ or that the court may draw the reasonable and legitimate inferences in the same way, and to the same extent, that it could have done had the facts agreed on been adduced by the taking of testimony in open court.⁶⁴ The agreement may provide that inferences, deductions, and conclusions of fact may be drawn from the agreed facts.⁶⁵ Other holdings are to the effect that, where a case is tried on an agreed statement of facts, none except necessary inferences can be drawn or considered;⁶⁶ or, as otherwise expressed, the court, in the absence of any provision to that effect, is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred, but is confined to the consideration of the facts to which the parties have agreed.⁶⁷ It has also been held that no inferences

54. Mass.—Allen v. Town of Plymouth, 47 N.E.2d 284, 313 Mass. 356—Kennedy v. B. A. Gardetto, Inc., 27 N.E.2d 957, 306 Mass. 212, 129 A.L.R. 453—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487.

60 C.J. p 85 note 92.

All technical questions of procedure held waived

Me.—Cooper v. Fidelity Trust Co., 170 A. 726, 132 Me. 260.

55. Mass.—Hull v. Adams, 190 N.E. 510, 286 Mass. 329.

56. Mass.—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487.

57. Mass.—Kimball v. Preston, 2 Gray 567.

58. Mass.—West Roxbury v. Minot, 114 Mass. 546.

60 C.J. p 85 note 95.

59. U.S.—U. S. v. One 1946 Mercury Sedan Auto., D.C.Ga., 100 F.Supp. 957, affirmed, C.A., U. S. v. Frank Graham Co., 199 F.2d 499.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Moran v. Fifteenth Ward Building & Loan Ass'n, 25 A.2d 426, 131 N.J.Eq. 361.

S.D.—Corpus Juris cited in Federal Deposit Ins. Corp. v. Western Surety Co., 285 N.W. 909, 913, 66 S.D. 503.

60 C.J. p 85 note 97.

Inferences from admissions see supra § 24.

Inferences from agreed statement on appeal see Appeal and Error § 1458.

Statutory exception

In proceeding, presented on agreed statement of facts, for forfeiture of intoxicating liquor allegedly transported into dry state, inference was that statutory exception permitting importation of wine and alcohol for

sacramental and medicinal purposes was not applicable, where there was nothing on face of agreed statement to bring claimant within the exception.—7 Fifths Old Grand-Dad Whiskey v. U. S., C.C.A.Kan., 158 F.2d 34, certiorari denied 67 S.Ct. 870, 330 U.S. 828, 91 L.Ed. 1277.

60. N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Moran v. Fifteenth Ward Building & Loan Ass'n, 25 A.2d 426, 131 N.J.Eq. 361. Vt.—Barre v. Bethel, 145 A. 410, 102 Vt. 22.

61. U.S.—Federal Trade Commission v. Pacific States Paper Trade Association, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 535.

Tenn.—Ballinger v. Connecticut Mut. Life Ins. Co., 69 S.W.2d 1090, 167 Tenn. 367—Still v. Equitable Life Assurance Society, 54 S.W.2d 947, 165 Tenn. 224, 86 A.L.R. 382.

Any legitimate inference that jury might make

Va.—Dearing v. Rucker, 18 Gratt. 426, 59 Va. 426.

W.Va.—National Surety Co. v. Conley, 152 S.E. 3, 108 W.Va. 589.

62. N.M.—Wilson v. Rowan Drilling Co., 227 P.2d 365, 55 N.M. 81.

Any reasonable inference that jury might make

Ind.—Henderson v. Barbee, 6 Blackf. 28.

Making of contract with defendant held reasonably inferred.—Godfrey v. Mutual Finance Corporation, 136 N.E. 178, 242 Mass. 197.

63. Mass.—Rosenthal v. Liss, 169 N.E. 142, 269 Mass. 353.

Unexplained delays in shipment

Where it appeared by agreed statement of facts in action against railroad for delay in transporting a shipment of live stock that there were repeated delays en route, the court

had a right to infer that such delays, unexplained, were unreasonable.—Pittsburgh, C. & St. L. R. Co. v. Hughes, 131 N.E. 234, 76 Ind.App. 26.

64. Ill.—Zweig v. Goldreich, 59 N.E. 2d 316, 325 Ill.App. 331.

Miss.—Love v. Hytken, 150 So. 777, 168 Miss. 194.

65. Mass.—Daley v. Daley, 32 N.E. 2d 286, 308 Mass. 293.

66. Mass.—Berton v. Atlas Assur. Co., 89 N.E. 244, 203 Mass. 134.

Vt.—Manley Bros. v. Bush, 169 A. 782, 106 Vt. 57—Town of Hardwick v. Town of Barnard, 148 A. 408, 102 Vt. 330.

60 C.J. p 85 note 1.

Necessary inferences as matter of law

N.Y.—Commercial Credit Corporation v. Northern Westchester Bank, 177 N.E. 12, 256 N.Y. 482.

Tex.—Hutcherson v. Sovereign Camp, W. O. W., 251 S.W. 491, 112 Tex. 551, 28 A.L.R. 823—Abilene Hotel Corp. v. Gill, Civ.App., 187 S.W.2d 708, refused for want of merit—Cousins v. Cousins, Civ. App., 42 S.W.2d 1043.

67. Mass.—Gallagher v. Hathaway Mfg. Corp., 48 N.E. 844, 169 Mass. 578—Collins v. Waltham, 24 N.E. 327, 151 Mass. 196.

Mo.—Ozark Plateau Land Co. v. Hays, 16 S.W. 957, 105 Mo. 143.

Pa.—Williamsport v. Lycoming County, 34 Pa.Super. 221.

60 C.J. p 85 note 2.

Where the right to show further facts is reserved, such further facts may be shown as well by inference from the facts admitted as by independent evidence.—McKim v. Glover, 37 N.E. 443, 161 Mass. 418.

Check as not extinguishing claim

Mo.—Griffin v. Priest, App., 137 S.W. 2d 685.

of fact can be drawn from the facts stated.⁶⁸

Conclusions drawn by stipulators in an agreed statement of facts are not binding on the court if contrary to the facts stated in the stipulation;⁶⁹ and a conclusion of law contained therein may be disregarded by the court,⁷⁰ since it is not admitted by an agreed statement of facts.⁷¹

§ 26. — As to Trial

- a. In general
- b. Instructions and verdict

a. In General

A stipulation relating to the trial of a cause must be construed as a whole and the intention of the parties collected from the entire instrument, and the parties thereto are concluded as to all matters necessarily in-

cluded in the stipulation, but not as to matters not so included.

Rules governing construction, operation, and effect of stipulations generally, discussed supra §§ 11-17, apply to the construction⁷² and to the operation and effect⁷³ of stipulations relating to the trial of causes. Such a stipulation must be construed as a whole and the intention of the parties collected from the entire instrument,⁷⁴ and the parties thereto are concluded as to all matters necessarily included in the stipulation,⁷⁵ but not as to matters not so included.⁷⁶ Each party is entitled to rely on the stipulation and govern his actions with respect to the case in accordance therewith.⁷⁷

In accordance with the foregoing rules, the courts have construed the operation and effect of numerous particular stipulations as to trial,⁷⁸ as with respect

Negligence held not properly inferable from agreed statement of facts.—*De Francisco v. La Face*, 194 A. 511, 128 Pa.Super. 538.

68. Mass.—*Friedman v. Jaffe*, 92 N. E. 704, 206 Mass. 454.

Okl.—*Goodwin v. Kraft*, 101 P. 856, 23 Okl. 329.

69. Mo.—*State v. Christopher*, 2 S. W.2d 621, 318 Mo. 225.

Lack of notice

S.C.—*Oates v. Fountain*, 101 S.E. 830, 113 S.C. 372.

Sole and exclusive possession of land

A stipulated conclusion that plaintiffs were in sole and exclusive possession of land had no efficacy to bring them within the rule which did not apply under the stipulated probative facts, especially where the parties stipulated that the stipulated effect of agreed facts was not to be considered binding.—*McCaslin v. Hamblen*, 231 P.2d 1, 37 Cal.2d 196.

70. Wash.—*State v. Wehinger*, 47 P.2d 35, 182 Wash. 360.

71. La.—*Bourgoyne v. Louisiana Public Utilities Co.*, App., 152 So. 150.

Admissions held not legal conclusions

(1) Admission in agreed statement of facts that foreign corporation's agents came into state "casually and intermittently" to make purchases was not legal conclusion, but simply affirmative declaration of ultimate fact deduced from knowledge of primary facts.—*Schultz v. Long Island Machinery & Equipment Co.*, La. App., 173 So. 569.

(2) Allegation that children of neighborhood congregated on lot to play games and climbed trees thereon was allegation of fact, and hence agreed statement incorporating allegation was admission thereof.—*Bourgoyne v. Louisiana Public Utilities Co.*, La.App., 152 So. 150.

72. Cal.—*Petroleum Midway Co. v. Zahn*, 145 P.2d 371, 62 Cal.App.2d 645.

Iowa.—*Petersen v. New York Life Ins. Co. of New York*, 280 N.W. 521, 225 Iowa 293.

Ky.—*Jones v. Northern Assur. Co.*, 207 S.W. 459, 182 Ky. 701.

73. U.S.—*Seymour v. El Cerrito Corporation*, D.C.Cal., 7 F.Supp. 874, appeal dismissed, C.C.A., El Cerrito Corporation v. Seymour, 78 F.2d 1015.

Ala.—*Thompson v. State ex rel. Key*, 25 So.2d 671, 247 Ala. 585.

Ariz.—*Copper State Min. Co. v. Kidder*, 179 P. 641, 20 Ariz. 224.

Cal.—*Petroleum Midway Co. v. Zahn*, 145 P.2d 371, 62 Cal.App.2d 645.

Me.—*Hunt v. Anderson*, 148 A. 687, 128 Me. 544.

Mass.—*Graustein v. Boston & Maine R. R.*, 57 N.E.2d 570, 317 Mass. 164.

Mo.—*State v. Harmon*, 243 S.W.2d 326.

N.Y.—*Mason v. Lory Dress Co.*, 102 N.Y.S.2d 285, 278 App.Div. 660—*King v. King*, 276 N.Y.S. 440, 243 App.Div. 575—*In re Bird's Estate*, 265 N.Y.S. 218, 240 App.Div. 747.

Ohio.—*Union Ice Corp. v. City of Niles*, 13 Ohio Supp. 115.

Okl.—*Morriss v. Barton*, 190 P.2d 451, 200 Okl. 4.

Pa.—*Kingston Nat. Bank v. Wruble*, Com.Pl., 37 Luz.Leg.Reg. 371.

Tex.—*Eastham v. Farmer*, Civ.App., 193 S.W.2d 568.

Validity see supra § 10.

Operation and effect of waiver of right to jury trial see *Juries* § 111.

Stipulations held not absolute

Stipulations as to trial in district court on appeal from county court are not absolute, even though in writing, and are not to be treated as contracts to be enforced under all circumstances.—*In re Statz' Estate*, 12 N.W.2d 829, 144 Neb. 154.

74. Ky.—*Jones v. Northern Assur. Co.*, 207 S.W. 459, 182 Ky. 701.

75. Cal.—*In re Egan*, 149 P.2d 693, 24 Cal.2d 323, certiorari denied 65 S.Ct. 272, 223 U.S. 785, 89 L.Ed. 626—*North Side Property Owners' Ass'n v. Hillside Memorial Park*, 161 P.2d 618, 70 Cal.App.2d 609.

La.—*Kirby Lumber Corp. v. Cain*, 34 So.2d 259, 212 La. 1055.

Mass.—*Fulgenitti v. Cariddi*, 198 N.E. 258, 292 Mass. 321.

Mo.—*Maryland Cas. Co. v. Dobbin*, 108 S.W.2d 166, 232 Mo.App. 557.

60 C.J. p 86 note 9.

76. Ga.—*Hodges v. Holiday*, 29 Ga. 696.

77. Tex.—*Brown Cracker, etc., Co. v. Jensen*, Civ.App., 32 S.W.2d 227.

60 C.J. p 86 note 11.

78. U.S.—*U. S. v. Frankfeld*, D.C. Md., 103 F.Supp. 48.

Colo.—*Marsh v. Warren*, 248 P.2d 825.

Ind.—*State ex rel. Burdge v. Cummings*, 195 N.E. 879, 208 Ind. 292.

104 A.L.R. 1492—*Gilbert v. Lusk*, App., 106 N.E.2d 404.

N.J.—*In re Perrone's Estate*, 76 A.2d 518, 5 N.J. 514.

Okl.—*Vandevanter v. State*, 79 P.2d 1032, 64 Okl.Cr. 317, reheard 84 P.2d 819, 65 Okl.Cr. 239—*Staley v. State*, 79 P.2d 818, 64 Okl.Cr. 302,

reheard 84 P.2d 813, 65 Okl.Cr. 227.

Wis.—*Urban v. Trautmann*, 24 N.W.2d 619, 249 Wis. 264.

60 C.J. p 86 note 13.

Trial of case as one for accounting

Wash.—*Larson v. A. W. Larson Const. Co.*, 217 P.2d 789, 36 Wash. 2d 217.

Full trial

Where cases were tried on understanding that issues would be fully tried and fact findings made, whether or not necessary under strict rules of pleading, trial judge could consider questions whether parties' agreement was champertous and contrary to public policy, even in absence of express pleading.—*Sher-*

to appearance in the case,⁷⁹ appointment of an appraiser and effect of appraisal,⁸⁰ argument to the jury,⁸¹ conduct of jurors,⁸² consolidation of causes,⁸³ continuance of the trial to a subsequent time,⁸⁴ continuing certain questions or matters for later determination,⁸⁵ default,⁸⁶ determination of questions in vacation or at chambers,⁸⁷ and determination or settlement of attorney's fees.⁸⁸

General rules as to the construction, operation, and effect of stipulations have also been applied with respect to stipulations relating to examination before trial,⁸⁹ exceptions or objections to evidence⁹⁰ or to argument by counsel,⁹¹ findings,⁹² jury panel,⁹³ matters to be submitted for determination to the jury⁹⁴ or matters to be submitted for deter-

win Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 287 Mass. 304.

Withdrawal of exceptions before master

N.J.—Ditmars v. Camden Trust Co., 92 A.2d 12, 10 N.J. 471.

79. N.J.—Bernstein & Loubet v. Minikin, 186 A. 726, 14 N.J.Misc. 546, affirmed 191 A. 733, 118 N.J.Law 203.

N.D.—Bothum v. Bothum, 10 N.W.2d 603, 72 N.D. 649.
60 C.J. p 86 note 14.

80. Cal.—Petroleum Midway Co. v. Zahn, 161 P.2d 947, 70 Cal.App.2d 851—Petroleum Midway Co. v. Zahn, 145 P.2d 371, 62 Cal.App.2d 645.

81. Cal.—Emery v. Southern Cal. Gas Co., 165 P.2d 695, 72 Cal.App. 2d 821.

82. Ky.—Tate v. Shaver, 152 S.W.2d 259, 287 Ky. 29.

83. Ky.—Occidental Ins. Co. v. Chasteen, 75 S.W.2d 363, 255 Ky. 710.
Ill.—People v. Dieckman, 88 N.E.2d 433, 404 Ill. 161.

Tex.—Texas Life Ins. Co. v. Hatch, Civ.App., 167 S.W.2d 802, error refused.

Wis.—State v. Jakubowski, 27 N.W. 2d 742, 251 Wis. 74.
60 C.J. p 86 note 15.

Joint verdict or judgment

Where it was agreed that garnishment proceedings should be consolidated and tried as one case, joint verdict for plaintiffs in the total amount due both was proper, but only one joint judgment, instead of two different judgments for total amount due both parties, should have been entered.—Corder v. Morgan Roofing Co., 195 S.W.2d 441, 355 Mo. 127.

84. Cal.—Hunt v. United Artists Studio, 180 P.2d 460, 79 Cal.App.2d 619.

One stipulation extending statutory period action may pend without trial does not operate as a waiver for all future time.—Hunt v. United Artists Studio, *supra*.

85. U.S.—Bowles v. Mannie & Co., C.C.A.Ill., 155 F.2d 129, certiorari denied 67 S.Ct. 82, 329 U.S. 736, 91 L.Ed. 636.

N.Y.—In re Taylor's Will, 95 N.Y.S. 2d 459.

Adjournment of motion for leave to reargue

N.Y.—Metz v. Forest Hills Homes, 95 N.Y.S.2d 29, 197 Misc. 968.

86. Cal.—Cohn v. Cohn, 118 P. 903, 47 Cal.App.2d 683.

Waiver of fact findings

A stipulation that wife's divorce action on ground of desertion proceed to trial as a default case would be construed as a "waiver" of formal fact findings which are not required in default cases.—Cohn v. Cohn, *supra*.

87. Idaho.—Eagle Rock Corp. v. Idamont Hotel Co., 95 P.2d 838, 60 Idaho 639.
60 C.J. p 87 note 16.

88. Ariz.—Hallenbeck v. Regional Agr. Credit Corp. of Salt Lake City, Utah, 56 P.2d 1041, 47 Ariz. 477.

Cal.—Burrows v. Burrows, 63 P.2d 1135, 18 Cal.App.2d 275.

89. N.Y.—Heckel v. City of New York, 74 N.Y.S.2d 873, 273 App.Div. 776—La Manna v. Pillitz, 79 N.Y.S. 2d 578.

90. Cal.—Simpson v. Superior Court in and for Los Angeles County, 158 P.2d 46, 68 Cal.App.2d 821.

Iowa.—Lindburg v. Engster, 264 N. W. 31, 220 Iowa 1073, 116 A.L.R. 591.

Md.—Stevens v. Stevens, 47 A.2d 752, 186 Md. 612.

Va.—Menefee v. Commonwealth, 55 S.E.2d 9, 189 Va. 900.
60 C.J. p 87 note 18.

Objection by one defendant

A general stipulation early in the trial that an objection made by one defendant would avail all defendants could not be construed to apply to testimony which was clearly admissible as to at least some of the defendants.—State v. Hayes, 18 A.2d 895, 127 Conn. 543.

Defense in dual capacity

Where person defended action in dual capacity, stipulation as to objections to evidence made objections several, not joint, as against contention that objections must be good as to all or else overruled.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.

91. Tex.—Brooks v. Enriquez, Civ. App., 172 S.W.2d 794, error refused.

92. U.S.—Gray v. Bernuth Lembcke

Co., D.C.Pa., 88 F.Supp. 586, opinion adhered to 89 F.Supp. 156.

Cal.—Ito v. Watanabe, 2 P.2d 799, 213 Cal. 487.

Mass.—Fulgenitti v. Cariddi, 198 N.E. 258, 292 Mass. 321.

Pa.—Appeal of Mulhollen, 39 A.2d 283, 155 Pa.Super. 587.
60 C.J. p 87 note 19.

Submission to counsel

The effect of a stipulation of parties waiving jury, and providing that findings of fact should be submitted to respective counsel and filed at least five days before judgment should be rendered, was that filing of findings of fact and conclusions of law should not be considered as a final decision.—Morris v. Barton, 190 P.2d 451, 200 Okl. 4.

Waiver

(1) Stipulations by parties that jury be waived and that findings of fact and conclusions of law be waived, and that court may render decision accordingly, are not in every respect binding on the court, and courts may and should depart from them where they interfere with orderly procedure or preclude intelligent review on appeal.—Mason v. Lory Dress Co., 102 N.Y.S.2d 285, 278 App. Div. 660.

(2) Where action at law was tried before the court without a jury and formal findings of fact and conclusions of law were waived by stipulation, trial judge would nevertheless undertake to state the facts which he deemed essential.—Sasmor v. V. Vi-vaudou, Inc., 103 N.Y.S.2d 640, 200 Misc. 1020.

93. Wyo.—State v. Dobbs, 244 P.2d 280.

Selection of special panel

U.S.—Wells v. U. S., C.C.A.Ohio, 123 F.2d 506.

Excusing female members of panel

Cal.—People v. Crimm, 121 P.2d 1, 19 Cal.2d 314.

94. Ga.—Lamar v. State, 33 S.E.2d 263, 199 Ga. 1—Reese v. Baker, 29 S.E.2d 412, 197 Ga. 265.

Ill.—In re McLennan's Estate, 54 N. E.2d 758, 322 Ill.App. 690.

Ohio.—Congregation of St. Augustine Roman Catholic Church of Minister v. Metropolitan Bank of Lima, App., 32 N.E.2d 518.

Evidence adduced at time of motions

Stipulation of counsel in open court to submit cause for final judgment on

mination of the court,⁹⁵ misconduct of counsel,⁹⁶ number of jurors,⁹⁷ order of proof,⁹⁸ passing the case,⁹⁹ presence of parties,¹ process,² reference,³ and restoring the case on calendar.⁴

Courts have adjudicated, in accordance with general rules, the conclusiveness and effect of other

stipulations concerning submission of the case to the court without a jury,⁵ submission of the case on testimony taken before a referee⁶ or on the pleadings alone,⁷ submission of case to jury on special interrogatories,⁸ suspending action,⁹ time for hearing certain pleas or motions,¹⁰ time of taking testimony,¹¹ time for trial,¹² and the conclusiveness and

pleadings and on evidence adduced at time of motions precluded introduction of further evidence after pronouncement of judgment.—Schofield v. Scofield, 3 P.2d 794, 89 Colo. 409.

Venue

Stipulation, which was approved by the trial court, that venue question and merits would be tried to a jury at the same time was enforceable and tantamount to demand by both sides for jury trial of the venue issues.—Aycock v. Graham, Tex. Civ. App., 250 S.W.2d 935.

95. U.S.—Nat. Nut Co. of California v. Sontag Chain Stores Co., C.C.A. Cal., 107 F.2d 318, reversed on other grounds 60 S.Ct. 961, 310 U.S. 281, 84 L.Ed. 1204, rehearing denied 61 S.Ct. 53, 311 U.S. 724, 85 L.Ed. 471. Cal.—People v. Denningham, 185 P.2d 614, 82 Cal.App.2d 117.

Del.—State, to Use of Henderson, v. Clark, 20 A.2d 127, 2 Terry 138, 138 A.L.R. 704.

Idaho.—Donaldson v. Josephson, 228 P.2d 941, 71 Idaho 207.

Pa.—In re De Maio's Estate, 70 A.2d 339, 363 Pa. 559—Appeal of Ludwick, 178 A. 339, 117 Pa.Super. 471.

Second judge

Where, after case had been heard by a judge who died without making a decision, case was submitted to another judge in accordance with stipulation for his determination on a transcript of all the evidence, which stipulation did not require second judge to make any rulings on evidence or to adopt any ruling made at first trial, exceptions taken at first trial became of no avail.—Graustein v. Boston & Maine R. R., 57 N.E.2d 570, 317 Mass. 164.

Compensation of trustee

A stipulation of parties in suit for accounting by trustee to effect that trial court might, if it found that trustee was entitled to any compensation for his services, determine the amount to which he was entitled did not constitute agreement by parties to be bound by whatever amount the trial judge might determine so as to preclude parties, on appeal, from questioning amount allowed by trial court.—Marshall v. Frazier, 81 P.2d 132, 159 Or. 491.

Independent investigation

Where parties to child custody proceeding have stipulated for an independent investigation by court, such stipulation does not preclude their right to introduce evidence in the

conventional manner on issue being investigated.—Rea v. Rea, Or., 245 P.2d 884.

96. Cal.—Gordon v. Kifer, 79 P.2d 164, 26 Cal.App.2d 252.

97. U.S.—Union Electric Light & Power Co. v. Snyder Estate Co., D.C.Mo., 15 F.Supp. 379.

Tex.—Cas. Reciprocal Exchange v. Berry, Civ.App., 90 S.W.2d 595, error refused.

98. N.Y.—Rockaway Pac. Corporation v. State, 193 N.Y.S. 62, 200 App.Div. 172.

60 C.J. p 87 note 20.

99. Tex.—Armstrong v. State, Civ. App., 122 S.W.2d 662.

60 C.J. p 87 note 21.

1. Cal.—In re Egan, 149 P.2d 693, 24 Cal.2d 323, certiorari denied 65 S.Ct. 272, 323 U.S. 785, 89 L.Ed. 626.

2. Ohio.—Union Ice Corp. v. City of Niles, 13 Ohio Supp. 115.

Date writ signed

Vt.—Kessler v. Emmell, 50 A.2d 604, 115 Vt. 54.

3. Fla.—Muller v. Gables Racing Ass'n, 196 So. 864, 142 Fla. 834.

N.Y.—Rowell v. Lehigh Valley R. Co., 257 N.Y.S. 537, 235 App.Div. 891.

Wis.—Dunham v. Howard Industries, 34 N.W.2d 140, 253 Wis. 347.

Court was without power to deprive either party of the effect of stipulation that case be referred to special master to hear and determine all issues of law and fact.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, D.C.N.Y., 51 F.Supp. 36, reversed on other grounds, C.C.A., 145 F.2d 215, reversed on other grounds 65 S.Ct. 1533, 325 U.S. 797, 89 L.Ed. 1939, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489.

Fixing of referee's fee and disbursements by court

N.Y.—People ex rel. New York Cent. R. Co. v. State Tax Commission, 116 N.Y.S.2d 595, 280 App.Div. 627.

4. N.Y.—Clarriso v. Coney Island & B. R. Co., 172 N.Y.S. 183, 104 Misc. 592.

60 C.J. p 87 note 22.

5. Kan.—Broyles v. Order of United Commercial Travelers of America, 126 P.2d 212, 155 Kan. 458.

60 C.J. p 87 note 17.

Character of action

Where the parties agreed to trial of case without a jury, the trial court's approval had no effect on the

character of the action other than in the trial court.—Hodapp v. Shell Oil Co., Ohio App., 40 N.E.2d 848.

Functions of jury

A submission of an action to the court for trial clothes it with all the functions of a jury in determining the facts and rendering a judgment based thereon.

Ky.—East Tennessee, V. & G. R. Co. v. Adams, 14 Ky.L. 862.

W.Va.—Griffie v. McCoy, 8 W.Va. 201.

Trial judge not bound

A stipulation between parties to litigation, by which plaintiff waived his jury claim and the parties agreed that trial should continue before the judge alone, was not binding on trial judge.—Gechijian v. Richmond Ins. Co., 25 N.E.2d 191, 305 Mass. 132.

6. Okl.—Walker v. Walker, 88 P. 1127, 17 Okl. 467.

60 C.J. p 87 note 23.

Rendition of judgment

Where parties stipulated that presiding judge might review evidence, consider exceptions to referee's findings and conclusions, and render judgment, failure to submit to jury certain issues tendered by defendant was not error.—Smithfield Mills v. Stevens, 168 S.E. 201, 204 N.C. 382.

7. Fla.—Buscher v. Mangan, 59 So. 2d 745.

8. Kan.—Henderson v. Deckert, 162 P.2d 88, 160 Kan. 386.

9. N.Y.—Fawcett Publications v. Greenwald, 70 N.Y.S.2d 542, 189 Misc. 270.

60 C.J. p 87 note 24.

10. Cal.—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal.App. 671.

Tex.—Stone v. Luzier's, Inc., Civ. App., 144 S.W.2d 658, motion overruled 145 S.W.2d 242.

11. Ill.—Lenchard v. Friel, 61 N.E. 2d 768, 326 Ill.App. 461.

60 C.J. p 87 note 25.

12. Ariz.—Hiatt v. Hiatt, 80 P.2d 692, 52 Ariz. 284.

Cal.—Smith v. Bear Valley Milling & Lumber Co., 160 P.2d 1, 26 Cal.2d 590—Hunt v. United Artists Studio, 180 P.2d 460, 79 Cal.App.2d 619—Koehler v. Peckham, 54 P.2d 500, 11 Cal.App.2d 481.

60 C.J. p 87 note 26.

Indefinite time in future

Stipulation to set case for trial at indefinite time in future is merely an agreement that case will be set down for trial within reasonable time in

effect of other stipulations concerning time for final submission¹³ or adjudication on the merits,¹⁴ transfer of the cause,¹⁵ trial by the court as an equity case,¹⁶ and viewing of certain premises by the trial judge.¹⁷

b. Instructions and Verdict

Rules governing the construction, operation, and effect of stipulations generally apply to stipulations relating to instructions and verdict.

Rules governing the construction, operation, and effect of stipulations generally, discussed supra §§ 11-17, apply to stipulations relating to instructions.¹⁸ Where the parties stipulate that the pleadings shall be part of the instructions, the court may instruct accordingly.¹⁹ The court may properly refuse additional instructions where the instructions already given are by stipulation made decisive of the case.²⁰ A stipulation that an instruction is "founded upon and justified" by the evidence forecloses all objections to its propriety.²¹ A stipulation that certain instructions were prepared and given without objection on behalf of defendant's attorney has been

held not to preclude either party from excepting to them in the manner provided by statute.²² An oral stipulation made by counsel to the effect that they would risk the jury with the judge and that he could do what he thought was right in their absence, made after the jury had been charged by the court and the issues had been argued to the jury, does not authorize the judge to withdraw the original charge and submit altogether new and different issues in the absence of counsel.²³ A stipulation that the court may instruct orally and in writing does not waive the requirement that the instructions be presented in writing to the court in time to be properly considered.²⁴ A stipulation that without testimony the court may consider the laws of another state in evidence and instruct as it conceives the law to be under the decisions of the state is not an agreement to be bound by the court's conclusion as to the law as expressed in its instructions.²⁵

Verdict. General rules as to the construction, operation, and effect of stipulations also apply with respect to stipulations concerning the verdict,²⁶ such

future, and burden is on plaintiff to show diligence in attempting to bring case for trial within such reasonable time.—*Sedarovich v. Paul*, 60 P.2d 871, 16 Cal.App.2d 452.

Agreement not to ask for further postponement

Pa.—*Commonwealth v. Cameron County Bank*, 157 A. 586, 305 Pa. 499.

13. N.Y.—*Schwartz v. Leasehold Corp. of New York*, 48 N.Y.S.2d 146, 181 Misc. 666.

14. La.—*Kirby Lumber Corp. v. Cain*, 34 So.2d 259, 212 La. 1055.

Claim held not waived

Where case was not triable on its merits at March term but on hearing at March term of motion to dissolve temporary injunction attorneys entered into a stipulation that the hearing would be a final hearing on the issues of injunction and that rights of parties in property would be adjudicated, the stipulation did not operate as waiver of claim that bill could not be maintained because complainant did not come into court with clean hands.—*Hutchins v. Rounds*, 33 So.2d 622, 203 Miss. 169.

15. Tex.—*Carpenter v. State*, 192 S.W.2d 268, 149 Tex.Cr. 144.

Utah.—*Hammond v. Johnson*, 75 P.2d 164, 94 Utah 35.
60 C.J. p 87 note 27.

Transfer from equity side of court to law side

U.S.—*Dysart v. Remington Rand, D. C.Conn.*, 25 F.Supp. 293.

16. Mo.—*Maryland Cas. Co. v. Dobbin*, 108 S.W.2d 166, 232 Mo.App. 557.

Preservation of evidence

Party's agreement contained in record to try case as a chancery cause did not dispense with necessity of preserving evidence by bill of exceptions and filing of record for writ of error would avail appellant nothing.—*Walker v. Partin*, 227 S.W.2d 778, 32 Tenn.App. 683.

17. Cal.—*Three Sixty Five Club v. Shostak*, 232 P.2d 546, 104 Cal.App.2d 735.—*Blodgett v. Walker Scott Corp.*, 221 P.2d 325, 99 Cal.App.2d 251.

18. Iowa.—*Sanford v. Nesbit*, 11 N.W.2d 695, 234 Iowa 14.

In absence of fundamental error

Where counsel for accused stipulated with county attorney as to instruction to be given and court gave such instructions, accused could not thereafter complain of the giving thereof unless fundamental error was apparent.—*Bush v. State*, 215 P.2d 577, 91 Okl.Cr. 30.

Special instruction

Stipulation that court need not give special instruction on probable cause in malicious prosecution case did not authorize court to define "probable cause" incorrectly to jury.—*Huber v. Thomas*, 19 P.2d 1042, 45 Wyo. 440.

19. Iowa.—*Burns v. Oliphant*, 43 N.W. 289, 78 Iowa 456.

20. Iowa.—*Parsons v. Hedges*, 15 Iowa 119.

21. Mo.—*Forsee v. Hurd*, 84 S.W. 372, 185 Mo. 503.

22. Iowa.—*Sanford v. Nesbit*, 11 N.W.2d 695, 234 Iowa 14.

23. Tex.—*Hickman v. Talley*, Civ. App., 8 S.W.2d 267.

24. Wash.—*Hanson v. City of Seattle*, 185 P. 581, 108 Wash. 586.

25. Wash.—*Bogitch v. Potlatch Lumber Co.*, 161 P. 487, 93 Wash. 585.

26. Mass.—*Sermuks v. Automatic Aluminum Heel Co.*, 153 N.E. 8, 256 Mass. 478.

S.C.—*McGuinn v. Aetna Life Ins. Co.*, 171 S.E. 793, 171 S.C. 136.

Tex.—*Cas. Reciprocal Exchange v. Berry*, Civ.App., 90 S.W.2d 595, error refused.

Utah.—*Fudge v. Downing*, 27 P.2d 33, 83 Utah 101.

Interest

Where parties stipulated that question of interest on any verdict which might be returned should be determined by court and not jury, court had authority to reserve and determine it.—*Hartford Acc. & Indem. Co. v. Collins-Dietz-Morris Co.*, C.C.A. Okl., 80 F.2d 441.

Correction

Where record in condemnation proceeding disclosed that parties stipulated in open court that verdict could be corrected as to description, defendants could not contend on appeal that verdict was not in conformity with complaint filed.—*Department of Public Works & Bldgs. v. Filkins*, 104 N.E.2d 214, 411 Ill. 304.

Permanent damages

In action for damages to land, stipulation that verdict might set forth amount of permanent damages, if any, was not agreement by defendant that plaintiffs were entitled to recov-

as a stipulation that the jury might separate after rendering a sealed verdict.²⁷ A stipulation for a sealed verdict does not operate to dispense with the attendance of the jurors when it is opened and read in court²⁸ or deprive the court of the right to have the jury polled.²⁹ Also, a stipulation that should the jury agree that night, they might return a sealed verdict to the clerk and disperse, cannot be construed to extend to a verdict found on the next day.³⁰

Where the parties by stipulation agreed on the amount of the verdict in the event that plaintiff recover judgment, recovery is not erroneously allowed in the absence of proof of damages.³¹ A stipulation that in the event of a verdict a designated amount would be fair and reasonable does not prevent the jury from using their own judgment as to the amount to which plaintiff is entitled.³² Where, at the suggestion of the trial court,

the attorneys for both parties, after each had moved for a directed verdict, stipulated that on reservation of decision the court might enter a verdict in the absence of the jury as a general verdict, as though the jury were actually present, after such a verdict had been entered, the trial court properly refused to make findings of facts and conclusions of law, the verdict, when entered according to the stipulation, having the same effect as a general verdict.³³

§ 27. — As to Judgments and Executions

Rules relating to the construction, operation, and effect of stipulations generally apply to the construction, operation, and effect of stipulations relating to judgments or decrees, and executions.

Rules relating to the construction, operation, and effect of stipulations generally, discussed supra §§ 11-17, apply to the construction, operation, and effect of stipulations relating to judgments³⁴ or de-

er permanent damages, but agreement that they were entitled to permanent damages, if any.—*Carpenter v. City of Versailles*, Mo.App., 65 S. W.2d 957.

Reduction

Stipulation authorizing court to select expert to examine plaintiff, so as to aid court in ruling on motion to set aside verdict for injuries as excessive, permitted trial justice to reduce verdict on basis of medical reports made after trial.—*Nichols v. Corroon*, 274 N.Y.S. 596, 242 App.Div. 787.

Signature by one juror

Where counsel orally agreed that verdict would be signed by one juror after the others were excused and that case would be decided by presiding judge, court improperly entered judgment without directing verdict and having it signed by one juror, since losing party was deprived of opportunity to move for new trial.—*Lester v. Schutt*, 152 So. 726, 113 Fla. 659.

27. Or.—*Lehl v. Hull*, 53 P.2d 48, 152 Or. 470, rehearing denied 54 P.2d 290, 152 Or. 470.

Absence of valid verdict

Stipulation that jury might separate after rendering sealed verdict constitutes waiver of statutory provision requiring jury to be kept together, even though it subsequently develops that no valid verdict has been agreed on.—*Lehl v. Hull*, supra.

Disposition of reserved ruling

Plaintiff by his stipulation that jury might seal their verdict and separate agreed that trial court might dispose of its reserved ruling on defendant's motion for a directed verdict after jury separated.—*Compass Sales Corp. v. Nat. Mineral Co.*, 53

N.E.2d 319, 321 Ill.App. 522, error dismissed 57 N.E.2d 888, 388 Ill. 281.

28. Ill.—*St. Louis, etc., R. Co. v. Faitz*, 19 Ill.App. 85.

29. Ill.—*St. Louis, etc., R. Co. v. Faitz*, supra.

Or.—*Freeman v. Wentworth & Irwin*, 7 P.2d 796, 139 Or. 1.

30. Ga.—*Nolan v. State*, 53 Ga. 137.

31. Mich.—*Thompson v. Walker*, 234 N.W. 144, 253 Mich. 126.

32. Mass.—*Byam v. Carlisle-Ayer Co.*, 172 N.E. 113, 272 Mass. 176.

33. N.Y.—*Bobrick v. McAvoy*, 177 N.Y.S. 208, 188 App.Div. 545.

34. U.S.—*Eastern Transp. Co. v. U. S.*, C.C.A.N.Y., 159 F.2d 349—*Bair v. Bank of America Nat. Trust & Savings Ass'n*, C.C.A.Mont., 106 F.2d 794—*U. S. v. New Orleans Pac. Ry. Co.*, D.C.La., 52 F.2d 246—*Hoyt v. Empire Oil & Refining Co.*, D.C. Mich., 52 F.Supp. 744—*Hotchkiss v. National City Bank of New York*, N.Y., 223 F. 533, 139 C.C.A. 123.

Ariz.—*Betancourt v. Logia Suprema De La Alianza Hispana-Americana*, 86 P.2d 1026, 53 Ariz. 151, modified on other grounds 88 P.2d 83, 53 Ariz. 263—*Payne v. Williams*, 56 P.2d 186, 47 Ariz. 396.

Cal.—*Socol v. King*, 209 P.2d 577, 34 Cal.2d 292—*Los Angeles County v. Wright*, 236 P.2d 892, 107 Cal. App.2d 235.

Fla.—*Smith v. Urquhart*, 176 So. 787, 129 Fla. 742.

Ill.—*Meyer v. Meyer*, 77 N.E.2d 556, 333 Ill.App. 450—*Chicago Title & Trust Co. v. Cleary*, 2 N.E.2d 970, 286 Ill.App. 97.

Iowa.—*Peak v. Mulvaney*, 245 N.W. 748, 215 Iowa 1400.

Ky.—*Brock v. Harlan County*, 179 S.W.2d 202, 297 Ky. 113.

Mich.—*Toledo Pipe Organ Co. v. Paradise Theatre Co.*, 28 N.W.2d 224, 318 Mich. 342.

Mont.—*Espeland v. Espeland*, 109 P.2d 792, 111 Mont. 365.

N.H.—*Calley v. Boston & Maine R.*, 33 A.2d 227, 92 N.H. 455.

N.J.—*Harrison v. Dalton*, 80 A.2d 206, 7 N.J. 29.

N.Y.—*Mann v. R. Simpson & Co.*, 36 N.E.2d 658, 286 N.Y. 450—*Wells v. Hollister*, 40 N.Y.S.2d 166, 265 App. Div. 603—*People v. Schlund*, 16 N.Y.S.2d 1011, 258 App.Div. 1031, reargument denied 20 N.Y.S.2d 176, 259 App.Div. 796—*Gruen v. Carter*, 15 N.Y.S.2d 472, 258 App.Div. 36—*Tully v. Reclamation & Building Corporation*, 269 N.Y.S. 835, 241 App.Div. 742—*Kashefsky v. Futernick*, 276 N.Y.S. 253, 153 Misc. 733—*La Salle Extension University v. Pappace*, 273 N.Y.S. 198, 152 Misc. 274—*De Santolo v. La Porte*, 89 N.Y.S.2d 114.

N.C.—*Dellinger v. Clark*, 67 S.E.2d 448, 234 N.C. 419.

N.D.—*Mongeon v. Burkebile*, 55 N.W.2d 445.

Okl.—*Adamson v. Brady*, 182 P.2d 748, 199 Okl. 55.

Or.—*In re Lachmund's Estate*, 170 P.2d 748, 179 Or. 420, 166 A.L.R. 479.

Pa.—*Commonwealth v. Banholzer*, 156 A. 237, 304 Pa. 578, followed in *Commonwealth v. Goodwin*, 156 A. 238, 304 Pa. 581—*Dio Guardi & Co. v. March*, Com.Pl., 5 Chest.Co. 40.

R.I.—*Ell v. Messerlian*, 67 A.2d 703, 75 R.I. 458.

S.C.—*Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 221 S.C. 23.

Tex.—*Kluck v. Spitzer*, Civ.App., 54 S.W.2d 1063.

crees,³⁵ and executions.³⁶ Accordingly, such rules apply with respect to stipulations concerning the amount of recovery or relief awarded,³⁷ certification of the judgment of another state on which suit

Vt.—Granite City Co-op. Creamery Ass'n v. B & K Cheese Co., 62 A. 2d 193, 115 Vt. 408.

Judgment on consent, offer, or admission generally see Judgments §§ 173-186.

Motion

Defendant may bring suit for breach of terms of stipulation of settlement, but cannot have judgment entered pursuant to such settlement set aside on motion.—La Salle Extension University v. Pappace, 273 N.Y.S. 198, 152 Misc. 274.

Action not terminated

A stipulation of settlement did not terminate the action, but when motion to vacate the stipulation or to relieve defendants therefrom was made, the action was still pending.—Isler v. Isler, 24 N.Y.S.2d 401, 260 App.Div. 1032, reargument denied 25 N.Y.S.2d 998, 261 App.Div. 827.

Construed with pleadings

A written stipulation of facts authorizing rendering of judgment accordingly should be construed with, and is controlling over, the pleadings with which the stipulation merges.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.

Particular stipulations

(1) Approval and confirmation of executor's report.—In re Shepherd's Estate, 261 N.W. 35, 220 Iowa 12.

(2) Disposition of suit involving order of administrative body without remand to such body.—Baltimore & A. R. Co. v. Lichtenberg, 4 A.2d 734, 176 Md. 383, appeal dismissed U. S. v. Baltimore & A. R. Co., 60 S.Ct. 297, 308 U.S. 525, 84 L.Ed. 444.

(3) Judgment to be entered in one case on basis of verdict or judgment in another case.

Colo.—City and County of Denver v. Strafacia, 129 P.2d 674, 110 Colo. 14.

La.—Gaiennie v. Cooperative Produce Co., App., 199 So. 610.

(4) Rendition of judgment against defendants in representative capacity only.—Slusser v. Romine, 200 N.E. 731, 102 Ind.App. 25.

(5) Right to attorney's fee.—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569.

(6) Vacation of judgment as to one defendant.—Piper v. Epstein, 62 N.E.2d 139, 326 Ill.App. 400.

35. U.S.—N. L. R. B. v. Gerling Furniture Mfg. Co., C.C.A.7, 103 F.2d 663.

Cal.—Friedrich v. Roland, 213 P.2d 423, 95 Cal.App.2d 543.

Fla.—Pasco Holding Co. v. Wells, 171 So. 674, 126 Fla. 339—Phillips v. Acacia Mut. Life Ins. Co., 168 So.

34, 124 Fla. 179—Swann v. L. Maxcy, Inc., 162 So. 696, 120 Fla. 283.

Md.—Schill v. Remington-Putnam Book Co., 32 A.2d 296, 182 Md. 153.

N.Y.—In re Burridge's Estate, 251 N.Y.S. 206, 140 Misc. 574, reversed on other grounds 255 N.Y.S. 581, 234 App.Div. 457.

Or.—Harris v. Harris, 232 P.2d 818, 192 Or. 361.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

Vacating decree

Ill.—Reisman v. Central Mfg. Dist. Bank, 45 N.E.2d 90, 316 Ill.App. 371.

36. Fla.—Magee v. Croker, 156 So. 314, 116 Fla. 131.

N.Y.—Reisman v. Independence Realty Corp., 89 N.Y.S.2d 763, 195 Misc. 260, affirmed 100 N.Y.S.2d 407, 277 App.Div. 1020.

60 C.J. p 88 note 48.

37. U.S.—Drohan v. Standard Oil Co., C.C.A.Ind., 168 F.2d 761, certiorari denied 69 S.Ct. 69, 335 U.S. 845, 93 L.Ed. 396—U. S. v. Baugh, C.C.A.Tex., 149 F.2d 190—U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, C.C.A.N.C., 118 F.2d 79, reversed on other grounds 63 S.Ct. 1047, 319 U.S. 266, 87 L.Ed. 1390, mandate conformed to, C.C.A., 138 F.2d 343, certiorari denied 64 S.Ct. 612, 321 U.S. 773, 88 L.Ed. 1067—Metro-Goldwyn-Mayer Corp. v. Fear, C.C.A.Cal., 104 F.2d 892—Lundy v. Calmar S. S. Corp., D.C.N.Y., 96 F.Supp. 19—U. S. v. Certain Lands Situate in Kansas City, Jackson County, D.C.Mo., 66 F.Supp. 572—U. S. v. Certain Land in City of St. Louis, Mo., Known as City Block 67, D.C.Mo., 58 F.Supp. 305—Vietzka v. Austin Co., D.C. Wash., 54 F.Supp. 265.

Cal.—Scheffski v. Anker, 15 P.2d 744, 216 Cal. 624—Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 73 P.2d 1241, 23 Cal.App.2d 642—Larson v. Abdun-Nur, 4 P.2d 957, 118 Cal.App. 269.

Ill.—2063 Lawrence Ave. Bldg. Corp. v. Biedl, 31 N.E.2d 405, 308 Ill.App. 320—Soft-Lite Lens Co. v. Ritholz, 21 N.E.2d 835, 301 Ill.App. 100.

Mass.—Adamaitis v. Metropolitan Life Ins. Co., 3 N.E.2d 833, 295 Mass. 215—Somerville v. New York, N. H. & H. R. Co., 189 N.E. 592, 285 Mass. 539.

Minn.—Collins v. Marquette Trust Co., 246 N.W. 5, 187 Minn. 514.

Miss.—Taylor v. Jackson, 12 So.2d 144, 194 Miss. 441.

Mo.—General Motors Acceptance Corp. v. Vanausdall, App., 249 S.W.2d 1003—Esker v. Davis, App., 207 S.W.2d 798—Gilliland v. Bondurant,

App., 51 S.W.2d 559, affirmed 59 S.W.2d 679, 332 Mo. 881.

N.J.—Altshul v. Astor Coal Distributors, 16 A.2d 619, 125 N.J.Law 543.

N.Y.—Sulyok v. Penzintezeti Kozpont Budapest, 111 N.Y.S.2d 75, 279 App. Div. 528, modified on other grounds 107 N.E.2d 604, 304 N.Y. 704, motion denied 108 N.E.2d 407, 304 N.Y. 742

—Jordan v. Smyk, 29 N.Y.S.2d 62, 262 App.Div. 414, reversed on other grounds 41 N.E.2d 930, 288 N.Y. 525—In re Melzak's Estate, 275 N.Y.S. 607, 153 Misc. 600—Rock v. Belmar Contracting Co., 252 N.Y.S. 463, 141 Misc. 242—In re Arsdale's Will, 75 N.Y.S.2d 487, 190 Misc. 968

—R. H. Cunningham & Sons Co. v. State, 52 N.Y.S.2d 65, affirmed 60 N.Y.S.2d 206, 270 App.Div. 864.

R.I.—Salvatore v. Fucellaro, 166 A. 26, 53 R.I. 271.

Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.

Vt.—Granite City Co-op. Creamery Ass'n v. B & K Cheese Co., 63 A.2d 193, 115 Vt. 408.

Insufficient ad damnum in writ

Where jury found for plaintiff and assessed damages at amount agreed on if liability was established, the insufficient ad damnum in the writ would be deemed to have been amended.—Lawry v. Yeaton, 23 A.2d 890, 138 Me. 230.

Percentage of claims

Holding creditors to agreement for acceptance of percentage of value of claims, regardless of failure to make payments within reasonable time, was erroneous.—George N. Sparling Coal Co. v. Colorado Pulp & Paper Co., 299 P. 41, 88 Colo. 523.

Proof of damage

(1) Court may enter judgment for amount of stipulated damages without further proof of damages. U.S.—Fleming v. Myers, C.C.A.Ariz., 159 F.2d 210.

Cal.—Corbett v. Benioff, 14 P.2d 1028, 126 Cal.App. 772.

Okla.—City of Wewoka v. Magnolia Petroleum Co., 3 P.2d 182, 151 Okl. 177.

(2) However, there must be proof of damages other than those stipulated.—U. S. v. Oceanic S. S. Nav. Co., C.C.A.N.Y., 56 F.2d 764.

(3) Plaintiff's recovery was limited to maximum amount designated in stipulation notwithstanding evidence showed plaintiff was entitled to recover more.—Colonial Village Restaurants v. Colonial Village, 42 N.E.2d 849, 315 Ill.App. 237.

Interest

(1) In general.

Colo.—Myers v. Coloroda Pulp & Paper Co., 35 P.2d 1020, 95 Colo. 328.

is brought,³⁸ credits against the judgment or decree,³⁹ entry of default judgment, under certain conditions,⁴⁰ fund from which costs payable,⁴¹ grant or denial of relief, on certain conditions,⁴² persons against whom judgment to be rendered,⁴³ and satisfaction of judgment by applying amount recovered by defendant against a third person.⁴⁴ Where the parties by stipulation agree on a definite time for rendition or entry of judgment, strict conformity with the stipulation is necessary, and the court has no jurisdiction to render or enter a judgment after the time so fixed.⁴⁵ Where a stipulation provides for giving the court more time to render decision than is prescribed by statute, rendition of judgment after expiration of the time prescribed is authorized.⁴⁶

A stipulation by parties, permitting the trial court to render and enter judgment in vacation, does not authorize entry of judgment in vacation on findings materially different from those made in term time.⁴⁷

However, a stipulation that the court could sign findings of fact and judgment out of the county and out of term and mail them back does not limit the court to any specific decision announced or unannounced.⁴⁸ A stipulation made subsequent to a decision of the supreme court modifying and affirming the judgment appealed from, which recites that, pending the agreement, rights adjudged to either party by the judgment shall be held in abeyance, does not prevent the successful party from perfecting his judgment and inserting therein the costs allowed on appeal.⁴⁹

A stipulation on the part of plaintiff's attorney that final judgment would not be asked for without first notifying defendant's nonresident counsel, and that no technical advantage would be taken because of counsel's absence, imposed no obligation to notify defendant's counsel of a ruling denying defendant's motion for new trial.⁵⁰ Under a stipulation whereby defendant agreed to convey certain

Ill.—Blaine v. City of Chicago, 8 N. E.2d 939, 366 Ill. 341.

(2) Where stipulation of parties related to amount recoverable and was not intended to include or exclude interest thereon, court did not err in adding interest to amount recoverable.—Kropp Forge Co. v. Employers' Liability Assur. Corp., Limited, of London, England, C.C.A.Ill., 159 F.2d 536.

(3) Those defendants who signed stipulation which provided for interest in case of recovery could not complain of allowance of interest on ground that pleadings did not cover interest.—Humble Oil & Refining Co. v. State, Tex.Civ.App., 162 S.W.2d 119, error refused.

(4) Stipulation for entry of an order allowing claims on notes with accrued interest prevented party to stipulation from contending that accrued interest on notes was not to be discounted.—In re Plankinton Bldg. Co., C.C.A.Wis., 148 F.2d 119, certiorari denied Harvey v. Grossman, 66 S.Ct. 36, five cases, 326 U.S. 729, 90 L.Ed. 433, and Plankinton Bldg. Co. v. Grossman, 66 S.Ct. 36, 326 U.S. 729, 90 L.Ed. 433, and Harvey v. Grossman, 66 S.Ct. 37, 326 U.S. 729, 90 L.Ed. 433.

(5) Where it was stipulated that a decree as to inheritance tax should bear a designated per cent interest if affirmed, such an award of interest was required where the decree was modified and affirmed.—In re Felton's Estate, 169 P. 662, 177 Cal. 12.

38. Tex.—Heldingsfelder v. Rogers, Civ.App., 96 S.W.2d 147.

39. N.J.—Mahaffey v. Evens, 171 A. 315, 115 N.J.Eq. 434.

Tex.—Ortiz Oil Co. v. Geyer, 159 S. W.2d 494, 138 Tex. 373.

40. Alaska.—Rains v. Alaska Consol. Oil Fields, 8 Alaska 256.

41. La.—Metropolitan Life Ins. Co. v. Lewis, App., 142 So. 721.

42. U.S.—Barnidge v. U. S., C.C.A. Mo., 101 F.2d 295—Krauss v. U. S., D.C.La., 51 F.Supp. 388, affirmed, C. C.A., 140 F.2d 510—U. S. v. Query, D.C.S.C., 37 F.Supp. 972, affirmed, C.C.A., Query v. U. S., 121 F.2d 631, certiorari denied 62 S.Ct. 295, 314 U.S. 685, 86 L.Ed. 548, vacated on other grounds 62 S.Ct. 1036, 316 U. S. 653, 86 L.Ed. 1733, vacated on other grounds 62 S.Ct. 1122, 316 U. S. 486, 86 L.Ed. 1616.

Ala.—Gordon v. Medders, 148 So. 135, 226 Ala. 576.

Colo.—Timpfe v. Kayser, 69 P.2d 254, 100 Colo. 562—Wade v. State, 47 P. 2d 412, 97 Colo. 52.

Idaho.—In re Idaho Mut. Ben. Ass'n, 53 P.2d 1171, 56 Idaho 272.

Ill.—Littel v. City of Peoria, 29 N.E. 2d 533, 374 Ill. 344.

La.—Alfortish v. Wagner, 7 So.2d 708, 200 La. 198.

Mo.—Hansen v. Ryan, 186 S.W.2d 595—Pearson Drainage Dist. v. Erhardt, 201 S.W.2d 484, 239 Mo.App. 845.

N.Y.—Pines v. Beck, 90 N.E.2d 28, 300 N.Y. 181, motion denied 91 N.E.2d 723, 300 N.Y. 694—Siegel v. Tobias, 19 N.Y.S.2d 337, 173 Misc. 868.

N.C.—B-C Remedy Co. v. Unemployment Compensation Commission of N. C., 36 S.E.2d 733, 226 N.C. 52, 163 A.L.R. 773.

Tex.—Peavey-Moore Lumber Co. v. Spreckles, Civ.App., 153 S.W.2d 325, error refused.

43. Cal.—Deevy v. Tassi, 130 P.2d 389, 21 Cal.2d 109.

Mo.—Hansen v. Ryan, 186 S.W.2d 595—Panich v. Curtis, Owen, Fuller Corp., App., 124 S.W.2d 619.

N.Y.—Servidone v. Hirschmann, 51 N.Y.S.2d 917, 268 App.Div. 347, reargument denied 52 N.Y.S.2d 434, 268 App.Div. 1075, affirmed 62 N.E. 2d 232, 294 N.Y. 786.

Persons not parties to stipulation

A judgment, in action for mandatory injunction for removal of obstructions on a right of way created by a declaration of easement, which was based on a stipulation of settlement, was erroneous in so far as it purported to afford affirmative relief against persons who were made parties defendant after action had been commenced and who were not parties to the stipulation of settlement.—Bowler v. Apex Builders, 19 N.Y.S.2d 501, 259 App.Div. 834.

44. Mont.—Nepstad v. East Chicago Oil Ass'n, 9 P.2d 1074, 91 Mont. 366. Or.—Kotthoff v. Portland Seed Co., 800 P. 1029, 137 Or. 152.

45. Me.—In re Robinson, 100 A. 373, 116 Me. 125.

60 C.J. p 88 note 49.

46. N.Y.—Ross v. King, 37 N.Y.S.2d 243.

47. Colo.—Wilson v. Collin, 102 P. 21, 45 Colo. 412.

48. N.C.—Dellinger v. Clark, 67 S.E. 2d 448, 234 N.C. 419.

49. Cal.—Burr v. Maclay Rancho Water Co., 147 P. 990, 26 Cal.App. 611.

50. Colo.—Grimes v. John Harvey Fuel, etc., Co., 266 P. 204, 83 Colo. 411.

lands, and that, if he failed to do so within a stated time, judgment might be entered for plaintiff in a specified sum, he could elect which of the alternative covenants to perform, and, if he declined to convey the lands, plaintiff would not be entitled to specific performance, but could enforce only the alternative covenant.⁵¹ Where the parties privately stipulated that default would not be entered for ninety days, and that defendant need not file pleadings during such time, of which the court was not advised and by which it was not bound, it is incumbent on defendant, in order to take advantage of the stipulation, to appear at the appearance call of the docket and obtain an order extending the time to file a defense.⁵²

§ 28. — As to Review

General principles relating to the construction, operation, and effect of stipulations apply to the construction and operation and effect of stipulations relating to appeals and other proceedings for review.

General principles relating to the construction and to the operation and effect of stipulations, discussed supra §§ 11-17 apply to the construction and operation and effect of stipulations relating to appeals and other proceedings for review,⁵³ such as with respect to appeal bonds;⁵⁴ briefs;⁵⁵ consolidation of appeals;⁵⁶ dismissal of appeal;⁵⁷ disposition of the appeal, as by affirmance, reversal, or modification of the judgment rendered below;⁵⁸ participation of justices in opinion of reviewing court regardless

51. Wis.—State v. Circuit Court of St. Croix County, 203 N.W. 923, 187 Wis. 1, 48 A.L.R. 894.

52. Ga.—Fraser v. Neese, 187 S.E. 550, 163 Ga. 843.

53. Cal.—Garfield v. Board of Medical Examiners, 221 P.2d 705, 99 Cal.App.2d 219—Rahim v. Akbar, 207 P.2d 80, 92 Cal.App.2d 383—Riverside Rancho Corp. v. Cowan, 193 P.2d 480, 85 Cal.App.2d 565—In re Cohn's Estate, 98 P.2d 521, second case, 36 Cal.App.2d 676. Colo.—In re Maikka's Estate, 134 P. 2d 723, 110 Colo. 433.

Fla.—Schrivver v. Tucker, 42 So.2d 707.

Ind.—Cole v. Sheehan Const. Co., 57 N.E.2d 625, 115 Ind.App. 303.

Iowa.—Bates v. American Trust & Savings Bank of Le Mars, 273 N.W. 867, 223 Iowa 729.

Ky.—Samuels v. Commonwealth, 49 S.W.2d 312, 243 Ky. 523.

La.—Schneider v. Manion, 46 So.2d 58, 217 La. 118.

Mich.—Massachusetts Mut. Life Ins. Co. v. Sutton, 270 N.W. 748, 278 Mich. 457.

Miss.—Tatum v. Sciscocoe, 199 So. 70, 189 Miss. 803.

N.J.—Hackettstown Nat. Bank v. Smith, 6 A.2d 485, 125 N.J.Eq. 483, affirmed 6 A.2d 486, 125 N.J.Eq. 482—Hickory Grill v. Admiral Trading Corp., 81 A.2d 187, 14 N.J.Super. 1.

N.Y.—Skinner v. Paramount Pictures, 63 N.E.2d 64, 294 N.Y. 474—Chelrob, Inc. v. Barrett, 49 N.E.2d 994, 290 N.Y. 525—Langley v. Hennessey, 289 N.Y.S. 73, 248 App.Div. 797—Yamanaka & Co. v. Dunbar, 2 N.Y.S.2d 220, 166 Misc. 729, affirmed 7 N.Y.S.2d 571, 255 App.Div. 767—People v. Haag, 7 N.Y.S.2d 159.

N.C.—Mason v. Moore County Board of Com'rs, 51 S.E.2d 6, 229 N.C. 626—State v. Miller, 199 S.E. 89, 214 N.C. 317.

N.D.—Mongeon v. Burkeville, 55 N.W. 2d 445.

Or.—Durkheimer Inv. Co. v. Zell, 90 P.2d 213, 161 Or. 434—Nelson v. Title Guaranty & Surety Co., 199 P. 948, 101 Or. 262.

Tex.—Texas Liquor Control Board v. Salz, Civ.App., 220 S.W.2d 502.

Wis.—Hughes v. Fetter, 49 N.W.2d 280, 259 Wis. 411—Olen v. Waupaca County, 300 N.W. 178, 238 Wis. 442. 60 C.J. p 88 note 59.

Particular stipulations

(1) No exceptions to be filed or no appeal taken.—McRoberts v. Burns, 88 A.2d 741, 371 Pa. 129.

(2) Allowance of interest if judgment should be affirmed.—U. S. Cas. Co. v. District of Columbia, to Use of North American Cement Corp., 107 F.2d 652, 71 App.D.C. 92.

(3) Joining additional persons as parties bound by decree.—Fojtik v. Lawson, 6 N.W.2d 895, 303 Mich. 568.

(4) Opinion to await decision of another case pending in the United States supreme court.—Campbell v. Department of Labor and Industries, 169 P.2d 245, 25 Wash.2d 966.

Parties

Where appellee had stipulated that moneys owing by other parties to the suit to appellants and claimed by appellee should be paid to designated persons and held pending decision on appeal taken by appellants alone, appellee could not be heard to say there was a defect of parties.—Shepherd v. Haymond, 165 S.W.2d 812, 291 Ky. 780.

Stipulations after appeals

In foreclosure suit, stipulations after appeals were perfected should be enforced, where rights and interests of receiver were sufficiently safeguarded.—Gardner v. Grand Beach Co., C.C.A.Mich., 48 F.2d 491, followed in Grand Beach Co. v. Gardner, 51 F.2d 1077.

Supersedeas

Where parties stipulated that writ of supersedeas might issue, the district court of appeal granted the writ staying the trial pending deter-

mination of appeal from order denying motion for change of place of trial.—Willingham v. Pecora, 104 P.2d 405, 40 Cal.App.2d 123.

54. Filing additional bond

Fact that parties stipulated second appeal bond might be filed within five days did not entitle appellant to file third bond where second was defective.—Howland v. Scott, 9 P.2d 824, 215 Cal. 301.

55. Remarks of trial judge

An agreement permitting appellee to print in his brief all or any part of trial judge's remarks is binding on the courts as well as on the parties.—Gorham v. Pacific Mut. Life Ins. Co. of California, 1 S.E.2d 569, 215 N.C. 195.

56. Fla.—Economy Cash & Carry Cleaners v. Cleaning, Dyeing & Pressing Board, 174 So. 829, 128 Fla. 403.

57. U.S.—Weilbacher v. J. H. Winchester & Co., C.A.N.Y., 197 F.2d 303.

Cal.—Crow v. Madsen, App., 111 P.2d 663—In re Lawrence's Estate, 97 P.2d 850, 36 Cal.App.2d 377.

Okl.—Davis v. State, 135 P.2d 997, 76 Okl.Cr. 245. 60 C.J. p 88 note 59 [e].

Withdrawal of motion to dismiss

Where attorney for the people withdrew, in accordance with agreement with defendant, his motion to dismiss appeal on ground that it was not perfected in accordance with statute, attorney was precluded thereby from making such point on defendant's appeal.—People v. Booth, 57 N.E.2d 214, 324 Ill.App. 69, reversed on other grounds 61 N.E.2d 370, 390 Ill. 380.

Amendment of decree on dismissal of appeal

Fla.—Armstrong v. Browning, 165 So. 30, 122 Fla. 319.

58. U.S.—C. I. R. v. Baum, C.A.Tex., 199 F.2d 267.

Ala.—Crumley v. Thompson, 170 So. 99, 27 Ala.App. 270.

of presence for argument;⁵⁹ and transcript or bill of exceptions on appeal.⁶⁰ The stipulation of the parties may limit or control the matters or issues to be considered on appeal,⁶¹ but it has been held that the appellate court is not inclined to favor limitation of the scope of its consideration by stipulations, even in instances wherein such stipulations have been entered into fairly and openly by counsel of the respective parties.⁶² Where the parties could not agree on appeal with respect to what was intended to be considered as within the term "records," as used in a stipulation on appeal, the stipulation will be disregarded by the supreme court.⁶³ The agreement of counsel as to proper interpretation of a decree, although not binding on the appel-

late court, will be given weight.⁶⁴ A stipulation that the judgment be reversed and costs on appeal taxed against respondent has been held sufficient to restore jurisdiction of the trial court over the subject matter of the judgment.⁶⁵

§ 29. — Other Stipulations

The courts have judicially construed stipulations relating to assumption of liability, payment, powers of a receiver, rent, and other particular matters.

In addition to the particular stipulations already discussed supra §§ 18-28, other stipulations have received judicial construction, and their operation and effect have been determined,⁶⁶ such as stipulations relating to allowance of personal expenses to

Cal.—*People v. Williams*, 167 P.2d 488, 73 Cal.App.2d 852—In re *Beville's Estate*, 152 P.2d 229, 86 Cal. App.2d 271.

Confession of error

Stipulation, to effect that trial court's judgment should be reversed and trial court ordered to restate its conclusions of law, so as to state that defendants were, and that plaintiffs were not, entitled to have their title to real estate quieted, was in effect a confession of error by plaintiffs, and, therefore, trial court's judgment in favor of plaintiffs would be reversed and court ordered to restate its conclusions of law, in accordance with stipulations, and enter judgment accordingly.—*Stanley v. Phillippe*, 105 N.E.2d 173, 122 Ind. App. 369.

Improvident stipulation

Where parties stipulated that if trial judge's direction of verdict in favor of plaintiff in replevin action was wrong, judgment was to be entered for defendants for a return of the goods, appellate court, on sustaining defendants' exceptions, would vacate the stipulation on ground that it was improvident and would award a new trial.—*Lincoln Electric Co. v. Sovrensky*, 26 N.E.2d 378, 305 Mass. 476.

59. Cal.—*Straus v. Straus*, 42 P.2d 378, 4 Cal.App.2d 461.

60. Cal.—*Watkins v. Roth*, 118 P.2d 850, 47 Cal.App.2d 693.

Neb.—*Underwriters Acceptance Corp. v. Dunkin*, 41 N.W.2d 855, 152 Neb. 550.

60 C.J. p 88 note 59 [d].

Use of wire recorder

Where accused's counsel signed certificate appearing in case-made that the foregoing case-made "contains a full, true, correct and complete copy of the transcript and all the proceedings in said cause," accused could not be heard to complain that the proceedings were taken on a wire recording machine and later

transcribed rather than taken in shorthand by court reporter as required by statute.—*Antrim v. State*, 220 P.2d 846, 92 Okl.Cr. 91.

61. Ark.—*Rowe v. Housing Authority of City of Little Rock*, 249 S.W. 2d 551.

Cal.—*Phillips v. Patterson*, 93 P.2d 807, 34 Cal.App.2d 481—*Gordon v. Kifer*, 79 P.2d 164, 26 Cal.App.2d 252.

Fla.—*Fouts v. Fouts*, 61 So.2d 322. Me.—*State v. Harnum*, 56 A.2d 449, 143 Me. 133.

Mass.—*Derderian v. Union Market Nat. Bank of Watertown*, 95 N.E.2d 552, 326 Mass. 538.

Or.—*City of Portland v. Duntley*, 203 P.2d 640, 185 Or. 365.

Wis.—*Lamasco Realty Co. v. City of Milwaukee*, 8 N.W.2d 372, 242 Wis. 357, rehearing denied 8 N.W.2d 865, 242 Wis. 357—*Olen v. Waupaca County*, 300 N.W. 178, 238 Wis. 442. 60 C.J. p 88 note 59 [f].

Damages

(1) A stipulation by counsel that, on review of the cause, the amount of damages as fixed by the judgment was not involved foreclosed further consideration of question of damages.—*Oversmith v. Lake*, 295 N.W. 339, 295 Mich. 627.

(2) Defendants' contention that evidence showed an amount of damages less than that awarded for medical expenses, etc., could not be considered, where defendants stipulated that defendants would present no question on appeal concerning amount or excessiveness of damages.—*Stickel v. San Diego Elec. Ry. Co.*, 195 P.2d 416, 32 Cal.2d 157.

Error in rejecting evidence

Appellate court could not consider alleged error in rejecting evidence attacking foreclosure proceedings, where proceedings were absent and stipulated to be regular.—*Roberts Land & Improvement Co. v. Dallas*, 11 P.2d 1103, 124 Cal.App. 86.

62. Kan.—In re *Williams' Estate*, 160 P.2d 260, 160 Kan. 220.

63. Okl.—In re *Initiative Petition No. 158*, State Question No. 229, 106 P.2d 786, 188 Okl. 111.

64. Ala.—*Badham v. Badham*, 14 So. 2d 730, 244 Ala. 622.

65. Cal.—*Barton v. Maal*, 55 P.2d 529, 12 Cal.App.2d 353.

66. U.S.—*Future Fashions v. American Sur. Co. of N. Y.*, D.C.N.Y., 58 F.Supp. 36—In re *Bowen*, D.C. Pa., 46 F.Supp. 631—*Pettibone v. Cook County*, D.C.Minn., 31 F.Supp. 881, affirmed, C.C.A., 120 F.2d 850—*Western Wheeled Scraper Co. v. U. S. Ct.Cl.*, 13 F.Supp. 762, certiorari denied 57 S.Ct. 32, 299 U.S. 569, 81 L.Ed. 419.

Cal.—*Record v. Indemnity Ins. Co. of North America*, 229 P.2d 851, 103 Cal.App.2d 434—In re *Bendell's Estate*, 138 P.2d 378, 59 Cal.App. 2d 165—*Metropolitan Water Dist. of Southern California v. Adams*, 134 P.2d 882, 57 Cal.App.2d 574.

D.C.—*McDonald v. McDonald*, 189 F. 2d 24, 88 U.S.App.D.C. 272—*Tilbrook v. Forrestal*, D.C., 65 F.Supp. 1.

Ga.—*Pullman Co. v. Suttles*, 199 S.E. 821, 187 Ga. 217.

Ill.—*People ex rel. Brenza v. Anderson*, 103 N.E.2d 629, 411 Ill. 252—*Tuthill v. Rendleman*, 56 N.E.2d 375, 387 Ill. 321.

Iowa.—*Olson v. Abrahamson*, 241 N. W. 454, 214 Iowa 150.

Ky.—*Ballard v. Adair County*, 104 S.W.2d 1100, 268 Ky. 347.

Mont.—*Glacier County v. Schlinski*, 300 P. 270, 90 Mont. 136.

N.J.—*New Jersey Suburban Water Co. v. Town of Harrison*, 3 A.2d 623, 122 N.J.Law 189.

N.Y.—*Harrison v. New York Cent. R. Co.*, 6 N.Y.S.2d 978, 255 App.Div. 183, reargument denied 8 N.Y.S.2d 1017, 255 App.Div. 1032, affirmed 22 N.E.2d 483, 281 N.Y. 653—In re *Arsdale's Will*, 75 N.Y.S.2d 487, 190 Misc. 968—In re *Ekkins' Will*, 9 N.Y.S.2d 672, 170 Misc. 59—*McGreevey v. New York Cent. R. Co.*, 256 N.Y.S. 211, 143 Misc. 519—*Sea-*

defendant,⁶⁷ appointment of an administrator,⁶⁸ assumption of liability,⁶⁹ disposition of fund in registry of court,⁷⁰ execution of contracts,⁷¹ exercise of an option,⁷² extension of a preliminary restraining order,⁷³ notice,⁷⁴ parties,⁷⁵ payment,⁷⁶ or powers of a receiver.⁷⁷ The courts have also construed stipulations as to release,⁷⁸ rent,⁷⁹ report of an investigator,⁸⁰ return of an amount deposited in escrow,⁸¹ reservation of claim for damages in future suit,⁸² returns of eviction notices,⁸³ sale of the property in litigation and substitution therefor of the proceeds,⁸⁴ substitution for plaintiff's name,⁸⁵ sureties on bond,⁸⁶ tender of costs prior to trial,⁸⁷ or trust fund under a will.⁸⁸

§ 30. Rescission, Withdrawal, Abrogation, Waiver, or Abandonment

Stipulations with respect to the conduct of a pending cause cannot ordinarily be repudiated or withdrawn from by one party without the consent of the other, except by leave of court on cause shown; but a stipulation may be abrogated, waived, or abandoned by acts of both parties, which constitute a virtual disregard thereof, or one of the parties may waive the benefit thereof by his acts.

Stipulations with respect to the conduct of a pending cause cannot ordinarily be repudiated or withdrawn from by one party without the consent of the other, except by leave of court on cause shown;⁸⁹ and this is especially true after he has received the

feld Realty Corp. v. Thomas, 112 N.Y.S.2d 839.
N.C.—McIver Park, Inc., v. Brinn, 27 S.E.2d 548, 223 N.C. 502.
Ohio.—Union Ice Corp. v. City of Niles, 13 Ohio Supp. 115.
S.D.—Scovel v. Pennington County, 282 N.W. 524, 66 S.D. 311.
Wash.—In re Tembreull's Estate, 221 P.2d 821, 37 Wash.2d 93—Jones v. Jones, 161 P.2d 890, 23 Wash.2d 657—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740—In re Witte's Estate, 150 P.2d 595, 21 Wash.2d 112.
60 C.J. p 89 note 62.

Procedural matters

A valid stipulation precludes objection to procedural matters expressly or impliedly agreed on.—City of Los Angeles v. Cole, 170 P.2d 928, 28 Cal.2d 509—Sterling Drug v. Benatar, 221 P.2d 965, 99 Cal.App.2d 393.
67. U.S.—U. S. v. Stone, III., 187 F. 577, 109 C.C.A. 267.
60 C.J. p 89 note 63.
68. Neb.—In re Wortman's Estate, 12 N.W.2d 701, 144 Neb. 141.
N.D.—Funston v. Little, 25 N.W.2d 92, 75 N.D. 60.
69. Mo.—Monsanto Chemical Works v. American Zinc, Lead & Smelting Co., 253 S.W. 1006.
60 C.J. p 89 note 64.
70. U.S.—Hoyt v. Empire Oil & Refining Co., D.C.Mich., 52 F.Supp. 744.
71. Ark.—Harris v. Blackburn, 219 S.W.2d 922, 215 Ark. 195.
72. Fla.—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722.
73. U.S.—Six Companies v. Stinson, D.C.Nev., 58 F.2d 649.
74. Ind.—Windhorst v. City of Indianapolis, 188 N.E. 328, 99 Ind. App. 225.
Iowa.—Bates v. Farmers Loan & Trust Co. of Iowa City, 291 N.W. 184, 227 Iowa 1347.
75. Cal.—Standard Oil Co. of California v. John P. Mills Organization, 43 P.2d 797, 3 Cal.2d 128—

Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161.

Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360.

76. U.S.—U. S. Fidelity & Guaranty Co. v. Lawson, D.C.Ga., 15 F.Supp. 116.

Cal.—Publishers Distributing Service v. Southern California School Book Depository, 58 P.2d 401, 14 Cal.App. 2d 448.

Tex.—Simon v. State Mut. Life Assur. Co., Civ.App., 126 S.W.2d 682, error refused.

60 C.J. p 89 note 65.

Consideration for payment

U.S.—Strongin v. International Acceptance Bank, C.C.A.N.Y., 70 F.2d 248, certiorari denied 55 S.Ct. 86, 293 U.S. 575, 79 L.Ed. 673.

Payment for covenant not to sue

Ill.—McManaman v. Johns Manville Products Corp., 72 N.E.2d 741, 331 Ill.App. 178, affirmed 81 N.E.2d 137, 400 Ill. 423.

Return of payment

Ark.—Kromray v. Stobaugh, 206 S.W. 2d 171, 212 Ark. 377.

77. Cal.—Kato v. Busick, 162 P. 108, 174 Cal. 118.

60 C.J. p 89 note 66.

78. D.C.—Austin v. Bass, 163 F.2d 767, 82 U.S.App.D.C. 331.

Wash.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740.

79. Pa.—In re Chapman's Estate, Orph., 32 Erie Co. 262.

60 C.J. p 89 note 67.

Application of rents collected by receiver

Iowa.—Olson v. Abrahamson, 241 N. W. 454, 214 Iowa 150.

80. Wash.—Jones v. Jones, 161 P.2d 890, 23 Wash.2d 657.

81. Wis.—Ryan v. Berger, 40 N.W. 2d 501, 256 Wis. 281.

82. Tenn.—Tillman v. Lewisburg & N. R. Co., 182 S.W. 597, 133 Tenn. 554, L.R.A.1916D 259.

60 C.J. p 90 note 68.

83. Okl.—Irion v. Griffin, 170 P.2d 226, 197 Okl. 279.

84. Iowa.—Lovrien v. Fitzgerald, 49 N.W.2d 845, 242 Iowa 1258.

N.Y.—Svenska Taendsticks Fabrik Aktiebolaget v. Bankers Trust Co., 196 N.E. 748, 268 N.Y. 73.

Utah.—Wasatch Livestock Loan Co. v. Nielson, 61 P.2d 616, 90 Utah 331.

Proceeds treated as realty

The fact that testatrix' realty was sold pendente lite did not prevent application of the rule that in litigation affecting the title to, ownership of, or interest in, realty, the heirs and devisees are indispensable parties, where a stipulation signed by the parties provided that net proceeds of sale should be treated as though they were realty.—Sullivan v. Albuquerque Nat. Trust & Sav. Bank of Albuquerque, 188 P.2d 169, 51 N.M. 456.

85. Pa.—Smith v. Pennsylvania R. Co., 156 A. 89, 304 Pa. 294—Horsfield v. Metropolitan Life Ins. Co., 189 A. 892, 124 Pa.Super. 458.

86. Mich.—Sauer v. Detroit Fidelity & Surety Co., 213 N.W. 98, 237 Mich. 697, 51 A.L.R. 1485.

60 C.J. p 90 note 69.

87. Idaho.—Randall v. U. S. Fidelity & Guaranty Co., 23 P.2d 319, 53 Idaho 310.

88. Wis.—In re Leonard's Will, 230 N.W. 715, 202 Wis. 117.

60 C.J. p 90 note 70.

89. U.S.—Jones v. U. S., C.C.A.III., 72 F.2d 873—General Electric Co. v. Wagner Electric Mfg. Co., C.C.N.Y., 123 F. 101, affirmed 130 F. 772, 66 C. C.A. 82.

Cal.—Gonzales v. Pacific Greyhound Lines, 214 P.2d 809, 34 Cal.2d 749—Palmer v. City of Long Beach, 199 P.2d 952, 33 Cal.2d 134—Andrew v. Bankers' & Shippers' Ins. Co. of New York, 13 P.2d 515, 125 Cal. App. 24.

Fla.—Penney v. First Trust & Savings Bank, 135 So. 805, 102 Fla. 185.
Iowa.—Corpus Juris quoted in Burnett v. Poage, 29 N.W.2d 431, 434, 239 Iowa 31.

benefits contemplated by the stipulation,⁹⁰ or where it has been so acted on that the parties cannot be placed in statu quo.⁹¹ Under some circumstances, however, a party may withdraw from a stipulation or agreement, where there has been no injury to the other party,⁹² and the right to repudiate a stipulation is recognized where it is shown that it was inadvertently or mistakenly made, provided notice is given to the opposite party in sufficient time to prevent prejudice.⁹³

A party may be permitted to withdraw a stipulation if it appears that it was executed by his solicitor without authority and without full knowledge of its contents, and that the party subsequently repudiated the action of the solicitor;⁹⁴ and where a party, by stipulation, inadvertently admitted facts which are not true, he may withdraw such admission on timely notice, provided nothing prejudicial to the adverse party has occurred since it was made.⁹⁵ So it has been held that a stipulation postponing the trial of a case to abide the determination of an-

other may be rescinded, if the case in which the decision is awaited is not determined within a reasonable time.⁹⁶ It has also been held that on a new trial, either party may, as a matter of right, withdraw from and repudiate an agreed statement of facts had at a former trial, by giving proper and timely notice thereof to the opposite party, provided the opposite party is not injured thereby.⁹⁷ If the stipulation is obtained by fraud, it may be repudiated on discovery of the fraud and treated as void ab initio.⁹⁸

Abrogation, waiver, or abandonment. Generally, a stipulation may be rescinded or abandoned by the parties thereto.⁹⁹ Such rescission or abrogation need not be formal,¹ and the stipulation may be abrogated, waived, or abandoned by acts of both parties, which constitute a virtual disregard thereof.² So also, one of the parties may waive the benefit of the stipulation by his acts,³ as where he takes some step in conflict with the provisions of the agreement.⁴ Where a stipulation has been aban-

Mass.—*Kalika v. Munro*, 83 N.E.2d 172, 323 Mass. 542—*Loring v. Mercier*, 63 N.E.2d 466, 318 Mass. 599.
Mo.—*State ex rel. Nat. Lead Co. v. Smith*, App., 134 S.W.2d 1061.
Mont.—*Read v. Lewis and Clark County*, 178 P. 177, 55 Mont. 412.
N.M.—*Wilson v. Rowan Drilling Co.*, 227 P.2d 365, 55 N.M. 81.
Okl.—*Voightlander v. State ex rel. Barnett*, 52 P.2d 60, 175 Okl. 165.
60 C.J. p 90 note 71.

Submission on agreed facts

Where cause is submitted on agreed facts, party cannot seek reconsideration of adverse decision on different facts except on clear showing of fraud or mistake not chargeable to him and resulting in unconscionable injustice.—*Cameron v. Penn Mut. Life Ins. Co.*, 173 A. 344, 116 N.J.Eq. 311.

90. Cal.—*Witaschek v. Witaschek*, 132 P.2d 600, 56 Cal.App.2d 277.
Iowa.—*Corpus Juris* quoted in *Burnett v. Poage*, 29 N.W.2d 431, 434, 239 Iowa 31.
60 C.J. p 90 note 72.

91. Ga.—*Johnson v. Wright*, 19 Ga. 512.
Iowa.—*Corpus Juris* quoted in *Burnett v. Poage*, 29 N.W.2d 431, 434, 239 Iowa 31.

92. Ga.—*Branch v. State*, 3 S.E.2d 230, 60 Ga.App. 196.

93. U.S.—*Russell-Miller Mill. Co. v. Todd*, C.A.Ga., 198 F.2d 166.
Ky.—*World Fire & Marine Ins. Co. v. Tapp*, 151 S.W.2d 428, 286 Ky. 650.

94. Ill.—*Brockway v. McClun*, 148 Ill.App. 465, affirmed 90 N.E. 374, 243 Ill. 196.

Ky.—*Corpus Juris* cited in *World Fire & Marine Ins. Co. v. Tapp*, 151 S.W.2d 428, 430, 286 Ky. 650.

95. U.S.—*Skidmore v. John J. Casale, Inc.*, D.C.N.Y., 66 F.Supp. 282, affirmed in part and reversed in part on other grounds, C.C.A., 160 F.2d 527, certiorari denied 67 S.Ct. 1205, 331 U.S. 812, 91 L.Ed. 1832.
60 C.J. p 90 note 75.

96. Ky.—*Martin v. Martin*, 107 S.W. 771, 32 Ky.L. 1100.
60 C.J. p 90 note 76.

97. Ga.—*U. S. Fidelity & Guaranty Co. v. Clarke*, 2 S.E.2d 608, 187 Ga. 774.

98. Mass.—*Powell v. Turner*, 28 N.E. 453, 139 Mass. 97.

99. U.S.—*Bogart v. U. S.*, C.A.Kan., 169 F.2d 210.

1. U.S.—*Bogart v. U. S.*, supra.
N.D.—*Roe v. Hetherington*, 24 N.W. 2d 56, 74 N.D. 692.

2. U.S.—*Bogart v. U. S.*, C.A.Kan., 169 F.2d 210.

Ill.—*Corpus Juris* cited in *Vidon v. Roberts*, 69 N.E.2d 721, 724, 330 Ill. App. 104.

N.D.—*Corpus Juris* quoted in *Roe v. Hetherington*, 24 N.W.2d 56, 62, 74 N.D. 692.

60 C.J. p 90 note 78.

Agreed case

(1) An agreement to a case stated may be rescinded either by tacit or express consent, and the abandonment of it is satisfactorily evinced by the parties subsequently pleading to issue, and, when thus abandoned, it is not evidence which may be given to the jury on the trial of the cause.—*Philadelphia Sav. Fund Soc. v. City of Bethlehem*, 17 A.2d 750, 143 Pa.

Super. 449—*Gibson v. Rowland*, 35 Pa.Super. 158—*McLughan v. Bovard*, 4 Watts, Pa., 308.

(2) Refusal to permit parties to rescind agreed statement of facts was held not abuse of discretion.—*McFaddin v. Bland*, 144 S.E. 592, 147 S.C. 27.

3. N.D.—*Corpus Juris* quoted in *Roe v. Hetherington*, 24 N.W.2d 56, 62, 74 N.D. 692.

Okl.—*Corpus Juris* cited in *Gorman v. Wilson*, 98 P.2d 600, 602, 186 Okl. 435.

W.Va.—*Meyn v. Dulaney-Miller Auto Co.*, 191 S.E. 558, 118 W.Va. 545.
60 C.J. p 91 note 79.

Disaffirmance

Where contesting legatees did not consent to stipulation for settlement of claim and stipulation was entered into subject to court's approval and was disaffirmed by claimant before judgment was rendered, stipulation could not be relied on by claimant to overcome objections of contesting legatees.—*In re Kniffen's Estate*, 286 N.W. 8, 231 Wis. 589.

Limitation of issues

In order to waive a stipulation of limitation of issues by acquiescence, a party must voluntarily join in litigating an issue not pleaded, which could have been ruled out of the case by timely objection.—*First Nat. Bank in Albuquerque v. Rowe*, 199 P.2d 987, 52 N.M. 366.

Acts held not to constitute waiver

Iowa.—*Yost v. Devault*, 9 Iowa 60.
Wis.—*Town of Fox Lake v. Town of Trenton*, 12 N.W.2d 679, 244 Wis. 412.

4. N.D.—*Corpus Juris* quoted in *Roe*

done after having been found by the court to be inadequate, the court may thereafter properly refuse an offer of admissions contained in the stipulation.⁵

§ 31. Enforcement of Stipulation in General

- a. In general
- b. Methods of enforcement

a. In General

It is generally the policy of the courts to enforce valid stipulations, unless good cause is shown for not doing so, but a stipulation will not be enforced in favor of one who failed to comply with the conditions under which it was made.

Since, as discussed supra § 2, stipulations are favored by the courts, it is the policy of the courts to enforce valid stipulations, unless good cause is shown for not doing so.⁶ Nevertheless, stipulations will not be enforced under all circumstances.⁷ Even though the agreement relates to matters which may be validly made the subject of stipulation, the court, in its discretion, as discussed infra §§ 34-36, may set aside a stipulation on numerous grounds, such, for

instance, as fraud, undue influence, or collusion, mistake, false statements innocently made, inadvertence or improvidence in making the stipulation, and on other grounds; and the existence of any of these grounds will constitute sufficient reason for refusing to enforce a stipulation on application of the party relying thereon.

In order that a party may avail himself of the benefit of a stipulation, he must show a strict compliance therewith,⁸ and a stipulation will not be enforced in favor of one who has failed to comply with the conditions under which it was made.⁹ Also, a stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination of the rights of the parties,¹⁰ or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein,¹¹ nor will an agreement by counsel be enforced where it is so unreasonable as to carry on its face a presumption of bad faith.¹² Laches in failing to take steps to enforce the stipulation may constitute a sufficient ground to refuse enforcement thereof.¹³

v. Hetherington, 24 N.W.2d 56, 62, 74 N.D. 692.
60 C.J. p 91 note 80.

5. Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

6. U.S.—Byars v. C. I. R., C.C.A.5, 138 F.2d 513.
Fla.—Dunscombe v. Smith, 190 So. 796, 139 Fla. 497—Welch v. Gray Moss Bondholders Corp., 175 So. 529, 128 Fla. 722—Esch v. Forster, 168 So. 229, 123 Fla. 905—Penney v. First Trust & Savings Bank, 135 So. 805, 102 Fla. 185.

Iowa.—Corpus Juris quoted in Burnett v. Poage, 29 N.W.2d 481, 435, 239 Iowa 31.

Mo.—Ward v. Kurn, 132 S.W.2d 245, 234 Mo.App. 241.

N.Y.—Nat. Chautauqua County Bank of Jamestown v. Reynolds, 299 N.Y. S. 263, 164 Misc. 653, affirmed 4 N.Y.S.2d 176, 254 App.Div. 646—De Santolo v. La Porte, 89 N.Y.S.2d 114—In re Kellas' Estate, 40 N.Y.S.2d 655, affirmed 46 N.Y.S.2d 884, 267 App.Div. 924, appeal denied 48 N.Y.S.2d 686, 267 App.Div. 1006.

Or.—Berger v. Loomis, 131 P.2d 211, 169 Or. 575, 144 A.L.R. 686.
60 C.J. p 91 note 85.

Reason for rule

A stipulation between parties made in open court constitutes not only an agreement between the parties but between the parties and the court, and the court is bound to enforce the agreement for the benefit of the party interested and for the protection of the court's own dignity.—Webster

v. Webster, 14 P.2d 522, 216 Cal. 485—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179.

Discretion

The enforcement of a stipulation, extending the time of defendant to file a sworn answer which is broad enough to cover a demurrer or a motion to strike, is within the discretion of the trial court.—Woods v. First Nat. Bank of Chicago, 41 N.E. 2d 235, 314 Ill.App. 340.

Discussions or understandings between proctors could not supplant formal stipulation.—The Cockatoo, C. C.A.N.Y., 61 F.2d 889, certiorari denied Howard v. Randall & McAllister, 53 S.Ct. 292, 287 U.S. 669, 77 L.Ed. 576.

7. Mont.—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

Neb.—Rose v. Kahler, 38 N.W.2d 391, 151 Neb. 532.

Tex.—Cullers v. Platt, 16 S.W. 1003, 81 Tex. 258.

8. N.Y.—Burkard v. Stephan Bldg. & Const. Co., 144 N.Y.S. 775, 160 App.Div. 50.

Request for presentment to jury

Failure to read to jury stipulation which was entered into the record as to what a witness for defendant would testify to if called was not error, in absence of request that such evidence be presented to jury.—State v. Oldham, Ohio App., 84 N.E.2d 778.

9. Tex.—Board of Insurance Com'rs

v. Highway Insurance Underwriters, Civ.App., 169 S.W.2d 541.
60 C.J. p 91 note 94.

Allegation of noncompliance held not established

Okl.—Billingslea v. Billingslea, 152 P.2d 276, 194 Okl. 400.

10. Tex.—Sergeant v. Goldsmith Dry Goods Co., 221 S.W. 259, 110 Tex. 482, 10 A.L.R. 742, answers to certified questions conformed to, Civ. App., 223 S.W. 1118.

11. La.—Lombard v. Citizens' Bank, 31 So. 654, 107 La. 183.

Stipulation in another court

In passing on motion for order to modify subpoenas duces tecum and to limit depositions to be taken in Wisconsin, court would consider only the law applicable thereto after consideration of briefs and arguments of counsel, and would not attempt to determine what the parties had orally stipulated in Wisconsin federal court to which motion was first presented and which did not pass on motion but stayed taking of depositions to permit motion to be presented in Ohio federal court of original jurisdiction, where parties were in disagreement as to what they were supposed to have stipulated in Wisconsin.—Wagner Mfg. Co. v. Cutler-Hammer, Inc., D.C. Ohio, 10 F.R.D. 480.

12. N.J.—Howe v. Lawrence, 22 N.J. Law 99.

6 C.J. p 649 note 94.

13. N.Y.—Rockowitz Corset & Brassiere Corporation v. Madam X Co., 225 N.Y.S. 360, 130 Misc. 836.

60 C.J. p 92 note 98.

Jurisdiction. The court in which an action is pending has power to enforce a stipulation entered into between the parties to the action, as long as it retains jurisdiction over the cause and the parties,¹⁴ and the remedy of one who had been injured by disregard of a stipulation must generally be sought in the court in which it was violated,¹⁵ or in some other court of original jurisdiction.¹⁶ A stipulation cannot be availed of on appeal without having first been brought to the notice of the trial court for its adjudication¹⁷ except in cases of stipulations for dismissal of an appeal in which event the appellate court will dismiss an appeal taken in violation of such a stipulation.¹⁸

b. Methods of Enforcement

Stipulations may be enforced in a summary manner on motion, as long as the court retains jurisdiction over the cause and the parties; and enforcement may also be had by action at law, or, if the remedy at law is inadequate, by a suit for injunction, or by some other appropriate remedy in equity.

Stipulations may be enforced in a summary manner on motion, as long as the court retains jurisdiction over the cause and the parties;¹⁹ and such power exists in the court in which the stipulation was made notwithstanding the moving party could have brought an action or an independent proceeding to obtain the relief requested.²⁰ However, the rule as to summary enforcement is applicable only to cases pending and undetermined, and the power and jurisdiction of the court to enforce stipulations in a summary manner in the course of a proceeding cease with the termination of jurisdiction over the

cause and parties.²¹ Stipulations may also be enforced by actions at law,²² and, if the remedy at law is inadequate, by a suit for injunction,²³ or by some other appropriate remedy in equity,²⁴ such as specific performance.²⁵

Parties to actions to enforce. Where it is sought to enforce a stipulation by an action at law, general rules govern as to the parties in such an action.²⁶ It has been held that, in an action in which it was sought to enforce an agreement that the action, with others, should abide the result of a certain pending action and be determined by such result, it was not necessary that the parties plaintiff in the other suits mentioned in the agreement should be joined as parties to the present action.²⁷

Summary order. The court in enforcing a stipulation of the parties in open court must make the order sufficiently specific to protect and guard the rights of the parties under the stipulation.²⁸ A stipulation between parties to a suit, to be executed during the term, does not require a contemporaneous order with respect to it, since, the record being in fieri, the order can be entered at any time before final adjournment.²⁹ Where the court refuses to act on a stipulation of the parties, an interlocutory order made thereon, with the intention that it shall take effect on the stipulation being carried out, will be treated as having been revoked, and the stipulation will not be enforced against the parties.³⁰

§ 32. Pleading

A party relying on a stipulation as a defense must specially plead it.

14. Cal.—Grady v. Porter, 53 Cal. 680.
15. Cal.—Clarke v. Forshay, 3 Cal. 290.
16. Cal.—Clarke v. Forshay, supra.
17. Cal.—Clarke v. Forshay, supra.
18. Pa.—Rheem v. Allison, 2 Serg. & R. 113.
19. N.Y.—Cost v. Benetos, 97 N.Y.S. 2d 799, 277 App.Div. 880, reargument and appeal denied 98 N.Y.S.2d 590, 277 App.Div. 900, motion denied 101 N.Y.S.2d 233, 277 App.Div. 1047, order affirmed in re Cost, 101 N.Y.S.2d 237, 277 App.Div. 1049, reargument denied 101 N.Y.S.2d 944, 277 App.Div. 1151, appeal dismissed 104 N.E.2d 918, 303 N.Y. 862, affirmed 109 N.E.2d 343, 304 N.Y. 800—Cost v. Benetos, 95 N.Y.S.2d 525, affirmed 95 N.Y.S.2d 342, 276 App.Div. 975—Peterson v. Uhrlass, 71 N.Y.S.2d 2, 272 App.Div. 923—De Santolo v. La Porte, 89 N.Y.S.2d 114—in re Roeben's Will, 53 N.Y.S.2d 432.
- 20 C.J. p 92 note 5.

Settlement of differences

However, the court has no jurisdiction to enforce summarily judgment creditor's contractual rights against debtor under stipulation requiring debtor to save creditor harmless from payment of sheriff's poundage on value of debtor's property levied on under execution before settlement of parties' differences by such stipulation.—Nostdahl v. Finnegan, 68 N.Y.S.2d 466.

20. N.Y.—In re Roeben's Will, 53 N.Y.S.2d 432.
21. Ill.—People v. Spring Lake Drain, etc., Dist., 97 N.E. 1042, 253 Ill. 479.
- Mo.—Corpus Juris cited in Bishop v. Bishop, 151 S.W.2d 553, 557.
22. N.Y.—Davidson v. Davidson, 52 N.Y.S. 7, 29 App.Div. 629.
- 60 C.J. p 92 note 7.
23. Tex.—Gulf Coast, etc., R. Co. v. King, 16 S.W. 641, 80 Tex. 681.
- 60 C.J. p 92 note 8.
24. Ill.—People v. Spring Lake Drain, etc., Dist., 97 N.E. 1042, 253 Ill. 479.

Further relief

Where an action was dismissed on condition that defendant keep good a tender which plaintiffs were obligated under a stipulation to accept, further relief under the stipulation, such as a general release, return of documents, etc., must be sought by defendant in a suit in equity.—Batterman v. Flashnick, 56 N.Y.S.2d 158.

25. N.Y.—Deen v. Milne, 20 N.E. 861, 113 N.Y. 303, 22 N.Y.St. 620.
- 60 C.J. p 92 note 10.
26. Tex.—Mitchell v. Hancock, Civ. App., 196 S.W. 694.
27. Tex.—Mitchell v. Hancock, supra.
28. N.Y.—Randall v. Garfield Worsted Mills, 165 N.Y.S. 125, 178 App. Div. 196, reargument denied 166 N.Y.S. 1118.
29. Va.—Pollard & Haw v. American Stone Co., 68 S.E. 266, 111 Va. 147.
30. Mass.—Moore v. Stoddard, 92 N.E. 502, 206 Mass. 395.
- 60 C.J. p 93 note 18.

A party who relies on a stipulation as a defense to an action must specially plead it.³¹

§ 33. Evidence

A stipulation is presumed to be valid and binding. The intention of parties to a stipulation may be shown by testimony, as well as by the terms of the stipulation, where the pleadings put such intention in issue.

A stipulation is presumed to be valid and binding.³² Where defendant by stipulation consented to the amendment of a complaint, equity will not presume fraud in plaintiff's failure to file evidence of consent in procuring the amendment.³³ A party who has agreed in writing that a motion for a new trial be continued until decision of the reviewing court in a companion case is handed down is not estopped to deny the existence of a further oral agreement to abide the result of the companion case, but, when he does so, an issue of fact concerning the existence of the oral agreement is created to be tried by the judge as the trier of facts.³⁴

Admissibility. The intention of parties to a stipulation may be shown by testimony, as well as by the terms of the stipulation, where the pleadings put such intention in issue.³⁵ Where it is not shown that the parties agreed to a stipulation, such stipulation is not admissible in evidence.³⁶ So, where plaintiff's counsel apparently acquiesced in a statement of defendant's counsel that there were no admissions in the case, a written agreed statement as to certain facts is inadmissible when not sufficiently connected with the facts in the case.³⁷ Evidence of any oral stipulation between the parties

to treat the pleadings as amended, when they are not, and to show an issue different from that presented by the pleadings on file, is not admissible.³⁸ Where there is no ambiguity in a written stipulation, parol evidence is inadmissible to control or explain its meaning;³⁹ but the judgment record on a former trial is admissible where it is the foundation on which a stipulation of the parties rests, and tends to explain its purpose, scope, and legal effect.⁴⁰

Under a statute providing that an attorney may bind his client to any agreement in respect of any proceeding within the scope of his proper duties and powers, "but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court," only such evidence is admissible to prove a stipulation.⁴¹ Accordingly, under such a statute, it is not competent to prove a disputed parol stipulation by the testimony or affidavits of an adverse party⁴² or his attorney;⁴³ and the record of an agreement between attorneys with respect to a matter in litigation, based on testimony or affidavits offered after the agreement is disputed, constitutes no stronger evidence than the testimony or affidavits themselves, and it is not conclusive on the objecting party.⁴⁴ However, a stipulation may be proved by the statements of the attorney who made it for the person against whom it is sought to be established.⁴⁵

Weight and sufficiency. Applying general rules, evidence in proceedings to enforce stipulations has been held in particular cases to be sufficient⁴⁶ or

31. N.Y.—*Di Bartolo v. City of New York*, 56 N.E.2d 71, 293 N.Y. 114, motion denied 56 N.E.2d 749, 293 N.Y. 756.

60 C.J. p 94 note 33.

32. Minn.—*National Council of Knights and Ladies of Security v. Scheiber*, 169 N.W. 272, 141 Minn. 41.

Party to agreement

Sole distributee and legatee, who excepted to, and appealed from, probate court order fixing executors' compensation, would be presumed to have been a party to agreement reflected in probate court entry to the effect that it was agreed that executors should retain money in their hands pending determination of question of compensation and thereupon render a final account.—*Chapman v. Menke*, Ohio App., 68 N.E.2d 361.

33. N.Y.—*James Mills Orchards Corporation v. Frank*, 244 N.Y.S. 473, 137 Misc. 407.

60 C.J. p 93 note 20.

34. Ga.—*Peoples Credit Clothing Co. v. Scottish Union & Nat. Ins. Co.*, 196 S.E. 99, 57 Ga.App. 747.

35. Kan.—*Korb v. Minneapolis Threshing Mach. Co.*, 3 P.2d 502, 133 Kan. 783.

36. Cal.—*Palmer v. City of Long Beach*, 199 P.2d 952, 33 Cal.2d 134.

37. Ga.—*Morris v. Courts*, 1 S.E.2d 687, 59 Ga.App. 666.

38. Iowa.—*Matthews v. Tally, Morr.* 159.

39. Vt.—*Mussey v. Bates*, 14 A. 457, 60 Vt. 271.

60 C.J. p 93 note 22.

40. N.Y.—*Hine v. New York El. R. Co.*, 43 N.E. 414, 149 N.Y. 154.

41. Mont.—*U. S. Fidelity & Guaranty Co. v. Bourdeau*, 208 P. 947, 64 Mont. 60.

Neb.—*Oddo v. Fred F. Shields Co.*, 12 N.W.2d 659, 144 Neb. 111—*German-American Ins. Co. v. Buckstaff*, 56 N.W. 692, 38 Neb. 135.

42. Neb.—*Oddo v. Fred F. Shields Co.*, 12 N.W.2d 659, 144 Neb. 111.

60 C.J. p 93 note 25.

43. Iowa.—*Hampton v. Burrell*, 17 N.W.2d 110, 236 Iowa 79.

60 C.J. p 93 note 25.

Conflicting affidavits

Where affidavits of counsel with respect to conversation about extending time for appeal were conflicting, it was neither necessary nor proper to consider the affidavits.—*Shann v. Rapid City*, S. D., 44 N.W.2d 780.

44. Iowa.—*Hiller v. Landis*, 44 Iowa 223.

45. Iowa.—*Council Bluffs Loan, etc., Co. v. Jennings*, 46 N.W. 1006, 81 Iowa 470—*Myers v. Funk*, 50 N.W. 72, 51 Iowa 92.

46. Evidence held sufficient to show:

(1) That stipulation was entered into.

Conn.—*Cohn v. Dunn*, 149 A. 851, 111 Conn. 342, 70 A.L.R. 740.

Iowa.—*Holdorf v. Miller*, 264 N.W. 602, 220 Iowa 1380.

Wis.—*Haueter v. Budlow*, 42 N.W. 2d 261, 256 Wis. 561—*Logemann v. Logemann*, 15 N.W.2d 800, 245 Wis. 515.

(2) That plaintiff consented to and ratified stipulation of counsel.

Cal.—*Justice v. Oroville-Wyandotte Irr. Dist.*, 246 P.2d 134, 112 Cal.App. 2d 516.

insufficient.⁴⁷ A recital by the trial court in its order setting aside a judgment that the parties stipulated for time to file an amended declaration is entitled to great weight and may not be impeached by the mere statement of defendant denying knowledge of such stipulation.⁴⁸

§ 34. Relief from Stipulation

Stipulations are under the control and subject to the direction of the court which has power to relieve the parties therefrom on proper application and a showing

of sufficient cause, on such terms as will meet the justice of the particular case; but such matter rests in the sound discretion of the court and relief will be granted only where necessary to prevent injustice.

Stipulations are under the control and subject to the direction of the court⁴⁹ which has power to relieve the parties therefrom on proper application and a showing of sufficient cause,⁵⁰ on such terms as will meet the justice of the particular case.⁵¹ The question whether or not a stipulation shall be set aside rests in the discretion of the court,⁵² and

Mo.—Zeitinger v. Hargadine-McKitt-trick Dry Goods Co., 274 S.W. 789, 309 Mo. 433.

(3) That stipulation was binding on plaintiff as having been understandingly entered into and as fairly disposing of plaintiff's rights.—Powell v. Martone, 33 N.W.2d 914, 322 Mich. 441.

(4) That stipulation had not been obtained from plaintiff by defendant's fraud.—Miller v. Scobie, 11 So.2d 892, 152 Fla. 328.

(5) Other particular matters.—Wilhelm v. Johnson, 33 N.W.2d 563, 72 S.D. 316.
60 C.J. p 93 note 31.

Scope of agreement

In insured's action on liability policy, agreement in open court that, if policy covered punitive damages, insured should recover specified amount was held to embody parties' agreement, especially in view of court's findings, notwithstanding certain testimony that agreement was otherwise, and, hence, insurer was not precluded from contending that policy excluded punitive damages.—Ohio Casualty Ins. Co. v. Welfare Finance Co., C.C.A.Mo., 75 F.2d 58, certiorari denied 55 S.Ct. 645, 295 U.S. 734, 79 L.Ed. 1682.

47. Evidence held insufficient:

(1) To show that defendant never entered into stipulation.—Fitzgerald v. Juhlin, 240 P.2d 1191, 194 Or. 40.

(2) To establish other matters. U.S.—St. Paul-Mercury Indem. Co. v. Grayson, C.A.Okl., 194 F.2d 829.

Cal.—Theatrical Enterprises v. Ferron, 7 P.2d 351, 119 Cal.App. 671.

Okl.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.
60 C.J. p 93 note 32.

48. Fla.—State ex rel. Alfred E. Destin Co. v. Heffernan, 47 So.2d 15.

49. Ill.—Corpus Juris quoted in Woods v. First Nat. Bank of Chicago, 41 N.E.2d 235, 236, 314 Ill. App. 340.

N.Y.—Campbell v. Bussing, 82 N.Y.S. 2d 616, 274 App.Div. 893—Manufacturers Mut. Fire Ins. Co. of Rhode Island v. Hopson, 25 N.Y.S.2d 502, 176 Misc. 220, affirmed 29 N.Y.S.2d 139, 262 App.Div. 781, appeal denied 29 N.Y.S.2d 511, 262 App.Div.

847, affirmed 43 N.E.2d 71, 288 N.Y. 668.

60 C.J. p 94 note 34.

50. U.S.—Maryland Cas. Co. v. Rick-enbaker, C.C.A.S.C., 146 F.2d 751—Brast v. Winding Gulf Colliery Co., C.C.A.W.Va., 94 F.2d 179—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 79 F.Supp. 413—Winding Gulf Colliery Co. v. Brast, D.C.W.Va., 13 F.Supp. 743, affirmed Brast v. Winding Gulf Colliery Co., 94 F.2d 179—Snyder v. Dravo Corp., D.C.Pa., 6 F.R.D. 546—American Food Products Co. v. U. S., 73 Ct.Cl. 526. Cal.—Corpus Juris cited in Palmer v. City of Long Beach, 199 P.2d 952, 956, 33 Cal.2d 134—Schramm v. Industrial Acc. Commission, 53 P.2d 976, 11 Cal.App.2d 528—City of Los Angeles v. Harper, 48 P.2d 75, 8 Cal.App.2d 552.

D.C.—Laughlin v. Berens, 118 F.2d 193, 73 App.D.C. 136—Santucci v. Mancuso, Mun.App., 78 A.2d 671.

Ill.—Brink v. Industrial Commission, 15 N.E.2d 491, 368 Ill. 607—Corpus Juris quoted in Woods v. First Nat. Bank of Chicago, 41 N.E.2d 235, 236, 314 Ill.App. 340.

Ky.—World Fire & Marine Ins. Co. v. Tapp, 151 S.W.2d 428, 286 Ky. 650.

Mass.—Kalika v. Munro, 83 N.E.2d 172, 323 Mass. 542—Malone v. Bianchi, 61 N.E.2d 1, 318 Mass. 179, 161 A.L.R. 1158—Mitchell v. Walton Lunch Co., 25 N.E.2d 151, 305 Mass. 76—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1.

Mont.—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 428, 97 Mont. 540, 97 A.L.R. 292.

Neb.—Rose v. Kahler, 38 N.W.2d 391, 151 Neb. 532—Corpus Juris cited in In re Statz' Estate, 12 N.W.2d 829, 833, 144 Neb. 154—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.J.—Sommer v. Workmen's Building & Loan Ass'n of Newark, 8 A.2d 229, 17 N.J.Misc. 267, affirmed 13 A.2d 793, 125 N.J.Law 83.

N.Y.—Campbell v. Bussing, 82 N.Y.S. 2d 616, 274 App.Div. 893—Isler v. Isler, 24 N.Y.S.2d 401, 260 App.Div. 1032, reargument denied 25 N.Y.S. 2d 998, 261 App.Div. 827—Bregoff

v. Mitchell, 4 N.Y.S.2d 579, 254 App. Div. 263—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App. Div. 447—Kristol v. Steinberg, 69 N.Y.S.2d 476, 188 Misc. 500—In re Lambert's Estate, 42 N.Y.S.2d 239, 181 Misc. 706, affirmed 47 N.Y.S.2d 309, 267 App.Div. 866, appeal denied 48 N.Y.S.2d 551, 267 App.Div. 975—De Santolo v. La Porte, 89 N.Y.S.2d 114—Schiffman v. Cudahy Packing Co., 30 N.Y.S.2d 150—Ginsberg v. Vanneck, 25 N.Y.S.2d 367. N.D.—Adams v. Hartzell, 119 N.W. 635, 18 N.D. 221.

Pa.—Cook v. Shrauder, 25 Pa.St. 312. S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.

Vt.—In re Mangan, 32 A.2d 673, 113 Vt. 246.

W.Va.—Cole v. State Compensation Com'r, 173 S.E. 263, 114 W.Va. 633.
60 C.J. p 94 note 35.

After verdict

Court has power to relieve from trial stipulation even after verdict when properly moved thereto because of equitable considerations.—Nasios v. Contompas, 260 N.Y.S. 537, 236 App.Div. 621.

51. Ill.—Corpus Juris quoted in Woods v. First Nat. Bank of Chicago, 41 N.E.2d 235, 236, 314 Ill. App. 340.

60 C.J. p 94 note 36.

52. Cal.—Cohn v. Cohn, 118 P.2d 903, 47 Cal.App.2d 683—Brown v. Superior Court in and for Sierra County, 52 P.2d 256, 10 Cal.App.2d 865.

Colo.—Corpus Juris cited in In re Maikka's Estate, 134 P.2d 723, 725, 110 Colo. 433.

Ill.—Brink v. Industrial Commission, 15 N.E.2d 491, 368 Ill. 607.

Ky.—Dunn v. Champion, 99 S.W.2d 813, 266 Ky. 757.

Minn.—Albert v. Edgewater Beach Bldg. Corp., 15 N.W.2d 460, 218 Minn. 20.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.Y.—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App.Div. 447—Nasios v. Contompas, 260 N.Y.S. 537, 236 App.Div. 621—Corpus Juris cited in Baksi v. Wallman, 62 N.Y.S.2d 26, 30.

Okl.—Vandever v. State, 79 P.2d 1032, 64 Okl.Cr. 317, reversed on

requires an extraordinary exercise of its powers, which can be allowable and proper only when it is made clear that it is necessary to prevent injustice.⁵³ This discretion is a judicial discretion to be exercised in promotion of justice and equity, and not in subversion thereof,⁵⁴ and it is very generally declared that it will not be exercised to set aside a stipulation unless good cause be shown for doing so,⁵⁵ and unless such action may be taken without prejudice to either party.⁵⁶

It has been said that stipulations may be set aside by the court in the exercise of its sound discretion, when their enforcement would result in serious injury to one of the parties and the other party would

not be prejudiced by their being set aside,⁵⁷ and the parties can be restored to the same condition in which they would have been if no stipulation had been made.⁵⁸ On the other hand, relief from a stipulation ordinarily will be denied where the stipulation has been acted on so that the parties cannot be placed in statu quo,⁵⁹ or where one of the parties has received a benefit from the agreement,⁶⁰ or where an undue advantage would result in favor of the party seeking the relief,⁶¹ or where the setting aside of the stipulation would result in serious injury to the other party.⁶² Likewise, a stipulation will not be vacated where the result would be the same in any event.⁶³

other grounds 84 P.2d 819, 65 Okl. Cr. 239—Staley v. State, 79 P.2d 818, 64 Okl. Cr. 302, reversed on other grounds 84 P.2d 813, 65 Okl. Cr. 227.

S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.

Vt.—In re Mangan, 32 A.2d 673, 113 Vt. 246.

60 C.J. p 94 note 37.

53. N.H.—Page v. Brewsters, 54 N. H. 184.

Necessary showing

In order to obtain relief from stipulation, moving party must show that, unless relieved, he will suffer substantial injustice and that other parties to stipulation can be restored to same position they would have had if no agreements had been made.—Greenspahn v. Joseph E. Seagram & Sons, C.A.N.Y., 136 F.2d 616.

Weighing of equities

Where a party seeks to have stipulation entered into in open court vacated, equities between the parties must be carefully weighed, and it must appear that the moving party is placed at some disadvantage and that vacation would not work a hardship against the other party.—De Santolo v. La Porte, 89 N.Y.S.2d 114.

54. D.C.—Laughlin v. Berens, 118 F. 2d 193, 73 App.D.C. 136.

60 C.J. p 94 note 39.

Application of equitable rules

Party seeking to vacate a stipulation entered into in open court appeals to equitable discretion of the court, and equitable rules apply.—De Santolo v. La Porte, 89 N.Y.S.2d 114.

Discretion held abused

N.Y.—In re Siegelack's Estate, 17 N. Y.S.2d 747, 258 App.Div. 1059, appeal dismissed 29 N.E.2d 927, 284 N.Y. 602.

55. U.S.—Railroad Federal Savings & Loan Ass'n v. U. S., C.C.A.N.Y., 135 F.2d 290, 153 A.L.R. 581.

Cal.—Kier Corp. v. Treasure Oil Co., 136 P.2d 59, 57 Cal.App.2d 829.

Ill.—Stevens v. Moore, 47 N.E.2d 498, 318 Ill.App. 228.

Ky.—Leslie v. First Huntington Nat. Bank, 191 S.W.2d 204, 301 Ky. 145.

Mass.—Linnehan v. Matthews, 20 N. E. 453, 149 Mass. 29.

Neb.—Wells v. Tietge, 9 N.W.2d 180, 143 Neb. 230—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

N.Y.—Application of Abeel, 100 N.Y. S.2d 264, 277 App.Div. 404, reversed on other grounds In re Abeel, 99 N. E.2d 295, 302 N.Y. 479—Bond v. Bond, 24 N.Y.S.2d 169, 260 App. Div. 781, reargument denied 25 N. Y.S.2d 1001, 261 App.Div. 835—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App.Div. 447—Rosmor Realty Corp. v. Caviness, 66 N.Y.S.2d 588, 187 Misc. 888—Pesner v. H. M. Goldman, Inc., 23 N.Y.S.2d 698.

N.D.—Schott v. Enander, 15 N.W.2d 303, 73 N.D. 352.

Tex.—Early v. Burns, Civ.App., 142 S.W.2d 260, error refused.

Va.—Eubank & Caldwell v. Fuller, 158 S.E. 884, 156 Va. 635.

60 C.J. p 94 note 40.

Executed contract

The denial of plaintiff's motion to be relieved from stipulation, and entry of judgment on stipulation, was not abuse of discretion, notwithstanding stipulation was not entered on minutes of court and no agreement was filed with clerk of court, where there was no question of exact terms, character, and effect of stipulation, and it was acted on by trial court and plaintiff and defendants, and to such extent became an executed contract and not an executory contract.—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179.

Deprivation of substantial right

Where parties stipulated in open court that a final order should be entered in favor of landlord in summary proceedings, but that issuance of a warrant should be stayed, tenant thereafter seeking to be relieved of stipulation was required to establish that he had been deprived of a substantial right to his disadvantage.

—De Santolo v. La Porte, 89 N.Y.S. 2d 114.

56. N.Y.—Humphries v. Shapiro, 175 N.Y.S. 426, 187 App.Div. 96.

Tex.—Porter v. Holt, 11 S.W. 494, 73 Tex. 447—McClure v. Sheek's Heirs, 4 S.W. 552, 68 Tex. 426—Hancock v. Winans, 20 Tex. 320.

Neither party prejudiced

Where plaintiffs' attorney, without their knowledge or consent, made stipulation consenting to discontinuance against two defendants, and plaintiffs made prompt application to be relieved therefrom, such application would be granted, where the stipulation had been given without consideration, and nothing had intervened changing in any respect the situation of the parties, except the order of discontinuance entered on the stipulation.—Humphries v. Shapiro, 175 N.Y.S. 426, 187 App.Div. 96.

57. D.C.—Santucci v. Mancuso, Mun. App., 78 A.2d 671.

N.Y.—De Santolo v. La Porte, 89 N. Y.S.2d 114.

60 C.J. p 95 note 46.

58. N.Y.—Barry v. Mutual L. Ins. Co., 53 N.Y. 536.

59. N.Y.—Bond v. Bond, 24 N.Y.S.2d 169, 260 App.Div. 781, reargument denied 25 N.Y.S.2d 1001, 261 App. Div. 835—In re Broslin's Estate, 269 N.Y.S. 786, 241 App.Div. 700, resettled on other grounds Petruilla v. Broslin, 270 N.Y.S. 858, 241 App. Div. 817.

60 C.J. p 95 note 41.

60. Ga.—Caldwell v. McWilliams, 65 Ga. 99.

61. Minn.—Lieberknecht v. Great Northern R. Co., 126 N.W. 71, 110 Minn. 457.

N.Y.—De Santolo v. La Porte, 89 N. Y.S.2d 114.

62. N.Y.—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App.Div. 447.

60 C.J. p 95 note 44.

63. U.S.—Aronstam v. All-Russian

§ 35. — Grounds

- a. In general
- b. Particular grounds

a. In General

A stipulation having all the binding force of a contract cannot be set aside on grounds other than those justifying the setting aside of contracts.

The general rule is that a stipulation having all the binding force of a contract cannot be set aside on grounds other than those justifying the setting aside of contracts generally,⁶⁴ such, for instance, as fraud, collusion, mistake, accident, surprise, undue influence, false representations innocently made, inadvertence or improvidence in making the stipulation, or some other ground of the same nature;⁶⁵ and where, by statute, stipulations settling the issues to be tried are made effective as verdicts, the reasons advanced for setting them aside must be as weighty as those required to set aside a verdict.⁶⁶

Generally, the court will afford relief where enforcement of the stipulation would be unjust or give one party an unconscionable advantage;⁶⁷ but it is not a ground for relief against a stipulation that it was disadvantageous to the party asking relief,⁶⁸ or that the case had gone contrary to his expectations.⁶⁹ A trial court may, on a proper application, relieve a party from the effects of a stipulation which admits as a fact that which is not true and is

of such a material character as to change the rights of the parties,⁷⁰ but parties will not be relieved from a stipulation as to certain facts in the absence of a clear showing that the matter stipulated is untrue.⁷¹

b. Particular Grounds

- (1) Collusion, duress, fraud, misrepresentation, and undue influence
- (2) Mistake
- (3) Inadvertence or improvidence
- (4) Other grounds

(1) Collusion, Duress, Fraud, Misrepresentation, and Undue Influence

Generally, collusion, duress, fraud, misrepresentations as to material facts, and undue influence constitute sufficient grounds for granting relief against stipulations.

It is very generally held or conceded that duress,⁷² fraud,⁷³ undue influence,⁷⁴ or other overreaching conduct⁷⁵ constitutes sufficient ground for granting relief against stipulations; and collusion between attorneys has also been held or said to be a sufficient ground for relief against a stipulation.⁷⁶ Nevertheless, the discretion of the court to relieve parties from stipulations induced by fraud is a legal discretion to be exercised in the promotion of justice and equity, and there must be a plain case of fraud,⁷⁷ especially when a party, because of

Central Union of Consumers' Societies, C.C.A.N.Y., 270 F. 460.
60 C.J. p 95 note 45.

64. N.Y.—Bond v. Bond, 24 N.Y.S.2d 169, 260 App.Div. 781, reargument denied 25 N.Y.S.2d 1001, 261 App. Div. 835.

60 C.J. p 95 note 52.

Grounds for relief from stipulation held not shown

Cal.—People v. Houser, 193 P.2d 937, 85 Cal.App.2d 686—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App. 2d 179.

D.C.—Conrad v. Medina, Mun.App., 47 A.2d 562.

Idaho.—State ex rel. Graham v. Enklings, 82 P.2d 649, 59 Idaho 321.

Ky.—Jett v. Holland, 124 S.W.2d 1055, 276 Ky. 718.

N.Y.—In re Edwards' Will, 94 N.Y. S.2d 808, 276 App.Div. 944, affirmed 96 N.Y.S.2d 308, 276 App.Div. 1053—Peterson v. Uhrlass, 71 N.Y.S.2d 2, 272 App.Div. 923—Bond v. Bond, 24 N.Y.S.2d 169, 260 App.Div. 781, reargument denied 25 N.Y.S.2d 1001, 261 App.Div. 835—Rosmor Realty Corp. v. Caviness, 66 N.Y.S. 2d 588, 187 Misc. 888.

65. Cal.—Gonzales v. Pacific Greyhound Lines, 214 P.2d 809, 34 Cal.2d 749.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.Y.—Campbell v. Bussing, 82 N.Y. S.2d 616, 274 App.Div. 893—Federal Fuel Co. v. Macy, 223 N.Y.S. 710, 130 Misc. 192.

6 C.J. p 648 note 61—60 C.J. p 95 note 53.

66. Minn.—Bingham v. Winona County, 6 Minn. 136.

67. N.Y.—Goldstein v. Goldsmith, 276 N.Y.S. 861, 243 App.Div. 268—Kristel v. Steinberg, 69 N.Y.S.2d 476, 188 Misc. 500—Schiffman v. Cudahy Packing Co., 30 N.Y.S.2d 150.

68. Mo.—Franklin v. National Ins. Co., 43 Mo. 491.

69. N.Y.—Smith v. Barnes, 29 N.Y. S. 692, 9 Misc. 368.
60 C.J. p 95 note 57.

70. S.D.—Payton v. Rogers, 285 N. W. 873, 66 S.D. 486.

An erroneous stipulation of fact by the parties to a suit is to be disregarded, and the case considered and determined on the facts disclosed by the record.—Grissinger v. U. S., 77 Ct.Cl. 106, certiorari denied 54 S.Ct. 101, 290 U.S. 676, 78 L.Ed. 583.

71. Ill.—Brink v. Industrial Commission, 15 N.E.2d 491, 368 Ill. 607.

Neb.—Wells v. Tietge, 9 N.W.2d 180, 143 Neb. 230—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

72. N.Y.—Pechman v. Chantal Silks, 53 N.Y.S.2d 260.

73. Minn.—National Council of Knights and Ladies of Security v. Scheiber, 169 N.W. 272, 141 Minn. 41.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.Y.—De Santolo v. La Porte, 89 N. Y.S.2d 114—Baksi v. Wallman, 62 N.Y.S.2d 26, affirmed 63 N.Y.S.2d 215, 270 App.Div. 995, modified on other grounds 65 N.Y.S.2d 894, 271 App.Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456.

60 C.J. p 65 note 99, p 96 note 59.

74. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.

60 C.J. p 96 note 60.

Undue influence held not shown

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

75. N.Y.—De Santolo v. La Porte, 89 N.Y.S.2d 114.

76. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.

60 C.J. p 96 note 61.

77. Wis.—Illinois Steel Co. v. Waras, 123 N.W. 656, 141 Wis. 119.

changed conditions, will be prejudiced.⁷⁸

False statements innocently made. A stipulation as to the existence of certain facts,⁷⁹ or for the dismissal of a case on the merits,⁸⁰ may be set aside, where it was induced by false representation as to material facts, the falsity of which was unknown to the person making them, although there was no fraud or wrongful intent to defraud or deceive.

(2) Mistake

Courts may set aside stipulations where a mistake of fact is clearly shown, on such terms as will meet the justice of the particular case; but in order to warrant relief the mistake must be of a material character, such as will change the legal rights of the parties, and the mistake must be one which could not have been avoided by the exercise of ordinary care.

As a general rule, courts may set aside stipulations where a mistake of fact is clearly shown,⁸¹ on such terms as will meet the justice of the particular case.⁸² Nevertheless, in order to authorize the setting aside of a stipulation, the evidence of mistake must be clear and convincing,⁸³ and a stip-

ulation will not be set aside on the ground of mistake where all evidence in relation thereto is doubtful and conflicting.⁸⁴ It has also been held that the mistake which will authorize relief against a stipulation must be of a material character, such as will change the legal rights of the parties;⁸⁵ and the mistake must be one which could not have been avoided by the exercise of ordinary care.⁸⁶

Lack of full knowledge of facts. Where there was no mistake of fact, but merely a lack of full knowledge of the facts, which was plainly due to failure to exercise due diligence to ascertain them, this did not constitute a ground for relief against a stipulation.⁸⁷

Mistake of law. According to some decisions, a mistake of law is not by itself a sufficient ground for setting aside a stipulation,⁸⁸ but it has also been held that a court, in the exercise of a sound judicial discretion and in the furtherance of justice, may relieve parties from stipulations entered into under mistake of law.⁸⁹ A mere lack or want of knowl-

Facts held not to show fraud

Minn.—Albert v. Edgewater Beach Bldg. Corp., 15 N.W.2d 460, 218 Minn. 20.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.Y.—Wolf v. Bergano, 31 N.Y.S.2d 309, 263 App.Div. 825—Petition of Salomon, 111 N.Y.S.2d 684. 60 C.J. p 96 note 62 [a].

78. N.Y.—Wolf v. Bergano, 31 N.Y.S.2d 309, 263 App.Div. 825.

Wis.—Illinois Steel Co. v. Warras, 123 N.W. 656, 141 Wis. 119.

79. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

80. Minn.—Becker v. Messner, 221 N.W. 724, 175 Minn. 471.

81. U.S.—U. S. v. Jordan, C.A.Tenn., 186 F.2d 803, affirmed 72 S.Ct. 305, 342 U.S. 911, 96 L.Ed. 682—Bradford v. Schmucker, C.C.A.Okla., 135 F.2d 991.

Mass.—Gregory v. Pierce, 4 Metc. 478.

Minn.—National Council of Knights and Ladies of Security v. Scheiber, 169 N.W. 272, 141 Minn. 41.

N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.J.—Martin v. Lehigh Valley R. Co., 176 A. 665, 114 N.J.Law 243.

N.Y.—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App.Div. 447—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392—De Santolo v. La Porte, 89 N.Y.S.2d 114—Baksi v. Wallman, 62 N.Y.S.2d 26, affirmed 63 N.Y.S.2d 215, 270 App.Div. 995, modified on other grounds 65 N.Y.S.2d 894, 271 App.

Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456—Schiffman v. Cudañy Packing Co., 30 N.Y.S.2d 150.

S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.

6 C.J. p 649 note 93—60 C.J. p 96 note 65.

Documentary evidence of mistake

Generally, parties to proceeding are bound by their stipulations, but courts will not permit a mistake therein to remain uncorrected when opposite party has not been misled, no delay has been suffered thereby, and documentary evidence of mistake appears in files and record before court.—Thompson v. Continental Motors Corp., 30 N.W.2d 844, 320 Mich. 219—Basner v. Defoe Shipbuilding Co., 29 N.W.2d 140, 319 Mich. 67.

Error based on misinformation

A stipulation, while generally binding, is within court's power to correct where there is an error in stipulation based on misinformation at time of the making of such stipulation.—First Nat. Bank & Trust Co. of Tulsa v. Jones, D.C.Okla., 61 F.Supp. 364.

Law of other state

Motion to be relieved from stipulation of fact regarding law of another state was granted where stipulation was made before rendition of decision of court of such other state, determining law contrary to the stipulation.—Keeler v. Templeton, 300 N.Y.S. 868, 165 Misc. 392, denying motion 298 N.Y.S. 193, 164 Misc. 113.

Mistake apparent from record

Stipulation based on plain mistake of fact, as shown by record itself, will not control over undisputed facts, especially where stipulation

states conclusion erroneously arrived at from facts.—Kansas City Life Ins. Co. v. Bancroft, 36 P.2d 288, 169 Okl. 139.

82. Ala.—Harvey v. Thorpe, 28 Ala. 250, 65 Am.D. 344.

N.H.—Wells v. Jackson Iron Mfg. Co., 48 N.H. 491. 60 C.J. p 97 note 65.

83. U.S.—U. S. v. Butterfield, D.C.N.Y., 25 F.Cas.No.14,704, 8 Ben. 23. 60 C.J. p 97 notes 67, 68.

Mistake held not shown

Cal.—Cathcart v. Gregory, 113 P.2d 894, 45 Cal.App.2d 179.

Ill.—Vidon v. Roberts, 69 N.E.2d 721, 330 Ill.App. 104.

Iowa.—Carpenter v. Lothringer, 275 N.W. 98, 224 Iowa 439.

Mich.—Dutrowska v. Landolfo, 238 N.W. 207, 255 Mich. 377.

84. Ala.—Charles v. Miller, 36 Ala. 141.

60 C.J. p 97 note 68.

85. Ill.—Stevens v. Moore, 47 N.E.2d 498, 318 Ill.App. 228.

Iowa.—Chapman v. Coats, 26 Iowa 288.

86. U.S.—Central Trust Co. of New York v. Treat, C.C.N.Y., 192 F. 942. 60 C.J. p 97 note 71.

87. N.Y.—Di Donato v. Rosenberg, 245 N.Y.S. 675, 230 App.Div. 538.

88. U.S.—Franz v. Buder, D.C.Mo., 82 F.Supp. 379. 60 C.J. p 97 note 72.

89. U.S.—Brast v. Winding Gulf Colliery Co., C.C.A.W.Va., 94 F.2d 179—Federal Export Corp. v. U. S., Ct.Cl., 25 F.Supp. 109, certiorari denied 60 S.Ct. 120, 308 U.S. 590, 84 L.Ed. 494.

edge of the law or how it will be interpreted or administered by administrative officers is not sufficient ground to release a party from a stipulation.⁹⁰

(3) Inadvertence or Improvidence

Courts may relieve against stipulations inadvertently, inadvisedly, or improvidently entered into which will operate inequitably and to the prejudice of one of the parties, provided all the parties may be placed in the condition in which they were before the stipulation was made.

It has very generally been held that the courts, by reason of the large equitable powers which they have over their own proceedings,⁹¹ and the discretion vested in them,⁹² may relieve against stipulations inadvertently, inadvisedly, or improvidently entered into which will operate inequitably and to the prejudice of one of the parties,⁹³ provided all the parties may be placed in the condition in which they were before the stipulation was made.⁹⁴ However, due regard must be had to the rights of the adverse party so that he is not misled and allowed to act to his injury in reliance thereon.⁹⁵ A stipulation will not be set aside as improvidently made where the circumstances exclude every inference of fraud, collusion, or undue advantage, or the pos-

sibility that there was not a thorough understanding of the subject matter and of its terms.⁹⁶

(4) Other Grounds

Mental incompetency of a party to the stipulation, material change of conditions, noncompliance with the terms of the stipulation or failure of condition, or lack of authority of an attorney to enter into the stipulation may constitute ground for granting relief from stipulations.

Grounds, other than those discussed supra subdivisions b (1)-(3) of this section may exist for granting relief from stipulations.⁹⁷

Mental incompetency. It is usually a sufficient ground to set aside a stipulation that one of the parties to it by reason of unsoundness of mind was totally incapacitated to make a contract.⁹⁸ Nevertheless, it has been held that a stipulation will not be vacated on the ground of the incompetency of a party thereto where the stipulation was the result of considerable negotiation in which the interests of the party were well cared for.⁹⁹

Material change of conditions. A stipulation limiting the issues to a certain question may properly be set aside where the condition of the parties has

90. Ky.—Jett v. Holland, 124 S.W.2d 1055, 276 Ky. 718.

91. Minn.—Wells v. Penfield, 72 N.W. 816, 70 Minn. 66.

92. Ala.—Palliser v. Home Telephone Co., 54 So. 499, 170 Ala. 341.

93. U.S.—Bradford v. Schmucker, C.C.A. Okl., 135 F.2d 991—Brast v. Winding Gulf Colliery Co., C.C.A. W.Va., 94 F.2d 179—Porter v. Denholm Packing Co., D.C.Pa., 68 F. Supp. 654—Federal Export Corp. v. U. S., Ct.Cl., 25 F.Supp. 109, certiorari denied 60 S.Ct. 120, 308 U.S. 590, 84 L.Ed. 494—Hodgson Oil Refining Co. v. U. S., 74 Ct.Cl. 303.

Iowa.—Olds v. Olds, 260 N.W. 1, 219 Iowa, 1395, supplemented 261 N.W. 488, 219 Iowa 1395.

Ky.—World Fire & Marine Ins. Co. v. Tapp, 151 S.W.2d 428, 286 Ky. 650. Mass.—Loring v. Mercier, 63 N.E.2d 466, 318 Mass. 599—Malone v. Bianchi, 61 N.E.2d 1, 318 Mass. 179, 161 A.L.R. 1158.

Minn.—National Council of Knights and Ladies of Security v. Scheiber, 169 N.W. 272, 141 Minn. 41.

N.Y.—David S. Stern Corp. v. Edlstone, 35 N.Y.S.2d 300, 264 App. Div. 865—Clark v. Delaware & H. R. Corp., 283 N.Y.S. 739, 245 App. Div. 447—Goldstein v. Goldsmith, 276 N.Y.S. 861, 243 App. Div. 268—Bergheim v. Hofstatter, 276 N.Y.S. 188, 243 App. Div. 568—Kristol v. Steinberg, 69 N.Y.S.2d 476, 188

Misc. 500—In re Lambert's Estate, 42 N.Y.S.2d 239, 181 Misc. 706, affirmed 47 N.Y.S.2d 309, 267 App. Div. 866, appeal denied 48 N.Y.S.2d 551, 267 App. Div. 975.

S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.

W.Va.—Corpus Juris cited in Cole v. State Compensation Com'r, 173 S.E. 263, 114 W.Va. 633. 60 C.J. p 98 note 78.

Unjust or harsh

A court has power to relieve a party from a stipulation in a situation which is unjust or harsh, even when fully understood and authorized.—Bond v. Bond, 24 N.Y.S.2d 169, 260 App. Div. 781, reargument denied 25 N.Y.S.2d 1001, 261 App. Div. 835—Application of Freedman, 87 N.Y.S.2d 377, 184 Misc. 708.

Substantial proof to contrary

A stipulation which is clearly inadvertently made in conflict with a party's theory of his case and opposed to his absolute rights may be disregarded where there is substantial proof to the contrary.—Back v. Farnsworth, 77 P.2d 295, 25 Cal. App. 2d 212.

Inadvertent admission of fact which afterward proves to be erroneous justifies the setting aside of the stipulation.—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392.—60 C.J. p 98 note 78 [a].

94. W.Va.—Corpus Juris cited in

Cole v. State Compensation Com'r, 173 S.E. 263, 114 W.Va. 633. 60 C.J. p 98 note 79.

95. Ga.—Commercial Union Assur. Co. v. Chattahoochee Lumber Co., 60 S.E. 554, 130 Ga. 191.

96. Minn.—Dickinson v. Citizens' Ice, etc., Co., 165 N.W. 1056, 139 Minn. 201.

Held not unconscionable

Stipulation to abide by decision on appeal in another similar case being appealed, which was subsequently affirmed on certificate without hearing on merits because statute with respect to time for filing record was changed, was not unconscionable because no hearing was had on merits.—State Life Ins. Co. v. Duke, Tex. Civ. App., 69 S.W.2d 791, error refused.

97. Cal.—People v. Samenigo, 5 P. 2d 653, 118 Cal. App. 165.

D.C.—Laughlin v. Berens, 118 F.2d 193, 78 App. D.C. 136.

Mont.—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

N.Y.—Baksi v. Wallman, 65 N.Y.S. 2d 894, 271 App. Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456—Bergheim v. Hofstatter, 276 N.Y.S. 188, 243 App. Div. 568.

98. U.S.—Kendall v. Elwert, Okl., 42 S.Ct. 444, 259 U.S. 139, 66 L.Ed. 862.

99. Minn.—Fletcher v. Taylor, 182 N.W. 437, 148 Minn. 366.

materially changed, if the adverse party is given leave to amend.¹

Newly discovered defenses. A stipulation that one case shall be determined by the judgment in another will not be relieved against because of newly discovered defenses which will not be sufficient ground for a new trial.²

Amendment of pleadings in test case. A stipulation that one case shall abide the result of another will not be set aside because of amendment of the pleadings in the test case on reversal of a judgment rendered therein, where the amendments do not change the cause of action or make any substantial change in the issues.³

Noncompliance with terms of stipulation or failure of condition. Where one party has failed to comply with the terms of the stipulation, the other party may move to vacate the stipulation.⁴ Where plaintiff's attorney consented to the bringing in of a new defendant, on condition that the case should retain its place as a preferred case and be tried in a designated county, if the place of trial is changed to another county, plaintiff should be permitted to move to be relieved from his stipulation, and to dis-

continue the action against such defendant.⁵

Lack of authority of attorney. If a stipulation or agreement entered into by an attorney is beyond the scope of his authority, the client may, in a proper case, obtain relief therefrom by having it vacated or set aside;⁶ but a stipulation will not be set aside on a mere statement of belief of the attorney's lack of authority to execute a stipulation where positive evidence of such lack of authority, if any, was available and should have been forthcoming.⁷

§ 36. — Proceedings for Relief

A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding; and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party. The proceeding to set aside a stipulation is summary in its nature, and the hearing is usually had on affidavits and counter-affidavits of the parties.

A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding,⁸ and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation⁹ in the court in which the action is pending,¹⁰ on notice to the opposite party.¹¹ An independent action instituted for that purpose usually is unneces-

1. S.D.—Randall v. Burk Tp., 75 N. W. 276, 11 S.D. 40.
60 C.J. p 98 note 87.

2. U.S.—McNeill v. Andes, C.C.N.Y., 40 F. 45.

3. Cal.—Gilmore v. American Cent. Ins. Co., 7 P. 781, 67 Cal. 366.

Mo.—Galbreath v. Rogers, 45 Mo.App. 324.

4. N.Y.—In re Poster's Estate, 108 N.Y.S.2d 751.

5. N.Y.—Fisher v. Bullock, 204 N.Y. S. 425, 208 App.Div. 565.

6. N.J.—Martin v. Lehigh Valley R. Co., 176 A. 665, 114 N.J.Law 243
—Hygrade Cut Fabric Co. v. U. S. Stores Corporation, 144 A. 605, 105 N.J.Law 324.

N.Y.—In re Callahan, 174 N.Y.S. 268, 106 Misc. 202, affirmed 175 N.Y.S. 896, 188 App.Div. 944.

7. N.D.—Youmans v. Hanna, 160 N. W. 705, 35 N.D. 479, Ann.Cas.1917E 263, motion denied 161 N.W. 797, 35 N.D. 479, Ann.Cas.1917E 263, rehearing denied 171 N.W. 835, 43 N. D. 536.

8. Ill.—Chicago v. Drexel, 30 N.E. 774, 141 Ill. 89.

Affirmative application

In order to obtain relief against stipulation, regular course is not to ignore or attempt to evade it, but to make reasonable affirmative application to court by formal motion on notice, supported by affidavit for withdrawal or revocation of stipulation.

—Dunscombe v. Smith, 190 So. 796, 139 Fla. 497.

9. Fla.—Dunscombe v. Smith, 190 So. 796, 139 Fla. 497.

N.Y.—Kristel v. Steinberg, 69 N.Y.S. 2d 476, 188 Misc. 500.

60 C.J. p 99 note 94.

Request made in brief

Request for modification of agreed statement of facts was entertainable by trial court, even though request was made only in brief and not in form of motion, in view of clearly inadvertent use of words.—State v. Wehinger, 47 P.2d 35, 182 Wash. 360.

"Special proceeding"

Defendants' motion to be relieved from stipulation is "special proceeding," which could be commenced before one judge and continued before another; so where justice holds motion to be relieved from stipulation in abeyance pending coming in of report of referee appointed to hear and report, motion remains before court, and, if justice before whom motion is made goes out of office pending reference, matter may again be brought before court by moving to confirm referee's report.—Kynin v. Grand Plaza Caterers, 265 N.Y.S. 614, 148 Misc. 156.

10. N.Y.—Goldfarb v. Goldfarb, 257 N.Y.S. 538, 235 App.Div. 868.
60 C.J. p 99 note 95.

Action held pending

(1) Until warrant to dispossess was actually issued, landlords' sum-

mary proceeding was pending before the court, and, hence, stipulation for stay of execution of warrant, not being one which terminated the proceeding and executed a new agreement, was subject to review and to any order of municipal court made on motion in the proceeding.—Kristel v. Steinberg, 69 N.Y.S.2d 476, 188 Misc. 500.

(2) A stipulation for discontinuance of fraud action on payment of agreed weekly installments of amount demanded in complaint, but providing that on default in payments plaintiff could enter judgment for full amount demanded in complaint, was a stipulation in the case by which action was not discontinued but remained alive, at least until full payment; hence court had jurisdiction to set aside stipulation if extorted by threats or duress.—Pechman v. Chantal Silks, 53 N.Y.S.2d 260.

Court to which appeal is taken from a judgment in the action is without power to set aside the stipulation.—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355—60 C.J. p 99 note 95 [a].

11. Fla.—Dunscombe v. Smith, 190 So. 796, 139 Fla. 497.

Neb.—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A. L.R. 767.

60 C.J. p 99 note 96.

sary,¹² as the court has ample control over the action and may protect all the rights of the parties.¹³ Where a stipulation and a purported order approving it are invalid and of no effect, there is no necessity that an application be made for relief therefrom.¹⁴

A proceeding to set aside a stipulation is summary in its nature,¹⁵ and the hearing is usually had on affidavits and counter-affidavits of the parties,¹⁶ although it has been said that, where a large amount is involved and the conflict is sharp, the question should be determined on common-law evidence,¹⁷ and in some circumstances the court will not determine the matter on affidavits but may exercise its investigatory power by referring the matter to a referee to hear and report.¹⁸ Where mistake alleged as a ground in the stipulation is apparent without any further proofs, no affidavits are necessary.¹⁹ Where it is claimed that a stipulation as to facts was false or untrue as to the facts stated, or did not contain all the facts, the party moving to withdraw from the stipulation must show in what particulars the stipulation was erroneous or deficient, that is, he must point out the specific misstatements or omissions.²⁰

The issues raised on a motion to set aside a stipulation ordinarily are to be determined by the trial court, and pending such determination the status quo of the parties will be maintained.²¹ The court may reserve consideration of the motion and need

not rule on it immediately on its presentation.²² A party moving to withdraw a stipulation of facts is not entitled to a hearing on the motion where he has failed to file a brief or request oral argument on the motion.²³ No findings of fact are necessary as a basis for an order setting aside a stipulation.²⁴

Time of making application. Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto.²⁵ If parties desire an agreed statement of facts to be amended or discharged, or the facts to be varied, steps must be taken to effect these objects before the decision is announced.²⁶

§ 37. — Nature and Extent of Relief

Generally, if relief against a stipulation is granted, the entire stipulation must be set aside, and the court may not release one of the parties to a stipulation and still leave the other party bound thereby; but under some circumstances the court may modify or amend stipulations where it is satisfied that justice requires it.

Generally, if relief against a stipulation is granted, the entire stipulation must be set aside.²⁷ In other words, the stipulation must stand or else be set aside in toto,²⁸ and merely to strike out a portion of the stipulation on suggestion of one of the parties is error, if such portion is material.²⁹ It has apparently been held, however, that a party may in some circumstances be relieved in part only from the terms of a stipulation, where this may be done without prejudice to the substantial rights of

12. Wash.—Stevenson v. Hazard, 277 P. 450, 152 Wash. 104.

Relief against stipulation for settlement of controversy by independent equitable action see Compromise and Settlement § 30.

13. N.Y.—Turner v. New York Cent., etc., R. Co., 132 N.Y.S. 418, 74 Misc. 524.

14. Cal.—Berry v. Chaplin, 169 P.2d 442, 74 Cal.App.2d 652.

15. Tex.—Beaumont Pasture Co. v. Preston, 65 Tex. 448—Hancock v. Winans, 20 Tex. 320.

16. Fla.—Duncombe v. Smith, 190 So. 796, 139 Fla. 497.
60 C.J. p 99 note 1.

Absence of specific request

Where plaintiff moved to set aside a stipulation entered into in open court by plaintiff's attorney, but made no specific request to hear motion on testimony, accompanied by offer of witnesses for purpose of testifying, hearing of motion on affidavits rather than on testimony was not error.—Powell v. Martone, 33 N.W.2d 914, 322 Mich. 441.

17. N.Y.—Mutual L. Ins. Co. v.

O'Donnell, 40 N.E. 787, 146 N.Y. 275, 48 Am.S.R. 796.

18. N.Y.—Pechman v. Chantal Silks, 53 N.Y.S.2d 260.

19. Wash.—Levy v. Sheehan, 28 P. 748, 3 Wash. 420.

20. Or.—Robinson v. Oregon City Sand & Gravel Co., 20 P.2d 1073, 143 Or. 177.

21. N.Y.—Weinroth v. 603—Fifth Ave. Corp., 102 N.Y.S.2d 471.

22. Cal.—McClure, on Behalf of Caruthers v. Donovan, 205 P.2d 17, 33 Cal.2d 717.

23. Or.—Robinson v. Oregon City Sand & Gravel Co., 20 P.2d 1073, 143 Or. 177.

24. Minn.—Fletcher v. Taylor, 182 N.W. 437, 148 Minn. 366.

25. Ill.—Brink v. Industrial Commission, 15 N.E.2d 491, 368 Ill. 607.

Neb.—Wells v. Tietge, 9 N.W.2d 180, 143 Neb. 230—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767.

N.Y.—Rosmor Realty Corp. v. Cavinness, 66 N.Y.S.2d 588, 187 Misc. 888.

N.D.—Schott v. Enander, 15 N.W.2d 303, 73 N.D. 352.

Wis.—Thayer v. Federal Life Ins. Co., 258 N.W. 849, 217 Wis. 282.

60 C.J. p 100 note 5.

Loss of jurisdiction

Where defendant signed stipulation on which consent judgment was entered by circuit court, and defendant did not file motion seeking relief from such judgment or motion for new trial, judgment became final thirty days after its entry, circuit court lost jurisdiction, and was not authorized to hear motion filed on later date to set aside stipulation on ground that it was fraudulently procured.—Kidd v. Kidd, Mo.App., 229 S.W.2d 270.

Laches held not shown

Mo.—Huegel v. Huegel, 46 S.W.2d 157, 329 Mo. 571.

26. N.H.—Goodrich v. Eastern R. Co., 38 N.H. 390.

27. Colo.—Welsh v. Noyes, 14 P. 317, 10 Colo. 133.

N.H.—Colby v. American Express Co., 94 A. 198, 77 N.H. 548.

28. N.Y.—Saranac Land & Timber Co. v. Roberts, 166 N.Y.S. 8, 100 Misc. 511.

29. Colo.—Welsh v. Noyes, 14 P. 317, 10 Colo. 133.

the parties under the stipulation.³⁰ The court may not release one of the parties to a stipulation and still leave the other party bound thereby.³¹ The order setting aside the stipulation is in the nature of rescission, in which all the parties should be placed in statu quo.³²

Amendment or modification. As a general rule, courts have no power to amend or modify stipulations without the consent of all of the parties thereto.³³ Under some circumstances, however, stipulations may be modified where the court is satisfied that justice requires it.³⁴ So it has been held that

the court may permit a stipulation to be amended, so as to conform to the real intention of the parties in making it, where matter has been inadvertently inserted in,³⁵ or omitted from,³⁶ the stipulation; and an agreed statement of facts may be amended by the addition of facts inadvertently omitted, where such facts are of record in the court, and require no proof, and are not repugnant to the agreed statement or any of its terms.³⁷ A reviewing court has no power to correct stipulations made in the lower court in order to express the real agreement; the party must have moved in the lower court to have it corrected.³⁸

STIRPS. The word "stirps" means a root¹ of inheritance;² a common stock;³ and it designates the ancestor from whom the heir derives title, and necessarily presupposes the death of the ancestor.⁴

Stirpes. The plural of stirps,⁵ denoting roots or common stocks.⁶ It is said not to be a word of inheritance or purchase but to relate solely to the mode of distribution.⁷

The term "per stirpes" is discussed generally in 70 C.J.S. p 448 notes 52-56; with respect to intestate distribution of property see Descent and Distribution § 23, and with respect to testate distribution of property see the C.J.S. title Wills §§ 707-716, also 69 C.J. p 287 note 30-p 297 note 96.

STITCH. To join together with stitches; sew, as a seam of cloth.⁸

"Stitched" is the past participle of "stitch."⁹ The term is used in book binding to describe the method of binding a pamphlet by stabbing holes in the back, inserting thread or wires, and tying them.¹⁰

ST. JOHN'S BREAD. Locust beans, consisting of the fleshy pods, with the small seeds or beans inside, produced by the carob tree.¹¹

STOB. A variation of the word "stub," which means a small post.¹²

STOCK. The word "stock" is comprehensive¹³ and has various significations,¹⁴ and is used, both in

30. N.Y.—In re Broslin's Estate, 269 N.Y.S. 786, 241 App.Div. 700, re-settled on other grounds Petruilla v. Broslin, 270 N.Y.S. 858, 241 App. Div. 817.

Incorrect statement of material facts
Action of trial court in relieving plaintiff from portions of stipulation which incorrectly set forth material facts and which were contradicted by undisputed evidence was not improper.—Sinnock v. Young, 142 P.2d 85, 61 Cal.App.2d 130.

31. Minn.—Gerdtsen v. Cockrell, 52 N.W. 930, 50 Minn. 546.
60 C.J. p 100 note 9.

32. U.S.—Emerick, etc., Co. v. Hascy, Cal., 146 F. 688, 77 C.C.A. 114.
60 C.J. p 100 note 11.

33. Me.—Rowell v. Lewis, 49 A. 423, 95 Me. 83.
60 C.J. p 100 note 12.

34. Mass.—Mitchell v. Walton Lunch Co., 25 N.E.2d 151, 305 Mass. 76.

Denial of amendment held not abuse of discretion
U.S.—Mermis v. Jackson, C.C.A.Kan., 93 F.2d 579.

35. Wash.—State v. Wehinger, 47 P. 2d 35, 182 Wash. 360.

36. U.S.—Knight Newspapers v. C. I. R., C.C.A.6, 143 F.2d 1007, 154 A.L.R. 1267.

S.D.—Davis v. Davis, 137 N.W. 283, 29 S.D. 420.
60 C.J. p 100 note 13.

37. Mont.—Montana Milling Co. v. Jefferis, 41 P. 712, 16 Mont. 559.

38. Tex.—Texas Employers' Ins. Assoc. v. Wright, Civ.App., 297 S.W. 764, modified on other grounds, Com.App., 4 S.W.2d 31.

1. Md.—Patchell v. Groom, 43 A.2d 32, 34, 185 Md. 10—Rotmanskey v. Heiss, 39 A. 415, 86 Md. 633.
S.C.—Irvin v. Brown, 158 S.E. 733, 734, 160 S.C. 374.

2. Md.—Patchell v. Groom, 43 A.2d 32, 34, 185 Md. 10.
60 C.J. p 101 note 7.

3. S.C.—Irvin v. Brown, 158 S.E. 733, 734, 160 S.C. 374.

4. Md.—Patchell v. Groom, 43 A.2d 32, 34, 185 Md. 10—Rotmanskey v. Heiss, 39 A. 415, 86 Md. 633.

5. Webster New Int.D.

6. S.C.—Irvin v. Brown, 158 S.E. 733, 734, 160 S.C. 374.

7. S.C.—Irvin v. Brown, supra.
60 C.J. p 101 note 14.

8. New Standard D.

9. Webster New Int.D.

10. Iowa.—State v. Young, 110 N.W. 292, 294, 134 Iowa 505, 13 Ann.Cas. 345.
60 C.J. p 101 note 15.

11. U.S.—Sheldon v. U. S., 12 Cust. App. 474, 475.

12. Tex.—Galveston, H. & S. A. Ry. Co. v. Miller, Civ.App., 192 S.W. 593, 595.
60 C.J. p 101 note 17.

13. Wash.—Plass v. Morgan, 78 P. 784, 785, 36 Wash. 160.

14. N.Y.—Burr v. Wilcox, 22 N.Y. 551, 556—Williams v. Western Union Tel. Co., 48 N.Y.Super. 349, 367.

common speech and statutory enactments, in a variety of senses, some broader, some more limited.¹⁵

As used in agriculture,¹⁶ the word "stock" has a settled¹⁷ and popular¹⁸ meaning, and signifies domestic animals and nothing more,¹⁹ and thus the term is defined as meaning domestic animals²⁰ or beasts²¹ collected, raised, or used on a farm, especially, cattle, sheep, hogs, etc.²²

While it has been said that in common speech and under the law the word "stock" has reference to animals which have intrinsic value as for food or beasts of burden,²³ in fact the term is sufficiently broad to include all useful animals,²⁴ and therefore the word "stock" has been held to include asses,²⁵ calves,²⁶ cattle,²⁷ colts,²⁸ cows,²⁹ foxes,³⁰ goats,³¹ hogs,³² horses,³³ jennets and mules,³⁴ sheep,³⁵ and swine.³⁶

In a broader sense the term may embrace things other than animals pertaining to the farm.³⁷

In construing particular statutes the word "stock" has been held to apply only to specified animals,³⁸ and hence under the particular statute not to include dogs,³⁹ horses,⁴⁰ or swine.⁴¹

In mercantile sense. When the word "stock" is used in a mercantile sense it has a well-defined meaning,⁴² and an appropriate meaning in law,⁴³ and should be construed accordingly.⁴⁴ In this sense the term signifies the wares of a business man;⁴⁵ the goods and wares of a merchant or tradesman, kept for sale and traffic;⁴⁶ the goods or chattels which a tradesman holds for sale or traffic;⁴⁷ goods and merchandise in trade;⁴⁸ the goods on hand.⁴⁹ It generally comprehends articles accumulated in a business or calling for use and dis-

15. Ind.—State v. Hamilton, 5 Ind. 310, 313.
60 C.J. p 101 note 21.

16. Iowa.—State v. Clark, 21 N.W. 666, 667, 65 Iowa 336.

17. N.C.—Graham v. Davidson, 22 N.C. 155, 171.
Wis.—Baker v. Baker, 8 N.W. 289, 290, 51 Wis. 538.

18. Wis.—Baker v. Baker, supra.

19. Ind.—Heagy v. Cheesman, 33 Ind. 96, 98.

Also called "live stock"

Iowa.—Inman v. Chicago, etc., R. Co., 15 N.W. 286, 287, 60 Iowa 459.
60 C.J. p 102 note 43.

Similarly stated

(1) Used in connection with farm or land, the term "stock" has a settled meaning, whereby it is restricted to the animals which are used with, supported by, or raised upon it.—Baker v. Baker, 8 N.W. 289, 290, 51 Wis. 538—60 C.J. p 102 note 36.

(2) As commonly denominated in the country, "stock" means animals with which the plantations of farmers are usually supplied.—Van Norden v. Primm, 3 N.C. 324, 325.

20. Iowa.—State v. Clark, 21 N.W. 666, 667, 65 Iowa 336.
60 C.J. p 102 note 39.

21. Iowa.—Inman v. Chicago, M. & St. P. Ry. Co., 15 N.W. 286, 287, 60 Iowa 459.

22. La.—Henderson v. Lancaster, 2 La.App. 680, 683, 684.
60 C.J. p 102 note 42.

23. La.—Henderson v. Lancaster, supra.

24. N.H.—White Mountain Fur Co. v. Whitefield, 91 A. 870, 871, 77 N.H. 340.
60 C.J. p 102 note 59.

25. La.—Henderson v. Lancaster, 2 La.App. 680, 684.

26. La.—Henderson v. Lancaster, supra.

27. Conn.—Dudley v. Deming, 34 Conn. 169, 173.
60 C.J. p 102 note 46.

Meat cattle

La.—Henderson v. Lancaster, 2 La.App. 680, 684.

28. La.—Henderson v. Lancaster, supra.

29. La.—Henderson v. Lancaster, supra.

30. N.H.—White Mountain Fur Co. v. Whitefield, 91 A. 870, 871, 77 N.H. 340.
60 C.J. p 102 note 49.

31. La.—Henderson v. Lancaster, 2 La.App. 680, 684.

32. Ky.—Green v. Hart, 87 S.W. 315, 316, 27 Ky.L. 970.
60 C.J. p 102 note 51.

33. La.—Henderson v. Lancaster, 2 La.App. 680, 684.
60 C.J. p 102 note 52.

34. La.—Henderson v. Lancaster, supra.

35. Ky.—Green v. Hart, 87 S.W. 315, 316, 27 Ky.L. 970.
60 C.J. p 102 note 56.

36. Iowa.—State v. Clark, 21 N.W. 666, 667, 65 Iowa 336.
La.—Henderson v. Lancaster, 2 La.App. 680, 684.

37. Wis.—Baker v. Baker, 8 N.W. 289, 290, 51 Wis. 538.
60 C.J. p 103 note 65.

38. Iowa.—State v. Clark, 21 N.W. 666, 65 Iowa 336.
60 C.J. p 102 note 60.

39. Ala.—Louisville & N. R. Co. v. Carter, 104 So. 754, 755, 213 Ala. 393.
60 C.J. p 102 note 61.

40. Conn.—Dudley v. Deming, 34 Conn. 169, 173.
60 C.J. p 103 note 62.

Does not embrace the idea of a team.—Inman v. Chicago, etc., R. Co., 15 N.W. 286, 287, 60 Iowa 459—60 C.J. p 102 note 58.

41. Kan.—Usher v. Hiatt, 21 Kan. 548, 551.

42. Iowa.—Jewell v. Sumner Tp., 84 N.W. 973, 975, 113 Iowa 47.

43. Iowa.—Jewell v. Sumner Tp., supra.

44. Iowa.—Jewell v. Sumner Tp., supra.

45. N.J.—Rowe v. Davis, 47 A.2d 36, 38, 138 N.J.Eq. 132.

"Stock" distinguished from "merchandise" see 57 C.J.S. p 1059 note 91.

46. N.Y.—St. Regis Restaurant v. Powers, 216 N.Y.S. 129, 132, 127 Misc. 338.
60 C.J. p 105 note 25.

Similarly stated

(1) When applied to the business of a merchant or tradesman, the word "stock" means the merchandise he keeps for sale or traffic.—Schnitzer v. Excelsior Powder Mfg. Co., Mo. App. 160 S.W. 282, 285.

(2) The common use of the word "stock," when applied to goods of a mercantile house, refers to those which are kept for sale.—Albrecht v. Cudihee, 79 P. 628, 629, 37 Wash. 206—60 C.J. p 105 note 21.

47. Pa.—Commonwealth v. Danville, etc., R. Co., 2 Pearson 400, 401.
Tex.—Spring Garden Ins. Co. v. Brown, Civ.App., 143 S.W. 292.

48. Iowa.—Whiting v. Root, 3 N.W. 134, 141, 52 Iowa 292.
60 C.J. p 105 note 19.

49. S.C.—Todd v. Lewers, 9 S.C.Eq. 463, 464.
60 C.J. p 106 note 27.

posals in its regular prosecution,⁵⁰ and is not confined to goods with which a merchant begins business, but rather to the goods he employs in trade.⁵¹ It may include many different kinds of goods, wares, or merchandise,⁵² and in general terms refers to the entire property employed in business.⁵³ It connotes something actual and tangible,⁵⁴ and when applied to a manufactory may refer either to the finished product or to the raw material used in making such product.⁵⁵

The word "stock" is employed with reference to business in a somewhat different sense to signify, in its general acceptation, money invested in business;⁵⁶ and when used in this sense the term means funds employed in some business enterprise.⁵⁷ "Stock" is sometimes used in this sense to denote public funds or securities,⁵⁸ and formerly it was the common term for evidences of government debt.⁵⁹ The most frequent use of the word in this sense is with reference to corporate entities, and when used in this connection it is broadly defined as the sum of all the rights and duties of shareholders, but generally the term is used in a narrower sense, as, for example, to designate capital stock, capital, shares of stock, or certificates of stock, as stated in Corporations § 192.

Trees or plants. "Stock" is sometimes employed to indicate the stalk, stem, or trunk of a tree or other plant; the main body, or fixed and firm part; a stem in which a graft is inserted, and which is its support; also, a stem, tree, or plant which furnishes slips or cuttings.⁶⁰

In the law of descent the word "stock" is defined in Descent and Distribution § 1 as the progenitor of a family or ancestor.

Stock in Trade

The term "stock in trade" is very general⁶¹ and it varies in accordance with the business to which it is applied.⁶² It is usually applied to the stock of merchants and tradesmen,⁶³ and includes articles which cover a very wide range,⁶⁴ and in general everything that is appropriated or necessary to the carrying on of the trade.⁶⁵ In its limited or ordinary meaning, the term applies only to personal property employed by merchants and the like in their trade or business,⁶⁶ or, more specifically, to the visible and tangible property with which the trade or business of the owner is carried on, and to which it relates,⁶⁷ and it includes all chattels which the merchant acquires and puts into his place of business for use in his trade or for the purpose of sale.⁶⁸ It is said to be well understood as meaning

50. Iowa.—Jewell v. Sumner Tp., 84 N.W. 973, 975, 113 Iowa 47. 60 C.J. p 105 note 17.

To speak of a flock as the stock of a merchant would not be giving the word its ordinary significance.—Jewell v. Sumner Tp., supra.

51. Cal.—Braun v. Woollacott, 61 P. 801, 803, 129 Cal. 107. 60 C.J. p 105 note 18 [a].

52. Wash.—Plass v. Morgan, 78 P. 784, 785, 36 Wash. 160.

53. Pa.—Commonwealth v. Danville, etc., R. Co., 2 Pearson 400, 401.

54. Iowa.—The Peterson Co. v. Freeburn, 215 N.W. 746, 748, 204 Iowa 644.

The merchandise or thing itself
Iowa.—The Peterson Co. v. Freeburn, supra.

55. Mo.—Schnitzer v. Excelsior Powder Mfg. Co., App., 160 S.W. 282, 285.

56. S.C.—State v. Cheraw, etc., R. Co., 16 S.C. 524, 528. 60 C.J. p 110 note 97.

57. Pa.—Commonwealth v. Danville, etc., R. Co., 2 Pearson 400, 401.

58. Pa.—Commonwealth v. Danville, etc., R. Co., supra.

In England, the word "stock" includes certain public and private obligations, usually known to us as

bonds.—Tucker v. Curtin, Mass., 148 F. 929, 934, 78 C.C.A. 557—60 C.J. p 110 note 2.

59. N.J.—Rowe v. Davis, Ch., 47 A. 2d 36, 38, 138 N.J.Eq. 122.

60. U.S.—U. S. v. American Express Co., N.Y., 158 F. 808, 809, 86 C.C.A. 68.

60 C.J. p 105 note 10.

61. Ont.—Nolan v. Donnelly, 4 Ont. 440, 445.

60 C.J. p 106 note 35.

The word may not be sufficient, in and of itself, to identify property to which it is applied.—Wilson v. Kerr, 17 U.C.Q.B., Ont., 168, 171, 172 —60 C.J. p 107 note 53.

62. Cal.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

60 C.J. p 106 note 38.

Its meaning must depend on evidence of intention.—Todd v. Lewers, 9 S.C.Eq. 463, 464—60 C.J. p 106 note 37.

63. N.H.—Woodworth & Co. v. Concord, 96 A. 296, 297, 78 N.H. 54.

60 C.J. p 106 note 36.

64. Cal.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

65. S.C.—Todd v. Lewers, 9 S.C.Eq. 463, 464.

60 C.J. p 106 note 42.

Similarly stated

(1) The whole capital employed in the trade.—Todd v. Lewers, 9 S.C.Eq. 463, 464.

(2) Any kind of trade goods, according to the business carried on by the person and in the particular place mentioned.—Nolan v. Donnelly, 4 Ont. 440, 445.

66. N.H.—White Mountain Fur Co. v. Whitefield, 91 A. 870, 871, 77 N.H. 340.

60 C.J. p 106 note 39 [a].

67. Cal.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E.2d 505, 507, 321 Mass. 683.

60 C.J. p 107 note 51.

68. Fla.—Corpus Juris cited in Warren Co. v. Howell, 3 So.2d 167, 169, 147 Fla. 602.

60 C.J. p 106 note 39.

"I should be of the opinion that whatever he would need to carry on his business, not only of merchandise which he places upon his shelves or counter for sale, but such other materials as he would need for measuring, weighing or cutting such materials, or for keeping his books or cash, in connection with his business, would constitute the 'stock in trade of his business'."—Warren Co

goods for sale;⁶⁹ a stock of goods offered for sale;⁷⁰ the goods kept for sale by a merchant or shopkeeper;⁷¹ a stock of merchandise;⁷² merchandise or goods kept for sale or traffic;⁷³ the goods or chattels which a merchant holds for sale.⁷⁴

The following notes contain examples of property which has been held to be⁷⁵ or property which has been held not to be⁷⁶ "stock in trade."

The term "stock in trade" has been distinguished from "capital" see 12 C.J.S. p 1124 note 99.

"Stock in trade" as exempt from liability to seizure and sale under legal process see Exemptions § 45; as excluded from the term "capital assets" within the Internal Revenue Code, 26 U.S.C.A. § 117 (a) (1) and similar statutes dealing with taxation of capital gains or profits see Internal Revenue § 161; as used in tax statutes generally see Taxation §§ 88, 318, also 61 C.J. p 201 notes 78-81, p 525 note 52-p 526 note 68; and as used in insurance policies see the index to the title Insurance.

For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Other Phrases

Other phrases employing the term "stock" in its various senses are set out in the note.⁷⁷

STOCKHOLDER. In general, see Corporations §§ 475-713; in connection with particular associations, companies, or corporations, see Industrial Co-operative Societies § 7, Joint Stock Companies §§ 13-25, Street Railroads § 13, and the title indexes to Banks and Banking, Building and Loan Associations, Insurance, and Railroads. Consult also the Descriptive-Word Index.

STOCKJOBBER. An individual who makes it his continuous occupation or life business to buy and sell securities is called a "stockjobber" or "share-jobber."⁷⁸

v. Howell, 3 So.2d 167, 619, 147 Fla. 602.

69. N.H.—Woodworth & Co. v. Concord, 96 A. 296, 297, 78 N.H. 54. 60 C.J. p 107 note 43.

70. N.H.—Woodworth & Co. v. Concord, supra.

R.I.—Woodman v. American Print Works, 6 R.I. 470, 472.

71. Wis.—Wicker v. Comstock, 9 N. W. 25, 26, 52 Wis. 315.

72. Cal.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

60 C.J. p 106 note 41.

As that term is ordinarily used among business men.—Story v. Christin, supra.

73. N.H.—Woodworth & Co. v. Concord, 96 A. 296, 297, 78 N.H. 54.

Practical or ordinary meaning

N.H.—Woodworth & Co. v. Concord, supra.

74. Cal.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

60 C.J. p 107 note 49.

75. Held "stock in trade"

(1) Building and lot constituting entire property of a corporation.—Tuttle v. Junior Bldg. Corp., 41 S.E. 2d 365, 368, 227 N.C. 146.

(2) Electrical bookkeeping and accounting devices held in possession under a lease.—New England Mut. Life Ins. Co. v. City of Boston, 75 N. E.2d 505, 507, 321 Mass. 683.

(3) Nursery trees.—Story v. Christin, 95 P.2d 925, 927, 14 Cal.2d 592, 125 A.L.R. 1402.

(4) Refrigerating display case sold under a conditional sale contract.—

Warren Co. v. Howell, 3 So.2d 167, 169, 147 Fla. 602.

(5) Sewing machines owned by a foreign corporation in the possession of third persons under contracts by which they agreed to pay rent for such machines and after such rent had been fully paid to purchase said machines.—Singer Manuf'g Co. v. County Commissioners of Essex, 1 N.E. 419, 139 Mass. 266.

(6) Other examples see 60 C.J. p 107 note 54.

76. Held not "stock in trade"

(1) Accounts receivable.—Woodworth & Co. v. Concord, 96 A. 296, 297, 78 N.H. 54.

(2) Choses in action.—Woodworth & Co. v. Concord, supra.

(3) Other examples see 60 C.J. p 107 note 55.

77. Phrases

(1) "Capital stock" is defined generally and references to its specific application in various titles are made in 12 C.J.S. p 1131 note 92-p 1133 note 68.

(2) "Certificate of stock" defined see Corporations § 258.

(3) "Joint stock company" as an association of individuals for purposes of profit see Joint Stock Companies § 1 et seq.

(4) "Pool stock" defined see Corporations § 215.

(5) "Rolling stock" defined see Railroads § 1 r, and for other references see the title index. What may be used in the way of rolling stock upon street railroad tracks is treated in Street Railroads § 144. What constitutes the situs of rolling stock for the purposes of local taxation is

discussed in the C.J.S. title Taxation § 341, also 61 C.J. p 545 notes 81-96.

(6) "Stock and bond" method of valuing railroad property for tax purposes see Taxation § 426.

(7) "Stock article" see 6 C.J.S. p 775 note 9.1.

(8) "Stock beer" see Intoxicating Liquors § 13.

(9) "Stock broker," generally, see the title index to Brokers.

(10) "Stock cattle" defined see 14 C.J.S. p 37 notes 7, 8; as distinguished from "beef cattle" see 10 C.J.S. p 226 note 30.

(11) "Stock clock" see Gaming § 1 g.

(12) "Stock hogs" see 40 C.J.S. p 405 note 22.

(13) "Stock insurance company" defined see Insurance § 94.

(14) "Stock laws" see Animals §§ 109-129.

(15) "Stock merchant or buyer" see 57 C.J.S. p 1064 note 74.

(16) "Stock note" see Insurance §§ 373-376.

(17) "Stock raiser," "stock raising" see 75 C.J.S. p 456 notes 24, 25.

(18) "Stock sheets" see 80 C.J.S. p 144 note 49.

(19) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 103 note 67-p 104 note 90, p 104 note 98-p 105 note 6, p 105 notes 12-14, p 108 note 56-p 109 note 82, p 110 note 7-p 111 note 16, p 111 notes 23-25, 42-45.

78. Tenn.—Vanderbilt University v. Cheney, 94 S.W. 90, 93, 116 Tenn. 259.

STOCKJOBING. It has been said that the term "stockjobbing" is not defined by law,⁷⁹ but generally it is the business of dealing in stocks or shares; the purchase and sale of stocks, bonds, etc., as carried on by jobbers who operate on their own account.⁸⁰

STOCK-PILE. To heap up; to accumulate in piles.⁸¹

STOCKYARD. The term "stockyard" within the Packers and Stockyards Act of 1921, 7 U.S.C.A. §§ 181-229, is defined in Agriculture § 65. Stockyards as nuisances, see Nuisances § 75 a (5).

STOLEN. See Steal 82 C.J.S. p. 1038 note 56-58.

STOMP. To stamp with the foot.⁸²

Stomping implies an act of violence; the use of the feet applied with force,⁸³ and for that reason is not distinguishable from "kicking" see 51 C.J.S. p 430 note 4.

STONE. Earthy or mineral matter condensed into a hard state.⁸⁴ In its ordinary use, the word is said to cover small pieces of rock or one of moderate size;⁸⁵ and in particular connections it has been held to include "concrete,"⁸⁶ and to mean "limestone,"⁸⁷ but not "limerock."⁸⁸

Stone as a mineral see Mines and Minerals § 2 b (6).

STONECUTTER. One who cuts, carves, or dresses stone.⁸⁹

STONEYARD. As defined by the dictionaries,⁹⁰ the word "stoneyard" means a yard in which stonecutting is carried on;⁹¹ a yard in which stones are cut, shaped, broken, or the like.⁹²

STOOD. See Stand 81 C.J.S. p 846 note 25.

STOOL PIGEON. See 70 C.J.S. p 1059 note 36.

STOOP. In connection with buildings, a front porch; an uncovered platform before the entrance of a house, raised, and approached by means of steps.⁹³

STOP.

As a noun, the term "stop" is defined as meaning a cessation of motion, operation, progress, function, or the like.⁹⁴

As a verb, the word "stop" ordinarily means to cease from some particular motion;⁹⁵ to bring from motion to rest;⁹⁶ to arrest the progress or action of;⁹⁷ to arrest the course, progress, or movement of;⁹⁸ check; hold back;⁹⁹ also, to cause to cease; to suppress.¹

The term "stop" is sometimes used in a loose sense as equivalent to slackening speed,² and it has been said that the words "stop" and "stopping" do not necessarily mean an instant cessation of movement, and are not generally used in that narrow sense,³

79. La.—State v. Debenture Guar-
antee, etc., Co., Ltd., 26 So. 600,
606, 51 La. Ann. 1874.

80. La.—State v. Debenture Guar-
antee, etc., Co., Ltd., supra.

81. Mo.—Allen v. Kraus, 215 S.W.
2d 739, 740, 358 Mo. 520.

82. Webster New Int.D.

83. Mich.—People v. Collins, 5 N.W.
2d 556, 563, 303 Mich. 34.

84. U.S.—Jenkins v. Johnson, C.C.
N.Y., 13 F.Cas.No.7,271, 9 Blatchf.
516, 519, 5 Fish.Pat.Cas. 433.
60 C.J. p 113 note 91.

Phrases

(1) "Stone coal" see Mines and
Minerals § 2 b (1).

(2) Other phrases as to which
more recent adjudications have not
been found see 60 C.J. p 113 note 97-
p 114 note 13.

85. Me.—Dionne v. West Paris Bldg.
Assoc., 139 A. 497, 498, 126 Me.
454.
60 C.J. p 113 note 92.

86. Miss.—Vicksburg v. Robinson,
74 So. 617, 619, 113 Miss. 687.
60 C.J. p 113 note 94.

87. Ill.—Kelly v. Chicago, 61 N.E.
1009, 1110, 193 Ill. 324.
60 C.J. p 113 note 95.

88. U.S.—Dunbar Lime Co. v. Utah-
Idaho Sugar Co., Utah, 17 F.2d 351,
356.

89. Webster New Int.D.
"Stonecutter's disease" and "stone-
cutter's consumption" as other
names for silicosis see 80 C.J.S. p
1298 notes 31, 32.

90. Mo.—Killian v. Brith Sholom
Congregation, App., 154 S.W.2d
387, 395.

N.J.—City of Newark v. Lippman,
177 A. 556, 557, 13 N.J.Misc. 248.
Zoning regulations controlling use of
property as stoneyard see Municipal
Corporations § 226(18) b.

91. N.J.—City of Newark v. Lipp-
man, 177 A. 556, 557, 13 N.J.Misc.
248.

92. Mo.—Killian v. Brith Sholom
Congregation, App., 154 S.W.2d 387,
395.

N.J.—City of Newark v. Lippman, 177
A. 556, 557, 13 N.J.Misc. 248.

93. N.J.—Morra v. Laurel Realty
Co., 125 A. 8, 9, 100 N.J.Law 125.
60 C.J. p 114 note 21.

94. Ind.—Northern Ind. Transit v.
Burk, 89 N.E.2d 905, 908, 228 Ind.
162.

95. S.C.—Zeigler v. Northeastern R.
Co., 7 S.C. 402, 408.

96. Cal.—Wixon v. Ralsch Improve-
ment Co., 266 P. 964, 967, 91 Cal.
App. 129.

97. U.S.—Carter Products v. Fed-
eral Trade Commission, C.A.7, 186
F.2d 821, 824.

98. Cal.—Wixon v. Ralsch Improve-
ment Co., 266 P. 964, 967, 91 Cal.
App. 129.

99. U.S.—Carter Products v. Fed-
eral Trade Commission, C.A.7, 186
F.2d 821, 824.

1. U.S.—Carter Products v. Federal
Trade Commission, supra.

2. S.C.—Zeigler v. Northeastern R.
Co., 7 S.C. 402, 408.

3. Pa.—Farmer v. Nevin Bus Lines,
163 A. 41, 42, 107 Pa.Super. 153.

"We hear of a 'slow' stop, and of a
'sudden' stop."—Farmer v. Nevin
Bus Lines, supra.

and the word "stopped" may have either a permanent or a temporary connotation.⁴

"Stop" has been held synonymous with "obstruct" see 67 C.J.S. p 44 note 93, and it has been distinguished from "continue" see 17 C.J.S. p 282 note 25. It has been said that the difference between the words "stop" and "wait" is infinitesimal.⁵

"Stopping" is said to be the antithesis of "going" see 38 C.J.S. p 933 note 70.

The duty to stop, look, and listen before going across railroad tracks is discussed generally in Railroads §§ 773-790; the duty of children to stop, look, and listen at crossings is discussed in § 806, and of persons under physical disability in § 807.

Phrases employing the word in its various forms are set out in the note.⁶

STOPE. See Mines and Minerals § 3 h.

STOPOVER. Act or privilege of stopping over.⁷

STOPPAGE. Ordinarily the word means the obstruction or hindrance to doing a particular thing.⁸

STORAGE. The term "storage" involves the safekeeping of goods,⁹ or, more specifically, the safekeeping of goods in a warehouse or other depository.¹⁰ The underlying idea of the word is that of

holding or safekeeping goods in a warehouse or other depository to await the happening of some future event or contingency which will call for the removal of the goods,¹¹ and as commonly used it is not properly applied to goods or merchandise on hand for immediate sale and disposition.¹² Thus the term connotes a certain degree of permanency and immobility.¹³

"Storage," as used with respect to automobiles, has been distinguished from "parking" see Motor Vehicles § 8.

Municipalities frequently regulate the storage of various articles and in this connection see the index to the title Municipal Corporations. Various legal aspects connected with the storage of explosive substances are treated in the title Explosives, and for specific references see the title index.

Regulation and conduct of the business of storage and safekeeping, for compensation, of goods see the C.J.S. title Warehousemen and Safe Depositaries § 1 et seq, also 67 C.J. p 441 note 1-p 602 note 89.

The rights and liabilities of proprietors of land in respect of the accumulation and storage of water on such land is discussed in the C.J.S. title Waters §§ 141-143, also 67 C.J. p 915 note 45-p 917 note 70.

STORE. A broad word,¹⁴ employed in many

4. U.S.—Carter Products v. Federal Trade Commission, C.A.7, 186 F.2d 821, 824.

"If we say that a person is dead because he has 'stopped breathing,' there is a connotation of permanence about the word 'stopped'; but if when driving an automobile a person 'stopped for a traffic light,' the connotation of 'stopped' would be of a temporary nature."—Carter Products v. Federal Trade Commission, supra.

5. Cal.—Goldberger v. Market St. Ry. Co., 20 P.2d 351, 355, 351 Cal. App. 597—Wixson v. Ralsch Improvement Co., 266 P. 964, 967, 91 Cal.App. 129.

6. Phrases

(1) "Stop order" as a direction given by the purchaser or seller to his broker see Brokers § 33; within Securities Act see Licenses § 73 a (2).

(2) "Stop sign" defined in connection with Highway Law see Highways § 240 b, and as used with reference to automobiles see the index to the title Motor Vehicles.

(3) "Stop valve;" in steam engines, a valve fitted to the steam pipes where they leave the several boilers in such a way that any boiler may be shut off from the others and from the engines; one which shuts

off, in a pipe the flow of fluid in either direction.—Ithaca Traction Corp. v. Travelers' Indemnity Co., 177 N.Y.S. 753, 755—60 C.J. p 115 note 41.

(4) "Stop watch" is a watch which indicates a fraction of a second, as fourths or fifths, by a hand which may be instantly stopped by pressure on a spring or catch; used in timing race horses, etc.—Didisheim Co. (Inc.) v. U. S., 13 Ct.Cust.App. 647, 648.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 114 notes 26-30, p 115 notes 31, 33-38.

7. Webster New Int.D.

Phrases

(1) "Stopover privilege" see Carriers §§ 371, 647, 814.

(2) "Stopover ticket" defined see Carriers § 603 a.

8. U.S.—The Cogne, D.C.Va., 20 F. 2d 698, 701.

Phrases

(1) "Stoppage in transitu" see Sales §§ 403-411; and the title index to Carriers.

(2) "Stoppage of work" within unemployment compensation statutes see Social Security and Public Welfare § 190.

9. N.M.—Tres Ritos Ranch Co. v. Abbott, 105 P.2d 1070, 1072, 44 N.M. 556, 130 A.L.R. 963.

Phrases

(1) "Dead storage" described as a type of storage in which goods come to rest for safekeeping, and as contrasted with "live storage" see 25 C.J.S. p. 1015 note 58; as applied to the storage of automobiles see Motor Vehicles § 724.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 116 notes 60-78.

10. U.S.—Lincoln Sav. Bank of Brooklyn v. Brown, Em.App., 137 F.2d 228, 230, 231.

11. Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387, 395.

60 C.J. p 115 note 55.

12. Mo.—Killian v. Brith Sholom Congregation, supra, 60 C.J. p 115 note 56.

13. N.M.—Tres Ritos Ranch Co. v. Abbott, 105 P.2d 1070, 1072, 44 N.M. 556, 130 A.L.R. 963.

14. N.J.—Corpus Juris quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

60 C.J. p 116 note 76.

senses,¹⁵ and variously defined.¹⁶

As a Noun

English and American lexicographers indicate that the word "store," as applied to a building, is used in a more extensive sense in the United States than it is in England, since in England the term is never applied to a place where goods are sold, but only to a place where they are deposited, whereas in the United States "store" is used to denote both places,¹⁷ and not merely a warehouse, storehouse, or storeroom,¹⁸ and thus in American usage, when employed to designate a place of business, "store"

is regarded as being a broad term.¹⁹

As a place for the sale of goods. The word "store" is employed in a commercial sense²⁰ denoting a place of sale,²¹ and in this sense it has a popular,²² settled,²³ and known²⁴ meaning, and a well-defined legal signification,²⁵ and is said to be well understood by every person.²⁶

As defined in this sense by lexicographers,²⁷ the word "store" means any place where goods are kept for sale,²⁸ or are sold,²⁹ whether by wholesale or retail;³⁰ a place where merchandise is kept for sale;³¹ a place where goods, wares, and merchandise are retailed;³² a shop;³³ as a book store, a dry

15. N.J.—*Corpus Juris* quoted in Jackson v. Lane, supra. 60 C.J. p 116 note 77.

16. N.J.—*Corpus Juris* quoted in Jackson v. Lane, supra. 60 C.J. p 116 note 78.

Subject to frequent definition
Mich.—Detroit Edison Co. v. Secretary of State, 275 N.W. 196, 198, 281 Mich. 428.

17. Conn.—Barth v. State, 18 Conn. 432, 440.

18. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

Tex.—Continental Paper Bag Co. v. Bosworth, Com.App., 276 S.W. 170, 171.

19. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

Tex.—Continental Paper Bag Co. v. Bosworth, Com.App., 276 S.W. 170, 171.

20. Ind.—Midwestern Petroleum Corp. v. State Board of Tax Com'rs, 187 N.E. 882, 888, 191 N.E. 153, 154, 206 Ind. 688.

21. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

22. N.J.—*Corpus Juris* quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 117 note 80.

23. Mass.—Commonwealth v. McMonagle, 1 Mass. 517.

N.J.—*Corpus Juris* quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

24. Mass.—Commonwealth v. McMonagle, 1 Mass. 517.

N.J.—*Corpus Juris* quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

25. N.J.—*Corpus Juris* quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

Philippine.—People v. Tubog, 49 Philippine 620, 624.

26. N.J.—*Corpus Juris* quoted in Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

60 C.J. p 117 note 83.

27. Ind.—Midwestern Petroleum Corp. v. State Board of Tax Com'rs, 191 N.E. 153, 154, 206 Ind. 688.

28. U.S.—Standard Oil Co. v. Green, D.C.Iowa, 34 F.Supp. 30, 34.

Ind.—Midwestern Petroleum Corporation v. State Board of Tax Com'rs, 187 N.E. 882, 888, 191 N.E. 153, 154, 206 Ind. 688.

Mich.—Detroit Edison Co. v. Secretary of State, 275 N.W. 196, 198, 281 Mich. 428.

N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

N.C.—North Carolina Self Help Corp. v. Brinkley, 2 S.E.2d 889, 893, 215 N.C. 615.

60 C.J. p 118 note 5.

Similarly defined

(1) A place where goods are kept for sale in large or small quantities. —Pitts v. Vicksburg, 16 So. 418, 419, 72 Miss. 181.

(2) A place where goods are exhibited for sale.—State v. Canney, 19 N.H. 135, 137.

(3) A place where goods are exposed for sale.—State v. Canney, supra.

29. Ark.—Petty v. State, 22 S.W. 654, 655, 58 Ark. 1.
60 C.J. p 117 note 95.

Similarly defined

(1) A place where goods are bought and sold.—Barth v. State, 18 Conn. 432, 439—60 C.J. p 118 note 2.

(2) Any place where goods are deposited and sold by one engaged in selling.—Warburton-Beacham Supply Co. v. Jackson, 118 So. 606, 608, 151 Miss. 503—Folkes v. State, 63 Miss. 81, 84.

(3) A place where goods are sold, whether in a house or not.—San Juan v. Porto Rico Coal Co., 28 Puerto Rico 245, 247—60 C.J. p 117 note 99.

30. U.S.—Standard Oil Co. v. Green, D.C.Iowa, 34 F.Supp. 30, 34.

Ind.—Midwestern Petroleum Corp. v. State Board of Tax Com'rs, 187 N.E. 882, 888, 191 N.E. 153, 154, 206 Ind. 688.

Mich.—Detroit Edison Co. v. Secretary of State, 275 N.W. 196, 198, 281 Mich. 428.

N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 117 note 97.

31. Mass.—Commonwealth v. Moriarty, 40 N.E.2d 307, 309, 311 Mass. 116—Commonwealth v. Whelan, 131 Mass. 419, 421.

N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

60 C.J. p 118 note 9.

This is one of the common significations of the word in this country. —Commonwealth v. Moriarty, 40 N.E.2d 307, 309, 311 Mass. 116—Commonwealth v. Whelan, 131 Mass. 419, 421.

32. Ark.—Campbell v. State, 282 S.W. 4, 5, 170 Ark. 936.

Similarly defined

A place where traffic is carried on in goods, wares, and merchandise.—People v. Tubog, 49 Philippine 620, 624.

33. U.S.—Standard Oil Co. v. Green, D.C.Iowa, 34 F.Supp. 30, 34.

Ind.—Midwestern Petroleum Corporation v. State Board of Tax Com'rs, 187 N.E. 882, 888, 191 N.E. 153, 154, 206 Ind. 688.

N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

N.C.—North Carolina Self Help Corp. v. Brinkley, 2 S.E.2d 889, 893, 215 N.C. 615.

60 C.J. p 118 note 12.

The word "store" is included within the meaning of "shop."—Commonwealth v. Moriarty, 40 N.E.2d 307, 308, 311 Mass. 116.

The word "store" is commonly used in this country as the equivalent of the English word "shop," which is very generally applied to what we call a "bakery," as it is to any room or building where any kind of article of traffic is sold.

Mich.—Richards v. Washington Fire & Marine Ins. Co., 27 N.W. 586, 588, 60 Mich. 420.

N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

goods store;³⁴ a shop in the sense of an establishment for retail or wholesale trade in goods in the nature of buying or selling;³⁵ and it may include a business establishment where personalty is kept and sold, and incidently gotten in salable condition.³⁶

The term "store" is often applied to a building³⁷ or room³⁸ in which goods of any kind,³⁹ or in which goods, wares, and merchandise,⁴⁰ are kept for sale, or to any building used for the sale of goods of any kind;⁴¹ and it is frequently applied to a house where goods are bought and sold⁴² or to a house used for the sale of goods, wares, and merchandise.⁴³

The word "store," as used to indicate a place for the sale of goods, has been held to embrace a wide variety of establishments,⁴⁴ including a bakery and restaurant,⁴⁵ a banking house,⁴⁶ a butcher shop,⁴⁷ a dwelling house,⁴⁸ a gasoline station,⁴⁹ a harness shop,⁵⁰ a junk shop,⁵¹ a lumber yard,⁵² a pharmacy,⁵³ a plantation store,⁵⁴ a plumber's shop,⁵⁵ a printing plant,⁵⁶ a retail meat shop,⁵⁷ a saloon,⁵⁸ a shoe shining shop,⁵⁹ and trade buildings.⁶⁰

However, other establishments have been held not to be "stores," such as a building with a limited stock of goods,⁶¹ a business office,⁶² a countinghouse privilege,⁶³ desk room,⁶⁴ a dressmaking establish-

Similarly defined

(1) A shop for the sale of goods.—*Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 384, 58 Am.R. 667—60 C.J. p 118 note 13.

(2) A shop for the sale of goods of any kind, by wholesale or retail.—*State v. Canney*, 19 N.H. 135, 137—60 C.J. p 118 note 14.

34. Mo.—*State v. Sprague*, 50 S.W. 901, 903, 149 Mo. 409.

35. La.—*Sherrouse Realty Co. v. Marine*, App., 46 So.2d 156, 159.

36. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, 59 A.2d 662, 672, 142 N.J.Eq. 193.

Tex.—*Continental Paper Bag Co. v. Bosworth*, Com.App., 276 S.W. 170, 171.

37. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, Ch., 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 117 note 84.

The American word "store" applies to the building, the name more strictly belonging to the collection of wares within it.

Mich.—*Richards v. Washington F. & M. Ins. Co.*, 27 N.W. 586, 587, 60 Mich. 420.

N.J.—*Jackson v. Lane*, 59 A.2d 662, 673, 142 N.J.Eq. 193.

A building outwardly designed, adapted, and constructed for a trade might popularly be described as a store, and would be understood as devoted to retail trade.—*Gunther v. Atlantic Refining Co.*, 121 A. 53, 54, 277 Pa. 289—60 C.J. p 123 note 57.

38. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 117 note 85.

39. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 117 note 86.

40. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, supra.
60 C.J. p 117 note 87.

41. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, supra.
60 C.J. p 117 note 92.

42. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, supra.
60 C.J. p 117 note 91.

Popular signification

Ala.—*Sparrenberger v. State*, 53 Ala. 481, 484, 25 Am.R. 643.

Ark.—*Campbell v. State*, 282 S.W. 4, 5, 170 Ark. 936.

Frequently, in describing buildings in a street, the house in which goods are kept for sale, or a house erected for that purpose.—*Burress v. Blair*, 61 Mo. 133, 140.

43. Ky.—*Simpson v. Commonwealth*, 244 S.W. 912, 913, 196 Ky. 403.

44. N.J.—*Jackson v. Lane*, 59 A.2d 662, 672, 142 N.J.Eq. 193.

45. N.J.—*Corpus Juris* quoted in *Jackson v. Lane*, 59 A.2d 662, 672, 142 N.J.Eq. 193.
60 C.J. p 118 note 17.

46. Tex.—*Continental Paper Bag Co. v. Bosworth*, Com.App., 276 S.W. 170, 171.
60 C.J. p 118 note 18.

47. Ark.—*Petty v. State*, 22 S.W. 654, 655, 58 Ark. 1.
60 C.J. p 118 note 19.

48. S.C.—*State v. Ginns*, 10 S.C.L. 583, 585.
60 C.J. p 119 note 20.

49. Ind.—*Midwestern Petroleum Corporation v. State Board of Tax Com'rs*, 187 N.E. 882, 888, 206 Ind. 688.

Pa.—*Gunther v. Atlantic Refining Co.*, 121 A. 53, 54, 277 Pa. 289.

Where automobile accessories are sold

U.S.—*Fox v. Standard Oil Co. of New Jersey*, W.Va., 55 S.Ct. 333, 336, 294 U.S. 87, 79 L.Ed. 780.

Tex.—*Standard Oil Co. of Texas v. State*, Civ.App., 142 S.W.2d 519, 521, 522, 523.

50. Ark.—*Campbell v. State*, 282 S.W. 4, 5, 170 Ark. 936.
60 C.J. p 119 note 22.

51. Minn.—*Kelly v. Theo. Hamm Brewing Co.*, 168 N.W. 131, 132, 140 Minn. 371.

Miss.—*Pitts v. Vicksburg*, 16 So. 418, 419, 72 Miss. 181.

52. Miss.—*Folkes v. State*, 63 Miss. 81, 83.

53. Kan.—*State v. Hanchette*, 129 P. 1184, 1185, 88 Kan. 864.
60 C.J. p 119 note 25.

54. Miss.—*Craig v. Pattison*, 21 So. 756, 757, 74 Miss. 881.
60 C.J. p 119 note 26.

55. Miss.—*Warburton-Beacham Supply Co. v. Jackson*, 118 So. 606, 608, 151 Miss. 503.

56. Tex.—*Continental Paper Bag Co. v. Bosworth*, Com.App., 276 S.W. 170, 171.
60 C.J. p 119 note 28.

57. Tenn.—*Eastman v. Jackson*, 10 Lea 162, 164.
60 C.J. p 119 note 29.

58. Minn.—*Kelly v. Theo. Hamm Brewing Co.*, 168 N.W. 131, 132, 140 Minn. 371.
60 C.J. p 119 note 30.

59. Man.—*Just v. Stewart*, 23 Man. 517, 522.
60 C.J. p 119 note 31.

60. Pa.—*Gunther v. Atlantic Refining Co.*, 121 A. 53, 54, 277 Pa. 289—*Hoffman v. Parker*, 86 A. 864, 865, 239 Pa. 398.
60 C.J. p 119 note 32.

61. Colo.—*Divine v. George*, 166 P. 242, 244, 63 Colo. 341.
60 C.J. p 119 note 33.

62. N.Y.—*People v. Marks*, 4 Park. Cr. 153, 157.
60 C.J. p 119 note 34.

63. Me.—*Martin v. Portland*, 17 A. 72, 73, 81 Me. 293.
60 C.J. p 119 note 35.

64. Me.—*Martin v. Portland*, 17 A. 72, 73, 81 Me. 293.
60 C.J. p 119 note 36.

ment,⁶⁵ a factory,⁶⁶ a gasoline station,⁶⁷ a granary,⁶⁸ an inhabited place,⁶⁹ a park,⁷⁰ and a restaurant.⁷¹

As a place for the storage of goods. The word "store" is not confined in its meaning to a shop in the sense of an establishment for retail or wholesale trade in goods in the nature of buying or selling,⁷² but it also may denote a place for the storage of goods;⁷³ a place of deposit;⁷⁴ a place of deposit for goods, especially for large quantities;⁷⁵ a place where supplies, as provisions, arms, clothing, or goods of any kind, are kept for future use or distribution;⁷⁶ a storehouse;⁷⁷ a warehouse;⁷⁸ a magazine.⁷⁹

In the sense of quantity. It has been said that the word "store" properly means the quantity of a thing accumulated or deposited.⁸⁰

Stores. The word "stores" is defined as meaning supplies, as of ammunition, arms, or clothing, provided for a special purpose; necessary article, especially of food; as a ship's stores, military stores.⁸¹ Applied to vessels, it is said to be a term more general than "provisions" in that it is not confined to articles of food or subsistence,⁸² but may include

such things as anchors, cables, ropes,⁸³ coal,⁸⁴ oil, sails,⁸⁵ or wood⁸⁶ for the vessel's use, as distinguished from goods or merchandise earning freight.⁸⁷

Comparisons and distinctions. "Store" has been held synonymous with "shop" see 80 C.J.S. p 1266 note 84, "storehouse,"⁸⁸ and "warehouse" see the C.J.S. title Warehousemen and Safe Depositaries § 1, also 60 C.J. p 121 note 83 [a].

It has been compared with, or distinguished from, "factory" see Manufactures § 1 c (2), "mercantile establishment" see 30 C.J.S. p 1235 note 88, "restaurant" see Innkeepers § 1 b, "shop" see 80 C.J.S. p 1266 notes 85, 86, and "storehouse."⁸⁹

As a Verb

The term "store" is variously defined as meaning to deposit in a storehouse or other building for preservation;⁹⁰ to keep merchandise for safe custody, to be delivered in the same condition as when received;⁹¹ to stock against a future time.⁹²

"Stored," the past participle of the verb "store,"⁹³ has been said to mean simply placed or located,⁹⁴

65. Ont.—Toronto v. Foss, 27 Ont.L. 264, 268, 270, 8 Dom.L.R. 641.

66 C.J. p 119 note 37.

66. U.S.—Thurston v. Union Ins. Co. of Philadelphia, C.C.N.H., 17 F. 127, 129.

67. Wis.—Wadhams Oil Co. v. State, 245 N.W. 646, 649, 210 Wis. 448, 246 N.W. 687, 688.

68. N.H.—State v. Wilson, 47 N.H. 101, 104.

60 C.J. p 119 note 39.

69. Philippine.—People v. Tubog, 49 Philippine 620, 624.

60 C.J. p 119 note 40.

70. Conn.—State v. Barr, 39 Conn. 40, 44.

60 C.J. p 119 note 41.

71. Ala.—State Tax Commission v. Gay-Teague Realty Co., 185 So. 739, 740, 237 Ala. 133.

60 C.J. p 119 note 42.

As ordinarily used, the word "store" does not include a restaurant.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

72. La.—Sherrouse Realty Co. v. Marine, App., 46 So.2d 156, 159.

73. La.—Sherrouse Realty Co. v. Marine, supra.

74. Ala.—Sparrenberger v. State, 53 Ala. 481, 483, 25 Am.R. 643.

N.H.—State v. Canney, 19 N.H. 135, 137.

75. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.

Similarly defined

A place where goods are kept on deposit, especially in large quantities.—Pitts v. Vicksburg, 16 So. 418, 419, 72 Miss. 181.

76. Mo.—State v. Sprague, 50 S.W. 901, 903, 149 Mo. 409.

77. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.
N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 893, 215 N.C. 615.
60 C.J. p 121 note 81.

The word "store" has a popular signification as a house where goods are stored.

Ala.—Sparrenberger v. State, 53 Ala. 481, 484, 25 Am.R. 643.

Ark.—Campbell v. State, 282 S.W. 4, 5, 170 Ark. 936.

78. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.
N.C.—North Carolina Self Help Corp. v. Brinkley, 2 S.E.2d 889, 893, 215 N.C. 615.
60 C.J. p 121 note 83.

79. N.J.—Jackson v. Lane, 59 A.2d 662, 672, 142 N.J.Eq. 193.
N.C.—North Carolina Self Help Corp. v. Brinkley, 2 S.E.2d 889, 893, 215 N.C. 615.
60 C.J. p 120 note 75.

80. N.H.—State v. Canney, 19 N.H. 135, 137.

81. New Standard D.

82. N.Y.—Crooke v. Slack, 20 Wend. 177.

83. Eng.—The Nicolay Belozwetow, [1913] P. 1, 5.

84. N.Y.—Crooke v. Slack, 20 Wend. 177.
60 C.J. p 121 note 92.

85. Eng.—The Nicolay Belozwetow, [1913] P. 1, 5.—The Tongariro, [1912] P. 297, 301.

86. N.Y.—Crooke v. Slack, 20 Wend. 177.

87. Eng.—The Tongariro, [1912] P. 297, 301.

88. Mo.—State v. Sprague, 50 S.W. 901, 903, 149 Mo. 409.

89. Me.—New Limerick v. Watson, 57 A. 79, 81, 98 Me. 379.
60 C.J. p 121 note 81 [a].

90. Mo.—Renshaw v. Missouri State Mut. F. & M. Ins. Co., 15 S.W. 945, 947, 103 Mo. 595, 23 Am.S.R. 904.
60 C.J. p 121 note 7.

91. Mich.—Smith v. German Ins. Co., 65 N.W. 236, 240, 107 Mich. 270, 30 L.R.A. 368.
60 C.J. p 121 note 9.

92. N.Y.—Lee v. Vacuum Oil Co., 7 N.Y.S. 426, 433 note, 54 Hun 156.

93. Webster New Int.D.

94. Ga.—Moseley v. State, 74 Ga. 404.
60 C.J. p 122 note 19.

but in a limited and technical sense, it has been held to mean delivered as to a warehouseman in exchange for a warehouse receipt;⁹⁵ kept for safe custody.⁹⁶

"Storing," the present participle of the verb "store,"⁹⁷ connotes a certain degree of permanency,⁹⁸ and is defined as meaning the laying away for future use⁹⁹ or for preservation;¹ the act of laying away or furnishing against a future time;² and it may be used to denote a keeping of merchandise for safe custody to be delivered in the same condition as when received, where the safekeeping is the principal object of the deposit, and not a keeping for the purpose of consumption or sale in the usual course of business.³

It has been said that the words "storing" and "use" are not synonyms.⁴

The term "storing" as used in fire policies prohibiting the storing of certain articles is construed in Insurance § 558 b (1).

Phrases

Phrases employing the word "store" are set out in the note.⁵

STOREHOUSE. It has been said that the word "storehouse" is vulgarly used in different senses, and, perhaps, not exactly alike in different parts of the country.⁶ It does not necessarily refer to a house or a building, strictly speaking,⁷ but it may be employed to designate the building, only,⁸ and not to include the stock of goods therein.⁹

The term "storehouse" is employed to designate a building for keeping goods of any kind, especially provisions;¹⁰ a building for keeping grain or goods of any kind;¹¹ a building for the storing of grain, foodstuffs, or goods of any kind;¹² an apartment or building for the temporary reception and storage of goods and merchandise;¹³ a house in which things are stored;¹⁴ a magazine;¹⁵ a repository;¹⁶ a warehouse.¹⁷

95. U.S.—*Evans v. New York & P. S. S. Co.*, D.C.N.Y., 163 F. 405, 406. 60 C.J. p 122 note 20.

96. U.S.—*Southern Ry. Co. v. Stearns Bros.*, C.C.A.N.C., 28 F.2d 560, 562. 60 C.J. p 122 note 22.

97. Webster New Int.D.

98. Ga.—*Williams v. Grier*, 26 S.E. 2d 698, 703, 196 Ga. 327.

99. Tex.—*Backues v. Woods*, Civ. App., 218 S.W.2d 892, 895. 60 C.J. p 123 note 40.

1. Tex.—*Backues v. Woods*, supra.

2. S.C.—*State v. Bradley*, 96 S.E. 142, 143, 109 S.C. 411.

Similarly defined

The stocking or furnishing against a future time.—*State v. Campbell*, 140 S.E. 97, 141 S.C. 428—*Easley Town Council v. Pegg*, 41 S.E. 18, 19, 63 S.C. 98.

3. N.Y.—*O'Neil v. Buffalo F. Ins. Co.*, 3 N.Y. 122, 127. 60 C.J. p 122 note 36, p 123 notes 38, 39.

Similarly stated

The keeping of merchandise in safe custody, when the keeping is the principal object of the deposit.—*Lee v. Vacuum Oil Co.*, 7 N.Y.S. 426, 433, 54 Hun 156.

4. Wash.—*Northern Pac. Ry. Co. v. Henneford*, 113 P.2d 545, 547, 9 Wash.2d 18.

5. Phrases

(1) "Chain store" and "chain store taxes" see Licenses §§ 22 b (2), 30 d (4), 48 d.

(2) "Feed store" as place where food for animal consumption is sold see Food § 1.

(3) "Food store" as place where food for human consumption is sold see Food § 1.

(4) "Secondhand store" generally see Secondhand 79 C.J.S. p 934 note 94.

(5) "Store account" within statute of limitations see Limitations of Actions § 72 d.

(6) "Store fixtures" within fire policy see Insurance § 316.

(7) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 119 notes 43-72, p 121 notes 84, 85, 98-4, p 122 notes 13-18, 23-31, p 123 notes 42-51, p 124 notes 72, 73.

6. N.C.—*State v. Sandy*, 25 N.C. 570, 573.

7. Ky.—*Moss v. Commonwealth*, 111 S.W.2d 628, 630, 271 Ky. 283. 60 C.J. p 125 note 1.

8. Ky.—*Dennison v. Commonwealth*, 270 S.W. 752, 753, 208 Ky. 366. 60 C.J. p 124 note 79.

9. Ky.—*Dennison v. Commonwealth*, supra.

A stock of goods may be properly referred to and described as a "storehouse," but this meaning is considered obsolete.—*Dennison v. Commonwealth*, supra.

10. Colo.—*Tollifson v. People*, 112 P. 794, 797, 49 Colo. 219. 60 C.J. p 124 note 80.

"A common use of it is to designate a building in which domestic supplies are kept at a place of residence." Ala.—*Caraway v. State*, 93 So. 334, 18 Ala.App. 541.

N.C.—*State v. Sandy*, 25 N.C. 570, 573.

11. N.H.—*State v. Wilson*, 47 N.H. 101, 104.

N.C.—*State v. Sandy*, 25 N.C. 570, 573.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 126 notes 25-34, 36.

12. Ky.—*Moss v. Commonwealth*, 111 S.W.2d 628, 630, 271 Ky. 283. 60 C.J. p 124 note 81.

13. Ala.—*Andrews v. State*, 26 So. 522, 523, 123 Ala. 42.

14. Ky.—*Moss v. Commonwealth*, 111 S.W.2d 628, 630, 271 Ky. 283. 60 C.J. p 124 note 93.

Similarly defined

(1) A house for the storage of goods.—*Krebs Mfg. Co. v. Brown*, 18 So. 659, 108 Ala. 508, 54 Am.S.R. 188 —60 C.J. p 124 note 90.

(2) Any house, not an office, or a shop, or a room in a steam or other boat, in which goods, wares, and merchandise are usually deposited for safekeeping or for sale.—*Caraway v. State*, 93 So. 334, 18 Ala.App. 541—60 C.J. p 125 note 97.

15. Ky.—*Moss v. Commonwealth*, 111 S.W.2d 628, 630, 271 Ky. 283. 60 C.J. p 125 note 8.

16. Ky.—*Moss v. Commonwealth*, supra. 60 C.J. p 125 note 99.

Similarly defined

A repository or receptacle where goods are stored.—*Moss v. Commonwealth*, supra.

17. Mo.—*State v. Sprague*, 50 S.W. 901, 903, 149 Mo. 409. 60 C.J. p 125 note 19.

The word does not always have the larger meaning of storage house,¹⁸ but is frequently applied to places of business,¹⁹ and thus is sometimes employed as meaning a shop;²⁰ a store;²¹ a building in which goods of any kind are kept for sale;²² a house where merchandise is sold;²³ any place where goods are kept for sale, whether by wholesale or retail.²⁴

The term "storehouse" has been held to embrace a wide variety of places,²⁵ such as a corn crib,²⁶ a garage,²⁷ a grain elevator,²⁸ a granary,²⁹ a grocery store annex,³⁰ a livery stable,³¹ a meat house,³² an opera house,³³ a retail liquor house,³⁴ a saloon,³⁵ a smokehouse,³⁶ a terminal warehouse,³⁷ a tobacco barn,³⁸ an underground gasoline storage tank;³⁹ and a vat for storing hides.⁴⁰

On the other hand, it has been held that the term does not include a building used for offices only,⁴¹ a ginhouse,⁴² a locker,⁴³ a small wine room in a cellar,⁴⁴ or a stock of goods in a building.⁴⁵

"Storehouse" has been held synonymous with "store" see supra p 103 note 88, and to a certain extent is synonymous with "storeroom."⁴⁶ The term has been held synonymous with, and has also

been distinguished from, "warehouse" see the C.J.S. title Warehousemen and Safe Depositaries § 1, also 60 C.J. p 125 note 19 [a]—[d].

It has been compared with, or distinguished from, "building" see 12 C.J.S. p 382 note 55.3, "factory" see Manufactures § 1 c (2), and "store" see supra p 103 note 89.

The word "storehouse," as construed in various penal statutes, is treated in Arson § 6 a, Burglary §§ 23 b, 35 e, 53, and Larceny § 12.

STOREKEEPER. The term "storekeeper" is indefinite.⁴⁷ It may mean a wholesale merchant or a petty dealer,⁴⁸ and it may refer to a principal, or to an agent or servant.⁴⁹ It is defined as meaning a man who has the care of a store; one who takes care of a store.⁵⁰

It does not necessarily imply or indicate good credit.⁵¹

STORER. One who or that which stores.⁵²

STOREROOM. A room in a storehouse or repository; a room in which articles are stored.⁵³ The

18. Ga.—Coleman v. State, 7 S.E.2d 212, 214, 61 Ga.App. 658.

19. N.C.—State v. Sandy, 25 N.C. 570, 573.

20. Ga.—Coleman v. State, 7 S.E.2d 212, 214, 61 Ga.App. 658. 60 C.J. p 125 note 13.

21. Ky.—Moss v. Commonwealth, 111 S.W.2d 628, 630, 271 Ky. 283. 60 C.J. p 125 note 15.

22. Tenn.—Bank of Commerce & Trust Co. v. Burke, 185 S.W. 704, 706, 135 Tenn. 19, Ann.Cas.1918C 439.

23. Ga.—Coleman v. State, 7 S.E.2d 212, 214, 61 Ga.App. 658.

24. Ga.—Coleman v. State, supra.

25. Held to include

(1) A building within which were stored tools, utensils, and parts of machinery not in use.—Horn v. Commonwealth, 159 S.W.2d 417, 418, 289 Ky. 600.

(2) A building used as a place of business and in which a sum of money was stored.—Moseley v. State, 29 S.E.2d 86, 87, 70 Ga.App. 610.

26. Neb.—Steele v. State, 113 N.W. 798, 80 Neb. 9, 127 Am.S.R. 741. 60 C.J. p 125 note 2.

27. Ky.—Bean v. Commonwealth, 17 S.W.2d 262, 263, 229 Ky. 400. 60 C.J. p 125 note 3.

28. Neb.—Metz v. State, 65 N.W. 190, 191, 46 Neb. 547. 60 C.J. p 125 note 4.

29. Ky.—Wilson v. Commonwealth, 192 S.W. 631, 174 Ky. 602.

60 C.J. p 125 note 5.

30. Ohio.—State v. Turnbaugh, 85 N.E. 1060, 1061, 79 Ohio St. 63.

31. Ky.—Wilson v. Commonwealth, 192 S.W. 631, 174 Ky. 602—Webb v. Commonwealth, 35 S.W. 1038, 1039, 18 Ky.L. 220.

32. Neb.—Steele v. State, 113 N.W. 798, 80 Neb. 9, 127 Am.S.R. 741.

Va.—Benton v. Commonwealth, 21 S. E. 495, 498, 91 Va. 782.

33. Ky.—Wilson v. Commonwealth, 192 S.W. 631, 174 Ky. 602—Hunter v. Commonwealth, 48 S.W. 1077, 1078, 20 Ky.L. 1165.

34. Ky.—Drury v. Commonwealth, 172 S.W. 94, 96, 162 Ky. 123.

35. Ky.—Drury v. Commonwealth, supra. 60 C.J. p 125 note 12.

36. Ala.—Caraway v. State, 93 So. 334, 18 Ala.App. 541. 60 C.J. p 125 note 14.

37. Ill.—Armour & Co. v. Industrial Board of Illinois, 114 N.E. 173, 176, 275 Ill. 328. 60 C.J. p 125 note 16.

38. Ky.—Wilson v. Commonwealth, 192 S.W. 631, 174 Ky. 602. 60 C.J. p 125 note 17.

39. Ky.—Moss v. Commonwealth, 111 S.W.2d 628, 630, 271 Ky. 283.

40. Neb.—Steele v. State, 113 N.W. 798, 80 Neb. 9, 127 Am.S.R. 741. 60 C.J. p 125 note 18.

41. Ala.—Jefferson v. State, 14 So. 627, 100 Ala. 59.

60 C.J. p 126 note 20.

42. Fla.—Givens v. State, 23 So. 850, 851, 40 Fla. 200.

43. Ky.—Wilson v. Commonwealth, 192 S.W. 631, 632, 174 Ky. 602. 60 C.J. p 126 note 22.

44. Ky.—Wilson v. Commonwealth, supra. 60 C.J. p 126 note 23.

45. Ky.—Dennison v. Commonwealth, 270 S.W. 752, 753, 208 Ky. 366. 60 C.J. p 126 note 24.

46. Colo.—Tollifson v. People, 112 P. 794, 796, 49 Colo. 219. 60 C.J. p 127 note 50.

47. Mich.—Higler v. People, 6 N.W. 664, 665, 44 Mich. 299, 38 Am.R. 267.

48. Mich.—Higler v. People, supra.

49. Mich.—Higler v. People, supra.

50. Fla.—Salomon v. Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am.R. 667.

51. Mich.—Higler v. People, 6 N.W. 664, 665, 44 Mich. 299, 38 Am.R. 267. 60 C.J. p 126 note 43.

52. New Standard D. Statutes imposing tax on storers of gasoline see Licenses § 30 d (3) (b).

53. Colo.—Tollifson v. People, 112 P. 794, 797, 49 Colo. 219.

term may contemplate a room in an apartment or flat house set apart and having conveniences such as shelves, hooks, etc., for storage purposes.⁵⁴ While it has been said that the word does not necessarily mean either a storehouse or warehouse,⁵⁵ yet to a certain extent the words "storeroom" and "storehouse" are synonymous as stated *supra* p 105 note 46.

STORM. It has been said that the word "storm" does not seem to have acquired a legal sense or signification,⁵⁶ and that therefore in ascertaining its meaning recourse must be had to the ordinary standard of definition and interpretation.⁵⁷

As a noun. The word "storm," as a noun, is defined generally as meaning an outburst of tumultuous force,⁵⁸ and it is sometimes used in a figurative sense;⁵⁹ but it more frequently is used with respect to the weather, and in this sense it is connected indissolubly with the idea of violent force, vehement action, turbulent commotion, and disturbance, and it involves some preternatural action of the elements.⁶⁰

Defined with respect to the weather, the word "storm" means a violent agitation or commotion of the elements by winds, etc.;⁶¹ a commotion of the elements;⁶² the violent action of one or more of the

meteoric elements, wind, rain, snow, hail, or thunder and lightning;⁶³ a violent disturbance of the atmosphere, producing wind, rain, snow, hail, or thunder and lightning;⁶⁴ a violent wind;⁶⁵ a tempest.⁶⁶

The term does not necessarily imply the fall of anything from the clouds,⁶⁷ but it is often applied to a fall of rain or snow,⁶⁸ and sometimes to a heavy fall of rain, snow, or the like, without wind.⁶⁹

"Storm" has been compared with, or distinguished from, "flood," see 36 C.J.S. p 1028 note 14, "freshet" see 37 C.J.S. p 1379 note 68, "gale" see 37 C.J.S. p 1422 note 17, "hurricane" see 41 C.J.S. p 373 note 83, and "brisk wind."⁷⁰

As a verb. The term "storm" is defined as meaning to blow with violence; also, to rain, hail, snow, or the like, usually in a violent manner, or with high wind.⁷¹ It is also defined as meaning to be, or cause to be, tempestuous; to throw into commotion or tumult; to move about with violence, rage, or fury;⁷² and in a somewhat different sense as meaning to attack by open force.⁷³

Phrases employing the word "storm" in its various senses are set out in the note.⁷⁴

STORMY. Agitated with furious winds;⁷⁵ boisterous; tempestuous; violent.⁷⁶

54. N.Y.—Gardner v. Roosevelt Hotel, 24 N.Y.S.2d 261, 263, 175 Misc. 610.

60 C.J. p 126 note 48.

55. Ohio.—Hagar v. State, 35 Ohio St. 268, 270.

60 C.J. p 126 note 49.

56. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.

57. Pa.—Stover v. Insurance Co., *supra*.

58. Iowa.—Jordan v. Iowa Mut. Tornado Ins. Co., 130 N.W. 177, 178, 151 Iowa 73.

Mo.—Schaeffer v. Northern Assur. Co., App., 177 S.W.2d 688, 691.

59. **Figurative sense**

Poets and rhetoricians are in the habit of using the term in a figurative sense, as, for example, a storm of passion, a storm of affliction, a storm of sedition, storming a fort, etc.—Stover v. Insurance Co., 3 Phila., Pa., 38, 39.

60. Pa.—Stover v. Insurance Co., *supra*.
60 C.J. p 127 notes 58, 59.

61. N.D.—Rober v. Northern Pac. R. Co., 142 N.W. 22, 27, 25 N.D. 394.
Pa.—Tyson v. Union Mut. Fire, etc., Ins. Co., 2 Montg. Co. 17.

62. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.

63. Pa.—Riale v. Old Guard Mut. Fire, etc., Ins. Co., 14 Pa. Dist. 639.

64. Pa.—Tyson v. Union Mutual Fire & Storm Insurance Co., 2 Montg. Co. 17.

Similarly stated

The word "storm" is a general name applied to any violent commotion or disturbance of the atmosphere, producing or attended by wind, rain and snow, hail, or thunder and lightning.—Riale v. Old Guard Mutual Fire & Storm Ins. Co., 14 Pa. Dist. 639.

65. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.
60 C.J. p 127 note 68.

66. Pa.—Riale v. Old Guard Mut. Fire, etc., Ins. Co., 14 Pa. Dist. 639—Stover v. Insurance Co., 3 Phila. 38, 39.

67. N.D.—Rober v. Northern Pac. Ry. Co., 142 N.W. 22, 27, 25 N.D. 394.
60 C.J. p 127 note 66 [a].

68. Pa.—Tyson v. Union Mut. Fire, etc., Ins. Co., 2 Montg. Co. 17.

69. Pa.—Riale v. Old Guard Mut. Fire, etc., Ins. Co., 14 Pa. Dist. 639.
60 C.J. p 127 note 67.

70. U.S.—The Snap, D.C.Va., 24 F. 292, 293.

71. Webster New Int.D.

72. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.

To rage or rave

Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.

73. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.

74. Phrases

(1) "Storm sewer" generally see Sewer 80, C.J.S. p 130, notes 74, 78, 79; see also title index to Municipal Corporations.

(2) "Storm-tide line or mark" is described as the line or mark where the ordinary storm drives the ordinary tide; it has been held incapable of designating an absolute or fixed boundary, but relative, and as having relation to the condition of things from time to time.—Camden, etc., Land Co. v. Lippincott, 45 N.J. Law 405, 413, 415—60 C.J. p 128 note 3.

(3) "Storm water" see the C.J.S. title Waters § 112, also 60 C.J. p 128 notes 94—96.

(4) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 127 notes 75—78, p 128 notes 79—84, 91, 5—9.

75. N.D.—Rober v. Northern Pac. R. Co., 142 N.W. 22, 27, 25 N.D. 394.
60 C.J. p 128 note 15.

76. Pa.—Stover v. Insurance Co., 3 Phila. 38, 39.
60 C.J. p 129 note 17.

STORY.

As a narrative. The word "story" is defined in one sense as meaning the facts or events in a given case considered in their sequence, whether or not they are related;⁷⁷ an account of an event or incident; a relation; a recital;⁷⁸ a report;⁷⁹ an anecdote; an account; a statement; anything told.⁸⁰ The term "story" may mean a connected account or narration, oral or written, of events of the past, a narrative, either true or fictitious; specifically a fictitious tale; hence a falsehood; a fib; a lie.⁸¹ In this sense "story" has been held synonymous with "rumor" see 77 C.J.S. p 545 note 72, and "yarn."⁸²

As a part of a building. Applied to a building, the definitions of most general acceptance⁸³ are a set of rooms on the same floor or level;⁸⁴ a floor;⁸⁵ or the habitable⁸⁶ space⁸⁷ between two floors; that part of a building between the top of any floor beams and the top of the floor or roof beams next above;⁸⁸ also, a vertical physical division of a house;⁸⁹ or a horizontal division of a building's exterior considered architecturally, which need not correspond exactly with the stories within.⁹⁰ As used in this sense, the word "story" has been compared with, or distinguished from, "room" see 77 C.J.S. p 539 note 64.1.

STOVE. A word which covers a wide variety of heat-producing apparatus employed for various uses.⁹¹ The distinguishing feature of a stove is to produce heat.⁹²

"Stove works." A term used to designate all the grounds used by a manufacturer for the manufacture of stoves, including the buildings and all the grounds about the buildings, whether or not such grounds are fenced in.⁹³

STOVEPIPE. See 70 C.J.S. p 1087 note 21.

STOWAGE. See the title index to Shipping.

STOWAWAY.

As a noun, one who conceals himself aboard an outgoing vessel,⁹⁴ or on board a vessel about to leave port,⁹⁵ for the purpose of obtaining,⁹⁶ or in order to obtain,⁹⁷ free passage; one who steals his passage.⁹⁸

The deportation of alien stowaways, and the penalty imposed for permitting their escape, are treated in Aliens §§ 100 b (1), 114 b. Stowaways are also discussed in the title Seamen; and for specific references see that title index.

77. Neb.—Carleton v. State, 61 N. W. 699, 708, 43 Neb. 373.

78. Neb.—Carleton v. State, supra. 60 C.J. p 129 note 21.

79. Neb.—Carleton v. State, supra. 60 C.J. p 129 note 21½.

80. Neb.—Carleton v. State, supra.

81. Neb.—Carleton v. State, supra. 60 C.J. p 129 note 24.

Phrases

(1) "Coin a story" see 14 C.J.S. p 1314 note 10.

(2) Other phrases employing the word "story" in the sense of a narrative and as to which more recent adjudications have not been found see 60 C.J. p 129 notes 26, 27.

82. Cal.—People v. Santos, 26 P.2d 522, 527, 134 Cal.App. 736.

83. Ind.—Lagler v. Bye, 85 N.E. 36, 37, 42 Ind.App. 592.

84. Cal.—Biber v. O'Brien, 32 P.2d 425, 429, 138 Cal.App. 353.

Ind.—Lagler v. Bye, 85 N.E. 36, 37, 42 Ind.App. 592.

R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 48 R.I. 175.

Phrases

(1) "Mezzanine story" defined see 57 C.J.S. p 1077 note 86.

(2) Other phrases employing the word "story" as denoting a part of a building see 60 C.J. p 129 note 35-p 130 note 42.

85. R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 494, 48 R.I. 175. 60 C.J. p 129 note 29.

86. Cal.—Biber v. O'Brien, 32 P.2d 425, 429, 138 Cal.App. 353.

R.I.—Hunter v. Narragansett Electric Lighting Co., 146 A. 624, 625, 50 R.I. 196—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 494, 48 R.I. 175.

87. Cal.—Biber v. O'Brien, 32 P.2d 425, 429, 138 Cal.App. 353.

R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 494, 48 R.I. 175. 60 C.J. p 129 note 33.

88. Mass.—Vallen v. Cullin, 130 N.E. 216, 217, 238 Mass. 145.

89. Ind.—Lagler v. Bye, 85 N.E. 36, 37, 42 Ind.App. 592. 60 C.J. p 129 note 34.

90. R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 48 R.I. 175.

91. N.H.—Stevens v. Mutual Protection Fire Ins. Co., 149 A. 498, 501, 84 N.H. 275. 60 C.J. p 130 note 44. Stoves as part of realty see Fixtures § 45.

92. N.H.—Stevens v. Mutual Protection F. Ins. Co., supra.

93. N.Y.—People v. Haight, 7 N.Y. S. 89, 54 Hun 8. 60 C.J. p 130 note 46.

94. U.S.—U. S. v. Smith, C.C.A.III., 27 F.2d 642, 644—Corpus Juris cited in The Western World, D.C.N. Y., 31 F.Supp. 340, 341.

95. U.S.—U. S. v. Sandrey, C.C.La., 48 F. 550, 551.

96. U.S.—U. S. v. Smith, C.C.A.III., 27 F.2d 642, 644—Corpus Juris cited in The Western World, D.C.N. Y., 31 F.Supp. 340, 341.

97. U.S.—U. S. v. Sandrey, C.C.La., 48 F. 550, 551.

98. U.S.—U. S. v. Williams, D.C.S. D., 193 F. 228, 230. 60 C.J. p 130 note 55.

As a verb, to conceal on ship, train, or airplane so as to obtain free passage or to escape from pursuers.⁹⁹

STOWMAN. See Railroads § 1 g.

STRADDLE. To stretch the legs widely apart over or across; also, to sit or mount astride; as, to straddle a stream; to straddle a horse.¹

STRAGGLER. One who straggles or wanders apart from others; one who strays from the direct or proper course or from the main body, as from a procession.²

STRAIGHT. Direct; uninterrupted; unbroken.³

"Straight time." In describing rate of pay, as for services, the term is said to mean all the time elapsed, without deduction for time lost by reason of wet weather or other causes not the willful act of the person rendering the services;⁴ full time.⁵

Other phrases employing the term are set out in the note.⁶

STRAIN. The word "strain" is sometimes used to indicate a condition where the members of the body and their muscles are wrenched out of natural shape

or are distorted by the application of external force so that a twist results.⁷

As a noun, the word "strain" is defined as meaning distress or harm from overexertion;⁸ the hurt from an injury or from an excessive tension, as of the muscles or nerves;⁹ the physiological effect or injury due to excessive tension or effort.¹⁰ It does not always mean a sprain or an overexertion.¹¹

As a verb, "strain" is defined as meaning to extend with great effort; to extend to the utmost; to stretch beyond its proper limit;¹² also, to injure, as in the muscles or joints, by causing to make too strong an effort,¹³ to injure by pressing to excessive effort;¹⁴ to harm by overexertion.¹⁵

"Strain" has been held to be synonymous with "sprain" see 81 C.J.S. p 838 note 84, "twist,"¹⁶ and "wrench."¹⁷ It has been distinguished from "hernia" see 39 C.J.S. p 896 note 61.1.

Strains suffered by workmen in the course of, and arising out of, their employment are generally regarded as "accidental" injuries compensable under compensation acts, see the C.J.S. title Workmen's Compensation Acts §§ 183-186, also 71 C.J. p 618 note 85-p 622 note 28.

Phrases employing the term are set out in the note.¹⁸

99. N.Y.—Tamas v. 20th Century Fox Film Corporation, 25 N.Y.S.2d 899, 900.

1. New Standard D. As a brokerage term see Gaming §§ 1 h, 10.

2. New Standard D. "Straggler" under naval regulations see Army and Navy § 40 a.

3. U.S.—U. S. v. Scruggs-Vandervoort-Barney Dry Goods Co., 18 C. C.P.A., Customs, 279, 282.

4. Ark.—Maurice v. Hunt, 97 S.W. 664, 665, 80 Ark. 476, 479.

5. N.B.—Roy v. Saint John Lumber Co., 46 N.B. 120, 128, 60 C.J. p 131 note 82.

6. Phrases

(1) "Straight bill of lading" see Carriers § 122.

(2) "Straight candy" contrasted with "chance candy" see 12 C.J.S. p 1111 note 44.1.

(3) "Straight cut" see 25 C.J.S. p 434 note 19.1.

(4) "Straight line" see 54 C.J.S. p 561 notes 19, 20.

(5) "Straight-line method" of ascertaining depreciation within Internal Revenue Code with respect to income taxes see Internal Revenue §§ 355, 601; of computing depreciation for rate-making purposes see Public Utilities §§ 18 b (2) (c) bb, 25 b (2) (b), 45.

(6) "Straight poker" see Gaming § 1 b (3).

(7) "Straight whisky" see Intoxicating Liquors § 13.

7. Md.—Ross v. Smith, 179 A. 173, 175, 169 Md. 86.

8. Colo.—Central Surety & Insurance Corporation v. Industrial Commission of Colorado, 271 P. 617, 619, 84 Colo. 481.

9. Utah.—Tintic Standard Mining Co. v. Industrial Commission, 110 P.2d 367, 369, 100 Utah 96.

10. Colo.—Central Surety & Insurance Corporation v. Industrial Commission of Colorado, 271 P. 617, 619, 84 Colo. 481.

Similarly expressed

Tension and excessive physical effort.—McCormick Lumber Co. v. Department of Labor and Industries,

108 P.2d 807, 812, 7 Wash.2d 40—Devlin v. Department of Labor and Industries of Washington, 78 P.2d 952, 959, 194 Wash. 549.

11. Utah.—Tintic Standard Mining Co. v. Industrial Commission, 110 P.2d 367, 369, 100 Utah 96.

12. La.—Jackson v. Travelers' Ins. Co., App., 151 So. 790, 792, 793.

13. Colo.—Central Surety & Insurance Corporation v. Industrial Commission of Colorado, 271 P. 617, 619, 84 Colo. 481.

La.—Jackson v. Travelers' Ins. Co., App., 151 So. 790, 792, 793.

14. Colo.—Central Surety & Insurance Corporation v. Industrial Commission of Colorado, 271 P. 617, 619, 84 Colo. 481.

15. La.—Jackson v. Travelers' Ins. Co., App., 151 So. 790, 792, 793.

16. Md.—Ross v. Smith, 179 A. 173, 175, 169 Md. 86.

17. Md.—Ross v. Smith, supra.

18. Phrases

(1) "Accidental strain" defined as a strain that is unforeseen, unexpected, and unintended.—Central Surety

STRAIT. An arm of the sea; a narrow sea between two lands; an inland sea, having connection with the ocean at each end, and lying between a long extent of land on each side of it.¹⁹

STRAND. As a noun, and in one sense, the word "strand" means that portion of land lying between high-water and low-water marks;²⁰ the space on the shore between ordinary high-water and low-water marks;²¹ the shore or bank of the sea or river;²² the beach;²³ the shore or the beach of the sea or ocean or of large lakes;²⁴ the sea beach;²⁵ the flats.²⁶ In this sense "strand" has been held synonymous with "beach" see 10 C.J.S. p 217 note 99, and "shore" see 80 C.J.S. p 1270, note 63.

In a different sense "strand" means a single thread; a string; one of a number of flexible things, as grasses, strips of bark, or hair when used to be twisted or woven together,²⁷ and in this sense it has been distinguished from "yarn."²⁸

The verb "to strand" is defined as meaning to drift or be driven on shore; to drive or run aground on the sea shore.²⁹

"Stranding" is a running upon the shore;³⁰ a taking of the ground which happens from some accidental or extraneous cause.³¹ Stranding occurs

when a ship takes ground, not in the ordinary course of navigation but by accident, or the force of wind or sea, and remains stationary for some time,³² and it implies a settling of the vessel, and some rest or interruption of the voyage, and not merely a "touch and go" situation.³³

In marine insurance terminology "stranding" is a "peril of the sea," as stated in Insurance § 854. See also Insurance §§ 857, 947, 952 c, 955 a. "Stranding" is also treated in Seamen and Shipping; and for specific references see the indexes to those titles. See also the Descriptive-Word Index.

STRANGER. The word "stranger" comes almost directly from the Latin "extra," meaning beyond or outside,³⁴ and, observing all the common and legal definitions of the word, it has only the same value in expressing thought as its Anglo-Saxon counterpart, the word "outsider."³⁵

In legal contemplation, it is well recognized that the word often has a meaning distinctly different from that in common usage,³⁶ and, while in ordinary use, the word "stranger" means "not of the household,"³⁷ in its general legal signification "stranger" is opposed to the word "privy."³⁸

It has been stated that strangers are third persons,³⁹ generally all persons in the world except par-

& Insurance Corporation v. Industrial Commission of Colorado, 271 P. 617, 619, 84 Colo. 481.

(2) "Strain wire."—Campbell v. United Rys. Co., 147 S.W. 788, 791, 243 Mo. 141.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 132 notes 93-98, 4-6.

19. U.S.—The Martha Anne, D.C.N. Y., 16 F.Cas.No.9,146, Olcott 18, 21.

Long Island Sound held a strait.—The Martha Anne, supra.

20. N.Y.—Stillman v. Burfeind, 47 N.Y.S. 280, 281, 21 App.Div. 13.

Phrases employing the term as a noun and as to which more recent adjudications have not been found see 60 C.J. p 132 notes 23-26, p 133 notes 30, 31.

21. N.Y.—Bell v. Hayes, 69 N.Y.S. 898, 901, 60 App.Div. 382.

22. Or.—Harris v. St. Helens, 143 P. 941, 944, 72 Or. 377.

23. N.Y.—Bell v. Hayes, 69 N.Y.S. 898, 901, 60 App.Div. 382, 60 C.J. p 132 note 15.

24. Me.—Littlefield v. Littlefield, 28 Me. 180, 184.

25. Me.—Littlefield v. Littlefield, supra.

26. Mass.—Doane v. Willcutt, 5 Gray 328, 335, 6 Am.D. 369, 60 C.J. p 132 note 20.

27. U.S.—Haskell Golf Ball Co. v. Perfect Golf Ball Co., C.C.N.Y., 143 F. 128, 131, 60 C.J. p 133 note 27.

28. U.S.—Lawson v. Whitlock Cordage Co., C.C.A.N.J., 60 F.2d 362.

29. Century D.

30. Ohio.—Lake v. Columbus Ins. Co., 13 Ohio 48, 55, 42 Am.D. 188.

31. Wash.—Washington Iron Works v. St. Paul Fire & Marine Ins. Co., 222 P. 487, 488, 128 Wash. 349.

32. Ohio.—Lake v. Columbus Ins. Co., 13 Ohio 48, 66, 42 Am.D. 188, 60 C.J. p 133 note 40.

33. U.S.—New Castle Terminal Co. v. Western Assur. Co., D.C.Md., 5 F.Supp. 890, 891, 60 C.J. p 133 note 40 [d].

34. La.—Succession of Baker, 55 So. 714, 717, 129 La. 74, Ann.Cas.1912D 1181.

35. La.—Succession of Baker, supra.

36. Ga.—Deans v. Deans, 144 S.E. 116, 118, 166 Ga. 555, 60 C.J. p 134 note 47.

Method of determining meaning

The most effectual way in which to ascertain the meaning of the word "stranger" wherever used, is to contrast it with some other word in the text of known and fixed meaning.—Succession of Baker, 55 So. 714, 717, 129 La. 74, Ann.Cas.1912D 1181.

37. La.—Succession of Baker, supra, 60 C.J. p 134 note 46.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 135 notes 58-63.

38. N.Y.—O'Donnell v. McIntyre, 23 N.E. 455, 456, 118 N.Y. 156, 60 C.J. p 134 note 51.

39. N.M.—State v. Mills, 169 P. 1171, 1173, 23 N.M. 549, 60 C.J. p 134 note 52.

ties and privies,⁴⁰ and has the same meaning as though it read "all other persons."⁴¹ When used alone the word "stranger" is generally employed to denote one who is neither a party nor a privy to an act, a deed, or a record,⁴² but the term is generally used in the law with an adjunct, as "stranger to the deed, or to the record," or "stranger to the blood,"⁴³ and when used following other designations of persons it is generally intended to exhaust the whole category of persons within the range of the subject under discussion not included in the terms which preceded it.⁴⁴

While some of the definitions would seem to indicate that the terms "strangers" and "third persons" are synonymous,⁴⁵ the cases definitely establish that these terms are not synonymous.⁴⁶

The right of a stranger to invoke the statute of frauds is discussed in *Frauds, Statute of* § 220 a. Whether or not payment by a stranger operates as a satisfaction and extinguishment of a judgment, see *Judgments* § 557.

The term "stranger" as used with respect to the subject of subrogation is considered in *Subrogation* § 9; and the deposit of an instrument with a third person or stranger who is not a party to the instrument as a requisite to the creation of a valid escrow is discussed in *Escrows* § 7 a.

For other particular applications and specific uses of the word consult the *Descriptive-Word Index*.

STRANGLE. To suffocate by a pressure or constriction of the throat;⁴⁷ to stifle, choke, or suffocate in any manner; especially to interrupt the breathing

of, by entering the windpipe;⁴⁸ to deprive a person or animal of air;⁴⁹ also, to be strangled, or suffocated.⁵⁰

It has been held synonymous with "suffocate,"⁵¹ and has been distinguished from "smother" see 80 C.J.S. p 1337 note 9.

STRANGULATED. Constricted so as to prevent the passage of air, noting the trachea; or so as to cut off the blood-supply, noting a hernia or any part encircled by a tight band.⁵²

STRANGULATION. In general, the act of strangling, or the state of being strangled; suffocation by forcible compression or obstruction of the windpipe.⁵³ In pathology, the state of being strangulated; constriction of a part, as of the intestine in hernia, by mechanical means, to such a degree as to cut off circulation.⁵⁴

STRAP. A narrow strip or thong of some flexible material used for securing, holding together, wrapping, etc.; especially such a strip of leather, webbing, or the like, generally fitted with a clasp or buckle, and used for fastening, securing, holding together, etc.⁵⁵

"Strapping," in the fruit industry, means the securing of a metal band around each end of a box of fruit by means of a hand tool weighing only nine or ten pounds; it is done to strengthen the box for further shipment or exportation of the fruit.⁵⁶

STRATAGEM. An artifice, particularly in war;⁵⁷ a plan or scheme for deceiving an enemy;⁵⁸ any

40. N.M.—*State v. Mills*, supra.
60 C.J. p 134 note 53.

41. La.—*Succession of Baker*, 55 So. 714, 717, 129 La. 74, Ann.Cas.1912D 1181.

42. La.—*Succession of Baker*, supra.
60 C.J. p 134 note 50.

43. La.—*Succession of Baker*, supra.

44. La.—*Succession of Baker*, supra.
60 C.J. p 134 note 54.

45. Or.—*Balfour v. Burnett*, 41 P. 1, 2, 28 Or. 72.

46. Or.—*Balfour v. Burnett*, supra.

47. Ga.—*Lanier v. State*, 80 S.E. 5, 6, 141 Ga. 17.

48. Cal.—*Thomas v. Seaside Memorial Hospital of Long Beach*, 183 P.2d 288, 294, 80 Cal.App.2d 841.

49. Cal.—*Thomas v. Seaside Memorial Hospital of Long Beach*, supra.

50. Cal.—*Thomas v. Seaside Memorial Hospital of Long Beach*, supra.

51. Cal.—*Thomas v. Seaside Memorial Hospital of Long Beach*, supra.

52. *Stedman Med.D.*

Phrases

(1) "Strangulated hemorrhoids" see 39 C.J.S. p 888 note 99.5.

(2) "Strangulated hernia" see 39 C.J.S. p 896 note 62.

53. *New Standard D.*

54. *New Standard D.*

Similarly defined

"Strangulation" is the constriction of the contents of the hernial sac, or a portion thereof, in such a manner as to effect a stoppage of blood circulation in that part; it is quickly followed, if the condition is not remedied, by decay and mortification of the affected part.—*Furferi v. Pennsylvania R. Co.*, 189 A. 126, 129, 117 N.J.Law 508.

55. *Webster New Int.D.*

56. Wash.—*La Point v. Pacific Coast Strappers*, 13 P.2d 71, 72, 169 Wash. 71.

57. Tex.—*Mooney v. State*, 15 S.W. 724, 29 Tex.App. 257.

58. Tex.—*Mooney v. State*, supra.

artifice;⁵⁹ a trick by which some advantage is intended to be obtained.⁶⁰ The word implies artifice, trickery, deception, and perhaps even positive fraud practiced.⁶¹

STRATEGY. In general, the display or exercise of skill and forethought in carrying out one's plans, schemes, etc.; the use of stratagem or artifice, as in business, politics, or society, or in games.⁶² The term is also used in the operations of armies, conducted by a skillful commander, and implying tact and art in military maneuvering;⁶³ and it has been said that it is not very appropriate to the transactions of civil life.⁶⁴

"Strategy" has been held synonymous with "trick."⁶⁵

STRAW. The general term applied to the stalky residue of grain plants, especially wheat, rye, oats, barley,⁶⁶ and defined as meaning the stalk or stem of certain species of grain, pulse, etc., chiefly of wheat, rye, oats, barley, buckwheat, and peas, cut or broken off, and usually dry;⁶⁷ also, a piece of such a stem;⁶⁸ such stalks collectively, especially after drying and threshing, as, a load of straw.⁶⁹

It has been said that straw is too well known to require any description,⁷⁰ and that a hat made of

a leaf is not made of straw in any common or technical sense.⁷¹

The term "straw" is also defined as meaning of no value; worthless; sham; as, a straw bond, straw bail;⁷² and in this sense the word may be applied to a person who holds a naked title for the benefit of another.⁷³

"Straw" has been distinguished from "haulm" see 39 C.J.S. p 781 note 69, and "hay" see 39 C.J.S. p 803 note 12.

Phrases employing the word are set out in the note.⁷⁴

STRAY. An animal found in an unusual place for such an animal; or an animal that has roved for some time in a certain place, whose owner is unknown.⁷⁵

STREAM. Although it has been said that the definition of "stream" has caused the courts some trouble,⁷⁶ and that it is a word without definite legal meaning,⁷⁷ it has also been stated that it has a well-defined meaning.⁷⁸

In a broad general sense, the word "stream" means a flow, a flowing, that which flows;⁷⁹ any-

59. Tex.—Payne v. State, 43 S.W. 515, 516, 38 Tex.Cr. 494, 70 Am.S.R. 757—Mooney v. State, 15 S.W. 724, 29 Tex.App. 257.

60. Tex.—Payne v. State, 43 S.W. 515, 516, 38 Tex.Cr. 494, 498, 70 Am.S.R. 757—Mooney v. State, 15 S.W. 724, 29 Tex.App. 257.

61. N.C.—Fortune v. Watkins, 94 N. C. 304, 317.

62. New Standard D.

63. N.C.—Fortune v. Watkins, 94 N. C. 304, 317.

64. N.C.—Fortune v. Watkins, supra.

65. Minn.—State v. Smith, 85 N.W. 12, 13, 82 Minn. 342.
Mo.—Meriwether v. Publishers: George Knapp & Co., 97 S.W. 257, 268, 120 Mo.App. 354.

66. Idaho.—State v. Choate, 238 P. 538, 539, 41 Idaho 353.
60 C.J. p 135 note 84.

67. U.S.—Isler & Guye v. U. S., 10 Ct.Cust.App. 74, 78.
Idaho.—State v. Choate, 238 P. 538, 539, 41 Idaho 353.

Similarly defined

(1) A stalk or stem of grain, as of wheat, rye, oats, barley, or Indian corn; also, a stalk of buckwheat, beans, or peas.—State v. Choate, supra.

(2) A stalk, stem, or piece of a stalk or stem, of various grains, especially wheat, rye, barley, and buckwheat.—Isler & Guye v. U. S., 10 Ct. Cust.App. 74, 78.

68. U.S.—Isler & Guye v. U. S., supra.

69. Idaho.—State v. Choate, 238 P. 538, 539, 41 Idaho 353.
60 C.J. p 135 note 88.

70. U.S.—U. S. v. Goodwin, C.C.R. I., 25 F.Cas.No.15,229, 4 Mason 128, 130.

71. U.S.—U. S. v. Goodwin, supra.
60 C.J. p 135 note 85.

72. New Standard D.

73. Mass.—Collins v. Curtin, 89 N.E. 2d 211, 212, 325 Mass. 123.

74. Phrases

(1) "Straw bail" see Bail § 29 a.
(2) "Straw bond" see 11 C.J.S. p 392 note 84.3.

(3) "Straw boss" see Master and Servant § 1 b.

(4) "Straw braids" as exempt from tariff see Customs Duties § 73.

(5) "Straw hats" as dutiable see Customs Duties § 45 g.

(6) "Straw loan" see Banks and Banking § 896.

(7) "Straw man" see 54 C.J.S. p 1113 notes 73–75.

(8) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 135 notes 89–91, p 136 notes 93, 94.

75. La.—E. Imbeaux Co. v. Severt, 9 La. Ann. 124, 125.

76. Or.—State v. Hawk, 208 P. 709, 714, 105 Or. 319.

77. N.Y.—French v. Carhart, 1 N.Y. 96, 107, 4 How.Pr. 181.

78. Neb.—State v. Elckhoff, 154 N. W. 246, 247, 98 Neb. 739.
60 C.J. p 136 note 15.

79. Ill.—Illinois Cent. R. Co. v. Chicago, 50 N.E. 1104, 1108, 173 Ill. 471, 53 L.R.A. 408.

thing issuing from a source, and moving or flowing continuously;⁸⁰ a continued course or current.⁸¹ Thus the word "stream" implies motion,⁸² and by universal definition conveys the idea of uniform and unbroken succession of movement.⁸³

While the term "stream" may mean anything in fact which is liquid and flows in a line or course,⁸⁴ the word is used technically to distinguish the volume of water of a river, rivulet, or brook from the banks or bed,⁸⁵ and it ordinarily and most frequently⁸⁶ is used with respect to water,⁸⁷ signifying a running⁸⁸ or moving⁸⁹ body of water, a continuous⁹⁰ current,⁹¹ course,⁹² or flow⁹³ of water, in an ascertainable direction between banks or with-

in limits,⁹⁴ and thus is wholly inconsistent with a body of water at rest.⁹⁵

Streams are generally formed by surface waters gathering together in one channel and flowing therein,⁹⁶ and streams usually empty into other streams, lakes, or the ocean.⁹⁷

A stream must have substantial existence,⁹⁸ and must be something more than a mere surface draining, swelled by freshets and melting snow and running occasionally in hollows and ravines which are generally dry.⁹⁹ It must usually run in a definite,¹ defined² bed³ or channel,⁴ and ordinarily consists of bed, banks, and a watercourse.⁵

80. Ill.—Illinois Cent. R. Co. v. Chicago, supra.

81. Ill.—Illinois Cent. R. Co. v. Chicago, supra.

82. Ill.—School Trustees v. Schroll, 12 N.E. 243, 246, 120 Ill. 509, 60 Am. R. 575.

60 C.J. p 137 note 34.

83. U.S.—Homer Brooke Glass Co. v. Hartford-Fairmont Co., C.C.A. Conn., 262 F. 427, 431.

84. U.S.—Western Pac. R. Co. v. Southern Pac. Co., Cal., 151 F. 376, 398, 80 C.C.A. 606.

N.Y.—French v. Carhart, 1 N.Y. 96, 107, 4 How.Pr. 181.

85. Neb.—Dodge County v. Saunders County, 100 N.W. 934, 935, 70 Neb. 451.

86. Ind.—Hill v. Cincinnati, etc., R. Co., 10 N.E. 410, 109 Ind. 511—Weis v. Madison, 75 Ind. 241, 253, 39 Am.R. 135.

87. Iowa.—Long v. Boone Co., 36 Iowa 60, 64.

88. Ga.—Johnson v. State, 40 S.E. 807, 808, 114 Ga. 790.

89. Ind.—Hill v. Cincinnati, Etc., R. Co., 10 N.E. 410, 109 Ind. 511—Weis v. Madison, 75 Ind. 241, 253, 39 Am. R. 135.

90. Ga.—Johnson v. State, 40 S.E. 807, 808, 114 Ga. 790.

91. Ga.—Johnson v. State, supra.

Ill.—Illinois Cent. R. Co. v. Chicago, 50 N.E. 1104, 1108, 173 Ill. 471, 53 L.R.A. 408—Trustees of Schools v. Schroll, 12 N.E. 243, 246, 120 Ill. 509, 60 Am.R. 575—Joliet, etc., R. Co. v. Healy, 94 Ill. 416, 421.

Ind.—Vandalia R. Co. v. Yeager, 110 N.E. 230, 233, 60 Ind.App. 118.

Neb.—State v. Bickhoff, 154 N.W. 246, 247, 98 Neb. 739.

92. Md.—City Dairy Co. v. Scott, 100 A. 295, 296, 129 Md. 548.

Neb.—State v. Bickhoff, 154 N.W. 246, 247, 98 Neb. 739.

Tex.—St. Paul Fire & Marine Ins. Co. v. Carroll, Civ.App., 106 S.W.2d 757, 758.

93. Mass.—Inhabitants of Town of Holliston v. Holliston Water Co., 27 N.E.2d 194, 195, 196, 306 Mass. 17.

60 C.J. p 138 note 40.

94. Mass.—Inhabitants of Town of Holliston v. Holliston Water Co., supra.

95. Neb.—State v. Bickhoff, 154 N.W. 246, 247, 98 Neb. 739.

60 C.J. p 137 note 33.

96. Ariz.—Southern Pac. Co. v. Probstel, 150 P.2d 81, 83, 61 Ariz. 412.

Cal.—Mogle v. Moore, 104 P.2d 785, 789, 16 Cal.2d 1—Everett v. Davis, App., 107 P.2d 650, 655—Mogle v. Moore, App., 96 P.2d 147, 150.

The waters then lose their character as surface waters and become stream waters.

Ariz.—Southern Pac. Co. v. Probstel, 150 P.2d 81, 83, 61 Ariz. 412.

Cal.—Mogle v. Moore, 104 P.2d 785, 789, 16 Cal.2d 1—Everett v. Davis, App., 107 P.2d 650, 655—Mogle v. Moore, App., 96 P.2d 147, 150.

97. Ariz.—Southern Pac. Co. v. Probstel, 150 P.2d 81, 83, 61 Ariz. 412.

Cal.—Mogle v. Moore, 104 P.2d 785, 789, 16 Cal.2d 1—Everett v. Davis, App., 107 P.2d 650, 655—Mogle v. Moore, App., 96 P.2d 147, 150.

98. Tex.—Corpus Juris cited in St. Paul Fire & Marine Ins. Co. v. Carroll, Civ.App., 106 S.W.2d 757, 758.

60 C.J. p 137 note 35.

99. Mo.—Keener v. Sharp, 111 S.W. 2d 118, 120, 341 Mo. 1192—Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 57, 311 Mo. 175—Munkres v. Kansas City Railroad Co., 72

Mo. 514, 516—Dardenne Realty Co. v. Abeken, 106 S.W.2d 966, 968, 232 Mo.App. 945.

1. Mo.—Keener v. Sharp, 111 S.W.2d 118, 120, 341 Mo. 1192—Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 57, 311 Mo. 175—Munkres v. Kansas City Railroad Co., 72 Mo. 514, 516—Dardenne Realty Co. v. Abeken, 106 S.W.2d 966, 968, 232 Mo.App. 945.

A definite channel having a bed and sides or banks is an essential requisite to a stream.—State v. Hawk, 208 P. 709, 714, 105 Or. 319.

2. Ga.—Stoner v. Patten, 63 S.E. 897, 898, 132 Ga. 178—Pelham Phosphate Co. v. Daniels, 94 S.E. 846, 850, 21 Ga.App. 547.

3. Mo.—Keener v. Sharp, 111 S.W.2d 118, 120, 341 Mo. 1192—Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 57, 311 Mo. 175—Munkres v. Kansas City Railroad Co., 72 Mo. 514, 516—Dardenne Realty Co. v. Abeken, 106 S.W.2d 966, 968, 232 Mo.App. 945.

4. Ga.—Stoner v. Patten, 63 S.E. 897, 898, 132 Ga. 178—Pelham Phosphate Co. v. Daniels, 94 S.E. 846, 850, 21 Ga.App. 547.

Mo.—Keener v. Sharp, 111 S.W.2d 118, 120, 341 Mo. 1192—Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 57, 311 Mo. 175—Munkres v. Kansas City Railroad Co., 72 Mo. 514, 516—Dardenne Realty Co. v. Abeken, 106 S.W.2d 966, 968, 232 Mo.App. 945.

Or.—State v. Hawk, 208 P. 709, 714, 105 Or. 319.

5. Tex.—Corpus Juris cited in St. Paul Fire & Marine Ins. Co. v. Carroll, Civ.App., 106 S.W.2d 757, 758.

60 C.J. p 138 note 87.

A stream of water has banks.—Stoner v. Patten, 63 S.E. 897, 898, 132 Ga. 178—Pelham Phosphate Co.

While it has been said that the word "stream" implies a continuous current⁶ in one direction,⁷ it has also been stated that a continuous flow of water is not necessary to constitute a stream, and its waters stream waters,⁸ and that it is not essential in order for it to be classified as such that it flow continuously throughout the year⁹ or throughout its course.¹⁰ Thus a stream does not lose its character as such even though it may break up and disappear,¹¹ nor does a stream cease to be such merely because its course may be opposed by some obstruction, whether natural or artificial.¹² However, if water ceases to remain a channel, and spreads out over the surface of low lands and runs in different directions

in swags and flats without any definite channel, it ceases to be a stream.¹³

A stream includes any body of flowing water,¹⁴ such as a river,¹⁵ but tidewaters are not streams within the usual meaning of the term,¹⁶ nor are percolating waters¹⁷ or waters which ooze from a piece of marshy ground.¹⁸

The term "stream" is variously defined as meaning water;¹⁹ a current of water;²⁰ a steady current in a river or in the sea, especially the middle or most rapid part of a current or tide;²¹ a course of running water;²² a current or course of water or other fluid, flowing on the earth, as a river, brook, etc., or

v. Daniels, 94 S.E. 846, 850, 21 Ga. App. 547.

6. U.S.—Western Pac. R. Co. v. Southern Pac. Co., Cal., 151 F. 376, 398, 80 C.C.A. 606.
60 C.J. p 138 note 50.

Continuous flow

Unless water flows more or less in a channel and continuously it cannot be described as water which flows in "streams."—*McNab v. Robertson*, [1897] A.C. 129 (per Lord Shand)—60 C.J. p 138 note 39.

Regular flow

By the term "stream" is understood water which has a regular flow, and not that deposited during times of storm which immediately runs away and leaves in its course a mere stretch of sand and rock.—*San Pedro, L. A. & S. L. R. Co. v. Simons Brick Co.*, 187 P. 62, 64, 45 Cal.App. 57.

Without defined banks

A stream does not become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel.—*Blohowak v. Grochoski*, 96 N. W. 551, 553, 119 Wis. 189.

7. U.S.—Western Pac. R. Co. v. Southern Pac. Co., Cal., 151 F. 376, 398, 80 C.C.A. 606.
60 C.J. p 138 note 50.

8. Ariz.—Southern Pac. Co. v. Proebstel, 150 P.2d 81, 83, 61 Ariz. 412. Cal.—*Mogle v. Moore*, 104 P.2d 785, 789, 16 Cal.2d 1—*Everett v. Davis*, App., 107 P.2d 650, 655—*Mogle v. Moore*, App., 96 P.2d 147, 150.

9. Mo.—*Keener v. Sharp*, 111 S.W. 2d 118, 120, 341 Mo. 1192—*Sigler v. Inter-River Drainage Dist.*, 279 S. W. 50, 57, 311 Mo. 175—*Munkres v. Kansas City Railroad Co.*, 72 Mo. 514, 516—*Dardenne Realty Co. v. Abeken*, 106 S.W.2d 966, 968, 232 Mo.App. 945.

Tex.—*Corpus Juris* cited in *St. Paul Fire & Marine Ins. Co. v. Carroll*, Civ.App., 106 S.W.2d 757, 758.
60 C.J. p 137 note 35.

10. Tex.—*Corpus Juris* cited in *St. Paul Fire & Marine Ins. Co. v. Carroll*, Civ.App., 106 S.W.2d 757, 758.
60 C.J. p 137 note 36.

11. Ariz.—*Southern Pac. Co. v. Proebstel*, 150 P.2d 81, 83, 61 Ariz. 412.

Cal.—*Mogle v. Moore*, 104 P.2d 785, 789, 16 Cal.2d 1—*Everett v. Davis*, App., 107 P.2d 650, 655—*Mogle v. Moore*, App., 96 P.2d 147, 150.

12. N.Y.—*French v. Carhart*, 1 N. Y. 96, 107, 4 How.Pr. 181.

Similarly stated

Streams do not cease to be such because in consequence of some obstruction their water may be deepened or flow with a diminished velocity.—*French v. Carhart*, supra—60 C. J. p 138 note 47.

13. Mo.—*Keener v. Sharp*, 111 S.W. 2d 118, 120, 341 Mo. 1192—*Sigler v. Inter-River Drainage Dist.*, 279 S. W. 50, 57, 311 Mo. 175—*Munkres v. Kansas City Railroad Co.*, 72 Mo. 514, 516—*Dardenne Realty Co. v. Abeken*, 106 S.W.2d 966, 968, 232 Mo.App. 945.

14. La.—*Amerada Petroleum Corporation v. State Mineral Board*, 14 So.2d 61, 63, 203 La. 473.

15. La.—*Amerada Petroleum Corporation v. State Mineral Board*, supra.

All rivers and brooks are streams and have currents.—*Dodge County v. Saunders County*, 100 N.W. 934, 935, 70 Neb. 451.

16. Tex.—*State of Texas v. Chuoke*, C.C.A.Tex., 154 F.2d 1, 3.

17. Mass.—*Inhabitants of Town of Holliston v. Holliston Water Co.*, 27 N.E.2d 194, 196, 306 Mass. 17.

Similarly stated

(1) The term "stream" does not include the percolation of water below ground.—*Taylor v. St. Helens*, 6 Ch. D. 264, 273.

(2) A stream of water is very distinct from the percolations of subsurface water, which oozes in veins or filters through the earth's strata.—*Stoner v. Patten*, 63 S.E. 897, 898, 132 Ga. 178—*Pelham Phosphate Co. v. Daniels*, 94 S.E. 846, 850, 21 Ga. App. 547.

(3) Water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream.—*McNab v. Robertson*, [1897] A.C. 129, 134, 138 (per Lord Watson)—60 C.J. p 138 note 38.

18. Eng.—*McNab v. Robertson*, [1897] A.C. 129, 138 (per Lord Shand).
60 C.J. p 138 note 40.

19. Iowa.—*Long v. Boone Co.*, 36 Iowa 60, 64.

20. Ga.—*Johnson v. State*, 40 S.E. 807, 808, 114 Ga. 790.
60 C.J. p 137 note 29.

A stream of water is a current of water.—*Vandalia R. Co. v. Yeager*, 110 N.E. 230, 233, 60 Ind.App. 118.

21. Ill.—*Illinois Cent. R. Co. v. Chicago*, 50 N.E. 1104, 1108, 173 Ill. 471, 53 L.R.A. 408.
60 C.J. p 138 note 43.

22. Neb.—*State v. Eickhoff*, 154 N. W. 246, 247, 98 Neb. 739.

Tex.—*Corpus Juris* cited in *St. Paul Fire & Marine Ins. Co. v. Carroll*, Civ.App., 106 S.W.2d 757, 758.
60 C.J. p 137 note 27.

from a vessel, reservoir, or fountain;²³ a water-course having a source and terminus, banks, and channel, through which waters flow, at least periodically;²⁴ a body of flowing water;²⁵ a body of water having a continuous flow in one direction;²⁶ a river, rivulet, or brook.²⁷

"Stream" has been distinguished from "pond" or "lake" see the C.J.S. title Waters § 103, also 49 C.J. p 1079 note 12, 67 C.J. p 849 note 15, and "surface waters."²⁸

Matters pertaining to streams of water capable of ordinary navigation are treated in Navigable Waters § 1 et seq, and with respect to streams not capable of ordinary navigation in the C.J.S. title Waters § 1 et seq, also 67 C.J. p 675 note 1-p 1463 note 45.

References to the term "stream" as a boundary of land are made in the title index to Boundaries.

Thread of stream. The term "thread of stream" means the middle line between the shores, irrespective of the depth of the channel, taking it in the

natural and ordinary stage of the water,²⁹ at medium height, neither swollen by freshets nor shrunk by droughts;³⁰ the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream;³¹ the middle line of the channel, that is, of the hollow bed of running water, when the water is at its ordinary stages;³² that line which would give owners on either side access to the water at its lowest ebb.³³ It has been said that the thread of a nonnavigable stream is the line of the water at its lowest stage.³⁴ The term "thread of stream" means the same thing as "middle of main channel," or "middle of river," and refers to the center line of the main channel.³⁵ The relationship of the thread of the stream and the thalweg is treated in the definition Thalweg, post.

"Thread of stream" has been distinguished from "channel" see 14 C.J.S. p 397 note 15.

The term "thread of stream" is treated in Boundaries § 33, and Navigable Waters § 88. See also

Any course of running water

Md.—City Dairy Co. v. Scott, 100 A. 295, 296, 129 Md. 548.

23. Md.—City Dairy Co. v. Scott, supra.

24. Ariz.—Southern Pac. Co. v. Proebstel, 150 P.2d 81, 83, 61 Ariz. 412.

Cal.—Mogle v. Moore, 104 P.2d 785, 789, 16 Cal.2d 1—Everett v. Davis, App., 107 P.2d 650, 655—Mogle v. Moore, App., 96 P.2d 147, 150.

25. Ga.—Johnson v. State, 40 S.E. 807, 808, 114 Ga. 790.

Streams are bodies of flowing water.—Amerada Petroleum Corporation v. State Mineral Board, 14 So.2d 61, 68, 203 La. 473.

26. Tex.—Corpus Juris cited in St. Paul Fire & Marine Ins. Co. v. Carroll, Civ.App., 106 S.W.2d 757, 758. 60 C.J. p 137 note 25.

A stream of water is a body of water having a continuous flow in one direction.—Vandalia R. Co. v. Yeager, 110 N.E. 230, 233, 60 Ind.App. 118.

27. U.S.—Western Pac. R. Co. v. Southern Pac. Co., Cal., 151 F. 376, 398, 80 C.C.A. 606. 60 C.J. p 137 notes 27, 30.

Similarly defined

A rivulet or course of running water.—McNab v. Robertson, [1897] A. C. 129, 141.

28. Distinction stated

"The waters of Barilla Creek are not diffused over the surface of the ground, but are accustomed to flow in a well-defined channel, in a stream, which, though intermittent as to now, has a well-defined and permanent existence. They are therefore not surface waters, but are the waters of a stream."—International-Great Northern R. Co. v. Reagan, 49 S.W.2d 414, 418, 121 Tex. 233—Hoefs v. Short, 273 S.W. 785, 786, 114 Tex. 501, 40 A.L.R. 833.

29. Me.—Inhabitants of Warren v. Inhabitants of Thomaston, 75 Me. 329, 332, 46 Am.R. 397.

Tenn.—State v. Munice Pulp Co., 104 S.W. 437, 445, 119 Tenn. 47—Branham v. Bledsoe Creek Turnpike Co., 69 Tenn. 704, 706, 1 Lea 704, 27 Am.R. 789.

See Filum aquæ 36 C.J.S. p 761 note 87.

Thread of a private stream

The thread of a private stream is the line midway between the banks at the ordinary state of the water, without regard to the channel or the lowest or deepest part of the stream, and if the land upon one side is gradually and imperceptibly wearing away and soil is deposited upon the other, it is the thread of the stream for the time being, and not that which existed when the opposite owners acquired their titles, which forms the boundary between their estates.—Holmes v. Haines, 1 N.W.2d 746, 749, 231 Iowa 634.

30. Tenn.—State v. Munice Pulp Co., 104 S.W. 437, 445, 119 Tenn. 47—Branham v. Bledsoe Creek Turnpike Co., 69 Tenn. 704, 706, 1 Lea 704, 27 Am.R. 789.

31. La.—State v. Burton, 31 So. 291, 292, 106 La. 732.

32. Ohio.—Dayton v. Cooper Hydraulic Co., 10 Ohio S. & C.P.Dec. 192, 205.

33. Neb.—Curren v. All Persons Having or Claiming Any Interest in Certain Real Estate, 31 N.W.2d 405, 411, 149 Neb. 477.

34. N.Y.—Horton v. Niagara Lockport & Ontario Power Co., 247 N. Y.S. 741, 753, 231 App.Div. 386.

Measurement from low-water mark

Where one bank of a nonnavigable stream is quite precipitous and the other gradually sloping, so that on the abrupt margin the difference between the lines of ordinary and low water does not uncover much of the soil, but on the opposite bank the receding water exposes an extensive bed, the thread of the stream should not be measured from the lines of ordinary high water, but rather should be ascertained from the low-water mark.—Micelli v. Andrus, 120 P. 737, 741, 61 Or. 78.

35. Ill.—Buttenuth v. St. Louis Bridge Co., 17 N.E. 439, 443, 123 Ill. 535, 5 Am.S.R. 545.

the C.J.S. title Waters § 71, also 67 C.J. p 821 note 56.

Other phrases employing the word "stream" are set out in the note.³⁶

STREAMLINE. In the planning of bodies of airplanes, boats, automobiles, and railroad cars, a design which will result in an uninterrupted flow of the air or water about the body, instead of an eddying or turbulent motion.³⁷

STREET. The term is defined generally in Municipal Corporations § 1653 and references to it in various connections are made in the title index.

The word is treated in various other connections throughout this work, particular reference being made to the title indexes to Eminent Domain; Highways; and Motor Vehicles.

For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Phrases employing the word "street" are set out in the note.³⁸

36. Phrases

(1) "Running streams" consist of a well-defined channel with sides or banks, in which water habitually flows, although it need not flow continuously.—*State v. Hawk*, 208 P. 709, 714, 105 Or. 319.

(2) "Underground stream" differs from a surface stream only with respect to its location above or below the surface.—*Stoner v. Patten*, 63 S. E. 897, 898, 132 Ga. 178.

(3) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 138 note 55, p 139 note 74.

37. U.S.—*Forman v. American Exp. Co.*, D.C.N.Y., 37 F.Supp. 82, 83.

A streamlined body offers the least possible resistance to the fluid, and permits the current which it breaks simply to reunite in its wake, without the retarding or dragging eddies and turbulence created by partial vacuum in the wake of a non-streamlined body; the streamline design is typically a long ellipse, tapering to a point, and is illustrated in the cross-section of an airplane wing, and in a bird's or fish's body.—*Forman v. American Exp. Co.*, D.C.N.Y., 37 F. Supp. 82, 83.

38. Phrases

(1) "Street broker" defined see *Brokers* § 1 a.

(2) "Street car" defined generally see *Street Railroads* § 1; see also the title index to *Motor Vehicles*.

(3) "Street certificate" defined see *Corporations* § 258.

(4) "Street crossing" see 25 C.J.S. p 11 notes 31, 32.

(5) "Street crossing franchise" see 25 C.J.S. p 11 note 33.

38. Phrases

(6) "Street names" as applied to securities means securities listed on the New York Stock Exchange held in the name of brokers having seats on that Exchange and properly indorsed for transfer in blank, generally accepted as transferable like currency.—*Stubbs v. Fulton Nat. Bank of Atlanta*, C.C.A.Ga., 146 F.2d 558, 560.

(7) "Street railroad" or "street railway" generally see *Street Railroads* § 1 et seq; see also the title indexes to *Carriers*; and *Municipal Corporations*.

(8) "Street use" defined see *Municipal Corporations* § 1757.

(9) "Street work" defined see *Municipal Corporations* § 1044 c (1).

(10) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 139 notes 77-99, p 141 notes 29-39.

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(10) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 139 notes 77-99, p 141 notes 29-39.

STREET RAILROADS

This Title includes the construction, maintenance, regulation, and operation of railroads or tramways in streets of incorporated cities, towns, or villages, on the surface or elevated, depressed, or underground; organization of street railroad companies, and their rights, powers, and liabilities in respect of grants of franchises and public aid, and of the construction and maintenance of their roads and other property, and their ownership and conveyance thereof, and the rights and liabilities of their stockholders and officers; and also rights, duties, and liabilities of street railroad companies as to the public and as to individuals, in respect of the management and operation of their roads, otherwise than in their capacities of employers or carriers.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- I. DEFINITIONS AND NATURE AND STATUS, §§ 1-7**
- II. STREET RAILROAD COMPANIES OR CORPORATIONS, §§ 8-18**
- III. RIGHT TO CONSTRUCT AND OPERATE IN GENERAL, §§ 19-20**
- IV. DETERMINATION AS TO NECESSITY AND LOCATION, §§ 21-26**
- V. FRANCHISES OR PRIVILEGES IN STREETS, ROADS, OR BRIDGES, §§ 27-98**
 - A. GRANTS OF FRANCHISES OR PRIVILEGES, §§ 27-70
 - 1. *In General*, §§ 27-36
 - 2. *Grant or Consent by Local Authorities*, §§ 37-52
 - 3. *Consent of Abutting Owners*, §§ 53-70
 - B. CONSTRUCTION AND OPERATION OF GRANT IN GENERAL, §§ 71-74
 - C. LOCATION OF ROUTE AND TRACKS, §§ 75-78
 - D. ADDITIONAL TRACKS; BRANCHES, SWITCHES, TURNOUTS, AND THE LIKE; EXTENSIONS AND OTHER STRUCTURES, §§ 79-84
 - E. RIGHTS IN, AND USE OF, BRIDGES, TURNPIKES, AND TOLL ROADS, §§ 85-86
 - F. DURATION, EXTENSION, RENEWAL, REVOCATION, SURRENDER, AND FORFEITURE OF FRANCHISE OR GRANT; USURPATION OF FRANCHISE, §§ 87-98
- VI. RIGHTS IN, AND USE OF, PRIVATE PROPERTY; AND REMEDIES OF ABUTTING OWNERS, §§ 99-102**
- VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT, §§ 103-144**
 - A. IN GENERAL, §§ 103-110
 - B. RESTORATION, PAVING, AND REPAIR OF STREETS AND MAINTENANCE OF RAILROAD, §§ 111-128
 - C. RIGHTS IN, AND USE OF, TRACKS OF OTHER ROADS, §§ 129-131
 - D. CROSSING OR CONNECTION WITH OTHER RAILROADS, §§ 132-135
 - E. INJURIES FROM, OR INCIDENT TO, CONSTRUCTION OR MAINTENANCE, §§ 136-138
 - F. PENALTIES AND OFFENSES INCIDENT TO CONSTRUCTION AND MAINTENANCE, §§ 139-141
 - G. MOTIVE POWER AND ROLLING STOCK, §§ 142-144
- VIII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATIONS, §§ 145-153**
- IX. BONDS, LIENS, MORTGAGES, AND RECEIVERS, §§ 154-159**

See also descriptive word index in the back of this Volume

X. REGULATION AND OPERATION, §§ 160-340

- A. REGULATION IN GENERAL, §§ 160-176
- B. DUTY TO OPERATE AND DISCONTINUANCE, §§ 177-184
- C. OPERATION, §§ 185-340
 - 1. *Companies and Persons Liable for Injuries*, §§ 185-188
 - 2. *Care Required and Liability in General*, §§ 189-212
 - 3. *Defects and Obstructions*, §§ 213-223
 - 4. *Collisions*, §§ 224-244
 - 5. *Injuries to Persons on or near Tracks*, §§ 245-257
 - 6. *Injuries to Children and Persons under Disability*, §§ 258-262
 - 7. *Contributory Negligence*, §§ 263-287
 - 8. *Injuries Avoidable notwithstanding Contributory Negligence*, §§ 288-295
 - 9. *Actions for Injuries*, §§ 296-338
 - 10. *Offenses Incident to Operation of Street Railroads*, §§ 339-340

XI. CONSTRUCTION, ACQUISITION, AND OPERATION BY PUBLIC AUTHORITIES, §§ 341-345*Sub-Analysis***I. DEFINITIONS AND NATURE AND STATUS—p 126**

- § 1. Street Railroad—p 126
- 2. ——— Subway—p 130
- 3. ——— Elevated railroad—p 130
- 4. ——— Interurban railroad—p 131
- 5. ——— Nature and status—p 131
- 6. Street railroad company—p 131
- 7. ——— Nature and status—p 132

II. STREET RAILROAD COMPANIES OR CORPORATIONS—p 132

- § 8. Constitutional and statutory provisions in general—p 132
- 9. Incorporation and organization in general—p 132
- 10. Certificate or articles of incorporation—p 134
- 11. Reorganization—p 134
- 12. Officers and agents—p 136
- 13. Capital, stock, and stockholders—p 136
- 14. Powers of company in general—p 138
- 15. Carriage of freight—p 139
- 16. Auxiliary bus lines—p 140
- 17. Amendment or modification of charter—p 140
- 18. Dissolution or revocation of charter; winding up—p 140

III. RIGHT TO CONSTRUCT AND OPERATE IN GENERAL—p 141

- § 19. Source and nature of right—p 141
- 20. Who may acquire and exercise right—p 142

IV. DETERMINATION AS TO NECESSITY AND LOCATION—p 142

- § 21. In general—p 142
- 22. Authority and permission of municipality—p 143
- 23. Petition and consent of property owners—p 144
- 24. Appointment, powers, and proceedings of commissioners—p 144

See also descriptive word index in the back of this Volume

IV. DETERMINATION AS TO NECESSITY AND LOCATION—Continued

- § 25. Authority and determination by court—p 146
- 26. Review of determination—p 146

V. FRANCHISES OR PRIVILEGES IN STREETS, ROADS, OR BRIDGES—p 148**A. GRANTS OF FRANCHISES OR PRIVILEGES—p 148****1. *In General*—p 148**

- § 27. Necessity—p 148
- 28. — Effect of unauthorized entry on, or occupation of, streets, roads, or bridges—p 149
- 29. Power to grant—p 150
- 30. Grant by private or local statute—p 152
- 31. Rights which may be conferred in general—p 152
- 32. Conditions or reservations—p 153
- 33. — Particular conditions—p 155
- 34. Duration of rights which may be conferred—p 160
- 35. Acceptance—p 161
- 36. Modification and amendment of franchise or grant—p 161

2. *Grant or Consent by Local Authorities*—p 162

- § 37. Privileges in streets and highways in general—p 162
- 38. Use of bridges in general—p 163
- 39. Use of turnpikes and toll roads in general—p 163
- 40. Necessity of consent—p 163
- 41. To whom grant made—p 164
- 42. From whom consent obtained—p 165
- 43. Right to refuse consent—p 166
- 44. Proceedings to obtain in general—p 166
- 45. — Notice and hearing—p 166
- 46. — Mode of consent; sufficiency of ordinance or resolution—p 167
- 47. — Submission to popular vote—p 168
- 48. — Review by commission or court—p 168
- 49. Presumption as to requisite consents—p 169
- 50. Operation and effect—p 169
- 51. — Validation of defective or invalid grant or consent—p 170
- 52. Sale to highest bidder—p 170

3. *Consent of Abutting Owners*—p 172

- § 53. For use of streets and highways—p 172
- 54. — Necessity in general—p 172
- 55. — Grant of franchise and right to operate distinguished—p 172
- 56. — Elevated railroads—p 172
- 57. — Temporary tracks—p 172
- 58. — Extensions—p 173
- 59. — Additional tracks—p 173
- 60. — Switches and turnouts—p 173
- 61. — On consolidation of municipalities—p 173
- 62. — Franchise to new company—p 173
- 63. — Nature and scope of right to consent—p 173
- 64. — Who may give consent—p 174
- 65. — Purchase of consents; conditions—p 175

See also descriptive word index in the back of this Volume

V. FRANCHISES OR PRIVILEGES IN STREETS, ROADS, OR BRIDGES—Cont'd**A. GRANTS OF FRANCHISES OR PRIVILEGES—Cont'd.****3. *Consent of Abutting Owners*—Cont'd.**

- § 66. — Requisites and sufficiency—p 176
- 67. — Operation and effect of consent—p 177
- 68. — Who entitled to assert failure to obtain—p 178
- 69. — Determination by commissioners in lieu of consent of abutting owners—
p 179
- 70. To use of turnpikes or toll roads—p 182

B. CONSTRUCTION AND OPERATION OF GRANT IN GENERAL—p 182

- § 71. General rules of construction—p 182
- 72. Nature and extent of rights acquired in general—p 183
- 73. Exclusive and conflicting grants—p 185
- 74. — Protection and relief—p 188

C. LOCATION OF ROUTE AND TRACKS—p 188

- § 75. In general—p 188
- 76. Filing of map or plan—p 189
- 77. Change of route or location—p 189
- 78. Effect of widening street—p 190

**D. ADDITIONAL TRACKS; BRANCHES, SWITCHES, TURNOUTS, AND THE LIKE;
EXTENSIONS AND OTHER STRUCTURES—p 190**

- § 79. Switches, turnouts, sidings, and loops—p 190
- 80. Additional or double tracks—p 191
- 81. Branches and lateral tracks—p 191
- 82. Connection between lines of same company—p 191
- 83. Extensions and new lines; completion of lines—p 192
- 84. Structures in or over streets—p 196

E. RIGHTS IN, AND USE OF, BRIDGES, TURNPIKES, AND TOLL ROADS—p 197

- § 85. Bridges—p 197
- 86. Turnpikes and toll roads—p 198

**F. DURATION, EXTENSION, RENEWAL, REVOCATION, SURRENDER, AND FORFEI-
TURE OF FRANCHISE OR GRANT; USURPATION OF FRANCHISE—p 199**

- § 87. Duration and termination in general—p 199
- 88. Extensions and renewals—p 201
- 89. Revocation—p 203
- 90. Surrender—p 205
- 91. Forfeiture—p 205
- 92. — Grounds—p 206
- 93. — Waiver and estoppel—p 209
- 94. — Extent of forfeiture—p 210
- 95. — Persons entitled to assert—p 210
- 96. — Necessity for judicial or legislative determination of forfeiture—p 211
- 97. — Proceedings to enforce—p 212
- 98. Usurpation of franchise—p 212

See also descriptive word index in the back of this Volume

VI. RIGHTS IN, AND USE OF, PRIVATE PROPERTY; AND REMEDIES OF ABUTTING OWNERS—p 212

- § 99. Acquisition and use of private property—p 212
- 100. Rights and remedies of abutting owners—p 216
- 101. — Injunction—p 216
- 102. — Actions for damages—p 219

VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT—p 219**A. IN GENERAL—p 219**

- § 103. Duty to construct—p 219
- 104. Time for construction—p 221
- 105. Plan and mode of construction—p 222
- 106. — Municipal and state regulation—p 223
- 107. — Relocation of tracks and other changes required or authorized by public authorities—p 224
- 108. — Remedies—p 226
- 109. Removal of tracks and other railroad property—p 227
- 110. Liability for labor, work, or materials—p 228

B. RESTORATION, PAVING, AND REPAIR OF STREETS AND MAINTENANCE OF RAILROAD—p 228

- § 111. In general—p 228
- 112. Duty to repair street in general—p 229
- 113. Duty to pave or otherwise improve street or to pay therefor in general—p 230
- 114. Substitution of state for municipality as party to contract and authority of state officers or boards—p 232
- 115. Scope and extent of duty—p 233
- 116. — Change in obligation by subsequent statute or municipal ordinance or action—p 234
- 117. — Portion of street included—p 235
- 118. — Extension of line and of boundaries of municipality—p 236
- 119. — Bridges—p 236
- 120. — Change of grade—p 239
- 121. — Restoration of streets after removal of tracks—p 240
- 122. — Existing, original, and subsequent pavement—p 240
- 123. — Necessity, character, and type of repairs and improvements—p 241
- 124. Termination of, and exemption from, duty—p 244
- 125. Notice and demand by municipality—p 249
- 126. Improvement or repairs by municipality at company's expense—p 249
- 127. Estoppel to deny, or loss of right to object to, liability or imposition of obligation—p 252
- 128. Company under duty to perform obligations—p 253

C. RIGHTS IN, AND USE OF, TRACKS OF OTHER ROADS—p 254

- § 129. In general—p 254
- 130. Compensation—p 255
- 131. Rights and remedies—p 256

D. CROSSING OR CONNECTION WITH OTHER RAILROADS—p 257

- § 132. Right to cross—p 257
- 133. Mode of crossing—p 257
- 134. Connections with other roads—p 257
- 135. Compensation—p 257

See also descriptive word index in the back of this Volume

VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT—Continued**E. INJURIES FROM, OR INCIDENT TO, CONSTRUCTION OR MAINTENANCE—p 258**

- § 136. In general—p 258
- 137. Injuries to road or other property—p 259
- 138. Actions—p 259

F. PENALTIES AND OFFENSES INCIDENT TO CONSTRUCTION AND MAINTENANCE—p 260

- § 139. Penalties—p 260
- 140. Offenses—p 260
- 141. — Prosecution and punishment—p 260

G. MOTIVE POWER AND ROLLING STOCK—p 261

- § 142. Motive power—p 261
- 143. Change of motive power—p 262
- 144. Rolling stock and equipment—p 264

VIII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATIONS—p 264

- § 145. Sales—p 264
- 146. — Operation and effect—p 265
- 147. Leases—p 266
- 148. — Duration and termination—p 268
- 149. — Rights and liabilities of parties—p 268
- 150. Contracts not to construct or operate road—p 270
- 151. Contracts for unified management and operation—p 270
- 152. Contracts for joint or interchangeable use of tracks—p 270
- 153. Consolidation of roads—p 271

IX. BONDS, LIENS, MORTGAGES, AND RECEIVERS—p 273

- § 154. Bonds—p 273
- 155. Liens—p 275
- 156. Mortgages—p 276
- 157. Priorities—p 278
- 158. Foreclosure of lien or mortgage—p 279
- 159. Receivers—p 280

X. REGULATION AND OPERATION—p 282**A. REGULATION IN GENERAL—p 282**

- § 160. Power to regulate—p 282
- 161. — Municipality—p 284
- 162. — Public board, commission, or officers in general—p 285
- 163. Particular regulations—p 287
- 164. — As to passenger service and accommodations—p 288
- 165. — As to carriage of goods—p 290
- 166. — As to employees—p 290
- 167. — As to equipment of cars—p 291
- 168. — As to movement and speed of cars—p 291
- 169. — As to signals and lookouts—p 292
- 170. — As to roadbed and tracks—p 294
- 171. Rules and regulations of company—p 294
- 172. Penalties for violation of regulations—p 295
- 173. Acceptance of regulations—p 295

See also descriptive word index in the back of this Volume

X. REGULATION AND OPERATION—Continued**A. REGULATION IN GENERAL—Cont'd.**

- § 174. License fees and taxes—p 295
- 175. — Power and right to tax—p 296
- 176. — Payment and collection—p 298

B. DUTY TO OPERATE AND DISCONTINUANCE—p 300

- § 177. Duty to operate—p 300
- 178. — Relief from performance of duty—p 301
- 179. — Proceedings to compel operation—p 302
- 180. Interference with operation—p 302
- 181. Discontinuance of operation—p 303
- 182. — Proceedings to discontinue operation—p 305
- 183. — Effect of discontinuance—p 306
- 184. — Remedies in case of unauthorized discontinuance—p 307

C. OPERATION—p 307**1. Companies and Persons Liable for Injuries—p 307**

- § 185. In general—p 307
- 186. Company or municipality—p 308
- 187. Lessor and lessee—p 309
- 188. Vendor and purchaser—p 309

2. Care Required and Liability in General—p 310

- § 189. In general—p 310
- 190. Acts of servants or employees—p 311
- 191. Acts of third persons—p 312
- 192. Degree of care required—p 312
- 193. Duties and care as to trespassers in general—p 314
- 194. Duties and care as to licensees in general—p 317
- 195. Duties and care as to invitees—p 318
- 196. Construction and equipment of cars—p 319
- 197. Vigilance of persons in charge of car—p 320
- 198. Rate of speed and control of car—p 323
- 199. — Reducing speed and stopping car—p 325
- 200. — Statutory or municipal regulation—p 326
- 201. — Rules of company—p 326
- 202. Signals or warnings—p 327
- 203. Lights—p 328
- 204. Employing conductor—p 329
- 205. Frightening animals—p 329
- 206. — Duty after animal frightened—p 330
- 207. Reciprocal rights and duties of company and travelers on street—p 331
- 208. — Between street crossings—p 331
- 209. — At street crossings—p 333
- 210. — Under statutory provisions or ordinances—p 335
- 211. Willful or wanton injury—p 337
- 212. Proximate cause of injury—p 338

3. Defects and Obstructions—p 340

- § 213. In general—p 340
- 214. Obstructions in street or highway—p 343

See also descriptive word index in the back of this Volume

X. REGULATION AND OPERATION—Continued**C. OPERATION—Cont'd.****3. Defects and Obstructions—Cont'd.**

- § 215. — Excavations in street—p 343
- 216. — Track protruding above surface of street—p 343
- 217. — Trolley wire—p 344
- 218. — Trolley wire poles—p 344
- 219. — Cars in street—p 345
- 220. — Lubricant on track—p 345
- 221. — Snow piled in street—p 345
- 222. Notice of defect or obstruction—p 346
- 223. Approval of officials or compliance with requirements as excuse—p 346

4. Collisions—p 347

- § 224. Between cars or trains—p 347
- 225. — At steam railway crossings—p 348
- 226. Collisions with animals or vehicles in general—p 349
- 227. Nature and extent of liability in general—p 350
- 228. Duty and care required in general—p 350
- 229. Violation of statute or ordinance in general—p 352
- 230. Speed in general—p 352
- 231. Animals or vehicles crossing track in front of car—p 353
- 232. Passing animals or vehicles—p 356
- 233. Meeting animals or vehicles—p 356
- 234. Approaching animals or vehicles on or near track—p 358
- 235. — Parked or stalled vehicles—p 360
- 236. — Duty to give warning—p 362
- 237. On approach of animals or vehicles—p 363
- 238. At or approaching street intersections—p 363
- 239. — Duty to give warning—p 367
- 240. Operating at night or under adverse weather conditions—p 369
- 241. Collision with ambulance—p 370
- 242. Collision with fire apparatus—p 370
- 243. Collision with police vehicle—p 371
- 244. Collision with dog or other animal not under control of owner—p 371

5. Injuries to Persons on or near Tracks—p 372

- § 245. In general—p 372
- 246. Violation of statute or ordinance—p 373
- 247. Equipment—p 373
- 248. Lookouts, signals, and other warnings—p 375
- 249. Rate of speed and control of car—p 378
- 250. Failure to keep lookout or to perform other act as wanton or gross negligence—p 379
- 251. Precautions as to persons who are, or should be, seen on or near track—p 379
- 252. Duty at or approaching street crossings—p 385
- 253. Approaching or passing other cars or vehicles—p 387
- 254. Rounding curves—p 388
- 255. Persons working on or near tracks—p 390
- 256. Persons on private premises near tracks—p 391
- 257. Persons under elevated railroad—p 391

See also descriptive word index in the back of this Volume

X. REGULATION AND OPERATION—Continued**C. OPERATION—Cont'd.**

6. *Injuries to Children and Persons under Disability*—p 391
 - § 258. Children—p 391
 259. — Duty to anticipate presence and danger—p 392
 260. — Lookout and warning; speed and control of car—p 393
 261. — Precautions as to children who are seen or should be seen on or near or approaching track—p 394
 262. Infirm or otherwise disabled persons—p 396
7. *Contributory Negligence*—p 397
 - § 263. In general—p 397
 264. Reliance on precautions of company generally—p 399
 265. Acts in emergency or sudden peril—p 399
 266. Violation of statute, ordinance, or rule of company—p 400
 267. Working in street—p 400
 268. Standing, leaning, stooping, or crouching, on or near track—p 401
 269. Walking on or near track—p 401
 270. Crossing track—p 403
 271. — Duty to stop, look, and listen—p 408
 272. Passing under elevated structure—p 412
 273. Riding bicycle or motorcycle—p 412
 274. Driving, occupying, or alighting from vehicle; riding or driving horse—p 413
 275. — Driving horse near cars—p 417
 276. — Driving on or along track in general—p 417
 277. — Duty to turn out for cars—p 419
 278. — Attempting to cross in front of car—p 420
 279. — Duty to stop, look, and listen—p 422
 280. — Failure to observe law of road—p 428
 281. — Stopping horse or vehicle on or near track—p 428
 282. — Occupant of vehicle driven by another—p 430
 283. Driver or occupant of emergency vehicle—p 433
 284. Children—p 433
 285. Old, infirm, or afflicted persons—p 434
 286. Permitting animal at large, unrestrained, or unattended—p 435
 287. Proximate cause—p 435
8. *Injuries Avoidable notwithstanding Contributory Negligence*—p 436
 - § 288. In general—p 436
 289. Cause of injury—p 437
 290. — Cessation or continuance of plaintiff's negligence—p 437
 291. Danger or peril—p 438
 292. — Plaintiff's knowledge or ignorance of peril—p 439
 293. — Defendant's knowledge or ignorance of peril—p 439
 294. Ability and opportunity to avoid injury—p 441
 295. Care required after peril is, or should be, discovered—p 442
9. *Actions for Injuries*—p 443
 - § 296. In general—p 443
 297. Jurisdiction and venue—p 443
 298. Time to sue and limitations—p 444
 299. Parties—p 444
 300. Process and appearance—p 444

See also descriptive word index in the back of this Volume

X. REGULATION AND OPERATION—Continued**C. OPERATION—Cont'd.****9. Actions for Injuries—Cont'd.**

- § 301. Notice of claim—p 444
- 302. Complaint, declaration, or petition—p 445
- 303. Plea or answer and other pleadings—p 449
- 304. Issues, proof, and variance—p 451
- 305. Presumptions and burden of proof—p 454
- 306. — Negligence of defendant—p 455
- 307. — Contributory negligence—p 459
- 308. Admissibility of evidence—p 461
- 309. — Negligence of defendant—p 462
- 310. — Contributory negligence—p 469
- 311. — Last clear chance—p 471
- 312. Weight and sufficiency of evidence—p 472
- 313. — Relation of defendant to cause of injury—p 473
- 314. — Acts of employees—p 473
- 315. — Defects in tracks, street, or equipment—p 473
- 316. — Operation of cars—p 474
- 317. — Power of defendant to avoid injury; last clear chance—p 480
- 318. — Willful or wanton injury and gross negligence—p 481
- 319. — Contributory negligence—p 481
- 320. — Violation of municipal ordinances and regulations—p 484
- 321. — Proximate cause of injury—p 484
- 322. Questions of law and fact—p 486
- 323. — Companies and persons liable—p 487
- 324. — Negligence of defendant—p 487
- 325. — Contributory negligence—p 497
- 326. — Last clear chance—p 504
- 327. — Willful, wanton, or reckless injury—p 505
- 328. — Proximate cause; unavoidable accident—p 505
- 329. — Damages—p 506
- 330. Instructions—p 507
- 331. — Negligence of defendant—p 507
- 332. — Contributory negligence—p 510
- 333. — Last clear chance; willful injury—p 511
- 334. — Proximate cause—p 512
- 335. — Damages—p 513
- 336. Verdict and findings—p 513
- 337. Appeal and error—p 513
- 338. Damages—p 514

10. Offenses Incident to Operation of Street Railroads—p 514

- § 339. Offenses by street railroad company or its servants—p 514
- 340. Offenses against street railroad property or operation—p 515

XI. CONSTRUCTION, ACQUISITION, AND OPERATION BY PUBLIC AUTHORITIES—p 515

- § 341. By municipality—p 515
- 342. — Extent of system, and application of special fund—p 516
- 343. — Contract for construction, and lease—p 516
- 344. — Purchase—p 517
- 345. By state—p 519

See also descriptive word index in the back of this Volume

I. DEFINITIONS AND NATURE AND STATUS

§ 1. Street Railroad

- a. In general
- b. Essential features and characteristics
- c. Particular terms defined

a. In General

The term "street railroad" or "street railway" may have different meanings as used in different statutes or contexts but it is ordinarily defined as a railroad or railway constructed upon streets or highways for the purpose of facilitating the use thereof in the transportation of persons and property.

The term "street railroad" or "street railway" has not one settled and invariable meaning,¹ but may have different meanings as used in different statutes or contexts.² A street railroad or railway has been defined as a railroad or railway laid down upon roads or streets for the purpose of carrying passengers;³ but in view of the history and development of street railroads a "street railroad" may be more accurately defined as a railroad or railway constructed upon streets and highways for the purpose of facilitating the use thereof in the transportation of persons and property;⁴ an enterprise created and operated to carry on a fixed track passengers and freight, or passengers or freight, for

rates or tolls, without discrimination as to those who demand transportation.⁵ In some jurisdictions, for particular purposes, the term "street railroad" or "street railway" has been defined by statute, in which case the term has such meaning as is given to it;⁶ and, as used in some statutes, a "street railway," properly speaking, is only such as is authorized to occupy and use the streets of a city or town, under franchise from the municipality.⁷

A "city railroad," it has been said, is a mere omnibus upon rails, and like an omnibus it stops everywhere along its route, to enable passengers to come in or go out.⁸ The terms "tram railroad"⁹ and "tramroad"¹⁰ are sometimes applied to a street railroad or railway; and "tram railroad"¹¹ and "tramway"¹² have been considered as synonymous with "street railroad," although in some cases a distinction has been said to exist between "street railroad" and "tramway."¹³ "Street railroad" is distinguished from other kinds of railroads in Railroads § 1 a (3).

b. Essential Features and Characteristics

The distinctive and essential features and characteristics of a street railroad primarily are that it is constructed and operated upon and along streets and highways, that it is usually constructed so as to conform to the grade of the street, that it is operated for the

1. N.Y.—Bradley v. Degnon Contracting Co., 120 N.E. 89, 91, 224 N.Y. 60.

2. N.Y.—Bradley v. Degnon Contracting Co., *supra*.

3. Cal.—Montgomery v. Santa Ana & Westminster R. Co., 37 P. 786, 104 Cal. 186, 189, 43 Am.S.R. 89, 25 L.R.A. 654.

60 C.J. p 156 note 5.
Railroad or railway defined generally see Railroads § 1 a.

Other definitions

(1) A railway constructed and operated upon and along streets of city or town for carriage of persons from one point to another in such city or town or to and from its suburbs.

Cal.—Simoneau v. Pacific Electric R. Co., 115 P. 320, 323, 159 Cal. 494.
Utah.—Utah Rapid Transit Co. v. Ogden City, 58 P.2d 1, 4, 89 Utah 546.

(2) Further similar definitions see 60 C.J. p 156 note 5 [a].

Motorbus line not run on rails is not a street railway.—Utah Light & Traction Co. v. Public Service Commission, 118 P.2d 683, 101 Utah 99—Utah Rapid Transit Co. v. Ogden City, 58 P.2d 1, 89 Utah 546.

4. Ohio.—State v. Dayton Traction Co., 18 Ohio Cir.Ct. 490, 10 Ohio Cir.Dec. 212.

60 C.J. p 156 note 8.

History discussed

U.S.—Govin v. Chicago, C.C.Ill., 132 F. 848, reversed on other grounds 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801.

60 C.J. p 156 note 6 [a].

Development discussed

U.S.—Montgomery Amusement Co. v. Montgomery Traction Co., C.C.Ala., 139 F. 353, affirmed 140 F. 988, 72 C.C.A. 682.

60 C.J. p 156 note 7.

5. N.Y.—Bradley v. Degnon Contracting Co., 120 N.E. 89, 91, 224 N.Y. 60.

60 C.J. p 156 note 9.

6. Wash.—State v. Denney, 274 P. 791, 150 Wash. 690.

60 C.J. p 156 note 11.

7. Iowa.—Lewis v. Omaha & C. B. S. Ry. Co., 138 N.W. 1092, 158 Iowa 137, 142.

Ky.—South Covington & C. St. Ry. Co. v. Commonwealth, 205 S.W. 603, 181 Ky. 449, affirmed 40 S.Ct. 378, 252 U.S. 399, 64 L.Ed. 631.

Operation within prescribed area

Under the statute providing that cities may construct or authorize construction, maintenance, and operation of "street railways," quoted phrase means transit companies operating within city limits or within municipal area.—Provo City v. Department of Business Regulation, Utah, 218 P.2d 675.

8. N.Y.—Hoyt v. Sixth Ave. R. Co., 1 Daly 528, 530.

9. Mo.—Idalia Realty & D. Co. v. Norman's Southeastern R. Co., 219 S.W. 923, 925—State v. Pulliam, 135 S.W. 443, 444, 233 Mo. 229.

10. Ark.—Poinsett Lumber & Mfg. Co. v. St. Francis Levee Dist., 171 S.W. 875, 115 Ark. 454.

11. Mo.—Idalia Realty & D. Co. v. Norman's Southeastern R. Co., 219 S.W. 923, 925—State v. Pulliam, 135 S.W. 443, 444, 233 Mo. 229.

12. Cal.—Simoneau v. Pacific Electric R. Co., 115 P. 320, 159 Cal. 494, 499.

13. N.Y.—Bradley v. Degnon Contracting Co., 120 N.E. 89, 91, 224 N.Y. 60.

63 C.J. p 768 note 23.

transportation of passengers from one point to another in a city or town, and that its cars run at short intervals at a moderate rate of speed, and make frequent stops.

The distinctive and essential features and characteristics of a street railroad primarily are that it is constructed and operated upon and along streets and highways;¹⁴ that it is operated for the transportation of passengers from one point to another in a city or town, or to and from its suburbs;¹⁵ and that its cars run at short intervals,¹⁶ at a moderate rate of speed as compared with the speed of commercial railroads,¹⁷ and make frequent stops, particularly at street crossings to take on and leave off passengers.¹⁸

Method of construction. A distinguishing feature of a street railroad is the fact that it is usually constructed so as to conform to the grade of the street and so as not to interfere with the use of the street by pedestrians and vehicles.¹⁹ However, whether or not a certain railroad is a street railroad is not determined alone by the kind of rails it uses in its tracks,²⁰ or by its position with respect to the surface of the street,²¹ or by the fact that its tracks are laid in, and confined to, the streets of a city;²² but its character usually depends on the general purposes of the enterprise,²³ that is, on the character of its service;²⁴ and, if it is designed and used primarily for street passengers and for their reception and discharge along its route, it is a street railroad without regard to the method of construc-

tion or operation,²⁵ or whether it is constructed at grade,²⁶ or upon an overhead structure as in the case of an elevated railroad, as discussed *infra* § 3, or with cuts and fills,²⁷ or is beneath the surface as in the case of a subway, as discussed *infra* § 2; or for a part of its route upon property other than streets or highways.²⁸

Motive power. The motive power by which the cars are operated is immaterial as affecting the character of a railway as a street railway,²⁹ whether animal,³⁰ or mechanical, such as electricity,³¹ cable,³² or even steam.³³

Nature of business. Another distinguishing characteristic of a street railroad is that primarily its business is confined to the transportation of passengers and not freight;³⁴ but, if that is its primary purpose, it is none the less a street railroad because of the fact that it also transports freight as a part of its business.³⁵

c. Particular Terms Defined

- (1) In general
- (2) Cable railroad and related terms
- (3) Street car

(1) In General

Numerous particular terms used with respect to street railroads have been defined by the courts, such as controller, current breaker, fender, quadrilateral system, slot rails, and station.

14. Cal.—Simoneau v. Pacific Electric R. Co., 115 P. 320, 159 Cal. 494. 60 C.J. p 156 note 13.

15. Minn.—In re Minneapolis & St. P. Suburban Ry. Co., 112 N.W. 13, 16, 101 Minn. 132. 60 C.J. p 157 note 15.

16. U.S.—Williams v. City Electric St. R. Co., C.C.Ark., 41 F. 556. 60 C.J. p 157 note 16.

17. U.S.—Williams v. City Electric St. R. Co., *supra*. 60 C.J. p 157 note 17.

18. Mo.—Hannah v. Metropolitan St. R. Co., 81 Mo.App. 78. 60 C.J. p 157 note 18.

19. Fla.—Bloxham v. Consumers' Electric Light, etc., Co., 18 So. 444, 36 Fla. 519, 51 Am.S.R. 44, 29 L.R.A. 507. 60 C.J. p 157 note 20.

20. Mich.—Nieman v. Detroit Suburban St. R. Co., 61 N.W. 519, 103 Mich. 256. 60 C.J. p 157 note 21.

21. N.Y.—People's Rapid Transit R. Co. v. Dash, 26 N.E. 25, 125 N.Y.

93, 10 L.R.A. 728—In re New York Dist. R. Co., 14 N.E. 187, 107 N.Y. 42.

22. Pa.—Sparks v. Philadelphia, etc., R. Co., 61 A. 881, 212 Pa. 105.

23. Cal.—Simoneau v. Pacific Electric R. Co., 115 P. 320, 159 Cal. 494. 60 C.J. p 157 notes 25, 26.

24. Ill.—Hartzell v. Alton, Granite & St. Louis Traction Co., 104 N.E. 1080, 1081, 263 Ill. 205.

25. Pa.—Sparks v. Philadelphia, etc., R. Co., 31 Pa.Co. 449, affirmed 61 A. 881, 212 Pa. 105. 60 C.J. p 157 note 26.

26. Pa.—Potts v. Quaker City El. R. Co., 2 Pa.Dist. 200, 12 Pa.Co. 593.

27. Ohio.—Dietz v. Cincinnati, etc., Traction Co., 6 Ohio S. & C.P. 513, 4 Ohio N.P. 399. 60 C.J. p 158 note 29.

28. N.Y.—Matter of Syracuse, etc., R. Co., 68 N.Y.S. 881, 33 Misc. 510, dismissed 70 N.Y.S. 1149, 61 App. Div. 624. 60 C.J. p 158 note 31.

29. Utah.—Utah Rapid Transit Co. v. Ogden City, 58 P.2d 1, 4, 89 Utah 546. 60 C.J. p 158 note 32.

30. N.J.—Paterson R. Co. v. Grundy, 26 A. 788, 51 N.J.Eq. 213. 60 C.J. p 158 note 33.

31. Ga.—Hill v. Rome St. R. Co., 28 S.E. 631, 101 Ga. 66. Mich.—Nieman v. Detroit Suburban St. R. Co., 61 N.W. 519, 103 Mich. 256.

32. Ohio.—Clement v. Cincinnati, 9 Ohio Dec., Reprint, 688, 16 Cinc.L. Bul. 356. 60 C.J. p 158 note 35.

33. U.S.—Williams v. City Electric St. R. Co., C.C.Ark., 41 F. 556. 60 C.J. p 158 note 36.

34. U.S.—Williams v. City Electric St. R. Co., *supra*. 60 C.J. p 158 note 37.

35. Iowa.—Cedar Rapids, etc., R. Co. v. Cedar Rapids, 76 N.W. 728, 106 Iowa 476. 60 C.J. p 158 note 38.

Numerous particular terms used with respect to street railroads have been defined by the courts.³⁶

Controller. The easily recognized cylinder-shaped electric mechanism of an electric car at the left hand of the motorman, which is operated by a handle which is constantly being swung to and fro, and is the visible means by which the speed of the car is retarded or promoted; as a whole, a device for regulating or controlling the current delivered to an electric motor, and thereby regulating the speed of the car;³⁷ the cylindrically shaped structure or drum stationed on the car platform on top of which is a crank with a handle whereby the motorman operates it, and so effects control of the two electric motors through which the electric current flows.³⁸

Current breaker. A device fixed against the inside of the roof or hood of a trolley car just overhead where the motorman stands, and through which the electric current drawn from the wire on the outside passes.³⁹

Double tracks. Applied to a street railroad, the term means tracks laid on opposite sides of the center of the street, independent of each other and to be operated independently.⁴⁰

Fender or kid catcher. The term "fender," as applied to street railway cars, refers to a guard or protection against danger to pedestrians;⁴¹ a kind of steel basket attached to the front of a car.⁴² The term "practical fender" as used in a statute, refers to a fender fit and proper, or efficient for the

use for which it is intended, that is, to protect the life and limb of human beings and animals.⁴³ The term "kid catcher" has also been used as designating a mechanical device carried on street cars, intended to catch objects which strike the tripper in front of the car in a basket or fender, and thus keep them from getting under the wheels and save them from injury.⁴⁴

Greyhound motion. A term used to designate the oscillation of a street car due simply to the speed and constant going, and not to any sudden or abnormal motion.⁴⁵

Horse railroad; horse railroad track. "Horse railroad" is a street surface railroad.⁴⁶ "Horse railroad track" is a term descriptive of the railroad constructed, not of the motive power used.⁴⁷

Messenger cable or messenger wire. The cable, or either of the two cables, supporting the trolley wire of an electric railway in a single or double catenary construction system, in which the trolley wire is suspended from a cable or cables.⁴⁸

Motor. In electric railroading, the motion-producing contrivance in the car.⁴⁹

Quadrilateral system. A term applied to one of the four plans of improving the rail return of electric current in the construction and installment of an electric street railway.⁵⁰

Slot rails. "Slot rails" are those which form the sides of the slot or orifice through which passes the shank of the grip used in the operation of a cable.⁵¹

36. Breaker

That part of the road where the power is cut off, or a separation between the channel works.—O'Donnell v. Interurban St. R. Co., 88 N.Y.S. 1016, 1017.

"Locomotive power"

Pa.—Gillette v. Chester, etc., R. Co., 2 Pa. Dist. 450, 451.

38 C.J. p 135 note 23 [b].

"Trailer" defined see the C.J.S. definition Trailer, also 63 C.J. p 763 notes 12-16.

37. U.S.—Electric Car Co. of America v. Nassau Electric R. Co., N.Y., 91 F. 142, 33 C.C.A. 420.

38. U.S.—Westinghouse Electric, etc., Co. v. Toledo, etc., R. Co., Ohio, 172 F. 371, 373, 97 C.C.A. 69.

39. Mo.—Masterson v. St. Louis Transit Co., 103 S.W. 48, 204 Mo. 507, 514.

17 C.J. p 408 note 5.

40. Tex.—Denison v. Denison, etc., R. Co., 127 S.W. 804, 103 Tex. 344, 348.

19 C.J. p 447 note 32.

41. Utah.—Spiking v. Consolidated R., etc., Co., 93 P. 838, 33 Utah 313, 834.

25 C.J. p 1045 note 3.

42. Tex.—Galveston Electric Co. v. Swank, Civ.App., 188 S.W. 704, 705.

Other definition

A contrivance sometimes called lifeguard, which is placed not in front of the car but under it and some distance behind its fore end and in front of the forward wheels.—Tampa Electric Co. v. Bazemore, 96 So. 297, 298, 85 Fla. 164.

43. N.C.—Hanes v. Southern Public Utilities Co., 131 S.E. 402, 406, 191 N.C. 13—Smith v. Charlotte Electric R. Co., 92 S.E. 382, 383, 178 N.C. 489.

44. Ohio.—Columbus Ry., Power & Light Co. v. Lombard, 168 N.E. 619, 622, 33 Ohio App. 47.

45. N.Y.—Moskowitz v. Brooklyn Heights R. Co., 85 N.Y.S. 960, 963, 89 App.Div. 425.

46. N.J.—Paterson R. Co. v. Grundy, 26 A. 788, 51 N.J.Eq. 213.

30 C.J. p 460 note 30—60 C.J. p 158 note 33 [a].

47. N.J.—Paterson R. Co. v. Grundy, supra.

48. Webster New Int.D.

49. N.J.—State v. Clinton, 23 A. 281, 54 N.J.Law 92, 98.

50. U.S.—Peoria Waterworks Co. v. Peoria R. Co., C.C.Ill., 181 F. 990, 1009.

51 C.J. p 108 notes 18, 19.

51. U.S.—Johnson v. Pennsylvania Steel Co., C.C.Pa., 62 F. 156, 157.

Station. The term "station" as applied to street railroads may mean the place where the car stops,⁵² although it is somewhat out of the ordinary to call a mere street corner in a city a station.⁵³ The term has also been construed to mean not only such stations for the receipt and discharge of freight and passengers, but also those points on the lines of railroads after passing which an additional fare is charged to passengers.⁵⁴

(2) Cable Railroad and Related Terms

A cable railroad is a railroad in which the motive power is generated in a stationary engine and imparted to an endless cable, which runs under the roadway and to which cars are attached by means of a grip usually joining through a slot in the roadway.

A "cable railroad" is a railroad in which the motive power is generated in a stationary engine and imparted to an endless cable, which runs under the roadway and to which cars are attached by means of a grip usually joining through a slot in the roadway.⁵⁵ The term implies a street railroad.⁵⁶

Cable car. A car operated by means of a steel cable or rope in the tracks beneath the surface, to which a large metal grip is attached, or from which it is released, by means of what may be termed a "handle" to the grip, which extends from the grip through a slot in the track up into the grip car, where the gripman stands and operates the car;⁵⁷ a car fitted to run on a cable railroad.⁵⁸

Cable system. The term with respect to street

railways is generally understood to imply a stationary engine and an underground cable.⁵⁹

"Coasting" of a cable car means moving on the car's momentum, without gripping the cable.⁶⁰

Governor. As used in connection with the propulsion of street cable cars, a device attached to the engine used to propel the cable by the automatic action of which a certain rate of speed may be maintained without variation.⁶¹

Grip and grip car. The term "grip," as applied to cable street railroads, means a device attached to cable cars to grasp the cable.⁶² "Grip car" is the forward car of two cars of cable street railroads which is open on all sides, but provided with seats for passengers; so called because it contains the apparatus called the "grip" by which attachment is made to the cable underneath the tracks.⁶³

(3) Street Car

Street cars are defined as cars which traverse the streets of a town or city, and carry passengers, who get on and off at various points along the line; they are vehicles of street travel, or public conveyances.

"Street cars" are cars which traverse the streets of a town or city, and carry passengers, who get on and off at various points along the line.⁶⁴ They are vehicles of street travel,⁶⁵ or public conveyances,⁶⁶ and may be considered to be omnibuses or vehicles in the nature of omnibuses.⁶⁷ They have been held to be "cars" within the meaning of that term as used in some statutes,⁶⁸ but under other statutes the

52. Mo.—Maxey v. Metropolitan St. R. Co., 68 S.W. 1063, 95 Mo.App. 303, 307.

53. Mo.—Maxey v. Metropolitan St. R. Co., supra.

54. Pa.—In re Stations, 33 Pa.Co. 454, 455.

55. U.S.—City of Denver v. Mercantile Trust Co., Colo., 201 F. 790, 802, 120 C.C.A. 100.
60 C.J. p 158 note 35 [a].

56. U.S.—City of Denver v. Mercantile Trust Co. of New York, supra.

57. Mo.—Young v. Metropolitan St. R. Co., 103 S.W. 135, 126 Mo.App. 1, 5.
9 C.J. p 1114 note 68.

58. Standard D.

59. Md.—Hooper v. Baltimore City Pass. R. Co., 37 A. 359, 361, 85 Md. 509, 514, 38 L.R.A. 509.

60. Cal.—Bryant v. Market St. Ry. Co., App., 158 P.2d 18, 22, reheard 163 P.2d 33, 71 Cal.App.2d 508.

61. Minn.—Bishop v. St. Paul City R. Co., 50 N.W. 927, 48 Minn. 26, 31.

62. Mo.—Redman v. Metropolitan St. R. Co., 84 S.W. 26, 27, 185 Mo. 1, 105 Am.S.R. 558.
28 C.J. p 826 note 18.

63. Minn.—Bishop v. St. Paul City R. Co., 50 N.W. 927, 48 Minn. 26, 31.
28 C.J. p 827 note 19.

64. Cal.—Dolton v. Green, 164 P.2d 795, 800, 72 Cal.App.2d 427.
Ga.—Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 62 S.E. 52, 58, 131 Ga. 129.

Similar definition

A street car is a car, usually a passenger car, running through the public streets.—Dolton v. Green, 164 P. 2d 795, 800, 72 Cal.App.2d 427.

Compared with "accommodation coach" and "stage coach"

N.Y.—City of New York v. Third Avenue R. Co., 1 N.Y.S. 397, 399, 48 Hun 621.

65. Cal.—Dolton v. Green, 164 P.2d 795, 800, 72 Cal.App.2d 427.

Ga.—Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 62 S.E. 52, 58, 131 Ga. 129.

66. Mo.—Higgins v. St. Louis & S. R. Co., 95 S.W. 863, 865, 197 Mo. 300.

67. N.Y.—New York v. Third Ave. R. Co., 3 N.Y.St. 181, 184.

Pa.—Frankford, etc., Pass. R. Co. v. Philadelphia, 58 Pa. 119, 125, 98 Am.D. 242.

68. Mo.—State v. Lang, 14 Mo.App. 247, 249.

9 C.J. p 1284 note 14 [a] (1).

word "car" does not include a street car.⁶⁹

"Open car," with respect to a trolley line, is a car with a running board upon each side, from which the conductor collects fares and discharges his general duties in the premises.⁷⁰ "Summer street car" is also a term commonly used to denote a car open from top to bottom on the sides from which people enter and depart by stepping on what is called a "running board."⁷¹

Convertible car. A "semi-convertible car" is one the construction of which is such that the side of it is not open to the floor when the movable panels are removed so as to make an open car,⁷² or where the lower panel is not removable,⁷³ but forms an integral part of the car.⁷⁴ A "wholly convertible car" is one the sides of which, from the floor to the roof, are composed of panels and ribs or posts, and which panels may be removed in some way to some place so as to make a car wholly open on all sides.⁷⁵ A "self-contained convertible car" is one which somewhere within it has the storage for the panels when removed from the sides, either by pushing them up or down or sidewise, or removing them from the sides entirely, so as to form the necessary openings.⁷⁶

§ 2. — Subway

"Subway" is a term used to designate an electric railroad under the street surface, and a railroad so constructed may, by reason of its design, use, and the character of service which it renders, constitute a street railroad.

"Subway" is a term used to designate an electric railroad under the street surface.⁷⁷ A railroad may

by reason of its design, use, and the character of service which it renders constitute a street railroad notwithstanding it is beneath the surface of the street or highway as in the case of a subway.⁷⁸ So it has been held that an underground railway following the line of the street within the limits of a city or village is a street railway;⁷⁹ but an underground tunnel railroad with a large portion of its route beneath a river, and much of it built on upon private property has been held not a street railroad.⁸⁰

§ 3. — Elevated Railroad

An elevated railroad is a railroad which is placed above the surface of the street, and is used by the general public; and such a railroad may by reason of the character of the service it renders constitute a street railroad.

An elevated railroad is a railroad which is placed above the surface of the street, and is used by the general public.⁸¹ A railroad may by reason of the character of the service it renders constitute a street railroad notwithstanding it is constructed upon an overhead structure as in the case of an elevated railroad.⁸² It has been held, however, that an elevated railroad is not a street railroad where it is organized under a general railroad act, notwithstanding its business, by municipal regulation, is limited to carrying passengers.⁸³ It has also been held that an elevated railroad is not a street railroad where steam is its motive power;⁸⁴ but other authority holds that, although such a road is authorized to use steam as a motive power, where its route lies almost exclusively through the public ways, and its purpose is to give more rapid transit

Tramcars held to be "cars".

Tex.—Missouri, etc., R. Co. v. Smith, 99 S.W. 743, 744, 45 Tex.Civ.App. 128, 132.
9 C.J. p 1284 note 12 [g].

69. Kan.—State v. Cain, 76 P. 443, 444, 69 Kan. 186.
9 C.J. p 1284 note 14 [a] (2).

70. N.Y.—Drake v. Auburn City R. Co., 66 N.E. 121, 122, 173 N.Y. 466.

71. Kan.—Cummings v. Wichita Railroad & Light Co., 74 P. 1104, 68 Kan. 218, 1 Ann.Cas. 708.

72. U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., C.C.N.Y., 139 F. 330, 333.

Included in convertible car

U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., supra.

73. U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., supra.

74. U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., supra.

75. U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., supra.

76. U.S.—O'Leary v. Utica & Mohawk Valley Ry. Co., supra.

77. Webster New Int.D.

78. Ill.—Barsaloux v. Chicago, 92 N. E. 525, 245 Ill. 598, 19 Ann.Cas. 255.

Utah.—Utah Rapid Transit Co. v. Ogden City, 58 P.2d 1, 4, 89 Utah 546.
60 C.J. p 158 note 30.

79. N.Y.—In re New York Dist. R. Co., 14 N.E. 187, 107 N.Y. 42.

80. N.Y.—New York, etc., R. Co. v.

O'Brien, 106 N.Y.S. 909, 121 App. Div. 819, affirmed 85 N.E. 1113, 192 N.Y. 558.

Pa.—Sparks v. Philadelphia, etc., R. Co., 61 A. 881, 212 Pa. 105.

81. Wash.—State v. King County Super. Ct., 70 P. 484, 30 Wash. 219, 225.
20 C.J. p 400 note 31.

82. Pa.—Potts v. Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. 593.
60 C.J. p 158 note 28.

83. Ill.—Metropolitan West Side Electric R. Co. v. Chicago, 104 N. E. 165, 261 Ill. 624.
60 C.J. p 164 note 96.

84. Iowa.—Freiday v. Sioux City Rapid Transit Co., 60 N.W. 656, 92 Iowa 191, 26 L.R.A. 246.
60 C.J. p 163 note 95.

to street travel, it is in substance an elevated street railway.⁸⁵

§ 4. — Interurban Railroad

An Interurban railroad has been defined as a railroad, operated by power other than steam, which extends beyond the limits of a city or town to the limits of another city or town. It has in some respects the characteristics of a street railroad, and it is for some purposes, under some statutes, classified as a street railroad.

An "interurban railroad" has been defined as a railroad, operated by power other than steam, which extends beyond the limits of a city or town to the limits of another city or town.⁸⁶ It has in some respects the characteristics of a street railroad,⁸⁷ and, in view of the fact that it is an outgrowth⁸⁸ and development⁸⁹ of the street railroad, it is for some purposes, under some statutes, classified as a street railroad.⁹⁰ Within the limits and suburbs of the cities or towns which it enters an interurban railroad usually passes along the streets, and performs the ordinary functions of a street railroad and is classed as such;⁹¹ but a railroad built wholly upon private property and the cross streets, and engaged in interurban traffic, is not within the contemplation of the term "street railroad;"⁹² and also, outside the cities on its way from one city or town to another, it frequently travels upon a roadway obtained from private persons, not upon a public road, and stops, as in case of ordinary railroads, only at stations established by it for that purpose,

and is classed as an interurban railroad, and not as a street railroad.⁹³

§ 5. — Nature and Status

A street railroad is a public utility and is peculiarly an institution for the accommodation of people in cities and towns.

A street railroad is a public utility⁹⁴ and is peculiarly an institution for the accommodation of people in cities and towns;⁹⁵ it is not chartered and granted a location for the benefit of the promoters or owners, but for the accommodation of travelers.⁹⁶ It is a work of internal improvement,⁹⁷ although it cannot be considered strictly a street improvement.⁹⁸

Streetcars are subject to the immediate control of their owner and operator and, by virtue of their dedication to public service, they are for the common use of all their passengers.⁹⁹

Street railroad as a highway or part of a highway is considered in Highways § 1.

§ 6. Street Railroad Company

A street railroad company is a corporation by which a street railroad is conducted, maintained, and operated.

A street railroad company has been defined as a corporation by which a street railroad is conducted, maintained, and operated.¹ It does not include a railway company which operates its line on a

85. Mass.—*McGilveray v. Boston El. R. Co.*, 86 N.E. 893, 200 Mass. 551.

86. Iowa.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N.W. 1092, 1094, 158 Iowa 137.

60 C.J. p 158 note 40 [a].
Distinguished from other railroads see Railroads § 1 a (3).

Interurban cars are cars larger in all respects and constructed differently from cars used exclusively for city passenger service.—*Waterloo, etc., Rapid Transit Co. v. Black Hawk County*, 108 N.W. 316, 317, 131 Iowa 237.

Phrases construed

(1) "Passenger interurban railway service."—*Milwaukee v. Milwaukee Electric R., etc., Co.*, 180 N.W. 339, 341, 181 N.W. 821, 173 Wis. 400—33 C.J. p 476 note 7.

(2) Other words and phrases relating to interurban railroads see 33 C.J. p 476 notes 2-6.

87. Cal.—*San Francisco, etc., Elec-*

tric R. Co. v. Scott, 75 P. 575, 142 Cal. 222.

33 C.J. p 476 note 6—60 C.J. p 158 note 41.

88. Ohio.—*Cincinnati, etc., R. Co. v. Poland*, 10 Ohio N.P., N.S., 617, 620.

60 C.J. p 159 note 42.

89. Wis.—*Zehren v. Milwaukee Electric R., etc., Co.*, 74 N.W. 538, 99 Wis. 83, 96, 67 Am.S.R. 844, 41 L.R.A. 575.

60 C.J. p 159 note 43.

90. Wis.—*City of Milwaukee v. Railroad Commission of Wisconsin*, 173 N.W. 329, 330, 169 Wis. 559.

60 C.J. p 159 note 44.

91. Ind.—*Michigan Cent. R. Co. v. Hammond, etc., Electric R. Co.*, 83 N.E. 650, 42 Ind.App. 66.

60 C.J. p 159 note 45.

92. N.Y.—*Koehn v. Public Service Commission, Second Dist.*, 176 N.Y. S. 147, 107 Misc. 151.

60 C.J. p 159 note 46.

93. Ky.—*South Covington, etc., St. R. Co. v. Commonwealth*, 205 S.W. 603, 181 Ky. 449.

60 C.J. p 159 note 47.

94. Ariz.—*City of Phoenix v. Moore*, 113 P.2d 935, 57 Ariz. 350.

60 C.J. p 160 note 55.

95. Mo.—*Hannah v. Metropolitan St. R. Co.*, 81 Mo.App. 78.

96. Mass.—*Foster v. Curtis*, 99 N.E. 961, 213 Mass. 79, 42 L.R.A., N.S., 1188, Ann.Cas.1913E 116.

97. Mich.—*Attorney General v. Pingree*, 79 N.W. 814, 120 Mich. 550, 46 L.R.A. 407.

98. Ohio.—*Cleveland v. Cleveland City R. Co.*, 23 Ohio Cir.Ct. 373.

99. U.S.—*Public Utilities Commission of District of Columbia v. Pollak*, App.D.C., 72 S.Ct. 813, 343 U.S. 451, 96 L.Ed. 1068.

1. Mass.—*Holland v. Lynn, etc., R. Co.*, 11 N.E. 674, 144 Mass. 425, 427.

60 C.J. p 160 note 51.

private right of way.² A corporation empowered to construct, equip, and operate a street and interurban railroad is a street and interurban railroad corporation,³ even though it is also authorized to promote plans for the creation and distribution of electricity and other heat, light, and power.⁴

§ 7. — Nature and Status

A street railroad company is a quasi-public corporation, and its rights and liabilities are to be construed and measured by the law applicable to such corporations; it is a private enterprise subject to such restrictions and regulations as the statutes may prescribe or the municipality is authorized to impose.

A street railroad company is a quasi-public corporation,⁵ and its rights and liabilities are to be construed and measured by the law applicable to such corporations.⁶ It is also a "public service corporation" subject to state and municipal supervision as such,⁷ and it holds special privileges con-

ferred in consideration of its providing public transportation facilities, as agent and trustee of the sovereign power.⁸ At the same time, however, notwithstanding it is given corporate existence to enable it to provide the means of rapid transportation for the convenience of the people and the promotion of the public welfare,⁹ it is a private enterprise subject to such restrictions and regulations as the statutes may prescribe or the municipality is authorized to impose.¹⁰ The property of street railroad companies is private property, although devoted to public use.¹¹

A street railroad company is a common carrier of passengers, as discussed in Carriers § 532, and under exceptional circumstances may become a carrier of goods, as discussed in Carriers § 6 c (7).

Protection of courts. A street railroad company is entitled to the same protection at the hands of the courts as the law affords individuals.¹²

II. STREET RAILROAD COMPANIES OR CORPORATIONS

§ 8. Constitutional and Statutory Provisions in General

General rules apply with respect to the construction, operation, and repeal of statutes relating to street railroad companies or corporations, and such statutes are valid where they constitute a legitimate exercise of legislative power and are within constitutional limitations.

General rules apply with respect to the construction, operation, and repeal of statutes relating to street railroad companies or corporations.¹³ Such statutes are valid where they constitute a legitimate exercise of legislative power and are within con-

stitutional limitations,¹⁴ but they are invalid if they violate the constitution.¹⁵ Statutes relating to steam railroad companies may be inapplicable to street railroads.¹⁶

§ 9. Incorporation and Organization in General

The incorporation and organization of a street railroad corporation are governed by the rules of law regulating the organization of corporations in general, except in so far as affected by special statutory provisions relating to street railroad companies. A street railroad

2. Mich.—*People v. Detroit United Ry.*, 173 N.W. 396, 207 Mich. 143.

3. Ind.—*Reitz v. Evansville Terminal Ry.*, 93 N.E. 283, 175 Ind. 707—*F. W. Cook Inv. Co. v. Evansville Terminal Ry.*, 93 N.E. 279, 175 Ind. 3.

4. Ind.—*Reitz v. Evansville Terminal Ry.*, 93 N.E. 283, 175 Ind. 707—*F. W. Cook Inv. Co. v. Evansville Terminal Ry.*, 93 N.E. 279, 175 Ind. 3.

5. Ind.—*Evansville, S. & N. Ry. Co. v. Evansville & E. Electric Ry. Co.*, 98 N.E. 649, 50 Ind.App. 502.
14 C.J. p 76 note 50—60 C.J. p 160 note 66.

6. Ind.—*Evansville, S. & N. Ry. Co. v. Evansville & E. Electric Ry.*, supra.

7. U.S.—*Columbia Ry., Gas & Elec-*

tric Co. v. State of South Carolina, C.C.A.S.C., 27 F.2d 52, 54, 59 A.L.R. 665.

14 C.J. p 91 note 34 [a] (3)—60 C.J. p 161 note 69.

8. U.S.—*Columbia Ry., Gas & Electric Co. v. State of South Carolina*, supra.

9. Ill.—*North Chicago Electric R. Co. v. Peuser*, 60 N.E. 78, 190 Ill. 67.
60 C.J. p 161 note 71.

10. Ohio.—*Cleveland v. Cleveland City R. Co.*, 23 Ohio Cir.Ct. 373.
Pa.—*Shepp v. Norristown R. Co.*, 2 Pa.Dist. 679, 13 Pa.Co. 254.

11. Mo.—*State ex rel. School Dist. of Kansas City v. Waddill*, 52 S.W. 2d 476, 330 Mo. 1118.

12. D.C.—*Jacquette v. Capital Traction Co.*, 34 App.D.C. 41, 25 L.R.A., N.S., 407.

13. D.C.—*Hazen v. Washington Ry. & Electric Co.*, 74 F.2d 461, 64 App. D.C. 57, certiorari denied *Washington Ry. & Electric Co. v. Hazen*, 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1247.

Statute held to supersede prior laws in conflict therewith.—*Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

14. D.C.—*Hazen v. Washington Ry. & Electric Co.*, 74 F.2d 461, 64 App. D.C. 57, certiorari denied *Washington Ry. & Electric Co. v. Hazen*, 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1247.

15. Mass.—*Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

16. Conn.—*Root v. Connecticut Co.*, 108 A. 506, 93 Conn. 648.

company may be incorporated under a general railroad incorporation act, in the absence of a special statute under which incorporation could be had.

The incorporation and organization of a street railroad corporation are governed by the rules of law regulating the organization of corporations in general, except in so far as affected by special statutory provisions relating to street railroad companies.¹⁷ In order that a street railroad company may be entitled to corporate existence, as a legal entity, with the right to own, construct, and operate a street railroad, it must be incorporated or organized in compliance with the laws of the state regulating the organization of such a corporation,¹⁸ such as with respect to the minimum number of persons who may unite to form the corporation;¹⁹ and, where an application for a charter is in conformity with the requirements of the statute, it should be granted.²⁰

Under general or special statute. Since the term "railroad" or "railway" is a generic term sufficiently broad to include street railroads, as discussed in Railroads § 1 a (3), a street railroad company, in the absence of a special statute under which incorporation could be had, may be incorporated under a general railroad incorporation act,²¹ and a street railway and an electric railroad designed to run beyond the municipal limits may be incorporated under the same charter.²² It has been held that a street railroad company may be organized under a statute providing for the incorporation of industrial corporations generally.²³ Where, however, special statutory provision is made for the organization of street railroad corporations, the general railroad law does not apply to the formation of a street railroad company,²⁴ and, unless the right to

do so is authorized by statute, a company formed under such law cannot construct or operate a street railway,²⁵ except where it was organized prior to the street railroad act, and is recognized as valid by such act.²⁶ The right of a company organized under a street railroad statute to construct and operate a street railroad is not affected by the fact that the statute also contains provisions which are usually inserted in special charters granted to railroad companies.²⁷

Special charter. Where a general law relating to the incorporation of railroad companies does not apply to street railroads, the legislature may grant a special charter to a street railroad company,²⁸ and in doing so may authorize it to extend its line beyond the limits of the town or city in which it is to be located.²⁹ Where a general law is passed by the legislature, giving its consent to the continued existence of street railroad companies previously organized under special charters, a prior specially chartered company, after its acceptance of the provisions of the statute, becomes a de jure corporation, with all the powers granted in the charter³⁰ or conferred by the general law,³¹ without procuring a reincorporation under the general law;³² and this rule applies, although the charter may have been originally granted unlawfully³³ or under an invalid statute.³⁴

Organization by purchaser. A statutory provision authorizing the purchaser of a street railroad at a judicial sale to organize a corporation is not limited to the first or immediate purchasers at such sale, but extends to subpurchasers;³⁵ and, where such subpurchasers, in compliance with the statute, organize a corporation and transfer all the rights,

17. Ga.—Brown v. Atlanta, R., etc., Co., 39 S.E. 71, 113 Ga. 462.

60 C.J. p 164 note 2.

18. Ind.—Smith v. Indianapolis St. R. Co., 63 N.E. 849, 158 Ind. 425.

60 C.J. p 164 note 3.

19. N.Y.—Attorney General v. New York, 10 N.Y.Super. 119, reversed on other grounds 14 N.Y. 506, 67 Am.D. 186.

60 C.J. p 164 note 4.

20. Pa.—In re Pittsburgh Rapid Transit St. R. Co., 12 Pa.Dist. 454, 28 Pa.Co. 151.

21. Ill.—Lieberman v. Chicago Rapid Transit R. Co., 30 N.E. 544, 141 Ill. 140.

60 C.J. p 164 note 7.

22. La.—Shreveport Traction Co. v.

Kansas City, etc., R. Co., 44 So. 457, 119 La. 759.

23. U.S.—New York Cent. Trust Co. v. Warren, Mont., 121 F. 323, 58 C. A. 289, certiorari denied 24 S.Ct. 841, 191 U.S. 568, 48 L.Ed. 305.

24. Cal.—Huntington v. Curry, 112 P. 583, 14 Cal.App. 46—.

60 C.J. p 164 note 10.

25. N.J.—Tallon v. Hoboken, 37 A. 895, 60 N.J.Law 212.

60 C.J. p 165 note 11.

26. N.J.—Jersey City v. North Jersey St. R. Co., 67 A. 113, 74 N.J.Law 774.

27. N.J.—Paterson R. Co. v. Grundy, 26 A. 788, 51 N.J.Eq. 213.

28. Ga.—Dieter v. Estill, 22 S.E. 622, 95 Ga. 370.

29. Ga.—Dieter v. Estill, supra.

30. Ga.—Brown v. Atlanta R., etc., Co., 39 S.E. 71, 113 Ga. 462.

Pa.—Berks County v. Reading City Passenger Ry. Co., 31 A. 474, 663, 167 Pa. 102.

31. Pa.—Berks County v. Reading City Passenger R. Co., supra.

32. N.H.—Petition of Keene Electric R. Co., 41 A. 775, 68 N.H. 434.

33. Ga.—Brown v. Atlanta R., etc., Co., 39 S.E. 71, 113 Ga. 462.

34. Pa.—Berks County v. Reading City Passenger Ry. Co., 31 A. 474, 663, 167 Pa. 102.

35. Ala.—Birmingham R., etc., Co. v. Birmingham Traction Co., 29 So. 187, 128 Ala. 110.

powers, privileges, and franchises held by the original street railroad, the later company is entitled to exercise all of the rights, privileges, and franchises previously granted to the original corporation.³⁶

§ 10. Certificate or Articles of Incorporation

The certificate or articles of incorporation must comply with all the statutory requirements for a street railroad company. When accepted by the company the charter becomes a contract, and the company thereby consents to be bound by its provisions and conditions.

The certificate or articles of incorporation must comply with all the statutory requirements for a street railroad company,³⁷ such as with respect to the board or officer by whom they may be made,³⁸ to containing provisions relating to forfeitures,³⁹ to describing the plan and mode of construction,⁴⁰ and to stating with reasonable certainty the termini and route of the proposed road,⁴¹ although a more specific designation of the termini may be dispensed with by a later act of the legislature which recognizes the company as a valid existing corporation.⁴²

Where the filing of the articles of association is regarded merely as a preliminary step to the obtaining of a charter, the incorporators have no standing as a corporation until letters patent are issued;⁴³ but, where the statute provides that the persons associated constitute a corporation from the time of filing a proper certificate in the office of the secretary of state, it is not necessary that stock be issued or paid up before a valid organization can be effected or corporate action be taken.⁴⁴ When accepted by the company the charter becomes a contract,⁴⁵ and the company thereby consents to be

bound by its provisions and conditions.⁴⁶

As to conflicting routes. Articles of incorporation will not be issued to a company for the construction of a street railroad over a route which an existing company has a right to occupy by an extension of its line, and for which a record of the extension has already been filed.⁴⁷

§ 11. Reorganization

A reorganization plan of a street railway company and a sale of its property thereunder will be upheld by a court where the plan is fair and equitable and has been approved by a majority of the interested persons. The necessary documents involved in the reorganization of a street railroad company must all be construed together where they constitute one entire scheme of reorganization and refer to, and are dependent on, one another.

A reorganization plan of a street railway company and a sale of its property thereunder will be upheld by a court where the plan is fair and equitable and has been approved by a majority of the interested persons, notwithstanding objections relating to the inadequacy of the bid, and to the amount, terms, and distribution of securities to be issued under the plan;⁴⁸ but, where an ordinance for a new franchise lapsed because of nonacceptance by the grantee, final action on the plan for reorganization will be deferred pending application for a new ordinance and ascertainment of its terms.⁴⁹ Persons whose rights are otherwise adequately represented and protected are not entitled as of right to intervene in reorganization proceedings for the purpose of attacking actions of the court.⁵⁰ Where no plan or agreement is made at, or previous to, the

36. Ala.—Birmingham R., etc., Co. v. Birmingham Traction Co., *supra*.

37. N.Y.—New York Cable Co. v. New York, 10 N.E. 332, 104 N.Y. 1.

38. N.Y.—Matter of New York Cable R. Co., 15 N.E. 882, 109 N.Y. 32. 60 C.J. p 165 note 26.

39. N.Y.—Matter of New York Cable R. Co., *supra*—New York Cable Co. v. New York, 10 N.E. 332, 104 N.Y. 1.

40. N.Y.—New York Cable Co. v. New York, *supra*.

41. Conn.—Central R., etc., Co. v. New York, etc., R. Co., 43 A. 490, 72 Conn. 33. 60 C.J. p 165 note 29.

42. Md.—Koch v. North Ave. R. Co., 23 A. 463, 75 Md. 222, 15 L.R.A. 377.

43. Pa.—Andel v. Duquesne St. R. Co., 69 A. 278, 219 Pa. 635—Lovejoy v. Duquesne St. R. Co., 69 A. 280, 219 Pa. 639.

44. N.C.—Fayetteville St. R. Co. v. Aberdeen, etc., R. Co., 55 S.E. 345, 142 N.C. 423, 9 Ann.Cas. 683.

45. N.Y.—New York v. New York City R. Co., 86 N.E. 565, 193 N.Y. 543. 60 C.J. p 165 note 34.

46. N.Y.—New York v. Dry Dock, etc., R. Co., 30 N.E. 563, 133 N.Y. 104, 28 Am.S.R. 609.

47. Pa.—Commonwealth v. Uwchlan St. R. Co., 53 A. 513, 203 Pa. 608. 60 C.J. p 166 note 37.

48. U.S.—Harris Trust & Sav. Bank v. Chicago Rys. Co., D.C.Ill., 17 F. Supp. 181.

Reorganization of corporations in

general see Corporations §§ 1578-1602.

49. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., *supra*.

50. U.S.—In re Schommer, C.C.A.Ill., 112 F.2d 311.

Discretion

Owner of first mortgage bonds and owners of certificates for bonds on deposit with bondholders' protective committee were not entitled as a matter of right to intervene in reorganization proceedings, for purpose of attacking actions of the court, even if intervention was sought in good faith, but, in view of fact that bondholder was represented by mortgage trustee and certificate holders by committee, intervention was discretionary, in absence of support for charge of conspiracy between trustee, committee, and junior bondholders.—In re Schommer, *supra*.

sale of the property and franchises of a street company by the purchaser in anticipation of the readjustment of the respective interests of the creditors, mortgagees, and stockholders, the formation of another corporation by the purchaser of independent parts of the property and franchises of the company is not a reorganization of the old company.⁵¹

Statutory provisions that no railroad corporation shall exercise any franchise without the permission of the proper public service commission, unless it was entitled to do so prior to the creation of such commission, and forbidding the transfer of such a franchise without the commission's approval, do not apply to a reorganized street railroad corporation, formed to take the property and franchise of a street railroad corporation sold under foreclosure, since the right of the bondholders under the mortgage to have the property sold and the right of the purchasers are inviolable, and no consent can be made a prerequisite to either the enjoyment or transfer of the franchise.⁵² The reorganized company, however, is subject to the supervisory powers of the commission over the issuance of stocks and bonds,⁵³ although the commission may not refuse permission to the new corporation to issue stocks and bonds, not exceeding the amount of outstanding securities of the old corporation, notwithstanding such securities are in excess of the value of the property of the corporation.⁵⁴

The necessary documents involved in the reorganization of a street railroad company must all be construed together where they constitute one entire

scheme of reorganization and refer to, and are dependent on, one another.⁵⁵ Such construction is required in determining the relative rights of certificate holders and bondholders.⁵⁶ The status of holders of certificates issued under a street railway reorganization plan is not exactly that of stockholders,⁵⁷ and they may be estopped to question orders of the state public service commission with respect to application of funds of the company to improvements.⁵⁸ A finance committee created under the reorganization plan may have authority, in a proper case, to withhold payment of dividends to certificate holders from accumulated earnings;⁵⁹ but, where such earnings are available for distribution to security holders, the certificate holders are entitled to some protection, such as payments in cash or a lien on the property, to the extent of the undistributed earnings.⁶⁰

Insolvency. In determining the solvency of a company at the time of reorganization for the purpose of deciding whether a provision for unsecured creditors is fair, the rate-base value as determined in an action to increase fares is not conclusive, since the actual value or fair and reasonable market value is not the value taken into account in such valuation,⁶¹ and the reorganized company is not precluded by such rate-base value from asserting insolvency during receivership, under the doctrine of *res judicata*, since, when the proceeding was begun and prosecuted, the functions and authority of the old company over its property were suspended and the new company was not yet in existence.⁶²

51. N.Y.—People ex rel. Westchester St. R. Co. v. Public Service Commission, Second Dist., 104 N.E. 952, 210 N.Y. 456.

52. N.Y.—People ex rel. Third Ave. Ry. Co. v. Public Service Commission for First Dist., 96 N.E. 1011, 203 N.Y. 299.

53. N.Y.—People ex rel. Third Ave. Ry. Co. v. Public Service Commission for First Dist., *supra*.

54. N.Y.—People ex rel. Third Ave. Ry. Co. v. Public Service Commission for First Dist., *supra*.

55. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533, 60 C.J. p 166 note 39.

56. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III.,

56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

57. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

58. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

59. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

Payment of declared dividends

Modified plan of reorganization of street railway-making earnings, after meeting sinking fund payments, ap-

plicable to payments on certificates, contemplated payment only of declared dividends.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

60. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

Laches with respect to claim to earnings held not shown

U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.III., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

61. U.S.—Temmer v. Denver Tramway Co., C.C.A.Colo., 18 F.2d 226.

62. U.S.—Temmer v. Denver Tramway Co., *supra*.

§ 12. Officers and Agents

Except in so far as they are regulated by special statutory or charter provisions, the law applicable to the officers and agents of corporations in general governs questions relative to the officers and agents of a street railroad company.

Except in so far as they are regulated by special statutory or charter provisions,⁶³ the law applicable to the officers and agents of corporations in general governs questions relative to the officers and agents of a street railroad company.⁶⁴ Thus, the president and secretary of a street railroad company have no inherent or implied power to bind the company by the execution of promissory notes,⁶⁵ but the board of directors may bind the stockholders by its acceptance of a franchise;⁶⁶ and, in cases of emergency or accident, the acts and contracts of the corporate representatives in charge at the time may be binding on the company,⁶⁷ especially when such acts or contracts are ratified.⁶⁸ A street railroad company is chargeable with knowledge acquired by an officer or agent with respect to matters within the scope of his employment.⁶⁹ An investigator and adjuster, who acts under the direction of the attorney of the claims department, and whose authority is limited to investigating an accident and communicating the attorney's offer, has no authority to settle a claim against the company.⁷⁰

§ 13. Capital, Stock, and Stockholders

The rules governing the capital and stock of corporations in general apply to questions relating to the capital and stock of a street railroad corporation, except to the extent that such questions are controlled or modified by special provisions of law relating to street railroads. Street railway companies have the right to issue preferred stock where such issue is authorized by the stockholders acting in accordance with the statute in force.

The rules governing the capital and stock of corporations in general apply to questions relating to the capital and stock of a street railroad corporation,⁷¹ except to the extent that such questions are controlled or modified by special constitutional or statutory provisions relating to street railroads,⁷² such as with respect to the issuance of stock⁷³ and the distribution of dividends.⁷⁴ A commission having power to supervise and regulate a street railroad, in authorizing an issue of stocks or bonds, may determine the price and condition of their sale,⁷⁵ but cannot indirectly prevent such issue, in a proper case, by imposing impossible or unnecessary conditions.⁷⁶ Where the commission properly decides that it cannot, under existing conditions, order cancellation of common stock, it cannot be canceled by indirection, by withholding from the company that to which it otherwise would be entitled.⁷⁷

63. Liability of directors for debts
Mass.—Westinghouse Electric, etc.,
Co. v. Reed, 80 N.E. 621, 194 Mass.
590, 120 Am.S.R. 576.
60 C.J. p 166 note 48.

**64. Mass.—Foster v. Bowen, 41 N.
E.2d 181, 311 Mass. 359.**

**Liability for breach of fiduciary ob-
ligation held not established**
Mass.—Foster v. Bowen, *supra*.

**65. Ark.—City Electric St. R. Co. v.
First Nat. Exch. Bank, 34 S.W. 89,
62 Ark. 33, 54 Am.S.R. 282, 31 L.R.
A. 535.**

**66. Ill.—Venner v. Chicago City R.
Co., 86 N.E. 266, 236 Ill. 349.**

**67. Ill.—Chicago Consol. Traction
Co. v. Mathews, 117 Ill.App. 174.
60 C.J. p 166 note 53.**

**Express or implied authority to
bind company held not shown.—Ren-
berg v. Chicago City Ry. Co., 159 Ill.
App. 119.**

**68. Pa.—Heinrich v. Pittsburgh R.
Co., 36 Pa.Super. 612.**

**69. Ky.—Louisville, etc., R. Co. v.
Roberts, 228 S.W. 681, 190 Ky. 744.
60 C.J. p 167 note 55.**

70. Mass.—Ferran v. Boston Elevat-

**ed Ry. Co., 143 N.E. 823, 249 Mass.
212.**

**71. Me.—Augusta Trust Co. v. Au-
gusta, H. & G. R. Co., 187 A. 1, 134
Me. 314.**

Insolvency

Interurban electric railway compa-
ny became insolvent when its assets
became substantially less than its
bonds, notes, and current indebted-
ness and it became evident that com-
pany's obligations could not be met
out of earnings because of loss of
patronage.—United Light & Power
Co. v. Grand Rapids Trust Co., C.C.A.
Mich., 85 F.2d 331, certiorari denied
in part United Light & Power Co. v.
Grand Rapids Trust Co., 57 S.Ct. 118;
299 U.S. 591, 81 L.Ed. 436, certiorari
dismissed 57 S.Ct. 312, 299 U.S. 618,
81 L.Ed. 456.

**72. Mass.—Leonard v. Draper, 73 N.
E. 644, 187 Mass. 536.
60 C.J. p 167 note 60.**

**73. N.Y.—People ex rel. Westchester
St. R. Co. v. Public Service Com-
mission for Second Dist. of New
York, 143 N.Y.S. 148, 158 App.Div.
251, modified on other grounds 104
N.E. 952, 210 N.Y. 456, rehearing
denied 105 N.E. 1095, 211 N.Y. 533.
60 C.J. p 167 note 61.**

**74. U.S.—Abercrombie v. United
Light & Power Co., D.C.Md., 7 F.
Supp. 530.**

Funds available for dividends

Surplus of assets of interurban
electric railway company over its
debts and actual amount received
from its stockholder, and not surplus
of its assets over its debts and par
value of outstanding stock, was
available for dividends; dividends
paid to corporation owning all stock
of insolvent interurban electric rail-
way company constituted trust fund
for benefit of railway company's
creditors.—United Light & Power Co.
v. Grand Rapids Trust Co., C.C.A.
Mich., 85 F.2d 331, certiorari denied
in part United Light & Power Co. v.
Grand Rapids Trust Co., 57 S.Ct. 118,
299 U.S. 591, 81 L.Ed. 436, certiorari
dismissed 57 S.Ct. 312, 299 U.S. 618,
81 L.Ed. 456.

**75. Neb.—In re Lincoln Traction
Co., 171 N.W. 192, 103 Neb. 229.
60 C.J. p 167 note 62.**

**76. Neb.—In re Lincoln Traction
Co., *supra*.**

**77. Neb.—In re Lincoln Traction
Co., *supra*.**

Preferred stock. Street railway companies have the right to issue preferred stock where such issuance is authorized by the stockholders acting in accordance with the statute.⁷⁸ Stock issued to holders of bonds in exchange for such bonds is preferred stock and not certificates of indebtedness where the stock is designated as preferred stock and the holders are given the right to vote and to receive fixed yearly dividends.⁷⁹ Where a special statute authorizes a street railroad company to issue preferred stock and provide for its retirement without the consent of the holders thereof, such provision becomes an inherent quality or infirmity of such stock when issued,⁸⁰ and holders thereof, having made their investment on that basis, may not complain of its retirement;⁸¹ and a provision of a proposed law, for the retirement of the stock of minority nonassenting holders at a price to be ascertained by appraisal of value by commissioners or by trial by jury, is adequate;⁸² and a further provision of such law, that in ascertaining such value any enhancement or diminution thereof arising from the statute itself or a lease of the property to the commonwealth should be disregarded, is valid.⁸³

Holders of preferred stock, authorized by statute, can claim no rights in addition to those therein stipulated with respect to the voting power of the stock being the same as that of other stock;⁸⁴ and where a further issue of preferred stock is made under a special statute which does not specify any voting power, holders thereof are on the same basis as to voting as holders of other classes of preferred stock issued under the statute providing for voting power.⁸⁵

Taking over old company; trustees. Where a

special statute providing for the organization of a street railroad company for the purpose of acquiring an old street railroad company provides for the appointment of trustees to take over the property of the old company, the intention is that the street railroad should be operated as a going concern,⁸⁶ and that the trustees should act for the interests of the corporation, its creditors, and stockholders;⁸⁷ and, where the trustees are authorized to use discretion in the management of the company, their decision in applying earnings to the restoration of property, if in good faith, is final,⁸⁸ unless contrary to law.⁸⁹ Where the cost of service which rates and fares of the street railroad are to be fixed to meet is to include maintenance, operating expenses, dividends in a stated amount, and allowances for depreciation and rehabilitation as the trustees deem adequate, dividends are not contemplated until the railroad is restored to a safe and proper condition;⁹⁰ and, since the trustees are authorized to allow for depreciation as part of the cost of service, expenses for depreciation and restoring the property and thereby keeping the capital intact are operating expenses, and are not betterments to be charged to capital,⁹¹ and the discretion of the trustees in incurring such expenses before paying dividends is not abused.⁹²

Stockholders. The elementary principle, that, in the absence of any charter provision to the contrary, a majority of the stockholders controls in deciding ordinary corporate questions requiring their action, applies in determining the rights of stockholders of a street railroad corporation.⁹³ Such stockholders, in a proper case, may sue to rescind a fraudulent contract.⁹⁴ The stockholders of a street railroad company have been held to be within the meaning of statutes defining the liability of

78. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.

79. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

80. Mass.—In re Opinion of Justices, 159 N.E. 55, 261 Mass. 523.

81. Mass.—In re Opinion of Justices, *supra*.

82. Mass.—In re Opinion of Justices, *supra*.

83. Mass.—In re Opinion of Justices, *supra*.

84. Mass.—In re Opinion of Justices, 159 N.E. 70, 261 Mass. 556.

85. Mass.—In re Opinion of Justices, *supra*.

86. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., 153 N.E. 466, 257 Mass. 115.

87. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*.

88. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*.

89. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*.

90. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*. 60 C.J. p 168 note 75.

91. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*. 60 C.J. p 168 note 76.

92. Mass.—Adams v. Eastern Massachusetts St. Ry. Co., *supra*.

93. Ill.—Venner v. Chicago City R. Co., 86 N.E. 266, 236 Ill. 349.

Intervention by city in stockholders' suit to enjoin street railway company from abandoning track mileage and substituting motorbuses for trolley cars, and public service commission's approval of such conversion did not change company's charter as a contract between stockholders or as a contract, subject to reserved power of amendment, between company and state, or detract from stockholders' contract rights.—*Warren v. Fitzgerald*, 56 A.2d 827, 189 Md. 476.

94. U.S.—Old Colony Trust Co. v. Dubuque Light, etc., Co., C.C. Iowa, 89 F. 794.

stockholders of railroad corporations,⁹⁵ but a constitutional provision which excepts stockholders of "railroad corporations" from individual liability for corporate debts thereby imposed on stockholders of other corporations for profits has been held not to include stockholders in street railroad corporations.⁹⁶ Under a statute which imposes on stockholders of a street railroad corporation liability for all of the corporation's debts in the event that such stockholders knowingly receive any dividend paid in impairment of its capital, a remedy exists against stockholders regardless of any other provision for enforcement of individual liability of stockholders,⁹⁷ and such remedy may be sought by suit in equity in another state.⁹⁸ Accordingly, a holding company may be held liable, in a proper case, for debts of a subsidiary street railroad company.⁹⁹ Liability of stockholders under such a statute may be enforced at the suit of bondholders,¹ regardless of a clause in the mortgage given by the street railroad company prohibiting recourse to stockholders.²

§ 14. Powers of Company in General

A street railroad corporation possesses only such powers as are expressly given or are necessary incidents to the enjoyment of the powers expressly granted. It has capacity to acquire and hold such rights and property, both real and personal, as are necessary to enable it to transact the business for which it was created.

Like other corporations a street railroad corpora-

tion possesses only such powers as are expressly given or are necessary incidents to the enjoyment of the powers expressly granted;³ and, where it clearly acts beyond its corporate powers and franchises, no consent by a municipality can supply the want of power.⁴ It has capacity to acquire and hold such rights and property, both real and personal, as are necessary to enable it to transact the business for which it was created;⁵ and it may, in a proper case, issue negotiable paper,⁶ or make a valid contract to furnish or pay for medical aid to one injured on its cars or tracks.⁷ The fact, however, that a street railway company is authorized to operate by electricity or other motive power does not authorize the conducting of an ordinary commercial railroad,⁸ and charter authority to construct, operate, and manage a street railway in a city and vicinity, if granted a right of way by council, and to lease, operate, or intersect with other street railways, does not authorize the operation of a street railroad on the line of an interurban railroad.⁹ A street railroad company usually has no power, by virtue of its charter, to pave the streets of a city independently of the consent of the city.¹⁰

Other authorized purposes. A general statute authorizing a corporation to extend its business to other authorized purposes authorizes a street railroad company to amend its charter so as to extend its termini, and thereby carry the public a greater

95. Mo.—Jerman v. Benton, 79 Mo. 148.

96. Cal.—Ferguson v. Sherman, 47 P. 1023, 116 Cal. 169, 37 L.R.A. 622.

In support of this view it was said: "There is no rule of construction which make (makes) it mandatory upon a court to hold that 'railroad' must include street railroads, and, upon the principle that all grants from the state are construed most strongly in favor of the grantor, it would certainly be proper in this case, no reason to the contrary being shown, to narrow rather than to broaden the meaning of the word, and to limit its applicability to the one class which is necessarily embraced within the term."—Ferguson v. Sherman, supra.

97. U.S.—Abercrombie v. United Light & Power Co., D.C.Md., 7 F. Supp. 530.

98. U.S.—Abercrombie v. United Light & Power Co., supra.

"Penal law"

State statute making stockholders, who knowingly receive dividends

paid in impairment of street railway company's capital stock, liable for corporation's debts was not unenforceable in another state as "penal law."—Abercrombie v. United Light & Power Co., supra.

99. U.S.—Abercrombie v. United Light & Power Co., supra.

1. U.S.—Abercrombie v. United Light & Power Co., supra.

Bondholders held not estopped to bring suit

U.S.—Abercrombie v. United Light & Power Co., supra.

2. U.S.—Abercrombie v. United Light & Power Co., supra.

3. Ind.—State Board of Agriculture v. Citizens St. R. Co., 47 Ind. 407, 17 Am.R. 702.

Pa.—Deposit, etc., Co. v. R. Co., 100 A. 320, 255 Pa. 497.
60 C.J. p 168 note 85.

Grant of privilege

Grant of power by act of incorporation of street railway company to lay rails in streets of a city was a grant of a privilege, as a means to an end, and not a restriction on other

corporate powers or on progress.—Warren v. Fitzgerald, 56 A.2d 327, 189 Md. 476.

4. N.Y.—Brooklyn Heights R. Co. v. Brooklyn, 46 N.E. 509, 152 N.Y. 244.

5. N.Y.—People v. O'Brien, 18 N.E. 692, 111 N.Y. 1, 7 Am.S.R. 684, 2 L.R.A. 255.

Okl.—Overholser v. Oklahoma Interurban Traction Co., 119 P. 127, 29 Okl. 571.

6. Cal.—Temple St. Cable R. Co. v. Hellman, 37 P. 530, 103 Cal. 634.

Mass.—Kneeland v. Braintree St. R. Co., 45 N.E. 86, 167 Mass. 161.

7. Ohio.—Youngstown Park, etc., R. Co. v. Kessler, 95 N.E. 509, 84 Ohio St. 74, 36 L.R.A., N.S., 50, Ann.Cas. 1912B 933.

8. Cal.—Hunting v. Curry, 112 P. 583, 14 Cal.App. 468.
60 C.J. p 168 note 89.

9. Ky.—South Covington & C. St. Ry. Co. v. Commonwealth, 205 S. W. 603, 181 Ky. 449.

10. Ill.—Farson v. Fogg, 68 N.E. 755, 205 Ill. 326.

distance for the same fare,¹¹ or so as to include the right to buy or lease a road already constructed.¹²

Relinquishment of duties. The acceptance of its franchise by the railroad charges it with certain well-defined public duties which it cannot at will cast aside and repudiate so as to defeat the purpose of its organization.¹³

Collateral enterprises. Where power to do so is not given by the charter or by statute, a street railroad company has no power, by virtue of a permit from the city to string electric wires, to use such wires to distribute power to private consumers.¹⁴ It has been held that leasing advertising space in a streetcar is not within the corporate powers of a street railroad company;¹⁵ but, on the other hand, it has been held that advertising is incidental to the running of cars,¹⁶ and that the placing of advertisements in its cars is within the corporate powers of the company;¹⁷ and the fact that the street franchise granted to the company is silent on the matter of advertising does not restrict such power.¹⁸

§ 15. Carriage of Freight

A street railroad ordinarily has no power to do a freight business, unless it is authorized by statute or its charter to do so.

Ordinarily, as discussed supra § 1, a street rail-

road is one for the transportation of passengers, and such a railroad has no power to do a freight business,¹⁹ unless it is authorized by statute or its charter to do so.²⁰ Thus, under a statutory provision which authorizes such companies to convey "persons and property," a street railroad company, whether specifically chartered or organized under general laws, may carry freight for hire²¹ and may operate cars designed and intended exclusively for carrying express matter, freight, or property, and used exclusively for that purpose.²² Where authority as to use of the streets is consistent with the purpose for which the streets exist, it will not be restrained or declared a nuisance at the instance of an abutting property owner;²³ and, where it is given to an interurban street railroad company, it is not objectionable as extending the powers of such company over the streets of a city without its consent.²⁴

Authority, however, to transport passengers, freight, baggage, etc., gives no right to use a portion of a street, designated as a station, for loading and unloading freight.²⁵ Under a statute giving railway companies the right to transport light freight and property, the purpose stated in the articles of association to construct and operate a street railway for the conveyance of passengers is sufficient to indicate the right to carry light freight as incidental to the primary purpose.²⁶

11. Mo.—State v. Lindell R. Co., 52 S.W. 248, 151 Mo. 162.

12. Mo.—State v. Lindell R. Co., supra.

13. Ind.—Evansville, S. & N. Ry. Co. v. Evansville & El. Electric Ry., 98 N.E. 649, 50 Ind.App. 502.

14. U.S.—Chicago Gen. St. R. Co. v. Ellicott, C.C.Ill., 88 F. 941.

Amendment to charter

A corporation empowered to construct and operate a street railroad over a specified route in a designated city, with specified powers to that end, which obtained an amendment to its charter after the enactment of statute permitting street railway companies under the General Corporation Act to construct and operate electric light and power plants, without, by the amendment, seeking authority to construct electric light and power plants, had no authority to construct such a plant.—Commercial Trust Co. v. Chattanooga Ry. & Light Co., D.C.Tenn., 281 F. 856.

15. Pa.—Pittsburgh, etc., Tract. Co. v. Seidel, 19 Pa.Co. 463.

16. Minn.—Burns v. St. Paul R. Co., 112 N.W. 412, 101 Minn. 363, 12 L.R.A., N.S., 757.

17. Cal.—Pacific Rys. Advertising Co. v. City of Oakland, 276 P. 629, 98 Cal.App. 165, 60 C.J. p 169 note 98.

18. Cal.—Pacific Rys. Advertising Co. v. City of Oakland, supra.

19. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., 24 So. 114, 119 Ala. 105.

20. C.J. p 169 note 4.
Power to grant franchise to carry freight see infra § 29.

Construction of franchise as authorizing carriage of freight see infra § 72.

20. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 237 N.W. 64, 205 Wis. 453, 76 A.L.R. 1180, rehearing denied 238 N.W. 377, 205 Wis. 453, 76 A.L.R. 1180, 60 C.J. p 169 note 5.

Breach of contract

Evidence held to establish substantial damages for breach of a contract by the defendant street railroad company to furnish cars and facilities to an express company for a term of years.—Pennsylvania Steel Co. v. New York City Ry. Co., D.C., 216 F. 458, 132 C.C.A. 518.

21. Me.—Percy v. Lewiston, A. & W. St. Ry., 93 A. 43, 113 Me. 106.

22. N.Y.—De Grauw v. Long Island Electric R. Co., 60 N.Y.S. 163, 43 App.Div. 502, affirmed 57 N.E. 1108, 163 N.Y. 597.

23. Tex.—Aycock v. San Antonio Brewing Assoc., 63 S.W. 953, 26 Tex.Civ.App. 341.

24. Ind.—Roberts v. Terre Haute Electric Co., 76 N.E. 323, 895, 37 Ind.App. 664, 60 C.J. p 169 note 9.

25. Ohio.—Newark v. Ohio Electric R. Co., 13 Ohio N.P., N.S., 487.

26. Pa.—Keys v. Uniontown Radial St. R. Co., 84 A. 1109, 236 Pa. 611.

§ 16. Auxiliary Bus Lines

A street railroad company may be authorized by statute to operate auxiliary bus lines.

A statutory provision extending the corporate powers of street railroad companies to include the power to own and operate motor vehicles for the transportation of passengers authorizes such a company to operate auxiliary bus lines.²⁷

§ 17. Amendment or Modification of Charter

Under power to alter, amend, or repeal reserved at the time of granting the charter, or conferred by constitution or statute, the body which granted the charter of a street railroad company may alter or amend it, either on its own initiation or on application of the company, provided its action is not arbitrary or destructive of vested rights acquired in good faith under the charter.

Under power to alter, amend, or repeal reserved at the time of granting the charter, or conferred by constitution or statute, the body which granted the charter of a street railroad company may alter or amend it, either on its own initiation or on application of the company,²⁸ acting through its authorized representatives,²⁹ provided its action is not arbitrary or destructive of vested rights acquired in good faith under the charter.³⁰ The charter may be amended or altered by a subsequent statute, extending or limiting its powers, without an actual amendment of the articles of incorporation,³¹ and, if the statute imposes no condition of acceptance, the exercise by the company of the powers granted implies acceptance thereof.³² The municipality cannot object to any amendment of the charter, by statute, in respect of a duty due to the state;³³ and, where the charter contract is with the state alone,

the municipality in which the street railroad is constructed and operated cannot add to the rights and privileges conferred or detract from the duties and obligations imposed by the charter.³⁴

Where on application for such an amendment all the preliminaries required by statute are fully complied with, a board, whose duties in granting the amendment are purely ministerial, cannot refuse the application.³⁵ The right of a prior existing street railroad company to alter or amend its charter under a statute giving it such right is not affected by a later statute which provides a method for the alteration and amendment of street railroad charters, but which also provides that it shall not affect the rights, etc., of existing corporations.³⁶ A statutory provision authorizing street railroad companies to amend their charters does not apply to a consolidation of two or more companies.³⁷ An amendment or supplement does not discharge the company from contractual obligations previously undertaken,³⁸ or modify the express terms of contracts thereafter entered into by the company.³⁹

§ 18. Dissolution or Revocation of Charter; Winding Up

The dissolution of a street railroad company or the forfeiture of its charter is governed by the rules applicable to the dissolution or forfeiture of franchises of corporations in general, except to the extent that such rules are modified by constitutional or statutory provisions.

The dissolution of a street railroad company or the forfeiture of its charter is governed by the rules applicable to the dissolution or forfeiture of franchises of corporations in general, except to the extent that such rules are modified by constitutional or statutory provisions.⁴⁰ Ordinarily, action by the

27. Ind.—Denny v. Brady, 163 N.E. 489, 201 Ind. 59.

60 C.J. p 169 note 2.

Sight-seeing busses

Statute authorizing street railway corporations to operate motor trucks or jitney lines in connection therewith authorized operation of sight-seeing busses without amendment of corporate charter.—State v. San Antonio Public Service Co., Tex.Com. App., 69 S.W.2d 38.

28. Va.—Ex parte Norfolk Ry. & Light Co., 128 S.E. 603, 142 Va. 323. 60 C.J. p 170 note 14.

29. Md.—Warren v. Fitzgerald, 56 A.2d 827, 189 Md. 476.

30. D.C.—Metropolitan R. Co. v. Macfarland, 20 App.D.C. 421, affirmed 25 S.Ct. 28, 195 U.S. 322, 49 L.Ed. 219.

31. Pa.—Appeal of Williamsport Pass. Ry. Co., 13 A. 496, 120 Pa. 1.

32. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.

60 C.J. p 170 note 16.

33. Ind.—Denny v. Brady, 163 N.E. 489, 201 Ind. 59.

34. Va.—Ex parte Norfolk Ry. & Light Co., 128 S.E. 602, 142 Va. 323.

60 C.J. p 170 note 18.

35. Va.—Ex parte Norfolk Ry. & Light Co., supra.

36. Va.—Ex parte Norfolk Ry. & Light Co., supra.

37. U.S.—Montgomery Amusement

Co. v. Montgomery Traction Co., C.C.Ala., 139 F. 353, affirmed 140 F. 988, 72 C.C.A. 682.

38. Ind.—Norton v. Union Traction Co. of Indiana, 110 N.E. 113, 183 Ind. 666, Ann.Cas.1918A 156. 60 C.J. p 170 note 22.

39. N.J.—Jersey City v. North Jersey St. R. Co., 61 A. 95, 72 N.J.Law 383.

40. N.J.—Jersey City v. North Jersey St. R. Co., supra.

41. Mass.—In re Opinions of the Justices, 199 N.E. 538, 293 Mass. 589.

60 C.J. p 170 note 27.

General court may provide for dissolution of elevated railway company and distribution of cash receipts

statute is required in order to effect annulment of the articles of incorporation of a street railroad.⁴¹ Where the statute under which the company was incorporated in effect provides that dissolution shall not take away any of the rights or remedies by or against the company, for any liability previously incurred, the state has authority to repeal the charter of such a corporation where no rights of property or contracts are thereby invaded or destroyed;⁴² and, on dissolution by legislative act, rights of contract acquired by the company during its lawful existence, which do not in their nature depend on the general powers conferred by the charter, are not destroyed, but survive;⁴³ and the company is protected from any consequences following

a repeal of its charter, other than those expressly agreed on.⁴⁴ A statutory provision which takes away merely some of the powers given to a street railroad company does not constitute a revocation of all of its charter powers;⁴⁵ and an injunction whose only effect is to keep the company within the limits of its charter does not operate as a repeal thereof.⁴⁶ It has been held that proceedings, such as quo warranto, may be maintained against a street railroad company to vacate its charter or annul its corporate existence, for a violation of a municipal ordinance which granted it the right to occupy and use the public streets for the purposes of its railway.⁴⁷

III. RIGHT TO CONSTRUCT AND OPERATE IN GENERAL

§ 19. Source and Nature of Right

The right to construct and operate a street railroad upon and along the streets of a municipality is not a natural right which every citizen possesses, but is a right which is derived from, and limited by, a lawful grant made by the proper authorities.

The right to construct and operate a street railroad upon and along the streets of a municipality is not a constitutional right of every citizen,⁴⁸ that is, it is not the natural right which every citizen possesses, but is a right which is derived from, and limited by, a lawful grant made by the proper authorities.⁴⁹ It is a franchise which must be derived from legislative authority,⁵⁰ and which, in the

absence of constitutional restrictions, may be conferred directly by the legislature, or by a municipality pursuant to authority delegated by the legislature, as discussed in Municipal Corporations § 1726 b. It has been held, however, that, where this right is acquired by permit, license, or contract with the municipality, it is a mere license;⁵¹ and it has also been said to be not a franchise but a "secondary franchise," that is, an instrumentality by which the corporate powers granted by the legislature may be exercised.⁵² So, where the legislature grants a franchise to construct and operate a railroad, subject to the consent of the local authorities to the use of the streets of a city, the consent of the city is

from sale of its assets, although in purchase of such assets metropolitan utility district assumes all liabilities of company.—In re Opinions of the Justices, *supra*.

41. N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

42. N.Y.—People v. O'Brien, 18 N.E. 692, 111 N.Y. 1, 7 Am.S.R. 684, 2 L.R.A. 255.

43. N.Y.—People v. O'Brien, *supra*. 60 C.J. p 171 note 30.

44. N.Y.—People v. O'Brien, *supra*.

45. Mass.—Dedham, etc., R. Co. v. Metropolitan R. Co., 8 Allen 279.

46. Pa.—Lehigh Coal, etc., Co. v. Inter-County St. R. Co., 31 A. 471, 187 Pa. 75. 60 C.J. p 171 note 33.

47. Wis.—State v. Madison St. R.

Co., 40 N.W. 487, 72 Wis. 612, 1 L. R.A. 771.

48. Ill.—Goddard v. Chicago, etc., R. Co., 66 N.E. 1066, 202 Ill. 362.

49. Ind.—City R. Co. v. Citizens' St. R. Co., 52 N.E. 157. 60 C.J. p 171 note 38.

Not a matter of trade or contract

Street railroads are allowed to be established and are required to depart, not as a matter of trade or contract but as a result of some particular determination, on consideration by an authorized board as to the public necessity and convenience of the service at the particular time and place; the procedure being quasi-judicial and not merely a matter of public business administration.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

50. Wis.—State v. Milwaukee, etc., R. Co., 92 N.W. 546, 116 Wis. 142. 26 C.J. p 1011 note 52—60 C.J. p 171 note 39.

Acquisition pursuant to general act

Franchises are sometimes obtained by the adoption of a charter in a prescribed form containing a description of the franchise to be exercised pursuant to the general act.—Africa v. Knoxville, C.C.Tenn., 70 F. 729, reversed on other grounds 77 F. 501, 23 C.C.A. 252—26 C.J. p 1023 note 32.

Leases

Contract between city and street railroad granting leases and including during the term the right to occupy public streets was in substance a "franchise."—Murray v. Roberts, C.C.A.N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469.

51. U.S.—Potter v. Calumet Electric St. R. Co., C.C.Ill., 158 F. 521. 60 C.J. p 172 note 42.

52. La.—Shreveport Traction Co. v. Kansas City, etc., R. Co., 44 So. 457, 119 La. 759.

but a step in the grant of a single indivisible franchise to construct and operate a street railroad, and is not the grant of an independent franchise.⁵³

§ 20. Who may Acquire and Exercise Right

The right to construct and operate street railroads may be acquired and exercised by corporations formed for that purpose or, where it is not otherwise provided by law, by natural persons, acting individually, or as a partnership, or joint-stock association.

Corporations formed for the purpose of constructing and operating street railroads may exercise that right upon the streets of a municipality when duly authorized by the state, either directly or through the agency of a municipality,⁵⁴ and, although this right to construct, maintain, and operate a street railroad is generally conferred on such a corpora-

tion,⁵⁵ it may also be conferred on, and exercised by, natural persons, acting individually,⁵⁶ or as a partnership,⁵⁷ or joint-stock association,⁵⁸ except where the statutes authorizing the granting of such a right are applicable to corporations only.⁵⁹ It has been held that a grant which is void because granted to individuals cannot be validated by an assignment thereof;⁶⁰ but it has also been held that, notwithstanding, by statute, an individual cannot be authorized to construct and operate a street railroad, he may nevertheless acquire the right by purchase, and may either organize a corporation to construct and operate it or may transfer it unimpaired to a corporation which is capable of exercising the franchise.⁶¹ A street railroad franchise cannot be granted to an ordinary commercial railroad⁶² or to a corporation not authorized to engage in a street railroad enterprise.⁶³

IV. DETERMINATION AS TO NECESSITY AND LOCATION

§ 21. In General

Under some statutes, a certificate or finding by designated public authorities that public convenience and necessity require the construction of a proposed street railroad is a prerequisite to the right to construct and operate it.

Under some statutory provisions relating to the construction and operation of street railroads, the purpose of which is to restrain the construction of useless street railroads,⁶⁴ a certificate or finding by designated public authorities that public convenience and necessity require the construction of a proposed

street railroad is a prerequisite to the right to construct and operate it.⁶⁵ Statutes of this nature have been held not to apply to authorized routes of existing corporations operating roads at the time of their passage,⁶⁶ or to a corporation purchasing the property of an existing street railroad company at a mortgage foreclosure sale thereof.⁶⁷

Parallel road. A statutory provision requiring such a certificate or finding of public convenience and necessity in respect of a proposed street railroad from one town to another, in the public high-

53. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158.

54. N.Y.—Potter v. Collis, 46 N.Y.S. 471, 19 App.Div. 392, affirmed 50 N. E. 413, 156 N.Y. 16.

Power of municipal corporation to construct and operate street railroad see Municipal Corporations § 1054.

To whom grant may be made by local authorities see *infra* § 41.

55. N.Y.—Village of Phoenix v. Gannon, 88 N.E. 1066, 195 N.Y. 471. Wis.—State v. Milwaukee, etc., R. Co., 92 N.W. 546, 116 Wis. 142.

56. U.S.—Security Trust Co. v. Village of Grosse Pointe, D.C.Mich., 32 F.2d 706, affirmed, C.C.A., 42 F.2d 377.

60 C.J. p 172 note 48.

57. Minn.—Nash v. Lowry, 33 N.W. 787, 37 Minn. 261.

60 C.J. p 172 note 49.

58. Tex.—Beaumont Traction Co. v. State, 122 S.W. 615, 57 Tex.Civ. App. 605.

59. Ill.—Goddard v. Chicago, etc., R. Co., 66 N.E. 1068, 202 Ill. 362, affirmed 66 N.E. 1119, 202 Ill. 452. 60 C.J. p 172 note 51.

60. Ill.—Wilder v. Aurora, etc., Electric Traction Co., 75 N.E. 194, 216 Ill. 493.

Tex.—San Antonio v. Rische, Civ. App., 38 S.W. 388.

61. N.Y.—Village of Phoenix v. Gannon, 88 N.E. 1066, 195 N.Y. 471.—Trojan R. Co. v. Troy, 109 N.Y.S. 779, 125 App.Div. 362, affirmed 89 N.E. 1113, 195 N.Y. 614.

62. Wis.—State v. Milwaukee, etc., R. Co., 92 N.W. 546, 116 Wis. 142.

63. Minn.—International Lumber Co. v. American Suburbs Co., 137 N.W. 395, 119 Minn. 77.

60 C.J. p 172 note 55.

64. N.Y.—New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., 89 N.Y.S. 418, 96 App.Div. 471.

65. N.Y.—New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., *supra*.

60 C.J. p 172 note 61.

Certificate by board of commissioners see *infra* § 24.

Finding by court see *infra* § 25.

The issue as to whether locations for street railroads are to be granted is determined broadly from the standpoint of the public interest in the service, and not from the standpoint of payment for the right.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

66. N.H.—In re Nashua St. R. Co., 41 A. 858, 69 N.H. 275.

60 C.J. p 173 note 62.

67. N.Y.—Syracuse, L. S. & N. R. Co. v. Carrier, 134 N.Y.S. 791, 149 App.Div. 411.

ways, which will parallel another existing street or steam railroad confers on a company which will be affected by the construction of the proposed road the right to be protected against it unless and until the required certificate has been found or obtained,⁶⁸ and such a certificate or finding is necessary where a part of the proposed line is within the public highways, although but a small part of the parallel line is so located.⁶⁹

§ 22. Authority and Permission of Municipality

Under some statutes, the power of approving the route or location of a street railroad is vested in the municipal authorities, and they may, in making their decision, consider all matters bearing on the suitability of the proposed route or location. Where the power of determining such questions is vested in the municipal council, the propriety of, and public necessity for, additional lines or extensions are for the council to decide as a legislative matter.

Under some statutes, the power of approving the route or location of a street railroad is vested in the municipal authorities.⁷⁰ In making their decision the municipal authorities may consider all matters bearing on the suitability of the proposed route or location,⁷¹ but must consider the route or location as a whole and not with respect to particular streets, one by one;⁷² and all the statutory requirements as to formal requisites of their decision must be complied with.⁷³ Where, however, the plan of the proposed route of a subway with location of stations is to be filed with the railroad commissioners, subject to the approval of municipal authority, with a right of appeal therefrom to the commissioner, the number of stations on the subway to be established is a question to be determined by the commissioners,⁷⁴ and the location of the sta-

tions after determination by the board as to their number is subject to the approval or disapproval of the municipal authorities,⁷⁵ and, in case they refuse to approve, their decision is subject to review by the board of commissioners.⁷⁶

Power of municipality to require or authorize extension. A certificate of public convenience and necessity or assent of the commission as required by statute, discussed *infra* § 24, is also a condition precedent to the right of a municipality to compel the construction of a proposed extension.⁷⁷ Where, however, the power of determining such questions is vested in the municipal council, the propriety of, and public necessity for, the additional lines or extension are for the council to decide as a legislative matter,⁷⁸ and, in the absence of some provision for a judicial review, the determination of the council as to the extension is ordinarily final, and cannot be interfered with by the courts,⁷⁹ unless, because of the extension in fact not being required by public convenience and necessity, the action of the council in determining on and directing the extension is arbitrary and unreasonable.⁸⁰

Such an ordinance is presumed to be valid with respect to public necessity and reasonableness,⁸¹ but is not conclusive, and the street railroad company is entitled to a hearing thereon in judicial proceedings,⁸² in which proceedings the burden is on it of proving the unreasonableness and invalidity of the ordinance.⁸³ Although a franchise ordinance reserves to the common council the right at any time to order the company to construct new lines, it can order the construction of a new line only where public convenience and necessity will be promoted thereby.⁸⁴

68. Conn.—New England R. Co. v. Central R., etc., Co., 36 A. 1061, 69 Conn. 47.

60 C.J. p 173 note 67.

69. Conn.—New England R. Co. v. Central R., etc., Co., *supra*.

70. Mass.—City of Cambridge v. Boston Elevated Ry. Co., 135 N.E. 313, 241 Mass. 374.
60 C.J. p 173 note 74.

Consent by local authorities for use of streets for street railroads generally see *infra* §§ 37-52.

71. Me.—Appeal of Cherryfield, etc., Electric R. Co., 50 A. 27, 95 Me. 381.

60 C.J. p 173 note 76.

72. Me.—Appeal of Cherryfield, etc., Electric R. Co., *supra*.

73. N.H.—Lenox v. Dover, etc., St. R. Co., 54 A. 1022, 72 N.H. 58.
60 C.J. p 173 note 78.

74. Mass.—Cambridge v. Railroad Com'r's, 83 N.E. 869, 197 Mass. 574.

75. Mass.—Cambridge v. Railroad Com'r's, *supra*.

76. Mass.—Cambridge v. Railroad Com'r's, *supra*.

77. Wis.—State v. Milwaukee Electric Ry. & Light Co., 172 N.W. 230, 169 Wis. 183.

78. Minn.—State v. St. Paul City Ry. Co., 230 N.W. 809, 180 Minn. 329.
60 C.J. p 175 note 16.

Consent of local authorities as condition precedent to extension of lines see *infra* § 83.

79. Minn.—State v. St. Paul City Ry. Co., 142 N.W. 136, 122 Minn. 163—
State v. St. Paul City Ry. Co., 135 N.W. 976, 117 Minn. 316, Ann.Cas. 1913D 139.

80. Minn.—State v. Duluth St. Ry. Co., 229 N.W. 883, 179 Minn. 548.
60 C.J. p 175 note 18.

81. Minn.—State v. St. Paul City Ry. Co., 230 N.W. 809, 180 Minn. 329—
State v. St. Paul City Ry. Co., 142 N.W. 136, 122 Minn. 163.

82. Minn.—State v. St. Paul City Ry. Co., 142 N.W. 136, 122 Minn. 163.

83. Minn.—State v. St. Paul City Ry. Co., 230 N.W. 809, 180 Minn. 329.

84. Minn.—State v. St. Paul City Ry. Co., 142 N.W. 136, 122 Minn. 163—

§ 23. Petition and Consent of Property Owners

Commissioners prescribing the method and manner of construction of a street railroad should, if possible, avoid injury to the owner of the fee of the highway or the adjoining owner, and such owners are entitled as of right to an opportunity to establish before the commissioners, and the court on appeal, that a proposed location or method of construction will cause them special damage.

As discussed *infra* § 54, while the legislature may usually authorize the construction and operation of a street railroad without the consent of the abutting owners, such consent may be required under the provisions of some constitutions or statutes. Where the matter of determining the location of a street railroad is intrusted to a board of commissioners, it is the duty of the commissioners in prescribing the method and manner of construction to protect the rights of the general public, as far as consistent with the execution of the railroad company's franchise, by ways reasonably practicable, and at the same time to do no greater injury to the owner of the fee of the highway, or the adjoining owner, than follows from the necessary exercise of the company's franchise;⁸⁵ and every owner of the fee in a highway over which a street railway proposes to locate and every adjoining owner is entitled as of right to an opportunity to establish before the commissioners, and the court on appeal, that a proposed location or method of construction will cause him special damage.⁸⁶ However, where such owners appear and file their petition of protest to the approval of the plan of location and have a hearing thereon before the commissioners, they cannot object thereafter that there was a failure to give them notice of such proceedings.⁸⁷

§ 24. Appointment, Powers, and Proceedings of Commissioners

- a. In general
- b. As to extension of lines

a. In General

Under some statutes, a certificate by a designated board of commissioners that public convenience and

necessity require the construction of a street railroad is a prerequisite to the right to construct and operate it. The determination of the commission with respect to a change of location may be final.

Under some statutes, a certificate by a designated board of commissioners that public convenience and necessity require the construction of a street railroad is a prerequisite to the right to construct and operate it.⁸⁸ Where the commissioners find that a street railroad properly constructed and operated over the route described in the franchise contract will, under proper conditions, be of great benefit to the community, the commission is without authority to refuse its permission for, and approval of, the construction of the railroad and the exercise of the franchise, because of limitations imposed by the municipal authorities on the franchise contract;⁸⁹ nor can the mere possibility of future contingencies which may arise in a period of years properly be considered as reasons for declining to sanction the construction of the street railroad line, and for withholding a certificate of public convenience and necessity.⁹⁰

Under some statutes, it is required that there be a public hearing on a petition for a permit to operate certain lines, and such requirement contemplates a quasi-judicial proceeding in which a majority of the commissioners must participate in the decision after considering and weighing the evidence.⁹¹ However, such evidence is properly received and the matter heard in the first instance by an employee of the public utilities department designated by the chairman with the concurrence of the commissioners.⁹² Where the statute provides that all decisions of a commissioner shall be the decisions of the commission when approved and confirmed by it, the determination of a commissioner, adopted by the commission, that the public interest requires the construction and operation of a street railroad on the route over which a particular corporation has acquired its franchise, as far as it deals with matters of fact, becomes the determination of the commission.⁹³

Location in general. A public commission may be vested with power to fix and determine the loca-

State ex rel. City of St. Paul v. St. Paul City Ry. Co., 81 N.W. 200, 78 Minn. 331.

85. Conn.—Appeal of Norton, 78 A. 593, 84 Conn. 40.

86. Conn.—Appeal of Norton, *supra*.

87. Conn.—Appeal of Norton, *supra*.

88. N.Y.—Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., 139 N.Y.S. 216, 78 Misc. 220, affirmed 144 N.Y.S. 523, 159 App. Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718.

60 C.J. p 172 notes 59, 61.

89. N.Y.—People v. Willcox, 89 N.E. 459, 196 N.Y. 212.

90. N.Y.—People v. Willcox, *supra*.

91. Mass.—City of Malden v. Metropolitan Transit Authority, 104 N.E. 2d 428, 328 Mass. 491.

92. Mass.—City of Malden v. Metropolitan Transit Authority, *supra*.

93. N.Y.—People v. Willcox, 89 N.E. 459, 196 N.Y. 212.

tion of a street railroad,⁹⁴ and in the absence of a statute to the contrary, the fact that a location, approved by commissioners, is merely a temporary location does not render it invalid.⁹⁵

Change of location. Under a statute permitting the location of a street railroad to be changed under the direction of the public utilities commission, the determination of the commission with respect to the change is final,⁹⁶ and the fact that the clerk of the commission fails to give the required notice of the determination to all parties of record does not deprive the street railroad company of its right to construct and operate its road;⁹⁷ but, where the statute requires the consent of the local authorities to the construction and operation of a street railroad, as discussed *infra* § 40, a public commission cannot order the company to remove its line of railroad from one street where it has a franchise to another street in such city where it does not have a franchise.⁹⁸

Location on private land. Under a statute which gives a street railroad company which cannot procure the right to use private land outside a highway, by agreement with the owners, the right to take, by condemnation, such land as may be necessary for the proper operation of the road within the limits of the route previously laid out, subject to the approval of the layout and location of its line by designated commissioners, a street railroad

company is not entitled to have a petition for the approval of its right of way by the commissioners entertained and approved until the company has secured by agreement, or by condemnation, the right to locate its line over private property,⁹⁹ and until a plan of location has been adopted by the company.¹ Although an application for such approval should allege these facts,² the proceeding is an informal one before the administrative tribunal,³ and the commissioners may act without such allegations if there is proof before it of such facts.⁴ Approval of the taking of a certain amount of land is not an approval of the location and taking of a smaller amount.⁵

b. As to Extension of Lines

It is sometimes required that a public commission or board grant a certificate of public convenience and necessity before an extension of the line of a street railroad may be constructed.

Under some provisions of law, a certificate of public convenience and necessity, by a public utility commission or board, is required as a prerequisite to the construction of an extension of the line of a street railroad.⁶ The requirement, however, does not apply to a company which was incorporated and had begun proceedings for an extension, under a prior statute, before the enactment of the later statute;⁷ and, unless the statute includes prior corporations, the requirement of such a certificate does

94. Mass.—*Daniels v. Commonwealth Ave. St. R. Co.*, 56 N.E. 715, 175 Mass. 518.

Tunnel railroad

Under the provisions of the Rapid Transit Act, the rapid transit commissioners fix and determine the route of a tunnel railroad in New York City.—*Hudson, etc., R. Co. v. Wendel*, 85 N.E. 1020, 193 N.Y. 166.

95. Mass.—*Daniels v. Commonwealth Ave. St. R. Co.*, 56 N.E. 715, 175 Mass. 518.

96. Me.—*Parsons v. Waterville, etc.*, St. R. Co., 63 A. 728, 101 Me. 173.

97. Me.—*Parsons v. Waterville, etc.*, St. R. Co., *supra*.

98. Okl.—*City of Tulsa v. Corporation Commission*, 221 P. 1000, 96 Okl. 180.

99. Conn.—*Appeal of Morton*, 78 A. 593, 84 Conn. 40.
60 C.J. p 174 note 91.

1. Conn.—*Stevens v. Connecticut Co.*,

84 A. 361, 86 Conn. 36, Ann.Cas. 1913D 597.
60 C.J. p 174 note 92.

2. Conn.—*Appeal of Norton*, 78 A. 593, 84 Conn. 40.
60 C.J. p 174 note 93.

3. Conn.—*Stevens v. Connecticut Co.*, 84 A. 361, 86 Conn. 36, Ann.Cas. 1913D 597.
60 C.J. p 174 note 94.

4. Conn.—*Stevens v. Connecticut Co.*, *supra*.
60 C.J. p 174 note 95.

5. Conn.—*Stevens v. New York, N. H. & H. R. Co.*, 78 A. 440, 83 Conn. 603.

6. Wis.—*State v. Milwaukee Electric Ry. & Light Co.*, 172 N.W. 230, 169 Wis. 183.
60 C.J. p 174 note 3.
Right and duty to construct extensions and new lines in general see *infra* § 83.

"Convenience" and "necessity" required to support order of commerce commission in respect of extension of streetcar line are those of public,

not of individuals; fact that considerable number of individuals might find it slightly more convenient to walk one or two blocks less to existing streetcar lines did not establish case of public convenience and necessity which would require commerce commission to order extension of streetcar line or installation of bus service.—*O'Keefe v. Chicago Rys. Co.*, 188 N.E. 815, 354 Ill. 645.

Findings

Where Public Service Commission found that extensions of two lines of street railway company were required by public convenience and necessity and that operation of proposed extensions would not impair company's earnings so as to prevent an adequate rate of return, finding would not be disturbed unless court determined that it was unsupported by substantial evidence.—*Milwaukee Elec. Ry. & Transport Co. v. Public Service Commission*, 52 N.W.2d 876, 261 Wis. 299.

7. N.Y.—*New York Cent., etc., R. Co. v. Auburn Interurban Electric R. Co.*, 70 N.E. 117, 178 N.Y. 75.

not apply to a previously and specially chartered corporation in respect of an extension of its road, as authorized by its act of incorporation.⁸ An extension of the railroad within the meaning of such a requirement does not include the construction of a transmission line, outside the right of way, for high-tension current.⁹

Under its power to authorize an extension, it has been held that the commission may authorize the construction of an additional track not connected with existing tracks, except by the tracks of another railroad company;¹⁰ but statutory power to order the construction of additional tracks and such changes, etc., as may promote the security and convenience of the public or secure adequate service, etc., does not authorize the commission to compel a street railroad company to extend its line into new territory, in the absence of authority in its charter therefor,¹¹ or where the extension, in the best judgment of the directors of the company, will result in loss.¹² The power of a municipality to require or authorize an extension of lines and the necessity of assent by the commission as a condition precedent to the right of a municipality to compel the construction of a proposed extension are discussed *supra* § 22.

New line. A statute which requires such certificate or approval by a commission where the extension constitutes a new and independent line applies only where there is an attempt to construct a road under the guise of an extension.¹³

§ 25. Authority and Determination by Court

A finding by a court that public convenience and necessity require the construction of a proposed street

railroad is, under some statutes, a prerequisite to the right to construct and operate it.

Under some statutes, a finding by a designated court that public convenience and necessity require the construction of a proposed street railroad is a prerequisite to the right to construct and operate it.¹⁴

§ 26. Review of Determination

- a. In general
- b. As to location

a. In General

Under some statutes an appeal may be taken to a designated court, from a decision of the commissioners or finding of a lower court, as to whether public convenience requires the construction or extension of a street railroad; but ordinarily the court may review the proceedings only as to rulings of law and not as to findings and decisions on questions of fact, except to determine whether there was sufficient evidence to support the decision or finding.

Under some statutes an appeal may be taken to a designated court, from a decision of the commissioners or finding of a lower court, as to whether public convenience requires the construction of a street railroad,¹⁵ and it has been held that an appeal may be taken by the commission from an order of the court reviewing its order.¹⁶ On such appeal the reviewing court may, by rule or otherwise, specify the time of hearing and notice to be given to the interested persons,¹⁷ and may review the proceedings of the board of commissioners or lower court only as to rulings of law and not as to findings and decisions on questions of fact,¹⁸ except to determine whether there was sufficient evidence to support the decision or finding.¹⁹ No evidence can be heard by the reviewing court except proof of

8. N.H.—In re Nashua St. R. Co., 41 A. 858, 69 N.H. 275—Petition of Keene Electric R. Co., 41 A. 775, 68 N.H. 434.

9. N.Y.—Syracuse, etc., R. Co. v. Carrier, 134 N.Y.S. 791, 149 App. Div. 411.

10. Mass.—Daniels v. Commonwealth Ave. St. R. Co., 58 N.E. 715, 175 Mass. 518—South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485.

11. Md.—Towers v. United Rys. & Electric Co. of Baltimore, 95 A. 170, 126 Md. 478.

Mo.—State ex rel. United Rys. Co. of St. Louis v. Public Service Com-

mission of Missouri, 192 S.W. 958, 270 Mo. 429.

12. Md.—Towers v. United Rys. & Electric Co. of Baltimore, 95 A. 170, 126 Md. 478.

13. N.Y.—Delaware, etc., R. Co. v. Syracuse, etc., R. Co., 59 N.Y.S. 1035, 28 Misc. 456, affirmed 60 N.Y.S. 386, 43 App.Div. 621.

60 C.J. p 175 note 12.

14. Conn.—New England R. Co. v. Central R., etc., Co., 36 A. 1061, 69 Conn. 47.

60 C.J. p 172 notes 60, 61.

15. Me.—In re Portland R. Extension Co., 48 A. 119, 94 Me. 565.

60 C.J. p 175 note 23.

16. N.Y.—People ex rel. South Shore

Traction Co. v. Willcox, 89 N.E. 459, 196 N.Y. 212.

60 C.J. p 176 note 24.

17. N.Y.—In re Wood, 73 N.E. 561, 181 N.Y. 93.

18. Mass.—Paine v. Newton St. R. Co., 77 N.E. 1026, 192 Mass. 90.

60 C.J. p 176 note 26.

19. N.Y.—In re Wood, 73 N.E. 561, 181 N.Y. 93.

60 C.J. p 176 note 27.

Evidence warranted determination of public utilities department that permit to metropolitan transit authority to operate trackless trolleys on designated public ways was in the public interest.—City of Malden v. Metropolitan Transit Authority, 104 N.E.2d 428, 328 Mass. 491.

the evidence that was before the board or court when the rulings complained of were made,²⁰ and, although the statute does not provide that a copy of the evidence shall be certified to the court, such certification must be deemed implied.²¹ On appeal from a decision refusing a certificate of necessity the company should allege enough to show that the court has jurisdiction, and that the company had the right to apply for an approval of its route,²² and the court, on a review of the testimony taken before the commissioners, and of the maps and papers on file, together with the findings, may order the granting of such certificate.²³

As to extension. On an application to a public commission for approval of a proposed extension of lines, whether there is a necessity for extended service is a question of fact for determination by the commission, and where the evidence supports the finding of necessity, there is no basis for judicial interference on appeal.²⁴ Where power to review a determination of municipal authorities as to an extension of a street railroad line is vested in a public commission, it may determine whether the requirement of such extension is just and reasonable,²⁵ and its decision will not be disturbed on appeal to the proper court, unless shown by the record to be erroneous.²⁶

b. As to Location

A person whose property rights are injuriously affected by unauthorized or irregular action may appeal from an order or decision of commissioners or a tribunal as to the route or location of a street railroad; and on such appeal questions submitted to the commissioners as an administrative tribunal cannot be tried *de novo*, but there may be a trial or review of judicial questions.

Under a statutory provision authorizing a person aggrieved to appeal from an order or decision as

to the route or location of a street railroad, a person is aggrieved when his property rights are injuriously affected by the unauthorized or irregular action of the commissioners or tribunal,²⁷ and if such fact appears on the face of the proceedings, he may appeal to have the order set aside,²⁸ and on appeal he assumes the position of plaintiff in equity, with the burden of proving that the commissioners or tribunal acted without authority or irregularly.²⁹

On appeal from a determination as to location, questions submitted to the commissioners as an administrative tribunal cannot be tried *de novo*,³⁰ but there may be such a trial or review of judicial questions,³¹ and, therefore, unless a specification of reasons is required by statute,³² if the objector alleges the fact that he was aggrieved, he need not state the grounds therefor,³³ and any illegality in the commissioners' order cannot be controlled or limited by the reasons of appeal.³⁴ Where the statute makes an appeal a supersedeas of the order appealed from until final action of the court thereon, an order approving the location on, and the taking of, land for a street railway, becomes of no binding force on appeal therefrom.³⁵ Where the appeal is taken by the railroad company, if objectors appear and are heard, it is immaterial that they were not given notice of the appeal.³⁶

On an application to a public commission for approval of a proposed extension of lines, whether the proposed route is a practicable one is a question of fact for determination by the commission, and where the evidence supports the finding of practicability, there is no basis for judicial interference on appeal.³⁷

Motion to erase appeal from the commissioners to

20. Mass.—Paine v. Newton St. R. Co., 77 N.E. 1026, 192 Mass. 90.

21. N.Y.—In re Wood, 73 N.E. 561, 181 N.Y. 93.

22. Me.—In re Milbridge, etc., R. Co., 51 A. 818, 96 Me. 110.

23. N.Y.—In re Wood, 73 N.E. 561, 181 N.Y. 93, 34 N.Y.Civ.Proc. 127.

24. N.Y.—Utica Transit Corp. v. Feinberg, 100 N.Y.S.2d 916, 277 App.Div. 464.

Evidence held sufficient

(1) To support commission's finding of necessity for extended service and practicability of route.—Utica Transit Corp. v. Feinberg, supra.

(2) To sustain commission's denial of application for extension of line.

—O'Keefe v. Chicago Rys. Co., 188 N.E. 815, 354 Ill. 645.

25. Ohio.—City of Cincinnati v. Public Utilities Commission, 110 N.E. 461, 91 Ohio St. 331, Ann.Cas. 1916E 1081.
60 C.J. p 176 note 33.

26. Ohio.—City of Cincinnati v. Public Utilities Commission, supra.

27. Conn.—Appeal of Norton, 78 A. 587, 84 Conn. 24.
60 C.J. p 176 note 37.

28. Conn.—Appeal of Norton, supra.
60 C.J. p 176 note 38.

29. Conn.—Stevens v. Connecticut Co., 84 A. 361, 86 Conn. 36, Ann. Cas.1913D 597.
60 C.J. p 176 note 39.

30. Conn.—Stevens v. Connecticut Co., supra.

31. Conn.—Appeal of Norton, 78 A. 587, 84 Conn. 24.
60 C.J. p 177 note 41.

32. Conn.—Appeal of Norton, supra.

33. Conn.—Appeal of Norton, supra.
60 C.J. p 177 note 43.

34. Conn.—Appeal of Norton, supra.

35. Conn.—New York, etc., R. Co. v. Stevens, 69 A. 1052, 81 Conn. 16.

36. Conn.—Appeal of Norton, 78 A. 587, 84 Conn. 24.

37. N.Y.—Utica Transit Corp. v. Feinberg, 100 N.Y.S.2d 916, 277 App.Div. 464.

the court, for want of jurisdiction, admits well pleaded facts and contests the right of appeal on any and every ground,³⁸ and will not be granted unless such want of jurisdiction appears plainly on the face of the record.³⁹ It is not essential to an appeal from an order granting such a motion that a formal judgment be filed and placed on record.⁴⁰

From decision of municipal officers. Where the power to locate the route of a street railroad through a township is conferred by statute on the supervisor and highway commissioner, it has been held that courts have no power to review their action.⁴¹ Under statutes authorizing an appeal to public commissioners from an order of municipal officers as to route or location, an appeal of this nature may be made from an order locating the tracks of a street railroad whose general route has been established by judicial decree;⁴² and, on such appeal, the municipal authorities who have entertained the petition for a location cannot raise the question that the petition was not authorized by the directors of the company, and that there was no party plaintiff before them.⁴³ A further provision of the statute that the decree of the commissioners on such appeal shall be final on all questions of fact includes the determination whether the interests of the public require certain conditions and

limitations imposed by the municipal authorities.⁴⁴ Such a decree is not invalid for want of notice of appeal to the municipality, if the mayor and aldermen were duly notified of the petition of appeal and hearing thereon, according to the orders of the commissioners;⁴⁵ nor can these officers raise the further objection that abutting landowners were not made parties to the proceeding and given notice thereof.⁴⁶

Where the statute authorizes an appeal from any decision or order of the municipal authorities, and provides that the petition of appeal shall state specifically the portions of the decision appealed from, the power of the commissioners to review the whole order is not taken away by the fact that only certain portions of the order as specified by appellant are objectionable,⁴⁷ and the commissioners may affirm, disaffirm, or modify the order appealed from as they deem equitable.⁴⁸ If the board of commissioners fails to exercise the power of review given it by statute, the court, on appeal from the decision of the board, is not required to make a decision of its own,⁴⁹ but may annul the decision of the board and direct it to proceed further,⁵⁰ and may direct the commissioners to exercise their equitable powers in disposing of the appeal to them from the decision of the municipal authorities.⁵¹

V. FRANCHISES OR PRIVILEGES IN STREETS, ROADS, OR BRIDGES

A. GRANTS OF FRANCHISES OR PRIVILEGES

1. IN GENERAL

§ 27. Necessity

In order that a street railroad company may carry out the purpose of its existence by constructing and operating its road on and along the streets of a municipality, it must have a further exercise of sovereign power in its behalf, by a grant of such right from the municipality, under authority from the legislature, or by a grant directly by the state legislature.

The charter or articles of incorporation of a street railroad company give it but the bare power to exist,⁵² and in order that it may carry out the purpose of its existence by constructing and operating its road on and along the streets of a municipality, it must have a further exercise of sovereign power in its behalf, by a grant of such right from

38. Conn.—Appeal of Norton, 78 A. 593, 84 Conn. 40.

39. Conn.—Appeal of Norton, 78 A. 587, 84 Conn. 24.
60 C.J. p 177 note 49.

40. Conn.—Appeal of Norton, *supra*.
60 C.J. p 177 note 50.

41. Mich.—Silsby v. Lyle, 75 N.W. 886, 117 Mich. 327.

42. N.H.—Boston, etc., R. Co. v. Portsmouth, 51 A. 664, 71 N.H. 21.

43. N.H.—Boston, etc., R. Co. v. Portsmouth, *supra*.

44. N.H.—Boston, etc., R. Co. v. Portsmouth, *supra*.

45. N.H.—Boston, etc., R. Co. v. Portsmouth, *supra*.

46. N.H.—Boston, etc., R. Co. v. Portsmouth, *supra*.

47. Conn.—Appeal of Waterbury, 61 A. 547, 78 Conn. 222.

48. Conn.—Appeal of Waterbury, *supra*.

49. Conn.—Appeal of Waterbury, *supra*.

50. Conn.—Appeal of Waterbury, *supra*.

51. Conn.—Appeal of Waterbury, *supra*.

52. Ill.—People v. Suburban R. Co., 53 N.E. 349, 178 Ill. 594, 49 L.R.A. 650.

Tex.—Ft. Worth St. R. Co. v. Rose-dale Co., 4 S.W. 534, 68 Tex. 169.

the municipality, under authority from the legislature, or by a grant directly by the state legislature.⁵³ Whatever consents are required by statute must be obtained before the company acquires any right to build, as discussed *infra* §§ 40, 54, and the unauthorized occupation of a street or highway by a street railroad company is a nuisance *per se*, as considered *infra* § 28. Where authority to use streets and roads is derived directly from the legislature, a street railroad company is not entitled to occupy a street or public road even temporarily, unless such right is clearly conferred by its charter;⁵⁴ but, when the company is acting within express charter authority, it is not subject to interference by a municipality.⁵⁵

Interurban service. The operation on a street railroad of cars reasonably suited for street car service, which render reasonable or prescribed street car service, do not subject the adjacent property within the city limits to an additional servitude, by the fact that they start from, or are destined for, points outside the city limits, and, hence, their operation does not require any franchise additional to the urban streetcar franchise,⁵⁶ and an injunction will not lie to restrain the company, having no franchise for interurban service, from carrying passen-

gers out of or into the city on cars rendering the usual street railway service while passing along the city streets.⁵⁷

§ 28. — Effect of Unauthorized Entry on, or Occupation of, Streets, Roads, or Bridges

The unauthorized entry on, or occupation of, a street or highway by a street railroad company constitutes a nuisance or a continuing trespass which may be restrained by injunction at the suit of public authorities or persons sustaining injury; and local authorities have the right to compel a street railroad to remove its property from streets occupied without authority.

The unauthorized entry on, or occupation of, a street or highway by a street railroad company constitutes a nuisance⁵⁸ which may be enjoined at the suit of the state,⁵⁹ of the local authorities from whom consent or a franchise is necessary,⁶⁰ or by any person sustaining peculiar injury not common to the general public.⁶¹ Such use has also been regarded as a continuing trespass⁶² which cannot ripen into a right as against a city in its governmental capacity or as against the public,⁶³ and may be restrained by injunction.⁶⁴ The local authorities have the right to compel a street railroad to remove its property from streets occupied without authority,⁶⁵ and this

53. U.S.—Blair v. Chicago, Ill., 26 S. Ct. 427, 201 U.S. 400, 50 L.Ed. 801. 60 C.J. p 178 note 67.

Consent of local authorities see *infra* §§ 37-52.

Power of state legislature or municipality to grant use of streets to street railroad company see Municipal Corporations § 1726 b.

54. Va.—Norfolk R., etc., Co. v. Consolidated Turnpike Co., 40 S.E. 897, 100 Va. 243.

60 C.J. p 178 note 71.

55. U.S.—Citizens' St. R. Co. v. Memphis, C.C.Tenn., 53 F. 715. 60 C.J. p 178 note 72.

56. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802, overruling *Younkin v. Milwaukee Light, Heat & Traction Co.*, 98 N.W. 215, 120 Wis. 477.

57. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802, overruling *Younkin v. Milwaukee Light, Heat & Traction Co.*, 98 N.W. 215, 120 Wis. 477.

58. Ill.—McEniry v. Tri-City Ry. Co., 98 N.E. 227, 254 Ill. 99. 60 C.J. p 178 note 77.

59. Iowa.—State v. Des Moines City Ry. Co., 140 N.W. 437, 159 Iowa 259.

Pa.—Attorney General v. Lombard, etc., R. Co., 10 Phila. 352.

60. N.J.—Grey v. New York & P. Traction Co., 40 A. 21, 56 N.J.Eq. 463.

60 C.J. p 178 note 79.

Complaint dismissed

N.Y.—City of New Rochelle v. Westchester Elec. R. Co., 29 N.Y.S.2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S.Ct. 64, 317 U.S. 663, 87 L.Ed. 533.

Evidence

In action by city to enjoin operation of trolley line over streets, the absence of evidence that defendant company had previously been lessee of trolley line of company which held franchise but which surrendered its capital stock to defendant did not warrant finding that defendant was operating without a franchise, where certificate of the surrender admitted in evidence stated that it was given pursuant to statute which did not authorize transfer to railroad which

was not a lessee.—City of New Rochelle v. Westchester Elec. R. Co., *supra*.

61. Pa.—Lehigh Coal, etc., Co. v. Intercounty St. R. Co., 31 A. 471, 167 Pa. 75.

60 C.J. p 178 note 80.

Suit by abutting landowner see *infra* § 101.

62. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802.

63. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., *supra*.

64. Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802, modified on other grounds 181 N.W. 821, 173 Wis. 400.

65. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 183 Ind. 543. 60 C.J. p 179 note 84.

right cannot be lost by laches⁶⁶ or by estoppel.⁶⁷

Local authorities cannot, however, abate a street railroad as a nuisance except by due process of law;⁶⁸ and threats of tearing up the tracks by the municipality gives the company a right of action against the municipality by injunction.⁶⁹ Where a highway is occupied without the required consent, the local authorities may sue for damage to the highway,⁷⁰ but it has been held that such authorities may not recover for the use and occupation of the highway,⁷¹ or for damages for trespass,⁷² where no effort was made to prevent the illegal act. A street railroad company operating without authority has the right at once to cease its service and take up its tracks,⁷³ and, although it is without legal right to operate its road, it nevertheless has a property right in the rails, ties, poles, and wires which it has placed in the street which even the legislature cannot take away.⁷⁴

Questioning right of another company to occupy street. A company which has not obtained the requisite consent has no standing to question the right of another company, subsequently incorporated, to occupy streets, covered by the prior charter of the complaining company,⁷⁵ and this is true whether the second company has received⁷⁶ or has not received⁷⁷ the consent of the authorities.

Bridges. Where a company has failed to obtain the consents made necessary by statute, a railroad company may enjoin the construction of tracks over its bridge for the purposes of the electric railway, although the municipality in which the bridge is situated has given its consent, and although the street

railway company has offered to reconstruct and strengthen the bridge so that it will be safe for the use of electric cars.⁷⁸

§ 29. Power to Grant

- a. In general
- b. Exclusive rights

a. In General

Although a franchise to occupy streets may be granted by a municipality in pursuance of delegated authority, it is in fact granted by the state through the agency of the municipality, and the legislature may enlarge the rights conferred by franchise of the municipality.

Since, has been discussed in Municipal Corporations § 1726 b, in the absence of constitutional provisions to the contrary, a franchise to use the streets of a municipal corporation can be granted only by the legislature or its duly authorized agent, strictly speaking, the municipality has no inherent power to grant such a franchise or privilege, although such power may be delegated to it by the state. Accordingly, although the franchise to occupy streets is granted by a municipality in pursuance of delegated authority, it is in fact granted by the state through the agency of the municipality.⁷⁹ The legislature, therefore, can enlarge the rights conferred by a franchise granted by a municipality,⁸⁰ either directly or through some other body.⁸¹ Where the streets on which the road may be constructed are designated by legislative grant, municipal consent to construct roads on streets not designated will not authorize construction of roads thereon,⁸² since such consent cannot supply the want of power.⁸³ Under some statutes, a public

66. N.J.—Trenton & Mercer County Traction Corporation v. Inhabitants of Ewing Tp., 107 A. 416, 90 N.J. Eq. 560.

67. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 183 Ind. 543.
60 C.J. p 179 note 86.

68. Ohio.—Mill Creek Valley St. R. Co. v. Carthage, 18 Ohio Cir.Ct. 216, 9 Ohio Cir.Dec. 833.
60 C.J. p 179 note 87.

69. Ohio.—Mill Creek Valley St. R. Co. v. Carthage, supra.

70. Ohio.—Citizens' Electric R. Co. v. Richland County, 46 N.E. 60, 56 Ohio St. 1.

71. N.Y.—City of New York v. Staten Island Rapid Transit Ry. Co., 14 N.E.2d 803, 277 N.Y. 485.

72. N.Y.—City of New York v. Stat-

en Island Rapid Transit Ry. Co., supra.

73. U.S.—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.

74. U.S.—Cleveland Electric R. Co. v. Cleveland, 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

N.J.—Jersey City v. North Jersey St. R. Co., 67 A. 113, 74 N.J.Law 774.

75. Pa.—Larimer, etc., R. Co. v. Larimer St. R. Co., 20 A. 570, 137 Pa. 533.
60 C.J. p 179 note 92.

76. Pa.—Coatesville, etc., St. R. Co. v. Uwchlan St. R. Co., 18 Pa.Super. 524.

77. Pa.—Larimer, etc., R. Co. v. Larimer St. R. Co., 20 A. 570, 137 Pa. 533.
60 C.J. p 179 note 94.

78. Pa.—Pennsylvania R. Co. v. Parkesburg, etc., St. R. Co., 26 Pa. Super. 159.

79. Conn.—City of Hartford v. Connecticut Co., 140 A. 734, 107 Conn. 312.
60 C.J. p 179 note 1.

80. Kan.—State v. Parsons St. Ry. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L.R.A., N.S., 1082.
60 C.J. p 179 note 2.

81. Kan.—State v. Parsons St. Ry. & Electrical Co., supra.

82. N.Y.—Brooklyn Heights R. Co. v. Brooklyn, 46 N.E. 509, 152 N.Y. 244.
60 C.J. p 179 note 4.

83. N.Y.—Brooklyn Heights R. Co. v. Brooklyn, supra.

commission is vested with exclusive authority to grant permits for the operation of certain street railroads,⁸⁴ and such provisions will be regarded as repealing other statutes giving municipal officers authority to grant permits with the approval of the public commission.⁸⁵ Legislative power conferred on a municipality to authorize street railroads to be laid down in streets does not prohibit it, where there is one track in the street, from granting the right to construct another in the same street.⁸⁶

Exhaustion of power. Since the railroad company derives its right to be a railroad company and to occupy the streets with its tracks from the legislature and not from the municipality, where the only authority granted to local authorities is to grant a location for the tracks over the route designated in the certificate of incorporation or to refuse to make the grant, the municipality having once made the grant has exhausted its power and may not take further action⁸⁷ or interfere with the legislative grant or any rights that are conferred by legislative authority.⁸⁸

Private purpose. In the absence of statutory authority therefor, a street railroad franchise is void when granted for private and not public purposes,⁸⁹ at least where public considerations do not enter into the grant.⁹⁰

Charter restrictions. A street railroad franchise is invalid where, when granted by a municipality, it conflicts with a provision of the city charter,⁹¹ unless such charter provision itself is void.⁹²

Carriage of freight. Under a power to grant franchises for street railroads, a municipal corporation, unless forbidden by statute, may grant a franchise for a street railroad intended to carry freight

as well as passengers.⁹³

Park commissioners. Under a statute authorizing a board of park commissioners to license such passenger railways as it thinks will comport with the use and enjoyment of the park by the public, it has, where the legislature has committed to it the entire exclusive control and maintenance of the park, the right to license railroads therein without interference by the municipal authorities,⁹⁴ and this power is not limited by a constitutional provision requiring the consent of local authorities to the construction of any street passenger railway within the limits of any city, borough, or township.⁹⁵

Who may question power. The question whether a street railway may, under a franchise to use city streets, carry freight, express, and mail in connection with its passenger service may be raised only by a citizen or resident or property owner of the city.⁹⁶

b. Exclusive Rights

While a municipality may in some circumstances have power to grant exclusive rights and privileges in streets for street railroads for a reasonable length of time, it cannot, except where authorized by the legislature either expressly or by necessary implication, grant a street railroad company an exclusive franchise to the use of its streets.

Since, when not restrained by constitutional provisions, and when the public interest makes it desirable, the state, acting through the legislature or municipal council, may grant an exclusive street railroad franchise, as discussed in Constitutional Law § 464, it has been held that statutory power in a city council to authorize or prohibit the location and laying down of tracks for street railways authorizes it to grant exclusive rights and privileges in streets for a reasonable length of time,⁹⁷ and

84. Mass.—City of Malden v. Metropolitan Transit Authority, 104 N. E.2d 428, 328 Mass. 491.

Statute held valid
Mass.—City of Malden v. Metropolitan Transit Authority, supra.

85. Mass.—City of Malden v. Metropolitan Transit Authority, supra.

86. Cal.—Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365, 13 Am.R. 181.

87. N.J.—Asbury Park, etc., R. Co. v. Neptune Tp., 67 A. 790, 73 N.J. Eq. 323, modified on other grounds 74 A. 998, 75 N.J.Eq. 562.

88. N.J.—Asbury Park, etc., R. Co. v. Neptune Tp., supra.

89. Tex.—San Antonio v. Rische, 93. Civ.App., 38 S.W. 388, 60 C.J. p 180 note 11.

Use of public road by private tramway

A public official may not assent to the occupancy of the road bed of a public road by a private tramway.—Hark v. Mountain Fork Lumber Co., 34 S.E.2d 348, 127 W.Va. 586.

90. N.Y.—Fanning v. Osborne, 7 N. E. 307, 102 N.Y. 441.

91. Wash.—Dolan v. Puget Sound Traction, Light & Power Co., 130 P. 353, 72 Wash. 343, 60 C.J. p 180 note 13.

92. Wash.—Dolan v. Puget Sound Traction, Light & Power Co., supra.

93. Cal.—City of Albany v. United States Fidelity & Guaranty Co., 176 P. 705, 38 Cal.App. 466.

94. Pa.—City of Philadelphia v. Com'rs of Fairmount Park, 4 Pa. Dist. 445, 16 Pa.Co. 625.

95. Pa.—City of Philadelphia v. Com'rs of Fairmount Park, supra.

96. Cal.—City of Albany v. United States Fidelity & Guaranty Co., 176 P. 705, 38 Cal.App. 466.

97. Iowa.—Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co., 33 N.W. 610, 35 N.W. 602, 73 Iowa 513.

Monopolistic operation

The city council has power to de-

that a street railroad company may obtain from the state, with the consent of the city, a right to such an exclusive use of a street as necessarily excludes or limits the power of the municipality thereafter to interfere.⁹⁸ However, in accordance with the general rule as to granting exclusive privileges or franchises by a municipality, discussed in Municipal Corporations § 1724, a municipality, except where authorized by the legislature either expressly or by necessary implication, cannot grant a street railroad company an exclusive franchise to the use of its streets,⁹⁹ and, where a municipality has no power to grant such an exclusive franchise, an agreement based on, and in consideration of, such a franchise is also void.¹

§ 30. Grant by Private or Local Statute

Under a constitutional provision which prohibits a private or local bill granting the right to lay railroad tracks, or any new exclusive privilege or franchise, the legislature has no power to pass a private or local bill granting to any corporation the right to construct or operate a street railroad, except on the conditions mentioned in the constitution.

Under a constitutional provision which prohibits a private or local bill granting the right to lay railroad tracks, or any new exclusive privilege or franchise, the legislature has no power to pass a private or local bill granting to any corporation the right to construct or operate a street railroad, except on the conditions mentioned in the constitution,² and such a statute cannot be passed to give

an existing street railroad company any new right to lay railroad tracks or any new franchise or privilege.³ Such provision, however, is not violated by a private or local statute to regulate and control a right previously existing in a corporation to lay down tracks or to give new privileges or franchises provided they are not exclusive;⁴ nor is it violated by a general statute providing for the construction of an elevated and underground railroad.⁵

§ 31. Rights Which May Be Conferred in General

A municipality in granting a street railroad company a franchise to use its streets cannot give to the grantee rights which are greater than those permitted by the law then in existence, or which are contrary to general legislative acts.

A municipality in granting a street railroad company a franchise to use its streets cannot give to the grantee rights which are greater than those permitted by the law then in existence,⁶ or which are contrary to general legislative acts;⁷ and, while the grant of such a franchise is subject to the rights of the public, as discussed *infra* § 72, it must be reasonable with respect to future public rights,⁸ and, if the use of the street by the company must necessarily result in denying the public the right to use it as a public thoroughfare, the grant is invalid and inoperative.⁹

As to route or streets. Where the charter of the street railroad company is required to state the route

cide whether operation of a street railway in a city shall be competitive or monopolistic.—*People v. Chicago Transit Authority*, 64 N.E.2d 4, 392 Ill. 77.

Use of city-owned subways

An ordinance of city implementing purposes of Transit Authority Act and granting to authority right to use city-owned subways is not invalid as granting exclusive rights and creating a monopoly beyond powers to be exercised by city by ordinance.—*People v. Chicago Transit Authority*, *supra*.

98. N.Y.—*City of New York v. Hudson, etc., R. Co.*, 128 N.E. 152, 229 N.Y. 141.

99. Fla.—*Florida Cent., etc., R. Co. v. Ocala St., etc., St. R. Co.*, 22 So. 692, 39 Fla. 306.
60 C.J. p 181 note 32.

1. N.Y.—*Potter v. Collis*, 50 N.E. 413, 156 N.Y. 18.

2. N.Y.—*Astor v. Arcade R. Co.*, 20

N.E. 594, 113 N.Y. 93, 2 L.R.A. 789—*Gilbert El. R. Co. v. Kobbe*, 70 N.Y. 361, 3 Abb.N.Cas. 434.
Legislative power to enact special or local laws in general see Statutes § 152 et seq.

Statute held not invalid

Fact that statute creating Chicago transit authority and giving authority right, but not to exclusion of public rights, to use streets or roads in metropolitan area for interurban transportation of passengers, might prevent operation of other transportation systems in the area and thus create a monopoly, would not render statute unconstitutional as granting special privileges or as constituting a local or special law granting right to lay down railroad tracks.—*People v. Chicago Transit Authority*, 64 N.E. 2d 4, 392 Ill. 77.

3. N.Y.—*Matter of New York El. R. Co.*, 70 N.Y. 327, 3 Abb.N.Cas. 401—*Auchincloss v. Metropolitan El. R. Co.*, 74 N.Y.S. 534, 69 App.Div. 63.

4. N.Y.—*Gilbert El. R. Co. v. Kobbe*, 70 N.Y. 361, 3 Abb.N.Cas. 434—*Matter of New York El. R. Co.*, 70 N.Y. 327, 3 Abb.N.Cas. 401.

5. N.Y.—*Matter of New York El. R. Co.*, *supra*.

6. N.Y.—*People ex rel. Cohoes Ry. Co. v. Public Service Commission*, Second District, 128 N.Y.S. 384, 143 App.Div. 769, affirmed 95 N.E. 1137, 202 N.Y. 547.

Construction of grant as to nature and extent of rights acquired see *infra* § 72.

Grant of exclusive franchise see *supra* § 29 b.

7. N.Y.—*People ex rel. Cohoes Ry. Co. v. Public Service Commission*, Second District, *supra*.

8. U.S.—*City of Denver v. Mercantile Trust Co. of New York, Colo.*, 201 F. 790, 120 C.C.A. 100.

9. Mo.—*Watson v. Robberson Ave. R. Co.*, 69 Mo.App. 548.
60 C.J. p 180 note 23.

and termini of the proposed road, the municipality has no power to grant, and the company no authority to accept, rights in streets other than those named in the charter of the company.¹⁰ A grant to use designated streets, proceedings to open which are then pending, is not invalid because the streets are not then open.¹¹

§ 32. Conditions or Reservations

- a. In general
- b. Limitations of power to impose
- c. Acceptance and estoppel
- d. Performance and enforcement

a. In General

Where the municipal authorities are given the power to grant or to withhold their consent to the construction of street railroads in the city streets, they may ordinarily impose such conditions on which their consent will be given as they see fit, and the company must accept the franchise or consent on the conditions so imposed or not at all.

Where the municipal authorities are given the power to grant or to withhold their consent to the construction of street railroads in the city streets, they may, subject to limitations considered infra subdivision b of this section, impose such conditions on which their consent will be given as they see fit,¹² more particularly where they are authorized to give their consent on such terms and conditions as they may deem for the best interests of the

public,¹³ or are otherwise expressly authorized to impose terms and conditions.¹⁴ The company must accept the franchise or consent on the conditions so imposed or not at all.¹⁵ As long as the discretion vested in the municipality as to such reservations and conditions is fairly and honestly exercised, it is not the province of the courts to interfere.¹⁶ Where the city in granting a street railway franchise expressly reserved the power to license for police power regulation, the exercise of such power by the city is not inconsistent with the preservation of the franchise privileges of the street railway.¹⁷

Necessity of incorporation in franchise ordinance. Conditions imposed by statute need not be embodied in the franchise ordinance in order to be binding on the company.¹⁸

b. Limitations of Power to Impose

The power of a municipal corporation to prescribe terms and conditions on which a street railroad shall be constructed and operated is not unlimited, and it cannot impose terms and conditions against public policy, or which are forbidden by, or conflict with, statutory enactments, or which are inconsistent with the rights granted to the company by the legislature or inconsistent with restrictions already placed on the company by the legislature.

Although express power is given to municipal corporations to prescribe terms and conditions on which a street railroad shall be constructed and operated, the power of the municipal corporation is not unlimited.¹⁹ It cannot impose terms and conditions against public policy,²⁰ or which are forbid-

10. Pa.—Van Voorhis v. Pittsburgh & Charleroi St. Ry. Co., 13 Pa. Dist. 719.

60 C.J. p 180 note 25.

11. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 144 N.W. 206, 156 Wis. 83.

12. U.S.—Cincinnati, N. & C. Ry. Co. v. City of Cincinnati, C.C.A. Ohio, 71 F.2d 124, certiorari denied 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

Utah.—Union Pac. R. Co. v. Public Service Commission, 134 P.2d 469, 103 Utah 186.

12 C.J. p 400 note 13 [a]—60 C.J. p 205 note 68.

The Public Service Commission has no power to issue an order taking precedence over conflicting terms of franchise granted railroad company by city to construct and maintain track on city street; nor is consent of commission necessary to exercise by city of its proper rights within

such terms.—Union Pac. R. Co. v. Public Service Commission, supra.

13. Mass.—Worcester v. Worcester Consol. St. R. Co., 78 N.E. 222, 192 Mass. 106.
60 C.J. p 205 note 69.

14. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801—Louisville Trust Co. v. Cincinnati, Ohio, 76 F. 296, 22 C.C.A. 334, certiorari denied 17 S.Ct. 995, 164 U.S. 707, 41 L.Ed. 1183.

Stipulations precedent to grant

In a statute, providing that "if it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied," the word "conditions" was construed as meaning

stipulations precedent to the enjoyment of the grant.—Cleveland, etc., R. Co. v. Cincinnati, Ohio Prob. 269, 271.

15. Pa.—Plymouth Tp. v. Chestnut Hill & N. Ry. Co., 32 A. 19, 168 Pa. 181.
60 C.J. p 205 note 71.

16. Ill.—Byrne v. Chicago Gen. R. Co., 48 N.E. 703, 169 Ill. 75.

17. Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

18. Ill.—General Electric R. Co. v. Chicago City R. Co., 66 Ill.App. 362.

19. Ohio.—Elyria v. Cleveland, etc., Ry. Co., 8 Ohio N.P., N.S., 85.

20. Ohio.—Elyria v. Cleveland, etc., Ry. Co., supra.
60 C.J. p 205 note 74.

den by,²¹ or conflict with,²² statutory enactments; nor can it impose conditions which are inconsistent with the rights granted to the company by the legislature²³ or inconsistent with restrictions already placed on the company by the legislature.²⁴ Further, the condition or restriction imposed must be one within the scope of the legislative power of the municipality.²⁵ For example, it cannot impose a restriction which would operate extraterritorially.²⁶ So, where the power of the municipality to grant the right to operate a railroad is conferred by the legislature, it can grant such right only in the manner and on the conditions prescribed by the statute conferring the power.²⁷

A constitutional provision prohibiting the legislature from passing any law granting the right to construct and operate a street railroad within any city without first acquiring the consent of such city does not, through the implied right of the city to impose conditions on its consent, confer on the city authority, by means of conditions imposed, to draw under its dominion subject matter not otherwise within its jurisdiction.²⁸ So it cannot, by means of conditions, limit, control, or interfere with the police power,²⁹ or limit the taxing power of the legislature,³⁰ or require the performance of a forbidden act.³¹

Conditions subsequent. A distinction is drawn between conditions precedent and conditions subsequent, in decisions which hold that, where the consent is granted on conditions subsequent, such condi-

tions must be reasonable and within the power of the company to perform.³² In such case the presumption is in favor of the validity of the subsequent condition imposed, on the assumption that the municipal authorities have acted properly and in good faith.³³ However, it is a matter over which the courts have jurisdiction, and any municipal action relating thereto which is arbitrary, oppressive, or confiscatory will be declared void.³⁴

c. Acceptance and Estoppel

A street railroad company has power to agree to such terms imposed by the municipality as a condition to use of its streets as are not in violation of law or public policy, and by accepting the grant the company estops itself to question the reasonableness of the conditions imposed.

The power of the city to prescribe terms on which street railway companies may lay tracks in the streets and operate them necessarily implies the power of the company to agree to such terms not in violation of law or public policy.³⁵ The company by accepting the grant estops itself from questioning the reasonableness of the conditions imposed,³⁶ or from attacking the condition imposed as ultra vires while asserting the validity of the franchise.³⁷ The doctrine of estoppel cannot be made, however, to cover a contract which is entirely beyond the range of the municipal authority,³⁸ as where it is attempted to impose on a grant a condition which operates beyond the limits of the municipality.³⁹

21. Ill.—Chicago Gen. R. Co. v. Chicago, 52 N.E. 880, 176 Ill. 253, 68 Am.S.R. 188, 66 L.R.A. 959—Byrne v. Chicago Gen. R. Co., 48 N.E. 703, 169 Ill. 75.

22. N.Y.—People v. Willcox, 89 N. E. 459, 196 N.Y. 212.
60 C.J. p 206 note 76.

23. Ohio.—State v. Dayton Traction Co., 18 Ohio Cir.Ct. 490, 10 Ohio Cir.Dec. 212.
60 C.J. p 206 note 77.

24. Ohio.—Elyria v. Cleveland, etc., R. Co., 8 Ohio N.P., N.S., 85.

25. Cal.—City of Arcata v. Green, 106 P. 86, 156 Cal. 759.

Rental

Where no authority was granted by general assembly to city to lease or let public streets for rental based on gross receipts or otherwise, ordinance seeking to recover fees and penalties for erection and maintenance of street railway poles and maintenance of electric wires could

not be sustained as authority to collect rental for use of a public street.—City of Chicago Heights v. W. U. Tel. Co., 94 N.E.2d 306, 406 Ill. 428.

26. Cal.—City of Arcata v. Green, 106 P. 86, 156 Cal. 759.
60 C.J. p 206 note 80.

27. N.Y.—Beekman v. Third Ave. R. Co., 47 N.E. 277, 153 N.Y. 144.
60 C.J. p 206 note 81.

28. Mo.—Southwest Missouri R. Co. v. Public Service Commission, 219 S.W. 380, 281 Mo. 52.

29. Mo.—Southwest Missouri R. Co. v. Public Service Commission, supra.

30. Mo.—Southwest Missouri R. Co. v. Public Service Commission, supra.

31. Mo.—Southwest Missouri R. Co. v. Public Service Commission, supra.

32. Pa.—Borough of Swarthmore v.

Philadelphia Rapid Transit Co., 124 A. 343, 280 Pa. 79, 33 A.L.R. 128.
60 C.J. p 206 note 86.

33. Pa.—Valley Rys. v. Borough of Mechanicsburg, 108 A. 629, 265 Pa. 222.
60 C.J. p 206 note 87.

34. Pa.—Valley Rys. v. Borough of Mechanicsburg, supra.

35. Ill.—People v. Chicago Rys. Co., 110 N.E. 401, 270 Ill. 379—People v. Chicago Rys. Co., 110 N.E. 394, 270 Ill. 278.

36. U.S.—Potter v. Calumet Electric St. R. Co., C.C.Ill., 158 F. 521.
60 C.J. p 206 note 92.

37. Conn.—City of Hartford v. Connecticut Co., 140 A. 734, 107 Conn. 312.
60 C.J. p 207 note 93.

38. Cal.—City of Arcata v. Green, 106 P. 86, 156 Cal. 759.

39. Cal.—City of Arcata v. Green, supra.

d. Performance and Enforcement

The street railroad company, by accepting the franchise and the privileges conferred thereby, obligates itself to perform the conditions imposed, and such conditions form part of the contract and will be enforced by the courts.

The street railroad company, by accepting the franchise and the privileges conferred thereby, obligates itself to perform the conditions imposed,⁴⁰ notwithstanding they do not inure to the benefit of the company,⁴¹ or that they render their business unprofitable,⁴² or may result in a serious financial loss.⁴³ The obligation accepted as a condition of the grant becomes a public duty, of which the company cannot be relieved by the parties' practical construction of the agreement.⁴⁴ If the conditions imposed are in the nature of conditions precedent, they must be complied with in a reasonable time, or else no rights vest under the franchise.⁴⁵

Enforcement. The conditions form part of the contract and will be enforced by the courts.⁴⁶ The city, however, under power to enact ordinances and to enforce them by imposing penalties, cannot enforce a mere contract obligation by the enactment of penal ordinances punishing a breach thereof.⁴⁷ Under some statutes the performance of conditions may be enforced, at the instance of a public service commission, by injunction.⁴⁸

§ 33. — Particular Conditions

- a. In general
- b. Payment of compensation
- c. Rate of fare; giving of transfers
- d. Construction, equipment, and operation

a. In General

Particular conditions which have been held properly imposed under the power of a municipality to fix the terms and conditions of its grant of a street railroad franchise include conditions that the company permit use of its tracks by another company, that the construction of new lines or extensions from time to time may be ordered, and that the company pay the incidental expenses of the ordinance and a reasonable counsel fee.

Numerous particular conditions have been held properly imposed under the power of a municipality to fix the terms and conditions of its grant of a street railroad franchise,⁴⁹ including conditions which are suggested by the changes in the surface of the street directly caused by the new construction;⁵⁰ that the company shall observe and be subject to all ordinances then in force or thereafter passed with respect to passenger railroads;⁵¹ and that the municipality shall have power to pass ordinances for the protection of persons and the creation of liability against the company for violations.⁵² The municipality may require that the company permit use of its tracks by another street railroad company,⁵³ and that elevated roads enter into agreement with companies owning and operating a surface steam railroad on the same street, transferring the operation by steam to the elevated tracks and transforming the surface road into an ordinary street railroad.⁵⁴

Construction of new lines or extensions. It is proper to impose as a condition that the construction of new lines or extensions from time to time may be ordered.⁵⁵

Limitations on duration of franchise. As a condition to the grant of a right to use the streets, a

40. Pa.—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 Pa.Super. 89.
60 C.J. p 207 note 96.

41. Ohio.—Cincinnati St. R. Co. v. Cincinnati, 24 OhioCir.Ct., N.S., 241.

42. N.Y.—Public Service Commission v. Westchester St. R. Co., 99 N.E. 536, 206 N.Y. 209.

43. Pa.—Borough of Swarthmore v. Philadelphia Rapid Transit Co., 124 A. 343, 280 Pa. 79, 33 A.L.R. 128.
60 C.J. p 207 note 99.

44. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

45. Ark.—Little Rock R., etc., Co. v. North Little Rock, 88 S.W. 826, 1026, 76 Ark. 48.

46. Pa.—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 Pa.Super. 89.
60 C.J. p 207 note 3.

47. N.Y.—City of New York v. New York City Ry. Co., 123 N.Y.S. 132, 138 App.Div. 131.

48. N.Y.—Public Service Commission v. Westchester St. R. Co., 99 N.E. 536, 206 N.Y. 209.
60 C.J. p 207 note 5.

49. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469.

50. Va.—Portsmouth v. Virginia, etc., R. Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.

51. Pa.—Philadelphia v. Ridge Ave.

Pass. R. Co., 22 A. 695, 143 Pa. 444—Philadelphia v. Citizens' Pass. R. Co., 10 Pa.Co. 16.

52. Ark.—Bain v. Ft. Smith Light & Traction Co., 172 S.W. 843, 116 Ark. 125, L.R.A.1915D 1021.

Bond

Bond, exacted of carrier by ordinance to protect person suffering damage, was held to be a collateral undertaking.—Stephenson v. New Orleans Ry. & Light Co., 115 So. 412, 165 La. 132.

53. N.Y.—Staten Island Midland R. Co. v. Staten Island Electric R. Co., 54 N.Y.S. 598, 34 App.Div. 181.

54. N.Y.—In re Atlantic Avenue Elevated R. Co., 32 N.E. 771, 136 N.Y. 292.

55. Minn.—State v. St. Paul City R. Co., 81 N.W. 200, 78 Minn. 331.

municipal authority may properly impose a limit on the duration of the right.⁵⁶

Payment of costs and expenses. It is proper to impose as a condition to the grant of consent that the company shall pay the incidental expenses of the ordinance and a reasonable counsel fee.⁵⁷

b. Payment of Compensation

- (1) For use of streets
- (2) For use of bridge
- (1) For Use of Streets
 - (a) In general
 - (b) Compensation based on earnings of company
- (a) In General

A municipality has the power to exact compensation for the use of its streets by street railroad companies as a consideration for such use, and such compensation may be by way of a fixed sum payable at specified times. If the power to readjust rates charged for use of the streets is expressly vested in the authorities granting the franchise, this power must be reasonably exercised.

A municipality has the power to exact compensation for the use of its streets by street railroad companies⁵⁸ as a consideration for such use.⁵⁹ This has been held not an exercise of the taxing or licensing power,⁶⁰ although called a license in the ordinance granting the franchise,⁶¹ since it is not compulsory in character, but is voluntary and individual,⁶² and rests on contract.⁶³ It is rather an equitable method of enabling the municipality to protect itself from a loss which would otherwise ensue from the location of the railway tracks in its streets.⁶⁴ The exaction of compensation has been described as in the nature of a toll or rental for use of streets or highways,⁶⁵ or as amounting to a purchase of the franchise to use them.⁶⁶

Such compensation may be by way of a fixed sum payable annually,⁶⁷ semiannually,⁶⁸ or monthly.⁶⁹ It may take the form of a fixed sum per car operated,⁷⁰ or a designated percentage of the company's earnings, as discussed infra subdivision b (1) (b) of this section, or such compensation may be based on lineal mileage of street railway tracks.⁷¹ Under

56. Utah.—Union Pac. R. Co. v. Public Service Commission, 134 P.2d 469, 103 Utah 186.

60 C.J. p 211 note 45.

Construction of grant or franchise as to duration see infra § 87.

Duration of rights which may be granted generally see infra § 34.

57. N.J.—Hutchinson v. Belmar, 39 A. 643, 61 N.J.Law 443, affirmed 45 A. 1092, 62 N.J.Law 450.

58. Cal.—City and County of San Francisco v. Market St. Ry. Co., 67 P.2d 89, reheard 73 P.2d 234, 9 Cal.2d 743.

60 C.J. p 208 note 8.

Conditions as to maintenance of streets see infra §§ 111-128.

Required compensation as constituting lien against company's property see infra § 155.

Sale of franchise to highest bidder see infra § 52.

59. U.S.—Tilney v. City of Chicago, C.C.A.III., 134 F.2d 682, certiorari denied 64 S.Ct. 66, 320 U.S. 759, 88 L.Ed. 452.

60 C.J. p 208 note 9.

60. Cal.—City and County of San Francisco v. Market St. Ry. Co., 73 P.2d 234, 9 Cal.2d 743.

Va.—Danville Traction & Power Co. v. City of Danville, 191 S.E. 592, 168 Va. 430.

60 C.J. p 208 note 10.

61. Pa.—City of McKeesport v. McKeesport & R. P. Ry. Co., 97 A. 184, 252 Pa. 142.

Mechanics of payment and collection

The fact that annual charge exacted of traction company by city was to be paid as license taxes are paid did not indicate that charge was a license tax within constitutional and statutory prohibitions, but words in phrase "as license taxes are paid" related to mechanics of payment and collection.—Danville Traction & Power Co. v. City of Danville, 191 S.E. 592, 168 Va. 430.

62. Conn.—City of Hartford v. Connecticut Co., 140 A. 734, 107 Conn. 312.

63. Conn.—City of Hartford v. Connecticut Co., supra.

Pa.—Valley Rys. v. Borough of Mechanicsburg, 108 A. 629, 265 Pa. 222.

64. Conn.—Appeal of Central R., etc., Co., 35 A. 32, 67 Conn. 197.

65. Cal.—San Francisco-Oakland Terminal Rys. v. Alameda County, 225 P. 304, 66 Cal.App. 77.

60 C.J. p 208 note 15.

Amount held not recoverable

A street railway company, voluntarily continuing to pay rent to city in amount of interest on bonds issued thereby to provide funds for construction of railway system, as provided by contract, could not recover from city portion of rent based on cost of spur, blocked for company's purposes by city subway, even though each payment was accompa-

nied by letter of protest.—Interborough Rapid Transit Co. v. City of New York, 297 N.Y.S. 401, 252 App. Div. 94, affirmed 12 N.E.2d 594, 276 N. Y. 596.

66. Pa.—Valley Rys. v. Borough of Mechanicsburg, 108 A. 629, 265 Pa. 222.—McKeesport v. McKeesport & R. P. Ry. Co., 97 A. 184, 252 Pa. 142.

67. Pa.—Valley Rys. v. Borough of Mechanicsburg, 108 A. 629, 265 Pa. 222.

Apportionment

Required annual payment to borough for privilege to operate street railway was held not apportionable to number of months franchise was exercised.—Borough of Mechanicsburg v. Valley Rys., 165 A. 541, 109 Pa. Super. 48.

68. Ky.—City of Covington v. South Covington & C. St. Ry. Co., 144 S. W. 17, 147 Ky. 326.

60 C.J. p 208 note 18.

69. U.S.—City and County of Denver v. Stenger, C.C.A.Colo., 295 F. 809.

60 C.J. p 208 note 19.

70. Minn.—Minneapolis St. R. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

60 C.J. p 208 note 20.

71. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., D.C.Ill., 39 F.2d 958.

a constitutional provision for a tax on street railways measured by gross receipts, in lieu of all other taxes and licenses, but not releasing railways from payment of an "amount agreed to be paid or required by law to be paid for any special privilege or franchise," the collection of licenses or license taxes on street cars, provided for by part of the franchises held by the street railway, was barred by payment of the "in lieu" tax.⁷²

Readjustment of charges. An ordinance imposing a condition that the street railway pay an annual license fee of a certain amount for each car operated has been construed as not precluding the city from increasing the license fee by a subsequent ordinance.⁷³ If the power to readjust rates charged for the use of streets is expressly vested in the authorities granting the franchise, this power must be reasonably exercised, so as not to be oppressive or confiscatory.⁷⁴ However, their action in increasing rates will not be declared void unless clearly oppressive,⁷⁵ and the courts will not interfere except in the case of manifest abuse of discretion.⁷⁶

(b) Compensation Based on Earnings of Company

A municipality may require a street railroad company to pay a designated per cent of its earnings, net or gross, as a consideration for the use of its streets.

A municipality may require a street railroad company to pay a designated per cent of its earnings, net or gross, as a consideration for the use of its streets,⁷⁷ even though partially derived from operation outside of the municipality.⁷⁸ A company which has agreed to pay a certain percentage of gross earnings is not relieved from a portion thereof, because the length of the road in the municipality was shortened by other municipalities being carved out of the municipality,⁷⁹ or because other sums had been exacted by such other municipalities for the right to lay additional tracks through their territory.⁸⁰ The contract providing for such franchise payments is not unlawfully impaired by a subsequent enactment requiring the railroad to pay a tax on gross income, since the city, in granting a franchise, does not abdicate its power of taxation.⁸¹

Suspension of right to payment. Where a city unlawfully prevents a street railroad company, for a certain period, from using one of the streets over which its franchise authorizes it to operate, this amounts to a partial eviction which suspends the city's right to collect during such period the percentage of the railroad's income stipulated in the franchise,⁸² and tender of payment of such percentage in an effort to induce the city to comply with the franchise contract is not an admission of the city's right to such percentage during the pe-

III.—Chicago Gen. R. Co. v. Chicago, 52 N.E. 880, 176 Ill. 253, 68 Am.S.R. 188, 66 L.R.A. 959.

72. Cal.—City and County of San Francisco v. Market St. Ry. Co., 73 P.2d 234, 9 Cal.2d 743.

73. Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

74. Pa.—Valley Rys. v. Borough of Mechanicsburg, 108 A. 629, 265 Pa. 222.

75. Pa.—Valley Rys. v. Borough of Mechanicsburg, *supra*.

76. Pa.—Valley Rys. v. Borough of Mechanicsburg, *supra*.
60 C.J. p 209 note 25.

77. Cal.—City and County of San Francisco v. Market St. Ry. Co., 73 P.2d 234, 9 Cal.2d 743.
60 C.J. p 209 note 26.

Use of fund

Where percentage of net profits of traction companies was in accordance with ordinance paid to city for privilege of using streets, such fund was to be kept by city and expended by

it for proper public purpose, and patrons who had paid legal fares did not have, by virtue of that fact alone, any enforceable legal right or beneficial interest in contract, the resulting profits, or the public fund created therefrom.—*Tilney v. City of Chicago*, C.C.A.III., 134 F.2d 682, certiorari denied 64 S.Ct. 66, 320 U.S. 759, 88 L.Ed. 452.

Receipts of advertising company

Under transit corporations' city franchises, prohibiting assignment or transfer of rights granted thereby without city's written consent and transferee's assumption of all franchise obligations especially with respect to payment of compensation to city, such corporations were taxable on entire gross receipts of advertising company, to which they leased advertising space in their streetcars and buses, from advertisements carried therein, not merely on amount received by them from such company, in absence of consent by city to transfer of corporations' rights to such company or agreement by transferee to assume franchise obligations.—*Third Ave. Transit Corp. v. City of New York*, 54 N.Y.S.2d 492, 183 Misc. 1027, affirmed 62 N.Y.S.2d 872, 270 App.Div. 983.

Nature of charge

Whether annual charge exacted of traction company by city on basis of gross receipts was a license tax, within constitutional and statutory prohibitions, or compensation for use of streets, permitted to be exacted under contract, could not be determined from fact that city officials had termed charge as license or franchise tax or from fact that company, without protest, had paid charge for many years.—*Danville Traction & Power Co. v. City of Danville*, 191 S.E. 592, 168 Va. 430.

78. Ala.—Mobile Light & R. Co. v. City of Mobile, 75 So. 889, 200 Ala. 141.

60 C.J. p 209 note 27.

79. N.J.—Asbury Park & S. G. R. Co. v. Neptune Tp., 74 A. 998, 75 N.J. Eq. 562.

80. N.J.—Asbury Park & S. G. R. Co. v. Neptune Tp., *supra*.

81. U.S.—Southern Boulevard R. Co. v. City of New York, C.C.A.N.Y., 86 F.2d 633, certiorari denied 57 S.Ct. 932, 301 U.S. 703, 81 L.Ed. 1357.

82. Wash.—Crawford v. Seattle, R. & S. Ry. Co., 165 P. 1070, 97 Wash. 70.

riod that the company was deprived of the use of the street.⁸³

Actions. An accounting as to a percentage of earnings may be had on a cross bill to an injunction by the railroad company against a threatened removal of the tracks because of its failure to pay compensation to the municipality.⁸⁴ The burden of proof as to the invalidity of its contract is on the railroad.⁸⁵

(2) For Use of Bridge

(a) In general

(b) Expenses made necessary by additional use

(a) In General

A street railroad company operating its cars over a bridge forming part of a street or highway may be required to pay for such use a reasonable compensation by rent or otherwise, whether the bridge is a public bridge or owned by a quasi-public corporation; but after a contractual grant of the right to use a bridge without compensation, the municipality cannot exact such compensation.

The operation by a street railroad company of its cars over a bridge forming part of a street or highway is a special use different in kind and extent from that of the general public,⁸⁶ and, in consequence, it may be required to pay for such use a reasonable compensation by rent or otherwise, whether the bridge is a public bridge or owned by a quasi-public corporation.⁸⁷ The fact that the bridge is free to the general public does not make

the charging of compensation for use by a street railroad company an unlawful discrimination.⁸⁸ However, after a contractual grant of the right to use a bridge without compensation, the municipality cannot exact such compensation,⁸⁹ although it has become the owner of all of the stock of the bridge company and opened the bridge free to public use,⁹⁰ and all that it can do in such case is to require a license fee in amount reasonably sufficient to indemnify it for whatever expense for repair, maintenance, and supervision it is called on to bear by reason of the extraordinary use to which the structure is subjected.⁹¹ At the expiration of a contract imposing the obligation to pay compensation for the use of a bridge, the company is not entitled to the free use of the bridge, but is under a common-law liability for use and occupation.⁹²

Where bridge is destroyed, additional compensation cannot be exacted from a street railroad company which proposes to make the same use of the bridge as it did before.⁹³ The right to rent terminates on the lawful demolition of the bridge.⁹⁴

Fixing compensation. The compensation being such as may be agreed on by the parties,⁹⁵ or fixed by the court,⁹⁶ or by a board to whom the legislature has delegated the power to ascertain what is a reasonable compensation,⁹⁷ on disagreement as to compensation for future use of a bridge, a court of equity has jurisdiction to fix the compensation to be paid,⁹⁸ and to enter a decree fixing such compensation for a term of years, with a provision for

83. Wash.—Crawford v. Seattle, R. & S. Ry. Co., *supra*.

84. N.J.—Asbury Park & S. G. R. Co. v. Neptune Tp., 74 A. 998, 75 N. J. Eq. 562.

85. Conn.—City of Hartford v. Connecticut Co., 140 A. 734, 107 Conn. 312.

60 C.J. p 210 note 33.

86. N.J.—Public Service Ry. Co. v. Board of Public Utility Com'rs, 93 A. 585, 87 N.J. Law 250.

60 C.J. p 211 note 52.

87. D.C.—Hazen v. Washington Ry. & Electric Co., 74 F.2d 461, 64 App. D.C. 57, certiorari denied Washington Ry. & Electric Co. v. Hazen, 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1247.

60 C.J. p 211 note 53.

Statute held not repealed

Statute requiring street railway company to pay one-half cost of maintenance and repairs of bridge occupied in part by its tracks was not impliedly repealed or superseded by

subsequent statute relating to construction and payment for underfloor method of propulsion of street cars across bridge.—Hazen v. Washington Ry. & Electric Co., 74 F.2d 461, 64 App. D.C. 57, certiorari denied Washington Ry. & Electric Co. v. Hazen, 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1247.

88. Pa.—Point Bridge Co. v. Pittsburgh & W. E. Ry. Co., 79 A. 567, 230 Pa. 289.

89. Pa.—Monongahela Bridge Co. v. Pittsburgh Rys. Co., 87 A. 619, 240 Pa. 121.—Point Bridge Co. v. Pittsburgh Rys. Co., 87 A. 614, 240 Pa. 105.

90. Pa.—Point Bridge Co. v. Pittsburgh Rys. Co., *supra*.

60 C.J. p 211 note 56.

91. Pa.—Point Bridge Co. v. Pittsburgh Rys. Co., *supra*.

92. Pa.—Beaver County v. Beaver Valley Traction Co., 79 A. 161, 229 Pa. 565.

93. Ga.—Floyd County v. Rome St. R. Co., 3 S.E. 3, 77 Ga. 614.

94. Pa.—Reading City Pass. Ry. Co. v. Berks County, 91 A. 1045, 246 Pa. 44.

95. Pa.—Beaver County v. Beaver Valley Traction Co., 79 A. 161, 229 Pa. 565.—Berks County v. Reading City Pass. Ry. Co., 31 A. 474, 663, 167 Pa. 102.

96. Pa.—Beaver County v. Beaver Valley Traction Co., 79 A. 161, 229 Pa. 565.—Berks County v. Reading City Pass. Ry. Co., 31 A. 474, 663, 167 Pa. 102.

97. N.J.—Public Service Ry. Co. v. Board of Public Utility Com'rs, 93 A. 585, 87 N.J. Law 250.

60 C.J. p 212 note 63.

98. Pa.—Point Bridge Co. v. Pittsburgh & West End Ry. Co., 79 A. 567, 230 Pa. 289.—Pittsburgh & West End Pass. Ry. Co. v. Point Bridge Co., 30 A. 511, 165 Pa. 37, 26 L.R.A. 233.

modification of the decree on application of either party for proper cause shown.⁹⁹ However, a decree granting to the company express permission to proceed with its construction work, without regulations to preserve the rights of the county and the safety of the public, is improvident; the court must keep itself in such position as on final hearing to make such decree on all disputed matters as the proofs will warrant.¹

Regulation of rates. Where the compensation provided for the use and occupation of a bridge owned by a private corporation is the payment of a certain sum for each passenger carried, such a contract is one regulating rates, and, as such, is subject to the jurisdiction of a state public service commission and to the power conferred on it to review rates;² and it is not material that such a contract is made in the form of a lease, when it in effect regulates the rates to be charged by the utility.³

An action at law is a proper remedy to recover an amount due for rent for use of a bridge due under the terms fixed by the decree.⁴ Also, where a company which continues to use a bridge after expiration of a contract imposing the obligation to pay compensation refuses further payment, an action at law will lie to enforce the common-law liability for use and occupation during the latter period;⁵ and in these circumstances it is for the jury to determine on all the evidence what would be a fair and proper rental.⁶

(b) Expenses Made Necessary by Additional Use

As a condition of occupying and using a bridge, a street railroad company may be required to bear the expense of strengthening the bridge so that it may support safely the street railroad and its traffic in addition to the ordinary public travel.

As a condition of occupying and using a bridge,

a street railroad company may be required to bear the expense of strengthening the bridge so that it may support safely the street railroad and its traffic in addition to the ordinary public travel;⁷ and this principle applies where the bridge is owned by a quasi-public corporation.⁸ An agreement between a county and a street railroad company inures to the benefit of a city whose territorial limits have been extended so as to include the bridge,⁹ and may be enforced by such city by any means which would have been available to the county had it not been included within such city.¹⁰ A condition of this character only requires the railroad company so to strengthen the bridge as to relieve the local authorities of the additional burden cast on the bridge by the construction and operation of the road over it.¹¹ Where the bridge connects two cities, one half thereof being in each of the cities, a release by one of them of the obligations of the company to it does not release the company from its joint obligation to the two cities to strengthen the bridge.¹²

Remedy of company on repudiation of agreement by local authorities. Where county commissioners have entered into a written agreement with a street railway company to give it the use of a county bridge without making provision for strengthening and repairing the bridge or paying a rental therefor, and have subsequently notified the company that they will not be bound by the agreement, the company will be restrained by injunction from taking forcible possession of the bridge.¹³ In these circumstances, the court may appoint an engineer to examine and report what will be necessary to strengthen the bridge for street railway traffic, and, on the filing of his report, the court may permit the street railway company to enter upon the bridge and strengthen it, and, when this has been done to the satisfaction of the court, the company may use the bridge for the purposes of its business, on giv-

99. Pa.—Point Bridge Co. v. Pittsburgh & West End Ry. Co., 79 A. 567, 230 Pa. 289.

1. Pa.—Lawrence County v. New Castle Electric Ry. Co., 8 Pa.Super. 313, 43 Wkly.N.C. 76.

2. Pa.—New Street Bridge Co. v. Public Service Commission, 76 Pa. Super. 6.

3. Pa.—New Street Bridge Co. v. Public Service Commission, supra.

4. Pa.—Point Bridge Co. v. Pittsburgh & West End Ry. Co., 79 A. 567, 230 Pa. 289—Pittsburgh & West End Ry. Co. v. Point Bridge Co., 72 A. 348, 223 Pa. 133.

5. Pa.—Beaver County v. Beaver Valley Traction Co., 79 A. 161, 229 Pa. 565.

6. Pa.—Beaver County v. Beaver Valley Traction Co., supra.

7. Pa.—Berks County v. Reading City Pass. Ry. Co., 31 A. 474, 663, 167 Pa. 102.
60 C.J. p 212 note 72.

Scope and extent of duty of restoration or repair of bridge used by street railroad generally see infra § 119.

8. Pa.—Conshohocken R. Co. v. Pennsylvania R. Co., 15 Pa.Co. 445.

9. W.Va.—City of McMechen v. Wheeling Traction Co., 110 S.E. 469, 90 W.Va. 24.

10. W.Va.—City of McMechen v. Wheeling Traction Co., supra.

11. W.Va.—City of McMechen v. Wheeling Traction Co., supra.
60 C.J. p 213 note 76.

12. W.Va.—City of McMechen v. Wheeling Traction Co., supra.

13. Pa.—Berks County v. Reading City Pass. Ry. Co., 31 A. 474, 663, 167 Pa. 102, 117.
60 C.J. p 213 note 78.

ing security to keep it in repair, pay the rental agreed on, and perform the conditions on which the municipal consent was given.¹⁴

c. Rate of Fare; Giving of Transfers

It is proper to impose as a condition to the grant of a street railroad franchise that the rate of fare shall not exceed a specified amount or that transfer tickets shall be provided at certain intersections or connections.

It is proper to impose as a condition to the grant of a street railroad franchise that the rate of fare shall not exceed a specified amount,¹⁵ that pupils going to or from school shall be carried at a reduced fare,¹⁶ or that each fare collected shall be good for one continuous ride in the same general direction, and that a transfer ticket shall be provided for this purpose, at a point of intersection or connection.¹⁷ A condition with respect to rate of fare may be waived by acts or agreements of the parties,¹⁸ and, where a city has permitted the Public Service Commission to establish a statutory rate of fare, notwithstanding the franchise provision, such rate of fare remains the legal rate and abolishes the franchise rate notwithstanding the authority to establish it is subsequently withdrawn.¹⁹

d. Construction, Equipment, and Operation

Municipal authorities, in granting consent to the operation of a railroad in their streets, may properly im-

pose conditions as to its construction, equipment, and operation.

The municipal authorities, in granting consent to the operation of a railroad in their streets, may properly impose conditions as to its construction,²⁰ equipment,²¹ and operation.²² It is proper to impose as a condition that there shall be no abandonment of tracks already laid.²³ Under a reserved power to regulate the running of cars, the municipality cannot require the railroad to establish a new route conflicting with its original grant.²⁴ A reservation of the power to change by resolution the location of tracks and poles on the application of the company is not invalid;²⁵ but power of the city arbitrarily to remove the tracks cannot be created by reservation or otherwise except by legislative authority.²⁶

§ 34. Duration of Rights Which May Be Conferred

Subject to constitutional or statutory restrictions, a municipality generally possesses either express or implied power to fix or limit the duration of a street railroad franchise.

Subject to constitutional or statutory restrictions,²⁷ a municipality generally possesses either express or implied power to fix or limit the duration of a street railroad franchise.²⁸ A grant in

14. Pa.—Berks County v. Reading City Pass. Ry. Co., *supra*.

15. U.S.—City of Detroit v. Detroit Citizens' St. Ry. Co., Mich., 22 S. Ct. 410, 184 U.S. 368, 46 L.Ed. 592. 60 C.J. p 210 note 34.

16. Mass.—Clinton v. Worcester St. R. Co., 85 N.E. 507, 199 Mass. 279.

17. N.Y.—People v. Barnard, 18 N. E. 354, 110 N.Y. 548.

Ohio.—Raynolds v. Cleveland, 28 Ohio Cir.Ct. 463, affirmed 81 N.E. 1182, 76 Ohio St. 619.

18. N.Y.—City of Rochester v. Public Service Commission, 89 N.Y.S. 2d 545, 275 App.Div. 172, affirmed 96 N.E.2d 192, 301 N.Y. 801.

19. N.Y.—City of Rochester v. Public Service Commission, *supra*.

20. Cal.—City of Albany v. United States Fidelity & Guaranty Co., 176 P. 705, 38 Cal.App. 466. 60 C.J. p 210 note 37.

21. Cal.—City of Albany v. United States Fidelity & Guaranty Co., *supra*. 60 C.J. p 210 note 38.

22. Pa.—City of McKeesport v. Pittsburgh R. Co., 12 Pa.Dist. 541. 60 C.J. p 210 note 39.

23. Conn.—Appeal of Central R., etc., Co., 35 A. 32, 67 Conn. 197.

24. Mich.—People v. Detroit United Ry., 121 N.W. 321, 156 Mich. 659. 60 C.J. p 210 note 41.

25. N.J.—Shepard v. East Orange, 53 A. 1047, 69 N.J.Law 133, reversed on other grounds 57 A. 441, 70 N.J. Law 203.

26. N.J.—North Jersey St. R. Co. v. Newark, St., etc., Com'rs, 67 A. 691, 73 N.J.Eq. 106.

27. U.S.—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A. Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702. 60 C.J. p 181 note 35.

Expiration after specified period

City ordinance, authorizing street railway company to erect and maintain wires, poles, etc., necessary for electrification of its lines, and pre-

scribing five cent interstate fare, expired twenty years after its enactment under state constitution, whether regarded as grant of new franchise or merely contract relating to existing franchise.—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L. Ed. 702.

Regulations of operation and rates of fare

Ky.—Scott v. Cincinnati, N. & C. Ry. Co., 105 S.W.2d 169, 268 Ky. 383.

28. Utah.—Union Pac. R. Co. v. Public Service Commission, 134 P.2d 469, 103 Utah 186. 60 C.J. p 181 note 36.

Construction of grant as to duration see *infra* § 87.

Limit on duration of franchise imposed as condition to grant see *supra* § 33 a.

Term held not invalid

Where city granted franchises to corporation for operation of a street railway for public use, the franchises to exist during life of corporation's

perpetuity may be made only when the authority to do so is conferred on the city, either expressly or by implication, by the legislature;²⁹ and such a grant is subject to the constitutional limitation that no special privilege may be granted which may not be altered, revoked, or repealed by the legislature.³⁰ A franchise which is revocable at the pleasure of the city, as required by a constitutional provision, but which fixes no definite term for its expiration if not revoked, does not conflict with another constitutional provision which prohibits the granting of a franchise for a longer period than a specified number of years.³¹

§ 35. Acceptance

In order that the grant of a street franchise to a street railroad company may become operative and binding, it must be accepted by, or on behalf of, the company within the time, if any, specified in the grant; and, when the grant is so accepted, it becomes a binding contract between the company and the granting power.

In order that the grant of a street franchise to a street railroad company may become operative and binding, it must be accepted by, or on behalf of, the company³² within the time, if any, specified in the grant;³³ and, when the grant is so accepted, it becomes a binding contract between the company and the granting power.³⁴ If the company accepts

and avails itself of the grant, it cannot question the validity thereof;³⁵ nor can the city, after the company has made a large expenditure of money, in pursuance of the grant, repudiate the action of its council on the ground that their proceedings were irregular.³⁶

§ 36. Modification and Amendment of Franchise or Grant

Generally, the public body granting a street railroad franchise may not later modify or amend it, without the company's consent, express or implied, so as to lessen the rights and privileges of the company, or impose additional burdens on it, unless the power to do so is clearly reserved; but an amendment or modification is permissible, if all parties interested consent.

Since a street railroad franchise constitutes a contract, as discussed supra § 35, the body granting it may not later modify or amend it, without the company's consent, express or implied, so as to lessen the rights and privileges of the company, or impose additional burdens on it,³⁷ unless the power to do so is clearly reserved.³⁸ Nevertheless, an amendment or modification is permissible, if all parties interested consent,³⁹ including the municipality in which the rights of the state have become vested,⁴⁰ and the company,⁴¹ and if it is of a character which the municipality has the power to make.⁴² It has

charter and for such time as charter might be extended by renewals, and in 1930 the corporation's charter was extended one hundred one years by act of legislature, the franchises did not violate laws or constitution of state with respect to terms of their duration.—*Phenix City v. Alabama Power Co.*, 195 So. 894, 239 Ala. 547.

29. U.S.—*Logansport R. Co. v. Logansport, C.C.Ind.*, 114 F. 688, appeal dismissed 24 S.Ct. 851, 192 U. S. 604, 48 L.Ed. 584.

30. Mich.—*Peck v. Detroit United Ry.*, 146 N.W. 977, 180 Mich. 343. 60 C.J. p 181 note 38.

31. Mich.—*Peck v. Detroit United Ry.*, supra.

32. Minn.—*International Lumber Co. v. American Suburbs Co.*, 137 N.W. 395, 119 Minn. 77. 60 C.J. p 204 note 60.

33. Pa.—*Williams Valley R. Co. v. Lykens, etc., St. R. Co.*, 1 Dauph. Co. 225. 60 C.J. p 204 note 61.

34. Mo.—*Bowers v. Kansas City Public Service Co.*, 41 S.W.2d 810, 328 Mo. 770.

Ohio.—*City of Cincinnati v. Cincinnati St. Ry. Co.*, 187 N.E. 312, 45 Ohio App. 511.

60 C.J. p 204 note 62. Acceptance of charter as contract see supra § 10.

Impairment of obligation of contract by: Regulation as to paving see infra § 116.

Repeal or revocation of grant see infra § 89.

35. Ohio.—*Hattersly v. Waterville*, 26 Ohio Cir.Ct. 226. 60 C.J. p 204 note 63.

Estoppel as to condition imposed by grant see supra § 32 c.

36. Ohio.—*Mill Creek Valley St. R. Co. v. Carthage*, 18 Ohio Cir.Ct. 216, 9 Ohio Cir.Dec. 833.

37. U.S.—*Minneapolis v. Minneapolis St. R. Co.*, Minn., 30 S.Ct. 118, 215 U.S. 417, 54 L.Ed. 259. 60 C.J. p 232 note 41.

38. Iowa.—*Sioux City St. R. Co. v. Sioux City*, 39 N.W. 498, 78 Iowa 742.

39. Ky.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784.

Change of regulatory provisions
Ordinance embodying agreement between city and street railroad as

to regulation of street cars, busses, and rates of fare was held valid, irrespective of whether it conflicted with franchise granting ordinance, since regulatory provisions may be changed at any time by agreement of municipality and grantee of franchise.—*Scott v. Cincinnati, N. & C. Ry. Co.*, 105 S.W.2d 169, 268 Ky. 383.

40. Ky.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784.

Public convenience and welfare

Municipality has power to modify contract with public utility for its service, where done for public convenience and welfare.—*Ricketts v. City of Mansfield*, 183 N.E. 181, 43 Ohio App. 316, error dismissed 185 N. E. 881, 125 Ohio St. 631.

41. N.Y.—*Long Island R. Co. v. City of New York*, 92 N.E. 681, 199 N.Y. 288.

60 C.J. p 232 note 45.

42. Ky.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784. 60 C.J. p 232 note 46.

Within scope of original grant

City ordinance amending contractual grant of right to construct, maintain, and operate a street railway system in city and affecting only

been held that by amendment or modification of a franchise the company may be relieved of a part of the obligations imposed by the franchise, if the new agreement is made in good faith and based on a sufficient consideration;⁴³ and that the power to make a modification or amendment of this character is not affected by a statute forbidding a municipality to "release the grantee from any obligations or liabilities imposed by the terms of the grant."⁴⁴

Citizens of the city may not complain of the modification or amendment of a franchise of a street railroad company as imposing a burden on the railroad company, but only the company may complain of the change.⁴⁵ A statute providing for conversion of every grant by a city of a street railway franchise into an indeterminate permit is a remedial measure and should be liberally construed to effect its purpose of making available to all municipal street railway systems coming under its scope the advantages of both state and local control.⁴⁶ A franchise grant converted under such

statute is preserved only to the extent that its terms are not in conflict with specific provisions of the statute as a whole, and, where any conflict appears, the statute governs.⁴⁷

Operation and effect of amendment. Where a city granted a street railway company a franchise, and after it was assigned to defendant amended it by a relocation of part of the line, which relocation was accepted by defendant, all other provisions and conditions in the franchise remain in force.⁴⁸ Also, where a municipality, after granting to a street railroad company a franchise under which the corporation is obligated to carry passengers at a specified fare, grants a franchise for the construction of an extension, on condition that the company carry passengers at a fare lower than that specified in the original franchise, the old franchise is presently and effectively modified or superseded by the new contract, in so far as the municipal authorities are interested in, and can contract for, a reduced fare.⁴⁹

2. GRANT OR CONSENT BY LOCAL AUTHORITIES

§ 37. Privileges in Streets and Highways in General

In the absence of constitutional restriction, the legislature may authorize a street railroad company to construct and operate its road in streets and highways without obtaining the consent of the local authorities having control and supervision thereof; and on the other hand, it may lawfully require such consent.

There is a distinction between the right of a street railroad company to operate a railroad under its articles of incorporation, called a "franchise," and the consent of a municipality to the use of its streets for street railroad purposes, required by constitutional or statutory provisions, which is also generally called a "franchise" or "secondary franchise."⁵⁰ As the legislature possesses the control

changes within the scope of provisions made in original grant in recognition of the need for future change is valid.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W. 2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

Arbitration

Ordinance adjusting street railway franchise provided for resort to arbitration as fact-finding procedure, and was not void as surrender of legislative authority by city.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784.

43. Ohio.—*Ricketts v. City of Mansfield*, 183 N.E. 181, 43 Ohio App. 316, error dismissed 185 N.E. 881, 125 Ohio St. 631.
60 C.J. p 232 note 47.

Rates of fare and frequency of service

A grant made in good faith to an interurban company, wherein certain obligations relating to rates and fre-

quency of service imposed in a former franchise are relinquished, is not invalid if the consideration supporting the second grant is substantial and advantageous to the public.—*State v. McClure*, 140 N.E. 487, 107 Ohio St. 551.

Consideration held sufficient

Making possible continued operation of street railway system constituted valid consideration for modification by city council of railway franchise paving obligations.—*Ricketts v. City of Mansfield*, 183 N.E. 181, 43 Ohio App. 316, error dismissed 185 N.E. 881, 125 Ohio St. 631.

44. Ohio.—*Ricketts v. City of Mansfield*, supra.
60 C.J. p 232 note 48.

Constitutional provisions prevail where statutes providing that grantee shall not be released from obligations imposed by grant for operation of street railroad conflict with constitutional powers given municipality to exercise power of local self-gov-

ernment and contract with public utilities for their services.—*Ricketts v. City of Mansfield*, supra.

45. Ky.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784.

46. Minn.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

47. Minn.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, supra.

48. Vt.—*City of Montpelier v. Barre & M. Traction & Power Co.*, 92 A. 241, 88 Vt. 314.

49. N.Y.—*Public Service Commission v. Westchester St. R. Co.*, 99 N.E. 536, 206 N.Y. 209.

50. N.Y.—*Bankers Trust Co. v. City of Yonkers*, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

of streets and highways, it may, in the absence of constitutional restriction, authorize a street railroad company to construct and operate its road in streets and highways without obtaining the consent of the local authorities having control and supervision thereof, such as boards or officers of cities, towns, villages, counties, boroughs, and townships;⁵¹ and on the other hand it may lawfully require such consent,⁵² in which case, the consent of the local authorities must be obtained before any rights in the street are acquired, as discussed *infra* § 40. An ordinance granting the right to construct, maintain, and operate a street railroad, where within the power of the municipality to enact, and not otherwise in contravention of law, constitutes a valid and subsisting contract between the city and the street railroad.⁵³

§ 38. Use of Bridges in General

Under some constitutional or statutory provisions, the consent of local authorities controlling and responsible for the maintenance of bridges must be obtained before such bridges may be used by street railroad companies, and the terms on which consent may be granted are in the first instance a matter of agreement between the local authorities and the railroad.

Under some constitutional or statutory provisions, the consent of local authorities controlling and responsible for the maintenance of bridges to the use of such bridges by street railroad companies, is required.⁵⁴ Under such provisions it has been held

that consent may not arbitrarily be refused,⁵⁵ although the terms on which it may be granted are in the first instance a matter of agreement between the local authorities and the railroad,⁵⁶ and if they cannot agree may be determined by the courts.⁵⁷ On the other hand, it is the duty of the local authorities to see that the bridge is made safe for the new use,⁵⁸ and, in consequence, they may refuse to allow the bridge to be used until it is made strong enough for the additional use.⁵⁹

§ 39. Use of Turnpikes and Toll Roads in General

When required by statute, the consent of the local authorities to the use of a turnpike or toll road by a street railroad company must be obtained.

When required by statute, the consent of the local authorities to the use of a turnpike or toll road by a street railroad company must be obtained,⁶⁰ notwithstanding the turnpike company has given its consent.⁶¹ Prior to obtaining the requisite consents, the right of the company to exercise its franchise is still an inchoate, and not a vested, right.⁶² However, the consent of local authorities is not necessary in the absence of a statute requiring it.⁶³

§ 40. Necessity of Consent

Where it is required either by statute or by organic law that a street railroad company obtain the consent

51. Fla.—*State v. Jacksonville St. R. Co.*, 10 So. 590, 29 Fla. 590. 60 C.J. p 182 note 47.

Indeterminate permit

Under statute providing for conversion of every grant by city of street railway franchise into an indeterminate permit, the consent of city is wholly unnecessary, since city is merely a department or political subdivision of the state to which governmental powers have been intrusted, subject to withdrawal or modification by enactment of general laws.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

52. Fla.—*State v. Jacksonville St. R. Co.*, 10 So. 590, 29 Fla. 590. 60 C.J. p 182 note 48.

53. Minn.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 907, 94 L.Ed. 1335.

54. N.Y.—*Town of Wheatfield v.*

Tonowanda St. R. Co., 36 N.Y.S. 744, 92 Hun 460. 60 C.J. p 189 note 42.

Construction and operation of grant as to rights in, and use of, bridges generally see *infra* § 85.

55. Pa.—*Reading City Pass. Ry. Co. v. Berks County*, 91 A. 1045, 246 Pa. 44.

60 C.J. p 190 note 43.

56. Pa.—*Reading City Passenger Ry. Co. v. Berks County*, *supra*. Conditions as to payment of compensation for use see *supra* § 33 b (2).

Cost of replacement

(1) Private contract between street railway company and county for use of bridge under which county agreed to bear replacement costs, which was not approved by Public Service Commission and was executed prior to Public Service Company Law, was held invalid.—*Wilkes-Barre Ry. Corp. v. Public Service Commission*, 188 A. 546, 124 Pa.Super. 362.

(2) Scope and extent of duty of restoration or repair of bridge used

by street railroad generally see *infra* § 119.

57. Pa.—*Reading City Passenger Ry. Co. v. Berks County*, 91 A. 1045, 246 Pa. 44.

58. N.J.—*Lewis v. Cumberland County*, 28 A. 553, 56 N.J.Law 416.

59. N.J.—*Lewis v. Cumberland County*, *supra*.

Pa.—*Berks County v. Reading City Pass. Ry. Co.*, 31 A. 474, 663, 167 Pa. 102.

60. Ill.—*Trotter v. St. Louis, etc., R. Co.*, 54 N.E. 487, 180 Ill. 471.

60 C.J. p 190 note 48.

61. N.Y.—*In re Rochester Electric Ry. Co.*, 25 N.E. 381, 123 N.Y. 351, 33 N.Y.St. 695.

Pa.—*Steelton Borough v. East Harrisburg Pass. R. Co.*, 11 Pa.Co. 161.

62. N.Y.—*In re Rochester Electric R. Co.*, 25 N.E. 381, 123 N.Y. 351, 33 N.Y.St. 695.

63. Mass.—*Eastern Dist. Atty. v. Lynn, etc., R. Co.*, 16 Gray 242.

of local authorities to the construction and operation of the railroad in streets and highways, such consent must be obtained before any rights in the streets are acquired.

While, in the absence of constitutional restriction, the legislature may authorize a street railroad company to construct and operate its road in streets and highways without obtaining the consent of the local authorities having control and supervision thereof, as discussed supra § 37, in many jurisdictions such consent is expressly required either by statute or by organic law, and, when so required, it must be obtained before any rights in the street are acquired.⁶⁴ It has been held, however, that, even where consent was not obtained in advance, as it should have been, there may be subsequent ratification of a street railroad company's use of the streets.⁶⁵ Further, the consent of local authorities is required only as to such railroads as are within the intent of the statutory or constitutional provisions.⁶⁶ A railroad company, under statutory power, may construct a section of an interurban railway, within city limits, on a private right of way and crossing city streets, without obtaining a franchise from the city,⁶⁷ although the company was organized for the purpose of avoiding a right of way offered by the city as being too circuitous and expensive.⁶⁸

Use of elevated tracks for freight traffic has been held not to constitute an additional burden on the streets so as to require the consent of the city, where no additional obstructions were placed in or over the streets and no limitation existed on the number of cars which the elevated railroad company might run over the tracks in a given time.⁶⁹

Abolition of office of an official whose consent was, by statute, essential to the extension of a railroad over township highways does not authorize such extension without official consent.⁷⁰

Line extending through more than one municipality or governmental unit. Where a street railroad extends through several villages, the consent of the village authorities of one village is sufficient as to the construction of the road in such village, although the consents of local authorities of other villages have not been obtained, where the statute provides that the authorities in villages may consent to the construction of proposed railroads in the streets of villages and that the consent of commissioners of highways shall be obtained with respect to highways in towns,⁷¹ and the view has been taken that the consent of one set of authorities is in no wise dependent on the consent of another set of authorities.⁷² However, under a charter which authorizes the building of a line of street railroad through several townships, and which makes the consent of local authorities a condition precedent to the right to construct the line, it has been held that the company must secure the consent of all of the townships before it can insist on its right to build under its charter,⁷³ and that the consent of one municipality alone will not authorize construction of a street railroad through its streets or highways unless and until the consent of all the municipalities has been obtained.⁷⁴

§ 41. To Whom Grant Made

Consent to construct and operate street railroads cannot be given to individuals where the legislature limits the power of the local authorities to grant licenses to construct and operate such roads to incorporated companies created under the general laws of the state.

Consent to construct and operate street railroads cannot be given to individuals where the legislature limits the power of the local authorities to grant licenses to construct and operate such roads to incorporated companies created under the general laws of the state.⁷⁵ A consent given by the local

64. Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6. 60 C.J. p 182 note 49.

Necessity of consent:

For extension of line see *infra* § 83.

To use of bridges see *supra* § 38.

To use of turnpikes and toll roads see *supra* § 39.

Statute held not in violation of constitutional requirement

Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

65. Pa.—Pennsylvania, etc., R. Co. v. Philadelphia, etc., R. Co., 28 A. 784, 160 Pa. 277.

60 C.J. p 183 note 50.

66. Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 294 Ill. 413.

60 C.J. p 183 note 51.

67. Mich.—Mason v. Lansing, etc., R. Co., 121 N.W. 466, 157 Mich. 1.

68. Mich.—Mason v. Lansing, etc., R. Co., *supra*.

69. Ill.—Chicago N. S. & M. R. Co. v. City of Chicago, 163 N.E. 141, 331 Ill. 360.

70. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801.

71. N.Y.—Geneva, etc., R. Co. v. New York Cent., etc., R. Co., 48 N.Y.S.

842, 24 App.Div. 335, reversed on other grounds 57 N.E. 498, 163 N. Y. 228.

60 C.J. p 184 note 54.

72. N.Y.—Geneva, etc., R. Co. v. New York Cent., etc., R. Co., *supra*.

73. Pa.—Lehigh Coal & Navigation Co. v. Inter-County St. Ry. Co., 31 A. 471, 167 Pa. 75.

74. Pa.—Pennsylvania R. Co. v. Turtle Creek Valley Electric R. Co., 36 A. 348, 179 Pa. 584.

60 C.J. p 184 note 57.

75. Ill.—Goddard v. Chicago, etc., R. Co., 66 N.E. 1066, 202 Ill. 362, reheard 66 N.E. 1119, 202 Ill. 452.

authorities to a company named, prior to its incorporation, to construct a road on a certain street, could not become effective after such incorporation, as against another company which incorporated before the former company, and within a reasonable time thereafter obtained consent to construct a road on the same street.⁷⁶ A grant by a municipal council of which the mayor is a member to one acting as agent for the mayor with the object of enabling the grantee to assign his rights and the resulting franchise to a railroad controlled by the mayor is invalid.⁷⁷ A statute providing that no railroad shall be constructed on a particular highway without a special act for that purpose may be amended so as to permit the construction of a road by a company organized under a general act.⁷⁸

§ 42. From Whom Consent Obtained

The boards or officers who have authority to give consent to the construction and operation of street railroads and from whom consent must be obtained as a condition precedent to the right to do so are those designated by local statutes or constitutional provisions.

The boards or officers who have authority to give consent to the construction and operation of street railroads and from whom consent must be obtained as a condition precedent to the right to do so are those designated by local statutes or constitutional provisions.⁷⁹ The "local authorities" whose consent is necessary are, in cities, ordinarily the common council,⁸⁰ and, in towns, the town highway commissioners.⁸¹ Township supervisors may be the proper "local authorities" to give consent to the construction of a street railroad through the township;⁸² and, where the law requires but one supervisor for the township, his consent must be ob-

tained.⁸³ Where the legislature has conferred on the commissioners' courts general superintendence over all highways in their counties, they are the "local authorities" within a constitutional provision as to the obtaining of permission to build a street railway along the public highways of counties.⁸⁴ The authorities of one municipality cannot consent for the authorities of another municipality.⁸⁵

Authorities having exclusive control. Where the statute requires the consent of authorities having exclusive control of the streets, and there is a repugnancy between different acts conferring exclusive control on different sets of officers, the latest act, being the final expression of the legislative intent, must control, and the consent of the officers designated therein is sufficient.⁸⁶ A commissioner of street improvements who has the authority previously vested in the department of public parks does not have exclusive control so that his consent may be required where, while the department of public parks had the exclusive power to locate, lay out, construct, and maintain certain streets and avenues, there were important governmental duties left to be performed by the city of which the city had control.⁸⁷ Where the statute requires the consent of the governing body of the township, the consent of the township committee which is the governing body is required in addition to that of the road board of the township which has general and exclusive control and management of the public highways.⁸⁸

Notwithstanding the consent of the county authorities, the consent of township authorities may be also required under a statute requiring such consent of any board, body, or public authorities other

Pa.—Homestead St. R. Co. v. Pittsburgh, etc., Electric St. R. Co., 30 A. 950, 166 Pa. 162, 27 L.R.A. 383.

Who may acquire and exercise right to construct and operate street railroad generally see supra § 20.

76. Pa.—Homestead St. R. Co. v. Pittsburgh, etc., Electric St. R. Co., supra.

77. N.Y.—Marjohn Realty Co. v. City of Long Beach, 204 N.Y.S. 53, 54, 122 Misc. 763, affirmed 206 N.Y.S. 933, 211 App.Div. 805, and 207 N.Y.S. 876, 211 App.Div. 860. 60 C.J. p 184 note 60.

78. N.Y.—Spofford v. Southern Boulevard R. Co., 4 N.Y.S. 383, 15 Daly 162.

79. Tex.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co., 122 S. W. 287, 57 Tex.Civ.App. 170. 60 C.J. p 184 note 62.

80. N.Y.—Matter of Broadway Surface R. Co., 34 Hun 414.

81. N.Y.—Matter of Rochester Electric R. Co., 25 N.E. 381, 123 N.Y. 351.

82. Pa.—Pennsylvania R. Co. v. Montgomery County R. Co., 3 Pa. Dist. 58, 14 Pa.Co. 88.

83. Pa.—Tamaqua, etc., St. R. Co. v. Inter County St. R. Co., 4 Pa.Dist. 20. 60 C.J. p 184 note 66.

84. Tex.—Galveston, H. & S. A. Ry.

Co. v. Houston Electric Co., 122 S. W. 287, 57 Tex.Civ.App. 170. 60 C.J. p 185 note 67.

85. W.Va.—Wheeling, etc., R. Co. v. Triadelphia, 52 S.E. 499, 58 W.Va. 487, 4 L.R.A., N.S., 321. 60 C.J. p 185 note 63.

86. N.Y.—Gaedeke v. Staten Island Midland R. Co., 60 N.Y.S. 598, 43 App.Div. 514, reargument denied 61 N.Y.S. 290, 46 App.Div. 219, appeal denied 63 N.Y.S. 1108, 49 App. Div. 636.

87. N.Y.—Bohmer v. Haffen, 54 N.Y. S. 1030, 35 App.Div. 381, affirmed 55 N.E. 1047, 161 N.Y. 390, reargument denied 57 N.E. 1104, 162 N.Y. 593.

88. N.J.—Bergen Traction Co. v. Ridgefield Tp., Ch., 32 A. 754.

than the governing body of the municipality, town, township, village, or borough which shall have control of any of the streets and highways.⁸⁹ Under a statute authorizing the construction of railroads along the highways of townships under the consent of the township authorities, state and territorial roads within the township, for the condition of which the township is responsible, are included, and a franchise may be granted by the township board and the consent of the highway township commissioner is not required.⁹⁰

§ 43. Right to Refuse Consent

The power conferred on local authorities having control of streets and highways to authorize street railroad companies to construct and operate lines of railroad therein necessarily implies the right to refuse to consent thereto.

Since the power conferred on local authorities having control of streets and highways to authorize street railroad companies to construct and operate lines of railroad therein necessarily implies the right to refuse consent thereto,⁹¹ they may withhold consent entirely,⁹² or, within limitations considered supra § 32, grant it on such conditions as they may see fit to impose. However, consent to the use of bridges by street railroad companies cannot arbitrarily be refused, as discussed supra § 38.

§ 44. Proceedings to Obtain in General

There must be a substantial compliance with the terms and conditions prescribed by statute, in order that the consent of local authorities to the use of streets by a street railroad may be valid and effective.

Since in giving consent, the local authorities do not act in the exercise of any natural or inherent power, but under delegated powers, as discussed supra § 29, there must be a substantial compliance with the terms and conditions prescribed by statute,

in order that the consent to the use of streets by a street railroad may be valid and effective.⁹³ Before a street railroad franchise may be legally granted, all statutory conditions precedent must be fulfilled.⁹⁴ Thus there must be a compliance with statutory requirements relating to the application for a franchise,⁹⁵ the giving of public notice of the application or of the proposed ordinance, discussed infra § 45, and the submitting of the ordinance granting the franchise to the voters, infra § 47. However, this does not apply to conditions which are in the nature of conditions subsequent,⁹⁶ or are conditions precedent only to the beginning of construction.⁹⁷ A certificate of public convenience and necessity as a condition to beginning construction of a street railroad, discussed supra §§ 21-26, has been held not a prerequisite to the granting of a local franchise,⁹⁸ since such certificate may be obtained after the franchise has been received.⁹⁹

§ 45. — Notice and Hearing

There must be a compliance with the statutory requirements in respect of giving public notice of the application for the franchise, consent, or privilege; and, where a statute requires a notice and hearing, the power of the city authorities to act is dependent on a hearing duly accorded on a proper notice.

There must be a compliance with the statutory requirements in respect of giving public notice of the application for the franchise, consent, or privilege,¹ or serving it on the municipality, where application is made to railroad commissioners;² but, where the statute provides only for notice of application, notice of the proposed ordinance need not be given.³ The requirement of such notice for a franchise for the construction of a new road or route does not apply to an application for an extension of the tracks of a line already existing and constructed under a former franchise duly granted,⁴ unless the

89. N.J.—Woodbridge Tp. v. Raritan Traction Co., 53 A. 175, 64 N.J. Eq. 169.

90. Mich.—Smith v. Jackson, etc., Traction Co., 100 N.W. 121, 137 Mich. 20.

91. Va.—Portsmouth v. Virginia, etc., R. Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.
60 C.J. p 185 note 74.

92. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801, reversed 132 F. 848.
60 C.J. p 185 note 75.

93. N.J.—St. Paul's Catholic Church of Greenville v. Jersey City, 78 A. 1064, 81 N.J.Law 110, affirmed 85 A. 826, 84 N.J.Law 416.

N.Y.—Beekman v. Third Ave. R. Co., 47 N.E. 277, 153 N.Y. 144.

94. Mo.—Ruckert v. Grand Ave. R. Co., 63 S.W. 814, 163 Mo. 260.

95. Ill.—Wilder v. Aurora, etc., Traction Co., 75 N.E. 194, 216 Ill. 493.
60 C.J. p 185 note 80.

96. N.Y.—In re Atlantic Ave. El. R. Co., 32 N.E. 771, 136 N.Y. 292.
60 C.J. p 186 note 84.

97. N.Y.—In re Atlantic Ave. El. R. Co., *supra*.

98. U.S.—Seccomb v. Wurster, C.C. N.Y., 83 F. 856.
60 C.J. p 186 note 87.

99. N.Y.—People v. Bauer, 103 N. Y.S. 1081, 54 Misc. 28, 39 N.Y.Civ. Proc. 258.

1. Ill.—Metropolitan City R. Co. v. Chicago, 96 Ill. 620.
60 C.J. p 186 note 89.

2. Vt.—Burlington v. Burlington Traction Co., 41 A. 514, 70 Vt. 491.
60 C.J. p 187 note 90.

3. Ohio.—Hamilton v. Cincinnati, etc., Electric St. R. Co., 8 Ohio S. & C.P. 174, 5 Ohio N.P. 457.

4. Ohio.—Cleveland, etc., St. R. Co. v. Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.
60 C.J. p 187 note 92.

extension in fact constitutes an original or new line,⁵ as where it is from a line wholly without the municipality into or through the municipality;⁶ nor does the requirement of such notice apply to an application for the renewal of a franchise previously granted.⁷ So, also, the statutory requirement of public notice of the pendency of a resolution or ordinance for an extension or change of route or routes does not apply to proceedings for the extension of the track of an existing line of railroad.⁸

Where the statute provides that no ordinance for such purpose shall be passed until public notice of the application has been given, notice is sufficient if given before the passage of the final ordinance establishing the route, although it is subsequent to the passage of the first ordinance or resolution.⁹ A publication of notice which is legally insufficient cannot, after the granting of the franchise, be rendered sufficient by a subsequent curative ordinance.¹⁰

Hearing. Where a statute requires a notice and hearing, the power of the city authorities to act is dependent on a hearing duly accorded on a proper notice.¹¹

§ 46. — Mode of Consent; Sufficiency of Ordinance or Resolution

In granting a street railroad franchise by municipal ordinance, statutory requirements relating to the passage and approval of ordinances must be observed, and, in order to become binding and operative as a contract, it must be perfected as such.

In granting a street railroad franchise by municipal ordinance, statutory requirements relating to the passage and approval of ordinances must be observed,¹² and, in order to become binding and op-

erative as a contract, it must be perfected as such.¹³ Where statutes require the giving of municipal consent to be exercised by ordinance approved by the mayor, exercise of the power by a resolution which was not submitted to the mayor is a nullity.¹⁴ If consent is given by a board, it must be given by the members thereof acting as a board at a regularly convened meeting, and not as individuals.¹⁵

Where the consent of a township is given, it has been held that it should be by means of a formal resolution, duly recorded in the minutes of the meeting,¹⁶ although, where such consent is evidenced by a written instrument duly signed and recorded by the township supervisors, their failure to have the minutes thereof entered on their own records will not invalidate the consent.¹⁷ Where the consent of park commissioners to the construction of a street railroad through a park approach is required in addition to the consent of the city council, the validity of such consent is not affected by the fact that it differs in its terms from the consent of the common council, especially where its terms are more rigorous.¹⁸

Details as to location and construction. Under a statute requiring the consent of the municipal authorities to a location of the tracks, the authorities in granting consent cannot leave it to the discretion of the company to determine whether more than one track shall be laid and as to the location on the street and the construction of sidings, crossovers, and switches.¹⁹ So, where the municipal authorities are permitted to authorize the use of poles and wires, a provision that they may prescribe the manner in which, and the places where, such poles shall be located, and the manner in which the wires shall be strung thereon, is mandatory.²⁰ It has, however, been held that it is not essential to the validity of a

5. Ohio.—Cleveland, etc., St. R. Co. v. Urbana, etc., R. Co., *supra*.

6. Ohio.—Cleveland, etc., St. R. Co. v. Urbana, etc., R. Co., *supra*.

7. Ohio.—State v. East Cleveland R. Co., 6 Ohio Cir.Ct. 318, 3 Ohio Cir. Dec. 471.
Renewals in general see *infra* § 88.

8. Ohio.—Belle v. Glenville, 27 Ohio Cir.Ct. 181.

9. Ohio.—Aydelott v. Cincinnati, 11 Ohio Cir.Ct. 11, 4 Ohio Cir.Dec. 486.

10. Ohio.—Raynolds v. Cleveland, 28 Ohio Cir.Ct. 463, affirmed 81 N.E. 1182, 76 Ohio St. 619.

11. N.J.—Camden Horse R. Co. v. West Jersey Traction Co., 32 A. 72, 58 N.J.Law 102.
60 C.J. p 187 note 1.

12. U.S.—Potter v. Calumet Electric St. R. Co., C.C.III., 158 F. 521.
60 C.J. p 187 note 2.

13. Ill.—People v. Suburban R. Co., 53 N.E. 349, 178 Ill. 594, 49 L.R.A. 650.
60 C.J. p 187 note 3.

14. N.J.—Specht v. Central Pass. R. Co., 72 A. 356, 76 N.J.Law 631.

15. N.J.—West Jersey Traction Co. v. Camden Horse R. Co., 35 A. 49, 53 N.J.Eq. 163.
60 C.J. p 188 note 5.

16. Pa.—Pittsburgh Rys. Co. v. Borough of Carrick, 103 A. 106, 259 Pa. 333.
60 C.J. p 188 note 6.

17. Pa.—Pittsburgh Rys. Co. v. Borough of Carrick, *supra*.

18. N.Y.—Kuhn v. Knight, 83 N.E. 293, 190 N.Y. 339.

19. N.J.—St. Paul's Catholic Church of Greenville v. Jersey City, 78 A. 1064, 81 N.J.Law 110, affirmed 85 A. 826, 84 N.J.Law 416.
60 C.J. p 188 note 9.

20. N.J.—Kennelly v. Jersey City, 30 A. 531, 57 N.J.Law 293, 26 L.R. A. 281.

franchise or right to construct a street railroad that the consent of the municipal authorities specifically designate the exact location latitudinally in the streets on which the road is to be constructed and operated or the number of tracks to be laid, but that, in the absence of a constitutional or statutory provision to the contrary, it may be regulated by the municipal authorities after consent has been given.²¹

Implied consent. Under charters simply authorizing the municipal authorities to disapprove of the construction of the road, within a specified time, consent will be inferred, unless the city manifests its disapproval within the named time in clear and certain terms.²²

§ 47. — Submission to Popular Vote

Where the power of granting street railroad franchises is vested directly and specifically by the legislature in the legislative authority of the city, it is neither necessary nor proper to submit to the voters for their ratification any ordinance granting a franchise to a street railroad company; but, under some statutes, it is necessary to obtain the consent of a majority of the electors of a city to the use of the streets over which a street railroad is to be constructed.

Where the power of granting street railroad franchises is vested directly and specifically by the legislature in the legislative authority of the city, that is, the mayor and city council, it is neither necessary nor proper to submit to the voters for their ratification any ordinance granting a franchise to a street railroad company.²³ In some jurisdictions, however, it is made necessary, by statute, to obtain

the consent of a majority of the electors of a city to the use of the streets over which a street railroad is to be constructed, the consent to be given or withheld at an election held for that purpose;²⁴ and the grant of a franchise to a street railroad without such consent is invalid.²⁵ In order to render the consent valid there must be a substantial compliance with the statutes requiring it, as to placing on file the ordinance granting the franchise one week before adoption, and publication of notice thereof,²⁶ as to the time of calling the election,²⁷ giving of notice for the time designated in the statute,²⁸ and designating a specific route or routes on which it is intended to lay the tracks;²⁹ and, when the election is had in conjunction with a general city election, the affirmative of the proposition must receive a majority of all the votes cast at such general election.³⁰ It has been held, however, that, where the electors of a city are invested with the power of extending to a streetcar company the right or privilege of entering on the streets of the city, an irregular exercise of such power will not, under all circumstances, be held void.³¹

§ 48. — Review by Commission or Court

Ordinarily the granting of a franchise cannot be interfered with by a public commission where its functions are merely regulatory; nor will the courts interfere therewith.

The granting of a franchise, being a legislative act, cannot be interfered with by a public commission where its functions are merely regulatory;³² nor will the courts interfere therewith,³³ except to

21. Ala.—*Baker v. Selma St., etc., R. Co.*, 80 So. 464, 130 Ala. 474.

22. Pa.—*Faust v. Third St. Pass. R. Co.*, 3 Phila. 164.
60 C.J. p 188 note 12.

23. Wash.—*Benton v. Seattle Electric R. Co.*, 96 P. 1033, 50 Wash. 156.

24. Wis.—*State ex rel. Leisk v. Common Council of City of Wauwatosa*, 102 N.W. 894, 124 Wis. 451.
60 C.J. p 186 note 83, p 201 note 31.

Statute held not applicable to extensions

(1) In general.—*Jones v. Dallas Ry. Co.*, Tex.Civ.App., 224 S.W. 807—60 C.J. p 201 note 31.

(2) Under a statute which provides that no ordinance granting a street railroad franchise or extending the life of any franchise shall be operative in a city until submitted to a direct vote of the voters, if demanded, and which declares that it shall not

apply to "the extension of any existing line or system . . . if the term of such extension expires at the same time as the franchise of which it is a part," an ordinance merely extending the existing lines and system of a street railroad on other streets, the extension expiring at the same time as the franchise, is operative without submitting it to a direct vote.—*State ex rel. Leisk v. Common Council of City of Wauwatosa*, 102 N.W. 894, 124 Wis. 451.

25. Colo.—*Baker v. Denver Tramway Co.*, 210 P. 845, 72 Colo. 233, 29 A.L.R. 1453.
60 C.J. p 202 note 32.

26. La.—*Long v. City of Shreveport*, 91 So. 825, 151 La. 423.
60 C.J. p 202 note 33.

27. Minn.—*Meyers v. Knott*, 174 N.W. 842, 144 Minn. 199.
60 C.J. p 202 note 34.

28. Neb.—*State v. Lincoln St. R.*

Co., 114 N.W. 422, 80 Neb. 333, 14 L.R.A.N.S., 336, motion denied 118 N.W. 326, 80 Neb. 352.

29. Neb.—*State v. Lincoln St. R. Co.*, supra.
60 C.J. p 202 note 36.

30. Neb.—*State v. Bechel*, 34 N.W. 342, 22 Neb. 158.

31. Neb.—*State v. Citizens' St. R. Co.*, 114 N.W. 429, 80 Neb. 357.
60 C.J. p 202 note 38.

32. Wis.—*City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802.

33. N.Y.—*Marjohn Realty Co. v. City of Long Beach*, 204 N.Y.S. 53, 122 Misc. 763, affirmed 206 N.Y.S. 933, 211 App.Div. 805, and 207 N.Y.S. 876, 211 App.Div. 860.

Wis.—*City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802.

prevent a fraudulent or manifestly abusive or oppressive exercise of the power of municipal authorities in granting such franchises.³⁴ Under a statute authorizing suit by taxpayers, a taxpayer suing to enjoin the granting of consent by local authorities to the building and operation of a street railroad cannot be compelled to admit others as co-complainants, although the entire body of taxpayers, the city itself, and the general public may be interested in the result.³⁵

§ 49. Presumption as to Requisite Consents

When a street railroad has been constructed and operated for a long time, it will be presumed that consents required by law were given.

Generally, when a street railroad has been constructed and operated for a long period of time, it will be presumed that consents required by law were given.³⁶ Under a statute providing that, where a railroad has been constructed and put in operation for a specific length of time, it will be presumed that the requisite consent of local authorities, property owners, and others has been duly obtained, the fact that there is no record of consent in a particular book of records does not overcome such presumption where there is no statutory requirement that the consent be recorded therein.³⁷

§ 50. Operation and Effect

a. In general

b. Matters affecting validity

a. In General

When all the consents required by statute have been obtained, the right of a company, duly incorporated, to build is complete; but consent given to a railroad company having no charter authority to use the streets is ineffectual to confer such power.

When all the consents required by statute have been obtained, the right of a company, duly incorporated, to build is complete.³⁸ However, as municipal consent cannot create or enlarge corporate franchises,³⁹ consent given to a railroad company having no charter authority to use the streets is ineffectual to confer such power;⁴⁰ and, where a street railway company has a trunk franchise and branch franchises, if the trunk has no sufficient legal existence, its branches must also fail, and the municipality's consent to their construction will not avail the company.⁴¹ Consent to individuals does not bind a municipality to accept a corporation in their stead.⁴²

Nature. Consent is in the nature of a license and must be shown and established by the street railroad company, when its authority is questioned.⁴³

b. Matters Affecting Validity

A street railroad franchise may be rendered invalid when its granting is attended with fraud, extortion, or bribery, although not where it is merely disadvantageous to the municipality or is injudicious. The partial invalidity of a franchise ordinance does not necessarily affect the validity of the whole.

A street railroad franchise is invalid when its granting is attended with fraud,⁴⁴ extortion,⁴⁵ or

34. Ill.—People v. Grand Trunk Western R. Co., 83 N.E. 839, 232 Ill. 292.

Va.—Wagner v. Bristol Belt Line R. Co., 62 S.E. 391, 108 Va. 594, 25 L. R.A.N.S., 1278.

35. U.S.—Seccomb v. Wurster, C.C. N.Y., 83 F. 856.

36. N.Y.—People ex rel. City of New York v. New York Railways Co., 112 N.E. 49, 217 N.Y. 310.

Operation approved by city

In action by city to enjoin continued operation of trolley line over city streets, although no franchise for the operation of defendant's line over certain street was produced in evidence, where evidence disclosed that operation of the line on such street was approved by the city by an agreement between the city, the defendant company, and another railroad company with which defendant's line connected, in the absence of other evidence, it was presumed

that a consent to such operation was obtained pursuant to law.—City of New Rochelle v. Westchester Elec. R. Co., 29 N.Y.S.2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S.Ct. 64, 317 U.S. 663, 87 L.Ed. 533.

37. N.Y.—Troy & N. E. Ry. Co. v. K. L. W. M., 192 N.Y.S. 277, affirmed 194 N.Y.S. 985, 202 App.Div. 768.

38. N.Y.—Coney Island, etc., R. Co. v. Kennedy, 44 N.Y.S. 825, 15 App. Div. 588.

60 C.J. p 188 note 17.
Revocation and forfeiture see infra §§ 89-97.

Rights conferred see infra § 72.

39. Pa.—Hannum v. Media, M., A. & C. Electric Ry. Co., 49 A. 789, 200 Pa. 44.

40. Ga.—Almand v. Atlanta Consol. St. R. Co., 34 S.E. 6, 108 Ga. 417.

N.Y.—Manhattan Bridge Three-Cent Line v. Third Avenue Ry. Co., 139 N.Y.S. 434, 154 App.Div. 704.

41. Pa.—Hannum v. Media, etc., Electric R. Co., 49 A. 789, 200 Pa. 44.

42. U.S.—People's Pass. R. Co. v. Memphis City R. Co., Tenn., 10 Wall. 38, 19 L.Ed. 844.
60 C.J. p 188 note 21.

43. Mo.—Swinhart v. St. Louis, etc., R. Co., 105 S.W. 1043, 207 Mo. 423.
Nature of right to construct and operate street railroad generally see supra § 19.

44. Cal.—Finch v. Riverside, etc., R. Co., 25 P. 765, 87 Cal. 597.

N.Y.—Adamson v. Nassau Electric R. Co., 33 N.Y.S. 732, 12 Misc. 600, reversed on other grounds 34 N.Y. S. 1073, 89 Hun 261.

45. Pa.—Tamaqua, etc., St. R. Co. v. Inter-County St. R. Co., 31 A. 472, 167 Pa. 91.

bribery.⁴⁶ However, the validity of such a franchise is not affected by the fact that it is not advantageous to the municipality,⁴⁷ or is injudicious,⁴⁸ or, in the absence of fraud, because of inadequacy of consideration, where the municipality has received all the consideration it had contracted for.⁴⁹

Effect of partial invalidity. The partial invalidity of a franchise ordinance does not necessarily affect the validity of the whole.⁵⁰ However, it has been held that, where a franchise ordinance which authorizes a street railway company to operate its lines on two streets is void as to one of those streets because of the company's lack of power to accept the ordinance, it is equally void as to the other street.⁵¹

Right to attack. Where a municipality in granting a franchise to a street railway company acts as agent of the state, as discussed supra § 29, the franchise is from the state, and, hence, the municipality cannot attack the validity of the franchise by action, where the state declines to do so.⁵² Except as he may be entitled to relief as an abutting owner, as discussed infra § 100, a taxpayer is not, as such, entitled to attack the validity of a franchise granted by the municipality and enjoin the use thereof by the grantee.⁵³ Complainants who have no right to the use and occupation of streets and highways covered by branches and extensions of a street railroad have no standing to ask a court of equity to enjoin it from asserting its right to such use and occupation.⁵⁴ Hence, individuals who have filed articles of association with the secretary of state as a step toward procuring a charter as a street railroad company have no standing before the charter has issued to question the right of a railroad company to maintain extensions secured as provided by a statute.⁵⁵

§ 51. — Validation of Defective or Invalid Grant or Consent

If the ordinance or resolution granting the franchise is void because it confers on the corporation authority to exercise power not given to it by the articles of association, it cannot be validated by a second ordinance, but a grant by a municipality, which is invalid by reason of irregularity, may be confirmed and ratified by an act of the legislature.

If the ordinance or resolution granting the franchise is void because it confers on the corporation authority to exercise power not given to it by the articles of association, it cannot be validated by a second ordinance or resolution;⁵⁶ but, where a second ordinance is complete and valid in itself, it is not invalid because it is passed as an amendment to a void act,⁵⁷ or because it is granted under a mistake of law or of fact as to the validity of the prior ordinance;⁵⁸ and a grant by a municipality, which is invalid by reason of irregularity, may be confirmed and ratified by an act of the legislature.⁵⁹

New franchise. A statute which merely confirms and regulates a franchise previously possessed by another company and which does not give any new authority to lay tracks does not confer a new franchise.⁶⁰

§ 52. Sale to Highest Bidder

Under some constitutional or statutory provisions, street railroad franchises must be sold to the highest bidder, or, in some instances, to the bidder offering to transport passengers at the lowest rate of fare; but such provisions do not apply to an extension of a line of road already in operation, or a removal of the right to operate a street railroad at the expiration of the term fixed by the franchise.

Under the constitution or statutes in some jurisdictions street railroad franchises or privileges in

46. Pa.—Lehigh Coal, etc., Co. v. Inter-County St. R. Co., 31 A. 471, 167 Pa. 75—Keogh v. Pittston, etc., R. Co., 5 Lack.Leg.N. 242.

47. Ind.—City R. Co. v. Citizens' R. Co., 52 N.E. 157.
60 C.J. p 189 note 26.

48. Ind.—Indianapolis & E. Ry. Co. v. Town of New Castle, 87 N.E. 1067, 43 Ind.App. 467.

49. Ind.—Indianapolis & E. Ry. Co. v. Town of New Castle, supra.
60 C.J. p 189 note 28.

50. Md.—Koch v. North Ave. R. Co., 23 A. 463, 75 Md. 222, 15 L.R.A. 377.

Tex.—Gray v. Dallas Terminal R.,

etc., Co., 36 S.W. 352, 13 Tex.Civ. App. 158.

51. Pa.—Valley Rys. v. City of Harrisburg, 124 A. 644, 280 Pa. 385.

52. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 144 N.W. 206, 156 Wis. 83.

53. Ohio.—Buning v. Cincinnati St. R. Co., 1 Ohio Cir.Ct. 323, 1 Ohio Cir.Dec. 178.

Wis.—Linden Land Co. v. Milwaukee Electric R., etc., Co., 83 N.W. 851, 107 Wis. 493.

54. Pa.—Lovejoy v. Duquesne St. R. Co., 69 A. 280, 219 Pa. 639—Andel v. Duquesne St. R. Co., 69 A. 278, 219 Pa. 635.

55. Pa.—Lovejoy v. Duquesne St. R.

Co., 69 A. 280, 219 Pa. 639—Andel v. Duquesne St. R. Co., 69 A. 278, 219 Pa. 635.

56. N.Y.—McClellan v. Westchester Electric R. Co., 55 N.Y.S. 556, 25 Misc. 383.

57. Ill.—Wilder v. Aurora, etc., Electric Traction Co., 75 N.E. 194, 216 Ill. 493.

58. Ind.—City R. Co. v. Citizens St. R. Co., 52 N.E. 157.

59. N.Y.—People v. Law, 34 Barb. 494, 22 How.Pr. 109.

60. N.Y.—In re New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401—Mattiage v. New York El. R. Co., 14 Daly 1.

the use of streets must be sold to the highest bidder, or, in some instances, to the bidder offering to transport passengers at the lowest rate of fare.⁶¹ Where such provisions exist, the sale of the franchise must be in compliance therewith,⁶² for example, with regard to such matters as the petition of abutting owners,⁶³ the consent of the municipal authorities,⁶⁴ the granting ordinance,⁶⁵ notice,⁶⁶ conditions,⁶⁷ and as to the award to the best bidder.⁶⁸ It is immaterial who the bidder is, whether an individual or a corporation, and, if there is a compliance with the terms of the sale, the highest bid must be accepted;⁶⁹ and a sale is not illegal because it happens that one purchaser, without his connivance or procurement, and without fraud, collusion, or undue influence being shown, is in a position, by reason of his situation, to bid a price higher than another;⁷⁰ but, where such conditions are incorporated in the franchise that in the natural course of things there will be only one bidder, a sale to him is void as in effect a private sale.⁷¹

Mere inadvertence or informality in the use of words which do not go to the substance of the bid will not invalidate the sale,⁷² and in general the duty of the local authorities consists in deciding which is the best bid within the meaning of the statute, without inquiring into the motives of the bidder,⁷³ but they have authority to reject a bid which they find to be frivolous or fraudulent.⁷⁴

Where a constitutional provision imposes certain taxes on street railroads in lieu of all other taxes and licenses, but does not release railways from payment of any "amount agreed to be paid or required by law to be paid for any special privilege or franchise," the company is not released from the payment of percentages of gross receipts required under statutes providing for grants of franchises to the highest bidders.⁷⁵

Adjustment or modification of franchises. A constitutional or statutory provision requiring sale of a franchise to the highest bidder does not apply to an ordinance for the purpose of adjusting existing franchises so that they shall be uniform in terms and expire simultaneously, but which does not propose to extend operations to any street or portion of any street on which operations were not at the time conducted.⁷⁶ So it has been held not to apply to an arrangement for the purpose of relocating the track of a railroad under an existing franchise for the benefit of the city and traveling public⁷⁷ or mere modification in a detail of the execution of the existing franchise.⁷⁸

Renewals and extensions. Statutes of this nature have been held not to apply to an extension of a line of road already in operation,⁷⁹ or a renewal of the right to operate a street railroad at the expiration of the term fixed by the franchise.⁸⁰

61. La.—New Orleans City, etc., R. Co. v. Watkins, 21 So. 199, 48 La. Ann. 1850.
60 C.J. p 202 note 41.

62. N.Y.—Beekman v. Third Ave. R. Co., 47 N.E. 277, 153 N.Y. 144.
60 C.J. p 202 note 42.

63. La.—Friscoville Realty Co. v. Police Jury of Parish of St. Bernard, 53 So. 578, 127 La. 318.
60 C.J. p 202 note 43.

64. N.Y.—Abraham v. Meyers, 23 N. Y.S. 225, 29 Abb.N.Cas. 384.
60 C.J. p 202 note 44.

65. Ohio.—State v. Bell, 34 Ohio St. 194.
60 C.J. p 203 note 45.

66. Ohio.—Cincinnati Street Railroad Company v. Smith, 29 Ohio St. 291.

67. N.Y.—Beekman v. Third Ave. R. Co., 47 N.E. 277, 153 N.Y. 144.
60 C.J. p 203 note 47.

68. U.S.—Hart v. Buckner, La., 54 F. 925, 5 C.C.A. 1.
60 C.J. p 203 notes 48–54.

69. N.Y.—Trojan Ry. Co. v. City of Troy, 109 N.Y.S. 779, 782, 125 App. Div. 362, affirmed 89 N.E. 1113, 195 N.Y. 614.
60 C.J. p 203 note 49.

70. La.—Johnson v. New Orleans, 29 So. 355, 105 La. 149.

71. La.—Friscoville Realty Co. v. Police Jury of Parish of St. Bernard, 53 So. 578, 127 La. 318.

72. Ohio.—Compton v. Johnson, 9 Ohio Cir.Ct. 532, 6 Ohio Cir.Dec. 110.
60 C.J. p 203 note 52.

73. Ohio.—Knorr v. Miller, 5 Ohio Cir.Ct. 609, 3 Ohio Cir.Dec. 297.
60 C.J. p 203 note 53.

74. Ohio.—Compton v. Johnson, 9

Ohio Cir.Ct. 532, 6 Ohio Cir.Dec. 110.
60 C.J. p 203 note 54.

75. Cal.—City and County of San Francisco v. Market St. Ry. Co., 73 P.2d 234, 9 Cal.2d 743.

76. Ky.—Poggel v. Louisville Ry. Co., 10 S.W.2d 305, 225 Ky. 784.

77. Ky.—Woodall v. South Covington & C. St. Ry. Co., 124 S.W. 843, 137 Ky. 512.
60 C.J. p 203 note 56.

78. Ky.—Woodall v. South Covington & C. St. Ry. Co., supra.
60 C.J. p 203 note 57.

79. N.Y.—Smith v. Buffalo, 100 N. Y.S. 322, 51 Misc. 244.
60 C.J. p 203 note 58.

80. Ohio.—Clement v. Cincinnati, 9 Ohio Dec., Reprint, 688, 16 Cinc.L. Bul. 355—Haskins v. Cincinnati Consol. St. R. Co., 7 Ohio Dec., Reprint, 713, 4 Cinc.L.Bul. 1126.

3. CONSENT OF ABUTTING OWNERS

§ 53. For Use of Streets and Highways

The consent of abutting owners to the use of streets and highways by street railroads, as an element of the grant of a franchise to a street railroad, is considered *infra* §§ 54-69. The right of abutting owners to raise objections to the proposed location or method of construction of a street railroad is discussed *supra* § 23.

Examine Pocket Parts for later cases.

§ 54. — Necessity in General

Ordinarily the owner of land abutting on a public street has no such right or interest in the street as to make his consent necessary for the construction and operation of a street railroad thereon; but under some constitutional or statutory provisions, the consent of abutting owners, or at least of some of them, may be required.

Except as it may be conferred by constitutional or statutory provisions, the owner of land abutting on a public street has no such right or interest in the lands included within the street as to make his consent necessary for the construction and operation of a street railroad thereon,⁸¹ and the legislature may, unless there are constitutional restraints, authorize the construction and operation of a street railroad without the consent of abutting owners.⁸² However, by some constitutional or statutory provisions, the consent of abutting owners, or at least of some of them may be required.⁸³ Accordingly, where it is so provided, no law may authorize the construction or operation of a street railroad except where the consent of a specified proportion of the owners of abutting property has been obtained, or, in lieu thereof, there has been a judicial determination that the road should be constructed.⁸⁴ Where a statute requires either the permission of the municipal authorities or the consent of property owners, either will be sufficient.⁸⁵

Renewal of franchise. The renewal of a franchise may be granted without the consent of abut-

ting owners, where it is provided by statute that the council may renew such grant at its expiration on such terms as shall be conducive to public interest.⁸⁶

§ 55. — Grant of Franchise and Right to Operate Distinguished

Under some provisions, consent of abutting owners is not a prerequisite to the granting of a franchise to a street railroad corporation, but such consent is merely required before the grant may be made effective upon any particular street.

A city charter provision requiring the written consent of abutting owners to the operation of a street railroad upon a particular street does not make such consent a prerequisite to the granting of a franchise to a street railroad corporation, but merely requires the consent before the grant may be effective upon any particular street.⁸⁷

§ 56. — Elevated Railroads

Ordinarily the construction of an elevated railroad requires the same consent of abutting owners as other street railroads.

Where a company incorporated under the general railroad law has no special power conferred on it by the legislature to build an elevated railroad in the streets of a city, it cannot do so without securing the consent of abutting owners in the manner required of other street railroads.⁸⁸

§ 57. — Temporary Tracks

A city may grant the right to construct a temporary track, without procuring the consent of abutting owners which is ordinarily required.

Notwithstanding a general requirement of the consent of abutting owners, it has been held that a city may, without such consent, grant the right to construct a temporary track, since it is not a grant, but a revocable license.⁸⁹

81. N.J.—Paterson, etc., Traction Co. v. Westbrock, Ch., 56 A. 698.
60 C.J. p 190 note 53.

82. Tex.—City of Dallas v. Couchman, Civ.App., 249 S.W. 234.
60 C.J. p 190 note 54.

83. N.Y.—In re Thirty-Fourth St. R. Co., 7 N.E. 172, 102 N.Y. 343.
60 C.J. p 191 note 55.

84. N.Y.—In re Metropolitan Transit Co., 19 N.E. 645, 111 N.Y. 588.
60 C.J. p 191 note 56.

85. N.Y.—Brooklyn City, etc., R. Co. v. Coney Island, etc., Co., 35 Barb. 364.

86. Ohio.—State v. East Cleveland R. Co., 3 Ohio Cir.Dec. 471—Pelton v. East Cleveland R. Co., 10 Ohio

Dec., Reprint, 545, 22 Cinc.L.Bul. 67.

87. U.S.—City of Denver v. Mercantile Trust Co. of New York, Colo., 201 F. 790, 120 C.C.A. 100.

88. N.Y.—Schaper v. Brooklyn & Long Island Cable Ry. Co., 26 N.E. 311, 124 N.Y. 630, 35 N.Y.St. 112.

89. Ohio.—Mathers v. Cincinnati, 7

§ 58. — Extensions

Where an extension of a road already in existence is proposed, consent of the abutting owners on the proposed extension may be necessary.

Under statutes requiring the consent of abutting owners, where the extension of a road already in existence is proposed, the consent of the abutting owners on the proposed extension must be obtained.⁹⁰ However, new consents from the abutting owners on the part of the line already built need not be obtained.⁹¹

§ 59. — Additional Tracks

Where a single-track road has been lawfully constructed with the consent of abutting owners, as required by law, and it is afterward proposed to construct another track on the same street, consent of the abutting owners is necessary for the proposed construction.

Under statutes requiring the consent of abutting owners, where a single-track road has been lawfully constructed with such consent, and it is afterward proposed to construct another track on the same street, the consent of the abutting owners is necessary.⁹² A constitutional requirement of the consent of abutting owners to the construction of a street railroad is applicable to a statute allowing the depression of the tracks of a steam railroad having a right to operate along a street and the construction of a street railroad upon the surface level over the depressed tracks where the effect is to authorize the construction of two railroads in the street where but one existed before.⁹³

§ 60. — Switches and Turnouts

A requirement of consent of abutters does not apply to the grant of a right to construct a turnout or a switch.

It has been held that a requirement of consent of abutters does not apply to the grant of a right to construct a turnout or a switch.⁹⁴

Ohio Dec., Reprint, 521, 3 Cinc.L. Bul. 709.

90. Ohio.—Mt. Auburn Cable R. Co. v. Neare, 42 N.E. 768, 54 Ohio St. 153.—Day v. Forest City Ry. Co., 27 Ohio Cir.Ct. 60.

Initiative ordinance

A statute, providing that permission shall not be granted to extend a streetcar line until written consent of the owners of more than one half of the abutting property has been

produced to the council or commissioners, does not require the securing of such consent as a condition precedent to the introduction of an initiative ordinance providing for extension.—Cincinnati v. Hillenbrand, 133 N.E. 556, 103 Ohio St. 286.

91. Ohio.—Broadway, etc., R. Co. v. Brooklyn St. R. Co., 9 Ohio Dec., Reprint, 25, 10 Cinc.L.Bul. 72.

92. Ohio.—Roberts v. Easton, 19 Ohio St. 78.

§ 61. — On Consolidation of Municipalities

Where municipalities are consolidated on terms permitting franchises originally granted to extend over the entire consolidated city, consent of abutting owners is not required on expiration of a franchise as to a portion of a line for which such consent was not originally required.

Where municipalities are consolidated and it is provided by the act of consolidation that the franchises granted by one of the constituents shall extend over the entire consolidated city, on expiration of a franchise granted by the other constituent as to a portion of a railroad line it is not necessary to obtain the consent of abutting owners to a continuance of the operation of the road over such portion of the line, although such consent had been required as a condition to the original grant of the franchise with respect to the other constituent municipalities.⁹⁵

§ 62. — Franchise to New Company

Where a franchise has expired, a new company seeking to construct and operate on the same street must first obtain the consent of abutting owners as required in the case of an original use of the street.

A franchise granting the right to operate a street railway upon a certain street having expired, a new company seeking to construct and operate upon the same street must first obtain the consent of a majority of the abutting property owners thereon as required in the case of an original use of the street.⁹⁶

§ 63. — Nature and Scope of Right to Consent

The nature, scope, and extent of the right or privilege of abutting owners conferred by constitutional or statutory provisions with respect to consent of such owners to the grant of a street railroad franchise depend entirely on the provisions conferring it. Ordinarily such provisions do not confer new rights in the street on the abutting owner but merely create a condition under which the municipality is without power to grant a franchise unless the condition is fulfilled.

93. N.Y.—In re Long Island R. Co., 82 N.E. 443, 189 N.Y. 428.

94. N.J.—Specht v. Central Pass. R. Co., 72 A. 356, 76 N.J.Law 631. 60 C.J. p 192 note 65.

95. Mich.—Bay City v. Saginaw-Bay City Ry. Co., 174 N.W. 193, 207 Mich. 419.

96. Ohio.—Isom v. Low Fare R. Co., 29 Ohio Cir.Ct. 583, 10 Ohio Cir.Ct. N.S., 89.

The nature, scope, and extent of the right or privilege of abutting owners conferred by organic or statutory provisions with respect to consent of such owners to the grant of a street railroad franchise depend entirely on the provisions conferring it.⁹⁷ Requirements of their consent have been held not to constitute a delegation of power to the owners, but merely to create a condition under which the municipality is without power to grant a franchise to a street railroad company unless the condition is fulfilled.⁹⁸ They do not confer any new rights in the street on the abutting owner.⁹⁹

The right to consent is not a special privilege¹ or property right,² inconsistent with the rule that abutting owners have no right in a street superior to those of the general public.³ It is a personal right or option⁴ which the property owner may exercise or withhold without compulsion from other owners, public authorities, or the courts,⁵ and which in consequence cannot be appropriated under the power of eminent domain.⁶

§ 64. — Who May Give Consent

A requirement that consent be given by the "owner" of the property involved has been held to be satisfied when given by the owner of a life estate, by devisees, or by a trustee in whom the legal title is vested; but the requirement is not satisfied by the consent of a tenant of the property. Generally consent may be given by a duly authorized agent.

A requirement that consent be given by the "owner" of the property involved has been held to be satisfied when given by the owner of a life estate,⁷ by the vendee of land under a contract to convey who is not in default under his contract and who is in possession of the land,⁸ by devisees,⁹ by a trustee in whom the legal title is vested,¹⁰ by the equitable owner where the trustee holding the legal title has declined to express himself as to being willing or unwilling,¹¹ and by a remainderman who has charge and who is in possession of the property.¹² On the other hand, the requirement has been held not satisfied by the consent of a tenant of the property,¹³ of fathers and guardians of minor children who are owners,¹⁴ of husbands of wives who hold the legal titles,¹⁵ or of executors,¹⁶ except where it is provided by statute that consent may be given by an executor holding the legal title.¹⁷ Where property is owned by tenants in common, the consent of all is required.¹⁸

Mortgages. Where a mortgage passes no title, and is nothing more than a lien or security for a debt, the consent of a mortgagee of abutting property is not the consent of the abutting owner, and is of no effect;¹⁹ but it has been held that a consent given by the holder of the legal title of an abutting lot cannot be affected by his subsequent admission that deeds to him are merely mortgages and that his interest is only that of a mortgagee in possession.²⁰

97. N.J.—Paterson, etc., Traction Co. v. Wostbrock, Ch., 56 A. 698. 60 C.J. p 192 note 70.

98. Ohio.—Carpenter v. Cincinnati, 111 N.E. 153, 92 Ohio St. 473.

99. Ill.—Doane v. Lake St. El. R. Co., 46 N.E. 520, 165 Ill. 510, 56 Am.S.R. 265, 36 L.R.A. 97.

1. Ohio.—Isom v. Low Fare Ry., 10 Ohio Cir.Ct., N.S., 89, 29 Ohio Cir. Ct. 583.

2. Ohio.—Hamilton, etc., Traction Co. v. Parish, 65 N.E. 1011, 67 Ohio St. 181. 60 C.J. p 192 note 74.

3. Ohio.—Isom v. Low Fare R. Co., 10 Ohio Cir.Ct., N.S., 29 Ohio Cir. Ct. 583.

4. Ohio.—Hamilton, etc., Traction Co. v. Parish, 65 N.E. 1011, 67 Ohio St. 181. 60 C.J. p 192 note 76.

5. Ohio.—Hamilton, etc., Traction Co. v. Parish, supra. 60 C.J. p 192 note 77.

6. Ohio.—Hamilton, etc., Traction Co. v. Parish, supra.

7. Ohio.—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119—Iretton v. Ft. Wayne, etc., Traction Co., 2 Ohio N.P., N.S., 317.

8. Ohio.—Day v. Forest City R. Co., 27 Ohio Cir.Ct. 60, reversed on other grounds 76 N.E. 396, 73 Ohio St. 83.

9. Ohio.—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119.

10. N.J.—Hutchinson v. Belmar, 39 A. 643, 61 N.J.Law 443, affirmed 45 A. 1092, 62 N.J.Law 450. 60 C.J. p 193 note 82.

11. Tex.—Gray v. Dallas Terminal R., etc., Co., 36 S.W. 352, 13 Tex. Civ.App. 158.

12. Ohio.—Simmons v. Toledo, 8 Ohio Cir.Ct. 535, 4 Ohio Cir.Dec. 69, affirmed 51 Ohio St. 626.

13. Ohio.—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119.

14. Ohio.—Day v. Forest City R. Co., 27 Ohio Cir.Ct. 60, reversed on other grounds 76 N.E. 396, 73 Ohio St. 83—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc. L.Bul. 119.

15. N.Y.—Baker v. New York Municipal Ry. Corp., 168 N.Y.S. 509, 181 App.Div. 939, 102 Misc. 719. Ohio.—Simmons v. Toledo, 8 Ohio Cir.Ct. 535, 4 Ohio Cir.Dec. 69, affirmed 51 Ohio St. 626.

16. Ohio.—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119.

17. N.J.—Orton v. Metuchen, 49 A. 814, 66 N.J.Law 572.

18. Ohio.—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119. 60 C.J. p 193 note 90.

19. N.Y.—Baker v. New York Municipal Ry. Corp., 168 N.Y.S. 509, 181 App.Div. 939, 102 Misc. 719.

20. N.Y.—Sea Beach R. Co. v. Coney Island, etc., Electric R. Co., 47 N. Y.S. 981, 22 App.Div. 477.

City owning property abutting on the street along which it is proposed to construct and operate a street railroad may consent as a landowner,²¹ notwithstanding it acts in a dual capacity.²²

Corporations. A corporation may consent as the owner of property²³ where the consent is executed as the act of the corporation.²⁴

Board of education, having no title to lands on which school buildings stand, is not their owner, and cannot give a valid consent.²⁵

Agents. It is very generally held that consent may be given by a duly authorized agent, although such consent is not specially provided for by the provisions requiring it;²⁶ and, by some provisions, express authority for consent by agents is given;²⁷ and it is not essential to the validity of the consent that the authority of the agent should appear on the instrument giving it,²⁸ or that he should have been authorized in writing.²⁹ However, if the authority of one signing as agent is challenged, the agency must be proved as in other cases.³⁰

Ownership to center of street. Where the statute requires the consent of the owners of at least one half of the amount in lineal feet of property fronting on the street through which permission to construct has been asked, the right to consent belongs to every owner of property fronting on the street regardless of his ownership to the center of the street.³¹

Consent of unauthorized person may be ratified or adopted by the owner and the consent thereby given

validity,³² provided timely action is taken to ratify or adopt the consent.³³

§ 65. — Purchase of Consents; Conditions

An agreement for the purchase of the consent of a property owner to the laying down of a street railway in the street on which his property abuts for a consideration inuring to the exclusive benefit of such owner is against public policy and void, and hence will not be enforced at the instance of the property holder; but the consent may be held valid for the purpose of authorizing the municipal authorities to act.

Although there is authority to the contrary,³⁴ it has been held that an agreement for the purchase of the consent of a property owner to the laying down of a street railway in the street on which his property abuts for money or for a consideration inuring to the exclusive benefit of such owner is, where made for the purpose of securing the action of the municipal authorities, against public policy and void,³⁵ and, in consequence, the courts will refuse to enforce such an agreement at the instance of the property holders.³⁶ However, it has been held that, although a condition or proviso is against public policy, it may be disregarded and the consent held valid for the purpose of authorizing the municipal authorities to act,³⁷ and that the legislative body may lawfully disregard the proviso.³⁸

Conditions in franchises. Where a franchise is granted on condition that the injury to abutting property owners shall be ascertained, and the railroad enters into an agreement with an abutting owner whereby he consents to its construction and waives damage resulting therefrom on condition that the company will vacate the track if it becomes

21. N.Y.—Westchester Electric R. Co. v. City of Mt. Vernon, 142 N. E. 585, 237 N.Y. 199.
60 C.J. p 193 note 94.

22. Ohio.—Emerson v. Forest City R. Co., 28 Ohio Cir.Ct. 683.

23. N.Y.—Baker v. New York Municipal Ry. Corp., 168 N.Y.S. 509, 181 App.Div. 939, 102 Misc. 719.

24. N.Y.—Baker v. New York Municipal Ry. Corp., supra.
60 C.J. p 193 note 97.

25. N.J.—Currie v. Atlantic City, 48 A. 615, 66 N.J.Law 140, reversed on other grounds 50 A. 504, 66 N.J. Law 671.

26. Ill.—Tibbetts v. West Towns, etc., St. R. Co., 38 N.E. 664, 153 Ill. 147.
60 C.J. p 193 note 99.

27. N.J.—Shepard v. East Orange, 57 A. 441, 70 N.J.Law 203.

28. Ill.—Tibbetts v. West Towns, etc., St. R. Co., 38 N.E. 664, 153 Ill. 147—North Chicago St. R. Co. v. Cheetham, 58 Ill.App. 318.

29. N.Y.—Baker v. New York Municipal Ry. Corp., 168 N.Y.S. 509, 181 App.Div. 939, 102 Misc. 719.

30. Ohio.—Day v. Forest City Ry. Co., 27 Ohio Cir.Ct. 60, reversed on other grounds 76 N.E. 396, 73 Ohio St. 83.

31. N.J.—St. Columba's Church v. North Jersey St. R. Co., Ch., 70 A. 692.

32. Ohio.—Day v. Forest City R. Co., 27 Ohio Cir.Ct. 60, reversed on other grounds 76 N.E. 396, 73 Ohio St. 83.

33. Ohio.—Sommers v. Cincinnati, 6

Ohio Dec., Reprint, 887, 8 Am.L. Rec. 612.
60 C.J. p 194 note 7.

34. Ohio.—Hamilton, etc., Traction Co. v. Parish, 65 N.E. 1011, 67 Ohio St. 181, 60 L.R.A. 531.
60 C.J. p 194 note 8.

35. Ill.—Doane v. Chicago City R. Co., 45 N.E. 507, 160 Ill. 22, 35 L. R.A. 588.
60 C.J. p 194 note 9.

36. Ill.—Doane v. Chicago City R. Co., supra.
60 C.J. p 194 note 11.

37. N.J.—St. Columba's Church of Newark v. Public Service Ry. Co., 78 A. 219, 80 N.J.Law 353.
60 C.J. p 194 note 12.

38. N.J.—St. Columba's Church of Newark v. Public Service Ry. Co., supra.

necessary to close the street in question, such agreement may be refused.³⁹

Conditions forbidden by statute. A property owner in giving his consent to the construction of a street railroad cannot attach conditions thereto which are in direct contravention of the statute under which the franchise is granted.⁴⁰

Nonconsenting abutting owners may not complain of violations by the grantee of conditions imposed by those who consented when the consenting owners do not themselves complain.⁴¹

§ 66. — Requisites and Sufficiency

- a. In general
- b. Number required

a. In General

When so provided by statute, the consent of an abutting owner to the construction and operation of a street railroad must be in writing, signed, acknowledged, sealed, and filed or recorded, in order to be valid and effective.

When so provided by statute, the consent of abutting owners to the construction and operation of a street railroad must be in writing,⁴² signed,⁴³ acknowledged,⁴⁴ sealed,⁴⁵ and filed or recorded,⁴⁶ in order to be valid and effective; but, in the absence of a statutory requirement to that effect, sealing⁴⁷ or recording⁴⁸ of consents is not necessary. A consent to the construction of a street railroad is, in the absence of an apparent intention of the legislature to the contrary, sufficient, and it need not be to the mode and manner of the construction and operation of the road.⁴⁹ A petition addressed to court commissioners advocating a particular loca-

tion for the road does not operate as a consent by the property owner.⁵⁰

To whom given. Consents procured fairly and in good faith by an individual interested in the railroad and transferred by him to the railroad company are not invalid by reason of the fact that they run to the individual instead of to the corporation and have been acquired by the latter through an intermediary by assignment instead of directly from the property owners themselves.⁵¹

Time when obtained. It is not, unless the terms of the statute so provide, necessary to the validity of a grant to construct a street railway that the number of consents of abutting property owners required by the statute should have been obtained prior to the publication of the notice inviting bids for the construction and operation of such railway as required by another statute.⁵²

Consent by municipality. Municipal consent to the construction and operation of a road operates also as a consent of the municipality as a property owner.⁵³

b. Number Required

The number of consents required and the determination of what property is to be included in the calculation depend on a construction of the constitutional or statutory provisions requiring the consent of abutting owners to the construction and operation of a street railroad.

Generally, where constitutional or statutory provisions require the consent of abutting owners to the construction and operation of a street railroad, the number of consents required and the determination of what property is to be included in the calculation depend on a construction of these provisions.⁵⁴ Un-

39. Iowa.—Gatchell, etc., Lumber, etc., Co. v. Des Moines Union R. Co., 87 N.W. 670, 115 Iowa 734.

40. Ohio.—Forest City R. Co. v. Day, 76 N.E. 396, 73 Ohio St. 83. 60 C.J. p 195 note 15.

41. Ohio.—Barney v. Mt. Adams, etc., Inclined Plane R. Co., 11 Ohio Dec., Reprint, 880, 30 Cinc.L.Bul. 286. 60 C.J. p 195 note 16.

42. Ohio.—Simmons v. Toledo, 8 Ohio Cir.Ct. 535, 4 Ohio Cir.Dec. 69, affirmed 51 Ohio St. 626—Rapp v. Cincinnati, etc., R. Co., 9 Ohio Dec., Reprint, 302, 12 Cinc.L.Bul. 119.

43. Ohio.—Simmons v. Toledo, 8 Ohio Cir.Ct. 535, 4 Ohio Cir.Dec. 69. 60 C.J. p 195 note 18.

44. N.J.—Orton v. Metuchen, 49 A. 814, 66 N.J.Law 572. 60 C.J. p 195 note 19.

45. N.J.—Mercer County Traction Co. v. United New Jersey R., etc., Co., 54 A. 819, 64 N.J.Eq. 588. 60 C.J. p 195 note 20.

46. N.Y.—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580. 60 C.J. p 195 note 21.

47. N.Y.—In re Cortland, etc., R. Co., 31 Hun 72, affirmed 95 N.Y. 663.

48. Ohio.—Sanfleet v. Toledo, 10 Ohio Cir.Ct. 460, 8 Ohio Cir.Dec. 711, affirmed 47 N.E. 1116, 54 Ohio St. 620. 60 C.J. p 195 note 23.

49. Ohio.—Sloane v. People's Electric R. Co., 7 Ohio Cir.Ct. 84, 3 Ohio Cir.Dec. 674.

50. N.Y.—Farmers' Loan & Trust Co. v. New York Elevated R. Co., 135 N.Y.S. 464, 150 App.Div. 565.

51. N.Y.—Geneva, etc., R. Co. v. New York Cent., etc., R. Co., 57 N.E. 498, 163 N.Y. 228.

52. Ohio.—Sloane v. People's Electric Ry. Co., 7 Ohio Cir.Ct. 84, 3 Ohio Cir.Dec. 674.

53. N.Y.—Westchester Electric R. Co. v. City of Mt. Vernon, 142 N.E. 585, 237 N.Y. 199. 60 C.J. p 195 note 28.

54. N.Y.—Sea Beach R. Co. v. Coney Island, etc., Electric R. Co., 47 N.Y.S. 981, 22 App.Div. 477.

der a statute requiring as a prerequisite to the construction of a street railroad the consent of owners of one half in value of the property bounded on that portion of the street upon which it is proposed to construct such railroad, all property bounded on such street, although fronting on another, is to be considered in determining the proportion of property bounded on the street, the owners of which have given their consent.⁵⁵ The value of an entire tract abutting on the street with buildings thereon, being used as an entirety for a single purpose, is to be considered, although it extends back to another street;⁵⁶ but the company is not entitled to the benefit of a consent in behalf of all of a piece of land, part of which is upon the line of the road, and part of which is not.⁵⁷ Within the meaning of a statute of this character, the property on all four corners of two intersecting streets is bounded by the intersecting space common to both; and where a proposed route runs south through one street to the intersection, and thence west through the other, the consent of the owner of the southeast corner, opposite its outer curve, should be counted in making up the requisite one half in value.⁵⁸

Road extending along several streets. A statute requiring the consent of owners of more than one half of the foot frontage of the land abutting on the street along which it is proposed to construct the road requires, where more than one street is to be occupied, the consent of a majority of property holders on each street as a prerequisite to the construction of a road along these streets.⁵⁹ Under a constitution and statute requiring the majority consent in value of the property bounded on a street or highway upon which it is proposed to construct a road, the consent is required on "a street" where construction is proposed, not on the route of combined streets,⁶⁰ and where the required number of consents of property owners on one street has been obtained, a road may be constructed upon such

street, although the owners of other streets have not yet granted their consent.⁶¹

Road extending beyond city limits. Where the proposed route is partly outside the jurisdiction of a municipality, it will be sufficient to support a grant for the part of the route within such jurisdiction that the consent of the owners of the requisite proportion of frontage on that part of the route be obtained and filed.⁶²

*In estimating number of lineal feet of property necessary to authorize the consent of a municipality to the construction of a street railway, the cross streets are to be omitted.*⁶³

Consent of municipality as abutting owner. The consent of a municipality to the construction of a street railroad along a street on which it is an abutting owner may be counted in ascertaining whether a majority of the frontage has consented to the granting of the franchise.⁶⁴

Consent obtained by fraud. Where the consent of more than the required number of property owners was properly obtained, the fact that the consent of two others was obtained by fraud does not affect the validity of the company's right.⁶⁵

§ 67. — Operation and Effect of Consent

Where the consent of abutting owners is a condition precedent to the right to construct a street railroad, the consent when granted is more than a mere license, and is a species of property. The effectiveness of the consent is not impaired by a subsequent alienation of his land by the person giving the consent, and, while the consent may be revoked before final action has been taken thereon, it is not revocable at the will of the person giving it after it has been acted on.

Under constitutional and statutory provisions requiring the consent of abutting owners as a condition precedent to the right of a street railroad company to construct its road, the consent when granted

55. N.Y.—Tiedemann v. Staten Island Midland R. Co., 46 N.Y.S. 64, 18 App.Div. 368.

56. N.Y.—Fox v. New York City Interborough R. Co., 98 N.Y.S. 338, 112 App.Div. 832, appeal dismissed 78 N.E. 1103, 186 N.Y. 524.

57. N.Y.—Merriman v. Utica Belt Line St. R. Co., 41 N.Y.S. 1049, 18 Misc. 269.

60 C.J. p 195 note 31.

58. N.Y.—Sea Beach R. Co. v. Coney

Island, etc., Electric R. Co., 47 N.Y.S. 981, 22 App.Div. 477.
60 C.J. p 196 note 32.

59. Ohio.—Carpenter v. Cincinnati Traction Co., 18 Ohio N.P., N.S., 1.
60 C.J. p 196 note 33.

60. N.Y.—Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., 144 N.Y.S. 523, 159 App.Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718—Hilton v. Thirty-Fourth St. R. Co., 1 How.Pr., N.S., 453.

61. N.Y.—Manhattan Bridge Three Cent Line v. Brooklyn Heights R.

Co., 144 N.Y.S. 523, 159 App.Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718.

62. N.J.—Hutchinson v. Belmar, 39 A. 643, 61 N.J.Law 443, affirmed 45 A. 1092, 62 N.J.Law 450.

63. N.J.—People's Traction Co. v. Atlantic City, 57 A. 972, 71 N.J.Law 134.

64. Ohio.—Emerson v. Forest City Ry. Co., 4 Ohio N.P., N.S., 493.

65. Mich.—Ecorse Tp. v. Jackson, etc., R. Co., 117 N.W. 89, 153 Mich. 393.

is more than a mere license, as it confers valuable rights,⁶⁶ and is a species of property;⁶⁷ but, where the statutes require consent as a condition precedent to the vesting of jurisdiction in municipal authorities to grant a franchise or permit to use the street, it has been held that the consent is neither a license nor a concession granting the company some interest in land or right in the street, but is merely the statutory mode of conferring on the municipal authorities jurisdiction to grant a franchise or permit to the railroad company to use the streets.⁶⁸ Under either class of provisions, the effectiveness of the consent is not impaired by a subsequent alienation of his land by the person giving the consent.⁶⁹ While it has been held that a consent necessary to give jurisdiction to the local authorities to grant a franchise or permit may be revoked before final action has been taken thereon by them,⁷⁰ neither this class of consent nor the consent made necessary by some provisions as a condition precedent to the construction of the road is revocable at the will of the person giving it or his successors, after it has been acted on.⁷¹ The consent is, however, limited to the purpose for which it was given;⁷² and it can not be made the basis of further municipal action on a second application.⁷³

To whose benefit consents inure. Under statutes requiring the franchise to be granted to that person or corporation that offers to carry passengers for the lowest rate of fare, the consents, by whomsoever obtained, inure to the benefit of the lowest bidder,⁷⁴ and need not in terms be given to the person who is the lowest bidder, since the contract can be awarded to him alone.⁷⁵

As abandonment of easements. The consent of the abutting owner may operate as an abandonment of his easements depriving him of right to compensation,⁷⁶ or to claim damages consequent on the erection and operation of the road.⁷⁷

As bar to action to restrain maintenance of road. Consent will defeat an equity action to restrain the maintenance of a street railroad which was being operated according to the terms of its charter.⁷⁸ Where the requisite number of consents has been obtained, a nonconsenting owner of abutting property may maintain an action for his damages, but cannot prevent the construction of the road.⁷⁹

Where part of street not dedicated. Where consent is obtained for the construction of a railroad over a street, part of which is subsequently shown not to have been dedicated to public use, the consent is inoperative even as to those parts of the street properly laid out and dedicated because the thing consented to and the thing given are radically different.⁸⁰

§ 68. — Who Entitled to Assert Failure to Obtain

Generally the failure to obtain the required number of consents to the construction and operation of a street railroad can be availed of only by the abutting owners; but a nonconsenting abutting owner may contest the construction and operation of the road on the ground that the required number of consents has not been obtained, his right in this regard being confined to the street on which his property abuts.

As discussed supra § 63, statutes which require the consent of a designated proportion of the abutting owners to the construction and operation of a

66. N.Y.—Paige v. Schenectady R. Co., 70 N.E. 213, 178 N.Y. 102—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.

67. N.Y.—Matter of Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359—People v. O'Brien, 18 N.E. 692, 111 N.Y. 1, 7 Am.S.R. 684, 2 L.R.A. 255.

68. N.J.—St. Columba's Church of Newark v. Public Service Ry. Co., 78 A. 219, 80 N.J.Law 353—Currie v. Atlantic City, 48 A. 615, 66 N.J.Law 140, reversed on other grounds 50 A. 504, 66 N.J.Law 671.

69. N.Y.—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.
60 C.J. p 196 note 43.

70. Ohio.—Simmons v. Toledo, 8 Ohio Cir.Ct. 535, 4 Ohio Cir.Dec. 69, affirmed 51 Ohio St. 626.
60 C.J. p 196 note 44.

71. N.Y.—Baker v. New York Municipal Ry. Corp., 168 N.Y.S. 509, 181 App.Div. 939, 102 Misc. 719.
60 C.J. p 196 note 45.

72. N.Y.—Eldert v. Long Island Electric R. Co., 51 N.Y.S. 186, 28 App.Div. 451, affirmed 59 N.E. 1122, 165 N.Y. 651.
60 C.J. p 197 note 46.

73. N.J.—Currie v. Atlantic City, 50 A. 504, 66 N.J.Law 671.
60 C.J. p 197 note 47.

74. Ohio.—Forest City Ry. Co. v. Day, 76 N.E. 396, 73 Ohio St. 83—State v. Bell, 34 Ohio St. 194.

75. Ohio.—State v. Bell, supra.

76. N.Y.—Smyth v. Brooklyn Union El. R. Co., 85 N.E. 1100, 193 N.Y. 335, 23 L.R.A., N.S., 433.
60 C.J. p 197 note 50.

77. N.Y.—White v. Manhattan Ry. Co., 34 N.E. 887, 139 N.Y. 19.

78. N.Y.—Smyth v. Brooklyn Union Elevated R. Co., 85 N.E. 1100, 193 N.Y. 335, 23 L.R.A., N.S., 433.
60 C.J. p 197 note 52.

79. N.Y.—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.
60 C.J. p 197 note 52 [a].

80. U.S.—Beeson v. Chicago, C.C. Ill., 75 F. 880.

street railroad confer a right personal to them, and, while there is some authority to the contrary,⁸¹ it has generally been held that failure to obtain the required number of consents can be availed of only by the abutting owners.⁸² Therefore, a municipality cannot attack its grant of a franchise to construct and operate a street railroad on the ground that the requisite number of consents of abutting property owners had not been obtained,⁸³ nor can a taxpayer.⁸⁴ However, a nonconsenting abutting owner may contest the construction and operation of the road on the ground that the required number of consents has not been obtained,⁸⁵ although his right in this respect is confined to the street on which his property abuts,⁸⁶ and the burden of proof is on him to show that the required number of consents has not been obtained;⁸⁷ and he is entitled to an injunction against the construction of the road if this fact is established by him.⁸⁸

Estoppel. A property owner who has given consent to entry on his land by a street railroad company for construction of its road is estopped to sue to enjoin such entry on the ground that the necessary consent of all owners affected had not been obtained,⁸⁹ but the fact that he has given his consent to the construction of the road does not affect his right to object to construction in front of other property on the street which he afterward buys.⁹⁰ Also, a vendee of property is not estopped by a consent given by the vendor but not recorded until after the conveyance of the property.⁹¹

§ 69. — Determination by Commissioners in Lieu of Consent of Abutting Owners

- a. In general
- b. Application, parties, and notice
- c. Hearing and determination of commissioners
- d. Operation and effect of determination; confirmation by court

a. In General

Under some constitutional and statutory provisions, whenever the requisite number of abutting property owners fails or refuses to consent to the routes and plans of the construction of a street railroad, a proceeding may be instituted by application or petition of the street railroad company to the proper court for the appointment of commissioners to determine the matter, whose determination that the road shall be constructed and operated, when confirmed by the court, may be taken in lieu of the consent of the abutting owners.

In some jurisdictions, under provisions of the constitution and enabling statutes, whenever the requisite number of abutting property owners, as required by statute, fails or refuses to consent to the routes and plans of the construction of a street railroad,⁹² a proceeding in the nature of a special proceeding in rem⁹³ may be instituted by application or petition of the street railroad company to the proper court⁹⁴ for the appointment of commissioners to determine the matter, whose determination that the road shall be constructed and operated, when confirmed by the court, may be taken in lieu of the consent of the abutting owners.⁹⁵ The only condition precedent to the appointment of such commissioners is the failure to obtain the requisite consent of abutting property owners;⁹⁶ and, when this condition is properly shown to exist, the court is not vested with

81. Pa.—*Pennsylvania R. Co. v. Parkesburg, etc.*, St. R. Co., 26 Pa. Super. 159.
60 C.J. p 197 note 57.

82. Ohio.—*Hamilton v. Cincinnati, etc.*, Electric St. R. Co., 8 Ohio S. & C.P. 174, 5 Ohio N.P. 457.

83. Ohio.—*Hamilton v. Cincinnati, etc.*, Electric St. R. Co., *supra*.
60 C.J. p 198 note 59.

84. Ohio.—*Hamilton v. Cincinnati, etc.*, Electric St. R. Co., *supra*.
60 C.J. p 198 note 60.

85. Ohio.—*Roberts v. Easton*, 19 Ohio St. 78.
60 C.J. p 198 note 61.

86. Ohio.—*Glidden v. Cincinnati, 4 Ohio S. & C.P. 423*, 30 Cinc.L.Bul. 213.

87. Ohio.—*Adee v. Nassau Electric R. Co.*, 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.
60 C.J. p 198 note 63.

88. Ohio.—*Roberts v. Easton*, 19 Ohio St. 78—*Ireton v. Ft. Wayne, etc.*, Traction Co., 2 Ohio N.P., N.S., 317.

89. Pa.—*Christie v. Philadelphia, etc.*, St. R. Co., 12 Pa.Dist. 508.

90. Pa.—*Taylor v. Erie City Pass. R. Co.*, 40 A. 316, 186 Pa. 120.

91. N.Y.—*Adee v. Nassau Electric R. Co.*, 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.

92. N.Y.—*Matter of People's R. Co.*, 20 N.E. 367, 112 N.Y. 578.
60 C.J. p 198 note 70.

93. N.Y.—*Matter of Union El. R. Co.*, 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359.
60 C.J. p 198 note 71.

94. N.Y.—*Matter of New York Rapid Transit R. Comrs.*, 41 N.E. 575, 147 N.Y. 260.
60 C.J. p 198 note 73.

95. N.Y.—*Matter of Buffalo Traction Co.*, 49 N.Y.S. 1052, 25 App. Div. 452.
60 C.J. p 198 note 75.

96. N.Y.—*Matter of Thirty-Fourth St. R. Co.*, 7 N.E. 172, 102 N.Y. 343.
60 C.J. p 198 note 76.

any discretion in the premises but must appoint the commissioners,⁹⁷ and cannot grant or deny the application on a consideration of the question of the utility or necessity of the proposed road,⁹⁸ and that an existing company, owning and maintaining a road coincident with the proposed road, has refused its consent to the construction and operation of the proposed road.⁹⁹

Effect of pendency. The company is not estopped by the pending of proceedings for the appointment of commissioners to show that, since the commencement of such proceedings, it has obtained a sufficient number of consents.¹

b. Application, Parties, and Notice

Application for the appointment of commissioners to determine the right to construct and operate a street railroad may be made by the street railroad company, on its failure to obtain the required consent of property owners, and notice of the application must be given to nonconsenting property owners in the time and manner prescribed by the statute. Only those persons who are interested in the affected property are proper parties to the proceeding.

Under the constitutional and statutory provisions discussed generally *supra* subdivision a of this section, application for the appointment of commissioners to determine the right to construct and operate a street railroad may be made by the street railroad company, on its failure to obtain the required consent of property owners,² at any time before the construction or operation of the proposed road is commenced,³ except that it cannot be made until after the proposed route has been fixed.⁴ The application or petition and accompanying affidavit must make a positive and affirmative statement, not merely of inferences or conclusions,⁵ but of facts which show that proper application was made to the property owners and that the requisite number refused to consent.⁶

The petition may precede the giving of any con-

sent by the local municipal authorities,⁷ and, therefore, need not make any allegation as to the filing of such consent.⁸ Where a corporation desiring to construct its road through various streets fails to obtain the necessary consent of property owners with respect to one street or any number of streets less than the total named in the articles of association, it may apply for the appointment of commissioners to determine whether the railroad should be constructed and operated along those streets, without including all the streets through which, under its charter, it was to construct, maintain, and operate its road,⁹ and several applications may be made with respect to particular streets.¹⁰

Parties. Only those persons who are interested in property along the street or streets with respect to which the petition is presented are proper parties thereto.¹¹

Notice. Notice of the application must be given to nonconsenting property owners in the time and manner prescribed by the statute,¹² and this is true of notice of the hearings by the commissioners.¹³

c. Hearing and Determination of Commissioners

Commissioners to whom application is made for approval of the construction and operation of a street railroad, notwithstanding the failure to secure the consent of abutting owners, must grant a hearing at which all persons interested have an opportunity to be heard; at such hearing the commissioners are not bound to strict compliance with rules of evidence, or to any particular method of procedure except as specified by statute, but their action is judicial in character and must to a reasonable extent conform to judicial methods.

After proper notice has been given the commissioners, to whom application is made for approval of the construction and operation of a street railroad, notwithstanding the failure to secure the consent of abutting owners, must grant a hearing at which all persons interested have an opportunity to be heard.¹⁴ At such hearing the commissioners

97. N.Y.—Matter of Thirty-Fourth St. R. Co., *supra*.
60 C.J. p 199 note 77.

98. N.Y.—Matter of Thirty-Fourth St. R. Co., *supra*.

99. N.Y.—Matter of Thirty-Fourth St. R. Co., *supra*.

1. N.Y.—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 580.

2. N.Y.—Matter of Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359.

3. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.

4. N.Y.—Matter of New York El. R. Co., *supra*.

5. N.Y.—In re New York Cable R. Co., 36 Hun 355.
60 C.J. p 199 note 84.

6. N.Y.—Matter of People's R. Co., 20 N.E. 367, 112 N.Y. 578.
60 C.J. p 199 note 85.

7. N.Y.—Matter of People's R. Co., *supra*.

8. N.Y.—Matter of People's R. Co., *supra*.

9. N.Y.—Matter of People's R. Co., *supra*.

10. N.Y.—Matter of People's R. Co., *supra*.

11. N.Y.—Matter of People's R. Co., *supra*.

12. N.Y.—In re Broadway Surface R. Co., 34 Hun 414.
60 C.J. p 199 note 91.

13. N.Y.—Matter of Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359.
60 C.J. p 200 note 92.

14. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.
60 C.J. p 200 note 94.

are not bound to strict compliance with rules of evidence, or to any particular method of procedure except as specified by statute, but their action is judicial in character and must to a reasonable extent conform to judicial methods.¹⁵ They may refuse to receive oral proof and require affidavits,¹⁶ and may consider all the circumstances bearing on the necessity for the proposed road as located,¹⁷ such as whether other routes are equally available,¹⁸ or whether the benefits which will ensue from the construction of the road will counterbalance the injury to private interests which will result therefrom,¹⁹ and, furthermore, they are not confined to the consideration of the evidence before them, but may use their own judgment and examine the situation for themselves.²⁰

The only question for the determination of the commissioners is whether the proposed road on the route designated should be constructed and operated,²¹ and such question is to be decided in the first instance by them.²² Where the proposed road is to extend along several streets, the commissioners may allow a road in some of the streets on the routes fixed and disallow it as to others, as long as a complete road on some route is left;²³ and, where connections are proposed to several ferries and depots, they may determine that some connections should, and some should not, be made,²⁴ but they have no power to consent to the construction of a road according to amended plans which have not been submitted to the property owners.²⁵

d. Operation and Effect of Determination; Confirmation by Court

Where the commissioners' determination or report is unfavorable to the road as located, ordinarily it is final,

except where it is affected with fraud, mistake, or gross irregularity, in which case it is the duty of the court to set the report aside. The determination of the commissioners, when in favor of the construction of the road, must be confirmed by the court which appointed them before it becomes final and effective, and it is within the discretion of the court whether or not to confirm the commissioners' report.

Where the commissioners' determination or report is unfavorable to the road as located, ordinarily it is final,²⁶ except where it is affected with fraud, mistake, or gross irregularity,²⁷ in which case it is the duty of the court to set the report aside and appoint other commissioners,²⁸ or to remit the matter to the same commissioners with proper instructions.²⁹ Where, however, the report is to the effect that the road should not be built in a certain street, under existing conditions, a confirmation of the report is not an adjudication that a road should never be constructed in that street, so as to preclude a subsequent application.³⁰ On a motion to set aside an unfavorable report, it is the duty of the court either to refuse to hear the motion where no grounds or reasons for interference were specified in the notice of motion,³¹ or to examine the record and decide whether the methods pursued by the commissioners were substantially within the law.³²

Favorable report; confirmation. In accordance with the provisions of the constitution, the determination of the commissioners, when in favor of the construction of the road, must be confirmed by the court which appointed them before it becomes final and effective.³³ It is within the discretion of the court whether or not to confirm the commissioners' report,³⁴ and, in considering the question of confirmation, the court exercises judicial and not merely formal functions,³⁵ and has power to examine

15. N.Y.—In re Nassau Electric R. Co., 60 N.E. 279, 167 N.Y. 37.

16. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.

17. N.Y.—Matter of United Traction Co., 104 N.Y.S. 377, 119 App.Div. 806.

18. N.Y.—Matter of Port Chester St. R. Co., 60 N.Y.S. 160, 43 App. Div. 536, reargument denied 60 N.Y.S. 1146, 44 App.Div. 630.

19. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.

20. N.Y.—Matter of Rapid Transit R. Com'rs, 19 N.Y.S. 561, 65 Hun 63.

21. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.

22. N.Y.—Matter of Thirty-Fourth St. R. Co., 7 N.E. 172, 102 N.Y. 343.

23. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401—Matter of Rapid Transit R. Com'rs, 19 N.Y.S. 561, 65 Hun 71.

24. N.Y.—Matter of New York El. R. Co., 70 N.Y. 327, 3 Abb.N.Cas. 401.

25. N.Y.—Matter of New York Cable R. Co., 15 N.E. 882, 109 N.Y. 32. 60 C.J. p 200 note 6.

26. N.Y.—In re Nassau Electric R. Co., 60 N.E. 279, 167 N.Y. 37.

27. N.Y.—In re Nassau Electric R. Co., supra.

28. N.Y.—In re Nassau Electric R. Co., supra.

29. N.Y.—In re Nassau Electric R. Co., supra.

30. N.Y.—In re Public Service Commission, 139 N.Y.S. 982, 154 App. Div. 587.

31. N.Y.—In re Nassau Electric R. Co., 60 N.E. 279, 167 N.Y. 37.

32. N.Y.—In re Nassau Electric R. Co., supra.

33. N.Y.—In re Nassau Electric R. Co., supra. 60 C.J. p 200 note 15.

34. N.Y.—Matter of Kings County El. R. Co., 82 N.Y. 95.

35. N.Y.—Matter of Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.

the merits of the case,³⁶ and to attach conditions to its confirmation;³⁷ but it has no power to pass on the merits of an application until after the commissioners have made their report and returned the evidence taken by them.³⁸ In order to have the report of the commissioners confirmed, an applicant must affirmatively show a sufficient public necessity to overcome the protest of property owners.³⁹

Persons affected by determination. On confirmation the report becomes conclusive as to all questions necessarily involved, on all interested persons having due notice of the proceedings and an opportunity to be heard,⁴⁰ but it does not bind or in any manner affect property owners along other streets not mentioned in the petition,⁴¹ and such owners have a right to oppose the granting of a petition or the making of a determination in a proceeding taken with respect to their streets, irrespective of the determination of the commissioners in the prior proceedings.⁴²

Review. An order of the court confirming or refusing to confirm the report of commissioners, made in the exercise of its discretion and on the merits, has been held not be reviewable,⁴³ except that, where a motion to confirm the report of the commissioners is denied solely on legal grounds and legal objections as to the right of petitioner to construct and operate a street railway, the appellate court may review the questions of law involved.⁴⁴

§ 70. To Use of Turnpikes or Toll Roads

When required by statute, the consent of abutting owners to the use of a turnpike by a street railroad company must be obtained, although the turnpike company has given its consent.

When required by statute, the consent of abutting owners to the use of a turnpike by a street railroad company must be obtained,⁴⁵ although the turnpike company has given its consent.⁴⁶ Prior to obtaining the requisite consent, the right of the company to exercise its franchise is still an inchoate, and not a vested, right.⁴⁷

B. CONSTRUCTION AND OPERATION OF GRANT IN GENERAL

§ 71. General Rules of Construction

A grant of street franchise rights to a street railroad company, if ambiguous, is to be strictly construed against the company and in favor of the public; but everything which is reasonably proper to effect the essential objects of the grant passes by necessary implication, except where it is in derogation of public rights. In construing the franchise, consideration may sometimes be given to the facts and conditions existing when the franchise was given, and to the practical construction of the franchise by the parties.

The construction of a street railroad franchise, in

case of dispute, is a judicial question for the courts,⁴⁸ and, in accordance with the rules relating to the construction of franchises in general, a grant of street franchise rights to a street railroad company, if ambiguous, is to be strictly construed against the company and in favor of the public,⁴⁹ and the company can claim no privilege which arises by mere inference and is not clearly given to it by the grant.⁵⁰ So the courts cannot by interpretation enlarge rights conferred on a street railway by municipal ordinance.⁵¹ This does not mean,

R.A. 359—In re Kings County El. R. Co., 82 N.Y. 95.

36. N.Y.—In re Kings County El. R. Co., 20 Hun 217, appeal dismissed 82 N.Y. 95.
60 C.J. p 201 note 18.

37. N.Y.—Matter of New York Rapid Transit R. Com'rs, 100 N.Y.S. 611, 114 App.Div. 379.
60 C.J. p 201 note 19.

38. N.Y.—Matter of Thirty-Fourth St. R. Co., 7 N.E. 172, 102 N.Y. 343—In re Kings County El. R. Co., 82 N.Y. 95.

39. N.Y.—In re Utica Ave. Route, 144 N.Y.S. 228, 159 App.Div. 306.
60 C.J. p 201 note 21.

40. N.Y.—In re Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359.

41. N.Y.—Matter of People's R. Co., 20 N.E. 367, 112 N.Y. 578.

42. N.Y.—Matter of People's R. Co., supra.

43. N.Y.—Matter of East River Bridge Co., 38 N.E. 283, 143 N.Y. 249.
60 C.J. p 201 note 25.

44. N.Y.—In re Union El. R. Co., 19 N.E. 664, 112 N.Y. 61, 2 L.R.A. 359—New York Cable Co. v. New York, 10 N.E. 332, 104 N.Y. 1.

45. N.Y.—In re Rochester Electric R. Co., 25 N.E. 381, 123 N.Y. 351.

46. N.Y.—In re Rochester Electric R. Co., supra.

47. N.Y.—In re Rochester Electric R. Co., supra.

48. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co.,

180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802.
60 C.J. p 213 note 80.

49. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801.
60 C.J. p 213 note 82.

50. N.Y.—New York v. Dry Dock, etc., R. Co., 19 N.E. 420, 112 N.Y. 137.
60 C.J. p 213 note 83.

Derogation of public use not implied

The extent of grant to construct and operate railroad in street is limited to what is expressly granted and nothing in derogation of public use is implied.—Di Blasi v. Pennsylvania R. Co., 63 A.2d 70, 361 Pa. 181.

51. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 238 N.W. 377, 205 Wis. 453, 76 A.L.R. 1180.

however, that the franchise is to be given a strained or unnatural construction which will defeat the manifest purpose of the grant,⁵² and as the grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary to effect the essential objects of the grant passes by necessary implication,⁵³ except where it is in derogation of public rights.⁵⁴ If the franchise is susceptible of two constructions, one legal and the other not, that interpretation will be adopted which will support the franchise and make it operative.⁵⁵

In construing the franchise, consideration may be given to the facts and conditions existing when the franchise was granted,⁵⁶ and to the practical construction of the franchise by the parties.⁵⁷ So the court may consider the company's long-continued interpretation of its franchise in which the public has acquiesced,⁵⁸ and, in the absence of some controlling rule of law, the court will follow the contemporaneous construction placed on the franchise by the legislative body of the city.⁵⁹ If, however, the grant is expressed in clear and unambiguous language, the intention of the parties, as so expressed, will be given effect,⁶⁰ by construing the franchise agreement as a whole,⁶¹ and construing, together with the facts and circumstances, the language employed in the grant in its natural and ordinary sense,⁶² and without resorting to the practical construction placed on the grant by the parties.⁶³

Construed with statutes. As the authority of the state is paramount in the granting of such rights, the statutes of the state with respect thereto enter into a grant made by a municipality and are controlling in case of conflict,⁶⁴ and, therefore, the company can obtain only such franchise powers as the city may lawfully grant, and must take its franchise subject to the limitations imposed on the city officials in the exercise of their powers to grant a franchise.⁶⁵ However, a construction of the statute which is most strongly adverse to a company assuming to build and operate its road under the provision of the act or any section thereof should not be adopted,⁶⁶ and the public is not entitled, as of course, to the benefit of any doubt as to the true construction of the language in such statute;⁶⁷ and, on the other hand, the fact that a street railroad company which holds a grant from the city is incorporated under the general railroad laws does not give it any greater franchise rights.⁶⁸

§ 72. Nature and Extent of Rights Acquired in General

The use of streets and public highways by street railroad companies is a legitimate public use, which is not inconsistent with street uses; and the right to such use conferred by a franchise is a property right, in the nature of an easement, which will be protected by a court of equity from unauthorized interference. Such right of use of the streets is not superior to, but is in common with, the general public.

52. Va.—Virginia Ry. & Power Co. v. City of Richmond, 106 S.E. 529, 129 Va. 592.

Wis.—State v. Braman, 178 N.W. 301, 172 Wis. 131.

53. Wis.—Waskiewicz v. Milwaukee Electric Ry. & Light Co., 133 N.W. 596, 147 Wis. 422.
60 C.J. p 213 note 85.

The sanction of the state for street railway operation includes sanction for any action reasonably incidental to the operation of a street railroad.—People v. Brooklyn & Queens Transit Corp., 28 N.E.2d 925, 283 N.Y. 484.

54. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

55. U.S.—Citizens' St. Ry. Co. v. Jones, C.C.Ark., 34 F. 579, appeal dismissed 12 S.Ct. 979, 145 U.S. 633, 36 L.Ed. 855.

Ky.—City of Henderson v. Henderson Traction Co., 254 S.W. 332, 200 Ky. 183.

56. Iowa.—State v. Ottumwa Ry. &

Light Co., 160 N.W. 336, 178 Iowa 961.

57. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 237 N.W. 64, 205 Wis. 453, 76 A.L.R. 1180, rehearing denied 238 N.W. 377, 205 Wis. 453, 76 A.L.R. 1180.

58. Iowa.—State v. Ottumwa Ry. & Light Co., 160 N.W. 336, 178 Iowa 961.

59. Wash.—McGivra v. Seattle Electric Co., 111 P. 896, 61 Wash. 38, Ann.Cas.1912B 1020.

60. Iowa.—State v. Ottumwa Ry. & Light Co., 160 N.W. 336, 178 Iowa 961.

60 C.J. p 214 note 91.

61. Iowa.—City of Dubuque v. Dubuque Electric Co., 177 N.W. 700, 188 Iowa 1192.

60 C.J. p 214 note 92.

62. Ill.—City of Spring Valley v. Chicago, O. & P. Ry. Co., 115 N.E. 168, 277 Ill. 313.

60 C.J. p 214 note 93.

63. Ohio.—Cincinnati v. Cincinnati

St. R. Co., 9 Ohio S. & C.P. 235, 6 Ohio N.P. 140.

Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

64. Cal.—Los Angeles R. Co. v. Los Angeles, 92 P. 490, 152 Cal. 242, 125 Am.S.R. 54, 15 L.R.A., N.S., 1269.
60 C.J. p 214 note 96.

65. Miss.—Edwards Hotel & City R. Co. v. City of Jackson, 51 So. 802, 96 Miss. 547.

66. N.Y.—New York v. Manhattan R. Co., 37 N.E. 494, 143 N.Y. 1.

Modern viewpoint

Statute relating to furnishing of street railway service in city should be construed from modern viewpoint and not to prohibit progress in public interest.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

67. N.Y.—New York v. Manhattan R. Co., 37 N.E. 494, 143 N.Y. 1.

68. N.Y.—People v. Newton, 19 N.E. 831, 112 N.Y. 396, 3 L.R.A. 174.

60 C.J. p 215 note 1.

It is recognized that the use of streets and public highways by street railroad companies is a legitimate public use,⁶⁹ which does not impose any additional servitude, as discussed in Eminent Domain § 133, and which is not inconsistent with street uses.⁷⁰ The right of a street railroad to use streets and highways has been described as "an incorporeal right,"⁷¹ a property right in the nature of an easement,⁷² an easement,⁷³ "an easement in the street,"⁷⁴ or part of the easement of the public in the streets.⁷⁵ Such right has also been referred to as a special franchise,⁷⁶ a privilege or permit to use the public ways,⁷⁷ or a right in the nature of a license to occupy portions of the street for purposes of travel;⁷⁸ and it is more than the mere right to operate a railroad.⁷⁹

While a street railroad company has no property in the soil of the street or highway,⁸⁰ its right to use the street is nevertheless a property right⁸¹ which survives the dissolution of the corporation by legislative act,⁸² is entitled to all the constitutional protection afforded other property rights,⁸³ and is transferable as such independent of the life of the corporation,⁸⁴ even in the absence of terms in the grant which authorize a transfer to others of the rights therein granted.⁸⁵ A court of equity will protect such right from unauthorized interference by injunction.⁸⁶ The occupancy of the street railroad is not exclusive of,⁸⁷ and is not superior to, but is in common with, the general public,⁸⁸ all persons being at liberty to drive upon and over the tracks when they are laid in the traveled portion of the street,⁸⁹ and the rights of each must be ex-

69. N.J.—Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co., 59 A. 523, 68 N.J.Eq. 279.
60 C.J. p 215 note 2.

70. Pa.—Attorney General v. Lombard & South Streets Passenger R. Co., Com.Pl., 10 Phila. 352, 32 Leg. Int. 238.
60 C.J. p 215 note 4.

71. Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.
60 C.J. p 215 note 5.

72. U.S.—Detroit Citizens' St. R. Co. v. Detroit, Mich., 64 F. 628, 12 C.C. A. 365, 26 L.R.A. 667, certiorari denied 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 310.
60 C.J. p 215 note 6.

73. U.S.—Knoxville v. Africa, Tenn., 77 F. 501, 23 C.C.A. 252.

The operation of an elevated railroad on a street is open possession of the easements appurtenant to abutting lots, and puts a purchaser on inquiry as to the right to such easements.—Ward v. Metropolitan El. R. Co., 46 N.E. 319, 152 N.Y. 39.

74. N.Y.—In re Forty-Second St. Spur of Manhattan Ry. Co., 216 N. Y.S. 1, 126 Misc. 879.

However, it has been held that a street railroad does not acquire by its street location an easement in the street.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

75. Ind.—Indiana Union Traction Co. v. Gough, 102 N.E. 453, 54 Ind. App. 438.
60 C.J. p 215 note 9.

76. N.Y.—People v. Tax Com'rs, 67 N.E. 69, 174 N.Y. 417.

77. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Denial by executive officers

Right of street railway company to construct and operate cars through the streets of a municipality may not be denied by the executive officers of the municipality while municipal consent as evidenced by ordinance remains unrevoked.—Denver Tramway Co. v. Londoner, 37 P. 723, 20 Colo. 150.

78. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.—Sawin v. Connecticut Valley Street Railway Co., 99 N.E. 952, 213 Mass. 103, 43 L.R.A., N.S., 72.

79. Cal.—San Francisco-Oakland Terminal Rys. v. Alameda County, 225 P. 304, 66 Cal.App. 77.

80. Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

60 C.J. p 215 note 12.

81. U.S.—Denver Tramway Corporation v. People's Cab Co. of Denver, D.C.Colo., 1 F.Supp. 449.

N.Y.—City of New Rochelle v. Westchester Electric R. Co., 29 N.Y.S.2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S.Ct. 64, 317 U.S. 663, 87 L.Ed. 533.

N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.
60 C.J. p 216 note 13.

82. N.Y.—People v. O'Brien, 18 N.E. 692, 111 N.Y. 1, 2 L.R.A. 255.

83. U.S.—Denver Tramway Corporation v. People's Cab Co. of Denver, D.C.Colo., 1 F.Supp. 449.

N.Y.—City of New Rochelle v. Westchester Electric R. Co., 29 N.Y.S.2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S.Ct. 64, 317 U.S. 663, 87 L.Ed. 533.

N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.
60 C.J. p 216 note 15.

84. U.S.—Detroit Citizens St. Ry. Co. v. Detroit, Mich., 64 F. 628, 12 C.C. A. 365, 26 L.R.A. 667, certiorari denied 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 310.
60 C.J. p 216 note 16.

85. Ohio.—State v. Northern Ohio Traction & Light Co., 2 Ohio App. 113, 34 Ohio Cir.Ct. 262.

60 C.J. p 216 note 17.

86. U.S.—Denver Tramway Corporation v. People's Cab Co. of Denver, D.C.Colo., 1 F.Supp. 449.
60 C.J. p 216 note 18.

87. Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.
60 C.J. p 216 note 19.

88. N.Y.—Tilton v. State, 20 N.Y.S.2d 76, 259 App.Div. 507, affirmed Tilton v. State of New York, 33 N.E.2d 540, 285 N.Y. 601.
60 C.J. p 216 note 20.

89. Mich.—Detroit v. Detroit United R. Co., 95 N.W. 736, 133 Mich. 608. Ohio.—Toledo, etc., Tract. Co. v. Sterling, 29 Ohio Cir.Ct. 227.

exercised in a reasonable and careful manner, so as not unnecessarily to abridge or interfere with the rights of the other.⁹⁰ Such use and occupancy are also subject to the right of the city to pave the street, construct sewers, or make other necessary public improvements,⁹¹ and to remove, or cause to be removed, the tracks when they no longer subserved the purposes for which they were intended,⁹² as the company will not be permitted to obstruct a street for the purpose of holding a right therein, and not for the purpose of serving the public.⁹³

Carriage of freight. A franchise to operate "interurban cars" has been held to authorize the carriage of freight or express as incidental to passenger service in interurban cars also available for passenger service,⁹⁴ but a franchise expressly or impliedly authorizing the carriage of freight only as an incident to passenger service does not authorize the operation of cars to be used exclusively for the transportation of freight.⁹⁵ In this respect, in determining whether the service of an electric railway company is primarily freight or passenger, the factors to be considered are the construction of the cars, the space allotted to each service, the comparative revenues therefrom, and other such matters.⁹⁶

§ 73. Exclusive and Conflicting Grants

- a. In general
- b. Conflicting grants

a. In General

The granting of a right of way over and along the streets does not of itself confer on the street railroad company exclusive right to use the streets on which its tracks are laid for transportation purposes; but such a grant confers exclusive privileges as against all persons on whom similar rights have not been conferred. Where the grant does confer an exclusive right, it will not be extended by construction beyond the clear import of its terms.

Since the occupation of streets by a street railway is regarded merely as an additional public use, as discussed supra § 72, the granting of a right of way over and along the streets does not of itself confer on the street railroad company exclusive right to use the streets on which its tracks are laid for transportation purposes,⁹⁷ and the designation of a particular portion of the street for occupation by the tracks merely fixes the location of the tracks.⁹⁸ Such a grant, however, confers exclusive privileges as against all persons on whom similar rights have not been conferred,⁹⁹ and as to the use of its tracks, the right of the street railroad company is exclusive by reason of the mere right of property, at least as against other competing companies.¹

90. Colo.—Harrison v. Denver City Tramway Co., 131 P. 409, 54 Colo. 593, 44 L.R.A., N.S., 1164.
60 C.J. p 216 note 22.

91. Pa.—Mahanoy City, S., G. & St. Ry. Co. v. Ashland Borough, 73 A. 338, 224 Pa. 375.
60 C.J. p 216 note 23.

92. U.S.—Southern R. Co. v. Memphis, Tenn., 97 F. 819, 38 C.C.A. 498, modified on other grounds 99 F. 170, 39 C.C.A. 451.
60 C.J. p 217 note 24.

93. U.S.—Southern R. Co. v. Memphis, supra.
60 C.J. p 217 note 25.

Purposes of transportation

Use of streets by street railroad under statutory authority must be for purposes of transportation, without unreasonable obstruction to traffic.—Butler v. City of Atlanta, 170 S.E. 539, 47 Ga.App. 841.

94. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 237 N.W. 64, 205 Wis. 453, 76 A.L.R. 1180, rehearing denied 238 N.W. 377, 205 Wis. 453, 76 A.L.R. 1180.
Power of municipality to grant franchise for carriage of freight see supra § 29 a.

Right of company to carry freight generally see supra § 15.

95. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 245 N.W. 853, 209 Wis. 611.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 237 N.W. 64, 205 Wis. 453, 76 A.L.R. 1180, rehearing denied 238 N.W. 377, 205 Wis. 453, 76 A.L.R. 1180.

96. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 245 N.W. 853, 209 Wis. 611.

Percentage of carrying space

Provision of judgment, restraining electric railway company, authorized to carry freight over city streets as incident to passenger service, from operating cars in which over one fourth of carrying space is available for freight, was improper.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., supra.

97. Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

Street railroads are distinct from general utilities in that their relationship to areas is only incidental and there is no ground for an implication that streets are preempted to

their sole use, hence, the requirement in the case of general utilities that there must be a showing of public convenience and necessity before a second utility can enter a given area does not apply.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., supra.

Franchise to elevated railroad

Franchise to surface railroad will not preclude granting of franchise to elevated railroad.—Ninth Ave. R. Co. v. New York El. R. Co., 7 Daly 174, 3 Abb.N.Cas. 347.

98. Iowa.—Baker v. Chicago, R. I. & P. Ry. Co., 134 N.W. 587, 154 Iowa 228.

99. Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Traction Co., 113 P. 180, 27 Okl. 339.

Competition

In absence of legislative authority, no one can engage in competition with street railroad holding valid franchises to its direct injury.—Denver Tramway Corporation v. People's Cab Co. of Denver, D.C.Colo., 1 F.Supp. 449.

1. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.

60 C.J. p 217 note 31.

Exclusive street railroad franchise to the use of streets may be granted, as discussed supra § 29 b, but as the policy of the law is against all grants of exclusive rights and monopolies, grants to street railroad companies which are claimed to confer an exclusive right, as against rival companies, to the use of particular streets, will be strictly construed,² and will not be held to confer such right unless it is plainly conferred by express words or necessary implication.³ Even where the grant does confer such an exclusive right, it will not be extended by construction beyond the clear import of its terms⁴ and all conditions precedent must be complied with before such right vests.⁵ Such a grant of exclusive rights relates to streets and not to tracks,⁶ and has been held to be exclusive only as to so much of the street as may be actually occupied and necessary for the proper operation of the cars;⁷ but, where the exclusive right is conferred as to all of the streets of the municipality, it applies, as against rival companies, to all of such streets, and not only as to streets on which the grantee has built.⁸

b. Conflicting Grants

Where the grant to a street railroad company is not exclusive, the same or similar rights and franchises in the use of the streets may be given to another company, unless they will conflict with, and cause substantial loss to, the company already occupying the streets, as

by appropriating that portion of the streets which has been granted to the first company and which is being used by it in the operation of its railway system.

Where the grant to a street railroad company is not exclusive, the same or similar rights and franchises in the use of the street or streets may be granted to another company,⁹ unless they will conflict with, and cause substantial loss to, the company already occupying the street or streets,¹⁰ as by appropriating that portion of the streets which has been granted to the first company and which is being used by it in the operation of its railway system.¹¹ The same or similar rights may also be granted to another company where the prior grant, although exclusive, is invalid because it is so,¹² or where it is otherwise ultra vires,¹³ or has been revoked.¹⁴

Priority. Although mere priority of grant does not confer exclusive rights,¹⁵ where valid grants of the right to use the same street or a particular portion thereof have been made to two different companies, the first of the grantees to comply with his franchise and rightfully occupy the street acquires the superior and better claim of right thereto.¹⁶ In some jurisdictions the policy of the legislation is that there shall be no more than one lawfully authorized street railroad track laid upon the same street or highway at the same time,¹⁷ unless the

2. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.

60 C.J. p 217 note 34.

3. U.S.—Detroit Citizens' St. R. Co. v. Detroit, Mich., 18 S.Ct. 732, 171 U.S. 48, 43 L.Ed. 67.

60 C.J. p 217 note 35.

Repair and maintenance of street

A showing that railway company had to pave and keep street in vicinity of its tracks in repair, sprinkle street, remove snow, contribute to cost of viaduct, and furnish power for operation of drawbridges did not establish that it had an exclusive franchise so that use of street by a bus line could be prevented.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

4. U.S.—New Orleans City R. Co. v. Crescent City R. Co., C.C.La., 12 F. 308.

60 C.J. p 218 note 36.

5. N.J.—People's Traction Co. v. Atlantic City, 57 A. 972, 71 N.J.Law 134.

60 C.J. p 218 note 37.

6. Iowa.—Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.,

33 N.W. 610, 35 N.W. 602, 73 Iowa 513.

Pa.—Commonwealth v. Bond, 63 A. 741, 214 Pa. 307, 112 Am.S.R. 745.

7. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.

60 C.J. p 218 note 39.

8. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.

60 C.J. p 218 note 40.

9. Wash.—Wood v. Seattle, 62 P. 135, 23 Wash. 1, 52 L.R.A. 369.

60 C.J. p 218 note 42.

Competing carrier

Where franchise giving railway company use of streets was not in terms exclusive, and indeterminate permit for which railway exchanged its franchise did not purport to be exclusive, railway could not base an attack on an order permitting a competing carrier to operate upon one of the same streets on theory that railway had an exclusive franchise to carry passengers over such street.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

10. U.S.—Fidelity Trust, etc., Co. v. Mobile St. R. Co., C.C.Ala., 53 F. 687.

Del.—Wilmington City R. Co. v. People's R. Co., Ch., 47 A. 245.

11. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.

60 C.J. p 219 note 44.

12. Utah.—Henderson v. Ogden City R. Co., 26 P. 286, 7 Utah 199.

13. N.J.—Pennsylvania R. Co. v. Hamilton Tp., 51 A. 926, 67 N.J. Law 477, affirmed 53 A. 1125, 68 N.J.Law 414.

60 C.J. p 219 note 46.

14. Del.—Wilmington City R. Co. v. People's R. Co., Ch., 47 A. 245.

15. N.Y.—Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co., 35 Barb. 364.

16. Ind.—Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 24 N.E. 1054, 26 N.E. 893, 127 Ind. 369, 8 L.R.A. 539.

60 C.J. p 219 note 49.

17. Pa.—Homestead St. R. Co. v. Pittsburgh, etc., St. R. Co., 30 A. 950, 166 Pa. 162, 27 L.R.A. 383.

60 C.J. p 219 note 50.

power to grant the use of the street to another company is reserved in the prior grant;¹⁸ in other jurisdictions this policy obtains with the limitation that a second company may be granted the right to occupy the same street on obtaining the consent of the first;¹⁹ and it follows that in such jurisdictions priority of user under a valid grant confers an exclusive right to the streets occupied. Such legislation, however, does not affect the right of the city to construct a street railroad of its own under later legislation,²⁰ as a street railroad company takes its franchise subject to the risk that subsequent legislation might empower the city to establish its own street railway system.²¹

Joint use. A street railroad does not become a part of the street, so as to authorize the public and other companies to use the road with appropriate cars and carriages in common with the owners of the franchise;²² but where a street railroad is granted merely the right to construct and operate a street railroad on the streets, although its trackage system and appurtenances are private property, it may by legislative authority be compelled to permit another company, under proper conditions imposed and compensation provided, to use a portion of its tracks to promote public interest,²³ unless the rendition of that use will result in such detriment or prejudice to the company affected as to make the regulation unreasonable,²⁴ and on this principle it has been held that a later company cannot be granted the right to straddle its tracks over the tracks of a prior company,²⁵ notwithstanding in the grant to the first company the power to grant the common use of the street to another company was reserved.²⁶

Where the right to place rails in and use the same street is given to two companies, each is bound to

place its rails and use the street in such manner that the public may have the benefit which can be derived from such joint use;²⁷ and neither can be permitted unnecessarily to interfere with the right of the other to lay its tracks.²⁸ Where grants, made at the same time, to two companies, authorized one to construct a single-track line or double-track line, and the other a single-track line, on the same street, the single-track company cannot be compelled by the courts to unite with the other company in the building of but two tracks for the joint use of both companies, however reasonable and proper and to the advantage of both companies it may seem to be,²⁹ as such provision can be made only by the municipal authorities at the proper time, and the courts can protect and enforce only the rights of the parties under the grants as made.³⁰

On city bridge. A license to a street railroad company to run its cars on tracks over a city bridge, and to charge not more than a designated fare, and to furnish transfers at the termini contemplates that it shall not inaugurate a pure shuttle service in competition with a company which has a franchise to maintain a shuttle service over the bridge,³¹ and, if it inaugurates such service without having complied with the statutory requirements therefor, it is a trespasser and subject to injunction at the instance of the company having a franchise to maintain a shuttle service over the bridge.³² Where, however, an ordinance prohibiting a company from laying tracks on a certain bridge is intended merely to avoid encumbering the bridge with unnecessary tracks, it does not secure to a company whose tracks are already on the bridge a monopoly of the right of way,³³ and the fact that only those companies that are entitled to occupy the permanent bridge when finished are granted the right to lay tracks on a

18. Pa.—Commonwealth v. Bond, 63 A. 741, 214 Pa. 307, 112 Am.S.R. 745.

19. N.Y.—Central Crosstown R. Co. v. Metropolitan St. R. Co., 40 N.Y.S. 1095, 17 Misc. 716, affirmed 44 N.Y.S. 752, 16 App.Div. 229. 60 C.J. p 219 note 52.

20. U.S.—United Railroads of San Francisco v. City and County of San Francisco, Cal., 39 S.Ct. 361, 249 U.S. 517, 63 L.Ed. 739.

21. U.S.—United Railroads of San Francisco v. City and County of San Francisco, supra.

22. N.Y.—Brooklyn Central R. Co. v. Brooklyn City R. Co., 32 Barb. 358.

23. Neb.—Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 187 N.W. 790, 108 Neb. 154, 28 A.L.R. 960. Rights in, and use of, tracks of other roads in general see *infra* §§ 129–131.

24. Neb.—Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., supra.

25. Pa.—Commonwealth v. Bond, 63 A. 741, 214 Pa. 307, 112 Am.S.R. 745. 60 C.J. p 220 note 59.

26. Pa.—Commonwealth v. Bond, supra.

27. Ill.—Chicago Gen. R. Co. v. West Chicago St. R. Co., 63 Ill.App. 464.

28. Ill.—Chicago Gen. R. Co. v. West Chicago St. R. Co., supra.

29. Ohio.—Hamilton St. R., etc., Co. v. Hamilton, etc., Electric Transit Co., 5 Ohio Cir.Ct. 319, 3 Ohio Cir. Dec. 158.

30. Ohio.—Hamilton St. R., etc., Co. v. Hamilton, etc., Electric Transit Co., supra.

31. U.S.—Brady v. South Shore Traction Co., D.C.N.Y., 197 F. 669. Rights in, and use of, bridges in general see *infra* § 85.

32. U.S.—Brady v. South Shore Traction Co., supra.

33. Md.—North Baltimore Pass. Co. v. Baltimore, 23 A. 470, 75 Md. 247.

temporary bridge does not prevent similar rights being granted afterward to other companies.³⁴

§ 74. — Protection and Relief

Where a valid grant of exclusive rights has been made to a street railroad company, the courts will affirm and protect such rights from interference by others, and even where a franchise is not exclusive, if the use and enjoyment of the property of the street railroad will be materially impaired by its use by another company, it may maintain injunction proceedings to restrain such other company from so using its roadbed or tracks, or from occupying the same portion of the street to its injury.

Where a valid grant of exclusive rights has been made to a street railroad company, the courts will affirm and protect such rights,³⁵ as by the issuance, on the application of the grantee, of an injunction against interference by another street railroad company.³⁶ Even where a company's franchise is not exclusive, if its use and enjoyment of its property will be materially impaired by its use by another company, it may maintain injunction proceedings to restrain such other company from so using its roadbed or tracks,³⁷ or from occupying the same portion of the street to its injury.³⁸

It has been held that it is not necessary, in order that one street railway company may question the authority of another company to construct tracks upon the streets of a city, so as to handle business which the first company is lawfully carrying on,

that the first company shall have an exclusive franchise,³⁹ but, where it has a lawful right to carry on a street railway business, its right is exclusive as against any person or company which attempts to operate in competition with it upon streets where the second company has no legal authority to go,⁴⁰ and any person or corporation that attempts to exercise such rights without legislative authority invades the private property of the person or corporation to whom such franchise was granted, and may be restrained at the instance of the owner of the franchise.⁴¹

On the other hand, equity cannot protect a street railroad from lawful competition,⁴² and it has been held that a company which has merely the right to construct and operate, and not an exclusive franchise, has no standing to question the right of another company to occupy the streets,⁴³ and, hence, is not entitled to maintain injunction proceedings to prevent another company from using a street for railroad purposes under a similar grant.⁴⁴ Injunctive relief will not be granted to a company which is in default on its agreement as to constructing its road,⁴⁵ and another company which, in good faith, and in pursuance of its charter, afterward begins the construction of a road upon the same streets is entitled to an injunction as against a company which has commenced construction without proper authority therefor.⁴⁶

C. LOCATION OF ROUTE AND TRACKS

§ 75. In General

The location of a street railroad consists of a definite

appropriation of a particular portion of the street or highway for street railroad use.

The location of a street railroad upon a street or

34. Md.—North Baltimore Pass. Co. v. Baltimore, *supra*.

35. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.
60 C.J. p 220 note 70.

36. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., *supra*.
60 C.J. p 220 note 71.

37. U.S.—Fidelity Trust, etc., Co. v. Mobile St. Ry. Co., C.C.Ala., 53 F. 687.

38. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.
60 C.J. p 220 note 73.

39. Neb.—Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 187 N.W. 790, 108 Neb. 154, 28 A.L.R. 960.

40. Neb.—Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., *supra*.

41. Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Traction Co., 113 P. 180, 27 Okl. 339.
60 C.J. p 221 note 76.

Illegal competition

Street railroad may resort to equity to restrain illegal competition which constitutes injurious invasion of its property rights, provided act complained of will cause irreparable injury.—Denver Tramway Corporation v. People's Cab Co. of Denver, D.C.Colo., 1 F.Supp. 449.

42. U.S.—Denver Tramway Corporation v. People's Cab Co. of Denver, *supra*.

43. N.Y.—Christopher, etc., R. Co. v.

Central Crosstown R. Co., 4 Hun. 630, 67 Barb. 315.
60 C.J. p 221 note 77.

Company furnishing passenger bus service

Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

44. Pa.—Thirteenth & F. St. Pass. Ry. Co. v. Southern Pass. Ry. Co., 3 Pa.Dist. 337.
60 C.J. p 221 note 78.

45. N.Y.—South Shore Traction Co. v. Brookhaven, 102 N.Y.S. 1074, 58 Misc. 392.
60 C.J. p 221 note 79.

46. Ind.—Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 24 N.E. 1054, 26 N.E. 893, 127 Ind. 869, 8 L.R.A. 539.

highway is a different thing from the right to make such location;⁴⁷ it presupposes a prior grant of the right to locate, and consists of a definite appropriation of a particular portion of the street or highway for street railroad use.⁴⁸ A street railroad company is entitled to establish its road on the streets specified or described generally in the legislative or municipal grant;⁴⁹ but it is confined within the limits thus specified.⁵⁰ However, while the limits fixed by the franchise must be observed, these limits will be liberally construed to uphold the action of the company, and it is enough if they are substantially observed.⁵¹ Reasonable or slight deviations or divergence from chartered routes or location have been held permissible under exceptional conditions;⁵² and the right of a municipality to the aid of a court of equity to prevent a deviation from the original location may be barred by laches or by implied assent to the new location.⁵³ Where the authority to locate is general in its terms, or specifically confers an option on the company as to which streets it will use or what termini it will establish, such option must be exercised within a reasonable time,⁵⁴ and the right to make a location of a railway or of any part of it is a power of election, and when once exercised is exhausted, in the absence of a statute to the contrary.⁵⁵

§ 76. Filing of Map or Plan

If so required by statute, a map or plan of the proposed route must be filed before commencing construction of the road.

If so required by statute, a map or plan of the proposed route must be filed before commencing construction of the road.⁵⁶ Where the map has been filed and approved, and the location made by the plan is in the middle of the street, the street railroad company cannot locate its road on the side of the street.⁵⁷ So it has been held that, where the directors of a company cause a map to be prepared of the location adopted by them and vote to apply to the local authorities for their approval thereof as required by law, such proceedings constitute a definite and final selection and demarcation of the route by the directors of the route indicated on the map.⁵⁸

§ 77. Change of Route or Location

A change of route or location of a street railroad line may be made only under the conditions fixed by the statute pertaining thereto; but all the formalities necessary in making an original grant need not be observed in authorizing a slight change in location.

A change of route⁵⁹ or location⁶⁰ of a street railroad line may be made only under the conditions fixed by the statute pertaining thereto. So, where a statute provides that the route may be changed if it will improve the line theretofore established, this is the only purpose for which a change of route is permissible; the route cannot be changed for the purpose of increasing the revenue of the company.⁶¹ Where a corporation secures a right to construct a street railroad along a certain route by obtaining the consent of abutting property owners, it cannot change its route without their consent.⁶² In some

47. Conn.—Appeal of Central R., etc., Co., 35 A. 32, 67 Conn. 197.

60 C.J. p 221 note 81½.
Determination as to location by boards and tribunals see supra §§ 22-26.

48. Conn.—Appeal of Central R. Co., 35 A. 32, 67 Conn. 197.

Special or reserved space

Definition of "location" in park commissioners' grant of location for street railway tracks in parkway as "any grass or reserved spaces within the location lies between roadways" and agreement of parties to action against street railway company for injuries to pedestrian struck by car while crossing tracks that location was special or reserved space, set apart for defendant's use under statutory authority and distinguished from remainder of roadway open to use of general public.—Pritchard v.

Boston Elevated Ry., 5 N.E.2d 29, 296 Mass. 197.

49. U.S.—Africa v. Knoxville, C.C. Tenn., 70 F. 729, reversed on other grounds 77 F. 501, 23 C.C.A. 252. 60 C.J. p 221 note 83.

50. Conn.—Canastota Knife Co. v. Newington Tramway Co., 36 A. 1107, 69 Conn. 146. 60 C.J. p 221 note 84.

51. Conn.—New York, etc., R. Co. v. Stevens, 69 A. 1052, 81 Conn. 16.

52. Mass.—Attorney General v. Metropolitan R. Co., 125 Mass. 515, 28 Am.R. 264. 60 C.J. p 222 note 86.

53. Pa.—Wilson Tp. v. Easton Transit Co., 101 A. 983, 258 Pa. 266.

54. Pa.—Junction Pass. R. Co. v. Williamsport Pass. R. Co., 26 A. 295, 154 Pa. 116. 60 C.J. p 222 note 88.

55. N.J.—West Jersey Traction Co.

v. Camden Horse R. Co., 35 A. 49, 53 N.J.Eq. 163.

60 C.J. p 222 note 89.

56. N.Y.—Matter of Rochester Electric R. Co., 10 N.Y.S. 379, 57 Hun 56, affirmed 25 N.E. 381, 123 N.Y. 351.

60 C.J. p 222 note 90.

57. Pa.—Philadelphia v. Continental Pass. R. Co., 11 Phila. 315.

58. Conn.—Stevens v. New York, N. H. & H. R. Co., 78 A. 440, 83 Conn. 603.

59. N.Y.—Webb v. Forty-Second St., etc., R. Co., 103 N.Y.S. 762, 52 Misc. 46.

60. Pa.—Shamokin v. Shamokin, etc., R. Co., 46 A. 382, 196 Pa. 166.

61. N.Y.—Webb v. Forty-Second St., etc., R. Co., 103 N.Y.S. 762, 52 Misc. 46.

62. N.Y.—Matter of South Beach R. Co., 6 N.Y.S. 172, 53 Hun 131, af-

jurisdictions a change of location from the side to the center of the street can be made only with the consent of the municipal or other authorities having charge of the streets;⁶³ but a change is lawful when the city by its tacit acceptance ratifies the act of its agents.⁶⁴ All the formalities necessary in making an original grant need not be observed in authorizing a slight change in location.⁶⁵ Where the franchise of a railway company occupying a street in a town site provided for changing the route by agreement, and the village council with the company's consent changes the route, such change, after being approved by the railroad and warehouse

commission, cannot be questioned by taxpayers and residents seeking to enjoin removal of the town to permit mining on the town site.⁶⁶

§ 78. Effect of Widening Street

The widening of a street does not limit the rights of a street railroad to lay tracks and switches to the width of the original street.

The widening of a street does not limit the rights of a street railroad to lay tracks and switches to the width of the original street, but gives it rights in the street as widened.⁶⁷

D. ADDITIONAL TRACKS; BRANCHES, SWITCHES, TURNOUTS, AND THE LIKE; EXTENSIONS AND OTHER STRUCTURES

§ 79. Switches, Turnouts, Sidings, and Loops

A street railroad company may have the right to construct necessary switches, turnouts, or sidings, whether such right is expressly conferred or is implied as an incident to the right to construct the road, and such facilities may be located on streets other than those designated as the route of the railroad where a reasonable necessity exists for the departure; but the right must not be exercised in such a way as arbitrarily and unnecessarily to obstruct public travel, and interfere with the rights of abutting owners.

While the right to construct necessary switches, turnouts, and sidings is sometimes expressly conferred on street railroad companies,⁶⁸ it has very generally been held that the grant of a right to construct a street railroad carries with it, as an incident, the right to construct such turnouts and switches and sidings as public convenience and the successful operation of the road render necessary,⁶⁹ subject, according to some decisions, to the approval of the

municipality,⁷⁰ or to the necessity of the laying out of the turnouts or spurs by the municipal authorities.⁷¹ In any event the right to construct must not be exercised in such a way as arbitrarily and unnecessarily to obstruct public travel, and interfere with the rights of abutting owners.⁷² There is no right to construct switches merely on the ground that they would be convenient to the railroad company and would facilitate its business,⁷³ or to construct sidings or spur tracks for private benefit.⁷⁴

Laying on streets not designated in grant. The laying of switches and sidings is not necessarily confined to streets upon which the company was expressly authorized to operate its system, and it may lay them on streets other than those designated as the route of the railroad where a reasonable necessity exists for the departure,⁷⁵ at least where

formed 23 N.E. 486, 119 N.Y. 141—
McCruden v. Rochester Ry. Co., 25
N.Y.S. 114, 5 Misc. 59.

63. Pa.—Shamokin v. Shamokin, etc.,
R. Co., 46 A. 382, 196 Pa. 166.

64. Pa.—Collins v. Carbondale Traction
Co., 5 Pa. Dist. 18.

65. Mich.—Mannel v. Detroit, etc.,
R. Co., 102 N.W. 633, 139 Mich.
106.
60 C.J. p 223 note 97.

66. Minn.—Reed v. Hibbing, 184 N.
W. 842, 150 Minn. 130.

67. Pa.—Pittsburgh Rys. Co. v. Borough
of Carrick, 103 A. 106, 259 Pa.
333.

68. Pa.—Pittsburgh Rys. Co. v. Borough
of Carrick, supra.
60 C.J. p 223 note 2.

69. N.Y.—City of New York v.

Brooklyn City R. Co., 134 N.E. 533,
232 N.Y. 463.
60 C.J. p 223 note 3.

Presumed intent

Where a street railroad was granted the power to use the streets of a city, but had no express power to construct a switch in the streets, and it became necessary to do so in order properly to switch its cars at the terminal, the court presumed that it was intended that the company should have that privilege.—Shelbyville v. Glover, Ky., 184 F. 234, 106 C.C.A. 376.

Approaches to loop track

Under franchise to maintain street railway, authority to maintain and operate approaches to loop track could be reasonably implied regardless of whether such approaches were turnouts.—Peter Stuyvesant Apartments v. Brooklyn & Queens Transit

Corp., 300 N.Y.S. 150, 252 App. Div.
876.

70. Me.—Percy v. Lewiston, A. & W.
St. Ry., 93 A. 43, 113 Me. 106.
60 C.J. p 223 note 4.

71. N.H.—Concord v. Concord Horse
R. Co., 18 A. 87, 65 N.H. 30.

72. Md.—Dulaney v. United R., etc.,
Co., 65 A. 45, 104 Md. 423.
Pa.—Stroudsburg v. Stroudsburg
Pass. R. Co., 2 Pa. Dist. 35, 12 Pa.
Co. 124.

73. Me.—Percy v. Lewiston, A. &
W. St. Ry. Co., 93 A. 43, 113 Me.
106.
60 C.J. p 224 note 7.

74. N.Y.—Brooklyn Heights R. Co. v.
Steers, 106 N.E. 919, 213 N.Y. 76,
Ann. Cas. 1916C 791.
60 C.J. p 224 note 8.

75. Minn.—Romer v. St. Paul City R.

the consent of the municipal authorities and of the property owners on the streets affected has been obtained;⁷⁶ but there must be a reasonable necessity for the departure.⁷⁷ Where the franchise of a street railroad company gives it the right to construct connections, sidings, etc., for the housing and care of its cars in streets adjacent to a particular street, the word "adjacent" will not be construed to confine the right to construct connections to streets actually touching the street named where to do so would be to destroy the effect of the grant.⁷⁸

Necessity because of changed conditions. The right of a street railroad company to construct necessary switches, turnouts, or sidings, whether expressly conferred or implied as an incident to the right to construct the road, exists whether the need therefor is due to the original conditions or to changed conditions,⁷⁹ because if it were otherwise, it would be impossible for a railroad company to keep pace with the increasing demands of business and to accommodate the public.⁸⁰ The company cannot be said to have exhausted its own powers of development because the facilities first adopted and constructed, and then sufficient, turned out, later on, to be inadequate.⁸¹

§ 80. Additional or Double Tracks

A general charter power to construct a line of street railroad authorizes the construction of double tracks on the streets, provided consent therefor is obtained from the authorities of the municipality; but, where a company is entitled to lay only a single-track railroad, it will not be permitted to construct a double-track railroad under the guise of building switches.

A general charter power to construct a line of street railroad authorizes the construction of double tracks on the streets of a municipality, provided the authorities of such municipality consent that the streets may be so used.⁸² Where the right is given

to build a double-track line, the building of a single-track line does not exhaust the power of the company, or forfeit its right to build an additional track, but it may do so whenever its necessities and business require it.⁸³ Where a company is entitled to lay only a single-track railroad, it will not be permitted to construct a double-track railroad under the guise of building switches,⁸⁴ and authority given by ordinance to construct necessary switches and turnouts does not authorize the construction of an additional track making a double-track line.⁸⁵

§ 81. Branches and Lateral Tracks

A street railroad, after securing the right to do so from the proper local authorities, as required by statute, may construct branches from its main line.

A street railroad, after securing the right to do so from the proper local authorities, as required by statute, may construct branches from its main line.⁸⁶ Where the location of a main route is ineffectual because it is different from that prescribed by statute, the location of a branch line must fall with it.⁸⁷ The right to construct branches given by charter when no time is fixed for doing so confers no power of indefinite location, without limit in duration of time, but only the power to select and occupy streets with branches within a reasonable time.⁸⁸

§ 82. Connection between Lines of Same Company

A street railroad company is not authorized to construct a track connecting its lines of road, unless its franchise grants such authority or the municipality has consented thereto.

A franchise authorizing a street railroad company to build "all necessary or convenient tracks for curves, turnouts, switches, sidetracks, stations,

Co., 77 N.W. 825, 75 Minn. 211, 74 Am.S.R. 455.

76. N.Y.—Brooklyn Heights R. Co. v. Brooklyn, 46 N.E. 509, 152 N.Y. 244.

77. N.Y.—Westchester Electric R. Co. v. City of Mt. Vernon, 142 N.E. 585, 237 N.Y. 199.
60 C.J. p 224 note 11.

78. N.Y.—Brooklyn Heights R. Co. v. Brooklyn, 18 N.Y.S. 876, affirmed 46 N.E. 509, 152 N.Y. 244.

79. N.Y.—Union Ry. Co. of New

York City v. City of New York, 144 N.E. 585, 238 N.Y. 289.
60 C.J. p 224 note 14.

80. Pa.—Pottsville v. People's Ry. Co., 23 A. 900, 148 Pa. 175.

81. Pa.—Taylor v. Erie City Pass. R. Co., 37 Pa.Super. 292.

82. Ga.—Brown v. Atlanta R., etc., Co., 39 S.E. 71, 113 Ga. 462.
60 C.J. p 225 note 22.

83. Mo.—Ransom v. Citizens' R. Co., 16 S.W. 416, 104 Mo. 375.
60 C.J. p 225 note 23.

84. Pa.—Willis v. Erie City Pass. R. Co., 41 A. 307, 188 Pa. 56.

85. Pa.—Bridgewater v. Beaver Valley Traction Co., 63 A. 796, 214 Pa. 343.

86. Ohio.—Cleveland, etc., R. Co. v. Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.
60 C.J. p 224 note 18.

87. N.Y.—Matter of Metropolitan Transit Co., 19 N.E. 645, 111 N.Y. 588.

88. Pa.—Junction Pass. Ry. v. Williamsport Pass. Ry., 26 A. 295, 154 Pa. 116.
60 C.J. p 225 note 21.

turntables and appendages" does not authorize it to construct a track connecting its lines of road.⁸⁹ Where, however, a company has contracted with a city to connect all its lines of road, it must be held that the city has conferred the right to do so.⁹⁰ A company which has acquired the lines of other companies may, with the consent of the authorities of the city, connect the lines so acquired.⁹¹

§ 83. Extensions and New Lines; Completion of Lines

- a. Right to make extensions
- b. Duty to construct extensions
- c. Duty to complete line constructed in part

a. Right to Make Extensions

- (1) In general
- (2) Conditions precedent
- (3) Character

(1) In General

Subject to statutory limitations, a grant to a street railroad company by a municipality is valid where it authorizes the company to extend the line of its tracks or its charter routes, where no tracks have been laid; and an extension, when made according to law, is to be deemed and taken as a part of the original grant.

Subject to statutory limitations, such as the requirement of a certificate or finding of public convenience and necessity, discussed supra § 24 b, a grant to a street railroad company by a municipality is valid where it authorizes the company to extend the line of its tracks⁹² or its charter routes, where no tracks have been laid.⁹³ Such a grant cannot be made so as to authorize the extension of an ordinary steam railroad as a street railroad and invest it with all the powers of a street railroad company.⁹⁴ An extension, when made according to

law, is to be deemed and taken as a part of the original grant.⁹⁵

An ordinance renewing a street railroad franchise in an entire street will be construed as a whole in determining whether it is limited in its operation to that part only of the street in which the company has already laid its tracks and is operating its cars, or extends to all the rights, privileges, and franchises granted by the original ordinance.⁹⁶ A company has no right to construct and operate an extension of its road on streets other than those designated by a statute conferring the right to make an extension, even with the consent of the local authorities.⁹⁷ Under a statute providing that a street railroad company organized to operate a street railroad in any city or incorporated town may, for the purpose of extending its railway beyond the limits thereof, locate its road upon any portion of a highway which is of a designated width, a railroad previously constructed upon a highway of less than such width may be legalized by the subsequent widening of the highway to the statutory width.⁹⁸

Injunction. A city solicitor cannot predicate an action for an injunction against the extension by the city of a street railroad franchise, on an anticipated injury to abutting owners.⁹⁹

(2) Conditions Precedent

Any condition precedent imposed by the statute authorizing the extension of the lines of a street railroad company must be complied with; but, where there is a compliance with all conditions, the company is immediately invested with an exclusive privilege in the streets covered by the extension.

Any conditions precedent imposed by the statute authorizing the extension of the lines of a street railroad company must be complied with,¹ such, for instance, as filing in the office of the secretary

89. Cal.—City of Sacramento v. Pacific Gas & Electric Co., 161 P. 978, 173 Cal. 787.

90. Mich.—Houghton County St. R. Co. v. Laurium, 98 N.W. 393, 135 Mich. 614.

91. Ga.—Brown v. Atlanta R., etc., Co., 39 S.E. 71, 113 Ga. 462.

92. Mass.—South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485. 60 C.J. p 227 note 61.

Contract between city and two street railroads empowering building of spur and providing for free carriage of passengers was held valid.—Murray v. Roberts, C.C.A.N.Y., 103

F.2d 889, certiorari dismissed 60 S. Ct. 1106, 311 U.S. 720, 85 L.Ed. 469, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469.

93. N.J.—Trenton St. R. Co. v. United New Jersey R., etc., Co., 46 A. 763, 60 N.J.Eq. 500. 60 C.J. p 227 note 62.

94. Ohio.—Cincinnati v. Cincinnati Inclined Plane R. Co., 4 Ohio S. & C.P. 507, 30 Cinc.L.Bul. 321, affirmed 44 N.E. 327, 52 Ohio St. 609.

95. Pa.—Braddock, etc., R. Co. v. Braddock Electric R. Co., 1 Pa.Dist. 44.

96. Ohio.—Akron v. Northern Ohio Traction, etc., Co., 27 Ohio Cir.Ct. 536.

60 C.J. p 228 note 65.

97. Pa.—Philadelphia v. Citizens Pass. Ry. Co., 24 A. 1099, 151 Pa. 128.

60 C.J. p 228 note 66.

98. Iowa.—Linn County v. Hewitt, 8 N.W. 340, 55 Iowa 505.

99. Ohio.—Lima v. Cramer, 5 Ohio N.P., N.S., 113.

1. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136. 95 N.J.Law 511.

60 C.J. p 228 note 70.

of state an exemplification of the record of the adoption of the extension,² filing in such office of a description of the route of the extension, showing the termini, with a map exhibiting them,³ filing a map of the proposed route of the extension with the local authorities,⁴ obtaining the consent of the local authorities,⁵ obtaining approval by the local authorities of the plan of the proposed extension,⁶ agreeing that a proposed extension on a street will not be the occasion of the abandonment of its tracks already laid down upon another section of that street,⁷ and commencing construction within the prescribed time.⁸

Where, however, there is a compliance with all the conditions, the company is immediately invested with an exclusive privilege in the streets covered by the extension,⁹ and a further provision that no right actually to construct the extension shall vest until after thirty days from the filing of such exemplification merely postpones the right to construct the extension for such thirty days.¹⁰ Where the consent of a city council and the street committee to the prosecution of the work of extending a street railroad has been given, and it appears that the only location for the line is the extension of a track which has been laid for years on the same street, the company will not be restrained from carrying on the work because the street committee has not in its official capacity defined and authorized the exact location of the tracks, since under the circumstances, there can be no doubt as to the proper location.¹¹

(3) Character

Unless the term is given a broader significance by statute, an extension of a street railway is a prolongation

of it from one of its termini to some other designated point, and, where some distance intervenes between the terminus of the road and the proposed road, the proposed road is not an extension.

Unless the term is given a broader significance by statute, an extension of a street railway is a prolongation of it from one of its termini to some other designated point,¹² and, where some distance intervenes between the terminus of the road and the proposed road, the proposed road is not an extension.¹³ So a street railroad company, whose articles contemplate a single, connected road, carrying from end to end for a single fare, cannot construct an independent line, not connected with its original line, under extension proceedings.¹⁴ However, a company is not restricted to a mere prolongation of existing lines but may extend its operation in any direction or upon any street or avenue provided additional lines are to be operated in connection with existing lines, under a statute providing that any corporation organized for the purpose of building or extending a street railroad or any of its branches on or along any street or avenue in any city, town, or village may do so on compliance with prescribed conditions.¹⁵

A branch built as a distinct line under a separate grant is not an extension or part of another line by reason of the fact that it uses the tracks of that line for a short distance,¹⁶ nor is it made so by a subsequent resolution of the city council which provides simply for a change of connection with the main line.¹⁷ Under general statutory authority to construct extensions, it has been held that an extension much longer than the original line may be made, and that this is insufficient of itself to constitute a "new road" and not an "extension,"¹⁸ and,

2. Pa.—Coatesville, etc., R. Co. v. West Chester R. Co., 55 A. 844, 206 Pa. 40.

60 C.J. p 228 note 71.

3. N.J.—Mercer County Traction Co. v. United New Jersey R., etc., Co., 54 A. 819, 64 N.J.Eq. 588.

60 C.J. p 228 note 72.

4. N.Y.—Matter of Rochester Electric R. Co., 10 N.Y.S. 379, 57 Hun 56, affirmed 25 N.E. 381, 123 N.Y. 351.

5. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.

60 C.J. p 228 note 74.

6. Conn.—New York, etc., R. Co. v. Stevens, 69 A. 1052, 81 Conn. 16—Appeal of Central Ry. & Electric Co., 35 A. 32, 67 Conn. 197.

7. Conn.—Appeal of Central Ry. & Electric Co., *supra*.

8. N.Y.—People ex rel. Brooklyn, Q. C. & S. R. Co. v. Steers, 143 N.Y. S. 52, 158 App.Div. 153, affirmed 105 N.E. 1094, 211 N.Y. 538.

60 C.J. p 228 note 77.

9. Pa.—Commonwealth v. Uwchlan St. R. Co., 53 A. 513, 203 Pa. 608.

10. Pa.—Commonwealth v. Uwchlan St. R. Co., *supra*.

11. N.J.—Trenton v. Trenton Horse R. Co., Ch., 19 A. 263.

12. N.J.—Trenton St. Ry. Co. v. Pennsylvania R. Co., 49 A. 481, 63 N.J.Eq. 276.

60 C.J. p 229 note 82.

13. N.J.—Trenton St. Ry. Co. v. Pennsylvania R. Co., *supra*.

14. N.Y.—McClellan v. Westchester Electric Ry. Co., 55 N.Y.S. 556, 25 Misc. 383.

15. N.Y.—Bohmer v. Haffen, 54 N.Y. S. 1030, 35 App.Div. 381, affirmed 55 N.E. 1047, 161 N.Y. 390, reargument denied 57 N.E. 1104, 162 N.Y. 593.

16. U.S.—Cleveland Electric R. Co. v. Cleveland, etc., R. Co., Ohio, 27 S. Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

17. U.S.—Cleveland Electric R. Co. v. Cleveland, etc., R. Co., *supra*.

18. N.Y.—Roberts v. Huntington R. Co., 105 N.Y.S. 1031, 56 Misc. 62—60 C.J. p 229 note 83.

by reason of the particular wording of some statutes, it has been held permissible for the company to construct an extension longer than the existing line and, in effect, constituting a new system.¹⁹ Where a franchise ordinance authorizes and requires the extension of lines when the city limits are extended, and also authorizes the construction of either single or double tracks, the company may construct a single track along the part of the street controlled by the city when the corporate limits on only one side of the street are extended.²⁰

b. Duty to Construct Extensions

- (1) In general
- (2) Extensions which may be required
- (3) Enforcement of order for extension

(1) In General

The exercise of statutory authority to compel a street railroad company to construct an extension to its lines rests in the discretion of the municipal council. There must be a compliance with conditions precedent to the right to compel a street railroad company to extend its lines in accordance with the contract obligations of the company.

Subject to the requirement of public convenience and necessity, discussed supra § 22, the exercise of statutory authority to compel a street railroad company to construct an extension to its lines rests in the discretion of the municipal council,²¹ but in this respect the council must act reasonably.²² A city and a street railroad company may contract with respect to an extension of lines.²³

Conditional order. It is not permissible to make an order conditioned on the happening of a fact in the future.²⁴

Conditions precedent to the right to compel a street railroad company to extend its lines in accordance with the contract obligations of the company must be complied with;²⁵ but a substantial compliance will be sufficient to satisfy this requirement.²⁶

Duty of successor to complete extension. A street railway company which succeeds to the rights, franchises, and obligations of another stands in the shoes of the latter with respect to its duty to complete and operate a railway extension begun by the former under a plan approved by the municipal authorities.²⁷

Proceedings by regulatory commission. Under some statutes, proceedings may be entertained by a regulatory commission to compel a street railroad company to extend its transportation system,²⁸ but some such provisions are not self-executing, and the order of the commission is not effective to require the company to extend its lines unless or until franchises therefor are issued by the cities concerned, as discussed infra subdivision b (2) of this section.

(2) Extensions Which May Be Required

A street railroad company may be bound by the terms of its franchise to construct an extension of its line to points outside the city, but ordinarily such a company cannot be compelled to extend its line into any new territory in which it has no franchise to operate, nor can it be compelled to construct and operate an extension which would not be remunerative.

Where the franchise as accepted by the company provides for the extension of the line to points outside the city, it is binding on the company to construct such extension,²⁹ which duty may be enforced

19. N.H.—In re Laconia Street Ry. Co., 52 A. 458, 71 N.H. 355. 60 C.J. p 229 note 89.

20. Wis.—State v. Braman, 178 N. W. 301, 172 Wis. 131.

21. Minn.—State v. St. Paul City Ry. Co., 135 N.W. 976, 117 Minn. 316, Ann.Cas.1913D 139. 60 C.J. p 225 note 31.

22. R.I.—Woonsocket St. R. Co. v. Woonsocket, 46 A. 272, 22 R.I. 64.

23. Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

24. Wis.—Madison Rys. Co. v. Railroad Commission of Wisconsin, 198 N.W. 278, 184 Wis. 164.

25. Ill.—People v. Chicago, etc., R. Co., 7 N.E. 116, 118 Ill. 113. 60 C.J. p 225 note 34.

26. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U. S. 196, 67 L.Ed. 946. 60 C.J. p 225 note 35.

27. Conn.—State v. New York, N. H. & H. R. Co., 71 A. 942, 81 Conn. 645.

28. Ill.—Illinois Commerce Commission v. Chicago Rys. Co., 1 N.E.2d 65, 362 Ill. 559.

Proceedings held in conformity with statute
Ill.—Illinois Commerce Commission v. Chicago Rys. Co., supra.

Findings held supported by evidence
Wis.—Milwaukee Elec. Ry. & Transport Co. v. Public Service Commission, 52 N.W.2d 876, 261 Wis. 299.

Issues

In proceeding to compel street railroad to furnish additional service to suburban communities in which motor coach company operated, motor coach company could not raise issue that operation of feeder bus line by street railroad would be ultra vires street railroad's charter.—Illinois Commerce Commission v. Chicago Rys. Co., 1 N.E.2d 65, 362 Ill. 559.

29. S.C.—Thomas v. Spartanburg Ry., Gas & Electric Co., 103 S.E. 149, 114 S.C. 74. 60 C.J. p 226 note 33.

by the city by an action for specific performance, as discussed *infra* subdivision b (3) of this section. Power reserved to the common council to order an extension of any present or future lines of railway upon any and all streets of a city is not limited to extensions on streets or part of streets not provided with any car service, but authorizes the extension of the car service of one line to or into the business or central part of the city, over streets or parts of streets upon which there is an existing track upon which the cars of another line are already operated.³⁰ In ordering a new line, the city does not exceed its authority in requiring that it conform to the general system already adopted by the company;³¹ and, in consequence, where the company has adopted a system of double tracks under its franchise, the city in ordering extensions may require the company to adopt the double-track system for its extensions.³²

Unremunerative extension. Where the charter of a street railroad company simply authorizes it to construct and maintain a railroad to a certain point, without requiring it to do so, it cannot be compelled to extend and maintain its road to that point if it would not be remunerative,³³ although the extension is greatly needed and although there is an urgent public demand for it.³⁴ Even though the franchise reserves to the city granting it the right to require extensions, in proceedings to compel such extension, it is error to exclude evidence offered by the company to show the effect on its financial condition and earnings, of requiring the proposed extension, and the unreasonableness and invalidity of the ordinance providing therefor.³⁵

Where permission is given to construct a street railroad on condition that it construct an extension when the construction and operation thereof could be done without loss, the company cannot be com-

pelled to construct the extension except in accordance with the terms of the ordinance, although the necessary consent of the property holders to the building of the road was accompanied by a request that the ordinance require the extension immediately.³⁶ Under a statute requiring the extension of streetcar lines on a finding by the commission that public convenience and necessity demanded it and that the company's earning power would not thereby be impaired, the commission is not empowered to order the extension on a finding of public convenience and necessity and that the company's earning power would not thereby be impaired if the city would relieve the company from the cost of constructing pavement within the track zone.³⁷

Extensions into territory in which company has no franchise to operate. A street railroad company cannot be compelled to extend its line into any new territory in which it has no franchise to operate, by any state agency, whether it be a municipality,³⁸ or a state railroad or public service commission.³⁹ So a statute which attempts to confer jurisdiction on a railroad commission to order a street railroad company to extend its line into new territory in which it has no franchise is void and ineffective.⁴⁰

Extensions requiring municipal consent. A public service commission has no power to compel a company to build extensions where its charter merely permits it to do so on obtaining municipal consent and where it has taken no steps to obtain such consent.⁴¹ So it has been held that provisions that a street railroad corporation shall extend its lines on a finding by the commission that public convenience and necessity require such extension are not self-executing, and, therefore, that the commission's finding and its order are not effective to require extension of lines unless or until franchises therefor are issued by the cities concerned.⁴²

30. Minn.—State ex rel. City of St. Paul v. St. Paul City Ry. Co., 81 N. W. 200, 78 Minn. 331.

31. Minn.—State v. St. Paul City Ry. Co., 149 N.W. 195, 127 Minn. 191.

32. Minn.—State v. St. Paul City Ry. Co., 149 N.W. 195, 127 Minn. 191.

33. Md.—Towers v. United Rys. & Electric Co., 95 A. 170, 126 Md. 478. 60 C.J. p 226 note 43.

34. Md.—Towers v. United Rys. & Electric Co., *supra*. 60 C.J. p 226 note 44.

35. Minn.—State v. St. Paul City Ry. Co., 230 N.W. 809, 180 Minn. 329.

60 C.J. p 226 note 45.

36. Ill.—People v. Chicago, etc., R. Co., 7 N.E. 116, 118 Ill. 113.

37. Wis.—Madison Rys. Co. v. Railroad Commission of Wisconsin, 198 N.W. 278, 184 Wis. 164.

60 C.J. p 226 note 47.

38. Cal.—Hollywood Chamber of Commerce v. Railroad Commission of State of California, 219 P. 983, 192 Cal. 307, 30 A.L.R. 68.

39. Cal.—Hollywood Chamber of

Commerce v. Railroad Commission of State of California, *supra*. 60 C.J. p 227 note 49.

40. Cal.—Hollywood Chamber of Commerce v. Railroad Commission of State of California, *supra*.

41. Mo.—State ex rel. United Rys. Co. of St. Louis v. Public Service Commission of Missouri, 192 S.W. 958, 270 Mo. 429.

60 C.J. p 227 note 51.

42. Wis.—Milwaukee Elec. Ry. & Transport Co. v. Public Service Commission, 52 N.W.2d 876, 261 Wis. 299—State v. Milwaukee Electric Ry. & Light Co., 172 N.W. 230, 169 Wis. 183.

(3) Enforcement of Order for Extension

A contractual duty to construct an extension may be enforced by an action for specific performance, but where the ordinance merely provides that on noncompliance with an order to construct new lines and extensions the city may grant the right to other companies, the city cannot compel a street railroad company to construct new lines or extensions or forfeit its charter rights for failure to do so.

Where the franchise as accepted by the company provides for certain extensions of its line, the city may enforce the duty of the company by an action for specific performance.⁴³ Where an ordinance granting a franchise to a street railroad company reserves the right to require construction of new lines and extensions on notice to do so within a time designated by the council, and provides that, on noncompliance therewith, the council may grant the right to any other company to construct new lines in the streets designated, the city cannot compel the company to construct new lines or extensions or forfeit its charter rights for failure to do so.⁴⁴ The sole remedy on failure to construct the new lines or make the extensions is to grant to some other company the right to maintain street cars upon those streets with respect to which extensions or new lines had been ordered.⁴⁵ Under such an ordinance, an order must be made fixing the time within which the construction of the new lines or extensions must be completed before the right to construct such lines or extensions may be granted to another company.⁴⁶

c. Duty to Complete Line Constructed in Part

Where a street railroad operating under a franchise requiring it to construct a line between two designated points constructs a part of its line but stops short of one of the terminal points, it may be compelled to complete construction of the line in accordance with the requirements of the franchise.

Where a street railroad operating under a franchise requiring it to construct a line between two designated points constructs a part of its line but

stops short of one of the terminal points, it cannot successfully defend proceedings to compel it to complete construction of the line in accordance with the requirements of the franchise on the ground that to do so would not be financially profitable.⁴⁷ Likewise, the company will not be permitted to say that because the necessity was not obvious at the time it could stop short of the terminal point, and that, when the necessity is shown to exist, it cannot be compelled to carry out the terms of its franchise.⁴⁸ Public necessity and convenience, and not private advantage, control.⁴⁹ So also the fact that the public authorities acquiesced in the termination of a street railroad line short of the terminus specified in the franchise did not constitute a practical construction thereof, relieving the railroad company from continuing the line,⁵⁰ and having accepted its franchise and built a substantial portion of its route, it is estopped thereafter to claim that it is under no legal obligation to complete the line,⁵¹ and the right of the public to compel completion of the line is not affected by delay of public officers in compelling the company to do so.⁵²

§ 84. Structures in or Over Streets

A surface railroad has no right to place structures in the streets except where such right is expressly conferred or arises by necessary implication from the grant of other rights. Elevated street railroad companies have the right to erect and maintain stations along their established routes where such right is expressly or impliedly granted.

A surface railroad has no right to place structures in the streets except where such right is expressly conferred or arises by necessary implication from the grant of other rights.⁵³

Elevated street railroad companies have the right to erect and maintain stations along their established routes where such right is expressly granted,⁵⁴ and it has been stated that the right would seem to exist from the grant to construct and operate elevated

43. S.C.—*Thomas v. Spartanburg Ry., Gas & Electric Co.*, 103 S.E. 149, 114 S.C. 74.
60 C.J. p 226 note 39.

44. U.S.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, C.C.Minn., 189 F. 445.

45. U.S.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, supra.

46. U.S.—*Minneapolis St. Ry. Co. v. City of Minneapolis*, supra.

47. N.Y.—*Public Service Commission*

of *First Dist. v. New York Rys. Co.*, 136 N.Y.S. 720, 77 Misc. 487.

48. N.Y.—*Public Service Commission of First Dist. v. New York Rys. Co.*, supra.

49. N.Y.—*Public Service Commission of First Dist. v. New York Rys. Co.*, supra.

50. N.Y.—*Public Service Commission of First Dist. v. New York Rys. Co.*, supra.

51. N.Y.—*Public Service Commission*

of *First Dist. v. New York Rys. Co.*, supra.

52. N.Y.—*Public Service Commission of First Dist. v. New York Rys. Co.*, supra.

53. Mont.—*Robinson v. Helena Light, etc., Co.*, 99 P. 837, 38 Mont. 222.
60 C.J. p 229 note 97.

54. N.Y.—*Adler v. Metropolitan El. R. Co.*, 18 N.Y.S. 858, 61 N.Y.Super. 85, 28 Abb.N.Cas. 198, modified and affirmed on other grounds 23 N.E. 935, 138 N.Y. 173.

street railroads,⁵⁵ in the absence of a statute providing otherwise.⁵⁶ If the right to build elevated stations exists, they may be built only upon streets within the route designated.⁵⁷ Where an elevated railroad company accepts the specifications of commissioners appointed to decide on routes, elevated structures, etc., their rights are determined and limited by such specifications, and, in the absence of legislative authority, can erect no bridges and

platforms other than those built with the approval of the commissioners and included in the specifications;⁵⁸ and, where the statute does not expressly authorize additions to original elevated structures, the building of additions is not legal as incidental to the franchise because necessary, where the public could use the original structures without unduly impeding ordinary traffic.⁵⁹

E. RIGHTS IN, AND USE OF, BRIDGES, TURNPIKES, AND TOLL ROADS

§ 85. Bridges

Generally, a street railroad company may construct and operate its road over any bridge in the street or highway, whether the bridge is owned by the public, or by a private corporation authorized to demand tolls for passage over it; but it is a limitation on such right that the use by the street railroad must be compatible with the use by the general public of the bridge, and the right is also subject to the right of the public authorities to improve the bridge in accordance with the public interests.

Since a public bridge is a part of the highway which passes over it, as discussed in Bridges § 3, where the right is conferred on a street railroad company to construct and operate a street railroad on a street or highway, it may, subject to requirements as to obtaining the consent of local authorities, discussed supra § 38, or property owners,⁶⁰ and the performance of conditions imposed, discussed supra § 33 b (2), construct and operate its road over any bridge in the street or highway whether then existing⁶¹ or which may be thereafter constructed in such street or highway as an integral part thereof.⁶² This rule ordinarily applies whether the bridge is owned by the public,⁶³ or by a private corporation authorized to demand tolls for passage over it;⁶⁴ and, where a bridge company, which is

authorized to construct a bridge between two cities for ordinary travel, induces streetcar companies subsequently organized to spend large sums in building to and over such bridge, and then allows the use of the bridge for a great length of time, it cannot deny the right to such use on payment of a reasonable toll.⁶⁵

Nevertheless, the primary user of the bridge, when the right of a street railroad company to use the bridge exists, is in the public, and the easement of the company is somewhat servient to the public user.⁶⁶ So it is a well-defined limitation on the right to construct and operate street railroads on public bridges that the use must be compatible with use by the general public of the bridge;⁶⁷ and a street railroad cannot lawfully construct and operate its line over a bridge, when to do so will render it unsafe for public travel,⁶⁸ or exclude the public partially or wholly from the use of the bridge.⁶⁹ If the bridge is either of insufficient strength or of insufficient capacity to accommodate the general public travel and also the company's cars, and cannot be so strengthened or enlarged as to do so, neither the city nor the county at large is bound to provide the company with a suitable viaduct or

55. N.Y.—Adler v. Metropolitan El. R. Co., supra.

56. N.Y.—Mattlage v. New York El. R. Co., 14 Daly 1.
60 C.J. p 230 note 1.

57. N.Y.—Adler v. Metropolitan El. R. Co., 18 N.Y.S. 858, 61 N.Y.Super. 85.
60 C.J. p 230 note 2.

58. N.Y.—Interborough Rapid Transit Co. v. City of New York, 161 N.Y.S. 803, 97 Misc. 499.

59. N.Y.—Interborough Rapid Transit Co. v. City of New York, supra.

60. Pa.—Pennsylvania Canal Co. v. Lewisburg, etc., Pass. R. Co., 10 Pa.Super. 413.

60 C.J. p 230 note 3.

61. N.J.—Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County, 78 A. 235, 78 N.J. Eq. 20.

60 C.J. p 230 note 10.

Duty to repair and maintain see infra § 119.

62. Va.—Roanoke Ry. & Electric Co. v. Brown, 154 S.E. 526, 155 Va. 259.

60 C.J. p 230 note 11.

63. Va.—Roanoke Ry. & Electric Co. v. Brown, supra.

64. Pa.—Pittsburg, etc., Pass. R. Co. v. Point Bridge Co., 30 A. 511, 165 Pa. 37, 26 L.R.A. 323.

60 C.J. p 230 note 13.

65. Ky.—Covington, etc., Bridge Co. v. South Covington, etc., St. R. Co., 19 S.W. 403, 93 Ky. 136, 14 Ky.L. 52, 15 L.R.A. 826.

66. Mo.—Riggs v. Metropolitan St. Ry. Co., 115 S.W. 969, 218 Mo. 304.

67. N.J.—Elmer v. Cumberland County, 30 A. 475, 57 N.J.Law 366.
60 C.J. p 230 note 16.

68. N.J.—Lewis v. Cumberland County, 28 A. 553, 56 N.J.Law 416.
Pa.—Larue v. Oil City St. Pass. R. Co., 32 A. 977, 170 Pa. 249.

69. N.J.—Elmer v. Cumberland County, 30 A. 475, 57 N.J.Law 366.
60 C.J. p 230 note 18.

other means of crossing at the point where the bridge is situated.⁷⁰

The right of a street railway company to operate its lines over a bridge is subject to the right of the public authorities to improve the bridge in accordance with the public interests.⁷¹ So, the right to operate cars over a bridge is subject to the right of the municipality owning it temporarily to interrupt such use for the purpose of making needful repairs and improvements as from time to time may be necessary,⁷² and this is true, although a serious interruption to the use of the railroad may be thereby rendered unavoidable.⁷³

Termination of contractual right to use bridge. An agreement between a street railway company and a county relating to the manner of use of a county bridge and the rental to be paid for the franchise terminates with the lawful demolition of the bridge by the county, and does not give rise to any rights on the part of the railway company in a new bridge thereafter built by the county.⁷⁴ Under the provisions of some local statutes, a contract between the municipality and a street railroad company for the operation of cars over a bridge gives merely a license so to operate cars subject to change in its terms or even total abrogation if the public interests should so require.⁷⁵

Determination of number of tracks. The legislature may determine the number of tracks to be laid across a bridge,⁷⁶ and may delegate this power to a public utilities commission, this being an adjudication of a matter of administrative character.⁷⁷ The commission must accord a hearing to the parties in interest;⁷⁸ but inasmuch as the order relating to the

number of tracks to be laid and the kind of rails to be used is administrative in character, the order will not be disturbed unless it is unreasonable.⁷⁹

Guaranteeing payment of bridge company's bonds. Unless authorized to do so by the terms of its charter, a street railroad company is without authority to guarantee payment of bonds of a bridge company over which its road is constructed,⁸⁰ and, in the absence of such authority, and of any consideration for the guaranty, the holder of the bonds cannot recover from the railroad company interest on the bonds which the bridge company had failed to pay.⁸¹

§ 86. Turnpikes and Toll Roads

Street railroad companies may be authorized to contract with turnpike companies for the use of their roads for the construction and operation of street railroads, but such companies must nevertheless comply with statutory conditions precedent before using a turnpike for a street railroad line.

The charters of some street railroad companies expressly authorize them to contract with turnpike companies for the use of their roads for the construction and operation of street railroads,⁸² and the charters of some turnpike companies authorize them to grant the right to street railroad companies to construct and operate street railroads on the roads of the turnpike company.⁸³ In some decisions where no express statutory authorization for contracts of this kind was mentioned, their validity has been assumed,⁸⁴ and it has been held that such contracts are binding and govern the rights of the parties.⁸⁵ So, in the absence of such contract, a street railroad company may obtain the use of such a road by condemnation proceedings.⁸⁶ It has also been held that

70. Pa.—Larue v. Oil City St. Pass. Ry. Co., 32 A. 977, 170 Pa. 249.

71. N.Y.—Town of Queensbury v. Hudson Valley Ry. Co., 135 N.Y.S. 200, 75 Misc. 197, modified on other grounds 143 N.Y.S. 120, 158 App. Div. 258, affirmed 112 N.E. 749, 218 N.Y. 648.

72. Mass.—Middlesex R. Co. v. Wakefield, 103 Mass. 261.
N.Y.—International Ry. Co. v. Wotherspoon, 152 N.Y.S. 971, 90 Misc. 56.

73. Mass.—Middlesex R. Co. v. Wakefield, 103 Mass. 261.
60 C.J. p 231 note 21.

74. Pa.—Reading City Pass. Ry. Co. v. Berks County, 91 A. 1045, 246 Pa. 44.

75. N.Y.—People ex rel. Bridge Operating Co. v. Public Service Commission, 138 N.Y.S. 434, 153 App. Div. 129—Schinzel v. Best, 92 N.Y. S. 754, 45 Misc. 455, affirmed 96 N.Y.S. 1145, 109 App. Div. 917.

76. Conn.—Appeal of Connecticut Co., 94 A. 992, 89 Conn. 528.

77. Conn.—Appeal of Connecticut Co., supra.

78. Conn.—Appeal of Connecticut Co., supra.

79. Conn.—Appeal of Connecticut Co., supra.

80. Pa.—Safe Deposit & Trust Co. of Pittsburgh v. Federal St. & P. V. Pass. Ry. Co., 100 A. 320, 255 Pa. 497.

81. Pa.—Safe Deposit & Trust Co.

of Pittsburgh v. Federal St. & P. V. Pass. Ry. Co., supra.
60 C.J. p 231 note 29.

82. N.J.—Hunt v. West Jersey Traction Co., 49 A. 434, 62 N.J.Eq. 225.
60 C.J. p 231 note 30.

83. Md.—Green v. City, etc., R. Co., 28 A. 626, 78 Md. 294, 44 Am.S.R. 288.

84. Pa.—Little Sawmill Valley Turnpike, etc., Road Co. v. Federal St., etc., Pass. R. Co., 45 A. 66, 194 Pa. 144, 75 Am.S.R. 690.

85. Md.—Baltimore, etc., Turnpike Road v. United R., etc., Co., 48 A. 723, 93 Md. 138.
60 C.J. p 231 note 33.

86. Ill.—Trotter v. St. Louis, etc., R. Co., 54 N.E. 487, 180 Ill. 471.
60 C.J. p 231 note 34.

a turnpike company, standing by while a street railway company was extending and double-tracking its road with the consent of the borough, will be presumed to have consented thereto, and is estopped to deny consent.⁸⁷ However, the right of a street railroad company to construct and operate its road

on a turnpike, whether created by agreement or otherwise, does not do away with the necessity of its complying with statutory conditions precedent,⁸⁸ such, for instance, as obtaining the consent of the local authorities, as discussed supra § 39, or of abutting property owners, supra § 73.

F. DURATION, EXTENSION, RENEWAL, REVOCATION, SURRENDER, AND FORFEITURE OF FRANCHISE OR GRANT; USURPATION OF FRANCHISE

§ 87. Duration and Termination in General

- a. In general
- b. Effect of expiration of franchise

a. In General

The duration of a franchise to a street railroad company depends on the language of the grant and the extent of the interest which the grantor had authority to convey. If the grant contains a limitation as to time, it terminates at the expiration of the period designated, but a grant which contains no limitation as to time ordinarily is construed as a grant in perpetuity.

The duration of a franchise to a street railroad company depends on the language of the grant and the extent of the interest which the grantor had authority to convey.⁸⁹ If the grant contains a limitation as to time, it terminates at the expiration of the period designated.⁹⁰ The courts have very generally held in accordance with principles governing franchises generally that a grant by city or county authorities of a franchise to a street railroad company which contains no limitation as to time is a grant in perpetuity, unless otherwise limited by organic or general statutory law or by the charter of the municipality making the grant;⁹¹ and this is the rule, especially where the grant is not only un-

limited as to duration, but contains a power of assignment.⁹² However, a grant of a franchise by a municipality for an indefinite term, the consideration for which was not only the service to be rendered the general public, but also obligations to be discharged to the municipality itself, as such, terminates when the municipality ceases to exist.⁹³

To whose benefit grant inures. A grant in perpetuity for the purpose of a street railroad may be exercised in perpetuity not only by the grantee, but by those who may lawfully succeed to its rights.⁹⁴

Grant for longer period than statutory limit. Where the term for which a franchise may be granted is limited by statute, a grant for a longer time will be sustained for the statutory term.⁹⁵

Limitation by corporate life of grantee. A grant of a franchise to a street railroad company,⁹⁶ or to a street railroad company, its successors, and assigns,⁹⁷ for a definite term, extending beyond the corporate life of the company, is valid and does not terminate with the ending of the corporate life of the company, and, if then owned by it, it may constitute an asset divisible among the stockholders

87. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.

88. N.J.—Stockton v. Atlantic Highlands, etc., Electric R. Co., 32 A. 680, 53 N.J.Eq. 418.

89. U.S.—Detroit Citizens' St. R. Co. v. Detroit, Mich., 64 F. 628, 12 C.C. A. 365, 26 L.R.A. 667, certiorari denied 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 310.

60 C.J. p 233 note 53.

Power of municipality to limit duration see supra §§ 33 a, 34.

Covenant in extensions certificate of street railroad to operate trains over elevated lines and the subway as stated in joint trackage agreement which provided for operation as long as the lessee should operate elevated was not limited to period during which lessee should find it desirable

to keep the lease, but the lessee was bound during the existence of the joint trackage agreement and extensions certificate.—Murray v. Roberts, C.C.A.N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.

90. U.S.—Detroit United R. Co. v. Detroit, Mich., 33 S.Ct. 697, 229 U. S. 39, 57 L.Ed. 1056.
60 C.J. p 233 note 54.

91. U.S.—City of Covington v. South Covington & C. St. Ry. Co., Ky., 38 S.Ct. 376, 246 U.S. 413, 62 L.Ed. 802.
60 C.J. p 233 note 56.

92. U.S.—City and County of Denver v. Denver Tramway Corp., C.C.A. Colo., 23 F.2d 287, certiorari denied

49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.

93. U.S.—Blair v. Chicago, Ill., 26 S. Ct. 427, 201 U.S. 400, 50 L.Ed. 801, followed in Venner v. Chicago St. R. Co., 86 N.E. 266, 236 Ill. 342.

94. N.Y.—People v. O'Brien, 18 N.E. 692, 111 N.Y. 1, 7 Am.S.R. 684, 2 L. R.A. 255.

95. Ohio.—Sommers v. Cincinnati, 6 Ohio Dec., Reprint, 887, 8 Am.L.R. 612.
60 C.J. p 224 note 60.

96. U.S.—City of Minneapolis v. Minneapolis St. Ry. Co., Minn., 30 S.Ct. 118, 215 U.S. 417, 54 L.Ed. 259.

97. U.S.—City of Detroit v. Detroit Citizens' St. R. Co., Mich., 22 S.Ct. 410, 184 U.S. 368, 46 L.Ed. 592.
60 C.J. p 234 note 62.

after the payment of debts.⁹⁸ On the other hand, the grant of a franchise to a street railroad company, and its successors, for the term of their charter, expires when the original charter of the company expires.⁹⁹ So, it has been held that, where a franchise was granted to a company "during the time of its charter," the fact that the corporate existence of the company was subsequently extended by the amendment of its articles does not result in an extension of the franchise;¹ but, where a franchise was granted for the life of the corporation's charter and for such time as the charter might be extended by renewals, the franchise does not expire at the time when the corporation's charter would have expired if it had not been extended.²

b. Effect of Expiration of Franchise

On the expiration of a franchise granted by a municipality to a street railway company, the contractual relation between the parties is at an end; all rights in the company to occupy the city streets and maintain and operate a street railway thereon are terminated, in the absence of another grant of authority; and the city may require the company to remove its property from the streets within a reasonable time, or impose such terms as it may see fit for the further use of the streets.

On the expiration of a franchise granted by a municipality to a street railway company, the contractual relation between the parties is at an end;³ all rights in the company to occupy the city streets and maintain and operate a street railway thereon are terminated,⁴ in the absence of another grant of authority;⁵ and the city may impose such terms as it may see fit for the further use of the streets, although they do not become operative without acceptance by the railroad company.⁶ The relation

existing between a city and a street railway company after the expiration of its franchise is not that of a landlord to a tenant holding over;⁷ and the city has the absolute and unquestioned right at any time to compel the company to vacate the streets on which the franchise has expired,⁸ and, if necessary for that purpose, to enforce its rights by a writ of assistance.⁹

While it has been held that a street railroad company operating on the public streets after the expiration of its franchise does not, by so doing, create a nuisance,¹⁰ but it is to be regarded as committing a continuing trespass,¹¹ it has been held, on the contrary, that a corporation which is a consolidation of several independent street railroad companies operating under separate franchises expiring at different dates is not, after the expiration of the franchises of the various constituent companies, a trespasser until it is forbidden to continue by positive action of the city authorities.¹² After expiration of the franchise, the company cannot enjoin the city from granting a similar franchise to another company.¹³

Ownership and disposition of property. After expiration of the franchise, the property in the streets used in the maintenance and operation of the railroad belongs to the company,¹⁴ in the absence of any provision to the contrary in the franchise;¹⁵ the city has no right to take possession thereof,¹⁶ and an ordinance granting it to another company on payment to the owner of a sum to be adjudicated as its value is void as depriving the owner of its property without due process of law.¹⁷ While the city

98. U.S.—City of Detroit v. Detroit Citizens' St. R. Co., *supra*.

99. Ga.—Augusta, etc., R. Co. v. Augusta, 28 S.E. 126, 100 Ga. 701.

1. Minn.—State v. Duluth St. Ry. Co., 150 N.W. 917, 128 Minn. 314.

2. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

3. Mo.—Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.

60 C.J. p 234 note 66.

4. U.S.—Detroit United R. Co. v. Detroit, Mich., 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

60 C.J. p 234 note 67.

5. Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

60 C.J. p 234 note 68.

6. U.S.—City of Detroit v. Detroit United Ry., *supra*.

7. U.S.—City of Detroit v. Detroit United Ry., *supra*.

60 C.J. p 234 note 70.

8. U.S.—Detroit United Ry. v. Detroit, Mich., 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570.

60 C.J. p 234 note 71.

9. U.S.—City of Detroit v. Detroit United Ry., 184 N.W. 516, 215 Mich. 401—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

10. Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

11. U.S.—Louisville Trust Co. v. Cincinnati, C.C.Ohio, 73 F. 716, reversed on other grounds 76 F. 296, 22 C.C.A. 334, certiorari denied 17

S.Ct. 995, 164 U.S. 707, 41 L.Ed. 1183.

60 C.J. p 234 note 74.

12. U.S.—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.

60 C.J. p 234 note 75.

13. La.—Canal, etc., R. Co. v. New Orleans, 2 So. 388, 39 La. Ann. 709.

14. U.S.—Cleveland Electric R. Co. v. Cleveland, Ohio, 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

15. U.S.—Cleveland Electric R. Co. v. Cleveland, Ohio, 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

16. U.S.—Cleveland Electric R. Co. v. Cleveland, *supra*.

17. U.S.—Cleveland Electric R. Co. v. Cleveland, *supra*.

may require the company to remove its property from the street within a reasonable time,¹⁸ it has no arbitrary power to proceed at once by force to effect such removal.¹⁹ It has also been held that a railway company operating its railroad after the expiration of its franchise, with the consent of the city, and making and incurring large expense in paving, etc., should be given a full two years as a reasonable time within which to negotiate for an extension of its franchise, or to dispose of its property.²⁰

Laches. In an action to oust a street railway company from the streets of a city because it was operating after the expiration of its franchise, the doctrine of laches does not apply, except as it may be considered in determining the final order which should be made.²¹

Waiver and estoppel. Day to day arrangements by which continued operation of a street railway was permitted, notwithstanding the expiration of the franchise rights, but which expressly provided that the permits thereby granted might be revoked, and that action thereunder should not waive the rights of either party, give the railway company no property rights in the streets of the city.²² A city is not estopped to insist on the expiration of franchises to a street railway company by the inaction of its officials while the company was expending large sums of money in betterments and replacements instead of ordinary repairs, where it had no right to prevent the company from making improvements or to require them to be made.²³ So, after expiration of its franchise, the company cannot acquire new franchise rights by estoppel against

the city through the expenditure, with its knowledge, of large sums on its railway, where the state constitution forbids the city to grant franchises not revocable at its will unless authorized by a popular vote.²⁴

§ 88. Extensions and Renewals

- a. In general
- b. Implied extension or renewal

a. In General

It is competent for a municipal corporation, under legislative authority, to grant a renewal, even before expiration of the franchise, for a term within the limit prescribed by statute, provided the company is not released from any obligation or liability under the old grant, and the renewal will, in the opinion of the municipal council, prove beneficial to the public; and suitable reservations and conditions may be imposed as a consideration therefor.

It is competent for a municipal corporation, under legislative authority, to grant a renewal,²⁵ even before the expiration of the franchise,²⁶ for a term within the limit prescribed by statute,²⁷ provided the company is not released from any obligation or liability under the old grant,²⁸ and the renewal will, in the opinion of the municipal council, prove beneficial to the public.²⁹ Such renewal must be made to the original grantee;³⁰ and in granting a renewal, as in granting an original franchise, suitable reservations and conditions may be imposed as a consideration therefor.³¹ An ordinance granting a renewal of a franchise to maintain a street railroad and fixing the conditions of such maintainance, which is accepted in writing, constitutes a binding contract between the city and the railroad company.³² Where the municipality

18. U.S.—Detroit United R. Co. v. Detroit, Mich., 33 S.Ct. 697, 229 U. S. 39, 57 L.Ed. 1056.
60 C.J. p 235 note 81.

19. U.S.—City of Detroit v. Detroit United Ry., Mich., 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570.

20. Iowa.—State v. Des Moines City R. Co., 140 N.W. 437, 159 Iowa 259.

21. Iowa.—State v. Des Moines City R. Co., supra.

22. U.S.—Detroit United Ry. v. City of Detroit, Mich., 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570.

23. Mich.—City of Detroit v. Detroit United Ry., 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

24. U.S.—Detroit United Ry. v. City

of Detroit, Mich., 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570—Detroit United Ry. v. City of Detroit, 39 S. Ct. 151, 248 U.S. 429, 63 L.Ed. 341.

25. Ohio.—State v. Oakwood St. R. Co., 11 Ohio Cir.Ct., N.S., 263.
60 C.J. p 235 note 88.

Mistake of fact

The language "valid until the expiration of the grants . . . on said Quincy Street . . . to wit, July 13, 1913" was held to be an expression of opinion that the date named was the termination of the Quincy Street grants and the statement, being a mistake of fact, granted no greater rights than those which already existed.—Cleveland Electric R. Co. v. Cleveland, Ohio, 27 S.Ct. 202, 204 U.S. 116, 138, 51 L.Ed. 399.

26. U.S.—Cleveland v. Cleveland

Electric R. Co., Ohio, 26 S.Ct. 513, 201 U.S. 529, 50 L.Ed. 854.
60 C.J. p 235 note 89.

27. Ohio.—Haskins v. Cincinnati Consol. St. R. Co., 7 Ohio Dec., Reprint, 713, 4 Cinc.L.Bul. 1126.

28. U.S.—Cleveland v. Cleveland Electric R. Co., Ohio, 26 S.Ct. 513, 201 U.S. 529, 50 L.Ed. 854.
60 C.J. p 235 note 91.

29. Ohio.—Lima v. Cramer, 5 Ohio N.P., N.S., 113.

30. Ohio.—Raynolds v. Cleveland, 21 Ohio Cir.Ct., N.S., 228.

31. N.Y.—Public Service Commission v. Westchester St. R. Co., 99 N.E. 536, 206 N.Y. 209.
60 C.J. p 235 note 95.

32. Ohio.—City of Cincinnati v. Cin-

by its acts and conduct recognizes the right of the company to use the streets, it may not claim that no franchise was granted by a renewal ordinance.³³

Consideration. The continued operation of a street railroad constitutes a sufficient consideration for an ordinance extending the date for the expiration of its franchise.³⁴

Acceptance. Acceptance by a street railway company of an amendatory ordinance, extending its franchise, may be presumed from the fact that the amendment was beneficial to it, and from the fact that it issued bonds which are to fall due at the expiration of the extension.³⁵

Contractual provision for renewal and revaluation. Where a franchise was granted for a specified term of years with privilege of renewal for an additional specified period on a fair revaluation of the franchise, an absolute right to renew is thereby granted.³⁶

b. Implied Extension or Renewal

Where the statute prescribes the manner in which, and officials by whom, renewal of a street railroad franchise may be made, it cannot be implied from the acts of other officials; nor will a renewal of a franchise be implied from permission granted the company to extend its tracks and operate them in connection with the main line for a period which endures longer than the right to operate the main line.

Where the statute prescribes the manner in which, and officials by whom, renewal of a street railroad franchise may be made, it cannot be implied from the acts of other officials;³⁷ nor will a renewal of the franchise be implied from permission granted the company to extend its tracks and operate them in connection with the main line for a period which endures longer than the right to operate the main line,³⁸ or from a consolidation with another company,³⁹ unless it is provided that the rights of the

company having the shorter franchise shall terminate with the franchise of the other company.⁴⁰ However, ordinances granting an extension to a consolidated street railway corporation, possessing franchises expiring at different times, on conditions involving great expense to the corporation and resulting in substantial benefits to the public as to transfers for single fares, and relating to the entire system as well as the extensions granted, and providing that the right granted shall terminate with the then existing grants of the main line at a specified date later than that of termination of some of the franchises, amount, on the acceptance by the company and compliance with the conditions, to a contract within the protection of the impairment clause of the constitution extending the various franchises to that date.⁴¹

The right to operate street railroads under a municipal ordinance, confirmed by statute, until the city should exercise its reserved right to purchase, is confined to the streets designated in the original ordinance and in such other later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the unity of the street railway system, extend to the rights of occupancy acquired in other streets, so as to continue such rights until purchase is made of the entire system.⁴² So, it has been held that the life of a street railway franchise granted by a city and an adjoining township for a fixed term is not extended until the date fixed by the township for the termination of other street railway franchises, by the adoption of a municipal ordinance, after the annexation of a part of the township to the city, requiring the street railway company for the full term of such township grants to sell workmen's tickets at a reduced rate, other provisions of the township grants to remain unchanged.⁴³ Where a city after the franchise of some of the lines of a

Cincinnati St. Ry. Co., 187 N.E. 312, 45 Ohio App. 511.
60 C.J. p 235 note 95 [a].

33. Ohio.—Woodland Avenue, etc., St. R. Co. v. Cleveland, 7 Ohio N. P., N.S., 161.

34. U.S.—City R. Co. v. Citizens' St. R. Co., Ind., 17 S.Ct. 653, 166 U.S. 557, 41 L.Ed. 1114.

35. U.S.—City R. Co. v. Citizens' St. R. Co., supra.

36. N.Y.—Manhattan Bridge Three-

Cent Line v. City of New York, 198 N.Y.S. 49, 204 App.Div. 89.
60 C.J. p 237 note 11.

37. Ohio.—Cincinnati v. Cincinnati Inclined Plane R. Co., 4 Ohio S. & C.P. 507, 30 Cinc.L.Bul. 321, affirmed 44 N.E. 327, 52 Ohio St. 609.
60 C.J. p 236 note 3.

38. U.S.—Cleveland Electric R. Co. v. Cleveland, C.C.Ohio, 137 F. 111, affirmed 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.
60 C.J. p 236 note 4.

39. Wash.—Wood v. Seattle, 62 P. 135, 23 Wash. 1, 52 L.R.A. 369.
60 C.J. p 236 note 5.

40. U.S.—Cleveland v. Cleveland Electric R. Co., Ohio, 26 S.Ct. 513, 201 U.S. 529, 50 L.Ed. 854.
60 C.J. p 236 note 6.

41. U.S.—Cleveland v. Cleveland Electric R. Co., supra.

42. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801.

43. U.S.—Detroit United Ry. v. City of Detroit, Mich., 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

street railway company have expired passes an ordinance to continue in force for a year unless sooner repealed, with penalties for its violation, for continued operation of the company's system, with fares and transfers over the various lines, whether or not having a franchise, this amounts to a grant to the company for further operation of the system, during the life of the ordinance.⁴⁴

Statute extending corporate life of grantee does not extend the term of a grant by a municipality limited in time.⁴⁵

Branch lines. A franchise of a distinct branch line made to terminate with the grant to the main line is to be measured by the grant as it then exists, and not by any subsequent extension of time which might be granted the main line.⁴⁶ An extension of the time for the termination of the franchise of a branch line to the date set for the termination of the main line is not effected by a municipal ordinance consenting to a consolidation of several street railroads, including the lines in question, on condition that but one fare shall be charged for a continuous ride.⁴⁷

§ 89. Revocation

In the absence of provisions in the constitution or a statute establishing a different rule, a franchise or grant to a street railroad company by the legislature or a municipality acting under delegated authority, when accepted and acted on by the company, is not a mere license, but a valid contract, the obligation of which neither party can impair, and the granting authority is without power to revoke it without the consent of the company, unless power to revoke is reserved in the franchise or grant.

In the absence of provisions in the constitution or a statute establishing a different rule,⁴⁸ a fran-

chise or grant to a street railroad company by the legislature or a municipality acting under delegated authority, when accepted and acted on by the company, is not a mere license, but a valid contract, the obligation of which neither party can impair, and the granting authority is without power to revoke it without the consent of the company, unless power to revoke is reserved in the franchise or grant.⁴⁹ The contract thus made is binding not only on a municipality making the grant, but also on a municipality which subsequently annexes it.⁵⁰ It has been held, however, that consent to occupy a highway may be revoked before the company has acquired a vested right by commencing construction and making expenditures.⁵¹ A mere license to construct a street railroad siding, although lawful in its origin, is a revocable privilege,⁵² and, on revocation by the proper authorities, its force is spent.⁵³ In the absence of a franchise right to the contrary, the municipality may require the removal of streetcar tracks from its streets.⁵⁴

Unauthorized franchise. Where a street railway operates under a franchise which the municipality was without power to grant, the grant is nothing more than a mere license revocable at pleasure, and the tracks are subject to removal as a nuisance at the suit of the city or state;⁵⁵ and it has been held that consent to the construction of a street railroad by a local agency, such as a county fiscal court, having no power to give consent, is a nullity, and an order revoking the attempted grant of the privilege does not change the status of the parties.⁵⁶

Methods of revocation. Revocation may be implied as well as expressed,⁵⁷ and the intent to revoke a franchise is plainly evinced by the granting

44. U.S.—Detroit United Ry. Co. v. City of Detroit, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed. 341.

45. U.S.—Blair v. Chicago, Ill., 26 S.Ct. 427, 201 U.S. 400, 50 L.Ed. 801.

46. U.S.—Cleveland Electric R. Co. v. Cleveland, Ohio, 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

47. U.S.—Cleveland Electric R. Co. v. Cleveland, Ohio, 27 S.Ct. 202, 204 U.S. 116, 51 L.Ed. 399.

48. Ohio.—Northern Ohio Traction, etc., Co. v. Ohio, 38 S.Ct. 196, 245 U.S. 574, 62 L.Ed. 481, L.R.A.1918E 865.
60 C.J. p 237 note 13.

49. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

N.Y.—City of New Rochelle v. West-

chester Electric R. Co., 29 N.Y.S. 2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S.Ct. 64, 317 U.S. 663, 87 L.Ed. 533.
N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 189.
60 C.J. p 237 note 14.

50. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.
60 C.J. p 238 note 15.

51. Kan.—Atchison St. R. Co. v. Nave, 17 P. 587, 38 Kan. 744, 5 Am. S.R. 800.

Ky.—Jefferson County v. Louisville & I. R. Co., 160 S.W. 502, 155 Ky. 810.

52. N.Y.—Brooklyn Heights R. Co.

v. Steers, 106 N.E. 919, 213 N.Y. 76.

53. N.Y.—Brooklyn Heights R. Co. v. Steers, supra.

54. S.C.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

55. Iowa.—State v. Des Moines City Ry. Co., 140 N.W. 437, 159 Iowa 259.

56. Ky.—Jefferson County v. Louisville & I. R. Co., 160 S.W. 502, 155 Ky. 810.

57. U.S.—Security Trust Co. v. Village of Grosse Pointe, D.C.Mich., 33 F.2d 706, affirmed, C.C.A., 42 F.2d 377.

Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.

of a second street railroad franchise over the same route to others.⁵⁸ It has been held, however, that an ordinance providing that a single track may be laid in any given street is not in any sense repealed by a subsequent ordinance authorizing the laying of double tracks in all streets where single tracks had been laid.⁵⁹

Protection of right of company on unauthorized revocation. Where a municipality annuls its license, and thus its grant to a street railroad company, and attempts by force to prevent the completion of the road then in construction, an injunction will issue restraining the city from such a proceeding.⁶⁰ Where consent to lay double tracks has been obtained from a municipality, it cannot take away the right by subsequent amendment of the ordinance granting the right after large sums have been expended in constructing the railroad.⁶¹

In Massachusetts. The courts have adjudicated numerous particular matters with respect to the exercise of the power of revocation.⁶² Generally, street railroads hold their locations in public ways under a tenure no more secure than a privilege or permit subject to revocation,⁶³ and, accordingly, such locations ordinarily are subject to revocation

without compensation by the particular authority and in the manner prescribed by law when further continuance is no longer compatible with the public interest.⁶⁴ Under a statute detailing the authority of the department of public works with respect to street railroads, the power to revoke locations on state highways is subject to a finding of public necessity and convenience, to the requirement of public notice and a hearing, and, unless the company consents in writing within the specified time, to ultimate decision by the department;⁶⁵ and in order to exercise the powers conferred by the statute, the department should follow the prescribed procedure instead of negotiating a contract for the payment of money for the locations.⁶⁶ Effect will be given to the specific provisions of a particular statute prohibiting the revocation of locations of a certain company,⁶⁷ and such a statute constitutes a contract between the commonwealth and the company, binding the commonwealth not to revoke the location by a mere repeal of the grant at the pleasure of the legislature.⁶⁸ Accordingly, a later statute purporting to terminate the right of the street railroad to operate at a certain location cannot validly be given effect as a revocation of the location without compensation.⁶⁹ A statute purporting,

58. U.S.—Security Trust Co. v. Village of Grosse Pointe, D.C.Mich., 32 F.2d 706, affirmed, C.C.A., 42 F.2d 377.

Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.

59. Ga.—Silvey v. Georgia Ry. & Electric Co., 73 S.E. 629, 137 Ga. 468.

60. N.C.—Asheville St. R. Co. v. Asheville, 14 S.E. 316, 109 N.C. 688

61. Iowa.—Burlington v. Burlington St. R. Co., 49 Iowa 144, 31 Am.R. 145.

62. Mass.—City Council of Salem v. Eastern Massachusetts St. Ry. Co., 149 N.E. 671, 254 Mass. 42.
60 C.J. p 237 note 13 [a].

63. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.
60 C.J. p 237 note 13 [a] (1)–(4).

64. Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E. 2d 166, 301 Mass. 283.

The issue as to whether locations for street railroads are to be revoked is determined broadly from the standpoint of the public interest in the service, and not from the standpoint of reimbursement for loss.—

Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, supra.

Legislative intent to authorize payment of public money to end street railway locations without investigation as to necessity or hearing, where locations could be brought to an end through ordinary methods of public necessity and convenience if public necessity and convenience in the use of the public ways so require for any good and sufficient reason, without payment of any money, is not to be lightly inferred but must be manifested by some clear indication of legislative purpose.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, supra.

65. Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, supra.
60 C.J. p 237 note 13 [a] (8)–(16).

66. Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, supra.

67. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Specific exceptions

Under statute providing that the locations of, or right to maintain, any elevated lines or structures of an elevated railway company should not be subject to revocation, the specific exceptions to the prohibitions of revocation amount to reservations of the

right to exercise the power of eminent domain and of the right to purchase from the company its railroad and all its franchises, properties, rights, and privileges by paying therefor an amount fixed by the statute.—Boston Elevated Ry. Co. v. Commonwealth, supra.

68. Mass.—Boston Elevated Ry. Co. v. Commonwealth, supra.

Objections

A statutory contract whereby the legislature agreed that a particular location of an elevated railway company should not be revoked without payment of compensation is not subject to objection that the power of eminent domain was bargained away, even without an express reservation of that power, since the state cannot divest itself of that power, and a reservation of the power would be implied.—Boston Elevated Ry. Co. v. Commonwealth, supra.

69. Mass.—Boston Elevated Ry. Co. v. Commonwealth, supra.

"Police power"

Revocation of locations purportedly made by a subsequent statute cannot be sustained as an exercise of the "police power" under the guise of regulating the use of the streets on ground of expediency in the interest of the general welfare in absence

subject to judicial review, to revoke a street railroad location should, if reasonably possible, be interpreted so as to effectuate the purpose of the statute and so as not to render it contrary to the terms of the constitution.⁷⁰

§ 90. Surrender

The franchise of a street railroad company can be extinguished by a surrender thereof to some body having authority to accept the surrender, and by its acceptance thereof, or by abandonment or nonuser for so long a period that a surrender and acceptance will be presumed.

The franchise of a street railroad company can be extinguished by a surrender thereof to some body having authority to accept the surrender, and by its acceptance thereof,⁷¹ or by abandonment or nonuser for so long a period that a surrender and acceptance will be presumed.⁷² Where, by charter, the mayor and city council are vested with absolute control of the franchises of the city, they may accept a surrender of any street railway franchises granted by the city, in the absence of an express provision in the charter forbidding it.⁷³ Under some statutes, the surrender may be accepted by a designated court.⁷⁴ The effect of the surrender is that the franchise contract is no longer binding on the company in favor of the city or state in which it operates.⁷⁵

§ 91. Forfeiture

Forfeitures of street railroad grants are not favored, and the courts will proceed with great caution in proceedings therefor, but, where the parties have by lawful contract provided for a forfeiture, the courts will enforce the agreement, and considerations of hardship resulting

therefrom cannot be invoked to prevent such enforcement when insisted on by the state.

Although the grant itself is strictly construed against a street railroad company, as discussed supra § 71, forfeitures thereof are not favored,⁷⁶ and the courts will proceed with great caution in proceedings therefor,⁷⁷ and will not enforce them in doubtful cases.⁷⁸ However, where the parties to a street railroad franchise have by lawful contract expressly or impliedly provided for a forfeiture, the courts will enforce the agreement,⁷⁹ notwithstanding the street railroad company is under management and control of public trustees;⁸⁰ and considerations of hardship resulting from enforcement of a condition by forfeiture of the grant for noncompliance therewith cannot be invoked to prevent such enforcement when insisted on by the state.⁸¹

Provisions for forfeiture are strictly construed against the party for whose benefit they are provided.⁸² The party seeking the forfeiture must show a literal compliance with the provisions which give the right to a forfeiture.⁸³ The conduct which is claimed to constitute the forfeiture of corporate rights and franchises is to have a charitable and liberal construction, like any conduct tending to penal consequences.⁸⁴ It has been held, however, that a statute purporting, subject to judicial review, to revoke a street railroad location, and to declare a forfeiture thereof, should, if it is reasonably possible, be interpreted so as to effectuate the purpose of the statute and so as not to render it contrary to the terms of the constitution.⁸⁵

Remedies of street railroad company. Under

of recital in statute or showing that continued occupation of streets would be dangerous.—*Boston Elevated Ry. Co. v. Commonwealth*, supra.

70. *Mass.—Boston Elevated Ry. Co. v. Commonwealth*, supra.

71. *U.S.—Security Trust Co. v. Village of Grosse Pointe*, C.C.A.Mich., 42 F.2d 377.
60 C.J. p 238 note 27—26 C.J. p 1043 note 71 [a].

72. *Wis.—Wright v. Milwaukee Electric R., etc., Co.*, 69 N.W. 791, 95 Wis. 29, 60 Am.S.R. 74, 36 L.R.A. 47.

73. *Wash.—Wood v. Seattle*, 62 P. 135, 23 Wash. 1, 52 L.R.A. 369.

74. *Pa.—Petition of Easton Transit Co.*, 30 Pa.Dist. 131.
60 C.J. p 238 note 30.

75. *Ind.—Chicago, L. S. & S. B. Ry.*

Co. v. Guilfoyle, 152 N.E. 167, 198 Ind. 9, 46 A.L.R. 1465.
60 C.J. p 239 note 31.

76. *Mich.—Village of Grandville v. Grand Rapids, H. & C. R. R.*, 196 N.W. 351, 225 Mich. 587, 34 A.L.R. 1408.
60 C.J. p 239 note 33.

77. *Ill.—Chicago City Ry. Co. v. People*, 73 Ill. 541.

78. *Ohio.—Toledo v. Toledo R., etc., Co.*, 25 Ohio Cir.Ct. 441.

79. *Mass.—Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

60 C.J. p 239 note 36.

Not a punishment

The enforcement of a forfeiture of a location granted to an elevated railway company for breach of an implied condition that it be used for purpose for which it was granted is

not a punishment for wrongdoing, but it is an assertion of a right of the commonwealth to regulate the use of the streets for the public generally.—*Boston Elevated Ry. Co. v. Commonwealth*, supra.

80. *Mass.—Boston Elevated Ry. Co. v. Commonwealth*, supra.

81. *Mass.—Boston Elevated Ry. Co. v. Commonwealth*, supra.

82. *Ohio.—Toledo v. Toledo, etc., R. Co.*, 25 Ohio Cir.Ct. 441.

83. *Utah.—Murray City v. Utah Light & Traction Co.*, 191 P. 421, 56 Utah 437.

84. *N.Y.—People v. Broadway R. Co. of Brooklyn*, 26 N.E. 961, 126 N.Y. 29.

85. *Mass.—Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

some statutes, a street railroad company is authorized to file a petition in equity to determine whether there was just cause for statutory revocation and declaration of forfeiture of the company's right to operate certain lines, and the court is vested with jurisdiction to enter a decree giving effect to its decision on those issues.⁸⁶ Such a suit is restricted to the issues provided for,⁸⁷ that is, whether, on the facts appearing in the record, the revocation and declaration of forfeiture impaired the company's constitutional rights,⁸⁸ and the suit does not involve, unless incidentally, either the company's general franchise to be a corporation or its subordinate franchise to manage and carry on its corporate business.⁸⁹ The court is required to decide the mixed question of fact and law, whether on the facts agreed and the proper inferences therefrom there was a breach of a material condition of the grant of the location constituting a cause sufficient in law for a declaration of forfeiture.⁹⁰

§ 92. — Grounds

a. In general

86. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

87. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

88. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

Standard of just cause

The determination of the question of just cause for the revocation and forfeiture involves a determination of the standard of just cause, and includes, therefore, the question of the constitutionality of the revocation and declaration.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

89. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

90. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

91. Minn.—City of Tower v. Tower & S. St. Ry. Co., 71 N.W. 691, 68 Minn. 500, 693, 38 L.R.A. 541, 64 Am.S.R. 493.
60 C.J. p 239 note 40.

Transfers

Where franchises had been granted to street railroad on condition that there would be transfers to other lines in the city, and that a violation of the condition would be deemed a forfeiture and surrender of the franchises, and condition was violated, city ordinance, declaring franchises forfeited, was effective to revoke the franchises.—Bankers Trust

Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

92. N.Y.—People v. New York City Cent. Underground R. Co., 21 N.Y. S. 373, 66 Hun 633, affirmed 33 N.E. 744, 137 N.Y. 606.
60 C.J. p 239 note 41.

93. Mo.—State ex rel. Kansas City v. East Fifth St. Ry. Co., 41 S.W. 955, 140 Mo. 539, 62 Am.S.R. 742, 38 L.R.A. 218.
60 C.J. p 239 note 42.

94. Utah.—Union Pac. R. Co. v. Public Service Commission, 134 P.2d 469, 103 Utah 186.
60 C.J. p 239 note 43.

Misuser

Forfeiture of a franchise may be declared for misuser.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

Irrevocable grant

The fact that the grant of a particular location to an elevated railway company was by contract irrevocable did not change its general purpose or its fundamental nature, and the contract against revocation could not

- b. Failure to commence or complete construction within time prescribed
- c. Nonuser and abandonment
- d. Excuses for nonperformance

a. In General

Grounds for forfeiture of a street railroad grant or franchise may be expressly provided for therein or by general statute, or may exist independently of such provisions or statutes, since a franchise may be forfeited on conditions broken; but the grounds for forfeiture must be of a substantial character, and forfeiture is not warranted where there has been a substantial performance of conditions imposed.

Grounds for forfeiture of a street railroad grant or franchise may be expressly provided for therein⁹¹ or by general statute,⁹² or may exist independently of such provisions or statutes,⁹³ since, like other contracts, a franchise may be forfeited on conditions broken.⁹⁴ Nevertheless, it is not every nonperformance of the conditions imposed, or every misuser, which will work a forfeiture.⁹⁵ The grounds for forfeiture must be of a substantial character,⁹⁶ especially where the franchise can be forfeited only as a whole.⁹⁷ Substantial performance of conditions imposed is all that is required.⁹⁸

rightly be interpreted as including a contract that the location should not be terminated for breach of a material condition of the grant.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

95. Ill.—Chicago City Ry. Co. v. People, 73 Ill. 541.
N.Y.—People v. Atlantic Ave. R. Co., 26 N.E. 622, 125 N.Y. 513.

96. Kan.—Olathe v. Missouri, etc., R. Co., 96 P. 42, 78 Kan. 193.
60 C.J. p 239 note 45—26 C.J. p 1044 note 5 [a].

Grounds held not shown

Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, Com.Pl., 44 Dauph.Co. 415, affirmed 194 A. 661, 327 Pa. 497.

97. Ohio.—Toledo v. Toledo R., etc., Co., 25 Ohio Cir.Ct. 441.
60 C.J. p 239 note 46.

98. Ill.—Chicago City Ry. Co. v. People, 73 Ill. 541.

Breach of conditions held not shown

N.Y.—City of New Rochelle v. Westchester Elec. R. Co., 29 N.Y.S.2d 805, 176 Misc. 1044, affirmed 29 N.Y.S.2d 719, 262 App.Div. 874, appeal denied 30 N.Y.S.2d 495, 262 App.Div. 961, affirmed 42 N.E.2d 23, 288 N.Y. 571, certiorari denied 63 S. Ct. 64, 317 U.S. 663, 87 L.Ed. 533.
Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6:

The unauthorized carriage of freight,⁹⁹ and the charging of excessive fares,¹ are not grounds of forfeiture but merely an occasion for the regulation of the company's business.

Arbitration clause. Where an ordinance giving a street railroad company the right to use a street contains no clause of forfeiture, an agreement of the company with the mayor, at the time of signing the ordinance, to arbitrate any difficulty with another street railroad company seeking to use the street, does not give the city the right to forfeit the franchise because its arbitrator is unable to agree with the second arbitrator in the choice of a third.²

b. Failure to Commence or Complete Construction within Time Prescribed

Failure to commence or complete construction within the time prescribed for so doing may constitute grounds for forfeiture of the franchise of a street railroad, when so declared by statute or where the franchise contains a provision therefor.

Failure to commence construction within the time prescribed for so doing is a ground for forfeiture of the franchise of a street railroad when so declared by statute.³ Also, failure to complete the construction of a railroad within the time limited by the grant is a ground for forfeiture of the company's franchise,⁴ unless excused, as discussed *infra* subdivision d of this section, or waived, *infra* § 93. Such matters constitute grounds for forfeiture especially where the franchise contains a provision therefor,⁵ or a forfeiture for breach of condition is provided for by general statute.⁶ In order to pre-

vent a forfeiture for noncompletion within the time specified, there must be a substantially constructed track,⁷ and what constitutes such a track is a question of fact for the jury under all the facts of the case.⁸ The right of a street railway company, under its franchise, to connect its main line in a village with a branch line which it afterward built to the village boundary, has been held not to be forfeited by its failure to construct the branch within the time fixed for the completion and operation of its main line.⁹ A statute which extended the time for building railroads for two years, and provided that "failure by any railroad company to construct its road heretofore shall not cause a forfeiture of its corporate powers," does not apply to a railroad company which willfully and intentionally failed to construct its road when able to do so.¹⁰

c. Nonuser and Abandonment

Nonuser may constitute a ground for forfeiture of a street railroad franchise, especially where the franchise contains a provision for forfeiture for conditions broken; and abandonment of its right of way or tracks by a street railroad company, or use of such right of way for purposes other than that of a street railroad, also constitutes a ground for forfeiture.

Nonuser may constitute a ground for forfeiture of a street railroad franchise,¹¹ especially where the franchise contains a provision for forfeiture for conditions broken,¹² or where, in addition thereto, there is some act of abandonment.¹³ Such ground of forfeiture may be enforced notwithstanding a contractual provision prohibiting revocation of a location granted to a railway company embodied in the statute granting the location.¹⁴ It

99. Mich.—Attorney General v. Toledo, etc., R. Co., 115 N.W. 422, 151 Mich. 473.

1. Mich.—Attorney General v. Toledo, etc., R. Co., *supra*.
60 C.J. p 239 note 49.

2. Pa.—Chester City v. Union R. Co., 66 A. 1107, 218 Pa. 24.

3. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.
60 C.J. p 240 note 51.

4. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.
60 C.J. p 240 note 52.

5. Mass.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.
60 C.J. p 240 note 55.

6. N.Y.—Matter of Brooklyn, etc., R. Co., 72 N.Y. 45.
60 C.J. p 240 note 56.

7. Tex.—Houston v. Houston Belt,

etc., R. Co., 19 S.W. 786, 84 Tex. 581.

8. Tex.—Houston v. Houston Belt, etc., R. Co., *supra*.

9. Mich.—Houghton County St. Ry. Co. v. Common Council of Village of Laurium, 98 N.W. 393, 135 Mich. 614.

10. N.Y.—People v. Broadway R. Co. of Brooklyn, 26 N.E. 961, 126 N.Y. 29.

11. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App. Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App. Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.
60 C.J. p 240 note 61—26 C.J. p 1044

note 96 [a].

Implied condition

The condition that a particular location granted to an elevated railway company should be used for the purpose for which it was granted, although an implied and not an express condition, was a part of the contract between the commonwealth and the company, limiting the obligation of the commonwealth thereunder.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

12. Minn.—City of Tower v. Tower & S. St. Ry. Co., 71 N.W. 691, 68 Minn. 500, 64 Am.S.R. 493, 38 L.R.A. 541.
60 C.J. p 240 note 62.

13. Pa.—Girard College Pass. R. Co. v. 13th and 15th Sts., etc., R. Co., 7 Phila. 620.

14. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

has been held, however, that in order to warrant a forfeiture for nonuser it must have existed for such a length of time, or under such circumstances, that a surrender of the franchise and its acceptance may be presumed;¹⁵ and that, if the period of nonuser which will give a right of forfeiture is fixed by statute,¹⁶ or by contract with the municipality,¹⁷ mere nonuser for a shorter period is not a ground for forfeiture. A company which has the right to lay and operate a double track does not forfeit its right to do so by laying a single track for a time;¹⁸ and the fact that a company having the right under its charter to operate two tracks removed one of the tracks during a period when a single track sufficed for its business does not forfeit by nonuser its right to relay the track removed.¹⁹

Abandonment or change of use. Abandonment of its right of way²⁰ or tracks²¹ by a street railroad company, or use of such right of way for purposes other than that of a street railroad,²² constitutes a ground for forfeiture. Nevertheless, in order to constitute abandonment there must be a clear, unequivocal, and decisive act on the part of the company showing a determination not to use the rights granted.²³ An agreement between a municipality and a street railroad company for the postponement of the laying of the company's tracks for a designated time does not constitute an abandonment of the right of the company to build, but merely a postponement of the right.²⁴

d. Excuses for Nonperformance

In order to avoid forfeiture the company is bound to perform in accordance with the terms of the franchise,

unless performance is rendered impossible by act of God, by the law, or by the other party; and the company is not excused from the performance of the conditions imposed by reason of the fact that performance thereof has become burdensome, or because of its financial inability to perform.

It has been stated in general terms that in order to avoid forfeiture the company is bound to perform in accordance with the terms of the franchise, unless performance is rendered impossible by act of God, by the law, or by the other party.²⁵ The company is not excused from performance of the conditions imposed by reason of the fact that performance thereof has become burdensome,²⁶ or because of its financial inability to perform,²⁷ or because it was impossible in a business sense to go ahead with the work,²⁸ or because the road would not have been profitable.²⁹ Also, the fact that the company was prohibited by statute from building one of its lines is no reason for not forfeiting its franchise therefor where it appears that, when the law was passed, the company had been in default for five years.³⁰ The company is not excused from performance because of failure to obtain consent of a plank road company, over whose road the track was to be laid, where it was not shown that it had used reasonable efforts and due diligence to obtain the consent.³¹

Nonuser has been held not to be excused by the fact that the city has passed an ordinance attempting to repeal the franchises granted to the company,³² or by the fact that the city has prevented the company from laying a small portion of its track, where, had it not interfered, the road could not have been operated without acquiring a right to use a por-

15. Wis.—Wright v. Milwaukee Electric Ry. & Light Co., 69 N.W. 791, 95 Wis. 29, 60 Am.S.R. 74, 36 L.R.A. 47.

16. N.Y.—People v. Atlantic Avenue R. Co., 26 N.E. 622, 125 N.Y. 513.

17. U.S.—Citizens' St. R. Co. v. Memphis, C.C.Tenn., 53 F. 715.

18. Pa.—People's Pass. R. Co. v. Baldwin, 14 Phila. 231, 37 Leg.Int. 424.

19. Pa.—Hestonville, etc., Pass. R. Co. v. Philadelphia, 39 Pa. 210.

20. U.S.—Central Passenger R. Co. v. Louisville City R. Co., C.C.Ky., 21 F. 358.

21. N.Y.—Paige v. Schenectady Ry. Co., 70 N.E. 213, 178 N.Y. 102.

22. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Use for transmission of electricity and compressed air

Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

23. U.S.—Citizens' St. R. Co. v. Memphis, C.C.Tenn., 53 F. 715. 60 C.J. p 241 note 71.

24. Ill.—McNeil v. Chicago City R. Co., 61 Ill. 150.

25. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946.

26. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946.

27. Mich.—Union St. R. Co. v. Snow, 71 N.W. 1073, 113 Mich. 694, error dismissed 18 S.Ct. 947, 168 U.S. 706, 42 L.Ed. 1214. 60 C.J. p 241 note 75.

28. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946.

29. N.Y.—People v. Broadway R. Co., 26 N.E. 961, 126 N.Y. 29, 26 Abb.N.Cas. 407.

30. N.Y.—People v. Broadway R. Co., supra.

31. N.Y.—People v. Broadway R. Co., supra.

32. Mo.—State v. East Fifth St. R. Co., 41 S.W. 955, 140 Mo. 539, 62 Am.S.R. 742, 38 L.R.A. 218.

tion of another company's track, which right could not be acquired.³³ So, also, where the grant is made on condition that one track is to be completed within a designated time except in case of delay by injunction, legal proceedings, or any cause beyond the control of the company, performance is not excused by reason of failure to obtain consent of property owners or a right of way through private property where it has a full legal right to force a right of way.³⁴

On the other hand, performance is excused where it is a legal impossibility because of the refusal of the property owners to consent to the construction required by the franchise, and where there are no legal means to compel consent.³⁵ It has also been held excused where performance was prevented by operation of law and the acts of the city authorities.³⁶ So it has been held that failure to complete construction within the time prescribed will not be permitted to work a forfeiture of the company's franchise where the delay was due to unforeseen circumstances, where the company had expended large sums of money and exercised due diligence in construction, and where the delay caused no pecuniary injury to the municipality or its inhabitants.³⁷

§ 93. — Waiver and Estoppel

The state or a municipality may waive performance of conditions imposed by it on granting a franchise or giving its consent to a street railroad company to con-

struct and operate its road, and thereby avoid the forfeiture of the franchise for breach of such conditions; but a municipality has no power to waive a forfeiture arising from nonperformance of conditions imposed by the state, or contract away the power of the state to forfeit a franchise for breach of conditions.

The state may waive performance of conditions imposed by it in the grant of street railroad franchises, and thereby avoid the forfeiture of the franchise for breach of such condition.³⁸ So, also, a municipality may waive performance of conditions imposed by it on granting a franchise or giving its consent to a street railroad company to construct and operate its road in the streets of the municipality.³⁹ However, a municipality has no power to waive a forfeiture arising from nonperformance of conditions imposed by the state,⁴⁰ or contract away the power of the state to forfeit a franchise for breach of conditions.⁴¹

A waiver may be either express or implied.⁴² A waiver will be inferred from any act which unequivocally recognizes that the franchise is still existing and in force, after knowledge of the act of omission constituting a ground of forfeiture.⁴³ If such act of recognition has the effect of causing the holder of the franchise to incur expense which he would not have incurred had the forfeiture been insisted on, or otherwise to change his position, the inference of a waiver becomes conclusive on the ground of estoppel.⁴⁴ A waiver may also result from subsequent legislation, state or municipal,

33. Mo.—*State v. East Fifth St. R. Co.*, supra.

34. N.Y.—*Manton v. South Shore Traction Co.*, 106 N.Y.S. 82, 121 App. Div. 410.

35. Pa.—*Millcreek Township v. Erie Rapid Transit St. R. Co.*, 64 A. 901, 216 Pa. 132.
60 C.J. p 241 note 83.

36. Ill.—*City of Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73.

Interruption of service by order of federal court in foreclosure proceeding

Pa.—*Dalton St. Ry. Co. v. City of Scranton*, 191 A. 133, 326 Pa. 6.

37. N.J.—*North Jersey St. Ry. Co. v. Inhabitants of Township of South Orange*, 43 A. 53, 58 N.J.Eq. 83.

38. Cal.—*People v. Los Angeles Electric R. Co.*, 27 P. 673, 91 Cal. 338.
60 C.J. p 242 note 86.

Waiver negatived

The declaration of forfeiture in statute declaring forfeited railway

company's right to operate elevated railway structure on a certain location served to define the attitude of the commonwealth by negativing waiver of the asserted breach of a condition of the grant and by insisting on forfeiture of the location by reason of the breach.—*Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

Possession by public trustees

A waiver by the commonwealth of an implied condition that the grant of a particular location to an elevated railway company should be used for the purpose for which it was granted could not be implied from fact that, under the Public Control Act and the contract between the company and the commonwealth embodied therein, public trustees had taken possession of location and structure thereon and were managing and operating company's properties.—*Boston Elevated Ry. Co. v. Commonwealth*, supra.

39. Pa.—*Dalton St. Ry. Co. v. City of Scranton*, 191 A. 133, 326 Pa. 6.
60 C.J. p 242 note 87.

Failure to file bond

Noncompliance by street railroad with conditions of a city ordinance granting franchise, in that railroad failed to file bond before construction, was not grounds for revocation of franchise, where city had not objected for many years to failure to file bond.—*Dalton St. Ry. Co. v. City of Scranton*, supra.

40. Ill.—*Chicago City Ry. Co. v. People*, 73 Ill. 541.
60 C.J. p 242 note 88.

41. Mo.—*State v. East Fifth St. R. Co.*, 41 S.W. 955, 140 Mo. 539, 38 L.R.A. 218, 62 Am.S.R. 742.

42. Cal.—*Santa Rosa City R. Co. v. Central St. Ry. Co.*, 38 P. 986, 4 Cal.Unrep.Cas. 950.
60 C.J. p 242 note 90.

43. Pa.—*Valley Rys. v. City of Harrisburg*, 124 A. 644, 280 Pa. 385.
60 C.J. p 242 note 91.

44. Cal.—*Santa Rosa City R. Co. v. Central St. R. Co.*, 38 P. 986, 4 Cal.Unrep.Cas. 950.

recognizing the continued existence of the company.⁴⁵ It has been held, however, that the mere acceptance of a street railroad company's payment of franchise taxes by the administrative officers of a city is not a waiver of rights of the municipality to claim a forfeiture of the franchise for non-performance of its conditions.⁴⁶ Where a street railroad failed to build an extension, which was the condition of its obtaining the use of the streets, indulgence by the borough in commencing proceedings to compel removal of the tracks under a forfeiture clause does not give rise to an estoppel, where the delay has led to no change in the situation.⁴⁷ The waiver of a right of forfeiture does not amount to the granting of a new right.⁴⁸

§ 94. — Extent of Forfeiture

The extent of the forfeiture depends on the provisions of the franchise, and, where such provisions authorize only a forfeiture of the entire grant, the city has no authority to select such portion of the route as it sees fit and ask to have a forfeiture declared on it, but, if it is entitled to a forfeiture, it is for all.

The extent of the forfeiture depends on the provisions of the franchise.⁴⁹ Where the only provision in a franchise is for a forfeiture of the entire grant, the city has no authority to select such portion of the route as it sees fit and ask to have a forfeiture declared on it; if it is entitled to a forfeiture, it is for all.⁵⁰ Where a franchise to a company, whose line was intended by the parties to be built in sections as the territory to be served became settled, provided that on failure to construct any portion of the road on or before the dates specified "the right herein granted shall cease," failure to construct any separable portion of the

line within the specified period works a forfeiture of the whole franchise.⁵¹ Where there was a breach of a condition of a grant of location that it be used for the purpose for which it was granted, the forfeiture extends to the entire location, including the part thereof situated on privately owned land, regardless of the rights retained in such land, since as far as the location was on privately owned land, it was incidental to the location in the public streets.⁵² Where a franchise was granted on condition that the company agreed to forfeit the road to the city in one year after ceasing to operate it, the word "forfeiture" does not signify a nonenforceable penalty or liquidated damages, but authorizes the court, on default of the conditions of the grant, to declare, in a proper action, an absolute forfeiture of the railway franchise, including rails, ties, roadbed, and things granted.⁵³ Where, however, the franchise provides that as much of the right of way as may not be occupied within a designated time shall be considered as abandoned, a forfeiture for noncompliance therewith is limited to as much of the right of way as is not occupied within the time designated, and does not extend to the completed portions of the road.⁵⁴

§ 95. — Persons Entitled to Assert

Ordinarily the state, and only the state, may institute proceedings for the forfeiture of a street railroad franchise, and private individuals or corporations cannot assert a forfeiture of the franchise of a street railroad corporation either in a direct or a collateral proceeding.

The state may institute proceedings for the forfeiture of a street railroad franchise,⁵⁵ or assert such forfeiture by legislative declaration, in a proper case.⁵⁶ Moreover, as a general rule, the

45. Ohio.—Akron v. Northern Ohio Traction, etc., Co., 27 Ohio Cir.Ct. 536.

60 C.J. p 242 note 93.

46. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946.

47. Pa.—Minersville Borough v. Schuylkill Electric R. Co., 54 A. 1050, 205 Pa. 334.

48. Va.—Newport News, etc., R. etc., Co. v. Hampton Roads, R., etc., Co., 47 S.E. 839, 102 Va. 795, error dismissed 27 S.Ct. 775, 203 U.S. 598, 51 L.Ed. 334.

49. Ohio.—Toledo v. Toledo Ry. & Light Co., 25 Ohio Cir.Ct. 441.

Title to rails and ties

It has been stated that, in case of the forfeiture of the special franchise of a street railroad company by a violation of the grant, title to the rails and ties would vest in the owner of the fee.—People v. State Tax Com'rs, 67 N.E. 69, 174 N.Y. 417, 105 Am.S.R. 674, 63 L.R.A. 884, affirmed 25 S.Ct. 705, 199 U.S. 1, 50 L.Ed. 65, 4 Ann.Cas. 381.

50. Ohio.—Toledo v. Toledo Ry. & Light Co., 25 Ohio Cir.Ct. 441.

51. U.S.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946.
60 C.J. p 243 note 1.

52. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

53. Minn.—City of Tower v. Tower & S. St. Ry. Co., 71 N.W. 691, 68 Minn. 500, 64 Am.S.R. 493, 38 L.R.A. 541.

54. Tex.—City of Houston v. Houston Belt & M. Park Ry. Co., 19 S. W. 786, 84 Tex. 581.
60 C.J. p 243 note 3.

55. Mo.—State ex rel. Kansas City v. East Fifth St. Ry. Co., 41 S.W. 955, 140 Mo. 539, 62 Am.S.R. 742, 38 L.R.A. 218.
60 C.J. p 243 note 4.

56. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

state alone can institute such proceedings,⁵⁷ and this principle has been held applicable, although the franchise was granted by the municipality under delegated authority.⁵⁸ However, there are decisions in which the right of a municipality to maintain proceedings to forfeit a franchise granted by it is apparently recognized;⁵⁹ and some decisions hold that a municipality may institute forfeiture proceedings where the franchise granted by it expressly gives it the power to declare a forfeiture for non-fulfillment of the conditions on which the franchise was granted,⁶⁰ or where a statute provides that the action may be brought by any person claiming an interest adverse to the franchise.⁶¹ Private individuals or corporations ordinarily may not assert a forfeiture of the franchise of a street railroad corporation either in a direct or collateral proceeding.⁶² It has been held, however, that an exclusive right granted to a street railroad company to operate its line in a city is such a property right as will entitle it to raise by injunction the question of forfeiture of the charter of another company which is granted the right to build a street railroad in certain streets of the same city.⁶³ It has also been held that, where a city was threatening to forfeit the franchise of a street railroad company for default of the latter which had been in controversy between them for years, a mortgagee of the company having a property right affected was entitled to maintain a suit in equity analogous to a bill of interpleader against the city and company to require them to submit their controversy to the

determination of the court.⁶⁴

§ 96. — Necessity for Judicial or Legislative Determination of Forfeiture

Unless it is expressly, or by necessary implication, so provided in a street railroad grant or franchise, failure to perform the conditions therein prescribed does not ipso facto work a forfeiture of the grant or franchise, but at most furnishes grounds for forfeiture, and it can be forfeited only in judicial proceedings instituted for that purpose, or by a legislative declaration.

Unless it is expressly, or by necessary implication, so provided in a street railroad grant or franchise, failure to perform the conditions therein prescribed does not ipso facto work a forfeiture of the grant or franchise, but at most furnishes grounds for forfeiture, and it can be forfeited only in judicial proceedings instituted for that purpose,⁶⁵ or by a legislative declaration.⁶⁶ It has been held that this rule is particularly applicable where, after expiration of the time prescribed for construction of the road, the work of construction is carried on without interference from the municipality.⁶⁷ On the other hand, if it is so provided by general statute,⁶⁸ or if the grant or franchise provides expressly or by necessary implication that nonperformance of conditions therein prescribed shall ipso facto work a forfeiture,⁶⁹ such provision is self-executing, and, on noncompliance with the conditions prescribed, no judicial proceedings for forfeiture are necessary. The legislative intent that a forfeiture shall be self-executing must be plain and unmistakable.⁷⁰ Where

57. Mo.—Kavanaugh v. City of St. Louis, 119 S.W. 552, 220 Mo. 496. 60 C.J. p 243 note 5.

58. Mo.—Kavanaugh v. City of St. Louis, 119 S.W. 552, 220 Mo. 496. 60 C.J. p 243 note 6.

59. Ohio.—Toledo v. Toledo R., etc., Co., 25 Ohio Cir.Ct. 441. 60 C.J. p 243 note 7.

60. Minn.—City of Tower v. Tower & S. Street Ry. Co., 71 N.W. 691, 68 Minn. 500, 64 Am.S.R. 493, 38 L.R.A. 541. 60 C.J. p 244 note 3.

61. Kan.—Olathe v. Missouri, etc., R. Co., 96 P. 42, 78 Kan. 193.

62. Va.—Newport News & O. P. Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co., 47 S.E. 839, 102 Va. 795, error dismissed 27 S.Ct. 775, 203 U.S. 598, 51 L.Ed. 334. 60 C.J. p 244 note 10.

63. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 463.

64. U.S.—Knickerbocker Trust Co. v. City of Kalamazoo, C.C.Mich., 182 F. 865.

65. Cal.—Santa Rosa City R. Co. v. Central St. R. Co., 38 P. 986, 4 Cal. Unrep.Cas. 950. 60 C.J. p 244 note 12.

Matter for judicial determination.

The legislative grant of a particular location to an elevated railway company constituted a contract, and whether there was a forfeiture of that location for breach of a condition of the grant was a matter for judicial determination on the facts and not for legislative determination. —Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

66. Cal.—Santa Rosa City R. Co. v. Central St. R. Co., 38 P. 986, 4 Cal.Unrep.Cas. 950.

Breach of condition subsequent

Under municipal grant authoriz-

ing annulment thereof if company failed to operate street railway as stipulated therein, and providing that privileges granted should thereupon cease, nonuser of franchise was breach of condition subsequent, and, hence, privilege of occupying street by placing tracks therein survived until revoked.—Green v. City of Mechanicville, 199 N.E. 26, 269 N.Y. 117, 102 A.L.R. 673.

67. Mich.—Sandstone Tp. v. Michigan Ry. Co., 164 N.W. 404, 198 Mich. 234.

68. N.Y.—In re Brooklyn Elevated R. Co., 77 N.E. 994, 185 N.Y. 171. 60 C.J. p 244 note 15.

69. Pa.—Millcreek Tp. v. Erie Rapid Transit St. R. Co., 58 A. 613, 209 Pa. 300. 60 C.J. p 245 note 16.

70. N.Y.—In re Brooklyn Elevated R. Co., 26 N.E. 474, 125 N.Y. 434. 60 C.J. p 245 note 17.

the consent of a city to the construction of a street railroad is considered a mere license and remains unused for such a length of time as to constitute an abandonment, it has been held that a judicial forfeiture necessary when the existence of the charter is involved is not necessary to render the particular forfeiture effective.⁷¹ It has been held that forfeiture of a street railroad franchise for nonuser may be effected by a declaration of revocation by the duly constituted municipal authorities,⁷² and such revocation, if based on sufficient grounds, is effective, without previous adjudication, from the time it is declared.⁷³

§ 97. — Proceedings to Enforce

Where failure to perform conditions prescribed by a street railroad grant or franchise does not ipso facto work a forfeiture thereof, a cause of forfeiture against the company cannot be enforced in any mode other than by a direct proceeding for that purpose against the company.

Where failure to perform conditions prescribed by a street railroad grant or franchise does not ipso facto work a forfeiture thereof, a cause of forfeiture against the company cannot be taken advantage of or enforced against it, collaterally or incidentally, or in any mode other than by a direct proceeding for that purpose against the company.⁷⁴ Quo warranto is a proper form of proceeding to obtain a forfeiture of the franchise of a street rail-

road company,⁷⁵ and some decisions hold that it is the exclusive remedy,⁷⁶ and that the franchise cannot be declared forfeited on a bill in equity,⁷⁷ or on a complaint in an action by the state against the corporation asking for forfeiture of the franchise.⁷⁸ There is, however, authority to the effect that there is no reason why the proceeding may not be by regular action;⁷⁹ and that, although equity dislikes to adjudge a forfeiture, and as a rule will do so only when no other adequate remedy is at hand, where parties to street railway franchises have by lawful contract expressly provided for a forfeiture, equity will not hesitate to grant what they have agreed to.⁸⁰

The complaint in proceedings to enforce a forfeiture must state facts showing grounds for forfeiture⁸¹ and present the questions on which an adjudication is desired.⁸² Ouster is the proper judgment on finding a forfeiture;⁸³ and, under some statutes, in addition to the forfeiture, a fine may be imposed.⁸⁴

§ 98. Usurpation of Franchise

The necessity of a franchise to construct and operate a street railroad, and the effect of unauthorized entry on, or occupation of, streets, roads, or bridges are discussed supra §§ 27, 28.

Examine Pocket Parts for later cases.

VI. RIGHTS IN, AND USE OF, PRIVATE PROPERTY; AND REMEDIES OF ABUTTING OWNERS

§ 99. Acquisition and Use of Private Property

Generally a street railroad company may acquire from private owners land or a right of way over land for the purpose of constructing and operating a part of its road thereon, by purchase, by lease, or, under some statutes, by voluntary grant or donation; but a mere

easement to use private property for a street railroad right of way reverts to the grantor on abandonment of user, and such reversion occurs where the grant of a right of way is expressly limited to the time for which the property is used and occupied for a railway.

In addition to its right to use the streets of a municipality, where conferred by franchise, as dis-

71. Mo.—State ex rel. United Rys. Co. v. Public Service Commission, 192 S.W. 958, 198 S.W. 872, 270 Mo. 429.
60 C.J. p 245 note 18.

72. N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

73. N.Y.—Bankers Trust Co. v. City of Yonkers, supra.

74. Mo.—Kavanaugh v. City of St. Louis, 119 S.W. 552, 220 Mo. 496. 60 C.J. p 246 note 19.

75. Kan.—Olathe v. Missouri, etc., R. Co., 96 P. 42, 78 Kan. 193. 60 C.J. p 246 note 20.

76. Mo.—Kavanaugh v. City of St. Louis, 119 S.W. 552, 220 Mo. 496. Pa.—Lejee v. Continental Passenger Ry. Co., 10 Phila. 362.

77. Pa.—Lejee v. Continental Passenger Ry. Co., supra.

78. N.Y.—People v. Westchester Traction Co., 108 N.Y.S. 59, 123 App. Div. 689.

79. Cal.—People v. Sutter Street Ry. Co., 49 P. 736, 117 Cal. 604.

80. Mich.—Village of Grandville v. Grand Rapids, H. & C. R. R., 196 N.

W. 351, 225 Mich. 587, 34 A.L.R. 1408.

81. Cal.—People v. Los Angeles Electric R. Co., 27 P. 673, 91 Cal. 338.
60 C.J. p 246 note 25.

82. Ark.—Little Rock R., etc., Co. v. North Little Rock, 83 S.W. 826, 1026, 76 Ark. 48.

83. Pa.—Commonwealth v. Middletown Electric R. Co., 23 Pa.Co. 262. Wis.—State v. Madison Street Ry. Co., 40 N.W. 487, 72 Wis. 612, 1 L. R.A. 771.

84. Cal.—People v. Sutter St. R. Co., 49 P. 736, 117 Cal. 604.

cussed supra § 72, it is very generally held that a street railroad company may acquire from private owners land or a right of way over land for the purpose of constructing and operating a part of its road thereon, by purchase,⁸⁵ by lease,⁸⁶ or, under some statutes, by voluntary grant or donation.⁸⁷ The right to acquire the right of way over privately owned land by purchase has been held to exist, regardless of any other existing right to acquire such property by condemnation proceedings.⁸⁸ Private property cannot, however, be used by a street railroad company without right, and the owner of land over which electric power wires have been constructed without right by an interurban railroad may maintain ejectment to compel their removal.⁸⁹ A valid right of the company in the land or right of way acquired by it will be protected by the courts.⁹⁰

General rules as to contracts and conveyances apply with respect to the construction, operation, and effect of a grant or conveyance to a street railroad of a right of way over, or interest in, private property.⁹¹ Contracts to convey a right of way over

private property for the construction and operation of street railroads stand on the same footing as other contracts,⁹² and will be specifically enforced in a proper case,⁹³ as where there has been a substantial compliance with conditions precedent.⁹⁴ Where the company avails itself of the right of way granted by the owner of land to construct its road over such land, the owner may recover such compensation as was agreed on, although the agreement for compensation was oral;⁹⁵ but, where the company is prevented from using such right of way by refusal of consent to its use by the local authorities, the owner cannot recover the full amount of the purchase price, but only an amount sufficient to cover the loss sustained by nonfulfillment of the contract.⁹⁶ Where the consideration for a deed of land for a street railroad company was to furnish to the grantor's family free electric current, "for such length of time, only, as they reside at their present residence," their removal from their residence for a short period of time does not work a forfeiture of the privilege conferred by the deed, especially where it was extended to them after their return;⁹⁷ nor does the fact that title to the residence

85. U.S.—Montgomery Amusement Co. v. Montgomery Traction Co., C.C.Ala., 139 F. 353, affirmed 140 F. 988, 72 C.C.A. 682.
60 C.J. p 246 note 30.

Held not a street railroad

Railway operating certain line was held not a street railroad for purpose of determining authority to own right of way.—Clay v. Missouri State Highway Commission, 239 S.W. 2d 505, 362 Mo. 60.

Abandonment of use on removal of tracks

Removal of street railroad tracks twenty-three years before action in trespass for damages to plaintiff's real estate was brought, absence of tracks after their removal, and non-user for street railroad purposes for twenty-five consecutive years were conclusive that plaintiff's premises were abandoned for railroad uses not later than time when tracks were removed.—Proctor v. Central Vt. Public Service Corp., 77 A.2d 828, 116 Vt. 431.

86. U.S.—Montgomery Amusement Co. v. Montgomery Traction Co., C.C.Ala., 139 F. 353, affirmed 140 F. 988, 72 C.C.A. 682.

87. Okl.—Oklahoma Ry. Co. v. Severns Paving Co., 170 P. 216, 67 Okl. 206, 10 A.L.R. 157, followed in Oklahoma Ry. Co. v. Severns Paving Co., 170 P. 220, 67 Okl. 211.

88. U.S.—Montgomery Amusement Co. v. Montgomery Traction Co., C.C.Ala., 139 F. 353, affirmed 140 F. 988, 72 C.C.A. 682.

89. Ohio.—Saner v. Lake Shore Electric R. Co., 28 O.C.A. 255.

90. Tex.—Ft. Worth St. R. Co. v. Queen City R. Co., 9 S.W. 94, 71 Tex. 165.

60 C.J. p 246 note 34.

Elevated railroad acquired right to impair light, air, and access at instant when city took title to abutting property for street purposes.—In re Elevated Railroad Structures, etc., in East Forty-Second St., City of New York, 253 N.Y.S. 743, 141 Misc. 565, followed in In re Forty Second St. Spur, Borough of Manhattan, City of New York, 257 N.Y.S. 37, 143 Misc. 129, affirmed In re Elevated Railroad Structures, etc., in East Forty-second St., City of New York, 262 N.Y.S. 973, 238 App.Div. 832, affirmed In re Elevated Railroad Structures in Forty-second St., City of New York, 192 N.E. 188, 265 N.Y. 170, affirmed Roberts v. City of New York, 55 S.Ct. 689, 295 U.S. 264, 79 L.Ed. 1429.

91. Fla.—Richardson v. Holman, 33 So.2d 641, 160 Fla. 65.

Promise of support

Promise of railroad of support to landowners contained in subway taking and implied from railway's acceptance of landowners' deed reserv-

ing support, both of which ran to railway and its successors and assigns, was not covenant of railway and did not run with land so as to render railway liable on the promise to landowners' successor, and, hence, metropolitan transit authority taking over assets of railway and assuming railway's liabilities likewise was not liable.—Putnam Furniture Bldg. v. Commonwealth, 80 N.E.2d 649, 323 Mass. 179.

92. Ill.—St. Louis, etc., Electric R. Co. v. Van Hoorebeke, 61 N.E. 326, 191 Ill. 633.

Waiver of lien

Vendor waived his lien to land conveyed to street railway corporation of which he was a director, where he had not demanded or taken any steps to secure delivery of stock which was to be received in payment.—Spindler v. Iowa & O. S. L. Ry. Co., 155 N.W. 271, 173 Iowa 348.

93. Ill.—St. Louis, etc., Electric R. Co. v. Van Hoorebeke, 61 N.E. 326, 191 Ill. 633.

94. Ill.—St. Louis, etc., Electric R. Co. v. Van Hoorebeke, supra.

95. Pa.—Quigley v. Montgomery, etc., Electric R. Co., 57 A. 512, 208 Pa. 238.

96. Pa.—Hays v. Wilksburg, etc., St. R. Co., 54 A. 822, 204 Pa. 488.

97. Pa.—Humbert v. West Penn. Rys. Co., 77 A. 661, 228 Pa. 440, 444.

passed to another give the right of forfeiture, if the family continues to occupy it.⁹⁸ A covenant contained in a grant of a right of way that the street railroad company will maintain a stop on the grantor's premises will be enforced at the instance of the grantor, although it does not designate a definite location for the stop,⁹⁹ but damages may not be recovered for breach of covenant that trains operated over the right of way should stop regularly on signal, where the railroad abandoned the line in good faith because of losses in operation.¹

Generally, a grant of land to construct and operate a street railroad is limited to what is expressly granted,² and, where there has been a prior dedication of the land to public use, nothing in derogation of the public user will be implied.³ A deed which "sells and quitclaims to the grantee all the right, title, and interest" of the grantor carries a fee, and not a mere easement, even though coupled with an agreement that the grantee will use the land for the construction and operation of a street railway,⁴ and although it contains a condition that if, in the future, it shall be abandoned for that purpose, it shall revert to the grantor or to the public.⁵ It has also been held that a deed of land to a holder of a street railway franchise without limitation as to the use to which it might be put, condi-

tioned to be void on the grantee's failure to construct and operate the line of street railway within a designated time, otherwise to be and remain the property of grantee, is an absolute grant of land on the single condition named, and that the grant is not defeated by the railway's discontinuance of operation after a short time.⁶

Under the provisions of some statutes, a voluntary grant or donation of land to a street railroad company vests it with an estate in fee, although the grant was for railroad purposes only.⁷ Under other statutes, although deeds by their terms conveyed a fee to the railroad company, the right of the railroad company to acquire a right of way over private property is limited to an easement,⁸ and the right acquired under the deed expires when the company abandons the use of the land for railroad purposes.⁹ Ordinarily, where private land is acquired for street railroad purposes without any provision for reverter if the railroad should cease to use the realty for such purposes, no right of reverter will be read into the deed,¹⁰ but a mere easement to use private property for a street railroad right of way reverts to the grantor on abandonment of user,¹¹ and such reversion occurs where the grant of a right of way is expressly limited to the time for which the property is used and occupied for a railway.¹²

98. Pa.—Humbert v. West Penn. Rys. Co., supra.
60 C.J. p 247 note 41.

99. Pa.—Vandivort v. Pittsburgh, etc., R. Co., 94 A. 743, 249 Pa. 217.

1. Ky.—Louisville & Interurban R. Co. v. Guenther, 105 S.W.2d 1029, 268 Ky. 790.

2. Pa.—Magerko v. West Penn Rys. Co., 76 A.2d 618, 365 Pa. 609.

Power lines

Under grant of a right of way for a railroad, where grantee constructed an electric railroad with necessary electrical equipment and power lines, if power lines were constructed solely for use of power company in pursuit of a business different from railway business and for profit of both railroad and power companies, they were not within grant of right of way, but if power lines were erected to be used by railway in the future in its business as a railway, no additional servitude was imposed on the land.—Potomac Edison Co. v. Routzahn, 65 A.2d 580, 192 Md. 449.

3. Pa.—Magerko v. West Penn Rys. Co., 76 A.2d 618, 365 Pa. 609.

Use of full width of street

Where landowner, after recording a plan showing street, then only fifteen feet wide, as being fifty feet wide, conveyed to street railway a right of way along western side of such street, intention thereby to destroy the right of the public to use the full fifty-foot width of such street could not be presumed in absence of anything in deed to indicate such intention.—Magerko v. West Penn Rys. Co., supra.

4. Iowa.—Des Moines City R. Co. v. City of Des Moines, 159 N.W. 450, 165 N.W. 398, 183 Iowa 1261, L.R.A.1918D 839.

5. Iowa.—Des Moines City R. Co. v. City of Des Moines, supra.

6. La.—Bush v. Bolton, 100 So. 692, 156 La. 491.

7. Okl.—Oklahoma Ry. Co. v. Sevens Paving Co., 170 P. 216, 67 Okl. 206, 10 A.L.R. 157.
60 C.J. p 247 note 45.

8. Mo.—State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 347 Mo. 690.

9. Mo.—State ex rel. State Highway

Commission v. Union Electric Co. of Missouri, supra.

10. Okl.—Stinson v. Oklahoma Ry. Co., 126 P.2d 260, 190 Okl. 624.

11. S.C.—Keenan v. Broad River Power Co., 161 S.E. 330, 163 S.C. 133.

Termination of trolley service

Under easement conveying to traction company right to construct across grantor's land a roadbed, tracks, and overhead structure to be built and maintained in connection with operation of trolley system, and providing that easement should revert on abandonment, all rights thereunder ceased on termination of trolley service and power company with which traction company merged could not continue to transmit electricity over right of way.—Sellick v. Jersey Central Power & Light Co., 11 A.2d 137, 124 N.J.Law 110.

12. Pa.—Dalton St. Ry. Co. v. Commonwealth, 53 Pa.Dist. & Co. 650, 46 Lack.Jur. 209.

Transmission of electricity

Under deed granting right of way for construction and operation of a railroad over a strip of land and providing for reverter if railroad should

A change from regular streetcars to trackless trolleys does not constitute an abandonment of the right of way or abandonment of use thereof for "railway purposes" within a deed containing a reversion clause;¹³ and a grant of a right of way across private property by a deed not containing a reversion clause does not revert to the grantor because of a change from an electric streetcar system to a gasoline-driven motorbus line, which change, without being accompanied with heavy additional burdens, did not constitute an abandonment of the right of way.¹⁴ A grant of land to a railway as long as it should be "maintained and operated" thereon has been held not forfeited by abandonment, although only a spur track was maintained;¹⁵ nor is an abandonment effected by a leasing of a small portion of the right of way for nonrailroad use, where the railroad retained the right to terminate the lease in the event it was desired to extend railroad facilities.¹⁶

On abandonment of a right of way and reversion to the grantor or his heirs, a bill may be maintained to compel the company to remove equipment from the right of way,¹⁷ but a power company as successor to the grantee is not obligated to remove the fill and abutments constructed as a suitable roadbed and for maintenance of grade.¹⁸

Power to impose added burdens. A street railroad company which has acquired a right of way over private property cannot grant to another company the right to impose additional burdens thereon.¹⁹

cease to be maintained and operated, on abandonment of the strip for electric railroad purposes, reverter occurred notwithstanding use of the right of way by successor power company for transmission of electricity to operate a railroad elsewhere.—*Potomac Edison Co. v. Routzahn*, 65 A.2d 580, 192 Md. 449.

Grant of fee with possibility of reverter

A warranty deed with a proviso that the conveyance was subject to the condition that, should the grantee cease to use the land for street railroad purposes, title should revert to the grantor and his heirs and assigns has been held to convey an estate in fee simple determinable with possibility of reverter, and not a condition subsequent, and the possibility of reverter materialized immediately when the railroad company ceased to use the land for street railroad purposes.—*Richardson v. Holman*, 33 So.2d 641, 160 Fla. 65.

Mode of construction. Under a deed granting a right of way to a suburban electric railroad company and authorizing it to construct and operate its road in the same manner as is authorized by a certain named franchise, which franchise requires the rails to be laid flush with the streets, the company has no right to build and maintain a trestle above grade.²⁰

Consent of local authorities. A provision of a state constitution requiring the consent of local municipal authorities for the construction of street railroads has been held not only to forbid construction without consent on the public streets, but to prohibit their construction on private land without the consent of local authorities, if intended for public transportation.²¹ Under a statute precluding the operation of a road without a location approved by the local authorities, the word "location," as applied to street railways on private lands, means a location in the nature of an easement in such land or of ownership thereof with permission from public authorities to the street railway company to construct and maintain its railway on that land;²² and it has been said that a location through the public streets, connected in any place with a track running through private lands, will not be likely to be approved by the authorities, unless the general arrangement of the course is such as the public convenience requires.²³ On the other hand, it has been held that it is not necessary that the consent of local authorities be obtained as a condition precedent to the location by the company of such portions of its

13. Tenn.—*Anderson v. Knoxville Power & Light Co.*, 64 S.W.2d 204, 16 Tenn.App. 259.

14. Kan.—*Kansas Electric Power Co. v. Walker*, 51 P.2d 1002, 142 Kan. 808, 102 A.L.R. 387.

15. Wash.—*Burkheimer v. City of Seattle*, 299 P. 381, 162 Wash. 645.

16. N.Y.—*Kouwenhoven v. New York Rapid Transit Corp.*, 9 N.Y.S.2d 629, 256 App.Div. 253, affirmed 24 N.E.2d 485, 281 N.Y. 811, reargument denied 25 N.E.2d 147, 282 N.Y. 593.

17. Md.—*Potomac Edison Co. v. Routzahn*, 65 A.2d 580, 192 Md. 449.

18. Md.—*Potomac Edison Co. v. Routzahn*, supra.

19. N.C.—*Wadsworth Land Co. v. Piedmont Traction Co.*, 78 S.E. 299, 162 N.C. 503, rehearing denied 81 S.E. 996, 166 N.C. 232.

Electric transmission line

Where interurban railroad company had only an easement interest in land, it had no right to grant an additional easement burden for electric transmission line beyond period of use by railroad for right of way purposes.—*State ex rel. State Highway Commission v. Union Electric Co. of Missouri*, 148 S.W.2d 503, 347 Mo. 690.

20. Mich.—*Lane v. Michigan Traction Co.*, 97 N.W. 354, 135 Mich. 70.

21. Pa.—*Portland Borough v. Stroudsburg, etc., St. Ry. Co.*, 21 Pa.Dist. 965.

22. Mass.—*Boston Elevated Ry. Co. v. Commonwealth*, 39 N.E.2d 87, 310 Mass. 528.

23. Mass.—*Farnum v. Haverhill & A. St. Ry. Co.*, 59 N.E. 755, 178 Mass. 300.

line as are not within, on, or across a street, but the consent may be secured subsequently.²⁴

§ 100. Rights and Remedies of Abutting Owners

The street railroad company and the abutting owners are each entitled to the reasonable use of the street, having due regard to the rights of the other, and each will be liable to the other for injuries resulting from abuse of their respective rights.

The street railroad company and the abutting owners are each entitled to the reasonable use of the street, having due regard to the rights of the other,²⁵ and each will be liable to the other for injuries resulting from abuse of their respective rights.²⁶ The property owner has the right to insist that the street shall not be devoted to a use inconsistent with its purposes as a public street,²⁷ and that the company shall do no unnecessary or unreasonable injury to others.²⁸ So, it has very generally been held that, where a street railroad is constructed without authority of law, or is constructed or operated in an unlawful manner, abutting owners are entitled to damages for such injuries as they may have suffered in consequence thereof,²⁹ if they have not consented to such use,³⁰ or waived the right to recover the damages sustained;³¹ and this right of action exists, although the fee of the street is in the city.³² An agreement to waive damages to land by the obstruction of a highway by a street railroad, in consideration of a money payment and certain promises by the railroad company, is not one which can be specifically

enforced in equity in favor of the railroad company.³³

§ 101. — Injunction

- a. In general
- b. Defenses
- c. Parties, pleading, evidence, and decree

a. In General

If a street railroad company has been legally vested with authority to lay out a railroad in a street, abutting owners are not entitled to an injunction to prevent its construction; but the construction and operation of a street railroad on a public street or highway, without authority of law, or in an unlawful manner, are a public nuisance, which any abutting owner who suffers a special injury may sue to enjoin.

If a street railroad company has been legally vested with authority to lay out a railroad in a street, abutting owners are not in any event entitled to an injunction to prevent its construction,³⁴ the remedy, if any, being by action for damages.³⁵ On the other hand, although the rule seems to be otherwise in some jurisdictions,³⁶ it has elsewhere been very generally held that the construction and operation of a street railroad on a public street or highway, without authority of law, or in an unlawful manner, are a public nuisance, which any abutting owner who suffers a special injury may sue to enjoin,³⁷ although he has no title to any part of the street itself.³⁸ It is not necessary that the abutting owner show that the benefits from the railroad will not offset the injuries resulting from the unauthorized construction and operation of the road.³⁹ A city in its proprietary capacity as

24. Ill.—Harvey v. Aurora, etc., R. Co., 57 N.E. 857, 186 Ill. 283.

25. Colo.—Harrison v. Denver City Tramway Co., 131 P. 409, 54 Colo. 593, 44 L.R.A., N.S., 1164.
60 C.J. p 248 note 55.

Right of abutting owner to recover compensation for new use of street by street railroad see Eminent Domain § 133 c.

26. Ohio.—Oviatt v. Akron St. R. Co., 3 Ohio Dec. 252.

27. N.Y.—Hussner v. Brooklyn City R. Co., 21 N.E. 1002, 114 N.Y. 433, 11 Am.S.R. 679.

28. Conn.—Cadwell v. Connecticut Ry. & Lighting Co., 80 A. 285, 84 Conn. 450.
60 C.J. p 248 note 58.

29. N.Y.—Hussner v. Brooklyn City

R. Co., 21 N.E. 1002, 114 N.Y. 433, 11 Am.S.R. 679.
60 C.J. p 248 note 59.

Changing grade of street

In the absence of express authority, a street railroad company has no right to change the existing grade of a street, and, when it does so, it is liable for the damages suffered by an abutting owner.—Stritesky v. Cedar Rapids, 67 N.W. 271, 98 Iowa 373.

30. Mich.—Grand Rapids & I. R. Co. v. Heisel, 11 N.W. 212, 47 Mich. 393.

31. Ky.—Somerset Water, etc., Co. v. Doyle, 107 S.W. 203, 32 Ky.L. 726.
60 C.J. p 249 note 61.

32. N.Y.—Mahady v. Bushwick R. Co., 91 N.Y. 148, 43 Am.R. 661.

33. Iowa.—Darst v. Ft. Dodge, D. M. & S. R. Co., 179 N.W. 61, 189 Iowa 632.

34. Kan.—Nuttle v. Wichita R. & Light Co., 256 P. 128, 123 Kan. 517.
60 C.J. p 249 note 68.

35. Kan.—State v. Parsons St. Ry. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L.R.A., N.S., 1082.

Ohio.—Taphorn v. Marietta & C. R. Co., 6 Ohio Dec., Reprint, 420.

36. Ill.—Doane v. Lake St. Elevated R. Co., 46 N.E. 520, 165 Ill. 510.
56 Am.S.R. 265, 36 L.R.A. 97.
60 C.J. p 250 note 70.

37. Kan.—Longenecker v. Wichita R. & Light Co., 102 P. 492, 80 Kan. 413.
60 C.J. p 250 note 71.

38. N.Y.—Fanning v. Osborne, 7 N. E. 307, 102 N.Y. 307.
60 C.J. p 251 note 72.

39. N.Y.—McClean v. Westchester

owner of lots is entitled to an injunction like any other owner.⁴⁰

Inadequacy of the remedy at law by reason of the difficulty of estimating the amount of damages suffered, it has been said, is a sufficient ground why a court of equity should take cognizance of the question.⁴¹ Nevertheless, an abutting owner is not entitled to an injunction against the unauthorized construction and operation of a street railroad unless he has suffered special injury.⁴² It has been held that, while an injunction may be granted abutting owners to prevent construction of a street railway under an invalid ordinance and franchise, a further injunction to prevent the company from accepting an invalid ordinance and franchise will not be granted, as the rights of the abutting owners are fully protected by the injunction forbidding the company to enter on the street on which their property abuts;⁴³ and that the mere grant of consent by the local authorities to the building and operation of a street railroad does not constitute irreparable injury to abutting property, so as to entitle an owner to maintain a suit to enjoin such action.⁴⁴ In accordance with principles governing injunctions in actions generally, it has been held that, although the construction and operation of an additional track were not authorized, the court might, on condition that the company pay damages sustained by plaintiff, an abutting owner, refuse an injunction to compel removal of the track, where for a long period of time plaintiff had made no objection, and where the damage to defendant and to the public caused by the removal of the track would be greatly in excess of the damage to plaintiff by the discontinuance thereof.⁴⁵

Interference with maintenance and operation. If

the rerouting of a streetcar line by a city, so as to require a change of cars where none was formerly required, would not prevent efficient service on the line, and subserves the interest of the general public, property owners abutting thereon cannot enjoin the rerouting because of any depreciation in the value of their property caused thereby.⁴⁶

b. Defenses

It is a good defense to an action by an abutting owner to enjoin the construction and operation of a street railroad that he consented thereto, or that he stood by and made no objection when the railroad was constructed, where large sums of money were expended in so doing.

It is a good defense to an action by an abutting owner to enjoin the construction and operation of a street railroad that he consented thereto,⁴⁷ or that he stood by and made no objection when the railroad was constructed, where large sums of money were expended in so doing.⁴⁸ However, consent to construction and operation of a street railroad will not estop the abutting owner from objecting to other construction which will constitute the imposition of an additional burden on the street or highway, such as a switch,⁴⁹ and this is true, even though the switch is necessary to the operation of the main line,⁵⁰ and although the power is conferred on the company to lay switches by its charter and by the franchise granted by the local authorities.⁵¹ It has similarly been held that acquiescence in the use of two tracks of an elevated road for a long period of time does not affect the abutting owner's right to object to a third track.⁵²

Delay in bringing suit to enjoin construction of a street railroad does not amount to laches where it is caused by negotiations of the parties to avoid litigation;⁵³ nor does mere delay alone within the

Electric R. Co., 55 N.Y.S. 556, 25 Misc. 383.
60 C.J. p 251 note 73.

40. Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 181 N.W. 821, 173 Wis. 400, 13 A.L.R. 802.

41. N.Y.—Bradley v. Degnon Contracting Co., 140 N.Y.S. 825, 80 Misc. 90, affirmed 141 N.Y.S. 852, 157 App.Div. 237.

42. Cal.—City Story v. San Jose-Los Gatos Interurban R. Co., 88 P. 977, 150 Cal. 277.
60 C.J. p 251 note 76.

43. Wis.—Linden Land Co. v. Milwaukee Electric R., etc., Co., 83 N.W. 851, 107 Wis. 493.

44. U.S.—Seccomb v. Wurster, C.C. N.Y., 83 F. 856.

45. N.Y.—Knoth v. Manhattan R. Co., 96 N.Y.S. 844, 109 App.Div. 802, affirmed 79 N.E. 1015, 187 N.Y. 243.
60 C.J. p 251 note 80.

46. Mo.—Heidegger v. Metropolitan St. Ry. Co., 126 S.W. 990, 142 Mo. App. 335.

47. N.Y.—Heimbarg v. Manhattan R. Co., 45 N.Y.S. 999, 19 App.Div. 179, affirmed 56 N.E. 899, 162 N.Y. 352.
60 C.J. p 251 note 81.

48. La.—Tilton v. New Orleans City R. Co., 35 La. Ann. 1062.

49. Ohio.—Chambers v. Cleveland, etc., Traction Co., 27 Ohio Cir.Ct. 193.

50. Ohio.—Chambers v. Cleveland, etc., Traction Co., supra.

51. Ohio.—Chambers v. Cleveland, etc., Traction Co., supra.

52. N.Y.—Roosevelt v. New York El. R. Co., 111 N.Y.S. 440, 58 Misc. 463.
60 C.J. p 251 note 86.

53. N.Y.—Callahan Estate v. Interborough Rapid Transit Co., 152 N.Y.S. 987, 90 Misc. 79, reversed on other grounds 153 N.Y.S. 770, 168 App.Div. 81.

statutory period for relief at law bar the abutting owner from securing an injunction.⁵⁴ Also, the right to injunctive relief is not barred by laches where the suit for injunction was commenced within two weeks after the work of construction began, and where the owner had no knowledge before that time that the work was about to commence.⁵⁵

c. Parties, Pleading, Evidence, and Decree

Two or more owners, who will be similarly affected by the construction of a street railroad without authority of law in the street on which their property abuts, may unite in an action to enjoin the construction. It must be alleged and proved that the construction and operation is without authority of law, that it constitutes a public nuisance, and that the complainant will suffer special injury different from that sustained by the general public.

Two or more owners, who will be similarly affected by the construction of a street railroad without authority of law in the street on which their property abuts, may unite in an action to enjoin the construction,⁵⁶ where it would do common injury to them independent of, and different from, that which the public suffers.⁵⁷ It has been held, however, that one owner cannot maintain an action to enjoin the construction on behalf of himself and all abutting property owners, since they have no common or general interest.⁵⁸ In a suit by property owners on a street to prevent the construction of a street railroad thereon, other property owners who consented to such building are not necessary parties.⁵⁹ So it has been held that the city is not a proper party to an action by a property owner to enjoin the unauthorized construction of a street railroad,⁶⁰ although the lack of authority to construct results from the invalidity of the grant by the city of a franchise for such construction.⁶¹ A reservation by a grantor of damages to

the premises conveyed, caused by the construction and operation of an elevated railroad in the street on which the premises abut, does not establish any trust relation between the grantor and the grantee, and, therefore, the grantor is not entitled to be made a party in an action by the grantee against the company to recover such damages.⁶² In an action to enjoin the operation of a street railroad, a company which has leased the street railroad since the commencement of the action should be brought in as a defendant by supplemental summons and complaint.⁶³

Pleading. A bill or complaint by an abutting owner, to enjoin the construction and operation of a street railroad on a street on which his property abuts, must allege that the construction and operation are without authority of law,⁶⁴ that they constitute a public nuisance,⁶⁵ and that complainant will suffer special injury different from that sustained by the general public.⁶⁶ The fact that plaintiff has prayed for more relief than he is entitled to does not preclude an award of such part thereof as is warranted by the pleadings and proof.⁶⁷

In accordance with rules governing actions for injunctions generally, the pleadings and proof in actions for injunctions of this nature must correspond, and a material variance is fatal to a recovery.⁶⁸

Evidence. In order to authorize the issuance of an injunction in an action of the character under consideration, complainant must show by competent evidence that the construction and operation of the road would constitute a public nuisance,⁶⁹ and that complainant would suffer special injury dif-

54. Wis.—Schuster v. Milwaukee Electric Ry. & Light Co., 126 N.W. 26, 142 Wis. 578.

55. N.Y.—Beekman v. Third Ave. R. Co., 43 N.Y.S. 174, 13 App.Div. 279, affirmed 47 N.E. 277, 153 N.Y. 144.

56. Wis.—Linden Land Co. v. Milwaukee Electric Ry. & Light Co., 83 N.W. 851, 107 Wis. 493.

57. Kan.—Atchison St. Ry. Co. v. Nave, 17 P. 587, 38 Kan. 744, 5 Am. S.R. 800.

58. Wis.—Linden Land Co. v. Milwaukee Electric Ry. & Light Co., 83 N.W. 851, 107 Wis. 493.
60 C.J. p 252 note 92.

59. U.S.—Thompson v. Schenectady R. Co., C.C.N.Y., 124 F. 274.
60 C.J. p 252 note 93.

60. N.Y.—Beekman v. Third Ave. R. Co., 43 N.Y.S. 174, 13 App.Div. 279, affirmed 47 N.E. 277, 153 N.Y. 144.

61. N.Y.—Beekman v. Third Ave. R. Co., supra.

62. N.Y.—Shepherd v. Metropolitan Elevated R. Co., 31 N.Y.S. 537, 82 Hun 527, affirmed 42 N.E. 726, 147 N.Y. 685, reargument denied 42 N. E. 726, 147 N.Y. 713.

63. N.Y.—Farley v. Manhattan Ry. Co., 102 N.Y.S. 330, 117 App.Div. 248, 38 N.Y.Civ.Proc. 459.

64. Tex.—Mangan v. Texas Transp. Co., 44 S.W. 998, 18 Tex.Civ.App. 478.

60 C.J. p 252 note 97.

65. Ala.—Baker v. Selma Street &

Suburban Ry. Co., 33 So. 685, 135 Ala. 552, 93 Am.S.R. 42.

N.J.—Hogencamp v. Paterson Horse R. Co., 17 N.J.Eq. 83.

66. Ala.—Baker v. Selma Street & Suburban Ry. Co., 33 So. 685, 135 Ala. 552, 93 Am.S.R. 42.
60 C.J. p 252 note 99.

67. Wis.—Younkin v. Milwaukee Light, etc., Co., 98 N.W. 215, 120 Wis. 477.
60 C.J. p 252 note 2.

68. N.Y.—Kennedy v. Mineola, etc., Traction Co., 71 N.E. 102, 178 N.Y. 508.
60 C.J. p 252 note 4.

69. Ala.—Baker v. Selma St., etc., R. Co., 33 So. 685, 135 Ala. 552, 93 Am.S.R. 42.

ferent in kind from that sustained by the general public.⁷⁰ It has been held, however, that, when lack of authority to construct the road is alleged, the burden is then on the company to show its authority.⁷¹ Where plaintiffs contend that the county authorities have not given their consent for the railway company to appropriate that part of the public road of the county between two cities, and that, therefore, it will be impossible for the company to construct and operate a continuous road as contemplated, evidence that, if there should be any difficulty in obtaining the consent of the county authorities the company could and would acquire the property contiguous to such public road is admissible.⁷²

Decree. Where the company does not begin to construct its road until after its franchise therefor has expired, an owner of property abutting on the line of the proposed road under process of construction is entitled to a continuance of a temporary injunction during the pendency of an action perpetually to enjoin the construction of the road.⁷³ Where the company has been enjoined from operating its road because the necessary consent of the county court has not been obtained, it is not error to refuse to modify the decree so as to allow the company permission to use one side of the street, instead of the center, since such modification would be granting the company a right which it could obtain only from the county court.⁷⁴ On rendition

of a decree for damages in making an excavation in front of plaintiff's premises and in constructing and maintaining a street railroad and enjoining its further maintenance, damages should not be awarded for permanent injury, but only for the injury done up to the time of the decree.⁷⁵

§ 102. — Actions for Damages

In defense of an action by an abutting owner to recover for injuries sustained by him by the unauthorized construction and operation of a street railroad in a street on which his property abuts, it cannot be set up as a defense that the road is liable to abatement as a nuisance.

In defense of an action for damages, by an abutting owner to recover for injuries sustained by him by the unauthorized construction and operation of a street railroad in a street on which his property abuts, it cannot be set up as a defense that the road is liable to abatement as a nuisance; defendant, having availed itself of the grant of authority, is estopped to question its validity.⁷⁶

Pleadings and evidence. Rules governing pleadings,⁷⁷ and burden of proof,⁷⁸ and admissibility⁷⁹ of evidence in actions for damages generally apply in actions by abutting owners to recover damages resulting from the unauthorized construction or operation of street railroads in front of their premises.

VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT

A. IN GENERAL

§ 103. Duty to Construct

While a street railroad company may under some circumstances be obligated to construct a street railroad line, and may be compelled to act by appropriate remedy, mere authority to construct imposes no positive obligation on the company to do so.

While a street railroad company, by procuring the enactment of, and accepting, a statute granting a franchise to construct a line, may be obligated to construct such line,⁸⁰ mere authority to construct a street railroad is permissive only, and im-

70. Ala.—Baker v. Selma St., etc., R. Co., *supra*.
60 C.J. p 252 note 6.

71. Pa.—Curry v. Pittsburgh, H. B. & N. C. Ry. Co., 96 A. 821, 251 Pa. 340.
60 C.J. p 252 note 7.

72. Ga.—Almand v. Atlanta Consol. St. R. Co., 34 S.E. 6, 108 Ga. 417.

73. N.Y.—Manton v. South Shore Traction Co., 106 N.Y.S. 82, 121 App. Div. 410.

74. Mo.—Swinhart v. St. Louis, etc., R. Co., 105 S.W. 1043, 207 Mo. 423.

75. Miss.—Meridian Light & Ry. Co. v. Slaughter, 53 So. 952, 98 Miss. 420.
60 C.J. p 253 note 11.

76. Ill.—Doane v. Lake St. El. R. Co., 46 N.E. 520, 165 Ill. 510, 56 Am.S.R. 265, 36 L.R.A. 97.

77. Ala.—Birmingham Ry., Light & Power Co. v. Long, 61 So. 11, 7 Ala. App. 567.
60 C.J. p 249 note 65.

78. Mo.—Egan v. United Rys. Co. of St. Louis, App., 227 S.W. 126.
60 C.J. p 249 note 66.

79. Pa.—Ickes v. Ambridge, L. & E. St. Ry. Co., 93 A. 488, 247 Pa. 392.
60 C.J. p 249 note 67.

80. N.Y.—People v. Broadway R. Co., 26 N.E. 961, 126 N.Y. 29, 26 Abb.N.Cas. 407.

Duty to construct extensions see *supra* § 83.

Duty to operate see *infra* §§ 177-179.

poses no positive obligation on the company to do so.⁸¹ If, however, the company builds at all, it has no right to stop when it has finished a part, and operate its cars on that part, but is bound to go on and complete the road in its entirety,⁸² where, by the terms of its contract with the municipality, the company is obliged to complete the road.⁸³ The company's failure strictly to comply with a provision of the ordinance, granting permission to construct the line, for a formal acceptance of such ordinance, does not necessarily prevent the existence of the duty to construct.⁸⁴

Extent of duty. Where the franchise or ordinance authorizing construction makes the necessity for construction contingent on the existence of certain conditions, the grantee of the right or privilege is not obliged to construct in the absence of the existence of such conditions.⁸⁵ There is no public duty to perform an act forbidden by a state statute, notwithstanding the ordinance granting permission to construct involves the performance of such act.⁸⁶

Bond for completion. It is proper for the municipal authorities to require the giving of a bond to secure the performance of a condition for the proper completion of the road,⁸⁷ and such a bond when given to secure the proper completion of a railroad in accordance with the terms and conditions of a valid franchise is valid.⁸⁸ If the franchise is invalid, there is no consideration for the bond, and it is of no effect.⁸⁹ So, also, if the franchise does not become operative or is forfeited, because of non-compliance with a condition precedent, a surety on a bond given to cover the construction of the road

is not liable thereon.⁹⁰

What constitutes construction. A contract by which a person agrees to pay to a street railroad company a specified amount after the completion of the railroad to a certain point must receive a reasonable construction,⁹¹ and is sufficiently complied with where, for a portion of the route involved, the company acquires the right to use the tracks of another company pursuant to a statute which was in force when the contract was made.⁹²

What company obligated. A street railroad company which succeeds to the rights, franchises, privileges, and obligations of another company rests under the same duty to construct the line as was imposed on its predecessor.⁹³

Termination of, or discharge from, duty. A company or its successor is not relieved of the former's duty to construct or to complete its line merely by the fact that it has failed to complete it within the time fixed by the municipal authorities for completion,⁹⁴ by the fact that, after a failure to complete construction within the time limited, the municipality fails to act on a proposed ordinance extending the time, when the municipality has always insisted on performance,⁹⁵ or by the fact that it stops work under circumstances within the specific terms of a provision of the ordinance granting permission to construct, that if the company so stops work the permission shall be null and void, where the municipality insists on completion.⁹⁶

Remedies. Where a railroad company is bound by law to construct a line, ordinarily it may be

81. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645. 60 C.J. p 253 note 14.

82. Conn.—State v. New York, etc., R. Co., supra. 60 C.J. p 253 note 15.

83. Pa.—Martin v. Second, etc., St. Pass. R. Co., 3 Phila. 316. 60 C.J. p 253 note 16.

84. N.J.—Hamilton Tp. in Mercer County v. Mercer County Traction Co., 97 A. 61, 88 N.J.Law 485, reversed on other grounds 102 A. 3, 90 N.J.Law 531. 60 C.J. p 253 note 17.

85. Ill.—People v. Chicago West Div. R. Co., 7 N.E. 116, 118 Ill. 113. 60 C.J. p 253 note 18.

86. N.J.—Hamilton Tp. v. Mercer County Traction Co., 102 A. 3, 90 N.J.Law 531. 60 C.J. p 253 note 19.

87. N.Y.—Village of Phoenix v. Gan- nan, 88 N.E. 1066, 195 N.Y. 471. 60 C.J. p 253 note 20.

88. N.Y.—Village of Phoenix v. Gan- nan, supra. 60 C.J. p 253 note 21.

89. N.Y.—Village of Phoenix v. Gan- nan, supra.

90. Cal.—Town of Mill Valley v. National Surety Co., 182 P. 459, 41 Cal.App. 540.

Refusal of commission to approve

The rule of the text applies where the franchise does not become effective because of the refusal of a designated commission to give its approval, even though the company had commenced work in anticipation of being granted such approval.—Town of Mill Valley v. National Surety Co., supra.

91. Cal.—Los Angeles Traction Co.

v. Wilshire, 67 P. 1086, 135 Cal. 654.

92. Cal.—Los Angeles Traction Co. v. Wilshire, supra. 60 C.J. p 254 note 27.

93. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645. N.J.—Hamilton Tp. in Mercer County v. Mercer County Traction Co., 97 A. 61, 88 N.J.Law 485, reversed on other grounds 102 A. 3, 90 N.J. Law 531.

94. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645.

95. N.J.—Hamilton Tp. in Mercer County v. Mercer County Traction Co., 97 A. 61, 88 N.J.Law 485, reversed on other grounds 102 A. 3, 90 N.J.Law 531.

96. N.J.—Hamilton Tp. in Mercer County v. Mercer County Traction Co., supra.

compelled to act, by an appropriate remedy,⁹⁷ even where relief is sought by a private individual whose property rights are involved.⁹⁸

§ 104. Time for Construction

Construction of a street railroad should begin or be completed within the time limited by charter or other statutory provisions or ordinances, or within a reasonable time if there is no prescribed time limit.

The time for construction may be limited by charter or other statutory provisions or ordinances,⁹⁹ and, where the time is so limited, any construction of the road after the expiration of the specified time is unauthorized,¹ and may be enjoined.² Even though the consent to construct a street railroad prescribes no time limit, the right must be exercised within a reasonable time,³ and in such case the company may, by long delay in commencing construction, lose the right to claim the benefit of the consent.⁴

Authority and duty to fix and extend limitation. Usually the municipal authorities may properly impose as a condition to the granting of a franchise or consent that the construction of the road shall be completed and that it shall be put in operation within a designated time,⁵ although the period fixed by the local authorities for completion of construction is less than that designated in a statute providing that unless a railroad is constructed within a given time such failure may work a forfeiture

of its franchise,⁶ or requiring that the company shall complete its road within two years after consent of the local authorities unless the time shall be extended by such authorities.⁷ The time specified is not irrevocable, but may be extended by the power that fixed it,⁸ except that when fixed by statute a different period cannot be fixed in the grant of the use of streets by local authorities.⁹

Excuses for delay. While the failure of a street railroad company to construct a certain part of its line within the time limited is not necessarily excused by the pendency of legal proceedings which prevented the completion of another part, the non-construction of which does not affect the desirability or convenience of constructing the part first mentioned,¹⁰ in general, time unavoidably consumed by legal proceedings should not be deemed a part of, but should be added to, the time limit,¹¹ and a valid provision in the authorization for the construction of a street railroad, prepared by public officers, that the period of unavoidable delays shall not be included in the limited period for construction, may be given effect.¹²

Security for construction. Where there is a failure to commence or complete the road within the time limited, the municipality concerned may claim the benefit of a bond given,¹³ or of a deposit made,¹⁴ to secure the completion within such time. Recovery on a bond has been denied, however, where the construction of the road was prevented by the re-

97. Minn.—State v. St. Paul City Ry. Co., 135 N.W. 976, 117 Minn. 316, Ann.Cas.1913D 139.

Mandamus to compel street railroad company to construct line see Mandamus § 231 e.

Injunction

Pa.—Martin v. Second, etc., St. Pass. R. Co., 3 Phila. 316.

98. Pa.—Martin v. Second, etc., St. Pass. R. Co., supra.

99. N.Y.—People v. Broadway R. Co., 26 N.E. 961, 126 N.Y. 29, 26 Abb.N.Cas. 407.
60 C.J. p 254 notes 37-38.

Failure to begin or complete road within time limited as working forfeiture of corporate powers and franchises of company see supra § 92.

1. Md.—State v. Latrobe, 31 A. 788, 81 Md. 222.

N.Y.—Auchincloss v. Metropolitan El. R. Co., 74 N.Y.S. 534, 69 App.Div. 63.

2. N.Y.—Dusenberry v. New York,

etc., Traction Co., 61 N.Y.S. 420, 46 App.Div. 267.

60 C.J. p 255 note 40.

3. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158.

4. Ill.—East St. Louis Connecting R. Co. v. East St. Louis, 55 N.E. 533, 182 Ill. 433.

5. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645.

60 C.J. p 255 note 44.

Duty to fix time devolved on commissioners

N.Y.—In re Kings County El. R. Co., 13 N.E. 18, 105 N.Y. 97.

60 C.J. p 255 note 47.

6. N.Y.—South Shore Traction Co. v. Town of Brookhaven, 102 N.Y. S. 75, 116 App.Div. 749.

60 C.J. p 255 note 45.

7. Pa.—Plymouth Tp. v. Chestnut Hill & N. Ry. Co., 32 A. 19, 168 Pa. 181.

8. Ill.—McNeill v. Chicago City R. Co., 61 Ill. 150.

60 C.J. p 255 note 43.

Particular statutes extending time construed

N.Y.—People v. Broadway R. Co., 26 N.E. 961, 126 N.Y. 29, 26 Abb.N.Cas. 407.

60 C.J. p 255 note 50.

9. Cal.—People v. Sutter St. R. Co., 49 P. 736, 117 Cal. 604.

Pa.—Plymouth Tp. v. Chestnut Hill, etc., R. Co., 4 Pa.Dist. 8, 15 Pa. Co. 442.

10. Ill.—Blocki v. People, 77 N.E. 172, 220 Ill. 444.

11. Ill.—Blocki v. People, supra.
60 C.J. p 256 note 52.

12. N.Y.—In re Kings County El. R. Co., 13 N.E. 18, 105 N.Y. 97.
60 C.J. p 256 note 53.

13. Ky.—Scott's Adm'rs v. City of Mayfield, 155 S.W. 376, 153 Ky. 278.
60 C.J. p 256 note 54.

14. Tex.—Spencer v. City of Palestine, 116 S.W. 857, 54 Tex.Civ.App. 392.
60 C.J. p 256 note 55.

fusal of requisite consents by municipalities other than the one to which the bond was given,¹⁵ and the right to claim the benefit of a deposit may be waived by the municipality for whose benefit it was made.¹⁶

§ 105. Plan and Mode of Construction

- a. In general
- b. Manner of construction as creating nuisance

a. In General

Unless limited by charter or other statutory provision or by ordinance, a street railroad company has large discretionary powers with respect to the plan and mode of construction of the railroad, but should construct the road in such manner as to do as little injury as is reasonably possible.

Unless limited by charter or other statutory provision or by ordinance, a railroad company or other entity entitled to construct a street railroad may begin the construction of the road in any part of the route, whether it is the charter route or an extension;¹⁷ may lay its tracks¹⁸ and place its poles¹⁹ on such part of the street as is deemed best; need not lay any particular style of rail;²⁰ may change the style of rail²¹ and the gauge²² originally adopted; may change the line from double to single

track;²³ and may install equipment reasonably required to insure the safe and proper operation of its road.²⁴ So, when it is given an election, the company may choose either of two ways of laying tracks.²⁵

Even in the absence of an obligation created by statute or ordinance,²⁶ a street railroad company must construct its road,²⁷ including the laying of rails²⁸ and the placing of poles and wires,²⁹ in such manner as to do as little injury to the street, and to offer as little hindrance or to present as little danger, in respect of public travel thereon, as is reasonably possible.

Agreement for payment of specified sum by private individual. A stipulation in an agreement by a private individual for payment of a specified sum to a street railroad company on the completion of a double track railroad has been held sufficiently complied with notwithstanding only a single track was constructed where the railroad turned a corner.³⁰

b. Manner of Construction as Creating Nuisance

A street railroad built by authority of law and in a lawful manner is not a nuisance, but an unauthorized or unlawful construction may constitute a nuisance.

A street railroad built by authority of law and

15. Pa.—Borough of Monaca v. Monaca & A. St. Ry. Co., 93 A. 344, 247 Pa. 242.

16. U.S.—Brady v. South Shore Traction Co., D.C.N.Y., 233 F. 778, affirmed 238 F. 1007, 151 C.C.A. 668.

17. Pa.—Hannum v. Media, etc., Electric R. Co., 8 Del.Co. 91. Municipal regulation in general see infra § 106.

18. Wis.—State v. Braman, 178 N. W. 301, 172 Wis. 131. 60 C.J. p 256 note 60.

19. N.Y.—Stern v. International Ry. Co., 115 N.E. 759, 220 N.Y. 284, 2 A. L.R. 487.

20. Pa.—Berks, etc., Turnpike Road v. Lebanon, etc., St. R. Co., 3 Pa. Dist. 55.

21. Pa.—Easton, etc., R. Co. v. Easton, 19 A. 486, 133 Pa. 505, 19 Am. S.R. 658. 60 C.J. p 256 note 63.

22. Colo.—Denver, etc., R. Co. v. Barsoloux, 25 P. 165, 15 Colo. 290, 10 L.R.A. 89. 60 C.J. p 256 note 64.

Authority of municipality to require change of gauge see infra § 107.

23. Ind.—City of Vincennes v. Vincennes Traction Co., 120 N.E. 27, 187 Ind. 498.

24. N.Y.—Empire City Subway Co. v. Broadway, etc., R. Co., 33 N.Y.S. 1055, 87 Hun 279, affirmed 54 N.E. 1092, 159 N.Y. 555. 60 C.J. p 256 note 66.

25. Mich.—Falls v. Grand Rapids, G. H. & M. Ry. Co., 155 N.W. 548, 189 Mich. 644. 60 C.J. p 256 note 67.

Discretion allowed by statute

N.Y.—In re Brooklyn El. R. Co., 26 N.E. 474, 125 N.Y. 434. 60 C.J. p 257 note 68.

26. Ala.—Birmingham, E. & B. R. Co. v. Staggs, 72 So. 164, 196 Ala. 612. 60 C.J. p 257 notes 69-71.

27. Iowa.—Citizens' Ry. & Light Co. v. Forepaugh & Sells Bros. Shows, 128 N.W. 357, 149 Iowa 355. 60 C.J. p 257 note 69.

28. Pa.—Berks, etc., Turnpike Road v. Lebanon, etc., St. R. Co., 3 Pa. Dist. 55. 60 C.J. p 257 note 70.

Joint use of streets by two companies

Where two companies have a right to place rails in, and to use, a street, each is bound to place its rails so that the public may have the benefit which may be derived from such joint use.

Ill.—General Electric R. Co. v. Chicago City R. Co., 66 Ill.App. 362—Chicago, etc., R. Co. v. West Chicago St. R. Co., 63 Ill.App. 464.

29. Del.—Wagner v. People's Ry. Co., 75 A. 610, 23 Del. 393. 60 C.J. p 257 note 71.

Avoiding contact with other electric wires

A company operating an electric street railroad is bound to use reasonable care so to place its poles and wires, and to adopt all such ordinary and usual appliances and methods, as to avoid contact with other wires which transmit electric current.—Central Pennsylvania Tel., etc., Co. v. Wilkes-Barre, etc., R. Co., 11 Pa. Co. 417.

30. Cal.—Los Angeles Traction Co. v. Wilshire, 67 P. 1086, 135 Cal. 354.

in a lawful manner is not a nuisance, and, therefore, can work no legal injury, either to the public or to any private individual.³¹ It may occasion inconvenience or loss, or may depreciate the value of property, and render its enjoyment incommodious and almost impossible, yet this is *damnum absque injuria*.³²

The construction and maintenance of a street railroad along the public streets of a city, without authority of law, or in an unlawful manner, may, however, constitute a nuisance.³³ So a street railroad may constitute a nuisance where the rails unduly project above the surface of the street or road.³⁴

§ 106. — Municipal and State Regulation

A street railroad company must comply with valid regulations or requirements of state or municipal authorities as to the method or mode of construction.

It is the duty of a street railroad company to comply with valid regulations or requirements of state or municipal authorities as to the method or mode of construction.³⁵ Usually a municipality has authority to make reasonable regulations as to the manner in which a street railroad company, empowered by its charter or other statute to occupy the streets of the municipality, shall lay its tracks

in the public streets, even though the charter is silent on the subject.³⁶ Under some statutes designated commissioners are authorized to formulate plans for the construction of street railroads.³⁷

Express statutory provisions conferring authority on a municipality will be given effect when the authority is properly exercised.³⁸ Where the consent and approval of the municipal authorities are necessary to the construction of a street railroad, they may, as a condition to the granting of such consent or approval, impose such reasonable terms and conditions as the public interests may require.³⁹ The power of the municipality does not, however, extend to matters not included by the legislature,⁴⁰ and conditions which the municipal authorities have no power to impose are void.⁴¹ So where a franchise granted by a municipality includes the right to construct turnouts, sidetracks, and switches, the approval of the plan of construction is not necessarily required.⁴²

Where a street railroad company authorized to construct tracks in the streets of a municipality departs from the plan adopted by the municipality for the construction thereof, the municipality may compel conformity to the plan adopted,⁴³ or it may ratify the variation by a formal change of plan⁴⁴ or by informal acquiescence.⁴⁵

31. U.S.—*Currier v. West Side El. Patent R. Co.*, C.C.N.Y., 6 F.Cas. No.3,493, 6 Blatchf. 487.

60 C.J. p 262 note 36.

Nuisance from operation of street railroads see Nuisances § 67.

Position of trolley poles

(1) Where electric railroad company is authorized to locate trolley poles along street they are not nuisances.—*Townsend v. Georgia Power Co.*, 160 S.E. 712, 44 Ga.App. 132—60 C.J. p 262 note 36 [b].

(2) Thus, trolley pole placed within five inches of traveled portion of twenty-seven-foot street, by direction of municipal authorities, does not constitute nuisance.—*Townsend v. Georgia Power Co.*, *supra*.

(3) Construction of street railroad with trolley poles between tracks in center of street bridge, as authorized by city authorities pursuant to franchise ordinance, cannot be treated as public nuisance.—*Meese v. Goodman*, 176 A. 621, 167 Md. 658, 98 A.L.R. 480.

32. Pa.—*Faust v. Passenger R. Co.*, 3 Phila. 164.

33. Kan.—*Longenecker v. Wichita R. & Light Co.*, 102 P. 492, 80 Kan. 413.

60 C.J. p 263 note 39.

34. Pa.—*In re Street Railways*, 25 Pa.Dist. 439.

Street railroad as nuisance where rails unduly project above surface of road or otherwise become dangerous for want of repair see *infra* § 111.

35. Cal.—*Finch v. Riverside, etc., R. Co.*, 25 P. 765, 87 Cal. 597.

60 C.J. p 258 note 91.

36. Wis.—*State v. Janesville St. R. Co.*, 57 N.W. 970, 87 Wis. 72, 41 Am.S.R. 23, 22 L.R.A. 759.

60 C.J. p 257 note 78.

Changes in construction and removal of tracks see *infra* § 107.

Statutory and municipal regulation of operation see *infra* §§ 160-184.

Authority held to extend to:

(1) Gauge of tracks.—*City of Waterloo v. Waterloo Street Ry. Co.*, 32 N.W. 329, 71 Iowa 193.

(2) Number of tracks.—*Baltimore v. Baltimore Trust, etc., Co.*, Md., 17 S.Ct. 696, 166 U.S. 673, 41 L.Ed. 1160—60 C.J. p 257 note 81.

(3) Type of rail to be used.—*Passenger R. Co. v. Easton*, 7 Pa.Co. 577—60 C.J. p 257 note 80.

37. N.Y.—*Matter of Kings County El. R. Co.*, 19 N.E. 654, 112 N.Y. 47. 60 C.J. p 259 note 98.

Public service commission

N.Y.—*In re Public Service Commission*, 139 N.Y.S. 982, 154 App.Div. 587.

60 C.J. p 259 note 1 [a].

38. Mass.—*Gardner v. Templeton St. R. Co.*, 68 N.E. 340, 184 Mass. 294. 60 C.J. p 258 note 84.

39. Va.—*Wagner v. Bristol Belt Line Ry. Co.*, 62 S.E. 391, 108 Va. 594, 25 L.R.A.N.S., 1278.

60 C.J. p 258 note 85.

40. Ind.—*City of Vincennes v. Vincennes Traction Co.*, 120 N.E. 27, 187 Ind. 498.

41. Conn.—*Fair Haven, etc., R. Co. v. New Haven*, 49 A. 863, 74 Conn. 102.

60 C.J. p 258 note 88.

42. Wis.—*State v. Braman*, 178 N. W. 301, 172 Wis. 131.

43. Conn.—*State v. Hartford St. R. Co.*, 56 A. 506, 76 Conn. 174.

44. Conn.—*State v. Hartford St. R. Co.*, *supra*.

45. Pa.—*Bridgewater v. Beaver Valley Traction Co.*, 63 A. 796, 214 Pa. 343.

Reasonable exercise of power. The regulatory powers of a municipality may not be exercised in an unreasonable manner,⁴⁶ but where conditions imposed by a municipality are reasonable, and otherwise valid, the discretion of the municipal authorities in this respect cannot be controlled by the courts.⁴⁷ Even though a statute conferring on a public utility commission the power to determine the number of tracks to be laid by any street railway on a bridge contains no specific provisions as to the rules to govern the determination of the commission, such statute has been so construed as not to permit an arbitrary determination by the commission, but to require that its determination shall be based on a finding of public convenience, necessity, or safety.⁴⁸

Necessity for exercise of power. A municipality may not refuse to exercise its power of regulation of street railroads;⁴⁹ nor can it deprive itself by contract of the right to exercise the power.⁵⁰ A statutory provision that, when a municipality authorizes the use of poles, it "may" prescribe the manner in which, and the places where, such poles shall be located and the manner in which wires shall be strung has been construed as mandatory.⁵¹

§ 107. — Relocation of Tracks and Other Changes Required or Authorized by Public Authorities

- a. In general
- b. Municipal or local authorities

a. In General

Public officers or bodies duly authorized have power to require or authorize reasonable changes in the construction of street railroads where the public interest or convenience requires such changes.

The power of public officers or bodies, duly authorized, to require or authorize reasonable changes in the construction of street railroads where the public interest or convenience requires such changes has frequently been recognized,⁵² at least where the power has duly been reserved by statute and conferred on the public authorities who seek to exercise such power.⁵³ Thus, in general, a street railroad company holds its franchise subject to the obligation to relocate its tracks in a street occupied by it,⁵⁴ and under some statutes a relocation is required where the public road on which the tracks are located is improved.⁵⁵ In the due exercise of the police power, the state may require such a relocation.⁵⁶ The question as to whether the cost of relocation must be borne by the street railroad company may depend on the construction of the statute providing for relocation.⁵⁷

46. Wis.—*Eastern Wisconsin R., etc.*, Co. v. Hackett, 115 N.W. 376, 135 Wis. 464.

47. Mass.—*Gardner v. Templeton St. R. Co.*, 68 N.E. 340, 184 Mass. 294, 60 C.J. p 258 note 95.

48. Conn.—*Appeal of Connecticut Co.*, 94 A. 992, 89 Conn. 528, 60 C.J. p 259 note 2.

49. Ky.—*Louisville City Ry. Co. v. City of Louisville*, 8 Bush 415.

50. Ky.—*Louisville City Ry. Co. v. City of Louisville*, supra.

51. N.J.—*Kennelly v. Jersey City*, 30 A. 531, 57 N.J. Law 293, 26 L.R.A. 281.

52. Mich.—*Detroit v. Ft. Wayne and Elmwood St. R. Co.*, 51 N.W. 688, 90 Mich. 646, 60 C.J. p 259 note 5.

Removal of tracks see infra § 109.

Temporary change pending grade crossing elimination work

N.Y.—*Tilton v. State*, 12 N.Y.S.2d 878, 171 Misc. 391, affirmed 20 N.Y.S.2d 76, 259 App.Div. 507, affirmed *Tilton v. State of New York*, 33 N.E.2d 540, 285 N.Y. 601.

53. Ala.—*State v. Alabama City, G.*

& A. Ry. Co., 55 So. 176, 172 Ala. 125, Ann.Cas.1913D 696, 60 C.J. p 259 note 6.

54. Ind.—*Hammond, W. & E. C. Ry. Co. v. State Highway Commission*, 152 N.E. 806, 154 N.E. 20, 198 Ind. 456.

60 C.J. p 259 note 7.
Conformity of tracks on change of grade see infra § 120.

55. Ohio.—*State v. Columbus, Delaware & Marion Electric Co.*, 133 N.E. 487, 103 Ohio St. 280.

60 C.J. p 260 note 8.

56. Ind.—*Hammond, W. & E. C. Ry. Co. v. State Highway Commission*, 152 N.E. 806, 154 N.E. 20, 198 Ind. 456.

60 C.J. p 260 note 9.

57. D.C.—*District of Columbia v. Georgetown & T. Ry. Co.*, 41 F.2d 424, 59 App.D.C. 335.

60 C.J. p 261 note 18.

Under statutes governing grade crossing elimination and providing that state shall be liable for "damage to property not acquired as above provided," the quoted phrase does not include damages to owner of street railroad, consisting in cost of

providing temporary substituted service by constructing temporary tracks necessitated by temporary closing of streets.—*Tilton v. State*, 20 N.Y.S.2d 76, 259 App.Div. 507, affirmed *Tilton v. State of New York*, 33 N.E.2d 540, 285 N.Y. 601.

Relocation of power cables

(1) Statute authorizing city to condemn right to remove spur of elevated railroad was held to impose duty on railroad, not city, to remove power cables from condemned structure and place them underground, and to bear cost and expense thereof in first instance, ultimate disposition of such cost and expense being determinable in condemnation proceeding.—*City of New York v. Murray*, 8 N.E.2d 29, 273 N.Y. 447.

(2) The statute should be strictly construed.—*City of New York v. Murray*, 288 N.Y.S. 1026, 248 App. Div. 102, reversed on other grounds 8 N.E.2d 29, 273 N.Y. 447.

Condemnation of right of way

In securing removal of streetcar tracks to allow for street widening to care for heavy traffic, city did not need to condemn old right of way.—*People v. Chicago City Ry. Co.*, 155 N.E. 781, 324 Ill. 618.

Authority of state boards or commissions. The authority of state public utility boards or commissions to direct certain structural changes may be exercised under some statutes.⁵⁸ The mere shifting of tracks to the center of the streets is not a relocation of a railroad within the meaning of certain statutes conferring authority on the railroad commission,⁵⁹ and under some statutes the state roads commission is not empowered to compel a street railroad company to make a relocation of its tracks at its own expense, required by improvements made by the commission.⁶⁰

b. Municipal or Local Authorities

Municipal or local authorities have power to require or authorize reasonable changes in the construction of street railroads where the legislature has delegated such power to them or where such authority has been duly reserved and the public interests demand.

A municipality may require a relocation of the tracks of a street railroad where the legislature has delegated to it the police power in this respect,⁶¹ and an ordinance repealing an earlier ordinance, and requiring a new location of tracks, does not constitute an unlawful impairment of contract obligations where it is enacted in the exercise of reasonable discretion for the convenience and safety of the public.⁶² So, also, where authority in this respect has duly been reserved and the public interests demand, a municipality may require such a relocation,⁶³ and a like rule applies where the legisla-

ture has conferred on the municipality express authority in this regard.⁶⁴

A municipality may not require a relocation of tracks in the assumed exercise of the police power, in the absence of a due delegation to it by the legislature of such power;⁶⁵ and, in the absence of such delegation, of other authority conferred by the legislature, and of a reservation of authority in this regard, a municipality may not require a relocation.⁶⁶ So, where the charter of a street railroad company requires the location of its tracks in a certain part of the street, local authorities may not require a relocation under general authority conferred on them to control the location of street railroad tracks.⁶⁷ Municipal authorities may, by acquiescence, lose the right to attack the relocation of tracks on the ground that they did not consent to such relocation.⁶⁸

Relocation of subway kiosks. Where the railroad company has, under its contract with the municipality, acquired the right to a fixed or specific location in public streets for its subway kiosks, and the location is, therefore, of the substance of its franchise, it has been held that the municipality may not, in the exercise of its general regulatory power in respect of public streets, require the railroad company to relocate such kiosks,⁶⁹ and that the state alone can require the company to make the change or authorize the municipality to act.⁷⁰

58. N.Y.—Callahan Estate v. Manhattan Ry. Co., 153 N.Y.S. 770, 168 App.Div. 81.

60 C.J. p 262 note 27.

Commission held authorized to require:

(1) Change of gauge.—Inhabitants of Town of Phillipsburg v. Board of Public Utility Com'rs, 88 A. 1096, 85 N.J.Law 141—60 C.J. p 262 note 32.

(2) Relocation of poles and wires of a street railroad at a safe distance from wires of another public utility.—Western Union Telegraph Co. v. Burlington Traction Co., 99 A. 4, 90 Vt. 506, Ann.Cas.1918B 841—60 C.J. p 262 note 30.

(3) Relocation of tracks.—Connecticut Co. v. Town of Stamford, 110 A. 554, 95 Conn. 26—60 C.J. p 262 note 31.

(4) Substitution of double tracks for a single track on a part of a street railroad line.—Phoenix Ry. Co. of Arizona v. Geary, D.C.Ariz., 209 F. 694, affirmed 36 S.Ct. 45, 239 U.S. 277, 60 L.Ed. 287—60 C.J. p 262 note 29.

59. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N.W. 877, 190 Wis. 379.

60. Md.—United Rys. & Electric Co. of Baltimore v. State Roads Commission, 91 A. 552, 123 Md. 561. 60 C.J. p 262 note 34.

61. Ill.—People v. Chicago City Ry. Co., 155 N.E. 781, 324 Ill. 618. 60 C.J. p 260 note 10.

Changes in structures not condemned
Statute authorizing city to condemn right to remove spur of elevated railroad was held intended to require approval by board of estimate and transit commission of plans for changes in railway structures not condemned, where such changes were allegedly necessitated by removal of condemned structure, as condition precedent to construction and maintenance of new structures.—City of New York v. Murray, 8 N.E.2d 29, 273 N.Y. 447.

62. Iowa.—Snouffer v. Cedar Rapids R. Co., 92 N.W. 79, 118 Iowa 287.

63. Mich.—City of Owosso v. Mich-

igan United Rys. Co., 167 N.W. 919, 202 Mich. 37. 60 C.J. p 260 note 12.

64. N.Y.—People v. Geneva, W., S. F. & C. L. Traction Co., 98 N.Y.S. 719, 112 App.Div. 581, affirmed 78 N.E. 1109, 186 N.Y. 516. 60 C.J. p 260 note 13.

65. N.Y.—People v. New York R. Co., 112 N.E. 49, 217 N.Y. 310. 60 C.J. p 260 note 14.

66. N.Y.—People v. New York R. Co., supra. 60 C.J. p 260 note 15.

67. Md.—Anne Arundel County Com'rs v. United Ry. & Electric Co., 72 A. 542, 109 Md. 377. 60 C.J. p 261 note 16.

68. Pa.—Wilson Tp. v. Easton Transit Co., 101 A. 983, 258 Pa. 266. 60 C.J. p 261 note 17.

69. N.Y.—City of New York v. Hudson & M. R. Co., 128 N.E. 152, 229 N.Y. 141. 60 C.J. p 261 note 19.

70. N.Y.—City of New York v. Hudson & M. R. Co., supra.

Relocation of poles. The authority of a municipality to require the relocation of the poles of a street railroad company, which, although not dangerous when erected, subsequently become dangerous, has been recognized, on the theory that the original location was not of the substance of the franchise.⁷¹

Change of gauge. In the absence of any reserved authority or statutory authorization, the municipality may not require a change of gauge.⁷²

Substitution of rails. While the courts, under certain circumstances, have denied the authority of the municipality to require a substitution,⁷³ there is authority for the view that local authorities may require the substitution of rails where the existing rails are such as seriously to interfere with the use of the road by the public,⁷⁴ and under due reservation of authority in this respect, the municipality may require such substitution.⁷⁵

Changes to permit use by another railroad company. Where there is a valid contract between the municipality and a railroad company, in respect of the construction and equipment of the road, the company may not be required to make changes in order to permit the use of the road by another railroad company, in the absence of any reservation of power in that regard.⁷⁶

Temporary bridge over tracks. In the absence of a delegation thereof by charter or statutory provisions a municipal board is without power, jurisdiction, or authority to require the erection of a

temporary pedestrian bridge across street railroad tracks.⁷⁷

§ 108. — Remedies

Appropriate actions may be pursued in the case of defaults or breaches of duty relating to the plan and mode of construction of street railroads.

Where a street railroad company fails to comply with the conditions and restrictions imposed on it by statute or ordinance as to the plan and mode of construction, it may be compelled to do so by a suit in equity⁷⁸ or, as shown in *Mandamus* § 231 e, by mandamus. So a municipality may sue to enjoin a street railroad company from unlawfully obstructing a street by the manner in which it is constructing its tracks.⁷⁹ Where a contract exists between the company and the municipality, it may be enforced by a mandatory injunction,⁸⁰ or the municipality may sue for damages for a breach of the contract.⁸¹ Likewise, a street railroad company is entitled to an injunction to prevent unlawful interference with the construction of its road by the municipal authorities;⁸² but if the acts of one of two companies constructing a railroad through the same street amount to a public nuisance or obstruction of the way, it is for the public, and not for the other company, to complain, in the absence of special injury.⁸³ A municipality may, under a charter provision authorizing it to cause any nuisance to be abated, abate an unauthorized street railway under general ordinance,⁸⁴ but not under a resolution aimed at one particular railway.⁸⁵ An action by

71. N.Y.—*Stern v. International Ry. Co.*, 115 N.E. 759, 220 N.Y. 284.

72. Iowa.—*Des Moines St. R. Co. v. Des Moines Broad Gauge R. Co.*, 38 N.W. 496, 74 Iowa 585.

73. Vt.—*City of Burlington v. Burlington Traction Co.*, 124 A. 857, 98 Vt. 24.
60 C.J. p 261 note 23.

74. N.J.—*State v. Trenton Passenger Ry. Co.*, 31 A. 238, 57 N.J.Law 216.

75. Ala.—*State v. Alabama City, G. & A. Ry. Co.*, 55 So. 176, 172 Ala. 125, Ann.Cas.1913D 696.
60 C.J. p 261 note 25.

76. N.Y.—*People ex rel. Delaney v. Interborough Rapid Transit Co.*, 183 N.Y.S. 864, 192 App.Div. 450, appeal dismissed 180 N.E. 892, 230 N.Y. 558.
60 C.J. p 261 note 26.

77. N.Y.—*In re Proposed Change in Map to Establish Temporary Pe-*

destrian Bridge in East 103d Street, Borough of Brooklyn, 287 N.Y.S. 377, 247 App.Div. 913, affirmed *In re Temporary Pedestrian Bridge in East One Hundred & Third St. Across Turnbull Ave. and Across Tracts of New York Rapid Transit Corp. in Borough of Brooklyn*, 4 N.E.2d 724, 272 N.Y. 536.

78. Mass.—*Gardner v. Templeton St. R. Co.*, 68 N.E. 340, 184 Mass. 294.
60 C.J. p 263 note 44.

Circumstances not warranting remedy

Where city has power to make all necessary and reasonable regulation as to the manner in which street railroad track shall be constructed, and condition in which it shall be maintained, and also the power to enforce its regulations, an injunction will not be granted to restrain construction of street railroad with line and gauge obnoxious to city.—*City of Waterloo v. Waterloo St. Ry. Co.*, 32 N.W. 329, 71 Iowa 193.

79. Pa.—*Wilkesbarre v. Coalville Pass. R. Co.*, 7 Leg.Gaz. 397, 4 Luz. Leg.Reg. 279.

80. Pa.—*Chester, etc., Road Co. v. Chester, etc., R. Co.*, 66 A. 358, 217 Pa. 272.

81. Pa.—*Montooth Borough v. Brownsville Ave. St. R. Co.*, 55 A. 1036, 206 Pa. 338.
60 C.J. p 263 note 48.

82. Ohio.—*Akron, etc., R. Co. v. Bedford*, 8 Ohio S. & C.P. 142, 6 Ohio N.P. 276.
60 C.J. p 263 note 49.

83. N.Y.—*Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. 364.

84. Wash.—*Spokane St. R. Co. v. Spokane Falls*, 33 P. 1072, 6 Wash. 521.

85. Wash.—*Spokane St. R. Co. v. Spokane Falls*, supra.

a city against a street railroad to recover money allegedly due from the railroad as its assessed share of the cost of a grade elimination improvement does not involve public money in the hands of the railroad, and, hence, is not maintainable under a statute relating to the collection of public money due.⁸⁶

§ 109. Removal of Tracks and Other Railroad Property

In the absence of authority granted by the legislature, a municipality ordinarily has no power to remove tracks, but the company may be required to remove them where they are in the streets without authority and constitute a trespass or a public nuisance.

Under authority to exercise a supervisory control over the use of streets by street railroads, the municipality has no power to remove tracks;⁸⁷ nor may it do so under an assumed exercise of the police power, where the legislature has not conferred the right to exercise the police power in this respect.⁸⁸ The company may be required to remove its tracks and other property from the streets, however, where they are there without authority and constitute a trespass or a public nuisance,⁸⁹ as where the full term of the grant has expired⁹⁰ or has duly been revoked,⁹¹ or where the company has forfeited a particular location by breach of an implied condition of the grant of location that it be used for the purpose for which it was granted.⁹² If the company desires to remove them, it may not,

ordinarily, be prevented from so doing.⁹³

Temporary removal. A statutory provision permitting a municipality to enter into a contract with a street railroad company, which contract would form part of the company's charter, for the removal of tracks from a street for a definite period, not to exceed a period specified, does not authorize an ordinance permitting the railroad company temporarily to remove tracks, with the approval of a certain municipal department, when the company certifies that it has no present use for such tracks.⁹⁴

Loss of right to remove or compel removal. While apparently a view to the contrary has been taken,⁹⁵ there is authority for the view that municipal or local officers who have knowingly and without objection permitted a street railway to be constructed cannot remove or compel removal on the ground that the required consent was not given.⁹⁶

Action for damages for removal. The owner of a street railroad may not recover damages for the removal of tracks by municipal authorities where the ordinance under which the road was constructed reserved to the municipality the right to remove such tracks in the event that the owner failed to comply with such conditions and it is shown that he did not comply therewith,⁹⁷ but such owner may, in a proper case, be entitled to recover for the conversion of such rails by the municipal authorities after removal.⁹⁸

86. Ohio.—City of Youngstown v. Youngstown Municipal Ry. Co., 16 N.E.2d 541, 134 Ohio St. 308.

87. Ky.—City of Dayton v. South Covington & C. St. Ry. Co., 197 S. W. 670, 177 Ky. 202, L.R.A.1918B 476, Ann.Cas.1918E 229. Relocation of tracks see supra § 107. Duty to restore street after removal see infra § 121.

88. Ky.—City of Dayton v. South Covington & C. St. Ry. Co., supra. 60 C.J. p 263 note 52.

89. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528. N.Y.—Village of Stillwater v. Hudson Valley Ry. Co., 174 N.E. 306, 255 N.Y. 144.

Time for repair

In equitable action for removal of rails and repair of street against railway abandoning tracks, fact that time for repair had not expired when action was brought was immaterial. —Village of Stillwater v. Hudson

Valley Ry. Co., 241 N.Y.S. 569, 229 App.Div. 41, modified on other grounds 174 N.E. 306, 255 N.Y. 144.

90. U.S.—Detroit United Railway v. City of Detroit, Mich., 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

Ohio.—City of Mt. Vernon v. Berman & Reed, 125 N.E. 116, 100 Ohio St. 1.

Expiration of franchise

Street railways may be compelled to remove their tracks from the streets following expiration of franchise.

U.S.—Detroit United R. Co. v. Detroit, Mich., 39 S.Ct. 151, 248 U. S. 429, 63 L.Ed. 341.

Mich.—Detroit v. Detroit United R. Co., 137 N.W. 645, 172 Mich. 136.

91. Ohio.—City of Mt. Vernon v. Berman & Reed, 125 N.E. 116, 100 Ohio St. 1.

92. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

93. Ohio.—City of Mt. Vernon v. Berman & Reed, 125 N.E. 116, 100 Ohio St. 1.

44 C.J. p 1010 note 41 [a].

94. Pa.—Passayunts Avenue Business Men's Ass'n v. Public Service Commission, 73 Pa.Super. 242.

95. N.J.—Trenton & Mercer County Traction Corporation v. Inhabitants of Ewing Tp., 107 A. 416, 90 N.J.Eq. 560.

60 C.J. p 264 note 57.

96. Pa.—Wilson Tp. v. Easton Transit Co., 101 A. 983, 258 Pa. 266.

60 C.J. p 264 note 58.

97. U.S.—Stewart v. Ashtabula, Ohio, 107 F. 857, 47 C.C.A. 21, certiorari denied 22 S.Ct. 932, 183 U. S. 696, 46 L.Ed. 394.

60 C.J. p 264 note 59.

98. U.S.—Stewart v. Ashtabula, supra.

60 C.J. p 264 note 60.

§ 110. Liability for Labor, Work, or Materials

A street railroad company is liable for material purchased by an authorized officer or agent on the credit of the company.

A street railroad company is liable for material

purchased by an authorized officer or agent on the credit of the company, notwithstanding the officer or agent was under contract with the company to furnish it himself, since that is a subject for adjustment between the officer and the company and is not enough to defeat the seller of the material who is otherwise entitled to recover.⁹⁹

B. RESTORATION, PAVING, AND REPAIR OF STREETS AND MAINTENANCE OF RAILROAD

§ 111. In General

A street railroad company may be obliged to restore the street after it has constructed its line, and to maintain its facilities in proper condition.

While the duty to restore the street is sometimes imposed by statute,¹ even in the absence of any express contract provision, statute, or ordinance so requiring, a street railroad company may be obliged to restore the street after it has constructed its line,² and to maintain its tracks and other facilities in proper condition³ so as not unnecessarily to interfere with the use of the street by others⁴ and so as not to cause undue danger to others;⁵ and it must make a street occupied by it suitable to its needs without the aid of the municipality.⁶

It has been recognized that a municipality has authority to make or enforce reasonable regulations or requirements as to the condition in which a street railroad company shall maintain its tracks in public

streets,⁷ under the police power⁸ and statutory provisions.⁹ Where matters involved relate to the regulation of streets and highways and to the control of the improvement of them, according to some cases, they involve the exercise of the police power, which municipal and other local authorities may not surrender by agreements with street railroad companies,¹⁰ and a grant of the use of a street for a street railroad is accepted subject to the reasonable and necessary exercise of such power by the municipality.¹¹

Nuisance. A street railroad may constitute a nuisance where, for want of repair, the rails unduly project above the surface of the street or road,¹² or where the rails otherwise become dangerous;¹³ and the municipality may sue to enjoin the maintenance of such nuisance.¹⁴

Injury or damage sustained by company. The company cannot successfully complain of any in-

99. Vt.—John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co., 56 A. 530, 76 Vt. 131.

1. Mo.—Burow v. St. Louis Public Service Co., 100 S.W.2d 269, 339 Mo. 1092.
60 C.J. p 264 note 63.

Declaratory of common law

Statutes, ordinances, charters, or franchises requiring persons who use the streets for railways to restore portions so used are merely declaratory of the common law.—In re Madison Rys. Co., C.C.A.Wis., 115 F.2d 586.

2. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645.
60 C.J. p 264 note 62.

Duty to keep portions of the street occupied by company in good condition see *infra* § 112.
Regulation as to roadbed and tracks in general see *infra* § 170.

3. Mo.—Burow v. St. Louis Public Service Co., 100 S.W.2d 269, 339 Mo. 1092.

Pa.—Abington Tp. v. Philadelphia

Rapid Transit Co., Com.Pl., 57 Montg.Co. 250.

Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S.W.2d 936, 167 Tenn. 265.
60 C.J. p 264 note 64.

Catch basin

Streetcar company installing catch basin as inlet to sewer to drain its own property with permission of city had duty to maintain such improvement in good condition.—Oklahoma City v. Lockett, 57 P.2d 817, 177 Okl. 129.

4. Mo.—Burow v. St. Louis Public Service Co., 100 S.W.2d 269, 339 Mo. 1092.
60 C.J. p 264 note 65.

5. Mo.—Burow v. St. Louis Public Service Co., *supra*.
60 C.J. p 264 note 66.

6. Mass.—Sawin v. Connecticut Valley St. R. Co., 99 N.E. 952, 213 Mass. 109.

7. Mo.—Burow v. St. Louis Public Service Co., 100 S.W.2d 269, 339 Mo. 1092.

60 C.J. p 264 note 69.

8. Wash.—State v. Olympia Light & Power Co., 158 P. 85, 91 Wash. 519.

9. Tex.—City of Highland Park v. Dallas Ry. Co., Civ.App., 243 S.W. 674.

10. U.S.—Wheeling Traction Co. v. Board of Com'rs of Belmont County, Ohio, 248 F. 205, 160 C.C.A. 283.
Mich.—City of Detroit v. Detroit United Ry., 138 N.W. 215, 172 Mich. 496.

11. Mich.—City of Detroit v. Detroit United Ry., *supra*.

12. Tex.—San Antonio Rapid Transit St. R. Co. v. Limburger, 30 S.W. 533, 88 Tex. 79, 53 Am.S.R. 730
Manner of construction as creating nuisance see *supra* § 105 b.
Nuisance from operation of street railroads see Nuisances § 67.

13. N.Y.—City of New York v. Montague, 129 N.Y.S. 1084, 141 App.Div. 172.
60 C.J. p 265 note 75.

14. N.Y.—City of New York v. Montague, *supra*.
60 C.J. p 265 note 76.

jury to its business by reason of the stoppage of its traffic, necessitated by the doing of work by the municipality which the railroad company should have done, if such stoppage was reasonably necessary to the work.¹⁵

Ownership of paving. Where pursuant to a duty imposed on it, the street railroad paves portions of the street along its right of way, it acquires no title to the paving, and the city can make no contract surrendering its authority over the paved strips or vesting title thereto in the company.¹⁶

§ 112. Duty to Repair Street in General

The duty of street railroad companies to keep the portions of streets occupied by their right of way in good condition may be imposed by statutes, ordinances, or contracts, and even in the absence thereof the duty has been held to exist.

While there is apparently some authority to the contrary,¹⁷ it has been held or recognized, even in the absence of any express contract or statutory direction to that effect, that a street railroad company is bound to keep the portions of streets occupied by its right of way in good condition,¹⁸ or in reasonably safe condition for travel.¹⁹ That obligation is an implied condition annexed to every grant authorizing a railway to occupy any portion of a public thoroughfare,²⁰ and the assumption of

an obligation by the city to take care of all matters relating to the paving of the streets cannot be construed to be an exemption of the company from its duty properly to maintain its tracks in good condition.²¹

Duty imposed by statutes or ordinances. Statutes, ordinances, charters, and franchises requiring persons who use the streets for railway purposes to keep them in repair during such use have been held to be merely declaratory of the common law.²² According to some cases, ordinance requirements as to repairs are not matters of contract but are regulations,²³ involving the exercise of the police power,²⁴ at least in respect of the kinds of repair,²⁵ and a municipality may require a company to keep the track zone in repair even in the absence of statutory authorization.²⁶

While the view has been expressed that the enactment of a statute imposing on a street railroad company the duty to repair a certain portion of the streets is an exercise of the taxing power,²⁷ it has been held that the duty to repair is not in the nature of an assessment liability, and the requirement that the railway meet the expense thereof is in no possible sense an assessment.²⁸ According to some cases, the state, in enacting such a statute, acts under the police power,²⁹ which is binding on all citizens.³⁰ Such a statute must be given effect,³¹

15. Pa.—Philadelphia v. 13th St., etc., Pass. R. Co., 3 Pa. Dist. 468, affirmed 33 A. 126, 169 Pa. 269—Philadelphia, etc., Pass. R. Co. v. Philadelphia, 11 Phila. 358. Set-off of alleged damages for such stoppage see *infra* § 126.

16. Ill.—People v. Chicago Rys. Co., 15 N.E.2d 705, 369 Ill. 128.

17. Ill.—Chicago Union Traction Co. v. Case, 129 Ill. App. 451. 60 C.J. p 265 note 78.

18. U.S.—In re Madison Rys. Co., C. C.A. Wis., 115 F.2d 586.

Pa.—Yoder v. City of Philadelphia, 173 A. 275, 315 Pa. 586—Abington Tp. v. Philadelphia Rapid Transit Co., Com. Pl., 57 Montg. Co. 250.

Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S.W.2d 936, 167 Tenn. 265. 60 C.J. p 265 note 79.

Scope and extent of duty see *infra* § 115.

Keeping open the public streets is an imperative duty resting on street railways.—Baltimore Transit Co. v. Faulkner, 20 A.2d 485, 179 Md. 593.

19. Kan.—Slaton v. Union Elec. Ry. Co., 145 P.2d 456, 158 Kan. 132.

Pa.—Illingsworth v. Pittsburgh Rys. Co., 200 A. 89, 331 Pa. 369—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503.

Utah.—Christensen v. Utah Rapid Transit Co., 27 P.2d 468, 83 Utah 231. 60 C.J. p 265 note 79.

Proper and suitable condition

Ill.—Valuch v. Rawson, 270 Ill. App. 583.

20. Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S.W.2d 936, 167 Tenn. 265.

21. Pa.—Yoder v. City of Philadelphia, 173 A. 275, 315 Pa. 586.

22. U.S.—In re Madison Rys. Co., C.C.A. Wis., 115 F.2d 586.

23. Wis.—State v. Milwaukee Electric Ry. & Light Co., 161 N.W. 745, 165 Wis. 230.

24. Wis.—State v. Milwaukee Electric Ry. & Light Co., *supra*. 60 C.J. p 266 note 82.

25. Wis.—State v. Milwaukee Electric Ry. & Light Co., *supra*.

26. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N.W. 377, 190 Wis. 379. 60 C.J. p 266 note 84.

27. U.S.—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied Sheeran v. City of New York, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449. 60 C.J. p 266 note 85.

28. N.H.—Standard Oil Co. of New York v. Nashua St. Ry., 189 A. 166, 88 N.H. 342.

Reason for rule

The duty to repair existed in order to relieve the public from the expenses of highway maintenance because of the railway's special use of the street, and the railway received no special benefits for which it could be assessed.—Standard Oil Co. of New York v. Nashua St. Ry., *supra*.

29. Ind.—State v. Terre Haute, I. & E. Traction Co., 167 N.E. 127, 201 Ind. 346.

30. Ind.—State v. Terre Haute, I. & E. Traction Co., *supra*.

31. U.S.—American Brake Shoe &

and, if duly authorized so to do, the municipality may require a compliance with such duty;³² but it has been held that the burden of maintaining streets in reasonably safe condition is not shifted from the city to the street railway company by a statute of this nature.³³ A statutory provision as to repairs has no application to a street railroad company which is not operating under such statute.³⁴

Duty imposed by contract or terms of grant or permission. Contracts with a municipality imposing on a street railroad company duties as to the repair of streets occupied by a street railroad company will be given effect³⁵ and enforced,³⁶ and under its general power to impose such terms as it may deem fit in granting permission to construct, maintain, and operate a street railroad, a municipality may impose on the grantee the duty to keep in repair that portion of streets which is occupied by the company,³⁷ and, according to some cases, on acceptance of the grant, a contract is created,³⁸ and the terms and conditions as to repairs are binding on the grantee.³⁹ It has been held, however, that, in imposing restrictions as to repairs, the local authorities act as public officers and not as trustees of the municipality,⁴⁰ that, in a strict sense, the acceptance of the grant does not create a contract,⁴¹ and that a provision as to the manner of repairing is regulatory and not contractual.⁴² In

determining questions as to the duty to repair, a grant is to be strongly construed against the grantee and favorably to the public.⁴³

§ 113. Duty to Pave or Otherwise Improve Street or to Pay Therefor in General

The duty of a street railroad company to improve or pave the street or pay the cost thereof may be imposed by legislative authority or exist by virtue of some contract, and does not generally exist in the absence of such statute or contract.

While there is authority for the view that, under its general duty to keep the portions of the street occupied by it in good condition, a street railroad company may, under certain circumstances be required to pave,⁴⁴ it has been held or recognized that the duty of a street railroad to improve or pave the street, or a portion thereof, or to pay the cost thereof, must be imposed by legislative authority, or exist by virtue of some contract, express or implied,⁴⁵ and that the common-law obligation so to use the right of way as to avoid obstructing travel cannot be stretched to include the duty to rebuild any portion of the street or to pave that portion of the street occupied by the tracks where the franchise imposes no obligation on the railway company to improve or repair any part of the street.⁴⁶

Valid statutory provisions imposing on street rail

Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied *Sheeran v. City of New York*, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.
60 C.J. p 266 note 88.

Purpose of statute relating to repair of street between street railway tracks was to charge street railway company with sole responsibility for maintenance of such portion of street, irrespective of the source of defects therein.—*McCarthy v. Brooklyn & Queens Transit Corp.*, 4 N.Y.S.2d 213, 254 App.Div. 757, affirmed 18 N.E.2d 686, 279 N.Y. 737.

32. Ga.—*Georgia Ry. & Power Co. v. City of Atlanta*, 113 S.E. 420, 153 Ga. 335.

33. Minn.—*Phellon v. Duluth-Superior Transit Co.*, 277 N.W. 552, 202 Minn. 224.

34. N.Y.—*Gilmore v. City of Utica*, 29 N.E. 841, 131 N.Y. 26—*Gilmore v. City of Utica*, 24 N.E. 1009, 121 N.Y. 561.

35. Ky.—*City of Maysville v. Davis*, 179 S.W. 463, 166 Ky. 555.
60 C.J. p 266 note 91.

36. Pa.—*Burgess and Town Council of Borough of Norristown v. Reading Transit & Light Co.*, 121 A. 495, 277 Pa. 459—*West Penn Rys. Co. v. Public Utility Commission*, 4 A.2d 545, 135 Pa.Super. 89.

Specific performance of contract by street railroad company to repair street see *Specific Performance* § 74.

37. Wis.—*State v. Milwaukee Electric Ry. & Light Co.*, 139 N.W. 396, 151 Wis. 520, Ann.Cas.1914B 123.
60 C.J. p 266 note 93.

Conditions or reservations in grants of franchises or privileges generally see *supra* §§ 32-33.
Portion of street included see *infra* § 117.

38. Ill.—*Chicago City Ry. Co. v. City of Chicago*, 154 N.E. 112, 323 Ill. 246.
60 C.J. p 266 note 95.

39. Ill.—*Chicago City Ry. Co. v. City of Chicago*, *supra*.
60 C.J. p 266 note 96.

40. Mass.—*City of Northampton v. Northampton St. Ry. Co.*, 121 N.E. 495, 231 Mass. 540.

41. Mass.—*City of Northampton v.*

Northampton St. Ry. Co., *supra*—*Flood v. Leahy*, 66 N.E. 804, 181 Mass. 230.

42. Wis.—*State v. Milwaukee Electric Ry. & Light Co.*, 147 N.W. 232, 157 Wis. 121.

43. Ill.—*Chicago City Ry. Co. v. City of Chicago*, 154 N.E. 112, 323 Ill. 246.

Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, 119 N.E. 202, 97 Ohl. St. 122.

Construction and operation of grant in general see *supra* §§ 71-74.

44. Pa.—*In re Street Railways*, 2 Pa.Dist. 439.
60 C.J. p 267 note 4.

Necessity, character, and type of repairs or improvements see *infra* § 123.

Recovery by municipality of cost of repairs see *infra* § 126.

45. Tenn.—*City of Knoxville v. Knoxville Power & Light Co.*, 6 S.W.2d 936, 167 Tenn. 265.
60 C.J. p 267 notes 5-8.

46. Tenn.—*City of Knoxville v. Knoxville Power & Light Co.*, *supra*.

road companies the duty to pave, or to pay for paving, must be given effect,⁴⁷ including provisions existing when such company accepts its franchise for the use of streets.⁴⁸ The view has been taken that, in order that a statute may be construed as imposing a liability in respect of paving, the intention of the legislature should be expressed in language which is not ambiguous.⁴⁹

Imposition of duty by municipality in general. According to some cases, a municipality may not require a street railroad company to improve the street occupied by such company's tracks, in the absence of statutory authorization of the municipality in this regard.⁵⁰ Thus, the powers of the municipality in respect of imposing on street railroad companies obligations as to paving are derived solely from statute, and it can exercise only such powers as are there conferred,⁵¹ in the manner prescribed, when the mode of exercise is prescribed in the statute;⁵² and the attempted imposition by a municipality of the duty to pave is an assumption of the power of taxation,⁵³ and, while there is authority apparently to the contrary,⁵⁴ the view has been taken, that, merely in the exercise of the police power, a municipality may not require a street railroad company to pave.⁵⁵

The power to require street railroad companies to pave is sometimes conferred on municipalities by express statutory provisions,⁵⁶ and, according to some cases, the power may be exercised under a statutory provision that a street railroad is subject to such reasonable rules and regulations as municipal authorities may prescribe,⁵⁷ or under a provision of a franchise that it is subject to such regulations as to streets and highways as the municipal council may from time to time enact,⁵⁸ and even under statutory provision giving the municipality exclusive control and power over its streets.⁵⁹ On the other hand, it has been held that a municipality may not impose on the railroad company obligations in respect of paving under a statutory provision that the company shall be subject to ordinances regulating the running of passenger railway cars,⁶⁰ and, where a street railroad is authorized by its charter to use streets without the consent of the municipality, the latter may not impose terms in respect of paving.⁶¹

It is usually recognized that a municipality and a street railroad company may enter into a contract by which the company becomes obligated to pave,⁶² and usually a municipality has authority to include in its consent to, or grant of, the use of

47. U.S.—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied *Sheeran v. City of New York*, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.

Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S.W.2d 936, 167 Tenn. 265.
60 C.J. p 267 note 7.

Statute held constitutional

(1) Statute authorizing special assessments against street railway for cost of city's reconstructing tracks.—State v. Kansas City, 4 P.2d 422, 134 Kan. 157, 78 A.L.R. 507.

(2) Provision that reconstruction of tracks should be to satisfaction of company engineer who was not a public officer.—State v. Kansas City, *supra*.

48. U.S.—Boisot v. Amarillo St. Ry. Co., D.C.Tex., 244 F. 838, affirmed 249 F. 193, 161 C.C.A. 229.

49. Pa.—Philadelphia v. Empire Pass. R. Co., 5 Pa.Dist. 53, 18 Pa. Co. 81.

50. Wash.—State v. Olympia Light & Power Co., 158 P. 85, 91 Wash. 519.

60 C.J. p 267 note 11.

Changes in obligations imposed see *infra* § 116.

51. Iowa.—Oskaloosa St. R., etc., Co. v. Oskaloosa, 68 N.W. 808, 99 Iowa 496.

52. Iowa.—Oskaloosa St. R., etc., Co. v. Oskaloosa, *supra*.
60 C.J. p 267 note 13.

53. N.J.—Fielders v. North Jersey St. R. Co., 53 A. 404, 54 A. 822, 68 N.J.Law 343, 96 Am.S.R. 552, 59 L.R.A. 455.

54. U.S.—Munoz v. Porto Rico Ry., Light & Power Co., C.C.A.Puerto Rico, 74 F.2d 816, certiorari denied 56 S.Ct. 88, 296 U.S. 577, 80 L.Ed. 408.

60 C.J. p 267 note 15.

55. N.J.—Fielders v. North Jersey St. R. Co., 53 A. 404, 54 A. 822, 68 N.J.Law 343, 96 Am.S.R. 552, 59 L.R.A. 455.

60 C.J. p 267 note 16.

56. U.S.—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied *Sheeran v. City of New York*, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.

60 C.J. p 267 note 17.

Statute and ordinance passed thereunder held constitutional

Ga.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471,

reversed on other grounds *Georgia Ry. & Electric Co. v. City of Decatur*, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.

57. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N. W. 877, 190 Wis. 379.
60 C.J. p 267 note 18.

58. Wis.—City of Madison v. Southern Wisconsin Ry. Co., 146 N.W. 492, 156 Wis. 352, 10 A.L.R. 910, affirmed 36 S.Ct. 400, 240 U.S. 457, 60 L.Ed. 739.

60 C.J. p 267 note 20.

59. Tex.—Dallas Ry. & Terminal Co. v. Bankston, Com.App., 51 S.W.2d 304—City of Highland Park v. Dallas Ry. Co., Civ.App., 243 S.W. 674.

60. Pa.—Philadelphia v. Empire Pass. R. Co., 35 A. 721, 177 Pa. 382.

60 C.J. p 268 note 21.

61. Pa.—Philadelphia v. Hestonville, etc., R. Co., 35 A. 718, 177 Pa. 371.

62. Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed *Latshaw v. State of Missouri ex rel. Kansas City Public Service Co.*, 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

60 C.J. p 268 note 23.

a street for street railroad purposes a provision requiring the grantee to pave, or to pay for paving, a certain portion of streets on which the tracks are located,⁶³ even, according to some cases, in the absence of an express statutory provision authorizing such stipulation;⁶⁴ and, where the grant is accepted, it becomes a binding contract between the municipality and the company,⁶⁵ and the company is bound to comply with such a provision as to paving.⁶⁶ An agreement by a street railroad company which is without consideration is not enforceable.⁶⁷

A street railroad company which accepts, and continues to enjoy the benefits of, an ordinance granting permission to use streets may not reject the burdens imposed with respect to paving,⁶⁸ even though the grant by the municipality,⁶⁹ or the work which the municipality did, out of which the obligation of the company arises,⁷⁰ is *ultra vires*.

The necessity that ordinances purporting to impose the duty to pave should be reasonable has been asserted,⁷¹ and the view has been taken that municipal ordinances requiring street railroad companies to pave the streets occupied by them relate only to such companies as are required by their several charters to do this,⁷² or to such as are amenable to conditions precedent imposed, in pursuance of acts of the legislature, by the municipality as the price and consideration of its consent to their occupation of the streets.⁷³ In determining whether the duty in respect of paving has been imposed on a street railroad company by a franchise agreement between such company and a mu-

nicipality, the agreement must be construed as a whole and given effect in all its parts.⁷⁴

Strict construction of franchise. The general rule that provisions in a street railroad franchise are to be strictly construed against the grantee and in favor of the public applies in determining the question as to the duty of the grantee to pave or to pay for paving.⁷⁵

§ 114. Substitution of State for Municipality as Party to Contract and Authority of State Officers or Boards

Statutes may validly substitute the state for a municipality as a party to a contract with a street railroad company for the maintenance of a highway.

A statute providing that the state shall succeed to, and take over to itself, the rights of a municipality under a contract between such municipality and a street railroad company providing for the maintenance by the railroad company of a highway which becomes a state highway is valid.⁷⁶ It substitutes the state for the municipality as a party to the contract and vests in the state the municipality's rights under the contract,⁷⁷ and constitutes the state the only party or entity which may enforce such contract against the railroad company.⁷⁸

Public utility boards. Certain statutes defining the powers of state public utility boards or commissions have been so construed as not to give to such boards or commissions general control over contracts between street railroad companies and

63. N.J.—Rutherford v. Hudson River Traction Co., 63 A. 84, 73 N.J.Law 227.

60 C.J. p 268 note 24.

64. U.S.—Boisot v. Amarillo St. Ry. Co., D.C.Tex., 244 F. 838, affirmed 249 F. 193, 161 C.C.A. 229.

60 C.J. p 268 note 25.

65. U.S.—Boisot v. Amarillo St. Ry. Co., *supra*.

60 C.J. p 268 note 26.

Duty equivalent to special assessment

Where agreement between city and street railroad requires railroad to pave, maintain, and repair portions of the street in consideration of rights and privileges granted, duty of maintenance thus created is equivalent to a special assessment on railway's right of way, as if railroad had paid consideration in cash and city used the money to lay and maintain pavement.—People v. Chicago Rys. Co., 15 N.E.2d 705, 369 Ill. 128.

66. N.J.—Rutherford v. Hudson River Traction Co., 63 A. 84, 73 N.J.Law 227.

60 C.J. p 268 note 27.

67. Ill.—South Park Com'rs v. Chicago City Ry. Co., 122 N.E. 89, 286 Ill. 504.

60 C.J. p 268 note 32.

68. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.

69. N.J.—Borough, etc., of Rutherford v. Hudson River Traction Co., 63 A. 84, 73 N.J.Law 84.

70. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.

71. Pa.—Philadelphia v. Empire Pass. R. Co., 7 Phila. 321.

72. Pa.—Philadelphia v. Empire Pass. R. Co., 5 Pa.Dist. 53, 18 Pa. Co. 81.

73. Pa.—Frankford, etc., Pass. R. Co. v. Philadelphia, 4 A. 550, 1 Pa. Cas. 583—Philadelphia v. Empire Pass. R. Co., 5 Pa.Dist. 53, 18 Pa. Co. 81.

74. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

60 C.J. p 269 note 36.

75. U.S.—Southern Wisconsin R. Co. v. City of Madison, Wis., 36 S.Ct. 400, 240 U.S. 457, 60 L.Ed. 739.

60 C.J. p 269 note 38.

76. Pa.—Cheltenham Tp. v. Philadelphia Rapid Transit Co., 141 A. 259, 292 Pa. 384.

60 C.J. p 269 note 39.

77. Pa.—Cheltenham Tp. v. Philadelphia Rapid Transit Co., *supra*.

60 C.J. p 269 note 40.

78. Pa.—Cheltenham Tp. v. Philadelphia Rapid Transit Co., *supra*.

municipalities, in respect of the maintenance or repair of streets or highways.⁷⁹ Under other statutes, the public service commission has been granted certain supervisory powers over street railroad companies in respect of their charter duties as to the maintenance and repair of streets between, and adjacent to their tracks, and the maintenance of tracks,⁸⁰ but such a statutory provision is repealed as to conflicting matters included in a subsequent statute conferring on a municipality the power to impose on the street railroad company concerned terms, conditions, and regulations as to the use and occupancy of streets of the municipality by such company.⁸¹

§ 115. Scope and Extent of Duty

The scope and extent of the duty of a street railroad company in respect of repairing or improving streets are generally determined by the terms of the governing statute, ordinance, or contract.

Subject to the rules sometimes recognized, as discussed supra §§ 111-113 and infra § 117, which impose certain so-called common-law duties on street railroad companies, the scope and extent of the obligation or duty of a street railroad company in respect of repairing, paving, or otherwise improving streets are determined by the terms of the governing statute, ordinance, or contract,⁸² and the

duty imposed on railroad companies by statute to keep in good and safe condition a certain portion of streets occupied by their tracks is the same as that which rests on the municipality.⁸³ Reasonable care and diligence are the measure of the duty.⁸⁴ The implied obligation of the railway company to repair and maintain the portion of the street occupied under its franchise cannot be judicially enlarged or extended to impose an additional obligation to rebuild or improve the space along the tracks so as to bring it into conformity with municipal ideals of street improvement or street reconstruction.⁸⁵

Continuing duty. The duty to repair is a continuing one;⁸⁶ and a duty to "lay and maintain" pavement is not limited to paving only, but includes the maintenance of the pavement.⁸⁷

What streets included. The duty of a street railroad company to pave a portion of streets occupied by its road applies, in general, to any public street so occupied,⁸⁸ even though, under some statutes, no cars are operated over the tracks.⁸⁹ Where the language of the controlling municipal grant, imposing duties as to improvements or repairs necessarily relates to streets occupied by the grantee, the duty does not extend to a street in which the railroad is not built,⁹⁰ even though the grant includes the right to build in such street,⁹¹ and, usual-

79. Pa.—Burgess and Town Council of Borough of Norristown v. Reading Transit & Light Co., 121 A. 495, 277 Pa. 459.

60 C.J. p 269 note 43.

Determination as to necessity and character of repairs or improvements see infra § 123.

80. Vt.—Town of West Rutland v. Rutland Ry., Light & Power Co., 121 A. 755, 96 Vt. 413.

60 C.J. p 269 notes 44, 45.

81. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

82. Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S. W.2d 936, 167 Tenn. 265.

60 C.J. p 270 note 46.

"Openings" made by others

(1) A statute relating to repair of streets between street railway tracks imposes an unlimited obligation on street railway company to keep such portion of street in permanent repair, except as to the making of pavements or repairs over "openings" made by other persons, municipalities, or corporations.—McCarthy v. Brooklyn & Queens Transit Corp., 4

N.Y.S.2d 213, 254 App.Div. 757, affirmed 18 N.E.2d 686, 279 N.Y. 737.

(2) A depression in pavement at crosswalk between street railway tracks caused by city's faulty repavement after city's excavation for installation of traffic lights was not an "opening" within statute.—McCarthy v. Brooklyn & Queens Transit Corp., supra.

83. N.Y.—Hayes v. Brooklyn Heights R. Co., 93 N.E. 469, 200 N. Y. 133.

84. Ala.—Alabama Power Co. v. Lewis, 141 So. 229, 224 Ala. 594.

Ind.—Gary Rys. Co. v. Michael, 34 N.E.2d 159, 109 Ind.App. 672.

Company's duty was only to see that the street between its rails and adjacent thereto should be kept so nearly level as not to endanger the lives of people using the street or crossing its rails.—Pfister's Adm'r v. Jones, 168 S.W.2d 304, 291 Ky. 151.

85. Tenn.—City of Knoxville v. Knoxville Power & Light Co., 68 S. W.2d 936, 167 Tenn. 265.

Change in obligation by subsequent statute or municipal ordinance or action see infra § 116.

86. Pa.—Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.

60 C.J. p 270 note 51.

Repaving see infra §§ 122, 123.

87. Mass.—Worcester v. Worcester Consol. St. R. Co., 78 N.E. 222, 192 Mass. 106.

88. U.S.—City of Memphis v. Elgin, C.C.A.Tenn., 299 F. 565.

60 C.J. p 270 note 54.

Bridges see infra § 119.

Extension of railroad lines and boundaries of municipality see infra § 118.

89. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., C.C.N.Y., 191 F. 216.

60 C.J. p 270 note 55.

90. Ill.—Uhlrich v. Chicago, 79 N.E. 598, 224 Ill. 402.

Tex.—Gulf City St. R., etc., Co. v. Galveston, 7 S.W. 520, 69 Tex. 660.

91. Tex.—Gulf City St. R., etc., Co. v. Galveston, supra.

60 C.J. p 270 note 57.

ly, no company may be compelled to pay for paving in a street not occupied by it.⁹²

Private right of way. The police powers vested in a municipality or public service commission do not authorize it to compel a street railroad company to pave between its rails where its tracks are laid on its private property on which the public has no right to enter;⁹³ and a statute requiring such utility to keep its facilities reasonably safe for patrons, employees, and the public cannot be construed to mean that the entire plant of the utility must be maintained so as to be safe for the public to enter upon its private property in invitum.⁹⁴

§ 116. — Change in Obligation by Subsequent Statute or Municipal Ordinance or Action

Where the obligation of a street railroad company in respect of repairs or paving is fixed by charter, statute or grant, it may not be enlarged, in the absence of valid statutory authorization or reservation of power to do so; and, where the subject has become a matter of contract, the contract may not be impaired by the imposition of additional burdens by subsequent statute or municipal action or ordinance.

The municipality may not enlarge the obligation, in the absence of valid statutory authorization or of a valid reservation of power to do so, where the

obligation of a street railroad company in respect of repairs or paving is fixed by its charter or other statute,⁹⁵ or by a municipal grant;⁹⁶ nor can it revoke or infringe rights vested by the franchise;⁹⁷ and, in general, where the subject of paving has become a matter of contract, the contract may not be impaired by the imposition of additional burdens by subsequent state statute⁹⁸ or municipal action or ordinance.⁹⁹ If a street railroad company is legally bound only to repair, and not to repave, local authorities may not require the company to repave even though repaving would cost less than repairs.¹

No question can arise, however, as to the impairment of the obligation of a contract, where the company accepts all of its corporate powers and franchises subject to the reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise,² and a modification of a franchise by statute accepted by the grantee does not constitute an impairment of the obligation of the contract.³ Where no contract is involved, ordinarily a subsequent statute as to paving supersedes prior municipal ordinances on the subject and is controlling.⁴ So the power of the municipality to change the terms of a franchise ordinance as to paving, under certain circumstances, has been recognized,⁵ and mere reasonable

92. Pa.—City of Philadelphia v. Second & Third Sts. Pass. R. Co., 2 Pa. Dist. 705.

93. U.S.—Munoz v. Puerto Rico Ry., Light & Power Co., C.C.A. Puerto Rico, 74 F.2d 816, certiorari denied 56 S.Ct. 88, 296 U.S. 577, 80 L.Ed. 408.

94. U.S.—Munoz v. Puerto Rico Ry., Light & Power Co., supra.

Determination of title

(1) Company operating street railroad and in possession of right of way for over thirty years and proving title thereto by duly recorded deeds was not required to establish its title at law before enjoining enforcement of Public Service Commission's order requiring pavement between rails.—Munoz v. Puerto Rico Ry., Light & Power Co., supra.

(2) Determination of title to land involves judicial powers which Public Service Commission of Puerto Rico does not possess, nor is commission empowered to condemn land, with respect to validity of commission's order requiring company operating street railroad to pave between rails laid on land allegedly

owned by company.—Munoz v. Puerto Rico Ry., Light & Power Co., supra.

95. N.Y.—City of Binghamton v. Binghamton & P. D. Ry. Co., 16 N.Y.S. 225, 61 Hun 479.

Pa.—Philadelphia v. Philadelphia City Pass. R. Co., 35 A. 720, 177 Pa. 379.

96. Ill.—City of Chicago v. Chicago Rys. Co., 118 N.E. 728, 282 Ill. 383. 60 C.J. p 271 note 61.

97. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.

98. U.S.—Chicago v. Sheldon, Ill., 9 Wall. 50, 19 L.Ed. 594.

60 C.J. p 271 note 63. Impairment of contract as to use of street in general see Constitutional Law § 311.

99. Wash.—State v. Olympia Light & Power Co., 158 P. 85, 91 Wash. 519.

60 C.J. p 271 note 64.

1. N.J.—Board of Chosen Freeholders of Hudson County v. Jersey City, H. & P. St. Ry. Co., 88 A. 1061, 85 N.J.Law 179.

60 C.J. p 272 note 71.

Release of company because of financial hardship see *infra* § 124.

2. N.Y.—City of New York v. Union Ry. Co. of New York City, 201 N.Y.S. 396, 206 App.Div. 472, affirmed 144 N.E. 896, 238 N.Y. 571. 60 C.J. p 271 note 65.

Effect of reservation on power to amend corporate charter in general see Corporations § 80.

3. N.Y.—Binniger v. City of New York, 81 N.Y.S. 226, 80 App.Div. 438, modified on other grounds 69 N.E. 390, 177 N.Y. 199.

4. N.J.—Kohlreiter v. Mackay, 160 A. 568, 10 N.J.Misc. 712, affirmed 166 A. 163, 110 N.J.Law 448. 60 C.J. p 271 note 67.

5. Iowa.—Des Moines City Ry. Co. v. City of Des Moines, 131 N.W. 43, 152 Iowa 18. 60 C.J. p 271 note 68.

Exercise of power of local self-government

City had authority to modify street railway franchise paving obligations without railway's consent because modification was exercise of power of local self-government.—Ricketts v. City of Mansfield, 183 N.E. 181, 43

regulations as to the details of carrying out an obligation previously imposed may be made by the municipality.⁶ As a consideration for the grant of additional privileges, the municipality may impose new or additional burdens.⁷ A resolution of a municipality requiring a street railway company to replace a portion of its track, which has been destroyed, and reciting that the company is bound to do so under the ordinance granting its privileges does not attempt to change or alter such ordinance, but is merely an assertion of what the city claims to be the company's duty thereunder, with a demand that it comply therewith.⁸

§ 117. — Portion of Street Included

The common-law duty of a street railroad company to keep that portion of the street occupied by it in repair at least to the end of its crossties may be enlarged by proper statutory or municipal authority or by contract; and in general the extent of the company's duty depends on the terms of the governing statute, ordinance, or contract.

The common-law duty of a street railroad company to keep the portion of the street or highway occupied by it in repair extends, it has been held, at least to the end of its crossties,⁹ and this duty

may be enlarged by proper statutory or municipal authority or by a contract voluntarily entered into.¹⁰ No duty to repair ordinarily rests on the company as to the part of the street not occupied by the right of way, and where as to that part any such duty exists, it must be by virtue of statutory imposition or of contract.¹¹ In granting the use of the street, however, the municipality may impose the duty to keep the whole roadway in repair.¹² In general the extent of the company's duty, in so far as the part of the streets to which it extends is concerned, depends on the terms of the governing statute, ordinance, or contract,¹³ and various terms describing such part have been the subject of judicial construction.¹⁴

Substitution of single for double track. While the right of a street railroad company to narrow its obligation as to the extent of a street which it must keep in repair, by the substitution of a single track for double tracks under authority duly conferred by the municipality, has been recognized,¹⁵ notwithstanding the right of a street railway company to remove double tracks and establish a single track, it may not, after its obligation to pave has been fixed by existing double tracks, and after the municipality

Ohio App. 316, error dismissed 185 N. E. 881, 125 Ohio St. 631.

6. Cal.—Town of St. Helena v. San Francisco, N. & C. Ry., 140 P. 600, 605, 24 Cal.App. 71.
60 C.J. p 272 note 69.

7. Pa.—McKeesport v. Pittsburgh, etc., R. Co., 62 A. 1075, 213 Pa. 542.
60 C.J. p 272 note 70.

8. U.S.—St. Augustine v. St. Johns Electric Co., C.C.A.Fla., 286 F. 474.

9. Ky.—South Covington & C. St. Ry. Co. v. Wintermeyer, 206 S.W. 157, 182 Ky. 94.
60 C.J. p 272 note 73.

10. Pa.—Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.

11. Ind.—Indianapolis Traction, etc., Co. v. Pressell, 77 N.E. 357, 39 Ind. App. 472.

Pa.—Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.

12. Pa.—Burgess and Town Council of Borough of Norristown v. Reading Transit & Light Co., 121 A. 495, 277 Pa. 459.

13. Ky.—South Covington & C. St. Ry. Co. v. Henkel & Sullivan, 14 S. W.2d 1068, 228 Ky. 271.
60 C.J. p 272 note 77.

14. Minn.—City of Duluth v. Duluth St. Ry. Co., 163 N.W. 659, 137 Minn. 286.

60 C.J. p 272 notes 78, 79, p 273 notes 80-91.

Particular descriptive terms construed

(1) "Between its tracks, the rails of its tracks" and a specified distance "outside of its tracks."—City of Amsterdam v. Fonda, etc., R. Co., 104 N.Y.S. 411, 119 App.Div. 680—60 C.J. p 273 note 91.

(2) "Between the rails."—Village of Grandville v. Grand Rapids, H. & C. R. R., 196 N.W. 351, 225 Mich. 587, 34 A.L.R. 1408—60 C.J. p 273 notes 84, 86.

(3) Between the rails and for a specified distance outside each rail.—Southern Bitulithic Co. v. Algiers Ry. & Lighting Co., 58 So. 588, 130 La. 830—60 C.J. p 273 note 89.

(4) "Between the tracks."—Orange County Traction Co. v. City of Newburgh, 149 N.Y.S. 1, 86 Misc. 512—60 C.J. p 273 note 87.

(5) Between the tracks and a specified distance outside thereof.—Washington, etc., R. Co. v. District of Columbia, D.C., 2 S.Ct. 865, 108 U.S. 522, 27 L.Ed. 807—60 C.J. p 273 note 90.

(6) "In and about the rails."—New York v. Second Ave. R. Co., 7 N.E. 905, 102 N.Y. 572, 55 Am.R. 839—60 C.J. p 273 note 83.

(7) "Inside of their tracks."—City of Bayonne v. Public Service Ry. Corporation, 119 A. 9, 98 N.J.Law 255—60 C.J. p 273 note 85.

(8) "Inside the rails, and for two feet four inches outside thereof."—People v. Fort St., etc., R. Co., 2 N. W. 188, 41 Mich. 413—60 C.J. p 273 note 88.

(9) "That portion of the street which they use and occupy."—Philadelphia v. Thirteenth St., etc., Pass. R. Co., 33 A. 126, 169 Pa. 269—60 C. J. p 273 note 81.

(10) The "roadbed" of the railroad.—Shreveport v. Shreveport Belt R. Co., 32 So. 189, 107 La. 785—60 C.J. p 273 note 82.

(11) Streets or other highways "occupied."—Philadelphia v. Thirteenth St., etc., Pass. R. Co., 33 A. 126, 169 Pa. 269—60 C.J. p 273 note 79.

(12) Streets "traversed by the said railway."—Mayberry v. Second St., etc., Pass. R. Co., 9 Wkly.N.C. 404—60 C.J. p 273 note 80.

15. Pa.—City of Allentown v. Lehigh Valley Transit Co., 39 Pa. Super. 529.

has put in its share of the paving, change its tracks, and thereby avoid a portion of the contract obligation.¹⁶

§ 118. — Extension of Line and of Boundaries of Municipality

The duty of a street railroad company to keep in repair and pave the part of the streets occupied by its tracks may apply to extensions of its line or where the boundaries of the municipality have been extended to include a street on which the company's tracks are laid.

A municipal ordinance requiring any street railroad company operating a line within the corporate limits to keep in good repair all that part of the street occupied by its tracks includes additional tracks to be laid, as well as those already laid and under operation,¹⁷ and a specific provision of an agreement between a municipality and the company as to the cost of paving, that the agreement shall be applicable to extensions, will be given effect.¹⁸ Where an extension is authorized by an amendment to the original act, such extension is subject to the obligations contained in such original act as amended, including the duty to pave, although the amendatory statute, permitting the construction of the tracks in the street in question, contains no provision for repair or paving;¹⁹ but where the extension is authorized by a subsequent independent ordinance, which does not refer to, or incorporate into itself, the terms of the original ordinances, and which makes no provision as to paving, the extension is not required to be paved.²⁰ Where a grant of a franchise for an extension can only be made subject to the restrictions of the municipal charter as to repairing and paving the streets, such extension is subject to the charter regulation, although the existing line is operated under a legislative act exempting it from paving.²¹

Extension of boundaries of municipality. The duty of a street railroad company to pave certain portions of the street may include a street which is included in the boundaries of a municipality after the company's track was laid in such street,²² but the authority of the municipality to require the company to bear the expense of repairs or improvements, not rendered necessary by wrongful acts of the company, has been denied where the street involved was one in which the railroad had been built, and the street itself dedicated, with reservation of the right to locate the tracks by a predecessor of the company, before the street had been included within the boundaries of the municipality.²³

§ 119. — Bridges

- a. In general
- b. Apportionment of cost and contribution

a. In General

Street railroad companies using a bridge may be required to assume the cost of repairs and alterations rendered necessary by such use, and it has been held that there is a common-law duty to repair.

Local authorities may require, as a condition of their consent to the use of a bridge by a street railroad company, that the company shall assume the cost of repairs and alterations rendered necessary by such use,²⁴ and there is authority for the view that there is a common-law duty to repair.²⁵ A company may be under a duty in respect of the maintenance and repair of a bridge on which its tracks are located notwithstanding a concurrent, but independent, duty of another corporation in respect thereof.²⁶ The extent of the duty imposed

16. Mich.—Village of Grandville v. Grand Rapids, H. & C. R. R., 196 N.W. 851, 225 Mich. 587, 34 A.L.R. 1408.

17. Ala.—Montgomery St. R. Co. v. Smith, 39 So. 757, 146 Ala. 316.

18. N.Y.—Davidge v. Binghamton, 71 N.Y.S. 282, 62 App.Div. 525. 60 C.J. p 274 note 94.

19. N.Y.—New York v. Harlem Bridge, etc., R. Co., 78 N.E. 1072, 186 N.Y. 304.

20. N.Y.—New York v. Eighth Ave. R. Co., 39 N.Y.S. 959, 7 App.Div. 84. 60 C.J. p 274 note 96.

21. Mo.—St. Louis v. Missouri R. Co., 87 Mo. 151.

22. N.C.—City of Raleigh v. Carolina Power & Light Co., 104 S.E. 462, 180 N.C. 234.

23. Va.—Lynchburg Traction & Light Co. v. City of Lynchburg, 128 S.E. 606, 142 Va. 255, 43 A.L.R. 752.

24. Iowa.—Burlington Ry. & Light Co. v. City of Burlington, 176 N.W. 285, 188 Iowa 272. 60 C.J. p 274 note 3.

Determination by public service commission of necessity for, and character of, repairs or rebuilding see *infra* § 123.

Requiring street railroad company to bear expense of strengthening bridge see *supra* § 33.

Right to use bridge see *supra* § 85.

25. Pa.—McKeesport v. Pittsburg, McK. & C. Ry. Co., 55 Pa.Super. 47. 60 C.J. p 274 note 5.

26. Va.—Roanoke Ry. & Electric Co. v. Brown, 154 S.E. 526, 155 Va. 259. 60 C.J. p 275 note 10.

Practical construction of ordinance

Railroad's maintaining overhead bridge on which tracks of street railway were carried in pursuance of ordinance requiring such maintenance and city's nonaction with respect thereto were held not practical construction of ordinances so as to exonerate street railroad from contributing to repairs which railroad made.—Roanoke Railway & Electric Co. v. Virginian Ry. Co., 165 S.E. 398, 159 Va. 289.

depends on the terms of the controlling statute,²⁷ franchise,²⁸ or contract,²⁹ and while, where an ordinance grants the right to lay street railroad tracks on the streets and bridges of a city, but in terms imposes the duty to repair only as to streets, it has been held that the company is not bound to keep in repair bridges crossed by its tracks,³⁰ the view has been taken that, under a statute or ordinance imposing on a street railroad company duties as to the repair of paving of streets or highways, and making no reference to bridges as distinguished from streets or highways, bridges are regarded as parts of such streets or highways.³¹

Bridge privately maintained. A street railroad company may have a duty to maintain a bridge, the general burden of maintaining which is on a private individual or another corporation.³²

b. Apportionment of Cost and Contribution

A street railroad company may be required to contribute to the expense of rebuilding or repairing a bridge used by it.

Even in the absence of express words imposing the obligation in the statute under which a street railroad company has the right to use a bridge, it has been held that such company is bound to contribute to the expense of rebuilding a public bridge, necessitated by the operation of heavier cars propelled by electricity.³³ Where a street railroad company's right to use a bridge is subject to revocation, the authority of the legislature to authorize municipal authorities to condemn and remove the bridge and to impose on the company the duty

to pay part of the cost of constructing a new bridge as a condition of the company's use of the new bridge has been upheld.³⁴ An agreement between a street railroad company and a municipal officer by which the company is to make certain improvements on a bridge, for which the municipality and the railroad company are to share the cost, is not binding on the municipality where such officer is not authorized to make such contract.³⁵ A municipality may not recover from a street railroad company a share of the cost of building a new bridge to replace another bridge where it appears that the new bridge was paid for by a third person and not by the municipality.³⁶ Where the duty of keeping a bridge in repair rests primarily on a railroad company, and a duty to keep in repair that portion of the bridge within its rails rests on a street railway company, the railroad company is entitled to recover contribution from the street railroad for repairs made without notice to the latter.³⁷

Authority of public utility commission in general.

Certain statutes conferring powers on state public utility boards or commissions authorize such boards or commissions to apportion the cost of rebuilding or repair between the company and the municipality involved.³⁸ The jurisdiction of the commission in this respect is, however, limited by the statute conferring authority,³⁹ and under some statutes the commission has no jurisdiction to apportion the expenses of repairs to a highway bridge which have already been made, in accordance with a contract between the municipality and a street railroad company whose road crosses the bridge,⁴⁰ the remedy

27. Iowa.—In re Walnut St. Bridge in City of Des Moines, 261 N.W. 781, 220 Iowa 55.

Kan.—State ex rel. Terbovich v. Board of Com'rs of Wyandotte County, 171 P.2d 777, 161 Kan. 700. 60 C.J. p 274 note 6.

Statute requiring operators of heavy vehicles to lay planks before crossing bridges was intended to increase strength of bridge as well as to protect floor thereof.—Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.

28. N.Y.—Town of Queensbury v. Hudson Valley Ry. Co., 135 N.Y.S. 200, 75 Misc. 197, modified on other grounds 143 N.Y.S. 120, 158 App. Div. 258, affirmed 112 N.E. 749, 218 N.Y. 648. 60 C.J. p 274 note 7.

Franchise construed with statute was held to require street railway to keep bridge safe without planking for vehicles weighing five tons or less

and safe for heavier vehicles with planking.—Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.

29. La.—State v. Canal St., etc., R. Co., 10 So. 940, 44 La. Ann. 526. Pa.—Pennsylvania R. R. v. Altoona & L. V. Elec. Ry., Com.Pl., 2 Lycoming 196. 60 C.J. p 274 note 7.

30. Iowa.—Cedar Rapids v. Cedar Rapids, etc., R. Co., 79 N.W. 125, 108 Iowa 406.

31. Va.—Roanoke Ry. & Electric Co. v. Brown, 154 S.E. 526, 155 Va. 259. 60 C.J. p 275 note 9.

32. Mass.—Proprietors Merrimack River Locks, etc. v. Lowell Horse R. Corp., 109 Mass. 221. 60 C.J. p 275 note 12.

33. N.J.—Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County, 78 A. 235, 78 N.J. Eq. 20.

34. U.S.—Rome Ry. & Light Co. v. Floyd County, Ga., 37 S.Ct. 291, 243 U.S. 257, 61 L.Ed. 706. 60 C.J. p 275 note 14.

35. N.Y.—New York Consolidated R. Co. v. City of New York, 155 N.E. 77, 244 N.Y. 140. 60 C.J. p 275 note 15.

36. N.C.—City of Raleigh v. Carolina Power & Light Co., 102 S.E. 614, 179 N.C. 380.

37. Va.—Roanoke Railway & Electric Co. v. Virginian Ry. Co., 165 S.E. 398, 159 Va. 289.

38. Conn.—Appeal of City of Norwalk, 91 A. 442, 88 Conn. 471. 60 C.J. p 276 note 17.

39. Me.—City of Augusta v. Lewiston, A. & W. St. Ry., 95 A. 267, 114 Me. 24.

40. Me.—City of Augusta v. Lewiston, A. & W. St. Ry., supra. 60 C.J. p 276 note 19.

of the municipality being one for breach of contract enforceable in the courts.⁴¹ Under some statutes the exercise of discretion by the commissioners in determining the apportionment of the cost between a company and a municipality is conclusive, unless manifestly illegal or unjust.⁴²

In view of a statute enacted by virtue of the police power of the state, giving the Public Service Commission exclusive powers with respect to the construction of bridges and apportionment of costs, it has been held that a private contract between a street railway company and a county for the use of a bridge, under which the county agreed to bear replacement costs, was subject to an implied condition that the lawful exercise of the police power might take place any time, and the parties concerned might be required to pay their proper share,⁴³ and, accordingly, even though such contract was valid when made, the street railroad company may be liable for its share of the cost of the replacement of the bridge.⁴⁴

Measure of contribution and matters considered. The measure of contribution for the cost of a new bridge on the part of a street railroad company ordinarily is the amount of the increased expense rendered necessary to accommodate the street railroad traffic on the bridge,⁴⁵ that is, the amount fairly expended by the municipality because of the company's use of the bridge;⁴⁶ and the amount ac-

tually expended by the municipality is not necessarily controlling in determining the amount of the company's contribution.⁴⁷

Under a statute requiring a street railroad company to pay so much of the expense of the construction of a new bridge to replace another bridge as may be equitable, what is equitable in a given case is what is fair and just under the circumstances,⁴⁸ and while under such statute a municipality which erects a bridge may not go beyond the public and street railway requirements, and compel the company to pay any part of the cost not needed for public and railway requirements, the municipality may provide for future as well as present railway and public needs;⁴⁹ in such case benefit to, and use by, the railway of the bridge, present and prospective, are decisive factors in fixing its equitable portion of the expense, and, since the apportionment between the company and the municipality must be made once only, the prospective and present use of the bridge by the company must be regarded, and various other matters considered.⁵⁰

Recovery by railroad company. The right of the railroad company to enforce against the municipality a claim for the share of the cost of rebuilding a bridge, apportioned to the municipality by a state public utility commission, has been recognized.⁵¹

Procedure. General rules as to procedure before, and appeals from decisions of, public utility

41. Me.—City of Augusta v. Lewiston, A. & W. St. Ry., *supra*.

42. Me.—Inhabitants of Orono v. Bangor Ry. & Electric Co., 74 A. 1022, 105 Me. 428.
60 C.J. p 276 note 21.

43. Pa.—Wilkes-Barre Ry. Corp. v. Public Service Commission, 188 A. 546, 124 Pa.Super. 362.

44. Pa.—Wilkes-Barre Ry. Corp. v. Public Service Commission, *supra*.

45. N.J.—Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County, 100 A. 610, 87 N.J. Eq. 518.
60 C.J. p 276 note 22.

46. N.J.—Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County, *supra*.

47. N.J.—Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County, *supra*.

48. Conn.—Appeal of City of Norwalk, 94 A. 988, 89 Conn. 537.
60 C.J. p 276 note 25.

49. Conn.—Appeal of City of Norwalk, *supra*.

50. Conn.—Appeal of City of Norwalk, *supra*.
60 C.J. p 277 note 31.

Matters properly considered

In apportioning the cost of a new bridge between a city and a street railway company under such statute, the following matters, among others, may properly be considered: The additional cost of strengthening the entire bridge so as to carry the load of cars operated over the tracks ordered by the public utilities commission; the increased size of the bridge due to provision for the tracks; the part of the surface of the bridge occupied by the company in the operation of its cars and the right of exclusion of other traffic when required for its own use; the permanent occupation of the bridge by the railway by its tracks, poles, wires, and equipment; the insurance of permanency in the installation of the railway's overhead equipment on the bridge; the special construction required for the company's exclusive service; the relative use of the part

of the bridge devoted to railway traffic by the railway and by the other traffic; the permanency of the bridge and the cost of its maintenance and depreciation on the investment; the impaired life cost of the bridge due to the railway; the saving to the railway in the maintenance and cost of operation; the decrease in liability for accident owing to the increased width of bridge and draw; the relief from congestion due to the increased width of the draw; and the saving of time in operation of cars by the change from a swinging to a lift draw.—Appeal of City of Norwalk, *supra*.

Matters not properly considered

In fixing the amount which, under such statute, the company must pay, the cost to it of paving, rails, ties, ballast, wires, cables, and other special work, must not be considered, nor must a contribution to the cost of the new bridge made by the state be considered.—Appeal of City of Norwalk, *supra*.

51. Me.—Bangor Ry. & Electric Co. v. Inhabitants of Town of Orono, 84 A. 385, 109 Me. 292.

commissions have been applied in proceedings involving the apportionment of the cost of repairing or replacing a bridge between a street railroad company and a municipality.⁵² The burden is on a county claiming contribution to the cost of a bridge from a street railroad company to show the amount which had been expended to accommodate trolley traffic in excess of what would have been necessary to accommodate other traffic only, where the municipality had sole control of the construction of the bridge.⁵³ The complaint in an action by a municipality to recover from a street railroad company a share of the cost of building a new bridge to replace another bridge is insufficient where it fails to show that the municipality has expended, or is bound to expend, any amount for the construction of the new bridge.⁵⁴

§ 120. — Change of Grade

The common-law duty of a street railroad company to keep its tracks in such condition that the street will be safe for travel requires it to restore the street, on a change of grade, and to make its tracks conform to all changes of grade, and this duty may be expressly imposed by statutes, ordinances, franchises, or contracts.

The common-law duty of a street railroad company to keep its tracks in such a condition that the street will be safe for travel requires it to restore the street, on a change of grade,⁵⁵ and to make its tracks conform to all changes of grade.⁵⁶ Furthermore, under the express provisions of some statutes, ordinances, franchises, or contracts, it is the duty of the company to maintain the tracks or roadbed in conformity with the grade of the street,⁵⁷ or to make the tracks or railroad conform to changes of

grade;⁵⁸ and, where a requirement to make "tracks" conform exists, it is implied that the company will change the grade of its roadbed whenever that is necessary to adjust the track to the changed grade of the street.⁵⁹ Where an interurban railway fails or refuses to lower its tracks to conform to a change of grade in the improvement of a road or street under a statute, it has been held that the commissioners of the county in which such improvement is situated may contract for the lowering of such tracks and assess the cost thereof against the railway company.⁶⁰ Ordinarily, however, the company is not bound to grade the street on either side of its tracks to the height of its roadbed.⁶¹

A municipality may be authorized by statutes to require a change of grade of the railroad,⁶² as, for example, by statutes conferring on certain municipal boards or officers authority as to change of grades of streets,⁶³ or as to paving and the laying or relaying of surface railroad tracks.⁶⁴ Under some statutes the expense of altering the grade of a highway at the request of a street railroad company, for the purpose of establishing the grade of its railroad, includes the damage to abutting owners resulting from such alteration.⁶⁵ A change of grade at the crown of the street to an unstated amount is not a change of grade in the sense contemplated by statute.⁶⁶

Authority of state boards. Under some statutes the state roads commission is not empowered to require a street railroad company to make changes in the grade of its road, at its own expense, rendered necessary by improvements made by the com-

52. Me.—*City of Augusta v. Lewiston, A. & W. St. Ry.*, 95 A. 267, 114 Me. 24.

60 C.J. p 277 note 50.

Appeal from, and review of, orders of public utility commissions see Public Utilities §§ 64-65.

Proceedings before public utility commissions generally see Public Utilities §§ 46-62.

53. N.J.—*Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County*, 100 A. 610, 87 N. J. Eq. 518.

60 C.J. p 277 note 51.

54. N.C.—*City of Raleigh v. Carolina Power & Light Co.*, 102 S.E. 614, 179 N.C. 380.

60 C.J. p 278 note 52.

55. Ind.—*Hammond, W. & E. C. Ry. Co. v. State Highway Commission*, 152 N.W. 806, 154 N.E. 20, 198 Ind. 456.

56. Ind.—*Hammond, W. & E. C. Ry. Co. v. State Highway Commission*, supra.

60 C.J. p 278 note 57.

57. Vt.—*City of Burlington v. Burlington Traction Co.*, 124 A. 857, 98 Vt. 24.

60 C.J. p 278 note 58.

58. Wis.—*Ashland St. R. Co. v. Ashland*, 47 N.W. 619, 78 Wis. 271.

60 C.J. p 278 note 59.

Apportionment of part of cost of eliminating grade crossing to street railroad see Railroads § 165.

59. Ark.—*Little Rock v. Citizens' St. R. Co.*, 19 S.W. 17, 56 Ark. 28.

60. Ohio.—*Ohio Traction Co. v. Huwe*, 189 N.E. 1, 127 Ohio St. 444.

61. La.—*State v. New Orleans Traction Co.*, 19 So. 565, 48 La. Ann. 567.

Tex.—*Galveston v. Galveston City R. Co.*, 46 Tex. 435.

62. Pa.—*Reading v. United Traction Co.*, 52 A. 106, 202 Pa. 571.

60 C.J. p 278 note 62.

63. N.Y.—*People ex rel. City of New York v. Belt Line Ry. Corp.*, 129 N.E. 217, 230 N.Y. 86.

60 C.J. p 278 note 63.

64. N.Y.—*People ex rel. City of New York v. Belt Line Ry. Corporation*, supra.

60 C.J. p 278 note 64.

65. Me.—*Hurley v. Inhabitants of South Thomaston*, 74 A. 734, 105 Me. 301.

60 C.J. p 278 note 65.

66. N.Y.—*Village of Peekskill v. Putnam & W. Traction Co.*, 168 N. Y.S. 809, 181 App. Div. 382.

mission,⁶⁷ and the commission may not impose liability on the company by virtue of the fact that a municipality might have required the company to make its tracks conform to a change of grade made by such municipality.⁶⁸ A municipality is not required to obtain the consent of the public service commission to make a slight and inconsequential change in the grade of its existing street intersections in a street occupied by a street railroad, rendered necessary before paving the street, especially where the railroad company is under contract to make the grade of its track conform to that of the street as the municipality may establish it.⁶⁹

§ 121. — Restoration of Streets after Removal of Tracks

The duty of a street railroad company or one claiming under it to restore streets on removal of tracks therefrom after the expiration or forfeiture of the franchise has been recognized.

While it has been held that one who acquires title to the rails of a street railroad, who is not the grantee, or purchaser, of the franchise, is not subject to the terms of the franchise which requires that on removal of rails the street shall be left in as good condition as before the removal was made,⁷⁰ there is authority recognizing that the duty to restore streets on the removal of tracks therefrom, after the expiration or forfeiture, of the franchise, rests on a street railroad company,⁷¹ or one claiming under it,⁷² and contract provisions imposing the duty must be given effect.⁷³ Moreover, the duty rests on the company, even though the abandonment of the

street car system was not formally approved by the public service commission.⁷⁴

§ 122. — Existing, Original, and Subsequent Pavement

Under some circumstances, depending on the provisions of the controlling statute, ordinance, or grant, a street railroad company may be required to pay for existing, original, or subsequent pavement.

While a statute which contemplates the imposition of a share of the cost of an improvement in a certain street when such improvement is made does not authorize the municipality, after the improvement is made and has been paid for and after a street railroad company has, with the consent of the municipality and subsequent to the improvement, laid down a second track in such street, to charge the company with a share of the cost of such improvement,⁷⁵ under some statutes a street railroad, before the laying of its tracks, is required to pay the value of the pavement on a specified portion of the street where such street is not then being repaved.⁷⁶

Original pavement. Certain statutes and municipal grants have been construed to require street railroad companies to lay pavement where no pavement had previously been laid.⁷⁷

Subsequent pavement. Whether or not the duty of the street railroad company is a continuous duty depends on the construction of the controlling statute, ordinance, or contract.⁷⁸

67. Md.—United Rys. & Electric Co. v. State Roads Commission, 91 A. 552, 123 Md. 561.

60 C.J. p 279 note 66.

68. Md.—United Rys. & Electric Co. v. State Roads Commission, *supra*.

69. Pa.—Borough of Sayre v. Waverly, Sayre & Athens Traction Co., 113 A. 424, 270 Pa. 412.

70. U.S.—Crebs v. Lebanon, C.C.Mo., 98 F. 549.

60 C.J. p 279 note 69.

71. U.S.—In re Madison Rys. Co., C. C.A.Wis., 102 F.2d 178.

Ohio.—City of Mt. Vernon v. Berman & Reed, 125 N.E. 116, 100 Ohio St. 1.

72. Ohio.—City of Mt. Vernon v. Berman & Reed, *supra*.

Basis of rule

The grantee of a franchise to con-

struct and operate a street railroad accepts the grant with notice of the dominant rights of the public and of the limited powers of a municipality as to contracts.—City of Mt. Vernon v. Berman & Reed, *supra*.

73. N.Y.—City of Buffalo v. International Ry. Co., 239 N.Y.S. 113, 135 Misc. 497.

60 C.J. p 279 note 73.

74. U.S.—In re Madison Rys. Co., C.C.A.Wis., 102 F.2d 178.

Statute held not to divest city of police power

U.S.—In re Madison Rys. Co., *supra*.

75. Tex.—Dallas v. Dallas Consol. Traction R. Co., Civ.App., 33 S.W. 757.

60 C.J. p 279 note 75.

Conformity to pavement laid by municipality see *infra* § 123.

76. Iowa.—City of Oskaloosa v. Osk-

aloosa Traction & Light Co., 119 N. W. 736, 141 Iowa 236.

60 C.J. p 279 note 76.

77. Ill.—City of Anna v. Northern, 104 N.E. 171, 261 Ill. 538.

Pa.—Philadelphia v. Spring Garden Farmers' Market Co., 29 A. 286, 161 Pa. 522.

60 C.J. p 279 note 77.

Municipal ordinances exempting street railroad from requirement as to paving generally see *infra* § 124 a.

78. Continuing duty held imposed

Minn.—City of Duluth v. Duluth St. Ry. Co., 215 N.W. 69, 172 Minn. 187.

60 C.J. p 280 note 79 [a].

Subsequent paving held not required

Wash.—State v. Olympia Light & Power Co., 158 P. 85, 91 Wash. 519.

60 C.J. p 280 note 79 [b].

§ 123. — Necessity, Character, and Type of Repairs and Improvements

- a. In general
- b. Conforming to changed conditions and to general condition of street, and kind of pavement
- c. Determination by public authorities as to necessity and character

a. In General

The character of the repairs and improvements required by a particular statute, ordinance, or contract depends on its terms, as determined from the common and ordinary use and meaning of the words and phrases employed.

The character of the repairs and improvements required by a particular statute, ordinance, or contract depends on its terms⁷⁹ and, where a franchise contract uses words and phrases of common and ordinary use and meaning in street improvement, such use and meaning will be adopted by courts in the construction of such contract.⁸⁰ While it has been held or recognized that a street railroad company, bound to "repair" or "keep in repair" a specified portion of the streets occupied by its tracks, is not thereby bound to pave, or to pay for paving,⁸¹ or otherwise to improve, the street,⁸² except in so far as the work in question comes within the category of repairs,⁸³ and that the duty to "maintain" pavement does not include the construction of pavement,⁸⁴ in order that the duty to pave or to pay therefor may be imposed, it is not necessary

that the governing statute, ordinance, or contract should contain a specific reference to paving,⁸⁵ and statutory and other requirements to repair have been construed to include the duty to pave, under certain circumstances,⁸⁶ as, for example, a requirement to keep "in proper repair,"⁸⁷ "in good repair,"⁸⁸ "in thorough repair,"⁸⁹ and "in permanent repair,"⁹⁰ under the supervision of, when required by, and in the manner prescribed by, local authorities.

"Repair" of pavement. The word "repair," with respect to the repair of pavement, is inherently local and somewhat temporary,⁹¹ and is usually made necessary by some local disturbance or defect in pavement.⁹² The duty to "repair" pavement may involve the use of new material⁹³ and includes the duty to restore.⁹⁴

"Repave." The word "repave" relates generally to a new pavement out of the same or different material for the full width of the street theretofore similarly improved, or for some defined section thereof.⁹⁵

Items included. The items, in respect of which a railroad company's duty or obligation is imposed, are determined by the terms of the controlling statute, grant, or contract, as, for example, in respect of preliminary work,⁹⁶ excavations,⁹⁷ and the base for the tracks.⁹⁸

Repairs or restoration rendered necessary by excavations. The duty of a street railroad company

79. Ill.—*McChesney v. City of Chicago*, 73 N.E. 368, 213 Ill. 592.

80. Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, 119 N.E. 202, 97 Ohio St. 122.

81. N.J.—*Jersey City v. Public Service Ry. Co.*, 129 A. 482, 101 N.J. Law 341.

82. Ind.—*State v. Vincennes Traction Co.*, 117 N.E. 961, 187 Ind. 291 —*Western Paving, etc., Co. v. Citizens St. R. Co.*, 26 N.E. 188, 28 N.E. 88, 128 Ind. 525, 25 Am.S.R. 462, 10 L.R.A. 770.

83. Fla.—*State v. Jacksonville St. R. Co.*, 10 So. 590, 29 Fla. 590.

84. C.J. p 280 note 84.

85. Wash.—*State v. Olympia Light & Power Co.*, 158 P. 85, 91 Wash. 519.

86. Va.—*City of Danville v. Danville Ry. & Electric Co.*, 76 S.E.

913, 174 Va. 382, 43 L.R.A., N.S., 468.

60 C.J. p 281 note 86.

87. Tex.—*City of Highland Park v. Dallas Ry. Co.*, Civ.App., 243 S.W. 674.

60 C.J. p 281 note 87.

88. Wis.—*City of Madison v. Southern Wisconsin R. Co.*, 146 N.W. 492, 156 Wis. 352, affirmed 36 S.Ct. 400, 240 U.S. 457, 60 L.Ed. 739.

60 C.J. p 281 note 88.

89. U.S.—*Milwaukee Electric Ry. & Light Co. v. State, Wis.*, 40 S.Ct. 306, 252 U.S. 100, 64 L.Ed. 476, 10 A.L.R. 892.

60 C.J. p 281 note 89.

90. N.Y.—*City of New York v. Ninth Ave. R. Co.*, 115 N.Y.S. 876, 130 App.Div. 839.

91. U.S.—*Rochester Railway Co. v. Rochester, N.Y.*, 27 S.Ct. 469, 205 U.S. 236, 51 L.Ed. 784.

60 C.J. p 281 note 91.

92. Ohio.—*Cleveland Ry. Co. v. City*

of Cleveland, 119 N.E. 202, 97 Ohio St. 122.

93. Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, supra.

94. Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, supra.

95. Ill.—*Chicago City Ry. Co. v. City of Chicago*, 238 Ill.App. 402, affirmed 154 N.E. 112, 323 Ill. 246.

96. Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, 119 N.E. 202, 97 Ohio St. 122.

97. Ohio.—*Cleveland Ry. Co. v. City of Cleveland*, supra.

98. Ill.—*Danville St. R., etc., Co. v. Mater*, 116 Ill.App. 519.

60 C.J. p 281 note 99.

99. Ky.—*Central Kentucky Traction Co. v. City of Winchester*, 191 S.W. 636, 175 Ky. 806.

60 C.J. p 281 note 1.

100. Va.—*Norfolk & P. Traction Co. v. City of Norfolk*, 78 S.E. 545, 115 Va. 169, Ann.Cas.1914D 1067.

60 C.J. p 281 note 2.

to keep streets in repair unequivocally imposed by a grant from a municipality includes the duty to make repairs to pavement rendered necessary by lawful acts of the municipality in making excavations in the performance of its public duties, in the absence of any exception in this regard.⁹⁹ So, a statutory provision requiring street railroad companies to keep in permanent repair a certain portion of the street has been construed as requiring the railroad company to restore the pavement where its removal is rendered necessary by excavations required in the making of public improvements.¹

b. Conforming to Changed Conditions and to General Condition of Street, and Kind of Pavement

The duty to repair or pave is generally imposed with respect to public changes and to improved methods of street construction, and involves the duty to lay new and improved pavement conforming to that in the remainder of the street where the pavement in that portion of the street to which the duty of a street railroad company extends is out of repair.

In general the duty to repair² or to pave³ is imposed with respect to public changes and to improved methods of street construction. While the view has been taken that the duty to repair does not require a railroad company to repave with new material, or to make its pavement conform to new pavement, whenever the municipality paves the remainder of the street with improved pavement,⁴ where the existing pavement does not need repair or mending,⁵ it has been held or recognized that the duty to repair involves the duty to lay new and improved pavement conforming to that in the remainder of the street where the pavement in the

portion of the street to which a company's duty extends is out of repair,⁶ even in the absence of an express provision in the governing statute, ordinance, or contract, for conformity.⁷ A statutory requirement that street railroad companies shall keep in permanent repair a certain portion of streets, under the supervision of, whenever required by, and in such manner as is prescribed by, local authorities, requires the laying of new and improved pavement conforming to that in the remainder of the street, even in the absence of a specific provision for such conformity,⁸ and a like rule has been recognized in respect of other statutory or ordinance requirements not specifically imposing the duty to pave.⁹

A specific requirement to pave ordinarily involves the duty of conformity,¹⁰ and valid requirements in terms imposing the duty to conform must be given effect;¹¹ in such case the railroad company may not be authorized¹² or required¹³ to lay down a pavement different from that laid in the remainder of the street.

Under a contract between a municipality and a street railroad company imposing on the latter the cost of paving or repaving a certain portion of streets occupied by the company if any paved or unpaved street occupied by a track or tracks should be ordered paved or repaved, the company is not primarily liable for a more expensive kind of pavement for that part of a street for which it is chargeable than that ordered for the entire street.¹⁴ According to some cases a provision in an ordinance granting the use of streets as to the kind of material to be used by a street railroad in paving between its tracks is a regulation and not a con-

99. Ill.—Chicago City R. Co. v. City of Chicago, 154 N.E. 112, 323 Ill. 246.
60 C.J. p 282 note 3.

1. N.Y.—City of New York v. Whitridge, 124 N.E. 788, 227 N.Y. 180.
60 C.J. p 282 note 4.

2. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.
60 C.J. p 282 note 6.

3. Va.—Norfolk & P. Traction Co. v. City of Norfolk, 78 S.E. 545, 115 Va. 169, Ann.Cas.1914D 1067.
60 C.J. p 282 note 7.

4. Md.—United Rys. & Electric Co. of Baltimore v. City of Baltimore, 88 A. 617, 121 Md. 552.
60 C.J. p 282 note 8.

5. Pa.—Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.
60 C.J. p 282 note 9.

6. U.S.—Milwaukee Electric Ry. & Light Co. v. State, Wis., 40 S.Ct. 366, 252 U.S. 100, 64 L.Ed. 476, 10 A.L.R. 892.
60 C.J. p 282 notes 10, 11.

7. Wis.—Madison v. Southern Wisconsin R. Co., 146 N.W. 492, 156 Wis. 352, affirmed 36 S.Ct. 400, 240 U.S. 457, 60 L.Ed. 739.
60 C.J. p 282 note 11.

8. N.Y.—City of New York v. New York City Ry. Co., 116 N.Y.S. 939, 132 App.Div. 156.
60 C.J. p 283 note 13.

9. Va.—City of Danville v. Danville

Ry. & Electric Co., 76 S.E. 913, 114 Va. 382, 43 L.R.A., N.S., 463.
60 C.J. p 283 note 14.

10. Pa.—Philadelphia v. Ridge Ave. Pass. R. Co., 22 A. 695, 143 Pa. 444.

11. U.S.—Milwaukee Electric Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee, Wis., 40 S.Ct. 366, 252 U.S. 100, 64 L.Ed. 476, 10 A.L.R. 892.
60 C.J. p 283 note 16.

12. Hawaii.—Honolulu Rapid Transit, etc., Co. v. Territory, 21 Hawaii 136.

13. Hawaii.—Honolulu Rapid Transit, etc., Co. v. Territory, supra.

14. La.—Southern Bitulithic Co. v. Algiers Ry. & Lighting Co., 58 So. 538, 130 La. 830.

tract,¹⁵ and a practical construction placed on it by the municipality is immaterial.¹⁶

c. Determination by Public Authorities as to Necessity and Character

Ordinarily the necessity of repairing or repaving streets, and the character of the material to be used, are to be determined by the municipal authorities.

Ordinarily the necessity of repairing or repaving streets is to be determined by the municipal authorities,¹⁷ and, according to some cases, the determination may be made in the exercise of the police power.¹⁸ A provision of a contract between a municipality and a street railroad company that the company shall keep in permanent repair a certain portion of the street, under the direction, supervision, and approval of, specified municipal officers, is controlling in respect of the particular officers who may act under the contract.¹⁹

The municipal authorities usually may determine the material with which the paving shall be done,²⁰ unless restricted by some legislative provision,²¹ and may require it to be done with a better and more expensive material than was in use when the company was chartered or the grant of, or consent to, the use of the street was made,²² and, while there is authority for the view that, where the materials to be used for paving are specified in the controlling contract or ordinance, the municipality may not require the use of different material,²³

according to some cases, notwithstanding an agreement as to the material to be used, the municipality may require the use of different material,²⁴ in reasonably exercising the police power,²⁵ and the power of the legislature to require the use of other material has been recognized.²⁶

While it has been held that, where the municipality is acting under certain statutory provisions, the company has no constitutional right to be heard on the question as to whether the requirement of the proper local authorities to lay a new and improved pavement is reasonable, since the obligation of the company is imposed as a mere condition of its use of the streets and as compensation to the city therefor,²⁷ there is authority for the view that there must be some showing as to the necessity for repairs or paving,²⁸ that the discretion of the municipal authorities in this regard is not an arbitrary one,²⁹ but must be reasonably exercised,³⁰ that whether it has been so exercised is for the jury to determine under all the facts, where the controversy involves submission to a jury,³¹ and that an actual determination in some form by municipal authorities that the street is out of repair must be made in order to impose the duty to repair.³²

Public utility commission or board. Under some statutes state public utilities boards or commissions are vested with authority in respect of the necessity and character of repairs or improvements,³³

15. Wis.—State v. Milwaukee Electric Ry. & Light Co., 147 N.W. 232, 157 Wis. 121.
60 C.J. p 284 note 20.

16. Wis.—State v. Milwaukee Electric Ry. & Light Co., *supra*.

17. N.Y.—City of Buffalo v. International R. Co., 239 N.Y.S. 113, 135 Misc. 497.
60 C.J. p 284 note 22.

18. Mich.—City of Detroit v. Detroit United Ry., 138 N.W. 215, 172 Mich. 496.
60 C.J. p 284 note 23.

19. Vt.—City of Burlington v. Burlington Traction Co., 124 A. 857, 98 Vt. 24.
60 C.J. p 285 note 33.

20. N.Y.—Conway v. Rochester, 51 N.E. 395, 157 N.Y. 33.
60 C.J. p 284 note 25.

21. Pa.—Philadelphia v. Evans, 21 A. 200, 139 Pa. 483.

22. N.Y.—New York v. Harlem Bridge, etc., R. Co., 78 N.E. 1072, 186 N.Y. 304.
60 C.J. p 284 note 27.

23. Pa.—West Chester Borough v. West Chester St. R. Co., 52 A. 252, 203 Pa. 201.
60 C.J. p 284 note 28.

24. N.Y.—Village of Mechanicville v. Stillwater, etc., Ry. Co., 71 N.Y.S. 1102, 35 Misc. 513, affirmed 74 N.Y.S. 1149, 67 App.Div. 628, affirmed 66 N.E. 1117, 174 N.Y. 507.
60 C.J. p 284 note 29.

25. U.S.—Wheeling Traction Co. v. Board of Com'rs of Belmont County, Ohio, 248 F. 205, 160 C.C.A. 283.
60 C.J. p 284 note 30.

26. N.Y.—Binnering v. City of New York, 69 N.E. 390, 177 N.Y. 199—Village of Mechanicville v. Stillwater & M. St. Ry. Co., 71 N.Y.S. 1102, 35 Misc. 513, affirmed 74 N.Y.S. 1149, 67 App.Div. 628, affirmed 174 N.Y. 507.

27. N.Y.—City of New York v. New York City Ry. Co., 116 N.Y.S. 939, 132 App.Div. 156.
60 C.J. p 285 note 32.

28. Pa.—Borough of Irwin v. Irwin-

Herminie Traction Co., 152 A. 544, 301 Pa. 456.
60 C.J. p 285 note 33.

29. N.Y.—Binghamton v. Binghamton, etc., R. Co., 16 N.Y.S. 225, 61 Hun 479.

30. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N.W. 877, 190 Wis. 379.
60 C.J. p 285 note 35.

31. Ga.—Atlanta v. Gate City St. R. Co., 4 S.E. 269, 80 Ga. 276.
Pa.—McKeesport Borough v. McKeesport Pass. R. Co., 27 A. 1006, 158 Pa. 447.

32. Pa.—Borough of Irwin v. Irwin-Herminie Traction Co., 152 A. 544, 301 Pa. 456.
60 C.J. p 285 note 37.

33. Vt.—Town of West Rutland v. Rutland Ry., Light & Power Co., 121 A. 755, 96 Vt. 413.
60 C.J. p 285 note 39.
Authority of public utility board as to repairs or improvements in general see *supra* § 114.

as, for example, authority to determine as to the necessity or character of repairs or rebuilding of bridges occupied by street railroads.³⁴ It has been held, however, that while a municipality and a street railroad company may not, by an agreement as to the necessity for certain repairs to a bridge, deprive the state commission of its authority to determine as to the necessity of other repairs,³⁵ the statute conferring authority on such commission does not prevent the municipality and the company from making a binding agreement as to the necessity for certain repairs.³⁶ In some jurisdictions a street railroad company is authorized, on being denied by the municipal authorities the right to lay a particular kind of pavement, to appeal from such order to the railroad commissioners.³⁷

§ 124. Termination of, and Exemption from, Duty

- a. In general
- b. Release from duty
- c. Statutes, ordinances, or contracts imposing other obligations
- d. Insolvency and financial hardship

a. In General

The duty of a street railway company to repair or pave the portion of the street occupied by its tracks may terminate with the revocation of its license to occupy the street or with the abandonment of its franchise or the removal of its tracks; and the legislature or municipality may exempt it from its duty under some circumstances.

Since the duty of a street railroad company to pave is coextensive with the existence of its street franchise,³⁸ if its license to occupy the street with its tracks is revoked by the city, the corresponding duty to pave necessarily terminates.³⁹ So, also, the

right of a street railroad company to abandon its franchise in order to avoid the duty to repair or to pave imposed by statute has been recognized,⁴⁰ although it has been held that a street railway company that is under contract to maintain and operate a street railway in a city cannot, without the consent of the city, avoid the payment of a paving assessment duly made by the city by tendering the city its street railway lines, property, and franchise,⁴¹ and that the surrender of its franchise and acceptance of an indeterminate permit under the Public Service Commission Law does not exempt a company from its obligation.⁴² A statute imposing the duty to repair as long as the company shall use or maintain the tracks has no application after the conveyance of the tracks to the city;⁴³ and, where the company has the right to remove its tracks from a street, it can, on such removal, be in no way liable for the improvement of such street.⁴⁴ Where, however, a resolution of the board of public works apportioning costs of a grade separation as authorized by statute was adopted while the street railroad company still had tracks at the intersection, and the company removed the tracks after it had received notice of the adoption of the resolution but before its confirmation, the company is liable for its share of the cost of the improvement.⁴⁵ In order to remove its tracks for the purpose of avoiding its obligation to repair or pave, the company must follow the required procedure.⁴⁶

The fact that the occupation of the street is terminable on certain contingencies, which may happen at any time, and at the will of the municipality, does not, however, destroy the obligation of the company to keep in repair as long as it occupies the street.⁴⁷ Where a statutory duty to repair has become fixed by proper notice from the

34. Me.—Bangor Ry. & Electric Co. v. Inhabitants of Town of Orono, 84 A. 885, 109 Me. 292.

60 C.J. p 286 note 40.
Apportionment of cost see *supra* § 119 b.

35. Me.—City of Augusta v. Lewiston, A. & W. St. Ry., 95 A. 267, 114 Me. 24.

36. Me.—City of Augusta v. Lewiston, A. & W. St. Ry., *supra*.

37. Conn.—Hartford v. Hartford St. R. Co., 53 A. 1010, 75 Conn. 471.
60 C.J. p 286 note 44.

38. Mo.—Brick, etc., Co. v. Hull, 49 Mo.App. 438.

39. Mo.—Brick, etc., Co. v. Hull, *supra*.

40. N.Y.—City of New York v. Broadway & S. A. R. Co., 115 N.Y.S. 872, 130 App.Div. 834.

41. Ga.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471, reversed on other grounds Georgia Ry. & Electric Co. v. City of Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.

42. Ind.—State v. Indiana R. R., 2 N.E.2d 404, 210 Ind. 222.

43. N.Y.—Greenberg v. City of New York, 274 N.Y.S. 4, 152 Misc. 488.

44. Pa.—Shamokin v. Shamokin, etc., Electric R. Co., 56 A. 64, 206 Pa. 625.

60 C.J. p 286 note 48.

45. Ind.—Indianapolis Rys. v. City of Indianapolis, 98 N.E.2d 505, 229 Ind. 487.

46. Pa.—Burgess and Town Council of Borough of Norristown v. Reading Transit & Light Co., 121 A. 495, 277 Pa. 459.

60 C.J. p 286 note 51.
Discontinuance of operation in general see *infra* §§ 181-184.

47. Pa.—Philadelphia v. Thirteenth St., etc., Pass. R. Co., 33 A. 126, 169 Pa. 269.

municipal authorities, the railroad company may not, by subsequently renouncing or abandoning its franchise, avoid the duty so imposed.⁴⁸ A duty to repair or pave imposed by statute remains regardless of the fact that the tracks have been relocated in the same street,⁴⁹ or of the mere fact that the tracks were removed for the purpose of permitting the construction of a sewer and have not been relaid,⁵⁰ and difficulty in procuring labor and material is not a legal excuse for the failure of a street railroad company to perform its obligation to make its tracks conform to grade and to repave.⁵¹

Exemption. While the legislature may exempt a street railroad company from requirements as to repairs and paving,⁵² including requirements of a general statute,⁵³ and exemptions contained in municipal ordinances have been given effect,⁵⁴ the power of municipal authorities to exempt street railroad companies from the obligation to pave or to pay therefor has been denied.⁵⁵ A municipality may not, it has been held, contract away its authority to impose on a street railroad company the obligation to pave a certain portion of the street.⁵⁶ Under a statutory provision that the municipality shall reserve the right to require street railroad

companies to pay the cost of paving or otherwise improving a certain portion of the streets occupied by its tracks, it has been held that, while the municipality may not surrender the right to require such payment,⁵⁷ and such reservation is read into a contract franchise by necessary implication,⁵⁸ the municipality has discretion to enforce or not to enforce the reserved right as it chooses.⁵⁹

It is generally recognized that provisions exempting a street railroad company from the cost of paving are not lightly to be read into a contract between the state and the company,⁶⁰ and any doubt in respect thereof must be resolved in favor of the state.⁶¹ Like rules of construction have been applied to a municipal ordinance granting the right to use streets for street railroad purposes,⁶² and the duty of a street railroad company to keep streets in repair unequivocally imposed by a grant from the municipality is not subject to exceptions not declared in terms equally unequivocal.⁶³

In determining the effect of ordinances which, it is claimed, grant exemptions from duties as to paving or repairs, the facts and circumstances surrounding the adoption of the ordinance,⁶⁴ and prior ordinances dealing with the matter,⁶⁵ may be con-

48. N.Y.—City of New York v. Dry Dock, E. B. & B. R. Co., 240 N.Y.S. 744, 135 Misc. 678, affirmed 232 N.Y.S. 715, 225 App.Div. 794, affirmed 168 N.E. 436, 251 N.Y. 533, certiorari denied 50 S.Ct. 86, 280 U.S. 603, 74 L.Ed. 648.
60 C.J. p 286 note 50.

Tracks allowed to remain available for use

The duty of a street surface railroad corporation to keep in permanent repair a portion of streets occupied by street railroad tracks "so long as it shall continue to use or maintain" its tracks covers the situation where tracks were allowed to remain under conditions which left them available for use by the receiver of the company whenever he might decide to use them.—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied Sheeran v. City of New York, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.

49. Pa.—Ashland v. Schuylkill Ry. Co., 5 Pa.Dist. & Co. 383.

50. Ill.—Sawyer v. City of Chicago, 55 N.E. 645, 183 Ill. 57.
60 C.J. p 286 note 53.

51. Pa.—Borough of Sayre v. Wav-

erly, Sayre & Athens Traction Co., 113 A. 424, 270 Pa. 412.
60 C.J. p 286 note 54.

52. Pa.—City of Philadelphia v. Empire Passenger Ry. Co., 5 Pa.Dist. 53, 18 Pa.Co. 81.
Imposition of additional obligations as to repairs or paving in general see supra § 116.

53. N.Y.—City of New York v. Union Ry. Co. of New York City, 201 N.Y.S. 396, 206 App.Div. 472, affirmed 144 N.E. 896, 238 N.Y. 571—Bohmer v. Haffen, 54 N.Y.S. 1030, 35 App.Div. 381, affirmed 55 N.E. 1047, 161 N.Y. 390.

54. Pa.—Leake v. Philadelphia & Vulcanite Paving Co., 24 A. 351, 150 Pa. 643.
60 C.J. p 287 note 58.

55. Miss.—Edwards Hotel & City R. Co. v. City of Jackson, 51 So. 802, 96 Miss. 547.
60 C.J. p 287 note 59.

56. Wis.—City of Madison v. Southern Wisconsin Ry. Co., 146 N.W. 492, 156 Wis. 352, 10 A.L.R. 910, affirmed 36 S.Ct. 400, 240 U.S. 457, 60 L.Ed. 739.

57. Ky.—City of Henderson v. Henderson Traction Co., 254 S.W. 332, 200 Ky. 183.
60 C.J. p 287 note 60.

58. Ky.—City of Henderson v. Henderson Traction Co., 254 S.W. 332, 200 Ky. 183.
60 C.J. p 287 note 61.

59. Ky.—Common Council of City of Frankfort v. Morris, 257 S.W. 16, 201 Ky. 449.
60 C.J. p 287 note 62.

60. U.S.—Ft. Smith Light & Traction Co. v. Board of Improvement of Paving Dist. No. 16 of City of Ft. Smith, Ark., 47 S.Ct. 595, 274 U.S. 387, 71 L.Ed. 1112.

61. U.S.—Durham Public Service Co. v. City of Durham, N.C., 43 S.Ct. 290, 261 U.S. 149, 67 L.Ed. 580.

62. N.J.—Town of Westfield v. Public Service Ry. Co., 87 A. 82, 84 N.J.Law 568.
60 C.J. p 287 note 65.

63. Ill.—Chicago City Ry. Co. v. City of Chicago, 154 N.E. 112, 323 Ill. 246.

64. Ga.—City Council of Augusta v. Augusta-Aiken Ry. & Electric Corporation, 104 S.E. 505, 150 Ga. 524.
60 C.J. p 287 note 67.

65. Ga.—City Council of Augusta v. Augusta-Aiken Ry. & Electric Corporation, supra.

sidered, and all parts of the ordinance must be examined and considered.⁶⁶ An exemption of a street railroad company from the duty to pay for the cost of paving, under a contract between the company and the state, is not transferred to another company by a lease, authorized by statute, of the property, franchises, rights, and privileges from the contracting company to such other company,⁶⁷ especially where such exemption is inconsistent with the charter of the lessee company.⁶⁸

b. Release from Duty

- (1) By state
- (2) By municipality

(1) By State

The legislature may relieve a street railroad company of its duty to repair or pave that portion of the street occupied by its tracks.

The legislature which imposes the duty to pave may also relieve from such duty,⁶⁹ and it may relieve from duties as to paving and repairs imposed by a municipality as a condition of using streets.⁷⁰ Various statutes have been construed as not relieving the street railroad company of its duties to pave or repair;⁷¹ and under a recital in a deed by which certain corporations surrendered to the state the right to operate a road as a turnpike that, as part of the consideration, the state released every duty or obligation of such companies to keep and maintain in good order and repair such turnpike, the release applies only to that part of the turnpike other than the part on which there was a street railroad

owned or operated by one of the grantors, the right to the continued operation of which was reserved.⁷²

Public utility boards. Statutes defining the powers of state public utility boards or commissions have been construed as not authorizing such boards or commissions to relieve street railroad companies from the obligation to pave or to repair imposed by agreements with, or franchises granted by, municipalities,⁷³ or from obligations imposed by a company's charter.⁷⁴

(2) By Municipality

Except as authorized by the legislature, municipal authorities have no power to relieve a street railroad company from the provisions of a statute requiring it to pave or repair certain portions of streets or bridges occupied by its tracks.

Municipal authorities have no power to relieve a street railroad company, by contract or otherwise, from the provisions of a statute requiring street surface railroad companies to pave or repair certain portions of streets occupied by the companies' tracks,⁷⁵ or to reconstruct and repair the paving or flooring of certain portions of bridges so occupied,⁷⁶ unless authorized in that regard by the legislature.⁷⁷ Under authority duly conferred by the legislature, however, a municipality may by contract with a street railroad company relieve the latter from duties as to repairs and paving.⁷⁸

Where a municipality, under a provision of its charter providing for the repair and repaving of streets, contracts with a paving company to pave

66. Kan.—Kansas City, L. & W. Ry. Co. v. City of Leavenworth, 242 P. 122, 120 Kan. 36.

67. U.S.—Rochester R. Co. v. Rochester, N.Y., 27 S.Ct. 469, 205 U.S. 236, 51 L.Ed. 784.
60 C.J. p 288 note 70.

68. U.S.—Rochester R. Co. v. Rochester, supra.

69. Pa.—Philadelphia v. Spring Garden Farmers' Market Co., 29 A. 286, 161 Pa. 522.

70. Mass.—City of Fall River v. Public Service Commission, 117 N. E. 915, 228 Mass. 575.
60 C.J. p 288 note 74.

71. N.Y.—Village of Peekskill v. Putnam & W. Traction Co., 168 N. Y.S. 809, 181 App.Div. 382.

Company held not relieved from duty by statute:

(1) Authorizing the taking over or improving of streets as state or coun-

ty roads.—Village of Grandville v. Grand Rapids, H. & C. R. R., 196 N. W. 351, 225 Mich. 587, 34 A.L.R. 1408
—60 C.J. p 288 notes 79, 80.

(2) Providing that, if the municipality undertakes to improve an entire street, a utility company may undertake to construct that portion of the work for which it is liable.—State v. Vincennes Traction Co., 117 N.E. 961, 187 Ind. 291.

(3) Requiring the municipality to extend to an interurban or street car company, at the latter's request, time to pay the cost of a street improvement.—State v. Vincennes Traction Co., supra.

72. Pa.—Horsham Tp. v. Public Service Commission, 97 Pa.Super. 366.
60 C.J. p 288 note 77.

73. Pa.—Borough of Swarthmore v. Public Service Commission, 121 A. 488, 277 Pa. 472.
60 C.J. p 288 note 81.

74. Vt.—Town of West Rutland v. Rutland Ry., Light & Power Co., 121 A. 755, 96 Vt. 413.
60 C.J. p 289 note 82.

Authority of commission as to company's obligation to repair or pave in general see supra § 114.

75. La.—H. W. Bond & Bro. v. City of New Orleans, 171 So. 572, 186 La. 60.
60 C.J. p 289 note 84.

76. Iowa.—Burlington Ry. & Light Co. v. City of Burlington, 176 N. W. 285, 188 Iowa 272.
60 C.J. p 289 note 85.

77. Pa.—Philadelphia v. Bowman, 34 A. 353, 175 Pa. 91.
60 C.J. p 289 note 86.

78. Pa.—Barrett v. Philadelphia Rapid Transit Co., 23 Pa.Dist. 149.
60 C.J. p 289 note 87.

a street occupied by a street railroad, and to maintain such pavement for a specified time, the railroad company to be assessed a certain proportion of the cost, the latter is thereby relieved from its obligation to keep streets in repair imposed by the ordinance consenting to the construction of the railroad,⁷⁹ and by a general statute.⁸⁰ An ordinance for a street improvement, requiring a street railway company to furnish rails and other track appliances, which are not a part of the street construction, is not a waiver by the city of its right to demand the construction by the railway company of part of the street.⁸¹ Where an obligation of a street railroad company is joint in respect of several municipalities, one such municipality, acting independently of the other interested municipalities, may not release the railroad company from the latter's obligation.⁸²

Failure to require performance and practical construction of ordinance or contract. While it has been held that a municipality may omit to enforce a contract between it and a street railroad company requiring the latter to replace and keep in repair the pavement on a certain portion of the street,⁸³ even as against abutting owners,⁸⁴ there is authority to the contrary,⁸⁵ and it has been held that, where, by a contract between the street railroad company and a municipality, under which the municipality has received a substantial consideration, the municipality assumes the company's obligation as to repairs and paving, the burden of such obligation may not be imposed on abutting owners.⁸⁶

The mere fact that a municipality has not on all occasions required performance by a street railroad company of the latter's duties as to maintenance and repairs does not release the company

from such duties,⁸⁷ and, where duties as to repairs and paving have been imposed on a street railroad company by a contract or franchise agreement, it may not be released from such duties by an alleged practical construction of the agreement by the parties, indicating that such duty did not exist,⁸⁸ at least where the acts of the municipality, relied on to show such practical construction, are independent of, and not done pursuant to, the contract in respect of which the practical construction is alleged.⁸⁹ A street railroad company is not released from its duty imposed by a municipal ordinance to maintain and keep in repair a portion of a bridge occupied by its tracks by the fact that by another and independent ordinance the duty to maintain and repair the whole bridge is imposed on another corporation.⁹⁰

Wrongful acts or omissions of municipality. Notwithstanding certain wrongful acts or omissions on the part of the municipality, it has been held that the duty of a street railroad company to repair or pave remains,⁹¹ especially where, prior to such acts of the municipality, the track area was out of repair and did not conform to the grade of the adjacent street.⁹²

Amendatory or supplementary ordinances. While an amendatory ordinance, which, when its terms are duly accepted by the street railroad company, constitutes a contract supported by a consideration, may release the company from obligations as to improving the street,⁹³ amendments of, or supplements to, ordinances which impose duties as to repairs or paving will not be construed to relieve a street railroad company from such duties in the absence of language in the subsequent ordinance showing an intention so to relieve the company.⁹⁴

79. N.Y.—*Binninger v. New York*, 69 N.E. 390, 177 N.Y. 199.

80. N.Y.—*Binninger v. New York*, supra.

81. Ky.—*Central Kentucky Traction Co. v. City of Winchester*, 191 S.W. 636, 175 Ky. 806.

82. W.Va.—*City of McMechen v. Wheeling Traction Co.*, 110 S.E. 469, 90 W.Va. 24.
60 C.J. p 289 note 90.

83. N.Y.—*Gilmore v. Utica*, 24 N.E. 1009, 121 N.Y. 561.

84. N.Y.—*Gilmore v. Utica*, supra.
60 C.J. p 289 note 94.

85. Ill.—*City of Lincoln v. Harts*, 95 N.E. 200, 250 Ill. 273—*City of Chicago v. The Newberry Library*, 79 N.E. 666, 224 Ill. 330.

86. Pa.—*Philadelphia v. Philadelphia*, 90 A. 573, 244 Pa. 224.

87. Va.—*Roanoke Ry. & Electric Co. v. Brown*, 154 S.E. 526, 155 Va. 259.
60 C.J. p 290 note 97.

88. Vt.—*City of Burlington v. Burlington Traction Co.*, 124 A. 857, 98 Vt. 24.
60 C.J. p 290 note 98.

89. Va.—*Roanoke Ry. & Electric Co. v. Brown*, 154 S.E. 526, 155 Va. 259.
60 C.J. p 290 note 99.

90. Va.—*Roanoke Ry. & Electric Co. v. Brown*, supra.
60 C.J. p 290 note 1.

91. Kan.—*City of Emporia v. Emporia Ry. & Light Co.*, 139 P. 1185, 92 Kan. 232.
60 C.J. p 290 note 2.

92. Vt.—*City of Burlington v. Burlington Traction Co.*, 124 A. 857, 98 Vt. 24.

93. Ind.—*Indianapolis & E. Ry. Co. v. Town of New Castle*, 87 N.E. 1067, 43 Ind.App. 467.
60 C.J. p 290 note 4.

94. U.S.—*Central Trust Co. of New York v. Chicago & O. P. Elevated R. Co.*, C.C.A.III., 282 F. 594.
60 C.J. p 290 note 5.

c. Statutes, Ordinances, or Contracts Imposing Other Obligations

Under some circumstances a street railroad company may be relieved from its duty to repair or pave by statutes, ordinances, or contracts imposing other obligations in lieu thereof, such as the payment of a specified amount, or a tax.

Under some statutes street railroad companies are made subject to a tax in lieu of the duty to repair,⁹⁵ but the obligation to repair or pave voluntarily assumed by a street railroad company in consideration of the right to use public streets does not, according to some cases, impose a tax within the meaning of a taxing statute providing that the tax therein provided for shall be in lieu of all franchise taxes.⁹⁶ While the authority of a municipality, under legislative sanction to enter into a binding contract with a street railroad company for the payment of a specified amount annually by the company in lieu of paving by the company, has been recognized,⁹⁷ in the absence of legislative authorization, the power of the municipality in this regard has been denied,⁹⁸ and a contract between a railroad company and a municipality for the payment by the railroad company of a lump sum and a percentage of its annual gross receipts in lieu of certain taxes and of all money demands or charges whatever has been so construed as not to relieve a railroad company from its duty to repair portions of the street occupied by it.⁹⁹

Provision of assessment for improvements. A contractual obligation to pave or to pay for paving has been treated as independent of, and not affected by, statutory provisions authorizing special assessments for local improvements,¹ and a statutory

provision imposing liability on street railroad companies for the payment of a share of the cost of repairs or improvements made under an assessment plan does not relieve a company from the duty of repairing the portions of the street occupied by it where no assessment plan is adopted.²

A consolidated company is not relieved from the full liability as to repairs or paving imposed on one of its constituent companies by a contract between a municipality and another of the constituent companies, to which the first mentioned company was not a party, made before the consolidation, which provides for the payment of certain sums in lieu of the contracting company's obligation to repair and pave, where the statute under which the consolidation was made expressly provided that the act of consolidation shall not release the consolidated company from any of the restrictions, liabilities, or duties of the constituent companies.³

d. Insolvency and Financial Hardship

Insolvency or financial hardship does not relieve a street railroad company from its obligation to repair or pave the street occupied by its tracks as long as it continues to use the street.

As long as it continues to use the street in question, a street railroad company is not relieved from its obligation to repair or pave it by the fact that the cost of complying with the obligation will be more than was anticipated when the obligation was assumed,⁴ that the company is operating at a loss,⁵ is insolvent,⁶ or, in general, that the performance of its obligation will work financial hardship.⁷ A street railroad company may not, however, be required to continue indefinitely operations which will result in the exhaustion of its assets,⁸ and, while the

95. Mass.—Worcester v. Worcester Consol. St. R. Co., 64 N.E. 581, 182 Mass. 49, affirmed 25 S.Ct. 327, 196 U.S. 539, 49 L.Ed. 591.

60 C.J. p 291 note 7.

Imposition of additional obligations as to repairs or paving see *supra* § 116.

96. N.J.—Trenton v. Trenton St. R. Co., 63 A. 1, 72 N.J.Law 317.

97. Ga.—City Council of Augusta v. Augusta-Aiken Ry. & Electric Corporation, 104 S.E. 503, 150 Ga. 529.

98. Ky.—South Covington & C. St. Ry. Co. v. Henkel & Sullivan, 14 S.W.2d 1068, 228 Ky. 271.

99. Ga.—Georgia Ry. & Power Co. v. City of Atlanta, 113 S.E. 420, 153 Ga. 335.

1. U.S.—Boisot v. Amarillo St. Ry. Co., D.C.Tex., 244 F. 838, affirmed 249 F. 193, 161 C.C.A. 229.

2. Ga.—Georgia Ry. & Power Co. v. City of Atlanta, 113 S.E. 420, 153 Ga. 335.

Liability of street railroad to assessment for municipal improvements in general see Municipal Corporations § 1335.

3. N.Y.—Kent v. Binghamton, 70 N.Y.S. 465, 61 App.Div. 323.

60 C.J. p 291 note 15.

Conditions as to repairing and paving street as ordinarily binding on company formed by consolidation or merger see *infra* § 128.

Consolidated company as assuming all burdens, liabilities, and obligations of constituent companies generally see *infra* § 153.

4. Pa.—Borough of Swarthmore v. Philadelphia Rapid Transit Co., 124 A. 343, 280 Pa. 79, 33 A.L.R. 128. 60 C.J. p 291 note 17.

5. Vt.—Town of West Rutland v. Rutland, 129 A. 303, 98 Vt. 508. 60 C.J. p 292 note 18.

6. U.S.—Boisot v. Amarillo St. Ry. Co., D.C.Tex., 244 F. 838, affirmed 249 F. 193, 161 C.C.A. 229.

7. U.S.—Milwaukee Electric Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee, Wis., 40 S.Ct. 306, 252 U.S. 100, 64 L.Ed. 476, 10 A.L.R. 892.

60 C.J. p 292 note 20.

8. Ill.—Northern Illinois Light & Traction Co., 134 N.E. 142, 302 Ill. 11.

60 C.J. p 292 note 21.

state public utility board or commission, under some statutes, has no power to release the company from its obligations as to repairs or paving because of financial hardship where the company continues to use the street in question,⁹ and, in some states, may not allow an abandonment in order that the company may avoid the financial hardship imposed by its charter obligations,¹⁰ under some statutes such board or commission may permit a removal of the tracks under certain circumstances, in order to permit the company to avoid undue financial hardship.¹¹

§ 125. Notice and Demand by Municipality

Under some statutes notice to the company is not required in order to give rise to the duty to keep the street in repair, but it may be necessary to impose the obligation to pave or make general repairs or to use particular materials in paving.

Under some statutes imposing the duty to keep a street in repair, in respect of mere defects in that part of the street to which the duty appertains, notice to the company by municipal authorities is not necessary in order to give rise to the duty,¹² but notice is required in order to impose the obligation to pave or to make general repairs.¹³ Where, by statute, the pavement to be used in the portion of the street to be paved by the railroad company is to be in substantial conformity with that used in the remainder of the street, the notice to the company

should conform to the statute in this regard.¹⁴

§ 126. Improvement or Repairs by Municipality at Company's Expense

- a. In general
- b. Opportunity to do work; notice and demand
- c. Amount of recovery

a. In General

Where the duty of repairing or paving the street occupied by it is imposed on a street railroad company, the municipality may, after notice to the delinquent company, cause the work to be done at the expense of the company and recover the cost thereof.

Where the duty of keeping in repair and repaving a street is imposed on a street railroad company occupying it, the municipality may, after notice to the delinquent company, cause the street to be repaired or paved at the expense of the company,¹⁵ even in the absence of a statute expressly so providing,¹⁶ and recover the cost thereof.¹⁷ Under some statutes, while the necessity for the use of the tracks, in order to impose liability for work done by the municipality, has been asserted,¹⁸ the liability arises from the conjunction of use, want of repair, and notice,¹⁹ regardless of the extent of the prior use²⁰ or of future prospective use,²¹ and no estoppel on the part of the municipality can affect a street railroad's duty under the statute when duly fixed.²²

9. Pa.—Borough of Swarthmore v. Public Service Commission, 121 A. 488, 277 Pa. 472.

10. Vt.—Town of West Rutland v. Rutland Ry. Light & Power Co., 129 A. 303, 98 Vt. 508—Rutland Ry. Light & Power Co. v. Town of West Rutland, 127 A. 882, 98 Vt. 385.

11. Ill.—Northern Illinois Light & Tract. Co. v. Illinois Commerce Commission, 134 N.E. 142, 302 Ill. 11.

Pa.—Burgess and Town Council of Borough of Norristown, 121 A. 495, 277 Pa. 459.

12. N.Y.—Schuster v. Forty-Second St., etc., R. Co., 85 N.E. 670, 192 N.Y. 403.

60 C.J. p 292 note 25.

Notice to company affecting liability for injuries to third persons resulting from defects see *infra* § 222.

Where company abandoned its system, city was not required to notify company that track zones were in need of repair and to request company to make the repairs before repairing them itself, as basis for mak-

ing claim against company in reorganization for cost thereof.—*In re Madison Rys. Co.*, C.C.A.Wis., 102 F. 2d 178.

13. N.Y.—Conway v. Rochester, 51 N.E. 395, 157 N.Y. 33.

Necessity for notice to permit municipality to pave or make general repairs at expense of company see *infra* § 126.

14. Hawaii.—Honolulu Rapid Transit & Land Co. v. Territory, 21 Hawaii 136.

60 C.J. p 292 note 29.

Conformity in general see *supra* § 123 b.

15. N.Y.—New York v. Ninth Ave. R. Co., 115 N.Y.S. 876, 130 App.Div. 839.

60 C.J. p 293 note 33.

Companies liable see *infra* § 128.

Contribution and apportionment of costs in respect of repairing and rebuilding bridges see *supra* § 119b.

Enforcing duty by:

Mandamus see *Mandamus* § 231 a.

Suit for specific performance see *Specific Performance* § 74 b (3).

Estoppel or loss of right to deny liability see *infra* § 127.

16. Pa.—Brobston v. Burgess and Town Council of Borough of Darby, 138 A. 849, 290 Pa. 331, 54 A. L.R. 1285.

60 C.J. p 293 note 34.

17. Ky.—Central Kentucky Traction Co. v. City of Winchester, 191 S.W. 636, 173 Ky. 806.

60 C.J. p 293 note 35.

18. N.Y.—City of New York v. Lynch, 146 N.Y.S. 357, 161 App.Div. 292, affirmed 107 N.E. 1074, 213 N.Y. 638.

60 C.J. p 293 note 36.

19. N.Y.—City of New York v. Lynch, *supra*.

60 C.J. p 293 note 37.

20. N.Y.—City of New York v. Lynch, *supra*—City of New York v. Dry Dock, El. B. & B. R. Co., 240 N.Y.S. 744, 135 Misc. 678.

21. N.Y.—City of New York v. Dry Dock, El. B. & B. R. Co., *supra*.

22. N.Y.—City of New York v. Dry Dock, El. B. & B. R. Co., *supra*.

60 C.J. p 293 note 40.

Under an ordinance providing that, on failure of the company to keep in repair or to repave, the municipality, after notice may do such work and collect the cost thereof from the company, the municipality cannot compel the company to do the work.²³ The right of a municipality to recover from a street railroad company the cost of paving a certain portion of a street occupied by the company's track, on the assumption that the obligation to pave was imposed by the franchise for the use of the street, has been denied where the municipality has been fully reimbursed for the cost of such paving by the collection of assessments on abutting property, in levying which assessments the municipality had not exceeded its powers.²⁴

Performance of work as condition precedent. While ordinarily the company does not become liable for the cost of paving before the paving has actually been done,²⁵ in a suit to foreclose a mortgage on the property of a street railroad company, the court may properly direct that an amount sufficient to cover the cost of paving a certain portion of a street, in respect of which the duty to pave was assumed by the company under a contract, should be reserved out of the proceeds of sale of

the railroad property for payment to the municipality on its completion of the paving.²⁶

Nature and form of proceeding. The right of a municipality to recover in an action at law for the expense of performing certain duties imposed on a street railroad company has been recognized.²⁷ Furthermore, it has been held that in an action by the contractor against the municipality, the company may be called in warranty, and cannot escape liability on the ground that there was no privity of contract between the contractors and the company because it did not sign the municipality's contract with the contractors.²⁸

Where no contract obligation is involved and the imposition by municipal authorities of conditions as to repairs is regarded as the exercise of a governmental function, the remedy, if any, for the recovery of the cost of repairs is in equity.²⁹ Under some enactments the municipality may acquire an enforceable lien on the franchises and tracks of a street railroad company for the cost of paving or repairing for which the company is liable,³⁰ and, under some statutes, the municipality may enforce liability for such cost either by suit in the ordinary form or by foreclosing a lien in the same

23. Pa.—City of Coatesville v. Christiansa & Coatesville St. Ry. Co., 159 A. 167, 168, 306 Pa. 196.

Reason for rule

"The municipal authorities will be far less apt to order such work to be done, without adequate reason, if the municipality has to pay for it when it is done, and possibly may not be able to recover back the amount paid, than they would be if the railway company could be compelled to do the work in the first instance."—City of Coatesville v. Christiansa & Coatesville St. Ry. Co., supra.

24. Minn.—City of Duluth v. Duluth St. Ry. Co., 176 N.W. 47, 145 Minn. 55.

25. Miss.—Edwards Hotel & City R. Co. v. City of Jackson, 51 So. 802, 96 Miss. 547.

26. U.S.—Boisot v. Amarillo St. Ry. Co., D.C.Tex., 244 F. 838, affirmed 249 F. 193, 161 C.C.A. 229.

27. D.C.—District of Columbia v. Washington, etc., R. Co., 15 D.C. 214.
60 C.J. p 293 notes 44–46.

Action of assumpsit

D.C.—District of Columbia v. Washington, etc., R. Co., supra.
60 C.J. p 294 note 45.

Action of contract

A municipality has the right to recover the cost of repairs, in an action of contract on the covenant of a street railroad company in an instrument under seal that, as long as the company shall operate certain extensions, it will save the city harmless from all loss by reason of the construction and operation of the extensions.—City of Northampton v. Northampton St. Ry. Co., 121 N.E. 495, 231 Mass. 540.

28. La.—H. W. Bond & Bro. v. City of New Orleans, 171 So. 572, 186 La. 60.

29. Mass.—City of Northampton v. Northampton St. Ry. Co., 121 N.E. 495, 231 Mass. 540.

30. Ohio.—Cleveland v. Cleveland, etc., R. Co., 4 Ohio Dec., Reprint, 315, 1 Clev.L.Rep. 304.
60 C.J. p 294 note 49.

Priorities

(1) City was not entitled to priority over mortgagee of property of discontinued railway, to proceeds of sale of tracks taken from city streets on theory that railway's duty to repair was in nature of assessment liability, and city's performance of duty on railway's default entitled city to priority.—Standard Oil Co. of New

York v. Nashua St. Ry., 189 A. 166, 88 N.H. 342.

(2) Likewise, city was not entitled to priority in such case on theory that mortgagee could not equitably enforce lien without subordination of burden of maintenance of street placed on railway, since no duties of railway were assumed by mortgagee.—Standard Oil Co. of New York v. Nashua St. Ry., supra.

(3) City was, however, entitled under franchise ordinance to prior lien against property of street railway on account of expenditures on behalf of railway where ordinance was regularly passed and entered on the records and action of city antedated recording of bond mortgage.—Real Estate-Land Title & Trust Co. v. City of Springfield, 182 N.E. 501, 125 Ohio St. 531, appeal dismissed 53 S.Ct. 292, 287 U.S. 577, 77 L.Ed. 506.

Expense of removal of tracks

Incidental benefits received by mortgagee of railway property because of removal of tracks from city's streets after discontinuance of railway gave city no right to have mortgaged property charged with expense of removal, where mortgagee did not request city to remove tracks.—Standard Oil Co. of New York v. Nashua St. Ry., 189 A. 166, 88 N.H. 342.

manner as mortgages may be foreclosed.³¹ A statutory lien is lost if proceedings to enforce it are not employed as directed by the statute.³²

An execution, although regularly issued by a city for paving assessment, unless the power is so granted by the legislature, cannot be lawfully levied on the property of a street railway company that is being used by the company as part of its system in rendering service to the public.³³

b. Opportunity to Do Work; Notice and Demand

A street railroad company is entitled to an opportunity to repair or pave the street before the municipality can do it and recover therefor, and, accordingly, notice must usually be given to the company requiring it to do the necessary work.

While the view has been taken that a street railroad company obtaining the consent of a municipality to operate railways is chargeable with notice of its duty to keep pavements clean, as required by ordinance, without special notice or request from the city,³⁴ a company is entitled to an opportunity to perform the work of repairing or to improve a portion of a street or highway where the obligation so to do is imposed on it, before the municipality can do it and recover therefor,³⁵ and, to this end, notice must usually be given to the company requiring it or requesting it to do the necessary work.³⁶ The view has been expressed, however, that actual notice is not necessary,³⁷ and that the enactment and publication of an ordinance requiring the paving

involved is constructive and sufficient notice to the company.³⁸

The fact that the municipality lets the contract to do the work within the time limited for the company to perform, but after notice is given, is not a defense to an action against the company for the cost of paving;³⁹ nor is it essential to the liability of the company that the notice shall precede the letting of the contract by the municipality for the work,⁴⁰ as long as the work is not commenced or done within the time limited for the company to do it.⁴¹

Notice need be given only to the company on whom the duty in question rests.⁴² While the notice should designate with reasonable accuracy the extent and type of work required,⁴³ and that the performance of the work is required,⁴⁴ it need not in all cases conform strictly to the requirements of the ordinance,⁴⁵ and usually it is sufficient if it is such as reasonably to inform the company on whom the duty in question rests of the character and extent of the work required,⁴⁶ and informalities or immaterial defects therein may be disregarded.⁴⁷

Company's waiver of notice and right to perform work. The company may waive such notice or lose its right to object to the lack of such notice,⁴⁸ or to the sufficiency of the notice given.⁴⁹ So, also, since the right to elect to make an improvement, or to pay therefor, is a privilege favorable to the company,⁵⁰ the company may waive its right to do the

31. N.M.—City Electric Co. v. City of Albuquerque, 258 P. 573, 32 N. M. 397.

60 C.J. p 294 note 50.

32. N.H.—Standard Oil Co. of New York v. Nashua St. Ry., 189 A. 166, 88 N.H. 342.

33. Ga.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471, reversed on other grounds Georgia Ry. & Electric Co. v. City of Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.

34. Pa.—City of Pittsburgh v. Pittsburgh Rys. Co., 83 A. 273, 234 Pa. 223, Ann.Cas.1913C 933.

35. Pa.—City of Coatesville v. Christiana & Coatesville St. Ry. Co., 159 A. 167, 306 Pa. 196. 60 C.J. p 294 note 52.

36. Pa.—City of Coatesville v. Christiana & Coatesville St. Ry. Co., supra.

60 C.J. p 294 note 53.

37. Ky.—Central Kentucky Traction Co. v. City of Winchester, 191 S.W. 636, 175 Ky. 806.

38. Ky.—Central Kentucky Traction Co. v. City of Winchester, supra.

39. N.Y.—City of New York v. New York City Ry. Co., 116 N.Y.S. 765, 132 App.Div. 164.

40. Ohio.—Columbus v. Columbus St. R. Co., 12 N.E. 651, 45 Ohio St. 98. 60 C.J. p 294 note 57.

41. N.Y.—New York v. New York City Ry. Co., 116 N.Y.S. 765, 132 App. Div. 164.

Ohio.—Columbus v. Columbus St. R. Co., 12 N.E. 651, 45 Ohio St. 98.

42. Pa.—Collingdale Borough v. Philadelphia Rapid Transit Co., 30 Pa. Dist. 293. 60 C.J. p 295 note 64.

43. Pa.—Borough of Irwin v. Irwin-Herminie Traction Co., 152 A. 544, 301 Pa. 456.

60 C.J. p 294 note 59.

44. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., C.C.N.Y., 191 F. 216.

N.Y.—City of New York v. Bleecker St. & F. Ferry R. Co., 115 N.Y.S. 592, 130 App.Div. 830.

45. Ohio.—Columbus v. Columbus St. R. Co., 12 N.E. 651, 45 Ohio St. 98. 60 C.J. p 295 note 61.

46. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., C.C.N.Y., 191 F. 216. 60 C.J. p 295 note 62.

47. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., supra. 60 C.J. p 295 note 63.

48. N.Y.—New York v. Ninth Ave. R. Co., 115 N.Y.S. 876, 130 App.Div. 60 C.J. p 295 note 65. 839.

49. Ky.—Central Kentucky Traction Co. v. City of Winchester, 191 S.W. 636, 175 Ky. 806.

50. Ind.—State v. Terre Haute, L. &

work,⁵¹ and failure specifically to elect by operation of law becomes an election to pay;⁵² the company cannot avoid the legal obligation imposed by a failure specifically to make an election.⁵³

c. Amount of Recovery

A municipality which has made repairs or done paving which the street railroad company was bound, but neglected, to make or do, is entitled to recover the reasonable cost or value of the work, which is *prima facie* the exact sum expended in the work.

Where a municipality has made repairs or done paving which the street railroad company was bound, but neglected, to make or do, it is entitled to recover the reasonable cost of the work,⁵⁴ or, as sometimes stated, the reasonable value of the work.⁵⁵ While the obligation of the company is not measured by the amount actually expended by the municipality,⁵⁶ where no fraud is shown, or any facts to impeach the reasonableness of the account, the exact sum expended in the work is *prima facie* the sum which the municipality is entitled to recover,⁵⁷ and the propriety of permitting a recovery in accordance with the terms of the contract for the work made by the municipality on the so-called "cost-plus" plan has been recognized.⁵⁸ Extravagant amounts recklessly expended in the work without reference to its true value should not be allowed, as the municipality cannot proceed in a reckless or extravagant manner and charge the company for expenses unnecessarily or unreasonably incurred,⁵⁹ and the court has also refused to allow certain items which were not authorized by the municipal council.⁶⁰

Judicial admission. Where the company judicially admits that it had agreed with the city to pay for its share of paving work performed, and judicially

admits the amount due, if the city is entitled to any judgment against the company, its obligations to the city are liquidated and fixed by such judicial admissions, irrespective of whether its franchise obligations are greater or less.⁶¹

Set-off or deductions. The right of the street railroad successfully to claim a set-off for alleged damages or loss resulting from the stoppage of its traffic, where such stoppage was reasonably necessary to permit the municipality to perform the work on the company's wrongfully refusing to perform it, has been denied,⁶² as has, it seems, the absolute right of the company to an allowance against the cost of repaving, for old material, originally laid by the company, on the theory that, when such old material was laid it became the property of the municipality;⁶³ and the right of a company, to the deduction of the amount of rent for the use of a bridge, paid under contract, in an action by the municipality to recover for certain expenditures has been denied.⁶⁴

Interest. A statute requiring the owner of street-car tracks to bear the paving expense should be construed to mean that, when a claim is presented and the owner knows how much that expense actually is, payment is due and interest accruing thereafter is to be included as a part of the expense to the city made necessary both by the neglect of the owner to pave after notice and the neglect to pay after knowledge of the amount due.⁶⁵

§ 127. Estoppel to Deny, or Loss of Right to Object to, Liability or Imposition of Obligation

A street railroad company may, under some circumstances, estop itself to deny liability for work done, or

E. Traction Co., 167 N.E. 127, 201 Ind. 346.

51. Ind.—State v. Terre Haute, I. & E. Traction Co., *supra*.
60 C.J. p 295 note 68.

52. Ind.—State v. Terre Haute, I. & E. Traction Co., *supra*.

53. Ind.—State v. Terre Haute, I. & E. Traction Co., *supra*.

54. N.Y.—New York v. Second Ave. R. Co., 7 N.E. 905, 102 N.Y. 572, 55 Am.R. 839.
60 C.J. p 295 note 72.

55. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N.W. 877, 190 Wis. 379.

56. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., *supra*.

57. Pa.—City of Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.
60 C.J. p 295 note 75.

58. Va.—Lynchburg Traction & Light Co. v. City of Lynchburg, 128 S.E. 606, 142 Va. 255, 43 A.L.R. 752.
60 C.J. p 295 note 76.

59. N.Y.—New York v. Second Ave. R. Co., 7 N.E. 905, 102 N.Y. 572, 55 Am.R. 839.
60 C.J. p 295 note 77.

60. Va.—Lynchburg Traction & Light Co. v. City of Lynchburg, 128 S.E. 606, 142 Va. 255, 43 A.L.R. 752.

61. La.—H. W. Bond & Bro. v. City

of New Orleans, 171 So. 572, 186 La. 60.

62. Pa.—Philadelphia v. Thirteenth St., etc., Pass. R. Co., 33 A. 126, 169 Pa. 269.

63. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., C.C.N.Y., 191 F. 216.
60 C.J. p 296 note 80.

64. Pa.—Monongahela Bridge Co. v. Pittsburgh Rys. Co., 87 A. 619, 240 Pa. 121.
60 C.J. p 296 note 81.

65. U.S.—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 85 F.2d 531, certiorari denied *Sheeran v. City of New York*, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.

waive or lose its right to object to certain matters affecting its liability.

Where a street railroad company may be liable, under certain circumstances, for the cost of repairs or paving, it may, by standing by and permitting the work to be done, estop itself to deny liability for the work done,⁶⁶ even though the work is not done in strict accordance with the contract or ordinance,⁶⁷ and the company may by contract or agreement with the municipality waive or lose its right to object to certain matters affecting its liability,⁶⁸ including alleged departures from the terms of an ordinance otherwise applicable.⁶⁹

On the other hand, mere inaction on the part of the company after notice to it of a claim of a municipality that the company is liable for certain work, for which it is not actually liable, does not, it has been held, render the company liable, in the absence of any request by the municipality for action,⁷⁰ and, where the company is not liable, for payment of the cost of improvements made, it is not estopped to deny liability, although the municipal council has by ordinance attempted to make it liable therefor.⁷¹ So, also, an agreement by the company to be liable for certain work, for which

otherwise it would not be liable, may not be made the basis of an implied agreement to assume liability for other work for which it is not liable;⁷² nor does the fact that a street railroad company complies with an order requiring it to lay and maintain paving within certain streets according to certain specifications estop it thereafter to contest the legality of the order.⁷³

§ 128. Company under Duty to Perform Obligations

The duty of a street railroad company to pave or repair streets may devolve on its successors, such as subsequent purchasers, lessees, or companies formed by consolidation or merger.

Charter restrictions and conditions as to repairing and paving the street or highway are ordinarily obligatory on any subsequent purchaser⁷⁴ or lessee⁷⁵ of the street railroad tracks and franchises, even without an express assumption. Such conditions are usually binding on a company formed by the consolidation or merger of the first and other companies,⁷⁶ and removal of the abandoned tracks and repavement of the streets at the expense of a street railway incorporated through merger may be

66. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.
60 C.J. p 296 note 82.

67. La.—Southern Bitulithic Co. v. Algiers Ry. & Lighting Co., 58 So. 588, 130 La. 830.
60 C.J. p 296 note 83.

68. Wis.—Village of Walworth v. Chicago, H. & G. L. Ry. Co., 208 N. W. 877, 190 Wis. 379.
60 C.J. p 296 note 84.

69. N.J.—Borough of Merchantville v. Camden & S. Ry. Co., 113 A. 136, 95 N.J.Law 511.
60 C.J. p 296 note 85.

70. N.J.—Board of Chosen Freeholders of Hudson County v. Jersey City, H. & P. St. Ry. Co., 88 A. 1061, 85 N.J.Law 179.

71. Ind.—Western Paving, etc., Co. v. Citizens' St. R. Co., 26 N.E. 188, 28 N.E. 88, 128 Ind. 525, 25 Am.S.R. 462, 10 L.R.A. 770.

72. N.J.—Board of Chosen Freeholders of Hudson County v. Jersey City, H. & P. St. Ry. Co., 88 A. 1061, 85 N.J.Law 179.

73. Mass.—Worcester v. Worcester Consol. St. R. Co., 78 N.E. 222, 192 Mass. 106.

74. N.Y.—Kent v. Binghamton, 81 N. Y.S. 198, 40 Misc. 1, affirmed 84 N. Y.S. 1131, 88 App.Div. 617, and reversed on other grounds 86 N.Y.S. 411, 90 App.Div. 553.
60 C.J. p 296 note 91.

Purchaser of property and franchise rights of street railway as assuming charter obligations and public duties of vendor generally see *infra* § 146.

Transfer of exemption from cost of paving by one company to another see *supra* § 124 a.

75. Pa.—Reading v. United Traction Co., 52 A. 106, 202 Pa. 571.
60 C.J. p 296 note 92.

Lessee as assuming all duties and liabilities imposed by charter of lessor generally see *infra* § 149.

Lessee holding under nine hundred ninety-nine-year lease

City was entitled to make assessment for paving improvement against lessee of street railway holding under nine hundred ninety-nine-year lease, with right to both possession and right of property, and with exclusive right of operation, although assessment could have been made against lessor.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471, reversed on other grounds Georgia Ry. & Electric Co. v. City of

Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.

Presumptions and burden of proof

Legislative act of city in adopting paving ordinance and making assessment against lessee raised presumption that assessment was legal, and lessee had burden of proving that action of city was arbitrary abuse of legislative authority because lessee received no benefit or assessment was confiscatory.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471, reversed on other grounds Georgia Ry. & Electric Co. v. City of Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.

76. Ga.—Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471, reversed on other grounds Georgia Ry. & Electric Co. v. City of Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365.
60 C.J. p 296 note 93.

Assumption by consolidated company of all burdens, liabilities, and obligations of constituent companies generally see *infra* § 153.
Consolidated company not relieved from liability as to repairs or paving imposed on constituent company by contract of municipality before consolidation relieving another constituent company of its obligation to repair and pave see *supra* § 124 c.

ordered under a statute authorizing the public utilities commission to order abandonment of tracks pursuant to merger of street railways.⁷⁷ A statute imposing certain obligations on every surface street railroad company as long as it shall continue "to use any of its tracks" is not confined to a company which owns the tracks,⁷⁸ and includes a company operating over certain tracks as lessee,⁷⁹ but, if the

lease has expired when the notice to repair is duly given, liability rests solely on the lessor.⁸⁰ It has been held that a lessee company is not subject to obligations as to repairs or improvements provided for by the statute under which such company was organized, in respect of a line which the company does not operate under such statute but in the right of the lessor company.⁸¹

C. RIGHTS IN, AND USE OF, TRACKS OF OTHER ROADS

§ 129. In General

In the absence of any valid statute or ordinance providing otherwise a street railroad company has no right to enter upon and use the tracks of another company without the latter's consent; and, in the absence of authority duly conferred or reserved, the municipality may not grant such right as against the objection of the company owning or controlling the tracks.

A street railroad company is subject to the limitations of its charter in respect of operation over tracks of other companies,⁸² and, in the absence of any valid statute or ordinance providing otherwise, a street railroad company has no right to enter upon and use the tracks of another company without the latter's consent,⁸³ and a company may exclude other companies from the use of its tracks.⁸⁴ So, also, in the absence of authority duly conferred or reserved, the municipality may not grant such right as against the objection of the company owning or controlling the tracks in question,⁸⁵ and the authority of the municipality in this respect is limited by the terms of the statute conferring such authority⁸⁶ or by the

terms of an ordinance reserving the right to grant such right.⁸⁷

It has been held or recognized, however, that such right may be acquired by virtue of an agreement between the companies, as discussed *infra* § 152, or it may be acquired by legislative authority,⁸⁸ by municipal authority, when the municipality is duly authorized,⁸⁹ or by virtue of an express reservation in the grant to the company⁹⁰ or in its charter,⁹¹ or it may result from such necessary implication from the grant that without it the grant itself would be defeated.⁹² The right to appropriate the joint use of the tracks of another company is not affected by a statute conferring the power on street railroad companies to make traffic agreements with other companies.⁹³ In order to protect the original company, the extent of track which may be thus occupied and used is sometimes limited to some fixed distance or some proportionate part of the total mileage of the second company.⁹⁴

77. D.C.—Capital Transit Co. v. Hazen, 93 F.2d 250, 68 App.D.C. 91.

78. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., C.C.N.Y., 191 F. 216.

79. U.S.—Pennsylvania Steel Co. v. New York City Ry. Co., *supra*.
60 C.J. p 297 note 95.

80. N.Y.—City of New York v. Lynch, 146 N.Y.S. 357, 161 App.Div. 292, affirmed 107 N.E. 1074, 213 N.Y. 638.
60 C.J. p 297 note 96.

81. N.Y.—Gilmore v. Utica, 24 N.E. 1009, 121 N.Y. 561.
60 C.J. p 297 note 97.

82. Ky.—South Covington & C. St. Ry. Co. v. Commonwealth, 205 S. W. 603, 181 Ky. 449, affirmed 40 S.Ct. 378, 252 U.S. 399, 64 L.Ed. 631, and Cincinnati, C. & E. R. Co. v. Commonwealth, 40 S.Ct. 381, 252 U.S. 408, 64 L.Ed. 637.
60 C.J. p 297 note 99.

83. Mass.—Metropolitan R. Co. v. Quincy R. Co., 12 Allen 262.

N.J.—Citizens' Coach Co. v. Camden Horse R. Co., 33 N.J.Eq. 267, 36 Am.R. 542.

84. Ill.—Barsaloux v. City of Chicago, 92 N.E. 525, 245 Ill. 598.
60 C.J. p 297 note 2.

85. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.

86. Neb.—Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 187 N.W. 790, 108 Neb. 154, 28 A.L.R. 960.
60 C.J. p 297 note 4.

87. Ill.—Peoria Ry. Co. v. Peoria Ry. Terminal Co., 96 N.E. 689, 252 Ill. 73.

88. Cal.—Pacific R. Co. v. Wade, 27 P. 768, 91 Cal. 449, 25 Am.S.R. 201, 13 L.R.A. 754.
60 C.J. p 297 note 7.

89. Va.—Virginia Ry. & Power Co. v. City of Richmond, 106 S.E. 529, 129 Va. 592.
60 C.J. p 297 note 8.

Traction ordinance held not invalid because authorizing transportation company to permit use of tracks in city-owned subways by any company having right on date specified to operate over railway tracks acquired by transportation company.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

90. U.S.—Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co., C.C. Ga., 101 F. 347.
60 C.J. p 298 note 10.

91. Pa.—Thirteenth & Fifteenth Sts. Pass. Ry. v. Southern Pass. Ry., 15 Pa.Co. 145.

92. La.—Crescent City R. Co. v. New Orleans, etc., R. Co., 19 So. 868, 48 La.Ann. 856.

93. Ohio.—State v. Cincinnati, etc., Electric St. R. Co., 19 Ohio Cir.Ct. 79, 10 Ohio Cir.Dec. 418.

94. Ohio.—State v. Cincinnati, etc., Electric St. R. Co., *supra*.
60 C.J. p 299 note 17.

Under some statutes or ordinances the right of a street railroad company to use the tracks of another company may be acquired without resorting to condemnation proceedings.⁹⁵ In other cases, however, it is held that the owning company has a private property in its tracks and their use, although devoted to a public purpose, of which it cannot be deprived without its consent, except by an authorized appropriation, in which it is entitled to have compensation therefor assessed by a jury.⁹⁶ In any case, in the absence of an agreement between the companies, the company which seeks the right must pursue the prescribed proceedings.⁹⁷

Where one street railroad company using another's tracks is required to make and maintain connections and pay switchmen, it is properly allowed to select and employ such switchmen.⁹⁸

Authority of public utility board. The authority to regulate the matter of the use of the tracks of one company by another is sometimes vested in state public utility boards or commissions.⁹⁹

Consent of municipal authorities. A grant to a street railroad company to operate its own lines on streets, subject to conditions and regulations, has been held not to confer on the company obtaining such franchise a right to permit other companies to use its tracks without municipal consent and against municipal protest.¹ A street railroad company which has, under power given by the legislature and the municipality, appropriated a right to use a portion of the tracks of another company, is

not, however, thereby precluded from appropriating the right to use more of the tracks without obtaining an additional ordinance from the municipality.²

Consent of abutting owners. Under some statutes the consent of the abutting property owners to the construction and operation of one street railroad is not sufficient to authorize the use of the tracks by another company for the operation of its road, but such consent must be obtained for the operation of the second road.³ Under other statutes such consent seems not to be necessary.⁴

§ 130. Compensation

A company acquiring the right to use the roadbed and tracks of another company must make compensation for such use.

A company acquiring the right to use the roadbed and tracks of another company must ordinarily make compensation for such use.⁵ The mode and amount of such compensation may be fixed by contract between the companies;⁶ and in some jurisdictions it is held that, if there is no agreement between the companies as to the mode or amount of compensation, it must be fixed as in other instances of the condemnation of private property to public uses.⁷ In other jurisdictions the determination of the amount of compensation may devolve on the municipal authorities,⁸ appraisers,⁹ a state public utility board or commission,¹⁰ commissioners appointed by the court,¹¹ or on the court without the intervention of a jury.¹²

95. Cal.—Pacific R. Co. v. Wade, 27 P. 768, 91 Cal. 449, 25 Am.S.R. 201, 13 L.R.A. 754.

Mo.—Union Depot R. Co. v. Southern R. Co., 16 S.W. 920, 105 Mo. 562.

96. Ohio.—Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 36 N.E. 312, 50 Ohio St. 603.

60 C.J. p 298 note 15.

Power of legislature to authorize one railroad company to use right of way or tracks of another generally see Eminent Domain § 76.

97. Pa.—The City of Philadelphia v. The Continental Passenger Ry. Co., 2 Wkly.N.C. 283.

98. Mo.—Grand Ave. R. Co. v. Citizens' R. Co., 50 S.W. 305, 148 Mo. 665.

99. Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Ry. Co., 184 P. 71, 76 Okl. 102.

60 C.J. p 299 note 19.

1. Pa.—Erie v. Erie Traction Co., 70 A. 904, 222 Pa. 43.

60 C.J. p 299 note 21.

2. Ohio.—Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 12 Ohio Cir.Ct. 367, 5 Ohio Cir.Dec. 643.

3. N.Y.—Colonial City Traction Co. v. Kingston City R. Co., 47 N.E. 810, 153 N.Y. 540, 48 N.E. 900, 154 N.Y. 493.

60 C.J. p 299 note 24.

Consent of abutting owners to use of streets and highways in general see supra §§ 53-69.

4. Ill.—Chicago, N. S. & M. R. Co. v. City of Chicago, 163 N.E. 141, 331 Ill. 360.

60 C.J. p 299 note 25.

5. La.—Canal, etc., R. Co. v. Orleans R. Co., 10 So. 389, 44 La. Ann. 54.

60 C.J. p 299 note 26.

6. La.—Canal, etc., R. Co. v. Orleans R. Co., 10 So. 389, 44 La. Ann. 54.

60 C.J. p 300 note 27.

Contracts for joint or interchangeable use of tracks see infra § 152.

7. Ohio.—Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 36 N.E. 312, 50 Ohio St. 603.

60 C.J. p 300 note 28.

Assessment of compensation in condemnation proceedings in general see Eminent Domain §§ 276-318.

8. Mo.—Grand Ave. R. Co. v. Lindell R. Co., 50 S.W. 302, 148 Mo. 637.

60 C.J. p 300 note 29.

9. Pa.—Second St., etc., Pass. R. Co. v. Green St., etc., Pass. R. Co., 3 Phila. 430.

10. Mass.—Cambridge R. Co. v. Charles River St. R. Co., 1 N.E. 925, 139 Mass. 454.

60 C.J. p 300 note 31.

11. Mass.—Metropolitan R. Co. v. Quincy R. Co., 12 Allen 262.

60 C.J. p 300 note 32.

12. Cal.—Pacific R. Co. v. Wade, 27

Measure of compensation. In the absence of any agreement, statute, or ordinance specifying the amount, the compensation to be allowed a street railroad company for the use of its tracks by another company should be a fair and full equivalent of the loss thus sustained.¹³ In estimating this amount there should be taken into consideration the value of the railroad structure and materials sought to be used,¹⁴ the cost of paving in conformity with the municipal ordinances,¹⁵ and the increased wear on the tracks, and expense in keeping them in repair;¹⁶ but no compensation should be allowed for interference with the franchise or profits of the company whose tracks are sought to be used.¹⁷

§ 131. Rights and Remedies

The use by one railroad company of the street or tracks occupied by another is not necessarily an invasion of the rights of the latter which will entitle it to relief, but an unauthorized interference with its tracks, franchise, or vested rights will give rise to a cause of action.

The fact that a street railroad company is about to lay its track in a street already occupied by another company with its tracks is not necessarily a threatened invasion of the easements of such other company or of its property rights, so as to entitle such other company to an injunction;¹⁸ and, when a street railroad company accepts its charter, or a renewal thereof, with the condition attached that the municipality may grant the right to use the tracks to any other company on such terms as the municipal council shall deem equitable, and the

municipality has granted such right and prescribed the terms, the court will not interfere with them if they are reasonable,¹⁹ and the company, the use of whose tracks has been granted, cannot object because a part of its business will be taken away.²⁰

A street railroad company which has constructed, and is legally operating, a line of railroad in the streets of a municipality is possessed of such a property interest as to give it a legal right to maintain an action to restrain a similar company from using or interfering with its line of tracks, without authority of law;²¹ and likewise an injunction will issue to restrain a company in the occupation and use of the tracks of another company from interfering with the latter's franchise or vested rights.²² Where, however, one company has a lawful right to the use of the tracks of another company, the latter is not entitled to an injunction to restrain the exercise of such right, without alleging and proving such facts as clothe the courts with power to grant relief in the exercise of their equitable jurisdiction.²³ A municipality may not maintain a suit in equity to compel a street railroad to permit the use of its tracks by another company to which the municipality has granted such use under authority duly reserved.²⁴

Repair of tracks at joint expense. Where street railroad tracks owned by one company, and subject to the use of another company operating on the same street, become in need of repair, the latter company may by suit compel the former to reconstruct the tracks at joint expense.²⁵

P. 768, 91 Cal. 449, 25 Am.S.R. 201, 13 L.R.A. 754.

13. Mo.—Grand Ave. R. Co. v. People's R. Co., 33 S.W. 472, 132 Mo. 34, 60 C.J. p 300 note 34.

14. Cal.—Hook v. Los Angeles R. Co., 61 P. 912, 129 Cal. 180, 60 C.J. p 300 note 35.

15. Ohio.—Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 6 Ohio Cir.Ct. 362, 3 Ohio Cir.Dec. 493.

16. Mo.—Grand Ave. R. Co. v. People's R. Co., 33 S.W. 472, 132 Mo. 34.

Ohio.—Toledo Consol. St. R. Co. v.

Toledo Electric St. R. Co., 6 Ohio Cir.Ct. 362, 3 Ohio Cir.Dec. 493.

17. Mo.—Grand Ave. R. Co. v. Citizens' R. Co., 50 S.W. 305, 148 Mo. 665.

60 C.J. p 300 note 38.

18. Ill.—General Electric R. Co. v. Chicago City R. Co., 66 Ill.App. 362.

19. Ohio.—Broadway, etc., St. R. Co. v. Brooklyn St. R. Co., 9 Ohio Dec., Reprint, 25, 10 Cinc.L.Bul. 72.

20. Ohio.—Broadway, etc., St. R. Co. v. Brooklyn St. R. Co., supra.

21. Ga.—Atlanta R., etc., Co. v. At-

lanta Rapid Transit Co., 39 S.E. 12, 113 Ga. 481.

60 C.J. p 301 note 43.

22. La.—Canal, etc., R. Co. v. Crescent City R. Co., 10 So. 888, 44 La. Ann. 485.

60 C.J. p 301 note 44.

23. Mo.—People's R. Co. v. Grand Ave. R. Co., 50 S.W. 829, 149 Mo. 245—St. Louis R. Co. v. Southern R. Co., 15 S.W. 1013.

24. Pa.—Chester City v. Union R. Co., 66 A. 1107, 218 Pa. 24, 60 C.J. p 301 note 46.

25. La.—New Orleans, etc., R. Co. v. Canal, etc., R. Co., 17 So. 834, 47 La. Ann. 1476.

D. CROSSING OR CONNECTION WITH OTHER RAILROADS

§ 132. Right to Cross

Street railroad companies have implied power to cross the lines of other companies, and one cannot enjoin such crossing by another; but if conditions precedent are provided for by statute, there must be compliance therewith.

Street and electric railroads have the same implied power, from the law authorizing their construction, to cross the lines of other street railroads as have commercial railroads,²⁶ and one street railroad company cannot enjoin such crossing by the other.²⁷ Under some constitutional or statutory provisions the right of a street railroad company to cross the tracks of another road is expressly provided for,²⁸ and there must be compliance with any conditions precedent therein specified.²⁹

§ 133. Mode of Crossing

The construction of a crossing of street railroads may be controlled by the courts, and there must be compliance with relevant statutory provisions.

Where the right to construct a crossing over the tracks of a street railroad company exists, a court of equity will control its construction and operation on the application of either party.³⁰ Under some statutes, the determination of the manner in which the crossing shall be made is vested in particular boards or commissioners,³¹ or in commissioners appointed by the court.³² Notice of the time and manner of the construction of a crossing must be given to a street railroad whose tracks will be crossed.³³

§ 134. Connections with Other Roads

Connections of the tracks of a street railroad with those of another railroad may be made as authorized by statutes.

Under some statutes connections or intersections of the tracks of a street railroad with those of another existing railroad are authorized;³⁴ and statutes authorizing or compelling connections or intersections of tracks between railroads have been held to apply to the intersection and connection of a street railroad operated by electricity with a steam railroad,³⁵ but not to the connection between a street surface railroad and an elevated railroad by an inclined plane, where the property owners have consented only to a surface road.³⁶ Such connections are usually required to be made with the consent of, and subject to the conditions imposed by, the city authorities.³⁷

§ 135. Compensation

On compliance with the prerequisites of statutes providing for the appointment of commissioners for the fixing of compensation to be paid a street railroad for the crossing of its tracks by another street railroad, an application for the appointment of such commissioners must be granted.

Although, as stated in Eminent Domain § 131, it has been held that a street railroad company may lay its tracks across a railroad or another street railroad without making compensation, some statutes

26. N.Y.—*Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co.*, 144 N.Y.S. 523, 159 App.Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718.

60 C.J. p 301 note 50.

Agreements between railroads and street railroads as to maintenance see Railroads § 152.

Apportionment of part of cost of eliminating grade crossing to street railroad see Railroads § 165.

Compensation for crossing see Eminent Domain § 131.

Right of street railroad and railroad to cross each other see Railroads § 133 b.

27. N.Y.—*Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420.

60 C.J. p 302 note 53.

Street railroad company's right of way as subject to easement of public in street see *supra* § 72.

Operation of a street railroad as im-

posing no additional burden on the street see Eminent Domain § 133 c.

28. Pa.—*Market St. Pass. R. Co. v. Union Pass. R. Co.*, 10 Phila. 43—*Maris v. Union Pass. R. Co.*, 10 Phila. 41.

60 C.J. p 302 note 54.

29. N.J.—*Consolidated Traction Co. v. South Orange, etc., Traction Co.*, 40 A. 15, 56 N.J.Eq. 569.

60 C.J. p 302 note 55.

30. N.J.—*Consolidated Traction Co. v. South Orange, etc., Traction Co.*, 40 A. 15, 56 N.J.Eq. 569.

31. Va.—*Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co.*, 47 S.E. 858, 102 Va. 847.

60 C.J. p 302 note 61.

32. N.Y.—*Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co.*, 139 N.Y.S. 216, 78 Misc. 220, affirmed 144 N.Y.S. 523, 159 App.

Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718.

60 C.J. p 302 note 62.

33. N.J.—*Consolidated Traction Co. v. South Orange, etc., Traction Co.*, 40 A. 15, 56 N.J.Eq. 569.

34. N.Y.—*New York v. Manhattan R. Co.*, 37 N.E. 494, 143 N.Y. 1.

60 C.J. p 302 note 66.

35. N.Y.—*Stillwater, etc., R. Co. v. Boston, etc., R. Co.*, 64 N.E. 511, 171 N.Y. 589, 59 L.R.A. 489—*Village of Waverly v. Waverly, S. & A. Traction Co.*, 116 N.Y.S. 1074, 132 App.Div. 561.

Railroads connecting with other railroads see Railroads § 56 a.

36. N.Y.—*Eldert v. Long Island Electric R. Co.*, 51 N.Y.S. 186, 28 App.Div. 451, affirmed 59 N.E. 1122, 165 N.Y. 651.

37. N.Y.—*New York v. Manhattan R. Co.*, 37 N.E. 494, 143 N.Y. 1, 60 C.J. p 303 note 68.

provide for the appointment of commissioners for the fixing of compensation to be paid a street railroad for the crossing of its tracks by another street railroad, and, on compliance with statutory prerequisites, an application for the appointment of such commissioners must be granted.³⁸

E. INJURIES FROM, OR INCIDENT TO, CONSTRUCTION OR MAINTENANCE

§ 136. In General

A street railroad company is liable for injuries sustained as a result of the negligent manner in which the work of constructing or maintaining the railroad is carried on.

A street railroad company will be held liable for injuries sustained by persons as a result of the negligent manner in which the work of constructing or maintaining the railroad is carried on.³⁹ When it engages in work on a public street, the company assumes a duty, imposed by law, of keeping that street in a reasonably safe condition while the work is in progress,⁴⁰ whether it is actually performing the work itself,⁴¹ or the work is being performed by an independent contractor.⁴² Hence the company is liable for injuries sustained by persons using the street or highway due to a dangerous condition negligently created by it,⁴³ and its liability exists even though the specific act complained of might

have been committed by an independent contractor.⁴⁴

The company is bound to use the care which an ordinarily prudent and careful man would use to warn travelers in the street of the existence and danger of an excavation,⁴⁵ and in providing a right of way over private property as a temporary substitute for the highway which it had completely obstructed while constructing its road, the company is under a duty to keep and maintain the way so provided in a reasonably safe condition for public use;⁴⁶ but in repairing its tracks at a street crossing, the company is not required to anticipate and provide for unusual and extraordinary emergencies,⁴⁷ and it is sufficient for it to provide a crossing for ordinary and usual travel.⁴⁸

The company can only be held liable where the defect or condition causing the injury was one for which it was responsible;⁴⁹ thus it is not liable for

38. N.Y.—*Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co.*, 139 N.Y.S. 216, 78 Misc. 220, affirmed 144 N.Y.S. 523, 159 App. Div. 567, affirmed 119 N.E. 1058, 222 N.Y. 718.

6Q C.J. p 302 note 65.

39. Conn.—*Sawicki v. Connecticut Railway & Lighting Co.*, 30 A.2d 556, 129 Conn. 626.

Mass.—*Berlandi v. Union Freight R. Co.*, 16 N.E.2d 17, 301 Mass. 47.

60 C.J. p 303 note 71.

Injuries from:
Negligent use of electricity see
Electricity §§ 38-73.

Operation

In general see *infra* §§ 185-338.
Due to defects or obstructions
see *infra* §§ 213-223.

Plan or mode of construction see
supra §§ 105-108.

Restoration, paving, and repair of
streets see *supra* §§ 111-128.

Rights of abutting owners see *supra*
§§ 100-102.

Maintenance of fence or barrier

(1) Where owners of realty adjacent to street conveyed it to railway company's agent and agent conveyed it to company by deeds stating that realty was to be used for highway purposes and for operation of street railway, but general public did not use realty for highway purposes, no care was taken of it, and it was rough and unfit for travel, company was not relieved of duty to maintain a fence on retaining wall constructed by company on realty.—*Sawicki v. Connecticut Railway & Lighting Co.*, 30 A.2d 556, 129 Conn. 626.

(2) Where company filled in such realty to make it level with street and built a retaining wall, company had duty to build a protective barrier along edge of retaining wall to prevent pedestrians from falling off wall.—*Sawicki v. Connecticut Railway & Lighting Co.*, *supra*.

(3) It was company's duty to maintain the fence, even though it removed its tracks and abandoned use of the realty under order of public utilities commission, and, hence, company was liable for injuries sustained by one who fell through the fence which had become unsafe.—*Sawicki v. Connecticut Railway & Lighting Co.*, *supra*.

40. N.Y.—*Keating v. Metropolitan St. R. Co.*, 94 N.Y.S. 117, 105 App. Div. 362—*Wolfe v. Third Ave. R. Co.*, 74 N.Y.S. 386, 67 App. Div. 605.

41. N.Y.—*Keating v. Metropolitan St. R. Co.*, 94 N.Y.S. 117, 105 App. Div. 362.

42. Del.—*White v. People's Ry. Co.*, 72 A. 1059, 22 Del. 476.

60 C.J. p 303 note 74.

Liability for acts of independent contractors generally see *Master and Servant* §§ 580-606.

43. Ga.—*Fulton County St. R. Co. v. McConnell*, 13 S.E. 828, 87 Ga. 756.
60 C.J. p 303 note 75.

44. Del.—*White v. People's Ry. Co.*, 72 A. 1059, 22 Del. 476.

45. Del.—*Neely v. People's Ry. Co.*, 89 A. 211, 27 Del. 457.

Mich.—*Norris v. Detroit United Ry.*, 151 N.W. 747, 185 Mich. 264.

46. Minn.—*McCoy v. Minneapolis, St. P., R. & D. Electric Traction Co.*, 134 N.W. 293, 117 Minn. 38.

47. Ark.—*Southern Produce Co. v. Texarkana Gas & Electric Co.*, 154 S.W. 184, 107 Ark. 59.

48. Ark.—*Southern Produce Co. v. Texarkana Gas & Electric Co.*, *supra*.

49. Mass.—*Becker v. City of Boston*, 72 N.E.2d 524, 321 Mass. 230.
60 C.J. p 304 note 81.

Unavoidable result of constructing trackless trolley

Where necessary and practically unavoidable result of proper construction of concrete slab for track-

injuries sustained by reason of defects resulting from an extraordinary storm,⁵⁰ until it had reasonable opportunity to remedy such defects.⁵¹

Contributory negligence. No recovery can be had against the railroad, where the injured person was guilty of contributory negligence.⁵² With respect to the question of contributory negligence, a statute requiring slow-moving vehicles to keep as closely as practical to the right-hand edge or curb of the roadway has no application where the center portion of the roadway is occupied by streetcar tracks which are being repaired, and the street, under the circumstances, is not sufficiently wide to permit two lines of traffic in the same direction to be maintained.⁵³

Proximate cause. In order to render a street railroad company liable for negligence in connection with the construction or repair of its tracks, the negligence must have been the proximate cause of the resulting injury;⁵⁴ there must be a causal connection between the conduct of the company and the accident before the question of the company's negligence can be considered.⁵⁵

Incidental interference with telephone company. A telephone company has no right to relief because of incidental interference by the construction or

maintenance of an electric street railroad,⁵⁶ particularly where it took its franchise subject to the condition that it should not incommode the use of the streets by the public.⁵⁷

§ 137. Injuries to Road or Other Property

A street railway company may recover damages for the destruction of its tracks, poles, wires, and other property by a municipality.

A street railway company may recover damages for the wrongful destruction of its tracks, poles, wires, and other property by a municipality,⁵⁸ and the fact that the street was taken over by the state as a state highway does not relieve the municipality from its liability.⁵⁹

§ 138. Actions

The rules governing civil actions generally apply in actions against a street railroad for injuries resulting from the construction and maintenance of the road.

Except in so far as regulated by special statutory provisions, the rules governing civil actions generally, particularly in actions for injuries resulting from negligence, apply in actions against a street railroad for injuries resulting from the construction and maintenance of the road.⁶⁰ Thus, the petition or complaint must state facts constituting a cause

less trolley on deeded street railway right of way was to cause more water to flow onto adjoining land, landowners would not be entitled to recover compensation therefor, or to injunction.—Anderson v. Knoxville Power & Light Co., 64 S.W.2d 204, 16 Tenn.App. 259.

Failure to light safety zone

Street railroad company was not liable for death of motorist's wife who was killed when automobile struck unlighted safety zone at night, where city had assumed obligation to light safety zone and had not been joined in action within time allowed by statute, in absence of evidence of negligence of street railroad company in other respects.—Reiners v. Pittsburgh Rys. Co., 188 A. 163, 324 Pa. 460.

Extinguishment of warning light

Mere fact that light on standard, placed to warn of work on track, went out immediately before accident which occurred when there had not been sufficient time to relight it was insufficient to establish street railroad's negligence.—Stewart v. Philadelphia Rapid Transit Co., 157 A. 37, 103 Pa.Super. 366.

50. Mich.—Norris v. Detroit United Ry., 151 N.W. 747, 185 Mich. 264.

51. Mich.—Norris v. Detroit United Ry. Co., supra.

52. Ill.—Wildt v. City of Chicago, 17 N.E.2d 612, 297 Ill.App. 640.
Neb.—Conklin v. Lincoln Traction Co., 263 N.W. 674, 130 Neb. 28.
60 C.J. p 304 note 85.

53. Wis.—Wilke v. Milwaukee Electric Ry. & Light Co., 245 N.W. 660, 209 Wis. 618.

54. Ark.—Southern Produce Co. v. Texarkana Gas & Electric Co., 154 S.W. 184, 107 Ark. 59.
60 C.J. p 304 note 87.

55. Del.—Neely v. People's Ry. Co., 89 A. 211, 27 Del. 457.
60 C.J. p 304 note 88.

56. Ind.—Citizens Tel. Co. v. Ft. Wayne, etc., R. Co., 100 N.E. 309, 53 Ind.App. 230, Ann.Cas.1916A 132.
20 C.J. p 315 note 59—62 C.J. p 43 note 69 [a].

57. N.Y.—Hudson River Tel. Co. v. Watervliet Turnp. & R. Co., 32 N.E.

148, 135 N.Y. 393, 31 Am.S.R. 838, 17 L.R.A. 674.

20 C.J. p 316 note 60.
Conflicting rights of telephone company and others in streets generally see the C.J.S. title Telegraphs and Telephones § 31, also 62 C.J. p 43 notes 69-74.

Injuries to lines or other property of telephone or telegraph company generally see the C.J.S. title Telegraphs and Telephones §§ 280-283, also 62 C.J. p 299 note 80-p 300 note 8.

58. Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.
Assignee of original company
Pa.—Dalton St. Ry. Co. v. City of Scranton, supra.

59. Pa.—Dalton St. Ry. Co. v. City of Scranton, supra.

60. Conn.—Coletti v. Connecticut Co., 134 A. 248, 105 Conn. 94.

Actions for:
Injuries from operation of street railroad generally see infra §§ 296-338.

Negligence generally see Negligence §§ 175-305.

Remedies of abutting owners see supra §§ 100-102.

of action;⁶¹ and general rules have been applied with respect to presumptions and burden of proof,⁶² the admissibility of the evidence⁶³ and its weight and sufficiency.⁶⁴ Disputed questions of fact should be submitted to the jury⁶⁵ under instructions properly stating the law.⁶⁶ Statutory requirements for notice of a claim for injuries must be complied

with.⁶⁷

Limitations of actions. Liability under a statute imposing on a street railroad company the duty to use reasonable care in repairing the streets rests in negligence, and is not penal, with respect to applicability of statute of limitations relating to actions for injury or death caused by negligence.⁶⁸

F. PENALTIES AND OFFENSES INCIDENT TO CONSTRUCTION AND MAINTENANCE

§ 139. Penalties

The imposition of penalties by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done, and actions and other proceedings to enforce penalties are discussed generally in Penalties §§ 1-21.

Examine Pocket Parts for later cases.

§ 140. Offenses

A street railroad company or its officers may be subject to criminal prosecution for the violation of its duties in connection with the construction and maintenance of its road.

A street railroad company or its officers may be

subject to criminal prosecution for the violation of its duties in connection with the construction and maintenance of its road,⁶⁹ as for the construction and maintenance of its road in such a manner as constitutes a public nuisance⁷⁰ or misdemeanor,⁷¹ or for its failure to keep its tracks and roadbed in repair, thereby obstructing travel.⁷²

§ 141. — Prosecution and Punishment

An indictment for obstructing streets by erecting poles and stringing wires, which fails to show negligence or that anything unauthorized was done, is bad.

In accordance with the general rule that facts constituting an offense must be stated in an indictment, an indictment of street railway directors for

61. Ga.—Townsend v. Georgia Power Co., 160 S.E. 712, 44 Ga.App. 132. 60 C.J. p 304 note 93.

62. Pa.—McCoy v. George, 27 A.2d 658, 149 Pa.Super. 630.

63. Ala.—Birmingham Ry. Light & Power Co. v. Donaldson, 68 So. 596, 14 Ala.App. 160. 60 C.J. p 305 note 94 [a].

64. Tex.—Cleburne St. Ry. Co. v. Dickey, Civ.App., 168 S.W. 475. 60 C.J. p 305 note 94 [b], [c].

65. Pa.—Palmer v. Philadelphia Suburban Transp. Co., Com.Pl., 38 Del. Co. 429.

Tex.—Fort Worth & Denver City Ry. Co. v. Walters, Civ.App., 154 S.W. 2d 177, error refused.

Held for jury

(1) In general.—Flanders v. Murray, 30 N.Y.S.2d 265, 177 Misc. 239—60 C.J. p 305 note 95 [a].

(2) Contributory negligence.—Wilke v. Milwaukee Electric Ry. & Light Co., 245 N.W. 660, 209 Wis. 618.

(3) Railway's negligence in permitting unlighted crossover switch to hang suspended above pavement during removal thereof.—Wilke v. Milwaukee Electric Ry. & Light Co., 245 N.W. 660, 209 Wis. 618.

(4) What photograph showed as to disputed location of holes into which plaintiff fell.—Clardy v. Kansas City Public Service Co., 42 S.W.2d 370, 227 Mo.App. 749.

(5) Whether hole into which pedestrian stepped was one left by street railway when removing trolley pole.—Jensen v. Omaha & C. B. St. Ry. Co., 257 N.W. 257, 128 Neb. 21.

(6) Whether defective condition of street which had been jointly maintained by city and company for many years constituted a nuisance.—Karle v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327.

Held not for jury

(1) In case predicated on maintenance of a nuisance by the railroad company, maintained at the instigation and by order of the city authorities, the jury was held not competent to find that legislative action of city authorities in passing ordinance, requiring location of trolley poles between street railway company's tracks on street bridge, many years before, was act of negligence.—Meese v. Goodman, 176 A. 621, 167 Md. 658, 98 A.L.R. 480.

(2) There was no issue of notice and reasonable opportunity to repair to be submitted to jury, where both city and company had participated in the original construction of the street

which continued in the same condition.—Karle v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327.

66. Instruction held erroneous as telling jury that street railway was insurer of safe condition of street between its tracks.—Clardy v. Kansas City Public Service Co., 42 S.W.2d 370, 227 Mo.App. 749.

67. Mass.—Berlandi v. Union Freight R. Co., 16 N.E.2d 17, 301 Mass. 47. 60 C.J. p 305 note 96. Notice of claim for injuries from operation see infra § 301.

68. Conn.—Coletti v. Connecticut Co., 134 A. 248, 105 Conn. 94.

69. Tenn.—Memphis, etc., R. Co. v. State, 11 S.W. 946, 87 Tenn. 746. 60 C.J. p 305 note 99. Offenses incident to operation see infra §§ 339-340.

At common law

Tenn.—Memphis, etc., R. Co. v. State, 11 S.W. 946, 87 Tenn. 746.

70. N.J.—State v. Riggs, 106 A. 216, 91 N.J.Law 456, error dismissed 106 A. 467, 92 N.J.Law 575.

71. Ala.—Oxanna v. Allen, 8 So. 79, 90 Ala. 468.

72. Tenn.—Memphis, etc., R. Co. v. State, 11 S.W. 946, 87 Tenn. 746.

obstructing streets by erecting poles and stringing wires, which fails to show negligence or that they did anything that they were not authorized to do, is insufficient and will be quashed.⁷³

G. MOTIVE POWER AND ROLLING STOCK

§ 142. Motive Power

- a. In general
- b. Steam
- c. Electricity
- d. Motorbusses
- e. Who may question right to use particular power

a. In General

The motive power to be used in the operation of a street railroad depends on the terms of the franchise, statute, or ordinance conferring the power to construct the road; and, under a general grant, any appropriate motive power may be used.

The motive power to be used in the operation of a street railroad depends on the terms of the franchise, statute, or ordinance conferring the power to construct the road.⁷⁴ Under a general grant of power to maintain and operate a street railroad, a corporation takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars which may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof.⁷⁵ Moreover, such a grant carries with it, at least in the absence of specific limitations or prohibitions,⁷⁶ the right from time to time to operate the road by new methods and motive powers developed in the progress of invention and experience.⁷⁷ Where, however, a statute specifies

the motive power to be used, the expression of that power may be construed to exclude any other.⁷⁸

b. Steam

Steam as a motive power may be used along the streets of a city by proper permission, but if it is prohibited, its use constitutes a nuisance.

Steam, as a motive power, may be used along the streets of a city by proper permission,⁷⁹ and in such case the use thereof cannot be abated as a public nuisance, even though it tends to the immediate annoyance of the public in general.⁸⁰ The use of steam as a motive power may, however, be prohibited expressly⁸¹ or impliedly,⁸² and if it is, its use constitutes a nuisance, constructive, if not actual,⁸³ especially in a thickly populated city.⁸⁴

c. Electricity

Electricity may be used as the motive power where expressly or impliedly permitted by the franchise or charter of the street railroad company or statutes or ordinances relating thereto.

Whether or not a street railroad may use electricity as its motive power depends on the terms of the franchise or charter and statutes or ordinances relating thereto.⁸⁵ The company has the right to use electricity where the grant of power to construct and operate a street railroad is silent as to the motive power to be used,⁸⁶ or where it authorizes the use of any motive power whatever,⁸⁷ or steam, horse, or other power, as the city council may from time to time direct,⁸⁸ or any power other

73. N.J.—*State v. Riggs*, 106 A. 216, 91 N.J.Law 456, error dismissed 106 A. 467, 92 N.J.Law 575.

74. Ill.—*McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611, 60 C.J. p 305 note 5.

75. N.J.—*Paterson R. Co. v. Grundy*, 26 A. 788, 51 N.J.Eq. 213, 60 C.J. p 305 note 7.

76. Mich.—*Detroit City R. Co. v. Mills*, 48 N.W. 1007, 85 Mich. 634.

77. Del.—*Wilmington City R. Co. v. Wilmington, etc., R. Co.*, 46 A. 12, 8 Del.Ch. 468, 60 C.J. p 306 note 9.

78. Del.—*Wilmington City R. Co. v. Wilmington, etc., R. Co.*, *supra*.

Pa.—*Haines v. Twenty-Second St. & Allegheny Ave. Pass. Ry. Co.*, 1 Pa. Dist. 506.

79. Ill.—*Moses v. Pittsburgh, etc., R. Co.*, 21 Ill. 516.

80. Ga.—*Vason v. South Carolina R. Co.*, 42 Ga. 631.

81. N.Y.—*Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co.*, 39 N.E. 17, 144 N.Y. 152, 26 L.R.A. 610, 60 C.J. p 306 note 13.

82. Ill.—*North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. R. 788, 60 C.J. p 306 note 14.

83. La.—*Tilton v. New Orleans City R. Co.*, 35 La. Ann. 1062.

84. Ill.—*North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. R. 788.

85. Wash.—*McGivra v. Seattle Electric Co.*, 111 P. 896, 61 Wash. 38, Ann.Cas.1912B 1020.

60 C.J. p 306 note 18—26 C.J. p 1034 note 15 [a].

86. U.S.—*Riverside, etc., R. Co. v. Riverside, C.C.Cal.*, 118 F. 736.

Del.—*Wilmington City R. Co. v. Wilmington, etc., R. Co.*, 46 A. 12, 8 Del.Ch. 468.

87. N.Y.—*Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 32 N.E. 148, 135 N.Y. 393, 31 Am.S.R. 838, 17 L.R.A. 674.

60 C.J. p 306 note 20.

88. R.I.—*Taggart v. Newport St. R. Co.*, 19 A. 326, 16 R.I. 668, 7 L.R.A. 205.

than that of locomotive.⁸⁹ Overhead wires may be used to supply the electricity⁹⁰ unless the use of such wires is prohibited expressly⁹¹ or impliedly.⁹² The fact that the use of electricity as a method of operating street railroads was unknown at the time the grant was made is immaterial,⁹³ unless the company was thereby limited to the use of such powers as were known at the time.⁹⁴

d. Motorbuses

A street railway company authorized to use any motive power and means of traction sanctioned by the municipality has authority to operate motorbuses.

Although there is a verbal plausibility in the contention that a street railway corporation has no power to operate without rails, the contention is narrowly verbal and also ignores material words;⁹⁵ and since transportation is the end and rails and motive power are means, when new motive power makes rails unnecessary, power to furnish transportation is not lost.⁹⁶ A company authorized to use any motive power and means of traction sanctioned by the municipality or any improved motive power except steam has authority to operate motorbuses as a part of an integrated system of mass transportation comprising rail cars, trackless trolleys, and motorbuses.⁹⁷ A statute requiring municipal consent to the operation of autobuses on the street is not applicable to street railways operating such

buses by authority of statute.⁹⁸

e. Who May Question Right to Use Particular Power

The right of a street railroad company to operate its cars by power other than that specified in its charter can be questioned only by the state or municipality with which its contract was made.

The right of a street railroad company to operate its cars by power other than that specified in its charter can be raised only by the state or city with which its contract was made, and is not subject to collateral attack in a private action to recover for injuries,⁹⁹ or in a proceeding by the company to enjoin private persons from cutting down its wires and poles.¹

§ 143. Change of Motive Power

A change in the motive power of a street railroad may be made by legislative authority.

A change by a street railroad to a motive power not covered by its franchise or charter generally requires legislative authority,² which may, however, be conferred by the local authorities to whom the power to authorize the change has been delegated.³ A street railroad company, which has complied with the requirements of law with respect to obtaining authority to change its motive power, becomes entitled to a permit to open the streets along

89. Pa.—Lockhart v. Craig St. R. Co., 21 A. 26, 139 Pa. 419.
60 C.J. p 306 note 22.

90. Md.—Hooper v. Baltimore City Pass. R. Co., 37 A. 359, 85 Md. 509, 38 L.R.A. 509.
60 C.J. p 306 note 23.

91. Conn.—Farrell v. Winchester Ave. R. Co., 23 A. 757, 61 Conn. 127.

92. N.J.—State v. Trenton, 23 A. 281, 54 N.J.Law 92.
60 C.J. p 306 note 25.

93. N.Y.—Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 32 N.E. 148, 135 N.Y. 393, 31 Am.S.R. 838, 17 L.R.A. 674.
60 C.J. p 307 note 26.

94. Mich.—Detroit City R. Co. v. Mills, 48 N.W. 1007, 85 Mich. 634.

95. Md.—Warren v. Fitzgerald, 56 A. 2d 827, 189 Md. 476.

96. Md.—Warren v. Fitzgerald, supra.

97. Md.—Warren v. Fitzgerald, 56 A.2d 827, 189 Md. 476.

Motorbuses as subject to regulation generally see Motor Vehicles § 46. Franchise or privilege tax on street railroads operating motorbuses see Motor Vehicles § 136 b.

98. N.J.—Public Service Coordinated Transport v. Newark-Elizabeth Independent Bus Owners Ass'n, 69 A.2d 22, 3 N.J. 118.

Statute held not unconstitutional

The statute providing that whenever the board of public utility commissioners has approved the substitution of trolley buses on any line of street railway the company may with the approval of such board utilize in lieu of such vehicles autobuses is not unconstitutional because persons who operate buses in competition with buses operated by street railway must obtain the approval of the municipality whereas the street railway company is not required to do so.—South Orange Ave. Independent Bus Owners Ass'n v. Board of Public Utility Commissioners, 66 A.2d 627, 4 N.J.Super. 191, affirmed N. J. Public Service Coordinated Transport v. Newark-Elizabeth Independent Bus Owners Ass'n, 69 A.2d 22, 3 N.J. 118.

99. Ill.—Chicago Gen. R. Co. v. Chicago City R. Co., 57 N.E. 822, 186 Ill. 219, 50 L.R.A. 734.
60 C.J. p 308 note 41.

Competitor

Persons who owned and operated buses in competition with the street railway company could not attack order of public utilities commissioners permitting street railway company to substitute autobuses for trolley buses.—Public Service Coordinated Transport v. Newark-Elizabeth Independent Bus Owners Ass'n, 69 A.2d 22, 3 N.J. 118.

1. Ind.—Williams v. Citizens' R. Co., 29 N.E. 408, 130 Ind. 71, 30 Am.S.R. 201, 15 L.R.A. 64.

Mich.—Detroit City R. Co. v. Mills, 48 N.W. 1007, 85 Mich. 634.

2. N.Y.—St. Michael's Protestant Episcopal Church v. Forty-Second St., etc., R. Co., 57 N.Y.S. 881, 26 Misc. 601.

Pa.—Watkin v. West Philadelphia Pass. Ry. Co., 11 Pa.Co. 648.

3. N.J.—Roebling v. Trenton Pass. R. Co., 34 A. 1090, 58 N.J.Law 666, 33 L.R.A. 129.

60 C.J. p 307 note 33.

its route for purposes necessary in making such change.⁴

Statutes authorizing street railroad companies to change their motive power usually require such companies first to comply with certain conditions, such as obtaining the consent of the local authorities⁵ and the owners of abutting property.⁶ It is, however, competent for the legislature to authorize a change of motive power without the consent of the local authorities,⁷ notwithstanding a constitutional provision that no law shall authorize the construction or operation of a street railroad without the consent of the local authorities.⁸ Where

consent to a change of the motive power has been given by the local authorities where the consent of the property owners was not required, the change cannot be prevented by abutting property owners.⁹

Change to motorbusses. A municipality may consent to the use by a street railroad of busses for passenger service in lieu of streetcars running on fixed tracks, in order to meet changed conditions and improve service,¹⁰ but, where a general statute to permit these changes has been enacted by the legislature, local laws may not supersede it.¹¹ Under some statutes the change may be authorized or required by the public utility commission.¹² Where

4. N.Y.—In re Third Ave. R. Co., 24 N.E. 951, 121 N.Y. 536, 9 L.R.A. 124 —Potter v. Collis, 46 N.Y.S. 471, 19 App.Div. 392, affirmed 50 N.E. 413, 156 N.Y. 16.

Mandamus as appropriate remedy to enforce duties of municipal authorities with respect to uses which public service corporations are entitled to make of streets see Mandamus § 179 b.

5. N.Y.—People v. Newton, 19 N.E. 831, 112 N.Y. 386, 3 L.R.A. 174. 60 C.J. p 307 note 36.

6. N.Y.—Stern v. International Ry. Co., 115 N.E. 759, 220 N.Y. 284, 2 A. L.R. 487. 60 C.J. p 307 note 37.

7. N.Y.—In re Third Ave. R. Co., 24 N.E. 951, 121 N.Y. 536, 9 L.R.A. 124.

8. N.Y.—In re Third Ave. R. Co., supra.

9. Kan.—Corpus Juris quoted in Kansas Electric Power Co. v. Walker, 51 P.2d 1002, 1004, 142 Kan. 808.

Pa.—Fox v. Catharine & Bainbridge Streets Ry. Co., 12 Pa.Co. 180.

10. Ky.—Scott v. Cincinnati, N. & C. Ry. Co., 105 S.W.2d 169, 268 Ky. 383.

N.C.—Carolina Power & Light Co. v. Iseley, 167 S.E. 56, 203 N.C. 811. 60 C.J. p 307 note 33 [e].

Licenses or permits required in respect of motorbusses generally see Motor Vehicles §§ 79–96.

Increase in fare

Provision of franchise, granted by city to street railway company, that company should operate busses propelled by gasoline, electricity, or other approved means, when reasonably necessary to improve and supplement its service upon all lines where street cars were then operated by the company under then existing grants or franchises, authorized the company to modernize its transportation sys-

tem by completely substituting new and modern motor coaches for obsolete street cars in order to make transportation system more flexible than that furnished by the street cars, even though an increase in fare was put into effect on the installation of the new transportation equipment. —Cincinnati, N. & C. Ry. Co. v. City of Bellevue, 151 S.W.2d 1025, 286 Ky. 764.

11. N.Y.—In re International Ry. Co., 275 N.Y.S. 5, 242 App.Div. 300. **Charter provision in conflict with general statute**

Railway company was entitled to operate busses in substitution for cars upon tracks and supplemental thereto in city, notwithstanding resolution of city council permitting such operation was not approved by popular vote as required by charter, where charter provision requiring popular vote was in conflict with general law requiring only resolution of council.—In re International Ry. Co., 275 N.Y.S. 5, 242 App.Div. 300.

Powers reserved to people

(1) The section of city and county of Denver charter authorizing council to grant revocable licenses or permits in streets did not impliedly authorize the council to grant temporary rights with respect to temporary permits, such as right of tramway corporation to eliminate rail lines and operate trolley coaches or motorbuses on certain streets, in view of constitutional provision that no franchise relating to any street shall be granted except on vote of qualified taxpaying electors.—Berman v. City and County of Denver, 209 P.2d 754, 120 Colo. 218.

(2) The constitutional amendment, ratifying and validating all provisions of Denver charter not in conflict with such amendment, ratified and validated charter section reserving to people exclusive power to regulate public utility rates, so as to deprive council of power to enact ordinance

authorizing tramway corporation to eliminate rail lines and operate trolley coaches or motorbuses on certain streets, and such ordinance is void.—Berman v. City and County of Denver, 209 P.2d 754, 120 Colo. 218.

12. Pa.—Harrisburg Rys. Co. v. McNair, Com.Pl., 50 Dauph.Co. 166. S.C.—City of Columbia v. Pearman, 185 S.E. 747, 180 S.C. 296.

Tenn.—Southeastern Greyhound Lines v. Dunlap, 160 S.W.2d 418, 178 Tenn. 546.

Power of commission, and validity and effect of orders

(1) In view of statute prescribing its powers and jurisdiction railroad commission was held to have jurisdiction to allow substitution of bus service for streetcar service on certain street, when this was in public interest, provided street railway's obligation to furnish adequate transportation service to city was not impaired.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

(2) Commission's order was legislative, and party adversely affected was entitled to judicial determination of its validity.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

(3) Commission's power to change from streetcars to busses in contract for public transportation service cannot be questioned by private property owner who enjoys benefits of contract not as party thereto but only as member of public.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

(4) Commission may change its orders, in absence of rights vested thereunder, since such orders are not res judicata in judicial sense.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

(5) In action to review orders of commission, court would grant plaintiff city relief to which it was entitled without further delay, and terminate litigation.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

the charter powers of the company include the power to operate motorbusses, a proposed plan of conversion of the system from trolley cars to motorbusses presents a business question within the power of the directors of the company and need not be authorized or approved by the stockholders.¹³

Leave to substitute busses for cars on a line already operated is not the granting of a new right or franchise to use the streets, but it is rather a modification of the old franchise permitting a change in the method of operation;¹⁴ and a company seeking to operate busses in substitution for cars upon tracks and supplemental thereto should be continued in the beneficial enjoyment of its franchise rights without an affirmative popular vote unless some right of the public is interfered with, and unless its affirmative servitude over the streets is increased.¹⁵

§ 144. Rolling Stock and Equipment

Only such vehicles may be used upon street railroad

tracks as the special charter of the company or the general laws under which it is organized permit.

Only such vehicles may be used upon street railroad tracks as the special charter of the company or the general laws under which it is organized permit;¹⁶ but, in the absence of any requirement that the company use only cars which it owns, the company may contract for the use of the cars of another company which are of the type which the first company is authorized to use.¹⁷ So it may operate cars which are the property of a company which it has leased.¹⁸ A car-control device attached to a car becomes a part of the rolling stock.¹⁹ Under a statute creating a rapid transit commission, the term "equipment" has been given a much broader significance than it usually receives.²⁰ A car-control device attached to a car is within the term "equipment" used in a contract providing for the payment thereof.²¹

The term "carriage" does not embrace a street car.²²

VIII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATIONS

§ 145. Sales

A street railroad company is without power, in the absence of express legislative authority, to alienate its general franchise to be a corporation, but there is authority holding that the secondary franchise, or right to construct, operate, and maintain a street railroad, is transferrable, and that rails and other property may be transferred under some circumstances.

A corporation created for the purpose of operating a street railroad is without power, in the absence of express legislative authority, to alienate its general franchise to be a corporation.²³ The secondary franchise, or right to construct, operate, and maintain a street railroad, is property,²⁴ and

13. Md.—*Warren v. Fitzgerald*, 56 A. 2d 827, 189 Md. 476.

Contract between stockholders controlling

The power of a street railway company under its corporate charter to purchase and operate motorbusses depended on the construction of a contract between stockholders, and not on a grant by the sovereign which must be strictly construed.—*Warren v. Fitzgerald*, *supra*.

Questions not reviewable by court

Whether trolley cars were obsolete, and whether conversion of portion of street railway transportation system from trolley cars to busses was wise were business questions not reviewable by the court, where action of directors in authorizing such conversion was not fraudulent, illegal, or ultra vires.—*Warren v. Fitzgerald*, *supra*.

Plan held not ultra vires

Md.—*Warren v. Fitzgerald*, *supra*.

14. N.Y.—*In re International Ry. Co.*, 275 N.Y.S. 5, 242 App.Div. 300.

Modification or amendment of charter generally see *supra* § 17.

15. N.Y.—*In re International Ry. Co.*, 275 N.Y.S. 5, 242 App.Div. 300.

Charter requiring popular approval of franchise

(1) Contract between corporation and city to discontinue existing streetcar line and substitute motorbus service was held valid without submission to voters, even though city charter required franchise to be approved by voters.—*Carolina Power & Light Co. v. Iseley*, 167 S.E. 56, 203 N.C. 811.

(2) Right to run motorbusses as franchise required to be submitted to popular vote generally see *Motor Vehicles* § 102.

16. N.J.—*State v. Atlantic City, etc., R. Co.*, 69 A. 468, 76 N.J.Law 15, reversed on other grounds 72 A. 111, 77 N.J.Law 465.

Regulation as to equipment of cars see *infra* § 167.

17. N.J.—*State v. Atlantic City, etc., R. Co.*, *supra*.

18. Pa.—*City of Pittsburg v. Pittsburg & C. St. Ry. Co.*, 79 A. 235, 230 Pa. 189.

19. N.Y.—*Rapid Transit Subway Const. Co. v. Craig*, 191 N.Y.S. 383, 199 App.Div. 45, affirmed 135 N.E. 911, 233 N.Y. 544.

20. N.Y.—*McDonald v. Grout*, 78 N.Y.S. 758, 39 Misc. 18, 20, reversed on other grounds 80 N.Y.S. 536, 80 App.Div. 210, affirmed 67 N.E. 1085, 175 N.Y. 470.

20 C.J. p 1802 note 59 [a].

21. N.Y.—*Rapid Transit Subway Const. Co. v. Craig*, 191 N.Y.S. 383, 199 App.Div. 45, affirmed 135 N.E. 911, 233 N.Y. 544.

22. Wis.—*Cream City R. Co. v. Chicago, M. & St. P. R. Co.*, 23 N.W. 425, 63 Wis. 93, 99, 53 Am.R. 267. 9 C.J. p 1295 note 89.

23. Mass.—*Richardson v. Sibley*, 11 Allen 65, 37 Am.D. 700.

Alienation of corporate franchise in general see *Corporations* § 1102 f.

24. Wis.—*State v. Anderson*, 63 N.W. 746, 90 Wis. 550. 60 C.J. p 308 note 50.

it has been held to be transferrable like any other property;²⁵ but there is also authority for the view that it cannot be transferred or alienated, either absolutely or conditionally,²⁶ except where authorized by statute,²⁷ and in such mode or manner as is thereby prescribed,²⁸ although no one but the public, it has been held, can question the validity of a sale made without such authority.²⁹

Where it is so provided by statute, a street railroad company is without power to sell or alienate its property without legislative permission;³⁰ but, in the absence of such statutory restriction, the rails of a street railroad may be sold as personal property,³¹ which they remain even though embedded in the streets of a city,³² although where there is no right to cease operation of its street railroad or abandon its tracks, a company cannot sell its rails for the purposes of removal.³³ It has been held that the right of an electric railway to occupy the street with poles, wires, etc., cannot be transferred independently of the operation of the railway for the purpose of electric lighting,³⁴ but, on the other hand, an order of a public service commission approving the sale by a street railway company of its power plant, substations, and distributing lines to a company engaged in furnishing light, heat, and

power, under an agreement that the purchaser would sell power to the railway company for the operation of its system, has been approved as not an abuse of discretion,³⁵ although such approval does not cure any invalidities if the vendor in making the sale has failed to comply with statutory requirements.³⁶

Property and rights included. What property and rights pass under a sale or conveyance of street railroad property or franchises depends primarily on the terms of the conveyance.³⁷ A covenant of warranty will not be implied from a mere recital.³⁸

§ 146. — Operation and Effect

On a sale by a street railroad company of its property and franchise rights to another, the vendor ceases to be liable for the performance of its public duties, and the purchasing company assumes all the charter obligations and duties of its vendor with respect to such property, and is bound by all the statutory and charter limitations or restrictions of the original grant.

Where a street railroad company validly sells its property and franchise rights to another, the vendor company ceases to be liable for the performance of its public duties,³⁹ while the purchasing company, by its purchase, assumes all the charter obligations and public duties of its vendor with respect to such property,⁴⁰ and is bound by all the

25. U.S.—Knoxville v. Africa, Tenn., 77 F. 501, 23 C.C.A. 252.

Neb.—State v. Citizens' St. R. Co., 114 N.W. 429, 80 Neb. 357.

Transfer and incumbency of franchises generally see Franchises § 25.

Street railroad's franchise to use streets is generally assignable unless its transfer is forbidden by constitution or statute.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.

26. Mass.—Clemens Electrical Mfg. Co. v. Walton, 52 N.E. 132, 53 N.E. 820, 173 Mass. 286.
60 C.J. p 308 note 53.

Property of quasi-public corporations as subject to execution see Executions § 35.

27. Ga.—Georgia Power Co. v. Rome, 157 S.E. 283, 172 Ga. 14.
60 C.J. p 308 note 54.

28. Mass.—Whiting v. Malden, etc., R. Co., 88 N.E. 907, 202 Mass. 298, 132 Am.S.R. 498.
60 C.J. p 309 note 55.

29. Cal.—Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365, 13 Am.R. 181.

30. Mass.—In re Opinion of the Justices, 159 N.E. 70, 261 Mass. 556.
60 C.J. p 309 note 58.

31. Mass.—French v. Jones, 78 N.E. 118, 191 Mass. 522, 7 L.R.A., N.S., 525—Lorain Steel Co. v. Norfolk, etc., St. R. Co., 73 N.E. 646, 187 Mass. 500.

32. Mass.—French v. Jones, 78 N.E. 118, 191 Mass. 522, 7 L.R.A., N.S., 525—Lorain Steel Co. v. Norfolk, etc., St. R. Co., 73 N.E. 646, 187 Mass. 500.

33. Mass.—Clemens Electric Mfg. Co. v. Walton, 52 N.E. 132, 53 N.E. 820, 173 Mass. 286.
Duty to operate and right to cease operation see *infra* §§ 177-184.

34. Mo.—Carthage v. Carthage Light Co., 70 S.W. 936, 97 Mo.App. 20.

35. Pa.—Boland v. Public Service Commission, 101 Pa.Super. 102.

Function of court on appeal from order

Court, on appeal from Public Service Commission's order approving contract for sale of power plant, does not act as second administrative tribunal, and inquiry is whether there was reasonable exercise of discretion by commission.—Boland v. Public Service Commission, *supra*.

Inapplicability of statutes relating to gas and light companies

Statute relating to sales of property of gas companies and corporations manufacturing and supplying light, heat, and fuel is inapplicable to traction company not engaged in such business except incidentally.—Boland v. Public Service Commission, *supra*.

36. Pa.—Boland v. Public Service Commission, *supra*.

37. Cal.—O'Sullivan v. Griffith, 95 P. 873, 96 P. 323, 153 Cal. 502.
60 C.J. p 309 note 62.

38. Cal.—O'Sullivan v. Griffith, *supra*.
60 C.J. p 309 note 63.

39. Mich.—Grosse Pointe Tp. v. Detroit, etc., R. Co., 90 N.W. 42, 130 Mich. 363.
Liability of vendor for injuries from operation see *infra* § 188.

40. Kan.—Potwin Place v. Topeka R. Co., 33 P. 309, 51 Kan. 609, 37 Am. S.R. 312.
60 C.J. p 309 note 65.

Charter restrictions and conditions as to repairing and paving street as obligatory on purchaser see *supra* § 128.

statutory and charter limitations or restrictions of the original grant⁴¹ even though it does not expressly assume them,⁴² unless and until such purchaser itself sells or transfers property to another, at which time its obligations cease.⁴³ The purchasing company is not, however, liable for debts, contracts, or personal obligations of the vendor,⁴⁴ except where made so by statute,⁴⁵ and except where it has expressly assumed liability,⁴⁶ provided they were not liens at the time of the transfer⁴⁷ and did not attach to the fee of land conveyed.⁴⁸

A company purchasing the property and franchises of another company becomes entitled to all rights, included in the grant of such franchises, to extend or expand the lines purchased.⁴⁹ Where a statute confers on the purchaser of street railroad property the rights and privileges of the vendor, a right to take property by condemnation, possessed by a company, passes to, and may be exercised by, a purchaser of its railroad;⁵⁰ but under such a statute a contract exemption from liability for the cost of paving between its rails enjoyed by the vendor does not pass to the purchasing company.⁵¹ A contract for the sale of street railroad property which recites an intention on the part of the purchaser to build a specified extension imposes no obligation so to do.⁵²

§ 147. Leases

- a. In general
- b. Mode of exercise of power to lease
- c. Who may question validity of lease

a. In General

Although a street railway company may be authorized to lease the lines of another, generally a company cannot, without statutory authority, relieve itself of its charter obligations and duties by leasing its line to another company.

Although a street railway company may be authorized to lease the lines of another,⁵³ a company cannot, without statutory authority, relieve itself of its charter obligations and duties by leasing its lines to another company,⁵⁴ and so, in the absence of such authority, a lease by a company of all its franchises and property, thereby disabling itself to serve the public, is ultra vires and void.⁵⁵ Authority to make a lease is not to be implied from a general grant to a street railroad company of all powers necessary to the exercise of those expressly conferred.⁵⁶

Where municipal assent is required by a constitutional provision, a municipal ordinance authorizing the lease is a sufficient assent.⁵⁷ In the absence of any evidence it will be presumed that the requisite municipal assent was given.⁵⁸

41. N.Y.—Kent v. Binghamton, 81 N.Y.S. 198, 40 Misc. 1, affirmed 84 N.Y.S. 1131, 88 App.Div. 617, reversed on other grounds 86 N.Y.S. 411, 90 App.Div. 553.
60 C.J. p 309 note 66.

42. N.J.—Asbury Park, etc., R. Co. v. Neptune Tp., 67 A. 790, 73 N.J.Eq. 323, modified on other grounds 74 A. 998, 75 N.J.Eq. 562.

43. Cal.—Reynolds v. Pacific Electric R. Co., 80 P. 77, 146 Cal. 261.

44. Wis.—Chicago, etc., R. Co. v. Fox River Electric R., etc., Co., 96 N.W. 541, 119 Wis. 181.
60 C.J. p 309 note 69.

45. Mass.—Whiting v. Malden, etc., R. Co., 88 N.E. 907, 202 Mass. 298, 132 Am.S.R. 493.
60 C.J. p 310 note 70.

46. Tex.—Beaumont Traction Co. v. Texarkana, etc., R. Co., 123 S.W. 124, 103 Tex. 49, answers conformed to, Civ.App., 124 S.W. 987.
60 C.J. p 310 note 71.

47. Ind.—Ft. Wayne, etc., Traction Co. v. Kindlesparker, 92 N.E. 228, 46 Ind.App. 299.
60 C.J. p 310 note 72.

Double relief in single action

Where a street railroad company has transferred its property under the authority given by statute, and before such transfer had become liable for certain personal injuries, the injured person need not first obtain judgment against the street railroad company for the injuries before subjecting the property, but the double relief may be had in one action.—Ft. Wayne & W. V. Traction Co. v. Kindlesparker, 92 N.E. 228, 46 Ind.App. 299.

48. Wis.—Chicago, etc., R. Co. v. Fox River Electric R., etc., Co., 96 N.W. 541, 119 Wis. 181.
60 C.J. p 310 note 73.

49. Mich.—City of Detroit v. Detroit United Ry., 139 N.W. 56, 173 Mich. 314, reversed on other grounds 37 S.Ct. 87, 242 U.S. 238, 61 L.Ed. 268.

50. N.J.—Brinkerhoff v. Newark, etc., Traction Co., 49 A. 812, 66 N.J.Law 478.

51. U.S.—Rochester R. Co. v. Rochester, N.Y., 27 S.Ct. 469, 205 U.S. 236, 51 L.Ed. 784.

52. Ind.—Morey v. Terre Haute

Traction, etc., Co., 93 N.E. 710, 47 Ind.App. 16.

53. Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.
60 C.J. p 310 note 81.

54. Ohio.—Quigley v. Toledo R., etc., Co., 105 N.E. 185, 89 Ohio St. 68, L.R.A.1918E 249, Ann.Cas.1916D 992.

Tex.—Ft. Worth St. R. Co. v. Allen, Civ.App., 39 S.W. 125.

Duty to operate and right to cease operation in general see infra §§ 177-184.

Lease distinguished from contract for passage over lines of cars of another company see infra § 152.

55. Mass.—Middlesex R. Co. v. Boston, etc., R. Co., 115 Mass. 347.
60 C.J. p 310 note 80.

56. U.S.—Dickinson v. Consolidated Traction Co., C.C.N.J., 114 F. 232, affirmed 119 F. 871, 56 C.C.A. 401.

57. Mo.—Moorshead v. United R. Co., 96 S.W. 261, 119 Mo.App. 541, affirmed 100 S.W. 611, 203 Mo. 121.
60 C.J. p 311 note 83.

58. Mo.—Chlanda v. St. Louis Transit Co., 112 S.W. 249, 213 Mo. 244.

Rights of dissenting stockholders. Power given to a street railroad corporation by its charter, or by the general act under which it is incorporated, to lease its property and franchises, enters into the agreement between its stockholders,⁵⁹ and so the making of a lease cannot be deemed to deprive a dissenting stockholder of his property without due process of law.⁶⁰ A lease at a guaranteed rental is not a fraud on minority stockholders where such rental does not appear to be inadequate;⁶¹ and the execution of a lease at a rental of a specified percentage of the valuation of the property is not a fraud on dissenting stockholders merely because it limits the annual dividends, no matter how great the earnings and profits of the system may become.⁶²

Rejection by receiver. Where a street railroad company has leased part of the line of another company and is bound to operate its trains over extensions and joint tracks, its receiver is not free to reject the lease which is indissolubly united with the extension certificate and joint-trackage agreement.⁶³

b. Mode of Exercise of Power to Lease

Where no particular mode is prescribed therefor, the power of a street railway company to lease may be exercised in the same manner as other general powers of the company, but the contract must be approved by the public service commission where such approval is required by statute.

Where no particular mode is prescribed for the exercise of a power given to a street railroad com-

pany to lease its property or franchises, such power may be exercised in the same manner as other general powers of the company, by the vote of a majority of the stockholders, or by the board of directors,⁶⁴ and unanimous consent of the stockholders is no more necessary to the validity of a lease than to that of any other corporate act.⁶⁵ The directors of a street railroad company, in making a lease of its franchises and property, will be presumed, in the absence of any evidence to the contrary, to have acted in good faith.⁶⁶ Where approval of the contract by the Public Service Commission is required by statute, administrative proceedings to obtain such approval must be had.⁶⁷

c. Who May Question Validity of Lease

A street railroad company is amenable to the state for exceeding its lawful authority in entering into a lease; stockholders of the company may sue to restrain the making of an unauthorized lease.

Whether a street railroad company has exceeded its lawful authority by entering into a lease of its property or franchises is a question of excessive exercise of corporate power, for which it is amenable to the state;⁶⁸ and stockholders of the company have a right to invoke the aid of a court of equity to restrain the making of an unauthorized lease.⁶⁹ A private suitor, however, has no right to question the validity of a lease unless he has sustained a private injury,⁷⁰ nor has another corporation any standing so to do unless its rights or franchises have been invaded.⁷¹

59. U.S.—*Dickinson v. Consolidated Traction Co.*, C.C.N.J., 114 F. 232, affirmed 119 F. 871, 56 C.C.A. 401.

60. U.S.—*Dickinson v. Consolidated Traction Co.*, supra.

61. N.Y.—*Wormser v. Metropolitan St. R. Co.*, 76 N.Y.S. 1038, 73 App. Div. 626.

62. N.Y.—*Wormser v. Metropolitan St. R. Co.*, supra.

63. U.S.—*Murray v. Roberts*, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and *Murray v. City of New York*, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.

Interdependence of franchises

Where franchises of street railroad leasing elevated were interdependent, fact that Public Service Commission approved mortgage containing provisions for sales in parcels did not destroy interdependence of franchises so as to warrant receiver's surrender of lease.—*Murray v. Roberts*, supra.

Sale and destruction of division of lessor street railroad of which leased track was not a part did not affect the rights or obligations of lessee, or render moot controversy whether receiver of lessee was entitled to reject the lease.—*Murray v. Roberts*, supra.

64. U.S.—*Dickinson v. Consolidated Traction Co.*, C.C.N.J., 114 F. 232, affirmed 119 F. 871, 56 C.C.A. 401. Pa.—*O'Neill v. Hestonville*, etc., Pass. R. Co., 9 Pa. Dist. 2.

Powers of officers, directors, and stockholders of street railroad companies in general see supra §§ 12, 13.

65. Pa.—*O'Neill v. Hestonville*, supra.

66. N.Y.—*Wormser v. Metropolitan St. R. Co.*, 76 N.Y.S. 1038, 73 App. Div. 626.

67. Evidence

(1) In proceeding to obtain approval of lease of municipal subway to public service company, commission's exclusion of private report made to

city controller was proper.—*Wilson v. Public Service Commission of Pennsylvania*, 157 A. 497, 103 Pa. Super. 558.

(2) Where commission did not pass on application for approval of lease of municipal subway until after termination of suit between applicant and city, its exclusion of record in such suit was immaterial.—*Wilson v. Public Service Commission of Pennsylvania*, supra.

68. Pa.—*Minersville v. Schuylkill Electric R. Co.*, 54 A. 1053, 205 Pa. 402.

Right to question validity of corporate transactions in general see Corporations § 981.

69. Pa.—*Smith v. Reading City Pass. R. Co.*, 2 Pa. Dist. 490, 13 Pa. Co. 49.

70. Pa.—*Minersville v. Schuylkill Electric R. Co.*, 54 A. 1053, 205 Pa. 402.

71. Pa.—*Minersville v. Schuylkill Electric R. Co.*, supra.

Validity of assignment of lease. In the absence of any provision in a lease prohibiting its assignment by the lessee company, the lessor is not entitled to question the validity of such an assignment.⁷²

§ 148. — Duration and Termination

A lease of a street railroad for as long a period as the lessee shall continue to exist and be capable of exercising its functions refers to legal capacity and not financial ability.

A lease of a street railroad for as long a period as the lessee shall continue to exist and be capable of exercising its functions refers to legal capacity, and not financial ability to perform the lease;⁷³ and the appointment of a receiver for the lessee does not terminate such a lease.⁷⁴

§ 149. — Rights and Liabilities of Parties

Street railroad companies accepting the provisions of statutes permitting them to lease their lines are bound to assume the duties and obligations imposed by the statutes. Generally the lessee in operating the leased road is governed by the charter of the lessor, assumes all duties and liabilities imposed by the lessor's charter and franchise, and succeeds to all the rights and privileges of the lessor under its charter or contracts.

Street railroad companies accepting the provisions of statutes permitting them to enter into contracts for leasing lines to other companies, as authorized thereby, are bound to assume the duties and obligations imposed by the statutes as a consideration for the privilege.⁷⁵ It is a general rule that, when one company leases its road to another, the lessee, in operating it, is governed by the charter of the lessor, and assumes all duties and liabilities thereby imposed,⁷⁶ as well as the duties and liabilities of the lessor under its franchises to use the public streets,⁷⁷ although the lease is silent with respect thereto,⁷⁸ and although there is no statutory provision for such liability.⁷⁹ Conversely, the lessee succeeds to all the rights and privileges of the lessor under its charter⁸⁰ and under any contract between the lessor and the municipality made in pursuance of the charter,⁸¹ including rights to occupy streets and to lay tracks,⁸² even though at the time of the lease the lessor's corporate existence has ceased by the limitations of its charter.⁸³ This can be true, however, only where the lessee company, in operating the road in accordance with the charter of the lessor, is not violating its own charter.⁸⁴ The lessee cannot have or acquire by virtue of the lease any greater rights than the lessor had.⁸⁵ Both parties are bound by the terms of their agreement.⁸⁶

72. Mass.—City of Boston v. Treasurer and Receiver General, 130 N. E. 390, 237 Mass. 403, affirmed 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274.

73. N.Y.—New York Elevated R. Co. v. Manhattan R. Co., 63 How.Pr. 14. Rights and liabilities of parties at termination of lease see *infra* § 149.

74. N.Y.—New York Elevated R. Co. v. Manhattan R. Co., *supra*.

75. N.Y.—O'Reilly v. Brooklyn Heights R. Co., 72 N.E. 517, 179 N. Y. 450.

Liability of lessor or lessee for:
Injuries from operation see *infra* § 187.

License fees and taxes see *infra* § 175.

Paving and repair of streets see *supra* § 128.

76. Conn.—State v. New York, etc., R. Co., 71 A. 942, 81 Conn. 645. 60 C.J. p 312 note 5.

Charter restrictions and conditions as to repairing and paving street as ordinarily obligatory on lessee see *supra* § 128.

77. Pa.—Collingdale v. Philadelphia Rapid Transit Co., 117 A. 909, 274 Pa. 124.

60 C.J. p 312 note 6.

78. N.Y.—New York v. Twenty-Third St. R. Co., 21 N.E. 60, 113 N.Y. 311.

79. N.Y.—New York v. Twenty-Third St. R. Co., *supra*.

80. Pa.—Rafferty v. Central Traction Co., 23 A. 884, 147 Pa. 579, 30 Am.S.R. 763.

60 C.J. p 312 note 9.

81. Pa.—Conshohocken v. Conshohocken R. Co., 55 A. 855, 206 Pa. 75—Wilkes-Barre v. Coalville Pass. R. Co., 8 Kulp 298.

82. Pa.—Rafferty v. Central Traction Co., 23 A. 884, 147 Pa. 579, 30 Am.S.R. 763.

60 C.J. p 312 note 11.

83. N.J.—Jersey City v. North Jersey St. R. Co., 63 A. 906, 73 N.J. Law 175, affirmed 67 A. 113, 74 N.J. Law 774.

84. Ill.—Chicago Union Traction Co. v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.

60 C.J. p 312 note 13.

85. N.Y.—Port Richmond, etc., Electric R. Co. v. Staten Island Rapid Transit R. Co., 39 N.E. 392, 144 N.Y. 445.

60 C.J. p 312 note 14.

86. Mass.—Eastern Massachusetts St. Ry. Co. v. Boston Elevated Ry.

Co., 39 N.E.2d 647, 310 Mass. 659, 140 A.L.R. 506.

Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, Com.Pl., 44 Dauph.Co. 415, affirmed 194 A. 661, 327 Pa. 497.

60 C.J. p 312 note 15.

Negotiations merged in agreement

Negotiations prior to execution of agreement for lease of street railway company's railway system to traction company must be considered merged in such agreement in so far as they are contrary to terms of agreement.—Monongahela St. Ry. Co. v. Philadelphia Co., 39 A.2d 909, 350 Pa. 603.

Rent obligations

(1) Mere instruction by president of lessor street railroad, who was also president of lessee, to accounting officer of both companies, to treat agreed annual rental per share as dividends on stock of lessor corporation all of which was owned by the lessee, did not operate as verbal agreement to cancel rent obligation, with respect to lessee's liability as garnishee.—Lyon v. Pittsburgh Allegheny & Manchester Traction Co., 169 A. 229, 312 Pa. 584.

(2) A contract, pursuant to which street railway company acquired possession of, and right to, operate

Sublessees and assignees of leases. Where the lessee of a street railroad demises the property to another for a term which expires before the expiration of the original lease, the instrument is properly construed as a sublease rather than an assignment of the lease;⁸⁷ but a demise of leased lines and property for a term longer than that of the original lease operates as an assignment of such lease.⁸⁸ An assignee is liable on covenants of the original lease with respect to the property thereby demised,⁸⁹ while a sublessee is not liable on covenants contained in the original lease, in the absence of any express assumption thereof.⁹⁰ It has been stated that, where a street railroad company has under its lease power to charge an extra fare for particular service, a sublessee or assignee of such lease has the same right.⁹¹ In an action of forcible entry and detainer by the assignee of a lease, the invalidity of the lease on the ground of noncompliance with a statute relating to approval

of the assignment is no defense, since title is not involved in the proceeding, but only the right of possession, and a tenant is estopped to deny his landlord's title.⁹²

On expiration or other termination of the lease the rights of the parties depend primarily on the terms of their agreement,⁹³ especially as to such matters as the surrender or delivery up to the lessor of property and equipment in the hands of the lessee.⁹⁴ Where, however, a lease is terminated not under, and in accordance with, its terms but on the mere arbitrary demand of the lessor company, and the entire property is surrendered, the lessor is not entitled to rely on provisions of the lease with respect to the rights and liabilities of the parties on its termination.⁹⁵ A company holding over after expiration of the lease pursuant to a "gentleman's agreement" is not a trespasser⁹⁶ and is liable only for a fair rental for the use of the property thus held.⁹⁷

street railway properties of traction company, was held not to make railway company liable for principal amount of bonded loan previously made to traction company.—Second Ave. Traction Co., for Use of Putnam, v. United Traction Co. of Pittsburgh, 195 A. 25, 328 Pa. 257.

Taxes and assessments

(1) In general.—Pennsylvania Steel Co. v. New York City R. Co., C.C.N.Y., 191 F. 216—60 C.J. p 312 note 15 [c].

(2) A traction company's covenant in lease to it of street railway company's railway system to pay all taxes imposed on lessor because of its business earnings or profits included obligation to pay lessor's federal and state income taxes, even though non-existent when covenant was made.—Monongahela St. Ry. Co. v. Philadelphia Co., 39 A.2d 909, 350 Pa. 603.

(3) On the other hand, under lease requiring lessee to pay or furnish to lessor the money necessary to pay all taxes of every description, federal, state, and municipal, levied on demised property, income therefrom, business thereof, rights and franchises thereto pertaining, and on certain portions of capital stock of lessor, and also any taxes by law required to be deducted from any amounts payable as dividends or otherwise to owners of such stock, lessee was required to pay federal taxes, whether assessed on lessor or on lessee; but lessee was not liable for federal income tax on rent received by lessor.—Eastern Massachusetts St. Ry. Co. v.

Boston Elevated Ry. Co., 39 N.E.2d 647, 310 Mass. 659, 140 A.L.R. 506.

Enforcement of guaranty

A street railway company, by bringing suit for specific performance of corporate defendant's guaranty of performance of covenant by corporate lessee of plaintiff's railway system to pay all taxes on plaintiff's property, earnings, or profits, revoked provision in lease agreement for arbitration of differences between parties as to construction of agreement and due performance of covenants therein, and did not disentitle itself to sue in equity for enforcement of guaranty.—Monongahela St. Ry. Co. v. Philadelphia Co., 39 A.2d 909, 350 Pa. 603.

Obligation to account to particular officer of lessor

Provision of lease of municipal subway to public service company approved by commission, that company shall furnish to another city official reports, cannot take away any statutory obligation of company to account to city controller.—Wilson v. Public Service Commission of Pennsylvania, 157 A. 497, 103 Pa.Super. 558.

Injunction for breach of lease

Pa.—Reading & Southwestern St. Ry. Co. v. Reading St. Ry. Co., 66 A.2d 260, 361 Pa. 647.

87. U.S.—Pennsylvania Steel Co. v. New York City R. Co., D.C.N.Y., 194 F. 543, modified on other grounds 198 F. 721, 117 C.C.A. 503.

88. U.S.—Pennsylvania Steel Co. v. New York City R. Co., N.Y., 216 F. 453, 132 C.C.A. 518, certiorari denied

Benner v. New York City R. Co., 35 S.Ct. 794, 238 U.S. 632, 59 L.Ed. 1498.

89. Pa.—Lyon v. Pittsburgh, Allegheny & Manchester Traction Co., 169 A. 229, 312 Pa. 584.
60 C.J. p 314 note 18.

90. U.S.—Pennsylvania Steel Co. v. New York City R. Co., D.C.N.Y., 194 F. 543, modified on other grounds 198 F. 721, 117 C.C.A. 503.

91. N.Y.—Eaton v. Nassau Electric R. Co., 124 N.Y.S. 555, 68 Misc. 385, affirmed 131 N.Y.S. 1113, 147 App.Div. 901.

92. Ill.—Okun v. Rotstein, 248 Ill. App. 171.

93. U.S.—Pennsylvania Steel Co. v. New York City R. Co., N.Y., 204 F. 513, 122 C.C.A. 633.
60 C.J. p 315 note 21.

94. U.S.—Pennsylvania Steel Co. v. New York City R. Co., D.C.N.Y., 219 F. 939.
60 C.J. p 315 note 22.

95. Mo.—Barrie v. United R. Co. of St. Louis, 119 S.W. 1020, 138 Mo. App. 557.

96. Pa.—Wilson v. Public Service Commission of Pennsylvania, 157 A. 497, 103 Pa.Super. 558.

97. Pa.—Wilson v. Public Service Commission of Pennsylvania, supra.

Evidence held to support conclusion of public service commission as to what constitutes fair rental.—Wilson v. Public Service Commission of Pennsylvania, supra.

§ 150. Contracts Not to Construct or Operate Road

An agreement by a street railroad company not to exercise a right to construct or operate its road is void except where the public will not be harmed, or will be benefited, thereby.

A street railroad company is without power to disable itself to perform its public duties by agreeing not to exercise a right under its charter or franchise to construct or operate its road into or through particular streets or territory, and such an agreement is void,⁹⁸ except where the public will not be harmed, or will be benefited, thereby.⁹⁹ An agreement between two street railroad companies to establish a joint station and terminus impliedly prohibits the extension by either company of its road beyond such station;¹ and an agreement not to cross each other's tracks has been held to be, in effect, an agreement that neither company will enter or invade the territory occupied by the other.²

§ 151. Contracts for Unified Management and Operation

A street railroad company may join with another company in setting up a board to manage and operate the properties and systems of both for the purpose of unification.

A street railroad company has power, subject to the consent of the municipality in which it operates,³ to join with another company or other companies in setting up a board to manage and operate the properties and systems of both or all such companies, for the purpose of unification.⁴

Such an arrangement or agreement does not constitute an assignment or transfer of the powers, duties, or franchises of the companies participating therein,⁵ and does not work a nonuser of their franchises, so as to render them liable to forfeiture,⁶ but is in effect merely the employment of managers, agents, and servants to attend to details of operation.⁷ Contracts made by an interurban electric railroad company with another corporation, which was virtually the sole stockholder of the railroad, for payment of management, engineering, and contracting fees, are not void, but are subject to careful scrutiny to see that they do not divert the assets of the railroad without consideration.⁸

§ 152. Contracts for Joint or Interchangeable Use of Tracks

Except where otherwise provided by statute or charter, a street railroad company has power to contract with another company for the joint or interchangeable use of its tracks and lines, and such power carries with it the right to fix by agreement the remuneration to be paid for such use.

Inasmuch as a street railway company, except where otherwise provided by statute or its charter,⁹ has power to contract with another company for the joint or interchangeable use of its tracks and lines,¹⁰ particularly where such power has been declared or confirmed by statute,¹¹ a company may, by virtue of an agreement with another company, acquire the right to enter upon and use the tracks of the latter.¹² The power to make such a contract carries with it the right to fix by agreement the remuneration to be paid by one company to the

98. Ind.—Evansville, etc., R. Co. v. Evansville, etc., Electric R., 98 N.E. 649, 50 Ind.App. 502.

60 C.J. p 316 note 25.

Contracts between street railway companies not to construct or operate road as creating monopoly see Monopolies § 68.

Duty of street railroad company to: Construct or complete road see supra § 103.

Operate generally see infra § 177.

99. N.Y.—Brooklyn El. R. Co. v. Brooklyn, etc., R. Co., 48 N.Y.S. 665, 23 App.Div. 29.

60 C.J. p 316 note 26.

1. N.Y.—Prospect Park, etc., R. Co. v. Brooklyn, etc., R. Co., 32 N.Y.S. 857, 84 Hun 516.

2. Ill.—South Chicago City R. Co. v. Calumet Electric St. R. Co., 49 N.E. 576, 171 Ill. 391.

3. Ill.—People v. Chicago, 110 N.E. 366, 270 Ill. 188.

60 C.J. p 316 note 29.

Necessity of municipal consent to operation of cars of one company over tracks of another see supra § 129.

4. Ill.—People v. Chicago, 110 N.E. 366, 270 Ill. 188.

5. Ill.—People v. Chicago, supra.

60 C.J. p 316 note 31.

Transfer or sale of franchises and rights see supra §§ 145, 146.

6. Ill.—People v. Chicago, supra. Forfeiture of franchises for nonuser see supra § 192.

7. Ill.—People v. Chicago, supra.

8. U.S.—United Light & Power Co. v. Grand Rapids Trust Co., C.C.A. Mich., 85 F.2d 331, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co.,

57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari dismissed 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

9. N.Y.—Berkey v. Third Ave. R. Co., 155 N.E. 514, 244 N.Y. 602, 50 A.L.R. 599.

60 C.J. p 316 note 35.

10. Kan.—Kansas Electric Utilities Co. v. Kansas City, K. V. & W. R. Co., 195 P. 889, 108 Kan. 285.

60 C.J. p 316 note 36.

Rights of street railroad company in, and use of, tracks of another company in general see supra §§ 129-131.

11. N.Y.—Ingersoll v. Nassau Electric R. Co., 52 N.E. 545, 157 N.Y. 453, 43 L.R.A. 236.

60 C.J. p 316 note 38.

12. Pa.—Hannum v. Media, etc., Electric R. Co., 70 A. 847, 221 Pa. 454.

60 C.J. p 297 note 6.

other for such use,¹³ and the compensation should be determined by a consideration of the contract.¹⁴

Nature of contract. A contract between two street railroad companies conferring on one the right to operate its cars over the tracks of the other, jointly with the latter company, which retains control over its road for all other purposes, is of the nature of a license,¹⁵ and is not a lease;¹⁶ nor is it an assignment to one company of the franchise or of franchise rights of the other.¹⁷ It has been held that such a contract confers on the company which is thereby given the right to operate over the tracks of the other no right or interest which can be assigned or leased;¹⁸ but the rights of the company over whose tracks the other company is given a right of operation pass to, and may be exercised by, its successor or an assignee of its property.¹⁹

Construction and operation. The general rules relating to the construction and operation of contracts are applicable to contracts between two street railroad companies for the joint use of tracks or lines.²⁰

Duration and termination. It is competent for the parties to an agreement for the joint use of street railroad tracks to agree on any period for the duration of their contract,²¹ and they may, if they choose to do so, provide that it shall cease on the passage of a statute, even though it is unconstitutional.²² Where the rights of a company to maintain and operate a street railroad expire, the right

of another company to operate over its tracks, under an agreement for such operation, necessarily expires also.²³

Rights, liabilities, and remedies of parties. Street railroad companies, by making contracts for the joint use of tracks or lines, acquire no new or greater powers and privileges than those created by their respective charters,²⁴ and each of such companies, while using the road of another company, must in all things conform to the provisions of the charter of the latter.²⁵ Either party to the contract is entitled to an injunction to restrain a violation thereof,²⁶ but, in the absence of any provision to the contrary in the contract, the mere failure of a company to pay the agreed compensation for the use of the tracks of another company does not in itself entitle the latter to interfere with or prevent such use.²⁷ While exercising and enjoying the rights conveyed by the contract, neither party can plead that the contract is ultra vires or illegal.²⁸

§ 153. Consolidation of Roads

In the absence of statutory permission, street railroad companies are without power to consolidate or merge, and an attempted consolidation or merger is void.

Street railroad companies are without power to consolidate, combine, amalgamate, or be merged one into another, and an attempted consolidation or merger is void,²⁹ except where authorized by statute,³⁰ which, where it exists, is the measure of

13. La.—Canal, etc., R. Co. v. St. Charles St. R. Co., 11 So. 702, 44 La. Ann. 1069—Canal, etc., R. Co. v. Orleans R. Co., 10 So. 389, 44 La. Ann. 54.

14. Ky.—Louisville City R. Co. v. Central Pass. R. Co., 8 S.W. 329, 87 Ky. 223, 10 Ky.L. 125.

15. N.Y.—Coney Island, etc., R. Co. v. Brooklyn Cable Co., 6 N.Y.S. 108, 53 Hun 169.

16. N.Y.—Chapman v. Syracuse Rapid-Transit R. Co., 56 N.Y.S. 250, 25 Misc. 626.
60 C.J. p 317 note 41.

17. Kan.—Kansas Electric Utilities Co. v. Kansas City, K. V. & W. R. Co., 195 P. 889, 108 Kan. 285.

18. N.Y.—Coney Island & B. R. Co. v. Brooklyn Cable Co., 6 N.Y.S. 108, 53 Hun 159.
60 C.J. p 317 note 43.

19. Kan.—Kansas Electric Utilities Co. v. Kansas City, K. V. & W. R. Co., 195 P. 889, 108 Kan. 285.

20. N.Y.—Interborough Rapid Transit Co. v. New York Rapid Transit Corp., 18 N.E.2d 833, 270 N.Y. 504, reargument denied 21 N.E.2d 196, 280 N.Y. 687.
60 C.J. p 317 note 46.

21. La.—Canal, etc., R. Co. v. St. Charles St. R. Co., 11 So. 702, 44 La. Ann. 1069.

N.Y.—Buffalo East Side R. Co. v. Buffalo St. R. Co., 19 N.E. 63, 111 N.Y. 132, 2 L.R.A. 384.

22. N.Y.—Buffalo East Side R. Co. v. Buffalo St. R. Co., supra.

23. Ohio.—Isom v. Low Fare R., 29 Ohio Cir.Ct. 583, 10 Ohio Cir.Ct., N.S., 89.

24. Ill.—Chicago v. Evans, 24 Ill. 52.

25. Ill.—Chicago v. Evans, supra.

26. N.Y.—Brooklyn El. R. Co. v. Brooklyn, B. & W. El. R. Co., 48 N.Y.S. 665, 23 App.Div. 29.
60 C.J. p 317 note 49.

27. N.Y.—Chapman v. Syracuse Rapid Transit R. Co., 56 N.Y.S. 250, 25 Misc. 626.

28. La.—Canal, etc., R. Co. v. St. Charles St. R. Co., 11 So. 702, 44 La. Ann. 1069.

N.Y.—Berkey v. Third Ave. R. Co., 155 N.E. 514, 244 N.Y. 602, 50 A.L.R. 599.

29. D.C.—Capitol Traction Co. v. Offutt, 17 App.D.C. 292, 53 L.R.A. 390.
60 C.J. p 318 note 56.
Consolidation of corporations generally see Corporations §§ 1603-1637.
Consolidation of street railroads as creating monopoly see Monopolies § 168.

30. Cal.—Market St. R. Co. v. Hellman, 42 P. 225, 109 Cal. 571.
60 C.J. p 318 note 57.

the character and extent of the consolidation which may be effected.³¹ Unless otherwise expressly provided by the statute authorizing consolidation, it is not necessary that a company entering into a consolidation shall have actually constructed or be operating a street railroad;³² and even where such a requirement exists it has been held that the failure of one of the consolidating companies to have a road constructed or in operation does not prevent the consolidated company from being a de facto corporation.³³ A prohibition against the consolidation of parallel or competing railroads has been held not to apply to street railroad companies;³⁴ and under a constitutional provision making void all contracts or agreements defeating or lessening competition, a consolidation of street railroad companies is not void because there is a small amount of competition at particular points, where the systems as a whole do not compete.³⁵

How effected. The sale by a street railroad company of its property and franchises to another company, and the exercise of such franchises by the latter do not, of themselves and without some further provision, operate to effect a consolidation of the two companies;³⁶ but, where the coming together of two companies under authority of law is in fact a consolidation, it is of no consequence by what name the act is characterized³⁷ or by what steps the result has been effected.³⁸ Proceedings for the consolidation of street railroad companies are governed by statutes relating specifically to such

companies rather than to those relating to corporations generally.³⁹

Operation and effect. As a general rule, a street railroad company formed by the consolidation of two or more such companies assumes, by operation of law, all the burdens, liabilities, and obligations of the constituent companies,⁴⁰ although the latter may also remain liable therefor,⁴¹ and succeeds to all their rights, franchises, and privileges,⁴² subject to all conditions originally attached thereto and restrictions imposed thereon,⁴³ regardless of whether such consolidated company is a corporation de jure or only de facto.⁴⁴ The consolidated company cannot, however, be made liable on obligations of a constituent company, in substitution for and to the exclusion of the latter, without the consent of the creditors;⁴⁵ but, where the consolidated company assumes the liabilities of its constituent companies, a creditor may at his election have recourse to the new company, and recover against it.⁴⁶ Existing liens are not affected by consolidation,⁴⁷ except that, it has been held, where tax liens existed before consolidation against the properties of each of the consolidating companies, such liens attach to the whole property after consolidation and may be enforced against it without dismembering or separating it into the several portions as they existed before consolidation.⁴⁸ It has been pointed out that a consolidation, in its legal consequences, differs radically from a sale.⁴⁹

Consolidation held authorized

Ky.—Donohue v. Heuser, 239 S.W. 2d 238.

60 C.J. p 318 note 57.

31. D.C.—Capitol Traction Co. v. Offutt, 17 App.D.C. 292, 53 L.R.A. 390.

60 C.J. p 318 note 58.

32. Ind.—Norton v. Union Traction Co. of Indiana, 110 N.E. 113, 183 Ind. 666, Ann.Cas.1918A 156.

60 C.J. p 318 note 59.

33. Ind.—Cleveland, etc., R. Co. v. Feight, 84 N.E. 15, 41 Ind.App. 416.

34. Pa.—Appeal of Montgomery, 20 A. 399, 136 Pa. 96, 9 L.R.A. 369.

60 C.J. p 318 note 61.

35. Ga.—Trust Co. of Georgia v. State, 35 S.E. 323, 109 Ga. 736, 48 L.R.A. 520.

36. D.C.—Capitol Traction Co. v. Offutt, 17 App.D.C. 292, 53 L.R.A. 390.

37. D.C.—Capitol Traction Co. v. Offutt, supra.

38. D.C.—Capitol Traction Co. v. Offutt, supra.

39. Pa.—In re Merger of Electric Rs., 18 Pa.Dist. 33, 35 Pa.Co. 92.

Notice of consolidation held sufficient Cal.—Market St. R. Co. v. Hellman, 42 P. 225, 109 Cal. 571.

40. D.C.—Capital Transit Co. v. Hazen, 93 F.2d 250, 68 App.D.C. 91.

60 C.J. p 319 note 73. Conditions as to repairing and paving street as ordinarily binding on company formed by consolidation or merger see supra § 128.

41. Utah.—Thomas v. Ogden Rapid Transit Co., 155 P. 436, 47 Utah 595.

42. Pa.—Valley R. v. Harrisburg, 124 A. 644, 280 Pa. 385.

60 C.J. p 319 note 75.

43. N.J.—Consolidated Traction Co. v. Elizabeth, 34 A. 146, 58 N.J.Law 619, 32 L.R.A. 170—Wilbur v. Trenton Pass. R. Co., 31 A. 238, 57 N. J.Law 212.

44. Ind.—Cleveland, etc., R. Co. v. Feight, 84 N.E. 15, 41 Ind.App. 416.

N.J.—In re Trenton St. R. Co., Ch., 47 A. 819, reversed on other grounds 49 A. 481, 63 N.J.Eq. 276.

45. Cal.—Market St. R. Co. v. Hellman, 42 P. 225, 109 Cal. 571.

60 C.J. p 320 note 78.

46. Cal.—Market St. R. Co. v. Hellman, supra.

Utah.—Thomas v. Ogden Rapid Transit Co., 155 P. 436, 47 Utah 595.

47. Neb.—Lincoln St. R. Co. v. Lincoln, 84 N.W. 802, 61 Neb. 109.

60 C.J. p 320 note 80.

48. Neb.—Lincoln St. R. Co. v. Lincoln, supra.

49. Ind.—Norton v. Union Traction Co. of Indiana, 110 N.E. 113, 183 Ind. 666, Ann.Cas.1918A 156. Sale of property and franchises see supra §§ 145, 146.

Rights and remedies of stockholders. Minority stockholders of a company may set aside a consolidation agreement because of fraud,⁵⁰ and may invoke the aid of a court of equity to enforce equality of exchange for their shares in the consolidating company,⁵¹ but they are without right to restrain a proposed consolidation where it is not inequitable on its face.⁵² Objecting stockholders who purchase their stock after enactment of a statute authorizing consolidation thereby consent to the provisions of the statute, and the exercise of the right of consolidation does not ipso facto impair the ob-

ligation of the contract of the corporation with the stockholders.⁵³ Assignees of stock are barred from objecting to a consolidation by a prior consent thereto on the part of their assignors.⁵⁴

Questioning validity of consolidation. The legality and validity of a consolidation of two or more street railroad companies cannot be collaterally attacked, but may be questioned only in an action brought for that purpose.⁵⁵ A consolidated company cannot defend against a claim due from one of the constituent companies on the ground that the consolidation was not authorized by law.⁵⁶

IX. BONDS, LIENS, MORTGAGES, AND RECEIVERS

§ 154. Bonds

The power of a street railroad company to make and issue bonds, and their form, requisites, and validity, are governed by the rules applicable to other railroad companies and to corporations generally.

The power of a street railroad company to make and issue bonds, and their form, requisites, and validity, are governed by the rules applicable to other railroad companies and to corporations generally,⁵⁷ and, subject thereto, by the terms of the mortgage securing them.⁵⁸ Before a legal issue of street railroad bonds may be made, all charter, statutory, and constitutional requirements with respect thereto must be complied with, and a want of such compliance ordinarily renders the bonds void,⁵⁹ although the company may be estopped by its conduct to deny their validity,⁶⁰ and, where the company has acted within the scope of its general powers, bonds

are not void for all purposes merely because the authorized amount is exceeded.⁶¹ In the hands of a bona fide purchaser for value without notice, negotiable bonds, although unlawfully issued, have been held to be a valid claim against the property of the company for the amount actually received by it therefor.⁶² In the absence of any evidence to the contrary, it will be presumed that authority to issue bonds has been properly exercised,⁶³ and in an action on a bond its illegality cannot be shown unless it has been pleaded in the answer.⁶⁴

A bond, although completely executed in due form, has no validity before delivery.⁶⁵ Where bonds are issued by one company to provide funds for another, and as the agent of the latter, it is liable to holders of such bonds as the principal debtor.⁶⁶ A bond is nonnegotiable where it provides

50. Ind.—Norton v. Union Traction Co. of Indiana, *supra*.

51. U.S.—Simon Borg & Co. v. New Orleans City R. Co., D.C.La., 244 F. 617.

52. U.S.—Simon Borg & Co. v. New Orleans City R. Co., *supra*.

53. Ky.—Donohue v. Heuser, 239 S. W.2d 238.

54. Ind.—Norton v. Union Traction Co. of Indiana, 110 N.E. 113, 183 Ind. 666, Ann.Cas.1918A 156.

55. Mich.—Shadford v. Detroit, etc., R. Co., 89 N.W. 960, 130 Mich. 300. N.Y.—Adee v. Nassau Electric R. Co., 72 N.Y.S. 992, 65 App.Div. 529, affirmed 65 N.E. 1113, 173 N.Y. 280.

56. Mich.—Green v. Michigan United R. Co., 123 N.W. 607, 159 Mich. 58—Shadford v. Detroit, etc., R. Co., 89 N.W. 960, 130 Mich. 300.

57. Pa.—York Rys. Co. v. Pennsyl-

vania Public Utility Commission, 198 A. 920, 131 Pa.Super. 126. 60 C.J. p 320 note 83.

Rejection of part of issue held arbitrary

Rejection by the Public Utility Commission of certificate extending bond issue except as to a part thereof, in order to create satisfactory relationship between bond issue and security, was so arbitrary and unreasonable as to amount to error of law requiring reversal of order, where order would throw company into bankruptcy and disrupt service with considerable loss to bondholders, and especially where company had never defaulted on bonds.—York Rys. Co. v. Pennsylvania Public Utility Commission, *supra*.

58. N.Y.—New York R. Co. v. Guaranty Trust Co., 148 N.Y.S. 476, 163 App.Div. 396, affirmed 118 N.E. 1070, 223 N.Y. 619.

60 C.J. p 320 note 84.

59. Cal.—Boyd v. Heron, 58 P. 64, 125 Cal. 453. 60 C.J. p 320 note 85.

60. Ill.—Wells v. Northern Trust Co., 63 N.E. 136, 195 Ill. 288. 60 C.J. p 321 note 86.

61. U.S.—Gibson v. Kansas City Refining Co., C.C.A.Mo., 32 F.2d 658.

62. U.S.—Vanderveer v. Asbury Park, etc., St. R. Co., C.C.N.J., 82 F. 355.

63. Mass.—Stevens v. Berkshire St. R. Co., 142 N.E. 59, 247 Mass. 399.

64. Mass.—Stevens v. Berkshire St. R. Co., *supra*.

65. N.Y.—Zimmerman v. Timmerman, 86 N.E. 540, 193 N.Y. 486.

66. N.Y.—Fidelity Trust Co. v. International R. Co., 193 N.Y.S. 726, 118 Misc. 227.

60 C.J. p 321 note 91.

that a majority of the bondholders may waive defaults and extend the time for payment and inhibits suit on the bond and on the mortgage when due.⁶⁷ The rights and powers of a mortgage trustee to cancel and retire bonds depends on the scope of the mortgage agreement.⁶⁸

Rights of bondholders. The general rules as to the rights of a purchaser or holder of bonds apply to purchasers or holders of bonds of a street railroad company.⁶⁹ As between bona fide purchasers for value all bonds of the same issue are equal in priority, the lien of each dating from the recording of the mortgage by which it is secured and not from the time of its issuance.⁷⁰ A bondholder is entitled to recover property or funds pledged for the security of the bonds and improperly diverted therefrom,⁷¹ or to compel the mortgagor company to account for a depreciation in value of the mortgaged property caused by failure to conserve, or improper diversion of, the business and income;⁷² and, where junior mortgagees receive the benefit of an improper diversion of property, they may be compelled to account therefor to bondholders under a prior mortgage.⁷³

Action cannot be maintained by a holder of bonds of one company to impress a lien on the earnings of another company which has promised to pay them, but the holder remains merely a general creditor of the latter company.⁷⁴ A waiver of a default on the part of the company by a majority of the holders of its bonds does not preclude a non-assenting bondholder from enforcing his bond, in the absence of agreement to the contrary.⁷⁵ Ordinarily, no scheme of reorganization can be entered into by the trustee named in a mortgage securing bonds, which will prejudicially affect the rights of bondholders, without their assent,⁷⁶ but such assent may be shown as well by acquiescing in the consummation of the scheme as by a positive adoption of it.⁷⁷ A bond, by referring to the mortgage securing it for the consequences of default of payment, when due, makes the pertinent provisions of the mortgage a part of the bond,⁷⁸ and charges the purchaser thereof with notice of such consequences.⁷⁹

General rules as to the rights of holders of corporate bonds convertible into stock, discussed in Corporations § 1167, apply in respect of such con-

67. Neb.—Greenwald v. Omaha & Council Bluffs St. Ry. Co., 280 N. W. 884, 135 Neb. 183.

68. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 97 S.W. 2d 825, 265 Ky. 820.

On sale of railway property

General mortgage bonds of railway company secured by stock of interurban company owned by railway company, which were held by interurban company and were transferred to railway company on liquidation of interurban company in payment of dividend due railway company, could be canceled and retired by general mortgage trustee, where general mortgage provided for cancellation of bonds on sale of any railway company property secured by mortgage.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., *supra*.

69. Neb.—Greenwald v. Omaha & Council Bluffs St. Ry. Co., 280 N. W. 884, 135 Neb. 183.

An inhibition in bonds preventing suit thereon and on mortgage securing them, when due, unless directed by holders of twenty-five per cent of the outstanding bonds, was reasonable and valid.—Greenwald v. Omaha & Council Bluffs St. Ry. Co., *supra*.

Acquisition by lessee

The acquisition of bonds of a street railway company on their maturity by a lessee of the property was not

a payment, but a purchase and extension, leaving the property as the primary fund for their payment.—Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co., N.Y., 193 F. 963, 113 C.C.A. 591, certiorari denied Central Park, N. & E. R. R. Co. v. Farmers' Loan & Trust Co., 32 S.Ct. 841, 225 U.S. 712, 56 L.Ed. 1268.

The term "negotiable in form," as applied to a participation receipt issued by the agent of a corporation to holders of its bonds, would not imply that the receipts would be negotiable in the sense of the law merchant so as to pass to an innocent holder for value. It would imply that such receipt would be transferable by the holder to a third person, who would acquire the rights of the original holder, no more and no less.—Cella v. Brown, Mo., 144 F. 742, 757, 75 C.C.A. 608, certiorari denied 26 S.Ct. 766, 202 U.S. 620, 50 L.Ed. 1174.

Nonassenting bondholder

Where holder of bonds of street railroad which was dissolved in connection with a plan of unification and adjustment under which city assumed control and agreed to issue its corporate stock in exchange for each bond deposited within a stipulated exchange period did not assent to plan and deposit bonds, but litigated the issue unsuccessfully in court, he was not entitled thereafter to have his bonds accepted under the plan

nunc pro tunc.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 51 F. Supp. 105.

70. Neb.—Lincoln v. Lincoln St. R. Co., 93 N.W. 766, 67 Neb. 469.

71. U.S.—Bowling Green Trust Co. v. Virginia Pass., etc., Co., D.C.Va., 276 F. 965, affirmed, C.C.A., Virginia R., etc., Co. v. Davis, 284 F. 479, certiorari denied 43 S.Ct. 247, 260 U.S. 746, 67 L.Ed. 473.

72. U.S.—Davis v. Virginia R., etc., Co., Va., 229 F. 633, 144 C.C.A. 43, certiorari denied 36 S.Ct. 723, 241 U.S. 672, 60 L.Ed. 1231.

73. U.S.—Davis v. Virginia R., etc., Co., *supra*.
60 C.J. p 321 note 96.

74. N.Y.—Fidelity Trust Co. v. International R. Co., 193 N.Y.S. 726, 118 Misc. 227.

75. Mass.—Mayo v. Fitchburg, etc., R. Co., 168 N.E. 405, 269 Mass. 118.

76. N.Y.—Butterfield v. Cowing, 20 N.E. 869, 112 N.Y. 486.

77. N.Y.—Butterfield v. Cowing, *supra*.

78. Neb.—Greenwald v. Omaha & Council Bluffs St. Ry. Co., 280 N.W. 884, 135 Neb. 183.

79. Neb.—Greenwald v. Omaha & Council Bluffs St. Ry. Co., *supra*.

vertible bonds of a street railroad company.⁸⁰ As such an agreement for conversion, although appearing on the face of the bonds, is in fact an independent agreement and no part of the bonds proper,⁸¹ the validity of the bonds is not impaired by conversion agreements written into them.⁸² Conversion agreements which authorize the holders to exchange the bonds for preferred stock which is to be equally and ratably secured with bonds are invalid where not authorized by statute when made,⁸³ and the bondholders who exchange their bonds for preferred stock cease to be creditors and become mere stockholders,⁸⁴ and are not entitled to share in the assets of the company until all creditors have been paid in full.⁸⁵

§ 155. Liens

In the absence of a statute providing otherwise, the property of a street railroad company is ordinarily not subject to a mechanic's lien except such property as is not essential to the performance of its public duties.

The property of a street railroad company is ordinarily not subject to a mechanic's lien, in the absence of statute otherwise providing,⁸⁶ except such property as is not essential to the performance of the public duties of the company.⁸⁷ Whether a statute providing for such a lien on "railroads" or the property of railroad companies makes the property of street railroad companies subject thereto is a question on which the authorities are not in agree-

ment, it having been held in some cases that such a statute applies to street railroads⁸⁸ and in others that it does not.⁸⁹ Such a lien, where it exists under the statute, may be claimed and enforced by such persons⁹⁰ and for such supplies⁹¹ only as are thereby specified.

The rights and liabilities under a lien may be controlled by the contract under which the particular lien is created,⁹² and a street railroad may create two classes of security holders, giving a first lien on property to one and on income to the other.⁹³ The parties to a franchise contract can be held to have contemplated only such liens as are created by the valid exercise of the contract.⁹⁴ Where the franchise contract does not so provide, the annual payments to the grantor of a stipulated percentage of the grantee's earnings cannot be construed as liens against the property of the grantee,⁹⁵ but, where by the terms of the franchise the parties undertake to provide for a lien in favor of the grantor against the property of the railroad company for all sums due for the making of street improvements or repairs, such claims constitute a lien against the property of the railroad.⁹⁶ A statute authorizing a company to build a work which is for the joint benefit of itself and another company, and to charge the latter with a portion of the cost thereof, gives the former company no lien on the property of the latter, in the absence of express provision therefor.⁹⁷

80. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.

81. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

82. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

83. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

Mistake of law

Conversion agreements which were void would not be upheld because of fact that parties concerned believed agreements to be valid, since that was a mistake of law.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

84. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

85. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., *supra*.

86. Pa.—Christ v. Schuylkill Electric R. Co., 9 Pa. Dist. 268, 23 Pa. Co. 353.

40 C.J. p 60 note 76.

87. Mass.—Prindiville v. Boston & W. St. Ry., 115 N.E. 299, 226 Mass. 148.

Evidence held sufficient to sustain finding of auditor that car house was not essential to operation of street railway.—Prindiville v. Boston & W. St. Ry., *supra*.

88. Mo.—Koken Iron Works v. Robertson Ave. R. Co., 44 S.W. 269, 141 Mo. 228.
60 C.J. p 322 note 4.

89. Mont.—Daly Bank, etc., Co. v. Great Falls St. R. Co., 80 P. 252, 32 Mont. 298.
60 C.J. p 322 note 5.

90. U.S.—Frick Co. v. Norfolk, etc., R. Co., Va., 86 F. 725, 32 C.C.A. 31.
60 C.J. p 322 note 6.

91. U.S.—Frick Co. v. Norfolk, etc., R. Co., *supra*.
60 C.J. p 322 note 7.

92. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A. Ill., 56 F.2d 942, certiorari denied

Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

Termination

Certificate holders' lien on net income terminated with contracts giving them existence.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A. Ill., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

93. U.S.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A. Ill., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

94. Ohio.—Transit Improvement Co. v. Springfield R. Co., 30 Ohio N.P., N.S., 499.

95. Ohio.—Transit Improvement Co. v. Springfield R. Co., *supra*.

96. Ohio.—Transit Improvement Co. v. Springfield R. Co., *supra*.

97. Conn.—Flint v. Danbury, etc., St. R. Co., 125 A. 194, 101 Conn. 13, 40 A.L.R. 1.

§ 156. Mortgages

- a. In general
- b. Rights and liabilities of parties

a. In General

A street railroad company is without power to mortgage its franchise, road, or property, and such a mortgage is void, except where authority so to do is conferred by statute or the charter of the company.

A street railroad company is without power to mortgage its franchise, road, or property, and such a mortgage is void,⁹⁸ except where authority so to do is conferred by statute or the charter of the company,⁹⁹ and then only for such purposes¹ and amount² as are thereby permitted. Where such power is granted by statute, it cannot be abridged by a municipality;³ but, where the consent of the municipality is required by law, it must first be obtained.⁴ The execution of a mortgage is not a violation of a constitutional provision prohibiting any alienation of a franchise which releases the holder thereof from its duties and liabilities thereunder,⁵ nor does it violate a provision of the franchise that no other company shall ever use the right thereby granted.⁶ A supplemental indenture providing for the issuance of additional bonds under an existing mortgage is not a new mortgage, and so not subject to statutes relating to mortgages of street railroads.⁷

A covenant by a street railroad company, in debentures or bonds issued by it, that, if it shall thereafter mortgage any of its property, such debentures shall participate in the security of the mortgage on equal terms with all other indebtedness secured thereby constitutes an enforceable agreement by the company not to mortgage its property save in the manner so provided.⁸

Property conveyed. The property conveyed by a mortgage executed by a street railroad company depends primarily on the terms of the instrument, as construed in accordance with the rules applicable to other railroad mortgages and mortgages generally.⁹ Fixtures and other property affixed to mortgaged realty of a street railroad company after the execution of the mortgage become subject to its lien as and when attached to the land.¹⁰ Where a mortgage of a street railroad company's property contains covenants of general warranty, a title acquired by the mortgagor company after the execution of the mortgage inures to the benefit of the mortgagee.¹¹

Subject to the general rules with respect to the right to mortgage property to be acquired in the future, as discussed in Mortgages § 73, property acquired by a street railroad company after the execution of a mortgage becomes subject thereto when an intention to include such property appears therein;¹² and it has been held that, even in the absence of express provision, extensions constructed after the execution of a mortgage become subject thereto where the road cannot be operated without them.¹³ A mortgage on after-acquired property extends to and embraces not only property acquired

98. Mass.—Richardson v. Sibley, 11 Allen 65, 87 Am.D. 700.
60 C.J. p 322 note 9.

99. Mo.—Kavanaugh v. St. Louis, 119 S.W. 552, 220 Mo. 496.
60 C.J. p 322 note 10.

1. Neb.—Lincoln v. Lincoln St. R. Co., 93 N.W. 766, 67 Neb. 469.
60 C.J. p 322 note 11.

2. Neb.—Lincoln v. Lincoln St. R. Co., supra.
60 C.J. p 322 note 12.

3. Ill.—Wells v. Northern Trust Co., 63 N.E. 136, 195 Ill. 288.

4. Mo.—Kavanaugh v. St. Louis, 119 S.W. 552, 220 Mo. 496.
60 C.J. p 322 note 14.

5. U.S.—Central Trust Co. v. Warren, Mont., 121 F. 323, 58 C.C.A. 289, certiorari denied 24 S.Ct. 841, 191 U.S. 568, 48 L.Ed. 305.
Ky.—Russell v. Frankfort, etc., R. Co., 116 S.W. 289, 131 Ky. 862.

6. Ill.—Wells v. Northern Trust Co., 63 N.E. 136, 195 Ill. 288.

7. Mass.—Federal Trust Co. v. Bristol County St. R. Co., 109 N.E. 880, 222 Mass. 35.

8. Conn.—Connecticut Co. v. New York, etc., R. Co., 107 A. 646, 94 Conn. 13.
60 C.J. p 323 note 18.

9. Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.
60 C.J. p 323 note 19.

Real estate

Rails, trolley wire, and other equipment of street railroad constitute real estate and are included in mortgage.—Dalton St. Ry. Co. v. City of Scranton, supra.

10. Mass.—Federal Trust Co. v. Bristol County St. R. Co., 109 N.E. 880, 222 Mass. 35.

11. Mass.—Federal Trust Co. v. Bristol County St. R. Co., supra.

12. Ky.—Fidelity & Columbia Trust

Co. v. Louisville Ry. Co., 97 S.W.2d 825, 265 Ky. 820.
60 C.J. p 324 note 25.

General mortgage and first and second bonds

Interurban company whose stock was largely owned by railway company could, on liquidation, transfer its assets to railway company subject to first lien by trustee under general mortgage given by railway company which was secured by capital stock of interurban company, notwithstanding provisions in first and second bond indentures executed prior to railway company's acquisition of stock of interurban company that lien of first and second bonds should extend to railway company's after-acquired property, since after-acquired property mentioned in first and second bonds did not, under ejusdem generis rule, include such stock.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., supra.

13. U.S.—Front St. Cable R. Co. v. Drake, C.C.Wash., 84 F. 257.

by the mortgagor company within its capacity and powers existing at the time the mortgage is made, but also extensions made or additions acquired under authority granted after the execution of the mortgage;¹⁴ and it includes property acquired by the mortgagor company by merger into itself of another company or other companies, as well as property acquired merely by purchase.¹⁵

Where the property of a street railroad company which has executed a mortgage covering after-acquired property is sold, property thereafter acquired by the purchaser, where not within the doctrine of accession, is not subject to the mortgage,¹⁶ and so the mortgage does not embrace an extension afterward built by the purchaser under another and different charter;¹⁷ but, where the property is sold as a whole system, an extension, which the mortgagor company had authority under its charter to build, and which is afterward constructed by the purchaser as its successor in right, comes within the after-acquired property clause of the mortgage.¹⁸ Where a street railroad company which has executed a mortgage conveying after-acquired property subsequently consolidates with another or other companies, property acquired by the consolidated company for the particular use or benefit of the line formerly belonging to the mortgagor is subject to the lien of the mortgage,¹⁹ as is property substituted

for that originally covered by the mortgage;²⁰ but property owned by, or acquired in the right of, one of the other consolidating companies is not brought within, or made subject to, the mortgage by the consolidation,²¹ and property, not within the doctrine of accession, thereafter acquired by the consolidated company for its own use or benefit, or for the use or benefit of the consolidated system as a whole, is not within the mortgage,²² except where its acquisition was actually within the contemplation of the parties to the mortgage at the time of its execution and an intention to include it appears.²³

b. Rights and Liabilities of Parties

The rights and liabilities of the parties to a mortgage of street railroad property are governed by the rules applicable to other mortgages.

The rights and liabilities of the parties to a mortgage of street railroad property are governed by the rules applicable to other mortgages and particularly to mortgages of railroad property.²⁴ Two or more mortgages executed by a street railroad company must, in determining the rights of the parties, be considered together in the light of the surrounding circumstances.²⁵ The rights of a mortgage trustee are limited by the terms of the mortgage indenture.²⁶ The rights of a mortgagee

14. N.Y.—Ithaca Trust Co. v. Ithaca Traction Corp., 162 N.E. 93, 248 N.Y. 322.

40 C.J. p 325 note 27.

15. N.Y.—Ithaca Trust Co. v. Ithaca Traction Corp., *supra*.

16. N.Y.—Ithaca Trust Co. v. Ithaca Traction Corp., *supra*.
40 C.J. p 325 note 29.

17. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., D.C.Tenn., 281 F. 856.

18. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., *supra*.
40 C.J. p 325 note 31.

19. N.Y.—Guaranty Trust Co. v. New York, etc., R. Co., 170 N.E. 887, 253 N.Y. 190, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

20. Ohio.—Citizens' Savings, etc., Co. v. Cincinnati, etc., Traction Co., 140 N.E. 380, 106 Ohio St. 577.

21. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., D.C.Tenn., 281 F. 856.

Ohio.—Citizens' Savings, etc., Co. v. Dayton Traction Co., 16 Ohio App.

161, modified on other grounds 140 N.E. 380, 106 Ohio St. 577.

22. N.Y.—Guaranty Trust Co. v. New York, etc., R. Co., 170 N.E. 887, 253 N.Y. 190, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

23. Ohio.—Citizens' Savings, etc., Co. v. Cincinnati, etc., Traction Co., 140 N.E. 380, 106 Ohio St. 577.

24. Ind.—Cambria Iron Co. v. Union Trust Co., 55 N.E. 745, 56 N.E. 665, 154 Ind. 291, 48 A.L.R. 41.

Property held as received

Mortgagees held the property as they received it from the mortgagor.—Cambria Iron Co. v. Union Trust Co., *supra*.

Right to income

(1) As against certificate holders, mortgagee was held entitled to street railway's income earned after maturity of mortgage and appointment of receiver.—Harris Trust & Savings Bank v. Chicago Rys. Co., C.C.A.Ill., 56 F.2d 942, certiorari denied Babcock v. Chicago Rys. Co., 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

(2) Under a provision of a mort-

gage giving the mortgagor company, until default, the right to the income from the mortgaged property, interest on indebtedness owing to the company belongs to it.—Barber Asphalt Paving Co. v. Forty-Second St., etc., R. Co., N.Y., 180 F. 648, 103 C.C.A. 614—60 C.J. p 326 note 53.

25. Ky.—Commonwealth Life Ins. Co. v. Louisville R. Co., 29 S.W.2d 352, 234 Ky. 802.

26. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 97 S.W. 2d 825, 265 Ky. 820.

Keeping bonds alive

Declaratory judgment authorizing payment to trustee under first mortgage indenture of income from property delivered to general mortgage trustee as security for payment of general mortgage bonds, to be used in calling first mortgage bonds which would be turned over to general mortgage trustee without cancellation as sinking fund for general mortgage bonds, was held error, where first mortgage indenture did not provide that called bonds could be kept alive.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., *supra*.

under a mortgage on a franchise and other property have been held to be subject to surrender of prior franchises and acceptances thereof.²⁷

In general, a street railroad company which has mortgaged its property is nevertheless free to deal with such property according to its own views of its own interests, subject to the terms of the mortgage, and provided it does not materially impair the value of the security.²⁸ The mortgagee is entitled to relief against any impairment of the security;²⁹ but unless otherwise expressly provided by the mortgage the mortgagee obtains no right to require the mortgagor company or any subsequent owner of the mortgaged property to improve it³⁰ or to manage it in any particular way.³¹ It has been held that, where part of the lines of a street railroad company are sold by it to the municipality, after the expiration of the company's franchise to operate such lines and a refusal to renew it, a court of equity is justified in apportioning a mortgage indebtedness on the whole system between the lines so sold and those retained by the company.³²

Time for payment; postponement. A provision in the franchise of a street railroad company for the payment to it of a specified sum, if earned, and for the cumulation of deficits in such payments, does not by implication make interest on mortgage indebtedness of the company payable only if the income of the company under the franchise is sufficient to pay it, or authorize the deferment of interest payments if the amount thereof is not earned.³³ A covenant to pay on a specified date does not impliedly preclude the parties from agreeing on a postponement of the maturity of the mortgage indebtedness,³⁴ and such a postponement, had by agreement, is not a default on the part of the company.³⁵

Release of property from lien of mortgage. Under a provision in a street railroad company's mortgage that the trustee shall release realty from the lien thereof on the substitution of property of equal value therefor, the trustee may be compelled to release property when the terms of such provision are complied with; and the property to be substituted for realty released under such a provision need not be realty.³⁶

Personal liability for debt; exhaustion of security. The effect of a provision in a street railroad company's mortgage that the mortgagor shall be liable in personam for the mortgage debt, and that any deficiency after exhausting the security may be enforced against the company, is to require a resort first to the security, and to limit the personal liability of the company to any deficiency remaining after the security has been exhausted.³⁷ It has been held that, unless the trustee under a street railroad company's mortgage securing its bonds is expressly authorized by the provisions thereof to enforce the obligation of a successor company which has assumed the mortgage, the right of action for such enforcement is vested in the bondholders alone.³⁸

§ 157. Priorities

Matters relating to priorities of mortgages of, or liens on, street railroad companies are governed by the general rules applicable to other mortgages and liens.

Matters relating to priorities of mortgages of, or liens on, street railroad companies are governed by the general rules applicable to other mortgages and liens and particularly to mortgages of, and liens on, railroad property.³⁹ Under some statutes

27. N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

28. U.S.—New England Engineering Co. v. Oakwood St. R. Co., C.C. Ohio, 71 F. 52.

N.J.—Fidelity Trust Co. v. Hoboken, etc., R. Co., 63 A. 273, 71 N. J.Eq. 14.

29. N.J.—Fidelity Trust Co. v. Hoboken, etc., R. Co., supra. 60 C.J. p 326 note 50.

30. N.J.—Fidelity Trust Co. v. Hoboken, etc., R. Co., supra.

31. N.J.—Fidelity Trust Co. v. Hoboken, etc., R. Co., supra. 60 C.J. p 326 note 52.

32. Mich.—Detroit v. Detroit United R., 197 N.W. 697, 226 Mich. 354. 60 C.J. p 326 note 54.

33. Mo.—Kansas City v. Missouri Public Service Commission, 210 S. W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190.

34. Ky.—Commonwealth Life Ins. Co. v. Louisville R. Co., 29 S.W.2d 352, 234 Ky. 802.

35. Ky.—Commonwealth Life Ins. Co. v. Louisville R. Co., supra. 60 C.J. p 327 note 57.

36. N.Y.—Brooklyn City R. Co. v. Kings County Trust Co., 212 N.Y.S. 343, 214 App.Div. 506.

37. U.S.—Pennsylvania Steel Co. v. New York City R. Co., C.C.N.Y., 189 F. 661, modified on other grounds 198 F. 721, 117 C.C.A. 503, and affirmed 264 F. 513, 122 C.C.A. 633.

38. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., D.C.Tenn., 281 F. 856.

39. Vt.—Westinghouse Electric Mfg. Co. v. Montpelier Traction, etc., Co., 126 A. 594, 98 Vt. 130.

Public maintenance

Liens arising out of the paramount requirement of public maintenance form a first lien entitled to priority

an attaching creditor is not entitled to priority over a prior unrecorded mortgage,⁴⁰ and, in the absence of a statute providing otherwise, the rights of laborers and materialmen are not entitled to priority over mortgages and other encumbrances on street railroad property.⁴¹ A statute authorizing the levy of an attachment on the property of a street railroad company for personal injuries as though such property had not been mortgaged gives such an attachment priority over a mortgage theretofore executed.⁴²

Taxes and assessments. A mortgage executed by a street railroad company on its property to secure the payment of bonds issued for the purpose of constructing and equipping the mortgagor's lines of railroad has been held to be a lien on the property of the street railroad company described therein as against all special assessments for paving the streets,⁴³ except such as are assessed for

paving already done, or as were in contemplation at the time the mortgage was recorded.⁴⁴ One who at the request of a street railroad company pays taxes on its mortgaged property does not have a lien on the property superior to the mortgage, although the company agrees that he shall have.⁴⁵

§ 158. Foreclosure of Lien or Mortgage

The general rules relating to the foreclosure of other mortgages and particularly the foreclosure of railroad mortgages are applicable to mortgages of street railroads.

The general rules relating to the foreclosure of other mortgages and particularly to mortgages of railroad property are applicable to mortgages of street railroads, as to the right to foreclose,⁴⁶ jurisdiction of a suit to foreclose,⁴⁷ intervention,⁴⁸ pleading,⁴⁹ defenses,⁵⁰ and the form, contents, and effect of the decree.⁵¹ These same general rules

over subsequently acquired rights of parties claiming under the grantee of a franchise contract.—*Transit Improvement Co. v. Springfield R. Co.*, 30 Ohio N.P., N.S., 499.

40. Conn.—*Washington Trust Co. v. Norwich & Westerly Traction Co.*, 92 A. 880, 89 Conn. 59.

41. Colo.—*Central Savings Bank v. Newton*, 147 P. 690, 59 Colo. 150.

42. Vt.—*Westinghouse Electric Mfg. Co. v. Montpelier Traction, etc., Co.*, 126 A. 594, 98 Vt. 130.
60 C.J. p 326 note 41.

43. Neb.—*Lincoln v. Lincoln St. R. Co.*, 93 N.W. 766, 67 Neb. 469.

44. Ind.—*Cambria Iron Co. v. Union Trust Co.*, 55 N.E. 745, 56 N.E. 665, 154 Ind. 291, 48 L.R.A. 41.
Neb.—*Lincoln v. Lincoln St. R. Co.*, 93 N.W. 766, 67 Neb. 469.

45. Conn.—*Mersick v. Hartford, etc., Horse R. Co.*, 55 A. 664, 76 Conn. 11, 100 Am.S.R. 977.

46. U.S.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co.*, C. C.A.N.Y., 99 F.2d 789, certiorari denied *Manhattan R. Co. v. Merlesmith*, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.
60 C.J. p 327 note 64.

Failure of subsequent lessee to perform

The right of trustee named in mortgage of elevated street railway system to foreclose and seek satisfaction from the property is not barred by failure of subsequent lessee of the property to perform its obligations under the lease and under

statute.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co.*, C.C. A.N.Y., 99 F.2d 789, certiorari denied *Manhattan R. Co. v. Merlesmith*, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.

47. Me.—*Chalmers v. Littlefield*, 69 A. 100, 103 Me. 271.
60 C.J. p 327 note 65.

48. N.Y.—*Knickerbocker Trust v. Tarrytown, W. P. & M. Ry. Co.*, 123 N.Y.S. 954, 139 App.Div. 305.
60 C.J. p 327 note 66.

Demand for leave to intervene

Owner of first mortgage bonds and owners of certificates for bonds were not entitled to intervene for purpose of securing disapproval of sale in absence of demand in court below for leave to intervene for such purpose, particularly since court was not obliged to allow it as a matter of right, even if such demand had been made.—*In re Schommer*, C.C.A.Ill., 112 F.2d 311.

Discretion of court

Permissive intervention under civil procedure rules is within discretion of district judge and can be reviewed only for abuse.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, C.C.A.N.Y., 112 F.2d 669.

Value of property

The fact that mortgage trustees and bondholders' committees had agreed to reorganization plan, tentatively approved by the court, furnished no support for the charge of conspiracy with junior bondholders, as a basis for the alleged right to intervene, in the absence of a definite showing as to the value of the prop-

erty as compared with first mortgage indebtedness, in view of wide divergence of views as to whether junior creditors would be entitled to realize anything on their claims.—*In re Schommer*, C.C.A.Ill., 112 F.2d 311.

Liens held barred by limitations

In a foreclosure suit wherein a receiver was appointed, and in which other mortgagees intervened, seeking to foreclose, interventions of laborers and materialmen to establish prior liens, on which no suit had been commenced within one year after accrual, were barred by statutes.—*Interurban Const. Co. v. Central State Bank of Kiefer*, 184 P. 905, 76 Okl. 281.

49. Complaint held sufficient

Conn.—*George Alling's Sons Co. v. Cheshire St. Ry. Co.*, 75 A. 143, 83 Conn. 82.

50. Ill.—*Wells v. Northern Trust Co.*, 63 N.E. 136, 195 Ill. 288.
60 C.J. p 327 note 67.

51. U.S.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co.*, C. C.A.N.Y., 99 F.2d 789, certiorari denied *Manhattan R. Co. v. Merlesmith*, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.
60 C.J. p 328 note 68.

Alleged injustice to security holders resulting from maintenance of five-cent fare, and other problems of management, did not affect validity of final decree.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co.*, C.C.A.N.Y., 99 F.2d 789, certiorari denied *Manhattan R. Co. v. Merlesmith*, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.

apply to the foreclosure sale,⁵² to the disposition of the proceeds,⁵³ to the property conveyed⁵⁴ or included in the sale,⁵⁵ the rights and liabilities of the purchaser,⁵⁶ and redemption.⁵⁷

§ 159. Receivers

The general rules relating to other receivers are applicable to street railroad receiverships.

The general rules relating to other railroad re-

ceivers and receivers generally are applicable to street railroad receiverships, as to the grounds for, and propriety of, appointing receivers,⁵⁸ in matters as to their selection and appointment,⁵⁹ their right to and possession of property,⁶⁰ and their powers and duties,⁶¹ including those with respect to the management and operation of the road.⁶² The same general rules also have been held applicable to their adoption or rejection of contracts and leases made before the receivership,⁶³ and also have been held

52. U.S.—Manhattan Ry. Co. v. Central Hanover Bank & Trust Co., C.C.A.N.Y., 99 F.2d 789, certiorari denied Manhattan R. Co. v. Merlesmith, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.
60 C.J. p 328 note 69.

One line

Order authorizing sale of one line alone to city for cash and back taxes was proper on showing that after two years new subway being built by city would compete with such line and decrease its value and that opportunity to sell the system as a whole was problematical, and alleged injustice to security holders resulting from maintenance of five-cent fare, and other problems of management, did not affect the validity of the order.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co., C.C.A.N.Y., 99 F.2d 789, certiorari denied Manhattan R. Co. v. Merlesmith, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.*

Upset price

The fixing of an upset price for sale under mortgage foreclosure is discretionary, and establishes nothing as a matter of law, except to give notice to prospective purchasers that lesser bids will not be entertained.—*Manhattan Ry. Co. v. Central Hanover Bank & Trust Co., C.C.A.N.Y., 99 F.2d 789, certiorari denied Manhattan R. Co. v. Merlesmith, 59 S.Ct. 582, two cases, 306 U.S. 641, 83 L.Ed. 1041.*

53. U.S.—Union Trust Co. v. Forty-Second St., etc., R. Co., C.C.N.Y., 179 F. 981.
60 C.J. p 328 note 70.

54. Ky.—Louisville, etc., R. Co. v. Central Kentucky Traction Co., 144 S.W. 739, 147 Ky. 513, Ann.Cas. 1915A 857.
60 C.J. p 329 note 71.

55. Pa.—Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.

Real estate

Rails, trolley wire, and other equipment of street railroad constitute real estate and are included in mortgage foreclosure sale.—*Dalton St. Ry. Co. v. City of Scranton, supra.*

56. Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.
60 C.J. p 329 note 72.

Purchase held valid

Purchase of franchise and property of one street railroad by another under mortgage foreclosure is valid.—*Dalton St. Ry. Co. v. City of Scranton, 191 A. 133, 326 Pa. 6.*

Nominal purchaser

Where private individual, acting for street railroad, bought all rights and franchise of former street railroad at mortgage foreclosure sale and assigned to the street railroad, all such rights passed to street railroad for whom nominal purchaser acted, irrespective of fact that nominal purchaser would have no right to operate street railroad.—*Dalton St. Ry. Co. v. City of Scranton, supra.*

Purchase of equity of redemption

Company which purchased equities of redemption in properties of street railway companies covered by mortgages, subject to encumbrances but without assuming payment of mortgages, was not liable for debts secured by such mortgages.—*Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.*

57. Ill.—Wells v. Northern Trust Co., 63 N.E. 136, 195 Ill. 288.
60 C.J. p 329 note 73.

58. U.S.—American Brake Shoe, etc., Co. v. New York R. Co., D.C.N.Y., 291 F. 112.
60 C.J. p 329 note 76.

59. U.S.—Central Trust Co. v. Third Ave. R. Co., C.C.N.Y., 159 F. 959.
60 C.J. p 330 note 77.

60. U.S.—Pennsylvania Steel Co. v. New York City R. Co., N.Y., 231 F. 442, 145 C.C.A. 436.
60 C.J. p 330 note 78.

61. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.
60 C.J. p 330 note 79.

Duty to accept new franchise

N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App. Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

62. Colo.—Pueblo Traction, etc., Co. v. Allison, 70 P. 424, 30 Colo. 337.
60 C.J. p 330 note 80.

Liability for injuries from operation see *infra* § 185.

Operation under expired franchise

Receivers, having continued to operate street railway under expired franchise and having received its benefits, could not avoid obligations created thereby.—*Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.*

Rate of fare

A court cannot authorize its receivers for a street railroad company to charge a higher rate of fare than that fixed as a maximum by the company's franchise.—*Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, D.C.N.Y., 253 F. 453.*

63. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.
60 C.J. p 331 note 81.

Right to question

On petition of receiver of street railroad for instructions on whether to retain lease of elevated railroad granted by company which was also in hands of receiver, the lessor could not question finding that continued operation of the elevated would be a burden on lessee, which was to be determined solely in the interests of the lessee, particularly where the lessor's receiver had acquiesced in the finding.—*Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.*

applicable to their compensation,⁶⁴ the disposition | and payment of claims and expenses,⁶⁶ account-
of property and funds in their hands,⁶⁵ the filing |

Leave of court

(1) Proposed state court action by city and transit commission against rapid transit corporation undergoing federal receivership, and receiver, for declaratory judgment that receiver's proposed disaffirmance of lease would result in breach of obligation to city, was not maintainable without leave of federal court having jurisdiction of receivership proceeding.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, D.C.N.Y., 10 F.Supp. 512, affirmed, C.C.A., 76 F.2d 1002, certiorari denied City of New York v. Murray, 55 S.Ct. 923, 295 U.S. 760, 79 L.Ed. 1702.

(2) City and transit commission, applying for permission to sue in state court rapid transit corporation undergoing federal receivership, had burden to show that balance of convenience weighed heavily in favor of their position.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, D.C.N.Y., 10 F.Supp. 512, affirmed, C.C.A., 76 F.2d 1002, certiorari denied City of New York v. Murray, 55 S.Ct. 923, 295 U.S. 760, 79 L.Ed. 1702.

(3) In receivership proceeding of rapid transit corporation, proceeding on receiver's application for disaffirmance of lease might be stayed until final determination of suit in state court by city and transit commission for declaratory judgment that receiver's proposed disaffirmance of lease would result in breach of obligation to city.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, D.C.N.Y., 10 F.Supp. 512, affirmed, C.C.A., 76 F.2d 1002, certiorari denied City of New York v. Murray, 55 S.Ct. 923, 295 U.S. 760, 79 L.Ed. 1702.

(4) Application held to state cause of action.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, D.C.N.Y., 10 F.Supp. 512, affirmed, C.C.A., 76 F.2d 1002, certiorari denied City of New York v. Murray, 55 S.Ct. 923, 295 U.S. 760, 79 L.Ed. 1702.

(5) Application denied.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 10 F.Supp. 512, affirmed, C.C.A., 76 F.2d 1002, certiorari denied City of New York v. Murray, 55 S.Ct. 923, 295 U.S. 760, 79 L.Ed. 1702.

Time for adoption or rejection

(1) Use by receiver of interurban railway of bridge lease by railway for period during which reasonable time for adoption or rejection of lease had been suspended by agreement between receiver and lessor was not adoption of lease by receiver.—

North Kansas City Bridge & Railroad Co. v. Leness, C.C.A.Mo., 82 F.2d 9.

(2) Operation of interurban railway by receiver for twenty-eight months before discontinuing operations and for eleven months after notification to lessor of bridge used by railway that lease would be affirmed or disaffirmed within reasonable time was not so unreasonable as to constitute adoption of lease by receiver.—*North Kansas City Bridge & Railroad Co. v. Leness*, supra.

64. U.S.—*Provident Life, etc., Co. v. Camden, etc., R. Co.*, N.J., 177 F.854, 101 C.C.A. 68.
60 C.J. p 332 note 82.

65. U.S.—*Miners' Bank of Wilkes-Barre v. Acker*, C.C.A.Pa., 66 F.2d 850.

60 C.J. p 332 note 83.

Sale free and clear of liens and encumbrances

U.S.—*Randolph v. Scranton, M. & B. R. Co.*, D.C.Pa., 4 F.Supp. 861, affirmed, C.C.A., *Miners' Bank of Wilkes-Barre v. Acker*, 66 F.2d 850.

66. U.S.—*Guaranty Trust Co. v. Chicago Union Traction Co.*, C.C.Ill., 175 F. 284.

60 C.J. p 333 note 84.

Claim established by state court

Under decree of federal court ordering sale of street railway in receiver's hands, requiring purchaser to pay claims against receiver, and authorizing claimant on nonpayment to enforce claim in federal court, purchaser was not obligated to pay claim established by judgment of state court.—*Shepherd v. St. Louis Public Service Co.*, C.C.A.Mo., 64 F.2d 612.

Creditors could not recover fees paid prior to insolvency in absence of showing that such fees were paid with intent to hinder, delay, or defraud railway company's creditors.—*United Light & Power Co. v. Grand Rapids Trust Co.*, C.C.A.Mich., 85 F.2d 331, certiorari denied in part *United Light & Power Co. v. Grand Rapids Trust Co.*, 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari dismissed *Grand Rapids Trust Co. v. United Light & Power Co.*, 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

Current assessments

(1) Where street railway receivership was extended to foreclosure bill filed by third mortgage trustee and subsequently to foreclosure bill filed by first mortgage trustee, assessments for street pavement, sidewalk pavement and sewers, together with interest thereon, should be charged to receivership in effect when they

were paid, since assessments were part of current upkeep expense.—*In re New York State Rys.*, D.C.N.Y., 16 F.Supp. 717.

(2) Receiver was liable for paying claims while operating street railway system in receivership; but receiver was not liable to city for paving tracks after date when new corporation acquired title to most of receivership property pursuant to plan of reorganization where by such action receiver was prevented from thereafter operating cars on tracks with any reasonable prospect of benefit to receivership.—*American Brake Shoe & Foundry Co. v. New York Rys. Co.*, C.C.A.N.Y., 85 F.2d 531, certiorari denied *Sheeran v. City of New York*, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449.

(3) Receiver held not liable for paving assessment under terms of statute.—*New York v. Lynch*, 146 N.Y.S. 357, 161 App.Div. 292, affirmed 107 N.E. 1074, 213 N.Y. 638—60 C.J. p 333 note 84 [f].

Decree held proper

Decree ordering sale of street railway then in receivership and requiring purchaser to pay claims against receiver, and retaining jurisdiction to retake property on purchaser's non-compliance with orders directing payment, was proper and governed those not parties to action.—*Shepherd v. St. Louis Public Service Co.*, C.C.A.Mo., 64 F.2d 612.

Fees of counsel

Any preliminary arrangements concerning fees of counsel of a company must be assumed to have been incorporated in final unification plan adopted in railway receivership obligating city to pay any allowance made by court to counsel of company for services in receivership.—*Manhattan Ry. Co. v. City of New York*, C.C.A.N.Y., 152 F.2d 655, certiorari denied 66 S.Ct. 764, 327 U.S. 785, 90 L.Ed. 1012.

Payments made to parent company

(1) Receiver of interurban electric railway company could recover dividends paid to parent corporation while railway company was insolvent, notwithstanding some of such dividends were paid with money loaned by parent corporation, where loans were intended to be actual obligations of railway company.—*United Light & Power Co. v. Grand Rapids Trust Co.*, C.C.A.Mich., 85 F.2d 331, certiorari denied in part *United Light & Power Co. v. Grand Rapids Trust Co.*, 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari dismissed *Grand Rapids Trust Co. v.*

ing,⁶⁷ the operation and effect of the receivership,⁶⁸ and its termination and the discharge of the receivers.⁶⁹

In administering the property and affairs of street railroad companies, where the matters involved are

complex and the various interests numerous, technicalities of pleading and practice will not be nicely considered, but the court will ordinarily adopt or permit such practice as is best calculated to secure and protect the equities.⁷⁰

X. REGULATION AND OPERATION

A. REGULATION IN GENERAL

§ 160. Power to Regulate

A street railway company is subject to control and regulation in the interest of the public.

A street railway company is subject to control and regulation in the interest of the public,⁷¹ and in the regulation of street cars the interests of all

United Light & Power Co., 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

(2) Suit to recover parent company's charges for management services rendered railway company was equity suit for recovery of trust fund for creditors, and, hence, court was not bound by Michigan six-year limitation statute.—United Light & Power Co. v. Grand Rapids Trust Co., C.C.A.Mich., 85 F.2d 331, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co., 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari dismissed Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

(3) Interurban railway company's failure to set up depreciation reserve did not necessitate recovery by railway company's receiver of dividends paid to parent corporation, where company's property and equipment were not irretrievably depreciated and operating conditions had been maintained by charging replacements and repairs to operating expenses.—United Light & Power Co. v. Grand Rapids Trust Co., C.C.A.Mich., 85 F.2d 331, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co., 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari dismissed Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

(4) Refusal to permit receiver of interurban railway company to recover from parent corporation interest obtained by parent corporation on railway company's monthly deposits to meet railway company's semiannual bond interest payments was not error, where such claim was not made in bill and no agreement to pay such interest was shown in proof.—United Light & Power Co. v. Grand Rapids Trust Co., C.C.A.Mich., 85 F.2d 331, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co., 57 S.Ct. 118, 299 U.S. 591, 81 L.

Ed. 436, certiorari dismissed Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

Settlement plan for assenting security holders

U.S.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., C.C.A.N.Y., 122 F.2d 454, certiorari denied Manheim v. Merle-Smith, 62 S.Ct. 625, 315 U.S. 801, 86 L.Ed. 1201 and Salomon v. Merle-Smith, 62 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201, rehearing denied 62 S.Ct. 804, 315 U.S. 829, 86 L.Ed. 1223.

The excess of operating revenues over current expenses of operating a street railway system in the hands of a receiver constitutes a fund in execution in the court for the benefit of creditors in order of their priority, determinable under the same rules as though the fund were derived from execution.—Pennsylvania Co. for Insurance on Lives, etc. v. Philadelphia Co., C.C.A.Pa., 286 F. 1.

67. U.S.—Guaranty Trust Co. v. Metropolitan St. R. Co., C.C.N.Y., 171 F. 1015.

60 C.J. p 333 note 85.

68. U.S.—Miners' Bank of Wilkes-Barre v. Acker, C.C.A.Pa., 66 F.2d 850.

60 C.J. p 333 note 86.

New franchise

Successor trustee of bonds issued by street railroad and secured by mortgage on franchises and other property was bound by new franchise directed by court to be accepted by receiver.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

Mortgages on property of electric interurban railway company operated

by receiver operate as liens to general creditors' prejudice only on company's earnings after actual entry and possession by mortgagees.—McCullough v. Union Traction Co. of Indiana, 186 N.E. 300, 206 Ind. 585.

69. U.S.—American Brake Shoe, etc., R. Co. v. Pittsburgh R. Co., D.C.Pa., 296 F. 204.

60 C.J. p 334 note 87.

A judgment rendered against receiver after his discharge was void ab initio, so as to bar recovery of amount thereof from purchaser of such company's property at sale under decree of court wherein receivership proceedings were had.—Truesdale v. St. Louis Public Service Co., 107 S.W.2d 778, 341 Mo. 402, 112 A.L.R. 135.

Statute held inapplicable

The statute providing that action shall be continued in original party's name after transfer of interest therein, if transferee will indemnify such party against costs and damages, or that court may allow substitution of transferee as party, and that court shall require transferee to give such indemnity or cause his substitution on transferor's application, and order dismissal of suit on transferee's omission to do so, is inapplicable to action against street railway company's receiver after his discharge and sale of company's property under court decree requiring purchaser to pay injury and damage claims against receiver.—Truesdale v. St. Louis Public Service Co., supra.

70. U.S.—Morton Trust Co. v. Metropolitan St. R. Co., C.C.N.Y., 170 F. 336.

71. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 114.

Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

60 C.J. p 334 note 93.

concerned should be considered.⁷² The power to control and regulate the operation of street railroads resides primarily in the legislature of the state,⁷³ although within constitutional limitations it may be delegated to a municipality and a commission.⁷⁴ Although power of regulation may have been delegated, there is always in reserve the authority of the legislature to do directly what it authorizes its creatures to do.⁷⁵ Contracts between streetcar companies are not enforceable where they are in violation of valid public regulations.⁷⁶

Extent and limits of power to regulate generally. Regulations of the proper body must not be inconsistent or in conflict with the charter rights of the street railroad,⁷⁷ so that such body cannot, under the pretense of regulation, deprive the company of its property or franchise rights.⁷⁸ The regulations must not be imposed arbitrarily or capriciously, but must be such only as are reasonable,⁷⁹ or necessary and reasonably adapted to remedy the evils complained of,⁸⁰ and, hence, must not be such as will destroy or unreasonably impair the rights or franchises granted to the company.⁸¹ Thus, a municipal government cannot deprive a street railroad company of the right of way, which has been

granted to it, except in the manner prescribed by law for the taking of private property for public use.⁸²

Regulations which are otherwise valid will be upheld if reasonable.⁸³ In determining the reasonableness of a regulation or order, pecuniary loss to the company which would result from compliance should be considered,⁸⁴ although such detail is not conclusive of the matter.⁸⁵ Hence, a regulation is not unreasonable or invalid from the mere fact that it will require a large outlay of money by the company.⁸⁶ The fact that an ordinance might increase employment cannot be considered in determining its validity.⁸⁷ The motive behind the promulgation of an order of regulation does not affect the reasonableness thereof.⁸⁸ A regulation which shows on its face that the end contemplated is the securing of reasonable safeguards against danger, and reasonable accommodations to the public, will ordinarily be presumed to be valid,⁸⁹ the burden of proving the unreasonableness of a regulation resting on the one who attacks its validity;⁹⁰ such regulations will not be interfered with on light grounds,⁹¹ or where they can fairly be said to tend toward a safer condition.⁹² The needs of the pub-

72. U.S.—Public Utilities Commission of District of Columbia v. Polak, App.D.C., 72 S.Ct. 813, 343 U. S. 451, 96 L.Ed. 1068.

73. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A. L.R.2d 114.
60 C.J. p 334 note 97.

74. Conn.—Connecticut Co. v. New Haven, 130 A. 169, 103 Conn. 197.

Combining state and local control

The wording of statute, providing for conversion of every grant by city of street railway franchise into an indeterminate permit, and legislative history of statute were held to indicate legislative intent not to give railroad and warehouse commission complete control over street railways but to combine state with local control in such a manner as to secure the advantages of both.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 904, 94 L.Ed. 1335.

75. Pa.—Ashworth v. Pittsburg Ry. Co., 44 Pa.Super. 326.

76. Okl.—Little v. Oklahoma Ry. Co., 223 P. 692, 97 Okl. 286.

77. Ark.—Bain v. Ft. Smith Light & Traction Co., 172 S.W. 843, 116 Ark. 125, L.R.A.1915D 1021.

Right to prescribe rules and regulations

A city ordinance granting a street railway franchise, and reserving the right to enact needful police regulations, did not preserve to the city the right to prescribe rules and regulations for the operation of the road.—Oklahoma Ry. Co. v. Powell, 127 P. 1080, 33 Okl. 737.

78. Ill.—City of Chicago v. Chicago & O. P. Elevated R. Co., 95 N.E. 456, 250 Ill. 486.

Pa.—Reading St. Ry. Co. v. Stump, Comp.Pl., 39 Berks Co. 261.

79. La.—Shreveport Traction Co. v. Shreveport, 47 So. 40, 122 La. 1, 129 Am.S.R. 345.
60 C.J. p 338 note 55.

80. U.S.—Georgia Power Co. v. Borough of Atlanta, D.C.Ga., 52 F.2d 303.

81. Mich.—Detroit v. Ft. Wayne, etc., R. Co., 54 N.W. 958, 95 Mich. 456, 35 Am.S.R. 580, 20 L.R.A. 79.
60 C.J. p 338 note 56.

82. Ky.—Louisville City R. Co. v. Louisville, 8 Bush 415.

83. Cal.—Simoneau v. Pacific Electric Ry. Co., 136 P. 544, 166 Cal. 264, 49 L.R.A.N.S., 737.
60 C.J. p 338 note 58.

84. Wash.—Puget Sound Traction,

Light & Power Co. v. Public Service Commission, 170 P. 1014, 100 Wash. 329, P.U.R.1918C 662, 5 A.L. R. 30.

85. Wash.—Puget Sound Traction, Light & Power Co. v. Public Service Commission, supra.

86. Mich.—People v. Detroit United R. Co., 97 N.W. 36, 134 Mich. 682, 104 Am.S.R. 626, 63 L.R.A. 746.
N.Y.—New York v. Dry Dock, etc., R. Co., 30 N.E. 563, 133 N.Y. 104, 28 Am.S.R. 609.

87. U.S.—Georgia Power Co. v. Borough of Atlanta, D.C.Ga., 52 F.2d 303.

88. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, D. C.Wash., 223 F. 371, affirmed 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed. 1325.
60 C.J. p 339 note 62.

89. Wis.—Eastern Wisconsin R., etc., Co. v. Hackett, 115 N.W. 376, 1136, 1139, 135 Wis. 464.
60 C.J. p 339 note 63.

90. Mich.—People v. Detroit United R. Co., 97 N.W. 36, 134 Mich. 682, 104 Am.S.R. 626, 63 L.R.A. 746.

91. Mich.—People v. Detroit United R. Co., supra.

92. Mich.—People v. Detroit United R. Co., supra.

lic, however, should be distinguished from mere inconvenience.⁹³

§ 161. — Municipality

As a general rule, municipal corporations are empowered to regulate the operation of street railways within their municipal boundaries.

While the power must be expressly granted or must arise by necessary implication from a power thus granted,⁹⁴ as a general rule, municipal corporations are empowered to regulate the operation of street railways within their municipal boundaries⁹⁵ whether the franchise is owned by an individual or by a corporation.⁹⁶ A municipal corporation cannot by contract abrogate or restrict this right.⁹⁷ The adoption of a home rule charter does not, of itself, give a city jurisdiction over a street railway except in matters of municipal concern.⁹⁸ A grant to a street railroad company to own property and transact business within a municipal corporation affords it no immunity from reasonable control and regulation by the municipal corporation under its police power,⁹⁹ although the railroad is constructed prior to the incorporation, as a municipal corporation, of the territory through which it runs,¹ particularly where it accepts the subsequently enacted municipal charter.²

On the other hand, where a street railroad company accepts its charter or the grant of its franchise from a municipality, it is bound to hold its special privileges subject to the regulations then existing and to such regulations as the municipality may from time to time impose on it, as reasonably necessary to the protection and preservation of persons and property,³ whether or not it accepts the ordinance making the regulation,⁴ and this is particularly true where the grant to the street railroad expressly reserves such right to the municipality.⁵ A track laid in a public street, although by express public grant, is subject to such regulations as are reasonably necessary to secure the public safety.⁶ Under a general power reserved to the municipality in the ordinance granting the franchise, specific regulations may be promulgated.⁷ A regulation in an ordinance granting a street railroad company the right to operate along the streets of the city, and providing that it shall apply to streets "hereafter" used, applies to the exercise of the franchise on streets subsequently added within the limits of the city.⁸

The right to regulate the operation of street railways is subject to limitation.⁹ The power must be exercised within its scope.¹⁰ It must be exercised

93. Wash.—Puget Sound Traction, Light & Power Co. v. Public Service Commission, 170 P. 1014, 100 Wash. 329, P.U.R.1918C 662, 5 A.L.R. 30.

60 C.J. p 339 note 67.

94. La.—Shreveport Tract. Co. v. Shreveport, 47 So. 40, 122 La. 1, 129 Am.S.R. 345.

43 C.J. p 434 note 57.

95. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 470.—In re Madison Rys. Co., C.C.A.Wis., 102 F.2d 178.

Ill.—City of Chicago v. O'Connell, 116 N.E. 210, 278 Ill. 591, 8 A.L.R. 916.

Va.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond, 173 S.E. 892, 162 Va. 296.

60 C.J. p 334 note 99—43 C.J. p 434 note 58.

96. N.J.—Trenton Horse R. Co. v. Trenton, 20 A. 1076, 53 N.J.Law 132, 11 L.R.A. 410.

Pa.—Frankford, etc., R. Co. v. Philadelphia, 58 Pa. 119, 98 Am.D. 242.

97. Ga.—Macon Cons. St. R. Co. v. Macon, 33 S.E. 60, 112 Ga. 782.

N.Y.—Brooklyn v. Nassau Electric R. Co., 20 App.Div. 31, 46 N.Y.S. 651.

98. Neb.—In re Curtailment of Bus Service, 252 N.W. 407, 125 Neb. 825.

99. U.S.—Walton v. City of Atlanta, D.C.Ga., 89 F.Supp. 309, modified on other grounds, C.A., 180 F.2d 143, set aside on other grounds 181 F.2d 693, certiorari denied 71 S.Ct. 56, 340 U.S. 823, 95 L.Ed. 604.

Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 904, 94 L.Ed. 1335.

60 C.J. p 335 note 8—43 C.J. p 435 note 61.

1. Va.—Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co., 47 S.E. 339, 102 Va. 795, error dismissed 27 S.Ct. 775, 203 U.S. 598, 51 L.Ed. 334.

60 C.J. p 335 note 9.

2. Mo.—Union Depot R. Co. v. Southern R. Co., 16 S.W. 920, 105 Mo. 562.

3. U.S.—Walton v. City of Atlanta, D.C.Ga., 89 F.Supp. 309, modified on other grounds, C.A., 180 F.2d 143, set aside on other grounds 181 F.2d 693, certiorari denied 71 S.Ct. 56, 340 U.S. 823, 95 L.Ed. 604.

Ill.—People v. Chicago City Ry. Co., 155 N.E. 781, 324 Ill. 618.

60 C.J. p 335 note 11—43 C.J. p 435 note 64.

4. Mo.—Sluder v. St. Louis Transit Co., 88 S.W. 648, 189 Mo. 107, 5 L.R.A.N.S., 186.

60 C.J. p 335 note 12—43 C.J. p 435 note 65.

5. Mich.—People v. Detroit United R. Co., 97 N.W. 36, 134 Mich. 682, 104 Am.S.R. 626, 63 L.R.A. 746.

60 C.J. p 336 note 13—43 C.J. p 435 note 66.

6. Conn.—Connecticut Co. v. Town of Stamford, 110 A. 554, 95 Conn. 26.

60 C.J. p 335 note 7.

7. Wash.—City of Tacoma v. Boultelle, 112 P. 661, 61 Wash. 434.

8. N.J.—City of Camden v. Public Service Ry. Co., 82 A. 607, 82 N.J. Law 246, error dismissed 86 A. 397, 84 N.J.Law 309.

9. Wis.—Eastern Wisconsin R., etc., Co. v. Hackett, 115 N.W. 376, 1136, 1139, 135 Wis. 464.

10. N.Y.—People v. Western New York, etc., Tract. Co., 108 N.E. 847, 214 N.Y. 526.

reasonably,¹¹ without unreasonably invading private rights.¹² Whether or not the enactment is reasonable is subject to judicial inquiry.¹³ If a reasonable doubt as to the reasonableness of the regulation exists it will be resolved in favor of the municipal power.¹⁴ It has been held that, in the absence of express authority of enactment, a penal ordinance regulating the safety devices to be adopted by a street railroad which undertakes to enforce a higher standard than that imposed by the common law should not be sustained;¹⁵ that the judgment of the board of directors of a street railroad is supreme and exclusive in the absence of statutory provision, in the operation of its roads and the running of its cars;¹⁶ and that a municipal corporation cannot interfere with such judgment.¹⁷ If a grant of special powers and privileges accompanies the grant of a street railway franchise, coupled with limitation on the right of the municipal interference, the municipal corporation cannot, by any regulation of its own, abridge the privilege concerned or infringe on the limitations thus prescribed.¹⁸

The power conferred on a municipality to regulate the exercise of the franchise of a street railroad company is in the nature of a police power which may be modified or repealed by the legislature,¹⁹ and may be revoked and conferred on another agency,²⁰ and such revocation takes place where the same power is conferred on a state board

or commission.²¹ Where the power to regulate the railways has been conferred on a state board, any conflicting power theretofore existing in a municipality ceases,²² and the municipality has no power to encroach on the power of the board.²³ However, the creation of a board on which has been conferred the power of general supervision of all railroads in the state that it may ascertain the physical conditions and details of operation for the purpose of recommending improvements has been held not to take away from the municipality the power to regulate the conduct of street railroads operating therein.²⁴ Where a municipality is given the right to operate and regulate a street railroad, it has been held that it can regulate it without the approval of a state commission, where the statute giving the commission jurisdiction over railroads is not clear whether it intends municipalities to be included, and the commission has not attempted, in the past, to exercise jurisdiction over the system.²⁵

§ 162. — Public Board, Commission, or Officers in General

The power to regulate the operation of a street railroad may be delegated to designated boards, commissions, or officers.

The power to regulate the operation of a street railroad may be delegated to designated boards, commissions, or officers.²⁶ The power of a com-

Pa.—Mahoning, etc., R., etc., Co. v. New Castle, 82 A. 501, 233 Pa. 413, Ann.Cas.1913B 658.

11. N.Y.—New York v. Dry Dock, etc., R. Co., 30 N.E. 563, 133 N.Y. 104, 28 Am.S.R. 609.
43 C.J. p 435 note 63.

12. La.—Shreveport Tract. Co. v. Shreveport, 47 So. 40, 122 La. 1, 129 Am.S.R. 345.

Wis.—Eastern Wisconsin R., etc., Co. v. Hackett, 115 N.W. 376, 1136, 1139, 135 Wis. 464.

13. Wis.—Eastern Wisconsin R., etc., Co. v. Hackett, *supra*.

14. Wis.—Eastern Wisconsin R., etc., Co. v. Hackett, *supra*.

15. Pa.—Mahoning, etc., R., etc., Co. v. New Castle, 82 A. 501, 233 Pa. 413, Ann.Cas.1913B 658.

16. Pa.—Mahoning, etc., R., etc., Co. v. New Castle, *supra*.

17. Pa.—Mahoning, etc., R., etc., Co. v. New Castle, *supra*.

18. N.J.—Trenton Horse R. Co. v.

Trenton, 20 A. 1076, 53 N.J.Law 132, 11 L.R.A. 410.
43 C.J. p 435 note 77.

19. N.J.—Inhabitants of Town of Phillipsburg v. Board of Public Utility Com'rs, 88 A. 1096, 85 N.J. Law 141.

20. N.Y.—City of Schenectady v. Schenectady Ry. Co., 194 N.Y.S. 375, 118 Misc. 676.
60 C.J. p 336 note 17.

21. Ill.—Northern Trust Co. v. Chicago Rys. Co., 149 N.E. 422, 426, 318 Ill. 402.
60 C.J. p 336 note 18.

22. Ariz.—Phoenix Ry. Co. of Arizona v. Lowe, 187 P. 933, 21 Ariz. 289.
60 C.J. p 336 note 19.

23. N.Y.—New York State Rys. v. City of Rochester, 195 N.Y.S. 783, 119 Misc. 128.
60 C.J. p 336 note 20.

24. N.Y.—New York v. Interurban St. R. Co., 86 N.Y.S. 673, 43 Misc. 29.

25. Fla.—City of St. Petersburg v. Carter, 39 So.2d 804.

26. Cal.—Holder v. Key System, 200 P.2d 98, 88 Cal.App.2d 925.

Neb.—In re Curtailment of Bus Service, 252 N.W. 407, 125 Neb. 825.

Pa.—Reading St. Ry. Co. v. Stump, Com.Pl., 39 Berks Co. 261.

S.C.—State v. Broad River Power Co., 164 S.E. 637, 166 S.C. 207.

60 C.J. p 335 note 1, p 336 note 24.

Items improperly charged

The legislature could delegate to a state department the duty of securing an adjudication on question whether certain items had been improperly charged to cost of service. —Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

Acquiring stock

A street railroad can acquire stock of another carrier existing under state laws only if authorized to do so by the public service commission. —Warren v. Fitzgerald, 56 A.2d 827, 139 Md. 476.

mission must be derived from the legislature by express grant²⁷ or reasonable intentment therefrom.²⁸ Such boards or commissions may act only within the authority granted by the statute,²⁹ or, as otherwise stated, the board or commission can exercise only such powers as the law has conferred on it,³⁰ and no regulations or orders may be promulgated by it beyond the powers delegated in the statute,³¹ and the enforcement of an order or regulation not within its powers to make will be restrained.³²

The power to regulate a street railroad company and its operation conferred on a state board does not include the power to grant franchises;³³ and, where the franchise granted to a street railroad company is subject to conditions and reservations set forth therein, the board may not by regulation interfere with or abrogate conditions or reservations lawfully imposed by a municipality in granting the franchise.³⁴ On the other hand, where the power to regulate a street railroad is vested by the consti-

tution in a board or commission, it cannot be deprived of its power by the terms of the franchise granted by the local authorities.³⁵ When the power of the state has been once delegated to a board or commission, this right to its exercise is exclusive of its exercise by any other body,³⁶ except such others as are specifically authorized to exercise it.³⁷

Where the power to regulate has been delegated to both a commission and the municipality, the power of the municipality is subject to that of the commissioners when exercised,³⁸ and the regulation of the board on the same subject prevails over the regulation of the municipality.³⁹ A board or commission to which regulatory powers have been delegated by the state has complete administrative supervision over the operation of the cars of a street railroad company.⁴⁰ In at least one jurisdiction giving to a state board power to regulate street railroads, an exception is made with respect to railroads owned or operated by a municipality.⁴¹

Management contract

(1) Under statute providing that no charge for services performed for a utility by an affiliated interest under a management contract shall exceed reasonable cost of performing such service, a charge for services rendered to street railroad by its affiliated interests was not only required to be reasonable but was required to represent the cost to the affiliated interest of performing the services.—*International Ry. Co. v. Public Service Commission*, 36 N.Y.S. 2d 125, 264 App.Div. 506, affirmed 47 N.E.2d 435, 289 N.Y. 830.

(2) Evidence sustained decision of the commission that street railroad failed to sustain burden of proving reasonableness of the cost of obtaining services of an affiliated interest, pursuant to a management contract, and showing that charges made were the actual cost to the affiliated interest, so that, under statute, the commission was justified in disapproving the contract.—*International Ry. Co. v. Public Service Commission*, supra.

27. Md.—*United R., etc., Co. v. State Roads Commission*, 91 A. 552, 123 Md. 561.

28. Md.—*United R., etc., Co. v. State Roads Commission*, supra.

29. U.S.—*In re Madison Rys. Co., C. C.A.Wis.*, 102 F.2d 178.
60 C.J. p 337 note 27.

Where not common carriers

Statutory jurisdiction of commission over the transportation of the

passengers and property by railroads doing business as common carriers does not extend to street railroads not doing business as common carriers.—*Cooperative Legislative Committee of R. R. Brotherhoods v. Public Utilities Commission*, 80 N.E.2d 159, 149 Ohio St. 511.

30. Mo.—*State ex rel. Kansas City Public Service Co. v. Latshaw*, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed *Latshaw v. State of Missouri ex rel. Kansas City Public Service Co.*, 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.
60 C.J. p 337 note 28.

31. N.Y.—*People ex rel. New York Rys. Co. v. Public Service Commission of First Dist.*, 119 N.E. 848, 223 N.Y. 373.
60 C.J. p 337 note 29.

32. Md.—*Towers v. United Rys. & Electric Co. of Baltimore*, 95 A. 170, 126 Md. 478.

33. Wash.—*City of Seattle v. Puget Sound Tract, etc., Co.*, 174 P. 464, 103 Wash. 41.—*State v. Public Service Commission*, 172 P. 890, 101 Wash. 601.

34. Wash.—*State v. Public Service Commission*, supra.
60 C.J. p 337 note 33.

35. Okl.—*Tulsa St. Ry. Co. v. State*, 110 P. 373, 26 Okl. 559.
60 C.J. p 337 note 35.

36. N.Y.—*City of Schenectady v. Schenectady Ry. Co.*, 194 N.Y.S. 375, 118 Misc. 676.

Pa.—*Reading St. Ry. Co. v. Stump*, Com.Pl., 39 Berks Co. 261.
60 C.J. p 337 note 36.

General powers not repealed

The statute granting commission exclusive power to prescribe manner and terms on which railroad tracks may be constructed and maintained across public streets did not impliedly repeal statutes conferring general powers on municipalities to control use and occupancy of their streets by railroads.—*Union Pac. R. Co. v. Public Service Commission*, 134 P.2d 469, 103 Utah 186.

37. N.Y.—*City of Schenectady v. Schenectady Ry. Co.*, 194 N.Y.S. 375, 118 Misc. 676.

38. Conn.—*Connecticut Co. v. City of New Haven*, 130 A. 169, 103 Conn. 197.

39. Ga.—*Savannah Electric Co. v. Lowe*, 108 S.E. 313, 27 Ga.App. 350.

40. Vt.—*Town of West Rutland v. Rutland Ry., Light & Power Co.*, 121 A. 755, 96 Vt. 413.

41. Ill.—*Fallon v. Illinois Commerce Commission*, 84 N.E.2d 641, 402 Ill. 516.
60 C.J. p 338 note 43.

Conveyance to authority

Where, after commission's order granting railroad temporary authority to use part of tracks of transit company, bankruptcy trustee conveyed property of transit company free of all claims except easements, etc., to transit authority, such order be-

Estoppel to deny power. Consent to, and compliance with, an order of the board estops the railway to deny the power of the board to make such order.⁴²

Proceedings before board. The proceedings before the board are governed by the statutes and rules relating thereto.⁴³ Where changes in circumstances have occurred after the close of a hearing before the board which materially affect the question before the board, a rehearing thereon should be granted.⁴⁴

Review of orders of board. In some jurisdictions there is provision for a review of the orders or rulings of the board or commission by a court,⁴⁵ in which case the review is limited to a consideration of such questions only as are permitted by the statute.⁴⁶

§ 163. Particular Regulations

The regulating body may, within its powers, make any regulation prescribing the manner in which a street railroad company shall enjoy its franchise rights, which

is reasonable and proper for the safety and protection of persons and property.

As a general rule, the regulating body may, within its powers, make any regulation prescribing the manner in which a street railroad company shall enjoy its franchise rights, which is reasonable and proper for the safety and protection of persons and property,⁴⁷ as, for example, the care to be taken in the operation of the railroad generally,⁴⁸ and the motive power to be used on streetcars within municipal limits,⁴⁹ as by prohibiting the use of steam as a motive power.⁵⁰ The regulating body may make a regulation against cars standing on the tracks,⁵¹ or grant the privilege of carrying passengers, and at the same time deny the privilege of operating freight cars,⁵² and an order may require that a street railroad be permitted to carry both passengers and freight.⁵³ An ordinance prohibiting commercial advertising on the exterior sides of streetcars has been held invalid.⁵⁴ It has been both affirmed⁵⁵ and denied⁵⁶ that a street railroad company is within a statutory provision making railroad companies liable for all damages caused by the running of trains. A street railroad company is not

came functus officio.—Fallon v. Illinois Commerce Commission, supra.

Acquiring property in public utility

The statutory provision is not modified by provision in statute creating the transit authority as a municipal corporation that, in case the authority acquires plant equipment property and rights in property of any public utility used or useful in operation of transportation system, the commission shall transfer and deliver to the board all books, papers, and records in control of the commission affecting "such public utility" exclusively, since the quoted phrase refers to the utility purchased.—Fallon v. Illinois Commerce Commission, supra.

42. N.J.—Public Service Ry. Co. v. Board of Public Utility Com'rs, 93 A. 585, 87 N.J.Law 250.

43. N.Y.—People ex rel. United Traction Co. v. Public Service Commission of New York, Second Dist., 153 N.Y.S. 542, 167 App.Div. 498.

44. N.Y.—People ex rel. United Traction Co. v. Public Service Commission of New York, Second Dist., supra. 60 C.J. p 338 note 47.

45. Mass.—City Council of Salem v. Eastern Massachusetts St. Ry. Co., 149 N.E. 671, 254 Mass. 42.

N.Y.—People ex rel. United Traction Co. v. Public Service Commission of New York, Second Dist., 153 N.Y.S. 542, 167 App.Div. 498.

46. Mass.—City Council of Salem v. Eastern Massachusetts St. Ry. Co., 149 N.E. 671, 254 Mass. 42. 60 C.J. p 338 note 50.

47. Cal.—Pacific Rys. Advertising Co. v. City of Oakland, 276 P. 629, 98 Cal.App. 165. 60 C.J. p 339 note 70.

Interurban railways

Statutory precautions to prevent accidents required of railroads apply to interurban railways.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.

Regulation of vehicles or motor vehicles

(1) The word "vehicle" does not ordinarily include streetcars, unless context of ordinance or statute in which word is used clearly indicates intention to include them.—Georgia Power Co. v. Clark, 25 S.E.2d 91, 69 Ga.App. 273.

(2) The statute defining a "motor vehicle" is inapplicable to a streetcar deriving its power from overhead wires.—Peterson v. Minneapolis St. Ry. Co., 31 N.W.2d 905, 226 Minn. 27.

(3) "Vehicles" is a general term broad enough to include streetcars on tracks.—Havins v. Dallas Railway & Terminal Co., Tex.Civ.App., 130 S.W.2d 878, error refused.

48. Mo.—Fath v. Tower Grove, etc., R. Co., 16 S.W. 913, 105 Mo. 537, 13 L.R.A. 74. 60 C.J. p 339 note 71.

49. Miss.—Donnaher v. State, 16 Miss. 649.

50. Ill.—North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. R. 788. 60 C.J. p 339 note 73.

51. Minn.—Wilson v. Duluth St. R. Co., 67 N.W. 82, 64 Minn. 363.

52. Mo.—St. Louis, etc., R. Co. v. Kirkwood, 60 S.W. 110, 159 Mo. 239, 53 L.R.A. 300. Right to carry freight under franchise see supra § 15.

53. Ill.—Chicago, N. S. & M. R. Co. v. City of Chicago, 163 N.E. 141, 331 Ill. 360.

Failure to appeal

Order of commission is binding on city which appeared at hearing and failed to exercise right of appeal.—Chicago, N. S. & M. R. Co. v. City of Chicago, supra.

54. Cal.—Pacific Rys. Advertising Co. v. City of Oakland, 276 P. 629, 98 Cal.App. 165.

Possibility of danger

Ordinance cannot be justified by mere possibility of danger which it seeks to avert.—Pacific Rys. Advertising Co. v. City of Oakland, supra.

55. Ga.—Cordray v. Savannah, etc., R. Co., 43 S.E. 755, 117 Ga. 464. 60 C.J. p 339 note 76.

56. Ark.—Little Rock R., etc., Co. v. Newman, 92 S.W. 864, 77 Ark. 599.

subject to regulations contained in the franchise of another company, which it has acquired, where its new franchise does not refer to such regulations, or make the provisions of the old grant part of the new one.⁵⁷

§ 164. — As to Passenger Service and Accommodations

The public is entitled to streetcar service which will, within reasonable limits, meet its needs, subject to the general rule that regulations adopted to secure such service must be reasonable.

A street railroad, the franchise of which requires it to furnish efficient service, may be compelled to render such service if it fails to do so.⁵⁸ The public is entitled to streetcar service which will, within reasonable limits, meet its needs,⁵⁹ subject to the general rule, however, that regulations adopted to secure such service, whether in the form of statute, ordinance, or order of a board or commission, must be reasonable.⁶⁰ Accordingly, regulations may be made with respect to the services and accommodations which street railroad companies are required

to provide for passengers who desire to ride on its cars.⁶¹

Regulations have been made, and held reasonable, requiring street railroad companies to keep tickets for sale on its cars.⁶² A street railway company may be required to furnish adequate facilities to the public,⁶³ even though it suffers some incidental loss in complying with such requirement.⁶⁴ Regulations have been promulgated and held reasonable which require the company to furnish additional seating capacity,⁶⁵ or trailers,⁶⁶ or cars,⁶⁷ or waiting room or waiting cars.⁶⁸ A regulation requiring the furnishing of seats for substantially all persons at all times is unreasonable,⁶⁹ although an order for an increase in the facilities provided during particular hours when many passengers are compelled to stand is reasonable.⁷⁰ An ordinance providing that it is the duty of the railroad to operate cars in sufficient numbers reasonably to accommodate the public is not unreasonable.⁷¹ A commission may prohibit or permit and regulate the receipt and amplification of radio programs on streetcars under such conditions that the total utility service shall not be unsafe, uncomfortable, or inconvenient.⁷²

57. Wis.—Stafford v. Chippewa Valley Electric R. Co., 85 N.W. 1036, 110 Wis. 331.

60 C.J. p 340 note 78.

58. Mo.—Heidegger v. Metropolitan St. Ry. Co., 126 S.W. 990, 142 Mo. App. 335.

59. Wash.—Puget Sound Traction, Light & Power Co. v. Public Service Commission, 170 P. 1014, 100 Wash. 329, P.U.R.1918C 662, 5 A.L.R. 30.—McGillvra v. Seattle Electric Co., 111 P. 896, 61 Wash. 38, Ann. Cas.1912B 1020.

60. Wash.—Puget Sound Traction, Light & Power Co. v. Public Service Commission, 170 P. 1014, 100 Wash. 329, P.U.R.1918C 662, 5 A.L.R. 30.

60 C.J. p 340 note 84.

61. D.C.—Pollak v. Public Utilities Commission of District of Columbia, 191 F.2d 450, 89 U.S.App.D.C. 94, reversed on other grounds 72 S.Ct. 813, 343 U.S. 451, 98 L.Ed. 1068.

Mass.—Boston, W. & N. Y. St. Ry. Co. v. Commonwealth, 17 N.E.2d 166, 301 Mass. 283.

60 C.J. p 340 note 85.

62. Mich.—Rice v. Detroit, etc., R. Co., 81 N.W. 927, 122 Mich. 677, 48 L.R.A. 84.

60 C.J. p 340 note 87.

63. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, D. C.Wash., 223 F. 371, affirmed 37 S. Ct. 705, 244 U.S. 574, 61 L.Ed. 1325.

64. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, supra.

65. U.S.—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065.

60 C.J. p 340 note 90.

66. U.S.—Georgia Ry. & Power Co. v. Town of Decatur, supra.

60 C.J. p 340 note 91.

67. N.Y.—Public Service Commission, First Dist. v. Brooklyn Heights R. Co., 172 N.Y.S. 790, 105 Misc. 254.

60 C.J. p 340 note 92.

68. N.Y.—Public Service Comm. for First Dist. v. New York & Q. C. Ry. Co., 156 N.Y.S. 323, 170 App. Div. 580.

60 C.J. p 340 note 93.

69. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, D. C.Wash., 223 F. 371, affirmed 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed. 1325.

70. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, supra.

60 C.J. p 341 note 95.

71. Ky.—South Covington & C. R. Co. v. City of Covington, 143 S.W. 28, 146 Ky. 592, reversed on other grounds 35 S.Ct. 158, 235 U.S. 537, 59 L.Ed. 350, L.R.A.1915F 792.

60 C.J. p 341 note 96.

72. U.S.—Public Utilities Commission of District of Columbia v. Pollak, App.D.C., 72 S.Ct. 813, 343 U.S. 451, 98 L.Ed. 1068.

Desirability of radio programs on public vehicles was a matter for decision between transit company operating streetcars, the public, and the commission.—Public Utilities Commission of District of Columbia v. Pollak, supra.

Occasional radio broadcasts of music alone in public streetcars would be constitutionally permissible.—Public Utilities Commission of District of Columbia v. Pollak, supra.

Findings and determination of commission

(1) In proceeding to determine whether installation and use of radio receivers in streetcars were consistent with public convenience, comfort, and safety, weight to be attached to public opinion surveys was a proper matter for determination by the commission.—Public Utilities Commission of District of Columbia v. Pollak, supra.

Regulations have been promulgated and held reasonable which prescribe the number of passengers to be carried in a car;⁷³ and it has been held a reasonable regulation to require that the company shall designate on its cars the destination thereof.⁷⁴ Regulations have also been promulgated and held reasonable which require the railway to carry a passenger thereon to any regular stopping place desired by him, on the car's route, without a change of cars,⁷⁵ except for transfer to a connecting line going in another direction,⁷⁶ or in case of an accident.⁷⁷

Other regulations which have been promulgated and held reasonable require cars to be stopped at frequent intervals,⁷⁸ or at all street crossings,⁷⁹ or at any point on the line,⁸⁰ or at any regular stopping place,⁸¹ when signaled to do so. Likewise, it has been held reasonable to require conductors not to allow ladies or children to leave or enter cars while in motion.⁸²

It has been held that the regulating body may provide for the separation of races on the streetcars operated within the city.⁸³ Regulations may be promulgated in the interest of public health,⁸⁴ subject to the general requirement of reasonableness,⁸⁵ as for example a regulation providing for the fumigation of streetcars,⁸⁶ a regulation fixing the minimum temperature to be maintained in such cars,⁸⁷ or prohibiting smoking in streetcars.⁸⁸ A street railroad has been held not to be within a provision requiring drinking water to be kept on a railroad train.⁸⁹

Frequency of service. Regulations have been enacted or promulgated which prescribe the frequency with which cars shall run during hours of the day⁹⁰ or night,⁹¹ as by requiring that the cars be kept running regularly,⁹² or by requiring that a sufficient number of cars shall be run to accommodate the traveling public,⁹³ or to provide every passenger

(2) In such a proceeding testimony did not compel a finding that programs interfered substantially with conversation of passengers or with rights of communication constitutionally protected in public places.—Public Utilities Commission of District of Columbia v. Pollak, *supra*.

(3) Where commission found that radio reception was not an obstacle to safety of operation, that public comfort and convenience were not impaired, and that in fact the creation of better will among passengers tended to improve conditions under which the public rode, concluding that such installation and use were not inconsistent with public convenience, comfort, and safety, board was within its discretion in dismissing investigation.—Public Utilities Commission of District of Columbia v. Pollak, *supra*.

Appeal

Courts on review were expressly restricted to facts found by commission insofar as those findings did not appear to be unreasonable, arbitrary, or capricious.—Public Utilities Commission of District of Columbia v. Pollak, *supra*.

73. Ky.—Commonwealth v. South Covington & C. St. Ry. Co., 205 S. W. 581, 181 Ky. 459, 6 A.L.R. 118. 60 C.J. p 341 note 97.

74. N.Y.—New York v. New York, etc., R. Co., 85 N.Y.S. 857, 89 App. Div. 442. 60 C.J. p 341 note 98.

75. N.Y.—New York v. Interurban

St. R. Co., 86 N.Y.S. 673, 43 Misc. 29.

60 C.J. p 342 note 14.

76. N.Y.—New York v. Interurban St. R. Co., *supra*.

77. Mich.—People v. Detroit United R. Co., 118 N.W. 9, 154 Mich. 514. 60 C.J. p 342 note 16.

78. Tex.—Galveston-Houston Electric Ry. Co. v. Jewish Literary Society, Civ.App., 192 S.W. 324. 60 C.J. p 343 note 18.

79. Mich.—People v. Detroit United Ry. Co., 173 N.W. 396, 207 Mich. 143. 60 C.J. p 343 note 19.

80. Mich.—Ross Tp. v. Michigan United Rys. Co., 130 N.W. 358, 165 Mich. 28, Ann.Cas.1912C 885. 60 C.J. p 343 note 20.

81. Ohio.—Lockyear v. Covert, 25 Ohio Cir.Ct. 486. 60 C.J. p 343 note 21.

82. Mo.—McHugh v. St. Louis Transit Co., 88 S.W. 853, 190 Mo. 85. 60 C.J. p 343 note 22.

83. Ga.—Savannah Electric Co. v. Lowe, 108 S.E. 313, 27 Ga.App. 350. 60 C.J. p 343 note 24.

An interurban railroad, as distinguished from a street railroad, is within a statute requiring every railroad operating passenger cars or coaches over a track or line within the state to provide separate and equal accommodations.—South Covington, etc., R. Co. v. Commonwealth,

205 S.W. 603, 181 Ky. 449—51 C.J. p 1023 note 33.

84. Ky.—South Covington & C. R. Co. v. City of Covington, 143 S.W. 28, 146 Ky. 592, reversed on other grounds 35 S.Ct. 158, 235 U.S. 537, 59 L.Ed. 350, L.R.A.1915F 792.

85. Ky.—South Covington & C. R. Co. v. City of Covington, *supra*.

86. Ky.—South Covington & C. R. Co. v. City of Covington, *supra*.

87. Ill.—City of Chicago v. South Side Elevated R. Co., 183 Ill.App. 181. 60 C.J. p 344 note 28.

88. La.—State v. Heidenhain, 7 So. 621, 42 La. Ann. 483, 21 Am.S.R. 383.

89. Ala.—Dean v. State, 43 So. 24, 149 Ala. 34, 45 So. 651, 154 Ala. 77. 60 C.J. p 344 note 30.

90. Mich.—People v. Detroit Citizens' St. R. Co., 74 N.W. 520, 116 Mich. 132. 60 C.J. p 341 note 99.

91. N.Y.—New York v. Dry Dock, etc., R. Co., 30 N.E. 563, 133 N.Y. 104, 28 Am.S.R. 609—New York v. Union R. Co., 64 N.Y.S. 483, 31 Misc. 451.

92. Pa.—McKeesport v. Pittsburgh R. Co., 12 Pa. Dist. 541.

93. U.S.—Minneapolis St. R. Co. v. City of Minneapolis, C.C.Minn., 189 F. 445. 60 C.J. p 342 note 3.

from whom fare is demanded with a seat,⁹⁴ or so that persons desiring transportation shall not be kept waiting longer than a prescribed time.⁹⁵ Such a regulation must be reasonable,⁹⁶ the reasonableness of the regulation to be determined by considering whether it has been carried to the point where it has become confiscatory.⁹⁷ The question of reasonableness is one of fact,⁹⁸ the burden of proving unreasonableness being on the party asserting it.⁹⁹ In ascertaining the reasonableness of such an ordinance, the language of the charter requiring the cars to run as often as the convenience of passengers required may be considered,¹ but it is not controlling or decisive,² nor is its reasonableness controlled by considerations of the expense to the company.³

Duty of railroad. It is the common-law duty of a street railroad to provide reasonable accommodations⁴ for such a number of passengers as, in the exercise of ordinary care, it has reason to anticipate will demand to be carried.⁵

§ 165. — As to Carriage of Goods

A regulating body may make a regulation denying a street railroad the privilege of operating freight cars on its line.

A regulating body may make a regulation denying a street railroad the privilege of operating freight cars on its line.⁶

§ 166. — As to Employees

A regulatory body may have the power to authorize the operation of one-man streetcars.

It has been both affirmed⁷ and denied⁸ that the general power to regulate street railroads includes the power to designate the number of employees required for the operation of a streetcar. Regulatory bodies have been held to have the power to authorize the operation of one-man cars,⁹ and, where so authorized, the conditions surrounding the operation of such cars are subject to regulation.¹⁰ In any event, the right under the police power to require two-men, or prohibit one-man, streetcars, exists only when necessary to the safety and convenience of the public,¹¹ and whether such a requirement is reasonably adapted to protect the public safety depends on the facts of each case.¹² Regulations have been held reasonable which requires a street railroad company to have a conductor in charge of each car,¹³ or to have a driver or motorman and a conductor or other agent on each car to control the car

94. N.J.—North Jersey St. R. Co. v. Jersey City, 67 A. 1072, 75 N.J.Law 349.

95. N.J.—North Jersey St. R. Co. v. Jersey City, supra.

96. Wash.—Puget Sound Traction, Light & Power Co. v. Public Service Commission, 170 P. 1014, 100 Wash. 329, P.U.R.1918C 662, 5 A.L.R. 30.

60 C.J. p 342 note 7.

97. Wash.—City of Tacoma v. Bou-telle, 112 P. 661, 61 Wash. 434.

98. Wash.—City of Tacoma v. Bou-telle, supra.

99. Mich.—People v. Detroit Citizens' St. R. Co., 74 N.W. 520, 116 Mich. 132.

60 C.J. p 342 note 10.

1. N.Y.—New York v. Dry Dock, etc., R. Co., 30 N.E. 563, 133 N.Y. 104, 28 Am.S.R. 609.

2. N.Y.—New York v. Dry Dock, etc., R. Co., supra.

3. N.Y.—New York v. Dry Dock, etc., R. Co., supra.

4. Ky.—South Covington & C. R. Co. v. City of Covington, 143 S.W. 28, 146 Ky. 592, reversed on other grounds 35 S.Ct. 158, 235 U.S. 537, 59 L.Ed. 350, L.R.A.1915F 792.

5. Ky.—South Covington & C. R. Co. v. City of Covington, 143 S.W. 28, 146 Ky. 592, supra.

6. Mo.—St. Louis & M. R. R. Co. v. City of Kirkwood, 60 S.W. 110, 159 Mo. 239, 53 A.L.R. 300.

7. Cal.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

60 C.J. p 344 note 35.

8. N.Y.—Brooklyn Crosstown R. Co. v. Brooklyn, 37 Hun 413.

60 C.J. p 344 note 36.

9. Cal.—Los Angeles Ry. Corp. v. City of Los Angeles, 108 P.2d 430, 16 Cal.2d 779.

60 C.J. p 344 note 37.

Conflicting power of commission and municipality

(1) The regulation and operation of streetcars in city were a matter of general public concern and not a municipal affair within constitutional grant to chartered municipal corporations of complete autonomy with respect to municipal affairs, and, hence, initiative ordinance requiring two-man operation of streetcars, even if considered as a police regulation, was ineffective as against conflicting order, permitting one-man operation, of railroad commission which had paramount power in the matter and

whose order acquired force of law, and the decision of the commission was conclusive on court with respect to question of comparative safety of one-man or two-man operation.—Los Angeles Ry. Corp. v. City of Los Angeles, supra.

(2) Whether one-man cars shall be operated on traction lines, constituting unified service in several cities and counties, is not a municipal affair beyond railroad commission's control, even though such cars are operated over line wholly within one city only.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

10. N.Y.—Third Ave. Ry. Co. v. God-ley, 238 N.Y.S. 380, 227 App.Div. 568.

11. U.S.—Shreveport Rys. Co. v. City of Shreveport, D.C.La., 37 F.2d 910, affirmed, C.C.A., 38 F.2d 945, 69 A.L.R. 340, and certiorari denied 50 S.Ct. 462, 281 U.S. 763, 74 L.Ed. 1172.

60 C.J. p 344 note 39.

12. U.S.—Sullivan v. Shreveport, La., 40 S.Ct. 102, 251 U.S. 169, 64 L.Ed. 205.

60 C.J. p 344 note 40.

13. S.C.—State v. Sloan, 25 S.E. 898, 48 S.C. 21.

and passengers.¹⁴ Regulations which require conductors to be licensed have been held to be reasonable.¹⁵

§ 167. — As to Equipment of Cars

Within its powers, the regulating body may enact regulations which require a street railroad company to furnish its cars with such equipment as will tend to make their operation safer.

Within its powers, the regulating body may enact regulations which require a street railroad company to furnish its cars with such equipment as will tend to make their operation safer.¹⁶ Accordingly regulations have been enacted and held to be reasonable or valid which require proper and suitable fenders to be placed on the front of traction cars,¹⁷ which require headlights of designated strength to be carried,¹⁸ which require screens or vestibules on cars during the winter months to afford protection to the motormen and conductors,¹⁹ or which require every streetcar to be provided with a stool as a seat for the motorman.²⁰ It has also been held to be a reasonable regulation to require a street railroad company to equip its cars with air or electric brakes,²¹ unless it clearly appears that

there is no necessity for a more efficient brake than that already in use,²² or that neither an air nor electric brake is more efficient than the one in use.²³

Under the federal Safety Appliance Act, the section of the statute requiring automatic couplers applies to cars hauled by an electric locomotive on an interurban interstate railway,²⁴ but not to single self-propelled cars on such railways.²⁵ The provision of the act excepting from the requirement of automatic couplings cars "used upon street railways" is applicable only when the cars are in fact so used.²⁶

§ 168. — As to Movement and Speed of Cars

A regulating body may make reasonable regulations with respect to the movements and speed of streetcars.

It is within the power of the regulating body to make reasonable regulations with respect to the movements of streetcars,²⁷ as by requiring cars to stop at specified places,²⁸ such as before crossing intersecting streets,²⁹ or before reaching a rail-

14. U.S.—City and County of San Francisco v. Market Street Ry. Co., C.C.A.Cal., 98 F.2d 628, certiorari denied Market Street Ry. Co. v. City and County of San Francisco, 59 S.Ct. 357, 305 U.S. 657, 83 L.Ed. 426, rehearing denied 59 S.Ct. 460, 306 U.S. 667, 83 L.Ed. 1062.
60 C.J. p 345 note 42.

15. Mass.—Caswell v. Boston El. R. Co., 77 N.E. 380, 190 Mass. 527.
60 C.J. p 345 note 43.

16. S.C.—State v. Broad River Power Co., 164 S.E. 637, 166 S.C. 207.
60 C.J. p 345 note 45.

Condition for commission's determination

Objection that streetcars were unsatisfactory, leaked, and had flat wheels was for commission's determination, and could not be urged in opposition to entering satisfaction of judgment requiring operation of transportation system.—State v. Broad River Power Co., supra.

17. La.—Handy v. New Orleans Public Service, 120 So. 271, 10 La.App. 72.
60 C.J. p 345 note 47.

18. Ga.—Rome Ry. & Light Co. v. King, 117 S.E. 464, 30 Ga.App. 231.
60 C.J. p 346 note 48.

Specified intensity under standard voltage

An order requiring a headlight of a specified constant intensity under use of the standard voltage on an interurban electric railroad does not require a fixed intensity irrespective of such standard voltage, the requirement being merely that the headlight mechanism should be capable of affording the specified intensity.—Terre Haute, etc., Tract. Co. v. Puckett, 158 N.E. 639, 94 Ind.App. 576.

19. D.C.—Washington Ry. & Electric Co. v. District of Columbia, 10 F.2d 999, 56 App.D.C. 134.
60 C.J. p 346 note 49.

20. Ky.—Silva v. City of Newport, 150 S.W. 1024, 150 Ky. 781, 42 L.R. A., N.S., 1060, Ann.Cas.1914D 613.

21. Mich.—People v. Detroit United R. Co., 97 N.W. 36, 134 Mich. 682, 104 Am.S.R. 626, 63 L.R.A. 746.
60 C.J. p 346 note 51.

22. Mich.—People v. Detroit United R. Co., supra.
60 C.J. p 347 note 52.

23. Mich.—People v. Detroit United R. Co., supra.

24. U.S.—International R. Co. v. U. S., N.Y., 238 F. 317, 151 C.C.A. 333.
51 C.J. p 1029 note 32.

25. U.S.—International R. Co. v. U. S., supra.
51 C.J. p 1030 note 33.

26. U.S.—Spokane, etc., R. Co. v. U. S., Wash., 36 S.Ct. 668, 241 U.S. 344, 60 L.Ed. 1037.
51 C.J. p 1030 note 34.

27. Cal.—Wright v. Los Angeles Ry. Corporation, 93 P.2d 135, 14 Cal.2d 168.

Pa.—Reading St. Ry. Co. v. Stump, Com.Pl., 39 Berks Co. 261.

28. Minn.—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205.
60 C.J. p 347 note 57.

Ordinance held repealed

Minn.—LeVasseur v. Minneapolis St. Ry. Co., supra.

29. N.J.—Cape May, etc., R. Co. v. Cape May, 36 A. 678, 59 N.J.Law 404, 36 L.R.A. 657.
60 C.J. p 347 note 58.

Interurban railways

An ordinance regulating the stoppage at street intersections, of cars on railways using the streets, does not apply to an interurban railway operating along its own right of way and incidentally crossing streets.—Excelsior v. Minneapolis, etc., R. Co., 122 N.W. 486, 108 Minn. 407, 133 Am. S.R. 455, 24 L.R.A., N.S., 1035, 17 Ann. Cas. 550—51 C.J. p 1021 note 94.

road crossing,³⁰ and not to proceed until it has been ascertained that the way is clear;³¹ or prohibiting motormen from moving cars across the tracks of a steam railroad until the conductor crosses the tracks and signals the motorman to proceed;³² The regulating body may also make reasonable regulations prohibiting the starting of an elevated train until all persons on the platform, desiring to do so, have entered;³³ or requiring that a car shall not pass any other car standing at a crossing for the discharge or reception of passengers;³⁴ or that it shall slacken speed when approaching such a car;³⁵ or requiring a streetcar to stop on the approach of fire apparatus responding to a fire alarm call;³⁶ or requiring a streetcar entering a public square to turn to the right and pass around it.³⁷

In addition, the regulating body may make reasonable regulations limiting the rate of speed at which cars may be run within municipal limits³⁸ or in designated parts of the municipality.³⁹ It has been held, however, that a regulation as to speed enacted in former years, when the motive power and other conditions were different, does not apply

to company operating in later years by a different motive power and under different conditions.⁴⁰ The law of the road as applied to vehicles on highways generally, and particularly as to motor vehicles, does not apply to street railways in so far as compliance therewith by a streetcar is impossible.⁴¹ An ordinance may give a streetcar the right of way at a crossing.⁴² A regulation as to the movement of streetcars which, although intended to relieve traffic conditions, has the effect of excluding the railroad from a street and thereby crippling its line is invalid,⁴³ even though the city has reserved in the franchise a right to regulate the operation of the railway upon such street.⁴⁴

§ 169. — As to Signals and Lookouts

Regulations which require streetcars to have signal lights and warning devices, and which require that the persons in charge shall keep a vigilant lookout have been held reasonable.

Regulations which have been held reasonable include those requiring streetcars to have signal lights on the front and rear,⁴⁵ or a good and sufficient headlight at certain hours;⁴⁶ and requiring suitable

30. Ala.—Montgomery St. R. Co. v. Lewis, 41 So. 736, 148 Ala. 134. 60 C.J. p 347 note 59.

31. Ala.—Montgomery St. R. Co. v. Lewis, supra.
Mich.—Philip v. Heraty, 97 N.W. 963, 100 N.W. 186, 135 Mich. 446.

32. Wis.—Bartholmaus v. Milwaukee Electric R., etc., Co., 109 N.W. 143, 129 Wis. 373. 60 C.J. p 347 note 61.

33. U.S.—Lauterer v. Manhattan R. Co., N.Y., 63 C.C.A. 38, 128 F. 540. 60 C.J. p 347 note 62.

34. N.Y.—Craven v. International R. Co., 91 N.Y.S. 625, 100 App.Div. 157. 60 C.J. p 347 note 63.

35. U.S.—Detroit United R. Co. v. Nichols, Mich., 91 C.C.A. 257, 165 F. 289.

36. Minn.—McCabe v. Duluth St. Ry. Co., 220 N.W. 182, 175 Minn. 122. 60 C.J. p 347 note 65.

37. Pa.—City of Easton v. Miller, 108 A. 262, 265 Pa. 25. 60 C.J. p 347 note 66.

38. Cal.—Wright v. Los Angeles Ry. Corporation, 93 P.2d 135, 14 Cal.2d 168.

Ind.—Bonham v. Citizens' St. R. Co., 62 N.E. 996, 158 Ind. 106.

Mo.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

W.Va.—Wheeling, etc., R. Co. v. Triadelphia, 52 S.E. 499, 58 W.Va. 499, 4 L.R.A., N.S., 321. 60 C.J. p 348 note 67.

Speed of vehicles

As a general rule regulations with respect to the speed of vehicles do not apply to streetcars.

Ga.—Georgia Power Co. v. Clark, 25 S.E.2d 91, 69 Ga.App. 273—Kirk v. Savannah Electric & Power Co., 178 S.E. 470, 50 Ga.App. 468.

Tex.—Northern Texas Traction Co. v. Weed, Civ.App., 297 S.W. 534, reversed on other grounds, Com.App., 300 S.W. 41.

60 C.J. p 348 note 67 [d].

39. Mo.—Petty v. Kansas City Public Service Co., 198 S.W.2d 684, 355 Mo. 824.

60 C.J. p 349 note 68.

Congested or business districts

An ordinance prescribing speed limits of streetcars in congested district was not in conflict with, or impliedly repealed by, a later ordinance prescribing a different speed limit for streetcars in a business district.—Petty v. Kansas City Public Service Co., supra.

Intersection

Condition imposed by commission, when it made a resolution giving corporation which operated interurban electric trains permission to connect track circuits with traffic control

system at certain intersection in city, that trains should not exceed a certain speed at intersection, although not embodied in resolution, was binding on corporation.—Holder v. Key System, 200 P.2d 98, 88 Cal.App.2d 925.

40. Ind.—Bonham v. Citizens' St. R. Co., 62 N.E. 996, 158 Ind. 106. 60 C.J. p 349 note 69.

Repeal of ordinance held not implied N.Y.—Martineau v. Rochester R. Co., 30 N.Y.S. 778, 81 Hun 263, affirmed 41 N.E. 90, 146 N.Y. 376. 43 C.J. p 566 note 42.

41. Pa.—Valley Rys. v. City of Harrisburg, 124 A. 644, 280 Pa. 385. 60 C.J. p 350 note 74.

42. Tex.—Havins v. Dallas Railway & Terminal Co., Civ.App., 130 S.W. 2d 878, error refused.

43. Pa.—Valley Rys. v. City of Harrisburg, 124 A. 644, 280 Pa. 385. 60 C.J. p 349 note 70.

44. Pa.—Valley Rys. v. City of Harrisburg, supra. 60 C.J. p 349 note 71.

45. Mich.—McGee v. Consolidated St. R. Co., 60 N.W. 293, 102 Mich. 107, 47 Am.S.R. 507, 26 L.R.A. 300. 60 C.J. p 350 note 76.

46. Tex.—San Antonio St. R. Co. v. Mechler, Civ.App., 29 S.W. 202, affirmed 30 S.W. 899, 87 Tex. 628.

and seasonable warning to be given of the approach of streetcars to crossings,⁴⁷ as by requiring the cars to be provided with suitable gongs or bells which shall be sounded before reaching crossings of streets,⁴⁸ or steam railroads,⁴⁹ or when approaching other vehicles,⁵⁰ or when the streetcar is about to pass another car going in the opposite direction at a point where it is permissible for passengers to alight from or to board a car.⁵¹

Lookouts; vigilance. When within the powers of the regulatory body⁵² regulations have been held valid which require the persons in charge of a streetcar to exercise due care with respect to keeping a lookout,⁵³ or which require that the persons in charge of a streetcar shall keep a vigilant lookout for obstructions on the track,⁵⁴ or for teams and persons on foot, especially children either on the tracks or moving toward them,⁵⁵ and shall stop the car in the shortest time and space possible,⁵⁶ on the first appearance of any obstruction⁵⁷ or on the first appearance of danger to a team, person, or vehicle.⁵⁸ Such a regulation is not extraordinary or unreasonable,⁵⁹ even though the care required

under it is greater than that imposed on the street railroad by the common law;⁶⁰ nor is it unreasonable in requiring to stop on the first sign of danger,⁶¹ or in requiring the stopping without specifying that due regard for the safety of passengers be taken.⁶² Similarly, regulations have been held reasonable which require persons in charge of a streetcar to exercise all possible care and vigilance on approaching a curve,⁶³ or another car which has stopped for the purpose of receiving or letting off passengers⁶⁴ or for any other purpose,⁶⁵ since those in charge of the approaching car are in absolute control thereof.⁶⁶

Interurban railroads. An interurban railroad is under a duty to give such signals as are required by the exercise of due care under the circumstances involved.⁶⁷ Ordinarily, signal statutes in terms applicable only to steam railroads do not apply to electric interurban railroads.⁶⁸ Where, however, there are other statutes making electric roads subject to the same duties as steam roads, the former are within signal provisions;⁶⁹ and, where an electric interurban railway is obligated to equip its cars with

47. Colo.—Denver City Tramway Co. v. Martin, 98 P. 836, 44 Colo. 324. 60 C.J. p 350 note 78.

General regulation

City ordinance requiring driver of a vehicle making a turn to left to extend his arm outward at full length from his body at right angles did not apply to streetcar.—Flanagan v. Oklahoma Ry. Co., 206 P.2d 190, 201 Okl. 362.

48. Cal.—Schneider v. Market St. R. Co., 66 P. 734, 134 Cal. 482. 60 C.J. p 350 note 79.

49. Tex.—Gulf, etc., R. Co. v. Holt, 70 S.W. 591, 30 Tex.Civ.App. 330.

50. Mo.—Hale v. St. Joseph Ry., Light, Heat & Power Co., 230 S.W. 113, 287 Mo. 499. 60 C.J. p 350 note 81.

51. Mo.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

52. Tex.—Dallas Ry. & Terminal Co. v. Bankston, Civ.App., 33 S.W.2d 500, reversed on other grounds, Com.App., 51 S.W.2d 304. 60 C.J. p 350 note 83.

53. Tex.—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W.2d 884, affirmed 114 S.W.2d 859, 131 Tex. 319.

Ordinance defining "due care" as that which person of ordinary prudence would use in same or similar

circumstances was valid and merely declaratory of common law.—Dallas Railway & Terminal Co. v. Price, supra.

54. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982. Tex.—Dallas Ry. & Terminal Co. v. Bankston, Com.App., 51 S.W.2d 304. 60 C.J. p 350 note 84.

55. Mass.—Caswell v. Boston El. R. Co., 77 N.E. 380, 190 Mass. 527. 60 C.J. p 350 note 85.

56. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982. 60 C.J. p 350 note 86.

Degree of care

In determining whether ordinance requiring motormen to stop car "in shortest time and space possible" on appearance of danger is invalid as exacting higher degree of care than common-law rule of ordinary care, ordinance should be considered with rule with respect to care to passengers, and the ordinance is not invalid as exacting a higher degree of care than common-law rule of ordinary care, and is sufficiently specific.—Dallas Ry. & Terminal Co. v. Bankston, Tex.Com.App., 51 S.W.2d 304.

57. Minn.—Gray v. St. Paul City R. Co., 91 N.W. 1106, 87 Minn. 280. Mo.—Murphy v. Lindell R. Co., 54 S. W. 442, 153 Mo. 252.

58. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982. 60 C.J. p 350 note 88.

59. Mo.—State ex rel. Vogt v. Reynolds, 244 S.W. 929, 295 Mo. 375. 60 C.J. p 351 note 89.

60. Tex.—Dallas Ry. & Terminal Co. v. Bankston, Civ.App., 33 S.W.2d 500, reversed on other grounds, Com.App., 51 S.W.2d 304. 60 C.J. p 351 note 90.

61. Tenn.—Memphis St. Ry. Co. v. Haynes, 81 S.W. 374, 112 Tenn. 712.

62. Minn.—Gray v. St. Paul City Ry. Co., 91 N.W. 1106, 87 Minn. 280. Mo.—Spencer v. St. Louis Transit Co., 121 S.W. 108, 222 Mo. 310.

63. Ohio.—Leis v. Cleveland Ry. Co., 128 N.E. 73, 101 Ohio St. 162. 60 C.J. p 351 note 95.

64. Ohio.—Leis v. Cleveland Ry. Co., supra.

65. Ohio.—Leis v. Cleveland Ry. Co., supra.

66. Ohio.—Leis v. Cleveland Ry. Co., supra.

67. Ala.—Birmingham R. Light, etc., Co. v. Ozburn, 56 So. 599, 4 Ala.App. 399. 51 C.J. p 1041 note 1.

68. Ill.—Kammann v. St. Louis, etc., R. Co., 173 Ill.App. 277. 51 C.J. p 1044 note 80.

69. Utah.—Shortino v. Salt Lake, etc., R. Co., 174 P. 860, 52 Utah 476.

51 C.J. p 1044 note 81.

signalling devices ordinarily used only by steam engines, or the equivalent of such devices, it must obey the statutory requirements as to operation of such devices.⁷⁰ Under a statute imposing the duties of blowing the whistle or ringing the bell in certain designated situations on "the engineer or other person having the control of the running of a locomotive on any railroad," the statutory duty does not exist with respect to an electric railroad.⁷¹ Where the statute requires signals to be sounded by a railroad train at a specified distance from a crossing, it has been held that the statutory duty is inapplicable to a single electric car run on an interurban railroad.⁷² A general lookout statute is applicable to electric interurban railroads.⁷³

§ 170. — As to Roadbed and Tracks

The regulating body may enact reasonable regulations with respect to the condition of the roadbed and tracks of a street railroad company.

The regulating body may enact reasonable regulations with respect to the condition of the roadbed and tracks of a street railroad company,⁷⁴ as by requiring that it shall sprinkle or water its tracks, so as to lay the dust,⁷⁵ clean the streets between its rails,⁷⁶ or keep the tracks free from ice and snow;⁷⁷ or by granting the right to sprinkle sand on the tracks during a certain season;⁷⁸ or by prohibiting the placing of salt on the tracks except at certain

places.⁷⁹ Reasonable regulations may also be enacted requiring street railroad companies to make changes in roadbeds, where required by the improved conditions of the street.⁸⁰

Fencing right of way. A statutory regulation requiring the right of way of a railroad to be fenced, even if otherwise applicable, does not apply to the tracks of a street railroad along a public highway,⁸¹ but an interurban railroad comes within the terms of a statute requiring railroads to fence their tracks passing through cultivated fields, even though such railroad also operates over a public road.⁸²

Lighting streets. Regulations have been promulgated requiring street railways to light the streets along which its cars operate.⁸³

§ 171. Rules and Regulations of Company

In the absence of a statute or ordinance to the contrary, a street railroad company has the right, and is under a duty, to adopt reasonable rules and regulations with respect to the conduct of its business and the running of its cars.

In the absence of a statute or ordinance to the contrary,⁸⁴ a street railroad company has the right,⁸⁵ and is under a duty,⁸⁶ to adopt reasonable rules and regulations with respect to the conduct of its business and the running of its cars, both for the safety and comfort of its passengers,⁸⁷ and for

70. Iowa.—Swisher v. Interurban R. Co., 130 N.W. 404, 151 Iowa 384, 388.

51 C.J. p 1044 note 83.

71. Ala.—Birmingham R. Light, etc., Co. v. Ozburn, 56 So. 599, 4 Ala.App. 399.

60 C.J. p 350 note 78 [a]—51 C.J. p 1044 note 85.

72. Mo.—Hudson v. Southwest Missouri R. Co., 159 S.W. 9, 173 Mo. App. 611.

51 C.J. p 1045 note 87.

73. Ark.—Ft. Smith Light, etc., Co. v. Phillips, 206 S.W. 453, 136 Ark. 310.

74. Mass.—Hawkes v. Metropolitan Transit Authority, 102 N.E.2d 409, 328 Mass. 140.

60 C.J. p 351 note 2.

75. Minn.—City of St. Paul v. St. Paul City Ry. Co., 130 N.W. 1108, 114 Minn. 250, 36 L.R.A., N.S., 235, Ann.Cas.1912B 1136.

60 C.J. p 351 note 3.

76. Ill.—Chicago v. Chicago Union Traction Co., 65 N.E. 243, 199 Ill. 259, 59 L.R.A. 666.

60 C.J. p 352 note 4.

77. N.Y.—Broadway, etc., R. Co. v. New York, 1 N.Y.S. 646, 49 Hun 126.

60 C.J. p 352 note 5.

78. N.Y.—Dry Dock, etc., R. Co. v. New York, 47 Hun 221.

60 C.J. p 352 note 6.

79. N.J.—Consolidated Traction Co. v. Elizabeth, 34 A. 146, 58 N.J.Law 619, 32 L.R.A. 170.

60 C.J. p 352 note 7.

80. Ill.—People v. Chicago City Ry. Co., 155 N.E. 781, 324 Ill. 618.

Relocation

Contract under which street railroad occupied streets was subject to power of municipality to compel relocation of tracks for public convenience, and approval of location of tracks did not estop city to demand relocation.—People v. Chicago City Ry. Co., supra.

81. Wis.—Henke v. Milwaukee Electric R. & Light Co., 133 N.W. 1107, 147 Wis. 661.

82. Mo.—Riggs v. St. Francois County R. Co., 96 S.W. 707, 120 Mo.App. 385.

60 C.J. p 352 note 10.

83. Mass.—Wellesley v. Boston, etc., R. Co., 74 N.E. 355, 188 Mass. 250.

60 C.J. p 352 note 12.

84. Ky.—Commonwealth v. South Covington & C. St. Ry. Co., 205 S. W. 581, 181 Ky. 459, 6 A.L.R. 118.

Mont.—Robinson v. Helena Light, etc., Co., 99 P. 837, 38 Mont. 222.

85. N.J.—Higbee v. Atlantic City & Shore R. Co., 32 A.2d 587, 130 N. J.Law 282.

60 C.J. p 353 note 19.

The purpose of the traffic act empowering a street railroad company to establish certain street intersections or other points as regular stops is the avoidance of collisions and other hazards incident to movement of vehicles upon public streets and highways.—Higbee v. Atlantic City & Shore R. Co., supra.

86. N.Y.—Montgomery v. Buffalo Ry. Co., 58 N.E. 770, 165 N.Y. 139 —Ketchum v. New York City R. Co., 103 N.Y.S. 486, 118 App.Div. 248.

87. N.Y.—Montgomery v. Buffalo Ry. Co., 58 N.E. 770, 165 N.Y. 139 —Ketchum v. New York City R.

its own protection;⁸⁸ but in some jurisdictions the approval of a designated board is required before rules and regulations by the company may be put into effect.⁸⁹ Among regulations which have been adopted by the company and upheld are those limiting the number of passengers that may ride on a car at any one time,⁹⁰ those prohibiting passengers from riding on platforms of its cars,⁹¹ and those designating the stopping places for its cars,⁹² and prohibiting persons to board its cars until they have come to a stop at the designated stopping place.⁹³ The company may not promulgate and enforce rules which are arbitrary and illegal;⁹⁴ nor can it avoid the requirements of a statute under color of its right to make and enforce reasonable rules and regulations for the conduct of its business.⁹⁵

§ 172. Penalties for Violation of Regulations

A penalty may be imposed for a violation of a valid regulation by a streetcar company or its employees.

In order to enforce regulations promulgated or enacted by the regulating body, penalties have been frequently provided for violations thereof by the

company or its employees,⁹⁶ recoverable in many instances by an action against the offending railway company.⁹⁷

§ 173. Acceptance of Regulations

A street railroad company need not accept a reasonable regulation in order to make it binding on the company.

A reasonable regulation of a regulatory body is binding on a street railroad company whether or not accepted by the company.⁹⁸

§ 174. License Fees and Taxes

The legislature or municipal government may impose a fee or tax on a street railroad company.

A fee or tax imposed by the legislature or by the municipal government may consist of a fixed fee for each car operated,⁹⁹ of a certain percentage of the annual earnings of the company,¹ or both;² or it may consist of a fixed sum to be paid annually,³ in some instances for each mile of railroad

Co., 103 N.Y.S. 486, 118 App.Div. 248.

88. N.Y.—Ketchum v. New York City R. Co., *supra*.

89. Wash.—McGilvra v. Seattle Electric Co., 111 P. 896, 61 Wash. 38, Ann.Cas.1912B 1020. 60 C.J. p 353 note 23.

90. Ky.—Commonwealth v. South Covington & C. St. Ry. Co., 205 S. W. 581, 181 Ky. 459, 6 A.L.R. 118.

91. N.Y.—Montgomery v. Buffalo Ry. Co., 58 N.E. 770, 165 N.Y. 139.

92. Mo.—Lesser v. St. Louis, etc., R. Co., 85 Mo.App. 326. 60 C.J. p 354 note 26.

93. Mo.—Lesser v. St. Louis, etc., Ry. Co., *supra*. 60 C.J. p 354 note 27.

94. N.Y.—Jenkins v. Brooklyn Heights R. Co., 51 N.Y.S. 216, 29 App.Div. 8, 5 N.Y. Ann.Cas. 315, reargument denied 51 N.Y.S. 868, 30 App.Div. 622.

95. N.Y.—Charbonneau v. Nassau Electric R. Co., 108 N.Y.S. 105, 123 App.Div. 531.

96. N.Y.—Levine v. Interborough Rapid Transit Co., 257 N.Y.S. 616, 143 Misc. 896. 60 C.J. p 353 note 14.

Intent

Under law penalizing common carrier officers violating orders of Public

Service Commission, defendant's intent is immaterial.—People v. Dempsey, 167 N.Y.S. 810, 180 App.Div. 765, affirmed 120 N.E. 145, 224 N.Y. 140.

Subway trains

Provision for penalty for violation of regulations as to stopping and maintaining gates or vestibule doors was applicable to subway trains.—Levine v. Interborough Rapid Transit Co., 257 N.Y.S. 616, 143 Misc. 896.

97. N.Y.—Levine v. Interborough Rapid Transit Co., *supra*. 60 C.J. p 353 note 15.

Pleading

Injured passenger did not establish case for imposition of penalty on railroad, where petition merely alleged car door was not held open by catch or spring.—Levine v. Interborough Rapid Transit Co., *supra*.

Burden of proof

Injured passenger has burden, on application for order directing payment of penalty, to show that railroad violated statute.—Levine v. Interborough Rapid Transit Co., 257 N.Y.S. 616, 143 Misc. 896.

98. Mo.—Meyers v. St. Louis Transit Co., 78 S.W. 379, 99 Mo.App. 363. 60 C.J. p 350 note 85 [a].

99. Ill.—City of Chicago v. Chicago & O. P. E. R. Co., 104 N.E. 240, 261 Ill. 478. 60 C.J. p 358 note 74—26 C.J. p 1034 note 18 [a].

1. Ariz.—City of Phoenix v. Moore, 113 P.2d 935, 57 Ariz. 350. 60 C.J. p 358 note 75.

Substitution of busses

A utilities company which had materially reduced its street railroad track mileage and had substituted busses with mileage in excess of original track mileage, was not, with respect to its bus lines, engaged in operating a "street railroad" within statute making street railroad corporation subject to gross receipts tax.—State v. York Utilities Co., 45 A.2d 634, 142 Me. 40.

Passengers exempt from sales tax

An amended statute, which after imposition of tax on services of common carriers and other utilities, provides that tax shall not apply to interstate movements of freight and express or to street railway fares, exempts passengers using different kind of vehicles employed in street railway system, such as trolley coaches and gasoline busses, from payment of tax.—Utah Light & Traction Co. v. State Tax Commission of Utah, 68 P.2d 759, 92 Utah 404.

2. N.Y.—New York v. Dry Dock, etc., R. Co., 19 N.E. 420, 112 N.Y. 137. 60 C.J. p 359 note 76.

3. Ala.—Anniston Electric & Gas Co. v. State, 67 So. 843, 12 Ala.App. 624. 60 C.J. p 359 note 77.

constructed,⁴ or of a fixed sum for every passenger carried,⁵ or it may consist of a tax or fee based on both mileage and earnings.⁶ Under some provisions the license tax on the earnings of a street railroad company attaches to the earnings of the entire line, including that part which extends beyond the city limits,⁷ but under other provisions it is otherwise.⁸ An agreement that a street railroad company shall pay a certain per cent of its net income in such manner as the "legislature may thereafter direct" does not fix any obligation on the company to pay such amount, until the legislature by further legislation directs the manner of payment.⁹

§ 175. — Power and Right to Tax

The business of operating a street railroad is one which may properly be subjected to the payment of a license fee or tax, and the amount of such fee or tax should be reasonable.

The business of operating a street railroad is one which may properly be subjected to the payment of a license fee or tax,¹⁰ which is a fee or tax exacted in exchange for the privilege of operating cars upon streets subject to the control of the munici-

pality;¹¹ and, in the absence of any contract provision between the municipality and the company,¹² a street railroad company is not exempted from the payment of such fee or tax by the mere fact that it has been granted an exclusive right over the streets,¹³ or by the fact that its property is taxed on an ad valorem basis;¹⁴ nor does the payment of a license fee or tax exempt the company from the payment of an ad valorem tax on its property;¹⁵ nor does the imposition of such a license tax and a tax on the property of the railway constitute double taxation in violation of constitutional prohibitions.¹⁶ On the other hand, a statute imposing a general corporate or privilege tax on corporations, not otherwise specifically required to pay a license tax, does not apply to a street railroad which has paid a license tax under the terms of another statute.¹⁷

In the absence of constitutional restrictions, such fee or tax may be imposed directly by the legislature,¹⁸ or the legislature may delegate such authority to the municipality,¹⁹ pursuant to, and in conformity with, which authority the municipality may act.²⁰

4. Ill.—Chicago Gen. R. Co. v. Chicago, 52 N.E. 880, 176 Ill. 253, 68 Am.S.R. 188, 66 L.R.A. 959.
60 C.J. p 359 note 78.

5. Mo.—City of St. Louis v. United Rys. Co. of St. Louis, 174 S.W. 110, 263 Mo. 508, error dismissed 36 S.Ct. 550, 241 U.S. 647, 60 L.Ed. 1220.
60 C.J. p 359 note 79.

6. Tex.—Dallas Consol. Electric St. Ry. Co. v. State, Civ.App., 118 S.W. 879, affirmed 120 S.W. 997, 102 Tex. 570.
60 C.J. p 359 note 80.

7. Ohio.—Cincinnati v. Mt. Auburn Cable R. Co., 11 Ohio Dec., Reprint, 667, 28 Cinc.L.Bul. 276.
60 C.J. p 359 note 81.

8. Md.—Baltimore Union Pass. R. Co. v. Baltimore, 18 A. 917, 71 Md. 405.
60 C.J. p 359 note 82.

9. N.Y.—New York v. Manhattan R. Co., 37 N.E. 494, 143 N.Y. 1.
60 C.J. p 359 note 83.

10. Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 904, 94 L.Ed. 1335.
60 C.J. p 354 note 31.

Trackless trolleys

(1) Companies transporting passengers by means of gasoline motor-busses and trackless trolley busses were not street railroad companies and, hence, were not taxable under statutes relating to public utilities. —Akron Transp. Co. v. Glander, 99 N.E.2d 493, 155 Ohio St. 471.

(2) The statute relating to licensing of vehicles discloses legislative intent to tax all vehicles within definition of a "street and suburban bus" notwithstanding some vehicles, such as trackless trolley coaches, do not come within classification of motor vehicles, trailers, or semitrailers. —Dallas Ry. & Terminal Co. v. Gentle, Tex.Civ.App., 218 S.W.2d 259, error refused.

(3) Electrically operated trackless trolley coaches were properly subjected to registration and license fees under the statute as "street and suburban busses;" and an electrically operated trackless trolley coach is not within the exemption from registration in favor of vehicles merely operating across a highway or in favor of certain implements of husbandry. —Dallas Ry. & Terminal Co. v. Gentle, supra.

11. U.S.—People of State of New York ex rel. Brooklyn City R. Co. v. State Board of Tax Com'rs, N.

Y., 25 S.Ct. 713, 199 U.S. 48, 50 L. Ed. 79.

60 C.J. p 354 note 32.

12. La.—New Orleans v. Orleans R. Co., 7 So. 59, 42 La. Ann. 4, 21 Am. S.R. 365.

60 C.J. p 354 note 33.

13. Iowa.—State v. Herod, 29 Iowa 123.

60 C.J. p 354 note 34.

14. Mo.—Kansas City v. Corrigan, 18 Mo.App. 206.

15. Mich.—Detroit United R. Co. v. State Tax Com'rs, 98 N.W. 997, 136 Mich. 96.

60 C.J. p 354 note 36.

16. Va.—Newport News, etc., R. etc., Co. v. Newport News, 46 S.E. 645, 100 Va. 157.

17. Ala.—Montgomery Traction Co. v. State, 44 So. 541, 150 Ala. 664.

18. Miss.—Gulfport & M. C. Traction Co. v. City of Biloxi, 88 So. 173, 125 Miss. 626.

60 C.J. p 354 note 39.

19. Colo.—Denver City R. Co. v. Denver, 41 P. 326, 21 Colo. 350, 52 Am.S.R. 239, 29 L.R.A. 608.

60 C.J. p 355 note 40.

20. Va.—Newport News, etc., R. etc., Co. v. Newport News, 40 S.E. 645, 100 Va. 157.

60 C.J. p 355 note 42.

A municipality cannot impose a license fee or tax which affects existing rights;²¹ but a contract conferring the right to operate a street railroad without dispensing with the payment of a license is not impaired by the exaction of such a license,²² and, where the grant is for a term of years on payment of a stated license fee, the company is not liable for such fee after the term has expired, without a renewal.²³ A license tax may be imposed by a municipality on a street railroad company, on the business done in such municipality, although the lines of the company extend beyond the municipal limits,²⁴ but not in so far as the street railroad does an interurban business similar to that of steam railroads;²⁵ and it has been held that such a tax cannot be imposed on a company which does not occupy a street subject to the control of the municipality, although it is within the municipal limits,²⁶ as where its tracks are located only upon private property or turnpike roads acquired by the company by purchase or condemnation.²⁷

License fee or tax as condition to grant or consent. Under its power to grant or consent to the construction and operation of a street railroad in the streets, a municipality may, as a condition to such grant or consent, require that the company shall pay a license fee or tax;²⁸ and if the company accepts the grant burdened with such a con-

dition, it accepts also the condition and makes a complete and valid contract with respect to the license fee or tax imposed,²⁹ although other companies operating cars in the same municipality are required to pay lower fees.³⁰ Where there are constitutional prohibitions against a municipality granting exemptions from taxation, the municipality has no power to contract that a specified license tax to be paid by the railway shall be in lieu of all taxes other than ad valorem taxes on its realty and personalty.³¹

The liability for such fee or tax attaches to a successor or lessee company which acquires the lines and assumes the obligations of the company to which the grant was made,³² the liability thus attaching in some jurisdictions, even though the lease is silent with respect thereto;³³ in the latter case the liability of the lessee for the license tax attaches only as to that accruing subsequent to the lease but not as to fees which have accrued against the lessor prior to the lease.³⁴

Purpose of fee or tax. Although it has been stated that, under its general police power, a municipality has no power to impose a license fee on cars of a company operating under an existing franchise,³⁵ it is more generally held that a municipality may, under its general police powers, impose

21. Ohio.—City of Cincinnati v. Cincinnati St. Ry. Co., 187 N.E. 312, 45 Ohio App. 511.
60 C.J. p 356 note 52.

Injunction

Street railway was entitled to injunction restraining city from enforcement of license ordinance against it, under persistent threat of prosecution, where such ordinance violated contractual rights of company under franchise.—City of Cincinnati v. Cincinnati St. Ry. Co., supra.

Duress

Street railway could recover from city license tax paid under duress, where city had no authority to impose such tax, but could not recover interest thereon.—City of Cincinnati v. Cincinnati St. Ry. Co., supra.

Discrimination

Fact that one city exacts, for privilege of operating street railway, percentage on gross receipts, while another city does not, does not constitute undue discrimination in favor of one locality and against the other.—City of Seattle v. Puget Sound Traction, Light & Power Co., 174 P. 464, 103 Wash. 41.

22. Kan.—Wyandotte v. Corrigan, 10 P. 99, 35 Kan. 21.

La.—New Orleans v. New Orleans City, etc., R. Co., 4 So. 512, 40 La. Ann. 587, affirmed 12 S.Ct. 406, 143 U.S. 192, 36 L.Ed. 121.

23. Ohio.—Cincinnati Inclined Plane R. Co. v. Cincinnati, 44 N.E. 327, 52 Ohio St. 609.

24. Ill.—City of Canton v. Illinois Cent. Electric Ry., 111 N.E. 1007, 272 Ill. 306.
60 C.J. p 356 note 55.

25. Ill.—City of Canton v. Illinois Cent. Electric Ry., 111 N.E. 1007, 272 Ill. 306.
Miss.—Gulfport & Mississippi Traction Co. v. Robertson, 92 So. 231, 129 Miss. 322.

26. Md.—Baltimore v. Baltimore, etc., R. Co., 35 A. 17, 84 Md. 1, 33 L.R.A. 503.

27. Md.—Baltimore v. United R., etc., Co., 68 A. 557, 107 Md. 250, 14 L.R.A., N.S., 805—Baltimore v. Baltimore, etc., R. Co., 35 A. 17, 84 Md. 1, 33 L.R.A. 503.

28. Ill.—Chicago General R. Co. v.

Chicago, 52 N.E. 880, 176 Ill. 253, 68 Am.S.R. 188, 66 L.R.A. 959.
60 C.J. p 355 note 43.

29. Pa.—City of McKeesport v. McKeesport & R. P. Ry. Co., 97 A. 184, 252 Pa. 142.
60 C.J. p 355 note 44.

30. Ill.—Byrne v. Chicago General R. Co., 48 N.E. 703, 169 Ill. 75.

31. Ky.—South Covington & C. St. Ry. Co. v. Henkel & Sullivan, 14 S.W.2d 1068, 228 Ky. 271.
60 C.J. p 355 note 47.

32. N.J.—Jersey City v. North Jersey St. R. Co., 61 A. 95, 72 N.J.Law 383—Jersey City v. Consolidated Traction Co., 57 A. 446, 70 N.J.Law 364.

33. N.Y.—Mayor, etc., of New York v. Twenty-Third St. Ry. Co., 21 N.E. 60, 113 N.Y. 311.
60 C.J. p 356 note 50.

34. N.Y.—City of New York v. Third Ave. R. Co., 79 N.Y.S. 431, 77 App. Div. 379.

35. N.Y.—City of New York v. New York City Ry. Co., 123 N.Y.S. 132, 138 App.Div. 131.

a license fee or tax on a street railroad company as a police regulation,³⁶ and if authorized by statute may impose such a tax as a source of municipal revenue;³⁷ but it cannot impose a license tax for purposes of revenue as a police regulation or under a general power to license and regulate,³⁸ although, if the sum charged as a police regulation is a reasonable one, the fact that it incidentally increases the revenue of the municipal treasury will not invalidate it.³⁹

Amount of fee or tax; reasonableness. Where the power of imposing such a license fee or tax is vested in the municipality, the amount thereof rests in the first instance within its discretion, and it may impose such fees or taxes as in its opinion the public interests require,⁴⁰ and it may from time to time, in its discretion, increase or diminish the amount of such fee or tax;⁴¹ and, in the absence of abuse or fraud, the courts will not interfere with the exercise of such discretion.⁴²

The amount of such fee or tax, however, must be reasonable,⁴³ and, if there is a manifest abuse of discretion or fraud, the courts are justified in interfering.⁴⁴ The elements which enter into the reasonableness of such a fee or tax are the necessary or probable expenses incident to the issuing of

the license, and the probable expense of proper inspection, regulation, and police surveillance,⁴⁵ each case to be determined on its own facts;⁴⁶ the municipality may fix the amount of such fee in advance without waiting until the end of the period for which the license is granted,⁴⁷ and may make the charge large enough to carry any reasonable anticipated expense,⁴⁸ and such charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense.⁴⁹

§ 176. — Payment and Collection

The amount of tax to be paid by a street railroad company depends on the terms of the particular statute, ordinance, or franchise; and if a fee or tax is not paid when due, an action at law will lie for the recovery thereof.

The amount to be paid by a street railroad company depends on the terms of the particular statute, ordinance, or franchise,⁵⁰ and if any ambiguity exists therein as to the amount of the fee to be paid, the greater amount should be adopted.⁵¹ If such fee or tax is not paid when due, the tax bills bear interest like other taxes.⁵²

A municipality is not estopped to recover a license fee or tax by reason of the fact that it has failed for some years to assert its right thereto,⁵³

36. Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 904, 94 L.Ed. 1335.

60 C.J. p 356 note 60.

Police power purpose

Ordinance amending earlier street railroad franchise grant by increasing annual license fee for each car is subject to interpretation that it was intended to apply only to a proper police power purpose, and it is not invalid on ground that fee is intended for the purpose of defraying cost of services unrelated to any regulatory function under police power.—Minneapolis St. Ry. Co. v. City of Minneapolis, *supra*.

37. Colo.—Denver City R. Co. v. Denver, 41 P. 826, 21 Colo. 350, 52 Am.S.R. 239, 29 L.R.A. 608.

60 C.J. p 356 note 61.

38. Ill.—City of Chicago Heights v. Western Union Tel. Co., 94 N.E.2d 306, 406 Ill. 428.

60 C.J. p 356 note 62.

39. Pa.—Johnson v. Philadelphia, 60 Pa. 445.

40. Ill.—Byrne v. Chicago General R. Co., 48 N.E. 703, 169 Ill. 75.

60 C.J. p 357 note 64.

41. Wis.—State v. Hilbert, 39 N.W. 326, 72 Wis. 184.

Ordinance increasing annual license fee for each car is a valid exercise of police power, provided such increase is necessary to defray the reasonable cost of police power regulation, and ordinance does not impair any obligations of contract or deprive street railroad of property without due process of law in violation of either federal Constitution or state Constitution.—Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353, 229 Minn. 502, appeal dismissed 70 S.Ct. 574, 339 U.S. 904, 94 L.Ed. 1335.

42. Ill.—Byrne v. Chicago Gen. R. Co., 48 N.E. 703, 169 Ill. 75.

43. Minn.—Minneapolis St. Ry. Co. v. City of Minneapolis, 52 N.W.2d 120.

60 C.J. p 357 note 67.

44. Pa.—Gettysburg Borough v. Gettysburg Transit Co., 36 Pa.Super. 598.

60 C.J. p 357 note 68.

45. Colo.—Denver City R. Co. v. Denver, 41 P. 826, 21 Colo. 350, 52 Am.S.R. 239, 29 L.R.A. 608.

60 C.J. p 357 note 69.

46. Pa.—Dormont Borough v. West Liberty St. Ry. Co., 64 Pa.Super. 562.

47. Ohio.—Cincinnati St. R. Co. v. Cincinnati, 11 Ohio S. & C.P. 15, 8 Ohio N.P. 80.

Pa.—Gettysburg Borough v. Gettysburg Transit Co., 36 Pa.Super. 598.

48. Pa.—Gettysburg Borough v. Gettysburg Transit Co., *supra*.

49. Pa.—Gettysburg Borough v. Gettysburg Transit Co., *supra*.

50. N.Y.—New York v. Broadway, etc., R. Co., 97 N.Y. 275.

51. N.Y.—New York v. Broadway, etc., R. Co., *supra*.

60 C.J. p 360 note 86.

52. Ky.—Louisville v. Louisville R. Co., 81 S.W. 701, 118 Ky. 534, 26 Ky.L. 373, 84 S.W. 535, 27 Ky.L. 141.

53. Md.—Baltimore v. United R., etc., Co., 68 A. 557, 107 Md. 250, 14 L.R.A.N.S., 805.

N.J.—Jersey City v. North Jersey St. R. Co., 73 A. 609, 73 N.J.Law 72.

or by reason of the fact that for several years it has accepted a lesser amount than that due it,⁵⁴ or by the fact that it has neglected part of its supervisory duty during the year.⁵⁵ On the other hand, a railway company which has constructed a connecting road under statutory provision is not estopped to deny liability to pay the same percentage on its income as to such connecting route as it was liable to pay on its original route, because of having voluntarily made such payment, where the payment was not imposed by the commissioners as a condition of fixing the route and no statutory liability to pay exists.⁵⁶

Collection. Where the statute imposing the fee states that payment shall be made in such manner as it may thereafter direct, the legislature must be held distinctly to have refused to provide for payment in accordance with existing laws so that the city is not authorized to collect the compensation provided for in accordance with existing general provisions of law for the payment, receipt, and disbursement of the city revenues;⁵⁷ under such statute, the company cannot be placed in default because of a refusal to pay the compensation provided for until the legislature has given further directions providing for the time and manner of payment.⁵⁸

If the fee or tax is not paid when due, an action at law will lie for the recovery thereof,⁵⁹ in which case the rules as to penal actions or suits to recover a tax have no application.⁶⁰ The burden is on the tax collector to establish the basis for judgment in a suit to enforce the payment of a license tax.⁶¹ On the other hand, where a corporation comes within the terms of the statute imposing the tax, the burden is on the company to show its exemption from the tax where such is claimed.⁶²

Where the statute provides that compensation be paid to abutting owners by the street railroad, amounts paid as damages to such abutting owners cannot be set up as a counterclaim in an action to recover the percentage on net income required by such statute.⁶³ In an action to recover the percentage on gross receipts required by statute, damages because of the passage of a prior void ordinance cannot be set up as a counterclaim.⁶⁴

Some statutes or ordinances providing for such fees or taxes exact a penalty as a means of enforcing the taking out of a license and the paying of the license fee,⁶⁵ and under such a provision mandamus will not lie to enforce the requirements thereof.⁶⁶ The fact that there is an ordinance imposing a penalty for a failure to procure a certificate for a license does not operate to prevent the city from maintaining an action against the railroad company to recover such license fees.⁶⁷

Release. The lapse of time, short of limitations, during which the fee has not been paid, merely raises a rebuttable presumption of fact as to a release,⁶⁸ and since such lapse of time is merely evidence of a release, it cannot operate to defeat a claim for the fee on demurrer.⁶⁹ Where the statute imposing the license fee or tax prohibits the release of any of the amount due, the railway cannot defend on an account stated or accord and satisfaction based on a payment to the municipality of less than what is actually due.⁷⁰

Application of payments. Payments of a license fee or tax are to be applied as of the date made, extinguishing principal and interest under the ordinary rule as to partial payments.⁷¹

54. Ill.—City of Chicago v. Chicago & O. P. E. R. Co., 104 N.E. 240, 261 Ill. 478.

60 C.J. p 360 note 89. .

55. Pa.—Gettysburg Borough v. Gettysburg Transit Co., 36 Pa.Super. 598.

60 C.J. p 360 note 90.

56. N.Y.—New York v. Manhattan R. Co., 37 N.E. 494, 143 N.Y. 1.

57. N.Y.—New York v. Manhattan R. Co., supra.

58. N.Y.—New York v. Manhattan R. Co., supra.

59. Ill.—Bloomington, etc., R., etc., Co. v. Bloomington, 123 Ill.App. 639. N.Y.—New York v. Broadway, etc., R. Co., 97 N.Y. 275.

60. N.Y.—New York v. Broadway, etc., R. Co., supra.

61. La.—Henderson v. Southwestern Traction & Power Co., 78 So. 435, 143 La. 170. 60 C.J. p 360 note 2.

62. N.Y.—New York v. Dry Dock, etc., R. Co., 19 N.E. 420, 112 N.Y. 137. 60 C.J. p 360 note 3.

63. N.Y.—New York v. Manhattan R. Co., 37 N.E. 494, 143 N.Y. 1.

64. Wash.—City of Seattle v. Puget Sound Traction, Light & Power Co., 174 P. 464, 103 Wash. 41.

65. Colo.—Denver City R. Co. v. Denver, 41 P. 826, 21 Colo. 350, 52 Am.S.R. 239, 29 L.R.A. 608. 60 C.J. p 361 note 6.

66. Ill.—People v. Swift, 66 Ill.App. 605.

60 C.J. p 361 note 7.

67. N.Y.—New York v. Eighth Ave. R. Co., 23 N.E. 550, 118 N.Y. 389.

68. N.J.—Jersey City v. Jersey City, etc., R. Co., 57 A. 445, 70 N.J.Law 360.

69. N.J.—Jersey City v. Jersey City, etc., R. Co., supra.

70. Ohio.—Cincinnati St. R. Co. v. Cincinnati, 11 Ohio S. & C.P. 15, 8 Ohio N.P. 80.

71. Ky.—Louisville v. Louisville R. Co., 81 S.W. 701, 118 Ky. 534, 26 Ky.L. 378, 84 S.W. 535, 27 Ky.L. 141.

Payment under mistake. Where payment of a license tax is made under the mistaken belief that the ordinance imposing it was existing and valid, credit for such payment will be given to the company against subsequent taxes imposed under new statutes

which rendered invalid the prior ordinance;⁷² but, where the railway company is under no statutory liability to pay, the amounts so paid cannot be recovered back as involuntary payments.⁷³

B. DUTY TO OPERATE AND DISCONTINUANCE

§ 177. Duty to Operate

In the exercise of its rights, privileges, and franchises a street railroad company has a duty to operate its road.

A street railroad company occupies a dual relation, a public relation to the people and a private one to its stockholders.⁷⁴ In its public relation it is the duty of the company in the exercise of its rights, privileges, and franchises for the benefit of the public to maintain and operate its road according to the terms of the ordinance or statute which confers such right, privileges, and franchises on it,⁷⁵ which duty transcends its duty to its stockholders.⁷⁶ The acceptance by a traction company of an ordinance authorizing and requiring it to operate a street railroad constitutes an enforceable contract, as considered *supra* § 35, and when, therefore, the company has commenced operation, it is its duty to continue to operate such road,⁷⁷ and, except as to such portions as public convenience and safety demand should be abandoned,⁷⁸ ordinarily it has no right at its mere will and discretion to abandon the

operation of the road or any portion thereof,⁷⁹ without the consent of the granting power,⁸⁰ or of the public utility commission having jurisdiction of the matter.⁸¹

The duty resting on the company must be performed or its privileges and franchises surrendered;⁸² as long as it retains any of the benefits, it must perform all obligations imposed by the contract.⁸³ It may not, by its own acts, render itself unable to perform the functions which were in consideration of the public grant.⁸⁴

The company cannot assume to discharge its duty to the public, on and off, as it may find it profitable to do so,⁸⁵ and it has been held that it may be compelled to continue the service of a part of its line, although the operation of that particular part involves a loss,⁸⁶ and even though the system, as a whole, fails to earn a fair return on the value of the property.⁸⁷ It cannot, however, in the absence of a contract, be compelled to continue to operate its system at a loss;⁸⁸ and it has been

72. Ky.—*Louisville v. Louisville R. Co.*, *supra*.

73. N.Y.—*New York v. Manhattan R. Co.*, 37 N.E. 494, 143 N.Y. 1.

74. N.Y.—*Matter of Loader*, 35 N.Y.S. 996, 999, 14 Misc. 208.

75. Wash.—*Wylde v. City of Seattle*, 299 P. 385, 162 Wash. 583, 60 C.J. p 361 note 15.

76. N.Y.—*Matter of Loader*, 35 N.Y.S. 996, 999, 14 Misc. 208.

77. Md.—*Hessey v. Capital Transit Co.*, 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—*Application of Westchester Electric Co.*, 280 N.Y.S. 894, 245 App.Div. 782, 60 C.J. p 362 note 20.

78. N.Y.—*Moore v. Brooklyn City R. Co.*, 15 N.E. 191, 108 N.Y. 98, 60 C.J. p 362 note 19.

79. Md.—*Hessey v. Capital Transit Co.*, 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—*Application of Westchester*

Electric Co., 280 N.Y.S. 894, 245 App.Div. 782, 60 C.J. p 362 note 20.

80. Wash.—*State v. Spokane St. R. Co.*, 53 P. 719, 19 Wash. 518, 67 Am.S.R. 739, 41 L.R.A. 515, 60 C.J. p 362 note 21.

81. Md.—*Hessey v. Capital Transit Co.*, 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—*Application of Westchester Electric Co.*, 280 N.Y.S. 894, 245 App.Div. 782, 60 C.J. p 362 note 22.

82. N.J.—*McCran v. Public Service Ry. Co.*, 122 A. 205, 95 N.J.Eq. 22. Pa.—*Philadelphia & West Chester Traction Co. v. Public Service Commission*, 80 Pa.Super. 355.

83. S.C.—*City of Spartanburg v. South Carolina Gas & Electric Co.*, 125 S.E. 295, 130 S.C. 125, 60 C.J. p 362 note 24.

84. U.S.—*Columbia Ry., Gas & Electric Co. v. State of South Carolina*, C.C.A.S.C., 27 F.2d 52, 59 A.L.R. 665.

85. N.J.—*McCran v. Public Service Ry. Co.*, 122 A. 205, 95 N.J.Eq. 22. Pa.—*Philadelphia & West Chester Traction Co. v. Public Service Commission*, 80 Pa.Super. 355.

86. N.Y.—*Application of Westchester Electric R. Co.*, 280 N.Y.S. 894, 245 App.Div. 782, 60 C.J. p 362 note 27.

87. U.S.—*Ft. Smith Light & Traction Co. v. Bourland*, Ark., 45 S.Ct. 249, 267 U.S. 330, 69 L.Ed. 631, rehearing denied and amended 45 S.Ct. 511, 268 U.S. 676, 69 L.Ed. 631. Ark.—*Ft. Smith Light, etc., Co. v. Ward*, 275 S.W. 757, 168 Ark. 519.

88. U.S.—*Crawford v. Duluth St. Ry. Co.*, C.C.A.Wis., 60 F.2d 212. Wash.—*Wylde v. City of Seattle*, 299 P. 385, 162 Wash. 583, 60 C.J. p 362 note 29.

An implied contract that a street railroad company will operate at a loss cannot be elicited from the acceptance of its charter or from the exercise of power of eminent domain.—*Hessey v. Capital Transit Co.*, 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

held that it cannot be compelled so to operate a portion of its system, where such portion can be operated only at a loss,⁸⁹ notwithstanding such loss could be offset by the profit derived from the operation of the rest of the system.⁹⁰ So, also, it has been held that, where the operation of a portion of a system causes the whole system to be operated at a loss⁹¹ or would result in the insolvency of the whole system,⁹² the courts will not compel the operation of such portion. Moreover, a street railroad company cannot be required to continue indefinitely operations, where such operations will result in the exhaustion of its assets,⁹³ although it may as to a portion of the line, which was formerly a successful operating unit, where it does not appear that profitable operation thereof may not be resumed independently of the remainder of the system.⁹⁴

After the franchises for some of the lines have expired, continuance of service cannot be required thereon on terms not allowing a reasonable return on investment.⁹⁵ Where the company is bound to secure its charter before it can apply to the municipality for consent to use its streets, the charter of itself is not mandatory on the company to operate a railroad.⁹⁶

Successor. The duty of a street railroad company to operate its lines extends to a company which succeeds to the rights, franchises, and obligations of the original company.⁹⁷ In the absence of an obligation to operate under the original franchise, however, a successor assignee of such franchise is

not obliged to operate the street railway system for the full franchise period.⁹⁸

§ 178. — Relief from Performance of Duty

A street railroad company will not be relieved of its duty to the public by any cause which does not constitute a legal excuse for failure to perform the duty.

A street railroad company cannot excuse its failure to perform its duty to operate on the ground that it has been prevented by violence from doing so, if the civil authorities have not failed to protect it fully in its efforts to operate,⁹⁹ or on the ground that it cannot get employees to accept its terms.¹ The fact that the located route of the road is laid across a bridge, over which the authorities will not permit tracks to be laid does not excuse the company from failure to operate cars through the streets on either side of the bridge;² and a provision in an ordinance granting a franchise that the company shall not be required to operate its lines or any part or portion thereof at a loss only permits discontinuance of the entire system or any entire unit,³ and does not authorize discontinuance of a part of a unit.⁴

Operation of bus line is not a compliance with a franchise requiring the operation of a street railway,⁵ and it has been held that neither a public utility commission nor the courts may authorize the substitution of busses for the streetcars required by the franchise.⁶

Contract not created by ordinance

City ordinance, requiring street railway company to operate branch lines, did not create contract requiring operation under circumstances which would result in confiscation of the company's property.—*Crawford v. Duluth St. Ry. Co.*, C.C.A.Wis., 60 F.2d 212.

89. Md.—*Hessey v. Capital Transit Co.*, 66 A.2d 787, 790, 193 Md. 265, 10 A.L.R.2d 1114.

90. Md.—*Hessey v. Capital Transit Co.*, *supra*.

Reason for rule

"If one branch of the service is unprofitable, it would be neither good business nor justice to compel the company to continue that branch merely because the loss could be offset by profit on the rest of the service."—*Hessey v. Capital Transit Co.*, *supra*.

91. U.S.—*Crawford v. Duluth St. Ry. Co.*, C.C.A.Wis., 60 F.2d 212.

92. Wash.—*Wylde v. City of Seattle*, 299 P. 385, 162 Wash. 583.

93. N.Y.—*New York Trust Co. v. Buffalo & Lake Erie Traction Co.*, 183 N.Y.S. 278, 112 Misc. 414.

94. N.Y.—*New York Trust Co. v. Buffalo & Lake Erie Traction Co.*, *supra*.

95. U.S.—*Detroit United Ry. Co. v. City of Detroit*, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed. 341—*City of Toledo v. Toledo Rys. & Light Co.*, Ohio, 259 F. 450, 170 C.C.A. 426.

96. U.S.—*Gilchrist v. Waycross Street & Suburban Ry. Co.*, D.C. Ga., 246 F. 952.

97. N.J.—*State v. Bridgeton, etc.*, Traction Co., 43 A. 715, 62 N.J.Law 592, 45 L.R.A. 837.
60 C.J. p 362 note 34.

98. Wash.—*Wylde v. City of Seattle*, 299 P. 385, 162 Wash. 583.

99. N.Y.—*Matter of Loader*, 35 N.Y. S. 996, 14 Misc. 208.

1. N.Y.—*Matter of Loader*, *supra*.
60 C.J. p 363 note 37.

2. N.J.—*State v. Bridgeton, etc.*, Traction Co., 43 A. 715, 62 N.J. Law 592, 45 L.R.A. 837.

3. Mont.—*City of Helena v. Helena Light & Ry. Co.*, 207 P. 337, 63 Mont. 108.

4. Mont.—*City of Helena v. Helena Light & Ry. Co.*, *supra*.

5. S.C.—*City of Spartanburg v. South Carolina Gas & Electric Co.*, 125 S.E. 295, 130 S.C. 125.

6. S.C.—*City of Spartanburg v. South Carolina Gas & Electric Co.*, *supra*.

§ 179. — Proceedings to Compel Operation

Operation of a street railroad may be compelled by appropriate proceedings brought for such purpose.

The power to compel the operation of a street railway line, or part thereof, arises out of the public interest with which the service is clothed, and is derivable solely from the police power of the state.⁷ Proceedings to compel operation of a street railroad may be maintained in appropriate cases,⁸ as where the continued operation of the company's facilities is required under its charter and franchise,⁹ and performance of its duty to operate may, in a proper case, be compelled by mandamus, as discussed in *Mandamus* § 231 e. Discontinuance may be enjoined at the suit of a landowner who has dedicated streets in consideration of an agreement to operate a line thereon,¹⁰ and made investments and built houses along the line,¹¹ where its operation would not prevent performance of the company's larger duty to the public;¹² and the landowner is not, in such case, limited to an action of breach of the contract.¹³ A mandatory injunction to compel operation of a branch line should not, however, be granted where such branch could not be operated without imperiling the financial stability of the entire system.¹⁴ Where no public injury will result from the proposed action of a street railroad company to discontinue the use of a portion of its facilities, such discontinuance will not be prevented by injunction.¹⁵ In a suit to enjoin abandonment of a portion of a street railroad system, it has been held that the court will inquire into the benefit to the public to be attained by continued operation,¹⁶

may properly consider competent and material evidence relating to the loss sustained by the operation of such portion,¹⁷ and, where such railroad is being operated by a public corporation, such as a city, should give great weight to the action of the city council directing abandonment of such portion.¹⁸

Review. Under a statute empowering a commission to compel operation of the lines of a street railroad, where the determination of such commission is sustained by competent evidence, and the commission in making it was within its jurisdiction, such determination will not be disturbed.¹⁹

§ 180. Interference with Operation

Members of the public have no right to use or occupy a street in such manner as to interfere with the operations of street railroads thereon.

Members of the public have no right to use or occupy a street in such manner as to exclude or unreasonably to interfere with the operation of a street railroad lawfully constructed and operating thereon,²⁰ and the street railroad company accordingly has the right to make reasonable regulations governing persons making an extraordinary use of the street, as for example, moving a building across the tracks,²¹ and may maintain a suit for an injunction to restrain a wrongful interference with, or invasion of, its rights,²² or an action to recover damages for a trespass.²³ The company has no right, however, to use undue force in removing an obstruction,²⁴ and if it does so is liable for any damages thereby done to property removed.²⁵

7. Mo.—*State ex rel. City of Carthage v. Public Service Commission*, 260 S.W. 973, 303 Mo. 505.

8. Mass.—*Amesbury v. Citizens' Electric St. R. Co.*, 85 N.E. 419, 199 Mass. 394, 19 L.R.A., N.S., 865, 60 C.J. p 363 note 44.

9. S.C.—*State v. Broad River Power Co.*, 153 S.E. 537, 157 S.C. 1, affirmed 51 S.Ct. 94, 282 U.S. 187, 75 L.Ed. 287.

10. Tex.—*Houston Electric Co. v. Glen Park Co.*, Civ.App., 155 S.W. 965.

11. Ga.—*Macon Ry. & Light Co. v. Corbin*, 116 S.E. 305, 155 Ga. 197.

12. Tex.—*Houston Electric Co. v. Glen Park Co.*, Civ.App., 155 S.W. 965.

13. Tex.—*Houston Electric Co. v. Glen Park Co.*, supra.

14. Miss.—*Vicksburg Traction Co. v. Warren County*, 56 So. 607, 100 Miss. 442.

15. N.Y.—*Moore v. Brooklyn City R. Co.*, 15 N.E. 191, 108 N.Y. 98.

16. Wash.—*Wylde v. City of Seattle*, 299 P. 385, 162 Wash. 533.

17. Wash.—*Wylde v. City of Seattle*, supra.

Portion outside city limits

In suit to enjoin city from abandoning street railway system beyond city limits, testimony that one third of loss resulting from entire system should be allocated to portion outside city limits was held competent.—*Wylde v. City of Seattle*, supra.

18. Wash.—*Wylde v. City of Seattle*, supra.

19. Pa.—*Passyunk Avenue Business*

Men's Ass'n v. Public Service Commission, 73 Pa.Super. 242.

20. Wis.—*Milwaukee St. R. Co. v. Adlam*, 55 N.W. 181, 85 Wis. 142, 60 C.J. p 655 note 76.

Reciprocal rights and duties of company and travelers on street see *infra* §§ 207-210.

21. Ohio.—*Toledo, etc., Traction Co. v. Sterling*, 29 Ohio Cir.Ct. 227, 60 C.J. p 656 note 78.

22. Iowa.—*Ft. Madison St. R. Co. v. Hughes*, 114 N.W. 10, 137 Iowa 122, 14 L.R.A., N.S., 448, 60 C.J. p 656 note 79.

23. Ill.—*Chicago West Division R. Co. v. Rend*, 9 Ill.App. 243, 60 C.J. p 656 note 80.

24. Ohio.—*Toledo, etc., Traction Co. v. Sterling*, 29 Ohio Cir.Ct. 227.

25. Ohio.—*Toledo, etc., Traction Co. v. Sterling*, supra.

§ 181. Discontinuance of Operation

- a. In general
- b. Power to permit

a. In General

Generally, street railroads cannot discontinue operations at their own mere will or discretion, but are required first to get permission from some designated authority.

While the view has been taken that, subject to the provisions of their charters and other statutes²⁶ or except as precluded therefrom by the terms of their franchises,²⁷ street railroad companies may voluntarily discontinue in whole or in part the use of their tracks, more particularly where the operation would not be remunerative,²⁸ it is more generally held that they cannot do so at their own mere will or discretion,²⁹ although the portion which they may desire to abandon is unprofitable,³⁰ or is more difficult to operate,³¹ and that in order to justify abandonment the company must obtain consent for it to abandon from some authorized source, such as the state,³² a municipality to whom the power to give consent is delegated, expressly or by necessary implication,³³ a public service commission vested with power to give consent,³⁴ or a court designated by statute.³⁵ Where, however, such consent

has been obtained, abandonment is lawful notwithstanding the opposition of abutting owners who would be unfavorably affected thereby.³⁶

Public corporation. A distinction has been drawn between the duty of a private corporation and that of a public corporation operating street railroads.³⁷ Where the latter acquires a street railway system free and clear of all franchise obligations, with full power to regulate and control its use and operation, it may abandon a part of the system where it does not do so arbitrarily or capriciously.³⁸ It has been held, however, that a municipality cannot summarily abandon a portion of a municipally owned and operated system.³⁹ Where the street railway system is being operated by a public corporation, such as a city, the action of its council in deciding to abandon a portion of such system is entitled to great weight.⁴⁰

Contractual provisions. The right to abandon an uncompleted part of a road may be conferred by contract on a street railroad company.⁴¹ Under statute authorizing a street railroad company and a municipality to agree on terms for the use and occupation of its streets, the company may be entitled, under a contract so providing, to abandon

26. Mass.—Amesbury v. Citizens' Electric St. R. Co., 85 N.E. 419, 199 Mass. 394, 19 L.R.A., N.S., 865. 60 C.J. p 363 note 54.

27. Mont.—State v. Helena Power, etc. Co., 56 P. 685, 22 Mont. 391, 44 L.R.A. 692. 60 C.J. p 363 note 55.

28. Mass.—Amesbury v. Citizens' Electric Street R. Co., 85 N.E. 419, 199 Mass. 394, 19 L.R.A., N.S., 865.

29. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—Application of Westchester Electric Co., 280 N.Y.S. 894, 245 App.Div. 782. 60 C.J. p 363 note 57.

30. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—Application of Westchester Electric Co., 280 N.Y.S. 894, 245 App.Div. 782. 60 C.J. p 364 note 58.

31. N.J.—City of Bridgeton v. Bridgeton & M. Traction Co., 43 A. 715, 62 N.J.Law 592, 45 L.R.A. 837.

32. Wash.—State v. Spokane St. Ry. Co., 53 P. 719, 19 Wash. 518, 67 Am. S.R. 739, 41 L.R.A. 515. 60 C.J. p 364 note 60.

33. U.S.—R. E. Duvall Co. v. Washington B. & A. Electric R. Co., D. C.Md., 60 F.2d 315. 60 C.J. p 364 note 61.

Reasonableness of city action

Regulatory power, conferred on city council by statute forbidding abandonment of any part of street railway without consent of city, is subject to limitation that order requiring continued operation must not be unreasonable.—Crawford v. Duluth St. Ry. Co., C.C.A.Wis., 60 F.2d 212.

34. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

N.Y.—Fischer v. Gross, 78 N.Y.S.2d 394, 273 App.Div. 983—Application of Westchester Electric Co., 280 N.Y.S. 894, 245 App.Div. 782. 60 C.J. p 364 note 62.

Restriction to voluntary abandonment

A statutory requirement for approval of public service commission before carrier may abandon exercise of any franchise relates to mere voluntary action by carrier, and not to abandonment required by prior authorized contract or by operation of law, so that such approval is not required for abandonment of lines on

streets in city by interurban electric railway pursuant to contractual obligation under ordinance.—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D.C.Md., 60 F.2d 315.

35. Pa.—Borough of Carlisle v. Public Service Commission, 81 Pa.Super. 475. 60 C.J. p 364 note 63.

36. Ala.—Birmingham Electric Co. v. Allen, 117 So. 100, 217 Ala. 607. Tex.—Jones v. Dallas Ry. Co., Civ. App., 224 S.W. 807.

37. Wash.—State v. City of Seattle, 282 P. 829, 154 Wash. 475.

38. Wash.—State v. City of Seattle, supra. 60 C.J. p 364 note 66.

39. N.Y.—Fischer v. Gross, 78 N.Y.S.2d 394, 273 App.Div. 983.

Board of transportation of city of New York has no power summarily to abandon service of a part of existing streetcar lines.—Fischer v. Gross, supra.

40. Wash.—Wylde v. City of Seattle, 299 P. 385, 162 Wash. 583.

41. Cal.—People v. Los Angeles Ry. Co., 143 P. 739, 168 Cal. 406. 60 C.J. p 364 note 67.

the use of the municipal streets for railroad purposes.⁴²

Presumption of abandonment. A right granted to a street railroad company to occupy a certain street not limited as to time is presumed to have been abandoned by the company, where no rights were exercised thereunder for almost twenty-four years.⁴³ Also, it has been held that a presumption of abandonment of the grant is raised by a failure for twenty years to operate a railroad on certain streets included in the franchise.⁴⁴

Temporary suspension of the use of a track, because of possible danger to workmen on the street, will not be required where the danger can be avoided by regulating the passage of the cars.⁴⁵

Abandonment of location. A location for a street railroad, granted by the selectmen of a town, is not abandoned by the president's unauthorized notification to the selectmen of an abandonment and request that the location be granted to another company, although it does not appear that all the conditions of the grant have been performed, since abandonment is necessarily a corporate act.⁴⁶

b. Power to Permit

The state, in the exercise of its sovereign power, may permit street railroad companies to discontinue operations, or may delegate power to grant or withhold permission to some public body, such as a commission.

The state, in the exercise of its sovereign power of regulation, may, under proper conditions, permit the abandonment by street railroads of the continuance of their facilities,⁴⁷ as, for example, to avoid confiscation,⁴⁸ although there is a constitutional provision that no street railway shall be constructed within the limits of any municipality without the consent of the local authorities,⁴⁹ and in doing so cannot be regarded as impairing the obligation of a contract contained in the franchise granted by the municipal authorities.⁵⁰ The power of the state to grant or withhold permission to abandon or discontinue operation of a street railroad system or a part thereof may be vested in public utility commissions.⁵¹ Such commissions have only such powers as are conferred on them by the legislature,⁵² or as are necessarily incidental to full exercise of powers granted.⁵³ Power of such commissions may include power to impose reasonable conditions on permission to discontinue service,⁵⁴ but in imposing conditions the commis-

42. U.S.—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D. C.Md., 60 F.2d 315.

43. Mo.—State ex rel. United Rys. Co. of St. Louis v. Public Service Commission of Missouri, 192 S.W. 953, 270 Mo. 429.

44. U.S.—Louisville Trust Co. v. Cincinnati, Ohio, 76 F. 296, 22 C. C.A. 334, certiorari denied 17 S.Ct. 995, 164 U.S. 707, 41 L.Ed. 1183.

45. N.Y.—Guaranty Trust Co. v. Second Ave. R. Co., 177 N.Y.S. 126.

46. Mass.—Clemons Electrical Mfg. Co. v. Walton, 92 N.E. 459, 206 Mass. 215.

47. Mo.—State ex rel. City of Kirkwood v. Public Service Commission of Missouri, 50 S.W.2d 114, 330 Mo. 507.
60 C.J. p 364 note 72.

48. Mo.—Southwest Missouri R. Co. v. Public Service Commission, 219 S.W. 380, 281 Mo. 52.
60 C.J. p 364 note 73.

49. Mo.—State ex rel. City of Carthage v. Public Service Commission, 260 S.W. 973, 303 Mo. 505.
60 C.J. p 365 note 74.

50. Mo.—State ex rel. City of Carthage v. Public Service Commission, supra.
60 C.J. p 365 note 75.

51. Mo.—State ex rel. City of Kirkwood v. Public Service Commission of Missouri, 50 S.W.2d 114, 330 Mo. 507.
60 C.J. p 365 note 78.

52. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 Pa.Super. 146.

Vt.—Rutland Ry. Light & Power Co. v. Town of West Rutland, 127 A. 882, 98 Vt. 335.

53. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 Pa.Super. 146.
60 C.J. p 365 note 80.

54. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, supra.

Discontinuance of service

Where superior court granted supersedeas to street railway company permitting the discontinuance of service pending disposition of company's application for certificate for abandonment, the fact that under the supersedeas the company had discontinued service did not deprive public utility commission of jurisdiction to impose conditions deemed reasonable in connection with the abandonment, on theory that after the discontinuance of the service company ceased to be a utility within the commission's

jurisdiction.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, supra.

Particular conditions

(1) Conditions requiring payment of certain sum to city, removal of tracks, repaving of disturbed area, and removal of poles and wires were held beyond the power of a commission to impose where not supported by evidence.—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 Pa.Super. 89.

(2) An order authorizing abandonment of portion of a line in a municipality is not unlawful because conditioned on the paving of the street by the municipality where such portion is located.—State ex rel. City of Kirkwood v. Public Service Commission of Missouri, 50 S.W.2d 114, 330 Mo. 507.

Substituted service

(1) An order authorizing abandonment of a railway line, or a portion thereof, may be conditioned on substituted service being furnished.—State ex rel. City of Kirkwood v. Public Service Commission of Missouri, supra.

(2) Order that company be authorized to abandon particular electric railway line coincident with, or subsequent to, institution of bus route was construed as seeking to insure that railway patrons would not be

sion must not raise the standard of duty fixed by law,⁵⁵ or interfere with the constitutional and statutory powers of municipalities.⁵⁶ The conditions imposed need not be confined to matters of service,⁵⁷ and may in a proper case relate to the safety of the public.⁵⁸ Authority vested in a board of county commissioners to authorize construction and maintenance of railroads on county roads does not authorize them, either expressly or by necessary implication, to consent to the abandonment of a street railroad line.⁵⁹ Where a statute requires the consent of the municipality to the abandonment or discontinuance of any part of its railroad on a street, the railroad commission in the absence of a statute conferring such authority is without power to authorize such abandonment or discontinuance without the consent of the municipality.⁶⁰

§ 182. — Proceedings to Discontinue Operation

Some statutes endow boards or commissions with

Jurisdiction of proceedings to discontinue street railroad operations.

Some statutes endow boards or commissions with jurisdiction of proceedings to allow a street railroad company to abandon or prevent it from abandoning its road, or a portion thereof.⁶¹ The company has the burden of proving by clear and satisfactory evidence that the granting of permission by the commission to discontinue is required by, or is consistent with, the public interest.⁶² In determining whether a particular line can be operated without a loss, the cost of operation includes a fair proportion of the expenses incurred for the entire system of which the line forms a part.⁶³ Although the commission hearing an application for discontinuance may order a valuation of all property to determine whether the company is operating at a loss, it is not obliged so to do.⁶⁴ The findings of the commission are entitled to great weight;⁶⁵ its orders will be presumed to be based on facts,⁶⁶ and are conclusive against collateral attack.⁶⁷

abandoned until substituted service by motorbus was in operation.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wisconsin, 37 N.W.2d 42, 254 Wis. 551.

Temporary service

An order permitting discontinuance, because of loss in operation, may require operation for such time as will enable the company's patrons to adjust themselves to the changed conditions.—New York Trust Co. v. Buffalo, etc., Traction Co., 183 N.Y.S. 278, 112 Misc. 414.

55. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 Pa.Super. 140.—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 Pa.Super. 89.

56. Pa.—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 Pa.Super. 89.

57. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 Pa.Super. 140.

58. Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, *supra*.

Express or implied power

The power of the commission in this respect must be within the express or implied power of the commission conferred by statute.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, *supra*.

59. Wash.—Day v. Tacoma Ry. & Power Co., 141 P. 347, 80 Wash. 161, L.R.A.1915B 547.

60. U.S.—Crawford v. Duluth St. Ry. Co., C.C.A.Wis., 60 F.2d 212.
Wis.—City of Madison v. Railroad Commission, 227 N.W. 10, 199 Wis. 571.

61. Mo.—State ex rel. City of Kirkwood v. Public Service Commission of Missouri, 50 S.W.2d 114, 330 Mo. 507.

Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 Pa.Super. 140.
60 C.J. p 365 note 78.

Jurisdiction of questions based on contract

The question of binding effect of contracts under which street railroad company seeking to abandon service was using tracks was one of law not cognizable by Public Utility Commission in passing on application for a certificate authorizing abandonment of service and the commission did not act improperly in refusing to require the company to remove certain tracks, where question of ownership of tracks involved was not clear on face of contracts and franchises under which the company used the tracks.—Borough of Irwin v. Pennsylvania Public Utility Commission, 15 A.2d 547, 142 Pa.Super. 157.

62. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

Sufficiency of evidence

Evidence that street railroad was sustaining substantial loss in operation of shuttle line, that there was no prospect that patronage would be sufficient to meet cost of operating line, even though population of area continued to increase, and that revenue from line was not sufficient to justify expenditure of substantial sums necessary to keep it in good condition required conclusion that the company should be permitted to discontinue service on such line.—Hessey v. Capital Transit Co., *supra*.

Application held properly denied where Public Service Commission found on evidence that road was necessary for public convenience.—Application of Westchester Electric R. Co., 280 N.Y.S. 894, 245 App.Div. 782.

63. Md.—Hessey v. Capital Transit Co., 66 A.2d 787, 193 Md. 265, 10 A.L.R.2d 1114.

64. Va.—City of Hampton v. Newport News & Hampton Ry., Gas & Electric Co., 131 S.E. 328, 144 Va. 29.

65. S.C.—State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, affirmed 51 S.Ct. 94, 282 U.S. 187, 75 L.Ed. 287.
60 C.J. p 365 note 82.

66. S.C.—State v. Broad River Power Co., *supra*.

67. Ariz.—Phoenix Ry. Co. of Arizona v. Lount, 187 P. 933, 21 Ariz. 289.

Where the commission has no jurisdiction to relieve the company of the duty of maintaining its tracks, it is without power to modify its order requiring reconstruction of such tracks.⁶⁸

A court of equity taking jurisdiction to enforce the performance of a contract to operate a street or interurban railroad will retain jurisdiction for the purpose of authorizing the owner thereof to discontinue its operation, where no contractual obligation is found to exist, and there is no prospect that the road can be made to earn a fair return on the investment.⁶⁹

Review. Under some statutes only interested parties are entitled to appeal from a ruling of the Public Service Commission,⁷⁰ and one not so entitled cannot maintain proceedings for suspension of an order of the commission pending perfection of an appeal.⁷¹ On a proper showing, a rule to show cause why certiorari should not be allowed to review the decision of the public utility commission approving suspension of service will be granted.⁷² When the statutes so provide, the review of the action of the commission takes the form of a hearing *de novo*, and the same facts are considered, and like principles of law are applicable in such review as would be in an independent action before the reviewing court if such action

could be brought.⁷³ An order of the commission refusing to approve abandonment will not be disturbed where the evidence is conflicting,⁷⁴ but an order which is not supported by the evidence cannot be upheld.⁷⁵

§ 183. — Effect of Discontinuance

At common law on abandonment of its street railroad the company is obliged to remove its tracks and track structures forthwith.

Where a street railroad company ceases its operation and the rendering of service to the public in a municipality, it has been held that pertinent franchises, ordinances, and contracts between the company and the municipality are determinative of the respective rights and obligations,⁷⁶ and that they may not be varied or set aside and other rights granted and obligations imposed.⁷⁷ On abandonment of its street railroad the company is obliged to remove its tracks and track structures forthwith;⁷⁸ this obligation exists at common law,⁷⁹ and in the absence of any specifically stated obligation in the franchise.⁸⁰ It is also the company's duty to restore the pavement of the invaded street or highway to the condition of the adjacent pavement as discussed *supra* § 121. Equity has jurisdiction to compel the company to perform its duty in this respect.⁸¹

68. *Vt.*—Rutland Ry., Light & Power Co. v. Town of West Rutland, 127 A. 382, 98 *Vt.* 385.

69. *Ohio.*—Gress v. Village of Ft. Loramie, 125 N.E. 112, 100 *Ohio St.* 35, 8 A.L.R. 242.

70. *N.H.*—Blanchard v. Boston & M. R. R., 167 A. 158, 86 *N.H.* 263.

Consideration of propriety

Treatment by Public Service Commission of individual as entitled to rights of party in proceeding for discontinuance of street railroad is subject to revision by supreme court on his motion to suspend order authorizing discontinuance pending perfection of appeal.—Blanchard v. Boston & M. R. R., *supra*.

71. *N.H.*—Blanchard v. Boston & M. R. R., *supra*.

Citizen and taxpayer, alleging no private injury, was not entitled to appeal from commission's order for discontinuance of street railway, and, hence, was not entitled to maintain proceedings for suspension thereof pending perfection of appeal.—Blanchard v. Boston & M. R. R., *supra*.

72. *N.J.*—Ironbound Transp. Co. v.

Board of Public Utility Com'rs, 150 A. 687, 8 *N.J.Misc.* 472.

73. *Ark.*—Ft. Smith Light & Traction Co. v. Bourland, 254 S.W. 481, 160 *Ark.* 1, affirmed 45 S.Ct. 249, 267 U.S. 330, 67 L.Ed. 631, rehearing denied and amended 45 S.Ct. 511, 268 U.S. 676, 69 L.Ed. 631, 60 C.J. p 365 note 89.

74. *N.Y.*—People ex rel. New York & Q. C. Ry. Co. v. Public Service Commission for First Dist., 160 *N.Y.S.* 91, 173 *App.Div.* 326.

75. *Pa.*—West Penn Rys. Co. v. Public Utility Commission, 4 A.2d 545, 135 *Pa.Super.* 89.

76. *Pa.*—West Penn Rys. Co. v. Public Utility Commission, *supra*.

Enforcement

Respective rights and obligations existing or arising by law or contract on discontinuance of service are enforceable by judicial process.—West Penn Rys. Co. v. Public Utility Commission, *supra*.

77. *Pa.*—West Penn Rys. Co. v. Public Utility Commission, *supra*.

78. *Pa.*—*Corpus Juris* cited in West Penn Rys. Co. v. Pennsyl-

vania Public Utility Commission, 15 A.2d 539, 544, 142 *Pa.Super.* 140, 60 C.J. p 366 note 92.

Statute vesting in a public utility commission authority to impose terms and conditions on permission to abandon operations does not divest cities of their right to require, by court order, that the company remove its tracks when it discontinues its lines and services, and does not abrogate common-law liability of the company in this respect, notwithstanding failure of commission to impose terms or conditions on abandonment.—In re Madison Rys. Co., C.C.A.Wis., 102 F.2d 178.

79. *U.S.*—In re Madison Rys. Co., C.C.A.Wis., 102 F.2d 178.

Pa.—West Penn Rys. Co. v. Pennsylvania Public Utility Commission, 15 A.2d 539, 142 *Pa.Super.* 140.

80. *N.Y.*—City of Buffalo v. International Ry. Co., 240 *N.Y.S.* 113, 135 *Misc.* 504.

81. *N.Y.*—Village of Stillwater v. Hudson Valley Ry. Co., 241 *N.Y.S.* 569, 229 *App.Div.* 41, modified on other grounds 174 *N.E.* 306, 255 *N.Y.* 144—City of Buffalo v. Interna-

§ 184. — Remedies in Case of Unauthorized Discontinuance

Where a street railroad company discontinues operations without authority, it may be compelled by appropriate remedy to resume such operations.

Where a street railroad company, or other operating authority, attempts to evade its duty by abandoning its road, or a part of it, it may be compelled, in proper proceedings, to resume its operation and carry out the public duty assumed by it,⁸² and mandamus⁸³ or, under statute, a proceeding in certiorari,⁸⁴ may be a proper proceeding for this purpose. Under statutes providing for review by certiorari, a denial of an application to review the action of a municipal board in discontinuing service on a portion of a municipally owned streetcar system has been held improper,⁸⁵

notwithstanding a statement by such board that the discontinuance of service is merely temporary;⁸⁶ and the duty of the court in such case is to take testimony to determine whether the suspension of service is arbitrary and has continued for an unreasonable time.⁸⁷ In an action for damages against a street railroad company for discontinuing service, plaintiff must introduce the franchise in evidence so that the rights, duties, and liabilities may be determined therefrom.⁸⁸ In such an action the measure of damages, where the abandonment was not permanent, is the amount that will reimburse plaintiff for the inconvenience and the loss incident thereto during the period of the discontinuance,⁸⁹ and not the difference between the value of the property with the streetcar service and the value thereof with it permanently discontinued.⁹⁰

C. OPERATION

1. COMPANIES AND PERSONS LIABLE FOR INJURIES

§ 185. In General

A street railroad company is liable for any neglect in the exercise of its franchise, and cannot, without legislative authority, terminate its liability.

As a general rule a street railroad company assumes by the acceptance of the grant of its franchise from the state or municipality a duty toward the public of seeing that its franchise is properly exercised, and therefore is liable for any neglect thereof,⁹¹ and cannot, without legislative or municipal authority, permit another company or person to exercise its franchise so as to avoid the liabilities incident thereto;⁹² and so a company, agreeing with another company for the joint use of its tracks, is liable for injuries caused by the action-

able negligence of its licensee,⁹³ and where two companies jointly operate a street railroad, partly owned by each, each is liable for the negligence of the other in the operation thereof.⁹⁴ A company using or operating a street railroad, although not the owner thereof, is liable for its own negligence or that of its own servants,⁹⁵ but a company acting as agent, and not as owner pro hac vice, is not liable for the negligence of employees of its principal.⁹⁶ So a company which is merely using the track of another company, without any obligation to keep the track in repair or any right to interfere therewith, is not liable for defects in the street or track;⁹⁷ nor is a succeeding company ordinarily liable for injuries caused by the negligence or im-

tional Ry. Co., 240 N.Y.S. 113, 135 Misc. 504.

82. N.Y.—Fischer v. Gross, 78 N.Y. S.2d 394, 273 App.Div. 983. 60 C.J. p 366 note 96.

83. Kan.—City of Potwin Place v. Topeka Ry. Co., 33 P. 309, 51 Kan. 609.

N.J.—City of Bridgeton v. Bridgeton & M. Traction Co., 43 A. 715, 62 N.J.Law 592, 45 L.R.A. 837.

84. N.Y.—Fischer v. Gross, 78 N.Y. S.2d 394, 273 App.Div. 983.

85. N.Y.—Fischer v. Gross, supra.

86. N.Y.—Fischer v. Gross, supra.

87. N.Y.—Fischer v. Gross, supra.

88. Miss.—Mississippi Power & Light Co. v. Maulding, 108 So. 901, 143 Miss. 371.

89. Miss.—Mississippi Power & Light Co. v. Maulding, supra.

90. Miss.—Mississippi Power & Light Co. v. Maulding, supra.

91. La.—Muntz v. Algiers, etc., R. Co., 35 So. 624, 111 La. 423, 100 Am. S.R. 495, 64 L.R.A. 222.

Me.—Milton v. Bangor R., etc., Co., 68 A. 826, 103 Me. 218, 125 Am.S.R. 293, 15 L.R.A., N.S., 203.

92. Ill.—Anderson v. West Chicago St. R. Co., 65 N.E. 717, 200 Ill. 329. 60 C.J. p 366 note 4.

93. Mo.—Millhouser v. Kansas City Public Service Co., App., 71 S.W. 2d 160. 60 C.J. p 366 note 5.

94. Minn.—Messenger v. St. Paul City R. Co., 79 N.W. 583, 77 Minn. 34. 60 C.J. p 366 note 6.

95. Ala.—Birmingham Ry., Light & Power Co. v. Daniel, 57 So. 119, 3 Ala.App. 391. 60 C.J. p 367 note 7.

96. U.S.—Costan v. Manila Electric Co., C.C.A.N.Y., 24 F.2d 383.

97. N.Y.—Lowery v. Brooklyn City, etc., R. Co., 76 N.Y. 28. 60 C.J. p 367 note 9.

proper operation of the road by its predecessor.⁹⁸ A stockholder in the corporation operating the road is not liable for its negligent acts.⁹⁹

Joint tort-feasors. Where the injury was caused by the concurrent negligence of the streetcar company and another, both are liable;¹ but the company, on payment of the judgment, is entitled to indemnity from the other where it is not in pari delicto with him, and he is the real party at fault.² Where the acts of the streetcar company and another are different and separate, there is no joint liability.³

Owner or receiver. Unless such liability is imposed by statute,⁴ where a street railroad has been placed in the hands of a receiver, the company owning it is not liable for injuries due to the negligence of the receiver or his employees,⁵ and the receiver is liable therefor in his official capacity.⁶ If, however, the receiver abandons a part of the road to the company, it is thereafter liable for negligent acts or omissions with respect to such part;⁷ and, if the company was actually operating the road, the receiver is not liable for negligence therein⁸ although the title to the road was vested in him.⁹

Mortgagee. A mortgagee obtaining possession of street railroad property on default is considered a trustee and is not liable for torts arising out of the use of the property in the business.¹⁰

§ 186. Company or Municipality

A street railroad company is liable for injuries caused by a failure to keep its tracks in repair, and may be liable for a failure to keep the street in repair, but it is not liable for the negligence of the municipal authorities.

A street railroad company is liable for injuries caused by a failure to keep its tracks in repair,¹¹ or by a failure to keep the street in repair, where, under the terms of its grant, or by statute or ordinance, it is under the duty to repair it,¹² although the municipality is also negligent in permitting the defect to remain in the street,¹³ or although the defective condition in fact results from a failure of the municipality to keep its street in repair;¹⁴ but the company is not liable for the negligence of the municipal authorities,¹⁵ and, although it is under the duty to repair the streets, it is not liable for a defect which is one of construction by the municipality, for which the municipality alone is responsible, and which the company is not at liberty to alter,¹⁶ unless it has assumed the duty of protecting travelers therefrom.¹⁷ A grant, however, to a street railroad company of the privilege of constructing its tracks in the streets and running cars thereon does not exonerate the municipality from liability for failing to keep its streets in proper repair should the company fail to do so, as discussed in Municipal Corporations § 797, but, if the municipality is compelled to pay damages in such a case by reason of the negligence or default of the street railroad company, it may recover over against the company.¹⁸

98. Ky.—Palmer Transfer Co. v. Paducah R., etc., Co., 89 S.W. 515, 28 Ky.L. 473.

Liability of purchaser of street railroad for torts of vendor see *infra* § 188.

99. Ky.—Evansville Rys. Co. v. Ligon's Adm'r, 189 S.W. 898, 172 Ky. 631.
60 C.J. p 367 note 11.

1. Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.
60 C.J. p 367 note 12.

2. Ill.—Chicago Rys. Co. v. R. F. Conway Co., 219 Ill.App. 220.

3. Mich.—Frye v. City of Detroit, 239 N.W. 886, 256 Mich. 466.

4. Mo.—Watkins v. Kansas City & W. B. Ry. Co., App., 209 S.W. 950.

5. Mo.—Moore v. Metropolitan St. Ry. Co., 176 S.W. 1120, 189 Mo.App. 555.

60 C.J. p 367 note 16.

6. Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.
60 C.J. p 367 note 17.

7. Tex.—Ft. Worth St. R. Co. v. Allen, Civ.App., 39 S.W. 125.

8. N.Y.—Lauber v. Lynch, 119 N.Y. S. 614, 65 Misc. 209.

9. N.Y.—Lauber v. Lynch, *supra*.

10. N.Y.—Stillwater v. R. Co., 241 N.Y.S. 569, 229 App.Div. 41.

11. La.—Cline v. Crescent City R. Co., 9 So. 122, 43 La. Ann. 327, 26 Am.S.R. 187.

Liability of municipality negligently operating railroad or subway see Municipal Corporations § 914.
Municipal operation of street railroads generally see *infra* §§ 341-345.

12. Mo.—Asums v. United Rys. Co. of St. Louis, 134 S.W. 92, 152 Mo. App. 521.

60 C.J. p 368 note 45.

Concurrent liability of municipality

for injury caused by defect or obstruction in street see Municipal Corporations § 870.

13. La.—Cline v. Crescent City R. Co., 9 So. 122, 43 La. Ann. 327, 26 Am.S.R. 187.

14. N.Y.—Dixon v. Brooklyn City, etc., R. Co., 3 N.E. 65, 100 N.Y. 170.

60 C.J. p 368 note 47.

15. N.Y.—Swift v. Brooklyn Heights R. Co., 118 N.Y.S. 827, 134 App. Div. 134.

60 C.J. p 369 note 48.

16. Mass.—Phinney v. Boston El. R. Co., 87 N.E. 490, 201 Mass. 286, 131 Am.S.R. 400.

60 C.J. p 369 note 49.

17. Mass.—Phinney v. Boston El. R. Co., *supra*.

60 C.J. p 369 note 50.

18. Tex.—Ft. Worth St. R. Co. v. Allen, Civ.App., 39 S.W. 125.

60 C.J. p 369 note 52.

§ 187. Lessor and Lessee

Where the lease of a street railroad is unauthorized, the lessor remains liable for the lessee's torts in operating the road; where the lease is authorized, the authorities differ as to the lessor's liability.

As a general rule a street railroad company cannot, without legislative or municipal authority, divest itself of any of the duties and liabilities incident to the maintenance and operation of its road by leasing the road to another,¹⁹ and, hence, if the lease is unauthorized, the lessor company will remain liable for the torts of the lessee in the operation of the road;²⁰ and it has been held that the lessor is so liable, without express reference to whether or not the lease was authorized.²¹ Where, however, there is legislative or municipal authority for the lease, the question of the liability of the lessor for the torts of the lessee is one on which there is a great diversity of judicial opinion.²² In some jurisdictions it is held that, where there is legislative or municipal authority for the lease, the lessor company is thereby absolved from liability for the torts of the lessee company,²³ unless such liability is expressly reserved in the statute or ordinance²⁴ or the lease is to an irresponsible company,²⁵ or unless the control of the road is reserved by the lessor, in the lease.²⁶ In other jurisdictions, however, it is held that, although there is legislative or municipal authority for the lease, the lessor is not absolved from liability unless in addition to such authority there is a provision expressly exempting the lessor from liability,²⁷ notwithstanding the lessee agrees to assume all liability;²⁸ and the fact that the lessee abandons a single track as leased and lays a double track at its own expense, as provided by the lease, does not

absolve the lessor from liability.²⁹ It is well settled, however, that the lessee company is liable for all injuries caused by its own negligence or that of its servants in the operation of the leased road;³⁰ but it is not liable for injuries caused by the negligence of an assignee of the lease or of the assignee's servants,³¹ or for torts committed by the lessor prior to the execution of the lease unless such liability is assumed in the lease.³²

Negligence of receiver. Neither the lessor nor the lessee of a street railroad is liable for the negligent maintenance or operation of the road while in the hands of a receiver.³³

§ 188. Vendor and Purchaser

The vendor of a street railroad and its franchise is not liable for an injury occurring after it has parted with possession and control, although it may be liable for injuries resulting from improper construction. The purchaser is liable for damages caused by its own negligence or for damages which occurred prior to acquisition where such liability is assumed.

A street railroad company which has lawfully sold and delivered its road and franchises to another company is not liable for an injury due to the negligence or improper operation of the road occurring after it has parted with its ownership, operation, and control,³⁴ although it may be liable for injuries due to the fact that the road was not properly constructed at the time of delivery.³⁵ The purchaser of a street railroad is liable for damages caused by its own negligence the same as any other owning company;³⁶ and, where the sale is a judicial one, the court in ordering the sale may impose a liability for past damages on the purchaser as a part of the consideration for the purchase.³⁷

19. *Tex.*—*Ft. Worth St. R. Co. v. Allen*, Civ.App., 39 S.W. 125. 60 C.J. p 367 note 22.

20. *La.*—*Muntz v. Algiers, etc., R. Co.*, 35 So. 624, 111 La. 423, 100 Am.S.R. 495, 64 L.R.A. 222.

Mo.—*Moorshead v. United Rys. Co.*, 100 S.W. 611, 203 Mo. 121.

21. *Ill.*—*Henning v. Sampsell*, 86 N.E. 274, 236 Ill. 375.

22. *Mo.*—*Moorshead v. United Rys. Co.*, 100 S.W. 611, 203 Mo. 121. 60 C.J. p 367 note 25.

23. *Mo.*—*Chlanda v. St. Louis Transit Co.*, 112 S.W. 249, 213 Mo. 244. 60 C.J. p 367 note 26.

24. *Mo.*—*Moorshead v. United Rys. Co.*, 100 S.W. 611, 203 Mo. 121.

25. *Mo.*—*Moorshead v. United Rys. Co.*, supra. 60 C.J. p 368 note 28.

26. *Mo.*—*Moorshead v. United Rys. Co.*, supra.

27. *Tex.*—*Ft. Worth St. R. Co. v. Ferguson*, 29 S.W. 61, 9 Tex.Civ.App. 610. 60 C.J. p 368 note 30.

28. *Mass.*—*Braslin v. Somerville Horse R. Co.*, 13 N.E. 65, 145 Mass. 64.

29. *Tex.*—*Ft. Worth St. R. Co. v. Ferguson*, 29 S.W. 61, 9 Tex.Civ.App. 610.

30. *Ind.*—*Indianapolis Traction & Terminal Co. v. Springer*, 93 N.E. 707, 47 Ind.App. 35. 60 C.J. p 368 note 33.

31. *N.C.*—*Dunn v. Asheville, etc., R. Co.*, 54 S.E. 416, 141 N.C. 521.

32. *N.Y.*—*Higgins v. Brooklyn, etc., R. Co.*, 66 N.Y.S. 334, 54 App.Div. 69.

33. *Ill.*—*Henning v. Sampsell*, 86 N.E. 274, 236 Ill. 375.

34. *Ark.*—*Pugh v. Texarkana Light, etc., Co.*, 109 S.W. 1019, 86 Ark. 38.

35. *Ark.*—*Pugh v. Texarkana Light, etc., Co.*, supra.

36. *Tex.*—*Citizens' R., etc., Co. v. Johns*, 116 S.W. 62, 52 Tex.Civ.App. 489.

37. *Mich.*—*Daniels v. Bay City Traction, etc., Co.*, 107 N.W. 94, 143 Mich. 493. 60 C.J. p 368 note 42.

2. CARE REQUIRED AND LIABILITY IN GENERAL

§ 189. In General

If a street railroad company, through its servants and agents, fails to exercise the degree of care required in the management and operation of its road and cars, it is guilty of negligence and is liable for the injuries caused thereby to property and persons.

If a street railroad company, through its servants and agents, fails to exercise the degree of care required in the management and operation of its road and cars, it is guilty of negligence and liable for the injuries caused thereby to property³⁸ or persons,³⁹ and this liability is sometimes expressly imposed on the company by ordinance or statute.⁴⁰ The fact that a street railroad company received its franchise from the municipality does not exempt it from liability for its negligence.⁴¹ A street railroad company is not, however, an insurer against every casualty which may happen, or liable for an injury attributable to a mere accident which ordinary vigilance could not avoid⁴² or which cannot be attributed to want of care on its part;⁴³ nor can negligence on its part be inferred from the mere happening of the injury, as discussed *infra* § 305. To run a car in one direction on a track generally used for cars going in the opposite direction is not negligence in itself, independent of other circumstances and conditions,⁴⁴ nor are maintaining and using a switch which projects out into the public highway,⁴⁵ or the failure to run cars on such switch with, rather than against, traffic.⁴⁶ The primary duty assumed by railway corporations, by the

acceptance of their charters, to operate their roads so as to afford reasonable protection to the public imposes on them the correlative duty to adopt and enforce reasonable rules tending to that end;⁴⁷ but the company's omission to promulgate such rules has no bearing on its legal responsibility for its alleged negligence.⁴⁸

Violation of statute or ordinance. Although it has been stated that the violation of a legislative enactment, prescribing merely a general rule of conduct and not a specific requirement to do or not to do a particular act, does not constitute negligence *per se*,⁴⁹ the failure of a street railroad company to perform a duty imposed by a valid⁵⁰ ordinance or statute is ordinarily such negligence as will render it liable for the injuries resulting therefrom,⁵¹ notwithstanding a fine is also imposed for such failure;⁵² but the circumstances may be such as to make the violation not necessarily negligence.⁵³ A general penal ordinance regulating the operation of streetcars, but conferring no particular benefits on persons injured by a violation of such ordinance, and not even making such violation negligence, confers no right of action on persons injured by its violation,⁵⁴ and the violation of a general ordinance, which is not made a part of the ordinance granting the company's franchise, does not authorize a recovery for injuries or death caused by such violation, unless the company has agreed to such ordinance or contracted to be bound thereby.⁵⁵

38. Ala.—Birmingham, E. & B. R. Co. v. Williams, 66 So. 653, 190 Ala. 53. 60 C.J. p 369 note 54.

39. Cal.—King v. San Diego Electric Ry. Co., 168 P. 131, 176 Cal. 268. 60 C.J. p 369 note 55.

40. Ky.—Johnson v. Louisville City R. Co., 10 Bush 231. 60 C.J. p 369 note 56.

41. N.C.—Norman v. Charlotte Electric Ry. Co., 83 S.E. 835, 167 N.C. 533, Ann.Cas.1916E 508. 60 C.J. p 369 note 57.

42. Tex.—Dallas Consol. Electric St. Ry. Co. v. Chambers, 118 S.W. 851, 55 Tex.Civ.App. 331. 60 C.J. p 369 note 58.

43. Ga.—Fairburn & A. Ry. & Electric Co. v. Latham, 107 S.E. 88, 26 Ga.App. 698. 60 C.J. p 369 note 58½.

44. Cal.—Busch v. Los Angeles Ry.

Corporation, 174 P. 665, 178 Cal. 536, 2 A.L.R. 1607. 60 C.J. p 370 note 60.

45. Tex.—El Paso Electric Co. v. Portillo, Civ.App., 37 S.W.2d 219.

46. Tex.—El Paso Electric Co. v. Portillo, *supra*.

47. S.C.—McCormick v. Columbia Electric St. Ry., Light & Power Co., 67 S.E. 562, 85 S.C. 455, 21 Ann. Cas. 144.

48. Wis.—Williams v. Duluth St. Ry. Co., 171 N.W. 939, 169 Wis. 261. 60 C.J. p 370 note 64.

49. Ohio.—Koppelman v. Springer, 104 N.E.2d 695, 157 Ohio St. 117.

50. Mo.—Sanders v. Southern Electric R. Co., 48 S.W. 855, 147 Mo. 411. 60 C.J. p 370 note 66.

51. Cal.—King v. San Diego Electric Ry. Co., 168 P. 131, 176 Cal. 268. 60 C.J. p 370 note 67.

Persons protected

An ordinance requiring streetcars to stop or hurry from crossings in case of fire may be invoked, as for his benefit, by a bystander injured while on the sidewalk by a fire automobile, forced to take to the sidewalk by a sudden obstruction of the crossing by a streetcar.—King v. San Diego Electric Ry. Co., *supra*—45 C.J. p 727 note 85 [a].

52. Mo.—Fath v. Tower Grove, etc., R. Co., 16 S.W. 913, 105 Mo. 537, 13 L.R.A. 74.

53. N.Y.—Clark v. Murray, 35 N.Y. S.2d 483, 264 App.Div. 843, affirmed 46 N.E.2d 353, 289 N.Y. 746. 60 C.J. p 370 note 69.

54. Mo.—Holwerson v. St. Louis, etc., R. Co., 57 S.W. 770, 157 Mo. 216, 50 L.R.A. 850.

55. Mo.—Holwerson v. St. Louis, etc., R. Co., *supra*.

Noise. Where no physical injury results, the noise caused by the operation of a street railroad furnishes the owner of property adjoining the premises upon which the railroad is operated no sufficient basis for the recovery of damages.⁵⁶

Vibrations. Since vibrations from a carefully operated street railroad which caused damage to abutting property are *damnum absque injuria*,⁵⁷ negligence in the operation or construction of the street railroad must be shown in order to justify a recovery for damages caused by vibrations in the operation of the road.⁵⁸

Transportation of freight. The unauthorized transportation of freight for hire for others over its tracks may constitute negligence which will render the company liable for the resulting injuries;⁵⁹ but this does not apply to the transportation of anything which it is reasonably necessary for the company to transport as incidental to the proper management of its legitimate business.⁶⁰

Opening the car door to permit a passenger to alight from a moving car in the middle of a block, whereby a traveler on the street was injured, has been held to be negligence,⁶¹ but there is also authority to the contrary.⁶²

§ 190. Acts of Servants or Employees

A street railroad company is liable for injuries which are due to the inexperience and incompetency of its servants and for all injurious acts done by its employees within the scope of their employment.

As a general rule it is the duty of a street railroad company to exercise ordinary care to employ sufficient reasonably skilled and competent servants on its cars to operate them in a careful manner so as to prevent injury to persons on the track;⁶³ and, therefore, the company is liable for injuries which are due to the inexperience and incompetency of such servants,⁶⁴ although it has been held that the mere employment or retention in service of a careless or unfit employee does not give rise to a cause of action against the company,⁶⁵ since there must be evidence of some specific act of negligence or incompetency which is the proximate cause of the injury, as discussed *infra* § 212. A motorman's collapse into unconsciousness from illness, allowing the car to run uncontrolled into a vehicle, is an act of God exculpating the company unless its negligence in placing him in charge of the car with notice of his incompetency was a concurring cause of the casualty.⁶⁶ A single act of negligence on the part of the driver or motorman at any time other than that when the accident happened does not establish unfitness on the part of such driver or motorman.⁶⁷ His unfitness because of illness may be inferred from his physical condition.⁶⁸

Error of judgment in emergency. It is not negligence on the part of a motorman or driver, required to choose instantly one of several methods to avert an injury, to choose one which may not have been the most efficacious.⁶⁹

Scope of employment. A street railroad company is liable for injurious acts done by its employees within the scope of their employment,⁷⁰ whether

56. Ill.—Griveau v. South Chicago City R. Co., 130 Ill.App. 519.

57. N.Y.—Frank v. City of New York, 43 N.Y.S.2d 177, 179 Misc. 895.

58. N.Y.—Frank v. City of New York, *supra*.

59. Mass.—Caswell v. Boston El. R. Co., 77 N.E. 380, 190 Mass. 527.

60. Tex.—Caswell v. Boston El. R. Co., *supra*—Dallas Rapid Transit R. Co. v. Dunlap, 26 S.W. 877, 7 Tex.Civ.App. 471.

61. Mo.—Gilman v. Fleming, App., 265 S.W. 104.

62. Ill.—Becker v. Chicago Rys. Co., 216 Ill.App. 324.

63. Del.—Igle v. People's Ry. Co., 93 A. 666, 28 Del. 376.
60 C.J. p 370 note 78.

Length of employment is immaterial where it appears employee was reasonably skillful and ordinarily observant.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La. App. 456.

64. La.—Rice v. Crescent City R. Co., 24 So. 791, 51 La. Ann. 108.
60 C.J. p 371 note 79.

65. Va.—Virginia Ry. & Power Co. v. Davidson's Admr., 89 S.E. 229, 119 Va. 313.
60 C.J. p 371 note 80.

66. N.Y.—Beiner v. Nassau Electric R. Co., 181 N.Y.S. 628, 191 App. Div. 371.

67. Tex.—Dallas City R. Co. v. Beeman, 11 S.W. 1102, 74 Tex. 291.

68. N.Y.—Beiner v. Nassau Electric R. Co., 181 N.Y.S. 628, 191 App. Div. 371.

69. Mich.—Nissly v. Detroit, J. & C.

Ry., 131 N.W. 145, 168 Mich. 676, Ann.Cas.1913C 719.
60 C.J. p 371 note 85.

70. Ky.—South Covington & C. St. Ry. Co. v. Cleveland, 100 S.W. 283, 30 Ky.L. 1072, 11 L.R.A., N.S., 853.
60 C.J. p 371 note 87.

Assault

(1) Contention that fight was a private affair could not be sustained where employee who, while on way home, alighted from streetcar, placed hand on motorist's shoulder, and in angry tone said "Get the hell off the tracks."—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

(2) Whether employee was acting for the company with respect to assault as question for jury see *infra* § 322.

such acts are willful or negligent,⁷¹ and whether in obedience to, or violation of, special instructions;⁷² but it is not liable for injuries which result from acts which are not within the scope of such employment.⁷³

§ 191. Acts of Third Persons

Generally, a street railroad company is not liable for injuries caused by the negligent or wrongful acts of third persons not in its employ and done without its knowledge or consent.

Generally, a street railroad company is not liable for injuries caused by negligent or wrongful acts of third persons not in its employ and done without its knowledge and consent,⁷⁴ as, for example, a passenger⁷⁵ or a volunteer assisting an employee of an independent contractor.⁷⁶ Where, however, the negligent operation of a streetcar produces an apparent peril, the company may be liable for an injury to a third person by a passenger,⁷⁷ provided the injury was proximately caused by the negligence of the company and was not the result of the independent and intervening act of the passenger, as discussed *infra* § 212. Furthermore, where the

company is negligent in maintaining poles as part of its system it may be liable to a person injured by the fall of a defective pole when struck by a motor vehicle,⁷⁸ provided the omission carefully to maintain such poles could be considered as a substantial concurring cause, as discussed § 212.

§ 192. Degree of Care Required

The general rule is that a street railroad company is required to exercise reasonable or ordinary care in the operation of its cars.

Although it has been said that a street railroad company in the operation of its road in public streets and highways is required to exercise a very high degree of care,⁷⁹ or more care than is usually required on the part of steam railroads operating on their own right of way,⁸⁰ it is not, with respect to the general public in the streets on which it runs, required to exercise as high a degree of care as it owes to passengers on its cars,⁸¹ or as is required of a steam railroad operating its cars on the streets.⁸² The general rule is that a street railroad company is required to exercise that which, under the circumstances, is reasonable⁸³ or ordinary⁸⁴

71. Ga.—Savannah Electric Co. v. Wheeler, 58 S.E. 38, 128 Ga. 550, 10 L.R.A., N.S., 1176.
60 C.J. p 371 note 88.

72. Ala.—Birmingham Ry., Light & Power Co. v. Donaldson, 68 So. 596, 14 Ala.App. 160.

73. Ohio.—Cleveland Ry. Co. v. Huntington, 164 N.E. 752, 119 Ohio St. 518.
60 C.J. p 371 note 90.

74. Ky.—Louisville R. Co. v. Holmes, 117 S.W. 953.
60 C.J. p 372 note 91.

Violation of ordinance

Rapid transit company, which failed to maintain signs forbidding spitting on the floors as required by ordinance, was not thereby rendered liable to a person injured as the result of the violation by another of ordinance prohibiting spitting on the floor of any public place or conveyance.—Clark v. Murray, 35 N.Y.S.2d 483, 264 App.Div. 843, affirmed 46 N.E.2d 353, 289 N.Y. 746.

75. Ky.—Louisville R. Co. v. Holmes, 117 S.W. 953.
60 C.J. p 372 note 92.

76. Pa.—Noggle v. Carlisle, etc., R. Co., 64 A. 547, 215 Pa. 357.
60 C.J. p 372 note 93.

77. La.—Kendall v. New Orleans Public Service, App., 45 So.2d 541.

78. Cal.—Gibson v. Gibson, 216 P.2d 119, 96 Cal.App.2d 681.

79. D.C.—Barstow v. Capital Traction Co., 29 App.D.C. 362.
Care required of railroads as to persons on or about tracks generally see Railroads § 904 et seq.

80. U.S.—Stelk v. McNulta, Ill., 99 F. 138, 40 C.C.A. 357.
Or.—Palmer v. Portland Ry., Light & Power Co., 108 P. 211, 56 Or. 262.

81. Conn.—Hayden v. Fair Haven, etc., R. Co., 56 A. 613, 76 Conn. 355.
60 C.J. p 372 note 97.

Care required as to passengers generally see Carriers § 676 et seq.

82. Or.—Wolf v. City R. Co., 85 P. 620, 91 P. 460, 50 Or. 64, 15 Ann. Cas. 1181.

60 C.J. p 372 note 98.
Care required of railroad operating cars on streets see Railroads § 984.

83. Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543—Terre Haute, Indianapolis & Eastern Traction Co. v. Sawyer, 179 N.E. 554, 95 Ind.App. 8.

Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

Pa.—Longden v. Conestoga Transp. Co., 169 A. 884, 313 Pa. 561.
60 C.J. p 372 note 99.

Reciprocal rights and duties of company and travelers on the street see *infra* §§ 207-209.

Trackless trolley

Md.—State v. Magaha, 32 A.2d 477, 182 Md. 122.

Proper care

Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113.

Duty superior to duty to company

Since a motorman's first duty, with respect to operating and managing his streetcar safely, is to the public, his duty to exercise reasonable care for protection of the public is superior to his duty to the company.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

84. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720—Alberts v. Lytle, 37 P.2d 705, 1 Cal.App. 682.

Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

Mo.—Fortner v. St. Louis Public Service Co., 244 S.W.2d 10.

Ohio.—McCarthy v. Cincinnati St. Ry. Co., 94 N.E.2d 627, 88 Ohio App. 454.

Or.—Harrington v. Portland Traction Co., 124 P.2d 715, 168 Or. 548.
60 C.J. p 372 note 1.

Snow removal

(1) Although street railroads have

care and prudence, operating with regard to known conditions⁸⁵ and taking proper or usual precautions to avoid injury to travelers.⁸⁶ Accordingly, a street railroad company is required to exercise such care and vigilance in the management and operation of its cars to avoid injuring persons rightfully upon such streets or highways as a person of ordinary prudence and capacity may be expected to exercise under the same or similar circumstances.⁸⁷ It is not required to exercise the highest degree,⁸⁸ or the highest practicable degree,⁸⁹ of care, or very high,⁹⁰ high,⁹¹ great,⁹² or special and particular⁹³ care; nor is it bound to guard against unusual and extraordinary dangers.⁹⁴ Furthermore, the street railroad company has no duty to anticipate and provide against every exigency or possible contingency which may suddenly arise in the operation of its lines,⁹⁵ and, in order to

import negligence from the action of the operator of a streetcar where danger appears in the way of such car, the danger must be a sufficient distance from the streetcar to give time enough to enable the operator to stop or slow down to avoid the accident.⁹⁶

The care required must be commensurate with the known danger,⁹⁷ and what constitutes ordinary care and prudence within the meaning of the general rule depends on the known and reasonably to be expected hazards and dangers of the particular case,⁹⁸ and varies under different conditions, such as the character of the cars, the agency of propulsion, the locality in which they are operated, whether in the country or in a city, whether over much traveled or unfrequented streets, and the possibility or probability attending their operation,⁹⁹

right to keep their tracks clear of snow, they must exercise ordinary care in their operation, and question whether they have used ordinary care should be decided in light of surrounding circumstances.—*Armiger v. Baltimore Transit Co.*, 196 A. 111, 173 Md. 416.

(2) Snow sweeper, operated by street railway company, was not so dangerous in itself that it should not be transported on public highway without unusual care for safety of travelers going in same direction.—*Overstreet v. Illinois Power & Light Corporation*, 190 N.E. 676, 356 Ill. 378.

Statutory rules or standards of conduct

(1) Statutory rules or standards of conduct governing operation of streetcar and other vehicles are not exclusive.—*Nees v. Minneapolis St. Ry. Co.*, 16 N.W.2d 758, 218 Minn. 532.

(2) Absence of statutory rule or regulation defining duty of operator does not absolve operator from the common-law duty to exercise reasonable or ordinary care.—*Peterson v. Minneapolis St. Ry. Co.*, 31 N.W.2d 905, 226 Minn. 27.—*Nees v. Minneapolis St. Ry. Co.*, 16 N.W.2d 758, 218 Minn. 532.

85. Mich.—*Hibbler v. Detroit United Ry.*, 137 N.W. 719, 172 Mich. 368. 60 C.J. p 373 note 2.

86. Cal.—*White v. Los Angeles Ry. Corp.*, 167 P.2d 530, 73 Cal.App.2d 720.

Mass.—*McBride v. Middlesex & B. St. Ry. Co.*, 176 N.E. 185, 276 Mass. 29.

Pa.—*Weiner v. Philadelphia Rapid Transit Co.*, 165 A. 252, 310 Pa. 415.

60 C.J. p 373 note 3.

Knowledge of peril

The duty of streetcar operator to avoid collision is not postponed until operator has actual knowledge of peril ahead but arises when by exercise of reasonable care he would have realized it.—*MacDonald, to Use of Emmco Ins. Co. v. Capital Transit Co.*, D.C.Mun.App., 31 A.2d 862.

87. Minn.—*Wright v. Minneapolis St. Ry. Co.*, 23 N.W.2d 347, 222 Minn. 105.

Va.—*Virginia Electric & Power Co. v. Mitchell*, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.

60 C.J. p 373 note 99, p 373 notes 1-3.

Probability of skidding

If condition of rails, because of wet leaves thereon, would probably cause car to skid on application of brakes, motorman must operate car with care of ordinarily prudent person.—*Virginia Electric & Power Co. v. Mitchell*, supra.

88. N.Y.—*Klimpl v. Metropolitan St. R. Co.*, 87 N.Y.S. 39, 92 App.Div. 291.

60 C.J. p 373 note 5.

89. Ky.—*Kentucky Traction & Terminal Co. v. Bain*, 170 S.W. 499, 501, 161 Ky. 44.

90. N.Y.—*Reiner v. Nassau Electric R. Co.*, 181 N.Y.S. 628, 191 App.Div. 371.

91. N.Y.—*Reiner v. Nassau Electric R. Co.*, supra.

92. N.Y.—*Reiner v. Nassau Electric R. Co.*, supra.

93. Cal.—*Busch v. Los Angeles Ry. Corporation*, 174 P. 665, 178 Cal. 536, 2 A.L.R. 1607.

94. Ill.—*Spencer v. Chicago City Ry. Co.*, 220 Ill.App. 436. 60 C.J. p 373 note 11.

95. Pa.—*Hamley v. Pittsburgh Rys. Co.*, 28 A.2d 911, 345 Pa. 380.—*Cox v. Wilkes-Barre Ry. Corp.*, 17 A.2d 367, 340 Pa. 554.—*Tatarewicz v. United Traction Co.*, 69 A. 995, 220 Pa. 560.—*Kelly v. Philadelphia Transp. Co.*, 23 A.2d 57, 146 Pa.Super. 445.

96. Pa.—*Cox v. Wilkes-Barre Ry. Corp.*, 17 A.2d 367, 340 Pa. 554.—*Weschler v. Buffalo & Lake Erie Traction Co.*, 143 A. 119, 293 Pa. 472.—*Wilkerson v. Philadelphia Transp. Co.*, 76 A.2d 430, 167 Pa. Super. 616.

97. Va.—*Virginia Electric & Power Co. v. Mitchell*, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855. 60 C.J. p 373 note 12.

98. Iowa.—*Rosenberg v. Des Moines Ry. Co.*, 238 N.W. 703, 213 Iowa 152.

Mo.—*Fortner v. St. Louis Public Service Co.*, 244 S.W.2d 10.

Va.—*Virginia Electric & Power Co. v. Mitchell*, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855. 60 C.J. p 373 note 13.

99. Minn.—*Peterson v. Minneapolis St. Ry. Co.*, 53 N.W.2d 817. 60 C.J. p 373 note 14.

At public crossing more care is required than at private crossing.—*Scholl v. Philadelphia Suburban Transp. Co.*, 51 A.2d 732, 356 Pa. 217.

as that which under some conditions will be ordinary and reasonable care may under other conditions amount even to gross negligence.¹ Thus, as compared with the usual operation of a car under ordinary conditions, ordinary care will require a higher degree of diligence and prudence where there is an increase of danger,² as in proceeding in one direction on a track generally used for cars going in the opposite direction,³ or at a crossing of intersecting streets,⁴ at the crossing of two street railroads,⁵ on obstructed streets,⁶ or streets in crowded or densely populated portions of a municipality,⁷ or where there are adverse weather⁸ or road⁹ conditions.

Where a street railroad is operated under conditions similar to the operation of steam railroad, general rules as to the care required of such roads are applicable.¹⁰

Statutory precautions to prevent accidents required of railroads have been held applicable to

interurban railroads,¹¹ although a doctrine to the contrary is equally supported by authority.¹²

Company rules. Although the existence of company operating rules does not render a violation of such rules by the operator of the streetcar negligence per se,¹³ such violation is evidence of negligence and a circumstance to be considered in determining whether or not the operator was negligent.¹⁴

§ 193. Duties and Care as to Trespassers in General

General rules apply in determining whether a person is a trespasser with respect to a street railroad company, and, generally, no duty exists towards a trespasser except to refrain from willfully or wantonly injuring him.

General rules apply in determining whether a person is a trespasser with respect to a street railroad company.¹⁵ Thus, since the rights of the

In crossing public street from main track to car yard, against traffic between intersections of streets, motorman was required to use high degree of skill and caution to avoid danger or injury to any person or collision with any vehicle on highway.—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.

1. Fla.—Consumers' Electric Light, etc., Co. v. Pryor, 32 So. 797, 44 Fla. 354.

2. Utah.—Spiking v. Consolidated R., etc., Co., 93 P. 838, 33 Utah 313. 60 C.J. p 374 note 16.

Roof steps

Where operator of streetcar, from previous experience, had reason to believe that roof step, instead of being folded against side of streetcar, might be down, extending outward from streetcar, a conclusion was authorized that, when streetcar was in a "tight" place, by the exercise of ordinary care, operator should have determined whether step was down and that failure to do so was negligence, notwithstanding streetcar company had the right to maintain roof steps either open at all times or closed at all times.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.

3. Ohio.—Cincinnati Traction Co. v. Jamison, 32 Ohio Cir.Ct. 336. 60 C.J. p 374 note 17.

4. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217. 60 C.J. p 374 note 18.

5. D.C.—Metropolitan R. Co. v. Hammett, 13 App.D.C. 370. 60 C.J. p 374 note 19.

6. Pa.—Algard v. Philadelphia Rapid Transit Co., 109 A. 647, 266 Pa. 390. 60 C.J. p 374 note 20.

7. Ill.—Chicago, etc., R. Co. v. Wan-ic, 82 N.E. 821, 230 Ill. 530, 15 L. R.A., N.S., 1167. 60 C.J. p 374 note 21.

8. Pa.—Algard v. Philadelphia Rapid Transit Co., 109 A. 647, 266 Pa. 390. 60 C.J. p 374 note 22.

9. Del.—Foulke v. Wilmington City R. Co., 60 A. 973, 21 Del. 363. 60 C.J. p 374 note 23.

10. Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287—Korchak v. Pacific Electric Ry. Co., 48 P.2d 752, 9 Cal.App.2d 89. Puerto Rico.—Transfer Co. v. R., etc., Co., 7 Puerto Rico Fed. 48. 60 C.J. p 374 note 25.

11. Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200. 52 C.J. p 235 note 26.

12. Mo.—Hudson v. Southwest Missouri R. Co., 159 S.W. 59, 146 Mo. App. 388. 52 C.J. p 235 note 28 [a], [c], [d].

13. Cal.—Gett v. Pacific Gas & Electric Co., 221 P. 376, 192 Cal. 621—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal. App.2d 590.

Wash.—Feizer v. City of Seattle, 24 P.2d 444, 174 Wash. 95.

14. Cal.—Gett v. Pacific Gas & Electric Co., 221 P. 376, 192 Cal. 621—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal. App.2d 590.

Wash.—Feizer v. City of Seattle, 24 P.2d 444, 174 Wash. 95.

15. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049. 60 C.J. p 375 note 27.

Abutment

Street railway company, owning easement across parking beyond end of street at intersecting street crossed by its tracks, and city, in its proprietary capacity as owner of such parking, were not liable for injuries to motorist driving off abutment of company's trestle over creek running through such parking, in absence of showing that either did anything to invite motorists onto such private property or maintained unsafe condition as near public highway as to render highway itself unsafe, such motorist being merely trespasser.—Hauck v. Kansas City Public Service Co., 200 S.W.2d 608, 239 Mo.App. 1092.

Playing in streets

Children have no right as a matter of law to play in that part of a street where streetcars are passing.—Camardo v. New York State Rys., 159 N.E. 879, 247 N.Y. 111.

Streetcar conductor standing on the company's tracks, not using the street as a traveler and not having the rights of an employee thereon,

street railroad company and the traveler on the street to use that part of the street occupied by the street railroad tracks are equal and reciprocal, as discussed *infra* § 208, a traveler on the street in the exercise of due care going across or along such part of the street when not occupied by cars is not a trespasser,¹⁶ although it has been said he may become one if, after notice, he negligently remains there¹⁷ or if he unreasonably and unnecessarily obstructs the company in using the tracks;¹⁸ but an unregistered automobile unlawfully on the highway has been held a trespasser,¹⁹ as has also a man who lies down on the streetcar track.²⁰ Where the tracks are laid on a private right of way,²¹ or where they are raised above the surface of the street²² or elevated on a trestle,²³ a person or animal on them is a trespasser, notwithstanding the defective condition of the roadway beside the tracks²⁴ or former use.²⁵ However, where the company has improved a crossing on its private right of way for public use and has invited the public to use it, a person injured while attempting to use such crossing is not a trespasser,²⁶ but is a licensee by implied permission, as discussed *infra* § 194. A person crossing tracks, which are not laid in a public street, is not a trespasser as a mat-

ter of law where a public way existed at the place of crossing for several months prior to the accident with the implied permission of the company.²⁷

Persons on cars. Where a person in danger of being run over by a vehicle leaps to the rear platform of a streetcar without intending to become a passenger, he is technically a trespasser,²⁸ as is a newsboy boarding a car to sell papers without intending to pay the fare.²⁹ So a boy who, without the intention of paying fare but with the purpose of stealing a ride, boards a streetcar, and secretes himself from observation so as to avoid detection, is a mere trespasser³⁰ unless his presence on the car be actually known and assented to, either directly or by implication, by the driver or conductor;³¹ but assent to the boy's riding on the car free will not arise by implication from the mere fact that the driver discovered him, and made no demand for fare, when the driver is neither required nor authorized to collect fares.³² The failure of a conductor to collect fare from a person on the platform does not make such person a trespasser, so as to preclude an action for his injuries resulting from his being thrown under the car wheels while

is a trespasser.—*Manning v. Manchester St. Ry.*, 118 A. 386, 80 N.H. 404—60 C.J. p 376 note 39.

16. Mo.—*McKenzie v. United Rys. Co. of St. Louis*, 115 S.W. 13, 216 Mo. 1.
60 C.J. p 375 note 27.

17. N.C.—*Norman v. Charlotte Electric Ry. Co.*, 83 S.E. 835, 167 N.C. 533, Ann.Cas.1916E 508.
60 C.J. p 375 note 28.

18. Pa.—*Struse v. Philadelphia Rapid Transit Co.*, 87 Pa.Super. 46.

19. Mass.—*Love v. Worcester Consol. St. Ry. Co.*, 99 N.E. 960, 213 Mass. 137.
60 C.J. p 375 note 30.

20. Ala.—*Corpus Juris cited in Clark v. Birmingham Elec. Co.*, 181 So. 294, 295, 236 Ala. 108.
60 C.J. p 375 note 31.

21. Ala.—*Clark v. Birmingham Electric Co.*, 181 So. 294, 236 Ala. 108.
60 C.J. p 375 note 32.

In Massachusetts

(1) Under statute effecting change in substantive law, person on space in public way expressly reserved for use of street railway company has rights of pedestrian or traveler on highway, and company has obligation to exercise reasonable care to avoid injuring such person regardless of

whether person is on reservation for purpose of becoming passenger or after alighting from car.—*Sears v. Boston Elevated Ry. Co.*, 47 N.E.2d 282, 313 Mass. 326.

(2) However, as such statute does not apply to events which occurred prior to its enactment, person injured while travelling across reservation did not have rights of pedestrian under prior statute giving such rights only to person on reservation for purpose of becoming passenger or after alighting from car, and, thus, company was not liable in absence of wanton and reckless misconduct.—*Sears v. Boston Elevated Ry. Co.*, *supra*.

(3) Prior to statute, person on reservation was considered trespasser or mere licensee and company was liable only for willful, wanton, or reckless misconduct.—*Pritchard v. Boston Elevated Ry.*, 5 N.E.2d 29, 296 Mass. 197—60 C.J. p 375 note 33.

22. Ala.—*Clark v. Birmingham Electric Co.*, 181 So. 294, 236 Ala. 108.
60 C.J. p 376 note 34.

23. Ala.—*Benton v. City of Montgomery*, 75 So. 473, 200 Ala. 97.

24. Ala.—*Snyder v. Mobile Light & Ry. Co.*, 107 So. 451, 214 Ala. 310.

25. Ala.—*Snyder v. Mobile Light & Ry. Co.*, *supra*.

26. Iowa.—*Mann v. Des Moines Ry. Co.*, 7 N.W.2d 45, 232 Iowa 1049.

Erection of signs

Where street railway company had improved crossing on private right of way for public use and invited public to use it, the company became bound to use care in operation of streetcars over the crossing, which ordinary prudence and the law demanded, and it could not change motorist from a licensee to a trespasser by signs erected at crossing.—*Mann v. Des Moines Ry. Co.*, *supra*.

27. N.Y.—*Zambardi v. South Brooklyn Ry. Co.*, 24 N.E.2d 312, 281 N.Y. 516.

28. N.Y.—*McCann v. Sixth Ave. R. Co.*, 23 N.E. 164, 117 N.Y. 505, 15 Am.S.R. 539.

29. Mass.—*Lebov v. Consolidated Ry. Co.*, 89 N.E. 546, 203 Mass. 380, 26 L.R.A., N.S., 265.
60 C.J. p 376 note 42.

30. Ky.—*Monehan v. South Covington, etc., R. Co.*, 78 S.W. 1106, 117 Ky. 771, 25 Ky.L. 1920.
60 C.J. p 376 note 43.

31. Ga.—*Wynn v. City & Suburban Ry. Co.*, 17 S.E. 649, 91 Ga. 344.

32. Ga.—*Wynn v. City & Suburban Ry. Co.*, *supra*.

stepping from the car.³³ Where a streetcar is stopped so as to obstruct the passage of a traveler on foot desiring to cross the street, it is not a trespass or wrongful act on his part to step on and pass over the platform of the car in order to avoid the obstruction.³⁴

Care required. As a general rule a street railroad company is under no duty to exercise active vigilance to look out for, and prevent injury to, trespassers on its cars,³⁵ but is bound only to abstain from wantonly, recklessly, or willfully injuring a trespasser, whose presence is known,³⁶ or to exercise reasonable care to avoid injuring him after discovering his peril;³⁷ and the company, therefore, is not liable for injuries caused to a trespasser on a car whose presence or peril is not known,³⁸ or whose injuries are caused without any negligence on the part of the operatives of the car,³⁹ or whose injuries are not the proximate result of such employee's negligent act, as discussed *infra* § 212. Where the trespasser is a child due regard should be paid, after he is discovered, to the known indiscretion of childhood, and the inability of children to exercise proper precaution for their own safety,⁴⁰ and it is negligence to permit a child to ride on the car and alight therefrom when in motion without endeavoring to restrain him,⁴¹ or to allow him to cling to, and ride on, the coupling bar of a car moving backwards on a switch while the motorman is operating the car from the opposite end

and the conductor has alighted,⁴² or to allow him to ride on the steps of the platform, when his presence in a situation thus exposed to danger is actually known or the circumstances are such as will make a failure to note his peril palpable neglect of duty on the part of those having the control of the car.⁴³

In removing or ejecting a trespasser from a car the company's employees may lawfully use only such force as is reasonably necessary to accomplish that object,⁴⁴ and if they use more force than is necessary in removing the trespasser or eject him in a careless and reckless manner whereby he is injured the company is liable therefor.⁴⁵ Thus, a street railroad company is liable for injuries caused to a trespasser, particularly a child, by forcibly ejecting him from a car while it is in motion,⁴⁶ or by so frightening him by gestures or otherwise as to cause him to jump or fall from the car.⁴⁷ An employee is justified, however, in catching hold of, and lecturing, a trespassing boy,⁴⁸ and if he, on being turned loose, runs blindly into an approaching car and is injured, neither the employee nor the company is liable therefor.⁴⁹ So, where an order to get off while the car is moving is not given in such a manner as to intimidate a trespassing boy, and he jumps off because he knows he has no right to be on the car, or because he had been told to get off before the car started, and is thereby injured, the company is not liable.⁵⁰

33. Conn.—*Brennan v. Fair Haven*, etc., R. Co., 45 Conn. 284, 29 Am.R. 679.

34. N.Y.—*Shea v. Sixth Ave. R. Co.*, 62 N.Y. 180, 20 Am.R. 480. 60 C.J. p 376 note 47.

35. Ky.—*Monehan v. South Covington*, etc., St. R. Co., 78 S.W. 1106, 117 Ky. 771, 25 Ky.L. 1920. 60 C.J. p 376 note 48.

36. Mass.—*Martin v. Union St. Ry. Co.*, 178 N.E. 734, 277 Mass. 369.

Mo.—*Corpus Juris cited in McClanahan v. St. Louis Public Service Co.*, 251 S.W.2d 704, 708. 60 C.J. p 376 note 49.

Primary negligence

Boy ten years of age who was clinging to outside of moving streetcar, although in precarious position fraught with perilous possibilities, was not in "imminent peril" within meaning of humanitarian rule, until streetcar motorman, with knowledge of boy's presence, accelerated and jerked the streetcar, and liability of streetcar company for injuries, if any, was not for negligence under the

humanitarian rule, but for the primary conduct amounting to negligence, willfulness, wantonness, or recklessness.—*McClanahan v. St. Louis Public Service Co.*, Mo., 251 S.W.2d 704.

37. Mo.—*Corpus Juris cited in McClanahan v. St. Louis Public Service Co.*, 251 S.W.2d 704, 708. 60 C.J. p 377 note 50.

38. Iowa.—*Bruhn v. Ft. Dodge St. Ry. Co.*, 192 N.W. 296, 195 Iowa 454.

60 C.J. p 377 note 51.

39. Ky.—*Taylor v. South Covington*, etc., St. R. Co., 20 S.W. 275, 14 Ky. L. 355.

N.Y.—*Chave v. New York*, etc., R. Co., 1 N.Y.S. 264, 48 Hun 620.

40. Colo.—*Pueblo Electric St. R. Co. v. Sherman*, 53 P. 322, 25 Colo. 114, 71 Am.S.R. 116.

Ga.—*Wynn v. City*, etc., R. Co., 17 S.E. 649, 91 Ga. 344.

41. Colo.—*Pueblo Electric St. R. Co. v. Sherman*, 53 P. 322, 25 Colo. 114, 71 Am.S.R. 116.

60 C.J. p 377 note 55.

42. Kan.—*Bellamy v. Kansas City Rys. Co.*, 196 P. 1104, 108 Kan. 708.

43. Pa.—*Levin v. Second Ave. Traction Co.*, 45 A. 134, 194 Pa. 156. 60 C.J. p 377 note 57.

44. Ky.—*Nussbaum v. Louisville R. Co.*, 57 S.W. 249, 22 Ky.L. 271.

45. Pa.—*Thomas v. Southern Pennsylvania Traction Co.*, 112 A. 918, 270 Pa. 146.

60 C.J. p 377 note 59.

46. Pa.—*Thomas v. Southern Pennsylvania Traction Co.*, *supra*—*Barre v. Reading City Pass. R. Co.*, 26 A. 99, 155 Pa. 170.

47. Pa.—*Thomas v. Southern Pennsylvania Traction Co.*, 112 A. 918, 270 Pa. 146.

60 C.J. p 377 note 61.

48. La.—*Palmisano v. New Orleans City R. Co.*, 32 So. 364, 108 La. 243, 92 Am.S.R. 381, 58 L.R.A. 405.

49. La.—*Palmisano v. New Orleans City R. Co.*, *supra*.

50. Va.—*Richmond Traction Co. v. Wilkinson*, 43 S.E. 622, 101 Va. 394.

As a general rule a street railroad company is under no duty to keep a lookout for trespassers on its track or private right of way at points where it has a right to assume that the track is clear,⁵¹ and this rule applies to children as well as adults,⁵² but it is bound only to abstain from wantonly and willfully injuring such a trespasser⁵³ and to use all proper precautions to avoid injuring him after discovering his peril, as by sounding the gong or whistle and taking proper precautions to stop the car when necessary.⁵⁴ So there is no legal duty to extricate a trespasser placed in a position of imminent peril under the safety guard of a car solely through his own negligence.⁵⁵ Where, however, from the locality and circumstances known to the company there is reason to apprehend that the tracks will not be clear from persons or vehicles,⁵⁶ as where the tracks are so placed in a street as to become a part and parcel of the street,⁵⁷ it is the duty of the driver or motorman to keep a lookout for trespassers on the street, and to use all reasonable precautions on the first appearance of danger to avoid injury;⁵⁸ but such a duty cannot be claimed as owing to a trespasser lying prone on the track or dangerously close to it.⁵⁹

On vehicle colliding with car. The fact that a person is trespassing on a vehicle which collides with a streetcar does not relieve a street railroad company of the duty of exercising reasonable care as to him.⁶⁰

§ 194. Duties and Care as to Licensees in General

As a general rule a street railroad company owes no duty to a mere licensee except to refrain from injuring him wantonly or intentionally, and to avoid injuring him after it discovers his presence and peril.

General rules apply in determining whether a person is a licensee with respect to a street railroad company.⁶¹ Thus, a person climbing a trolley pole to repair a city fire alarm wire attached thereto is a mere licensee of the street railroad company,⁶² and a city employee inspecting track repair work, whose employment does not require him to ride on the work car of the street railway company, entering the car to eat his lunch at the invitation of the company's foreman, is at most a mere licensee;⁶³ but a person on a street for a lawful purpose, who enters on a portion thereof which the city has permitted the street railway company to use, does not thereby become a mere licensee of the company, so as to absolve it from the duty of exercising ordinary care to prevent injury to him.⁶⁴

Where the company has improved a crossing on its private right of way for public use and has invited the public to use it, a person injured while attempting to use such crossing has been held not to be a trespasser, as discussed supra § 193, or a bare licensee,⁶⁵ but a licensee by implied permission.⁶⁶ Furthermore, although statutes, forbidding the public from walking along tracks not laid in the public street, prohibit the creation, even by invitation of the company, of a public way along the tracks,⁶⁷ such statutes do not prohibit the com-

51. Mich.—Wade v. Detroit, etc., R. Co., 115 N.W. 713, 151 Mich. 684.
60 C.J. p 377 note 65.

52. Ala.—Birmingham R., etc., Co. v. Jones, 45 So. 177, 153 Ala. 157.

53. Ala.—Clark v. Birmingham Elec. Co., 181 So. 294, 236 Ala. 108.
Mass.—Desmond v. Boston Elevated Ry. Co., 64 N.E.2d 357, 319 Mass. 13.

N.Y.—Vento v. South Brooklyn Ry. Co., 281 N.Y.S. 34, 245 App.Div. 830
—Chernozsky v. City of New York, 86 N.Y.S.2d 185.

Pa.—Malia v. West Penn Rys. Co., Com.Pl., 2 Fay.L.J. 135.
60 C.J. p 378 note 67.

54. Ala.—Clark v. Birmingham Elec. Co., 181 So. 294, 236 Ala. 108.
60 C.J. p 378 note 68.

Subsequent negligence

Ala.—Clark v. Birmingham Elec. Co., supra.

55. Ala.—Turbeville v. Mobile Light & R. Co., 127 So. 519, 221 Ala. 91.

56. Ala.—Birmingham R., etc., Co. v. Jones, 45 So. 177, 153 Ala. 157.
N.H.—Manning v. Manchester St. Ry., 118 A. 386, 80 N.H. 404.

57. Ala.—Birmingham R., etc., Co. v. Jones, 45 So. 177, 153 Ala. 157.
60 C.J. p 378 note 71.

58. Ala.—Clark v. Birmingham Electric Co., 181 So. 294, 236 Ala. 108.
60 C.J. p 378 note 72.

59. Ala.—Clark v. Birmingham Electric Co., supra.

60. N.Y.—North v. David Donaldson Co., 226 N.Y.S. 382, 131 Misc. 170.
60 C.J. p 378 note 73.

61. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.
Minn.—Howard v. Minneapolis & St. P. S. R. Co., 214 N.W. 658, 171 Minn. 395.

Pa.—Bally v. Pittsburgh Rys. Co., 116 A. 161, 272 Pa. 178.

62. Minn.—Howard v. Minneapolis & St. P. S. R. Co., 214 N.W. 658, 171 Minn. 395.

63. Pa.—Bally v. Pittsburgh Rys. Co., 116 A. 161, 272 Pa. 178.

64. Neb.—Mercer v. Omaha & C. B. St. Ry. Co., 188 N.W. 296, 108 Neb. 532.

65. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

66. Iowa.—Mann v. Des Moines Ry. Co., supra.
Erection of signs as changing person from licensee to trespasser see supra § 193.

67. N.Y.—Zambardi v. South Brooklyn Ry. Co., 24 N.E.2d 312, 281 N. Y. 518.

pany from inviting or permitting the public to cross the tracks from side to side at a point which is not in a strict sense a public street or highway, and which, through such invitation or permission becomes a way open to public use,⁶⁸ and a person injured while crossing the tracks is not a trespasser as a matter of law where such a public way existed at the place of crossing for several months prior to the accident with the implied permission of the company, as discussed *supra* § 193.

General rules apply as to the duty of care owed to licensees.⁶⁹ Thus, as a general rule a street railroad company owes no duty to a mere licensee⁷⁰ except to refrain from injuring him wantonly or intentionally,⁷¹ and to exercise ordinary care to avoid injuring him after it discovers his presence and peril;⁷² but, as to a licensee by implied permission, the company is bound to exercise reasonable or due care,⁷³ and it has been held that such duty cannot be changed by erecting signs at the crossing,⁷⁴ although it would seem that permission to cross the tracks at such place may be withdrawn by the company by the proper erection of signs and a fence.⁷⁵

§ 195. Duties and Care as to Invitees

An invitee on street railroad premises is a person whose presence there is in answer to the express or implied invitation of the street railroad company, and for its interest or benefit or for their mutual benefit or interest, and to such a person the railroad company owes the duty of exercising ordinary care to prevent injury.

An invitee on street railroad premises or property is a person whose presence there is in answer to the express or implied invitation of the street railroad company, and for its interest or benefit or for their mutual benefit or interest.⁷⁶ Thus, an employee of a lessee of a news stand crossing a subway platform to buy subway tickets to sell,⁷⁷ or an applicant for position as conductor while being instructed before having received his appointment,⁷⁸ or a consignee of freight invited by the conductor of a trolley freight express car to remove his consignment from it to a wheelbarrow⁷⁹ is an invitee of the company; but a passenger walking through an elevated train to cross the track from one station platform to another is not an invitee where the company has provided a subway passage for the purpose.⁸⁰

Where a person is on a car on the express or implied consent or invitation of the company or of those in charge of the car, within the scope of their employment, although not a passenger, it is bound to exercise ordinary care and diligence for his safety while thereon.⁸¹ The duty of exercising ordinary care to prevent injury is also due to one who is on the company's tracks and right of way or premises on its express or implied invitation.⁸² It has been held that a street railroad company is liable for injuries caused by the negligence of a driver, motorman, or conductor to a person while riding with due care on the platform of a car on the invitation of such an employee without collusion with

68. N.Y.—Zambardi v. South Brooklyn Ry. Co., *supra*.

69. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.
N.Y.—Zambardi v. South Brooklyn Ry. Co., 24 N.E.2d 13, 281 N.Y. 516.
60 C.J. p 379 note 77.

70. Pa.—Bally v. Pittsburgh Rys. Co., 116 A. 161, 272 Pa. 178.
60 C.J. p 379 note 77.

71. Ala.—Birmingham R., etc., Co. v. Sawyer, 47 So. 67, 156 Ala. 199, 19 L.R.A.,N.S., 717.
60 C.J. p 379 note 78.

72. Ala.—Birmingham R., etc., Co. v. Sawyer, *supra*.

73. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.
N.Y.—Zambardi v. South Brooklyn Ry. Co., 24 N.E.2d 13, 281 N.Y. 516.

Assumed risk limited

Where street railway company improved crossing on private right of

way for public use and invited public to use it, but erected sign warning that crossing was dangerous and that drivers used it at their own risk, motorist using the crossing assumed only the risk incident to the operation of street cars over the crossing with the observance of such reasonable and ordinary care as the circumstances demanded, and did not assume risk of negligence or recklessness in operation of street cars over crossing.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

74. Iowa.—Mann v. Des Moines Ry. Co., *supra*.

75. N.Y.—Zambardi v. South Brooklyn Ry. Co., 24 N.E.2d 13, 281 N.Y. 516.

76. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.
N.J.—Fineberg v. Public Service Ry. Co., 108 A. 311, 94 N.J.Law 55.
N.Y.—Verdini v. Interborough Rapid Transit Co., 182 N.Y.S. 754, 192 App.Div. 379.

Pa.—Hauenstein v. Conestoga Traction Co., 78 A. 31, 229 Pa. 128, 31 L.R.A.,N.S., 960.

Invitee of railroads see Railroads § 898 c.

77. N.Y.—Verdini v. Interborough Rapid Transit Co., 182 N.Y.S. 754, 192 App.Div. 379.
60 C.J. p 379 note 82.

78. N.J.—Fineberg v. Public Service Ry. Co., 108 A. 311, 94 N.J.Law 55.
60 C.J. p 379 note 84.

79. Pa.—Hauenstein v. Conestoga Traction Co., 78 A. 31, 229 Pa. 128, 31 L.R.A.,N.S., 960.

80. Mass.—Hillman v. Boston Elevated Ry. Co., 93 N.E. 653, 207 Mass. 478, 32 L.R.A.,N.S., 198.

81. Mo.—Brock v. St. Louis Transit Co., 81 S.W. 219, 107 Mo.App. 109.
60 C.J. p 379 note 86.

82. N.Y.—Wells v. Brooklyn Heights R. Co., 74 N.Y.S. 196, 67 App.Div. 212.
60 C.J. p 379 note 87.

him to defraud the company,⁸³ and that it is negligence for a street railroad company to permit a child of tender years to ride on the platform of a car.⁸⁴ Where an injury to a child permitted to ride on the platform of a car was not occasioned by the negligence of the motorman or driver, the company is not liable.⁸⁵ A consignee of freight invited by the conductor of a trolley freight express car to remove the freight from it to a wheelbarrow is entitled to an opportunity not only to place the freight on the barrow but to remove himself and the barrow so as to prevent a collision with the car,⁸⁶ and where he was struck by the swing of the starting car while placing the last box on the barrow, without any delay on his part, he is entitled to recover.⁸⁷

§ 196. Construction and Equipment of Cars

Ordinary care and prudence for the safety of pedestrians and vehicles on the street require that a street railroad company exercise reasonable care and diligence to equip and operate its cars with safety appliances for preventing accidents.

Ordinary care and prudence for the safety of pedestrians and vehicles on the street require that a street railroad company exercise reasonable care and diligence to equip and operate its cars with safety appliances for preventing accidents,⁸⁸ such as appliances for controlling and stopping cars,⁸⁹ and to keep such appliances in good condition.⁹⁰ Its duty in this respect is discharged if it uses cars and appliances in general use, which have usually been found adequate and safe,⁹¹ or where it has

exercised reasonable care in the inspection of the appliances and they were in reasonably good working condition when last inspected before an accident, the defect not being discovered sufficiently long reasonably to permit the repair thereof, or the discontinuance of the operation of the car.⁹² It is not required to have in use the latest improvements or most modern equipment which skill and ingenuity have devised to prevent accidents,⁹³ or any appliances which have not been tested and put into general use, although approved by the highest scientific authorities.⁹⁴

Where a car is known to be equipped with defective appliances for control, the company is not freed from responsibility for a collision with a person coming suddenly in front of it by the motorman on discovering such person doing all that he could with such appliances;⁹⁵ nor can the company require other users of the way to provide special devices to insure it the opportunity to drive its cars at unlimited speed.⁹⁶ The rule that it is necessary to prove that certain appliances are in general use by street railroad companies before negligence can be predicated on the omission to supply them does not apply to appliances, the use of which is a matter of common knowledge.⁹⁷ The character of appliances in use at the time of the accident determines the liability of a street railroad company for failure to equip its cars with safety appliances, without regard to what is done subsequently in adding other appliances.⁹⁸ A company is not negligent in using a car which in passing around a curve extends beyond the line of the track.⁹⁹

83. N.J.—Danbeck v. New Jersey Traction Co., 31 A. 1038, 57 N.J. Law 463.

60 C.J. p 379 note 88.

84. Mich.—East Saginaw City R. Co. v. Bohn, 27 Mich. 503.

Pa.—Kelly v. Railway Co., 39 Leg. Int. 168.

85. La.—Lott v. New Orleans City, etc., R. Co., 37 La. Ann. 337, 55 Am. R. 500.

60 C.J. p 380 note 90.

86. Pa.—Hauenstein v. Conestoga Traction Co., 78 A. 31, 229 Pa. 128, 81 L.R.A., N.S., 960.

87. Pa.—Hauenstein v. Conestoga Traction Co., supra.

88. N.H.—Warren v. Manchester St. R. Co., 47 A. 735, 70 N.H. 352.

30 C.J. p 380 note 94.

Requirements as to:

Lights see infra § 203.

Signals see infra § 202.

Statutory and municipal regulations

as to equipment of cars see supra § 167.

89. Mo.—Perrell v. Metropolitan St. R. Co., 103 S.W. 115, 126 Mo. App. 43.

60 C.J. p 380 note 96.

Speed and control of cars generally see infra §§ 198-200.

90. Del.—McCartney v. People's Ry. Co., 78 A. 771, 25 Del. 191.

60 C.J. p 380 note 97.

91. Ky.—Corpus Juris cited in Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 678, 260 Ky. 334.

60 C.J. p 380 note 98.

92. Del.—McCartney v. People's Ry. Co., 78 A. 771, 25 Del. 191.

La.—Kendall v. New Orleans Public Service, App., 45 So.2d 541.

93. Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.

60 C.J. p 380 note 1.

In absence of any evidence that equipment was defective or inadequate, mere failure to provide the most modern equipment on a street-car is not negligence.—Baltimore Transit Co. v. Worth, supra.

94. Pa.—Buente v. Pittsburg, etc., Traction Co., 2 Pa. Super. 185.

95. Wash.—Roberts v. Spokane St. R. Co., 63 P. 506, 23 Wash. 325, 54 L.R.A. 184.

96. N.J.—Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co., 59 A. 523, 68 N.J. Eq. 279.

97. Utah.—Spiking v. Consolidated R., etc., Co., 93 P. 838, 33 Utah 313.

98. Colo.—Zimmerman v. Denver Consol. Tramway Co., 72 P. 607, 18 Colo. App. 480.

99. Tex.—Carpenter v. Dallas Railway & Terminal Co., Civ. App., 163 S.W.2d 703.

60 C.J. p 381 note 7.

Fenders. In the exercise of ordinary care and prudence a company operating a street railroad is required to use reasonable diligence in equipping its cars with fenders,¹ and it is negligence per se to operate a car without fenders required by statute² or ordinance;³ but the failure to equip a car with a fender is not, in the absence of an ordinance or statute requiring it, of itself negligence,⁴ and the want of a fender cannot be made the ground of liability against the company if its absence is not the proximate cause of the injury or did not contribute in any way to it, as discussed *infra* § 212. Where an ordinance requiring the use of fenders provides that they shall not be attached until the kind selected has been approved by the common council, the company is under no obligation to order fenders in advance of the approval,⁵ and, where the fenders have been selected but not approved, the absence of fenders from a car is not per se negligence.⁶ The fact that a fender at the rear of a car is not raised is not negligence if it is not customary to keep such fenders raised.⁷

Where steam power is used, as in the case of an elevated railroad, the company should use reasonable care to equip its engines with, and keep in repair, appliances to prevent sparks, cinders, or coals from escaping on to persons crossing under or near the road,⁸ and if it uses such care it is not liable for negligence from the mere fact that a cinder or coal does escape and causes injury.⁹

§ 197. Vigilance of Persons in Charge of Car

It is the duty of the operator of a streetcar to keep a lookout and a failure to keep a lookout of the kind and at the times required by law is negligence.

A motorman, driver, or gripman in charge of the operation of a streetcar is ordinarily bound to anticipate the presence of vehicles and pedestrians on the street or highway in front of or near his car,¹⁰ and it is his duty to keep a diligent lookout to avert injury to persons, animals, or vehicles on the track or approaching it.¹¹ More care has been

1. N.C.—Smith v. Charlotte Electric Ry. Co., 92 S.E. 382, 173 N.C. 489. 60 C.J. p 381 note 8.

"Practical fender"

As used in a statute, a "practical fender" is a fender fit and proper, or efficient, for the use for which it is intended, that is, to protect the life and limb of human beings and animals.—Hanes v. Southern Public Utilities Co., 131 S.E. 402, 406, 191 N.C. 13—49 C.J. p 1310 note 50.

2. N.C.—Smith v. Charlotte Electric Ry. Co., 92 S.E. 382, 173 N.C. 489. 60 C.J. p 381 note 9.

3. Ind.—Waters v. Indianapolis Traction & Terminal Co., 113 N.E. 289, 185 Ind. 526. 60 C.J. p 381 note 10.

4. Mo.—Hogan v. Citizens' R. Co., 51 S.W. 473, 150 Mo. 36. Pa.—Pitcher v. People's St. R. Co., 34 A. 567, 174 Pa. 402.

5. N.Y.—Platt v. Albany R. Co., 62 N.E. 1071, 170 N.Y. 115.

6. N.Y.—Platt v. Albany R. Co., *supra*.

7. Pa.—Hoffman v. Philadelphia Rapid Transit Co., 63 A. 409, 214 Pa. 87.

8. Mass.—Woodall v. Boston El. R. Co., 78 N.E. 446, 192 Mass. 308. 60 C.J. p 381 note 17.

9. N.Y.—Wiedmer v. New York El. R. Co., 21 N.E. 1041, 114 N.Y. 462—Searles v. Manhattan R. Co., 5 N.E. 66, 101 N.Y. 661.

10. Md.—State v. Washington, B. & A. Electric R. Co., 131 A. 822, 827, 149 Md. 443. 60 C.J. p 382 note 20.

11. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

D.C.—MacDonald, to Use of Emmco Ins. Co., v. Capital Transit Co., Mun.App., 31 A.2d 862.

Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378.

Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.

Iowa.—Lynch v. Des Moines Ry. Co., 245 N.W. 219, 215 Iowa 1119.

Ky.—Cincinnati, N. & C. Ry. Co. v. England, 68 S.W.2d 783, 253 Ky. 86.

Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421—Beck v. Baltimore Transit Co., 58 A.2d 909, 190 Md. 506—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.

Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663—Fortner v. St. Louis Public Service Co., 244 S.W.2d 10—Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090—Murray v. Kansas City Public Service Co., 61 S.W.2d 334—Billingsley v. Kansas City Public Service Co., 191 S.W.2d 331,

239 Mo.App. 440—Billingsley v. Kansas City Public Service Co., App., 181 S.W.2d 204, record quashed in part State ex rel. Kansas City Public Service Co. v. Bland, 187 S.W.2d 211, 353 Mo. 1234, conformed to 191 S.W.2d 331, 239 Mo. App. 440.

Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317—Hinton v. Pittsburgh Rys. Co., 59 A.2d 151, 359 Pa. 381—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Hamley v. Pittsburgh Rys. Co., 28 A.2d 911, 345 Pa. 380—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554—Wilkinson v. Philadelphia Transp. Co., 76 A.2d 430, 167 Pa.Super. 616—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445.

W.Va.—Wilson v. Co-op. Transit Co., 30 S.E.2d 749, 126 W.Va. 943.

60 C.J. p 382 note 21.

Duty to keep lookout:

For animals and vehicles see *infra* § 228.

For persons on or near tracks see *infra* § 248.

Conductor

(1) Ordinarily a conductor of a streetcar is not required to keep a lookout to avoid accidents at crossings.—Gebhardt v. St. Louis Transit Co., 71 S.W. 448, 97 Mo.App. 373.

(2) If, however, a conductor sees a person exposed to danger, it is his duty to give a signal to stop the car and to take reasonable means to prevent the injury.—Indianapolis Trac-

required of a motorman on a streetcar than of an engineer on a locomotive.¹² Accordingly, a motorman starting a car from a standstill has no right to assume that the track before his car is clear,¹³ but must look to see that the track immediately ahead is clear;¹⁴ and, where he is so circumstanced, either by the structure of the streetcar or by its location where it is stopped, that he cannot see whether the track ahead is clear and whether it is safe to proceed, ordinary or reasonable care requires that he make such an observation as will enable him to ascertain whether it is safe to proceed,¹⁵ or that he give an adequate and timely warning of his intention so to do, as discussed *infra* § 202.

Although the duty to keep a lookout is not confined to street crossings but is applicable to the entire line of the street,¹⁶ and although the fact that the use of the street by pedestrians and vehicles is frequent or infrequent is not material as far as the duty of keeping a lookout is concerned,¹⁷ the lookout must be maintained where the operator should or ought to know that people are likely to be,¹⁸ which duty is particularly applicable at street cross-

ings¹⁹ where a greater degree of watchfulness is required than at other places,²⁰ and on streets in densely populated neighborhoods or on crowded streets.²¹ On the other hand, there is no duty to keep a lookout along the company's tracks outside the limits of the street or highway,²² except at points where the company has reasonable grounds to anticipate the presence of persons on the tracks,²³ as at a point where, for a considerable length of time, pedestrians have been in the habit of walking along or crossing the company's private right of way.²⁴

More care is required on a dark and foggy day than in broad daylight,²⁵ and, where conditions are such that the motorman cannot, by keeping a constant lookout, discover the near approach of persons, he should use his sense of hearing to avoid collisions with, or injury to, them.²⁶ The company is not liable for failure of a motorman to keep a lookout unless the danger appeared soon enough to use means to avert it;²⁷ and it has been held that, where the motorman has failed to keep a lookout, the law does not charge him with seeing a person's danger whether or not he saw him, if he

tion & Terminal Co. v. Croly, 96 N.E. 973, 98 N.E. 1091, 54 Ind.App. 566.

Curbliiner turning left

Driver of a curbliiner which, in making left turn, struck pedestrian at intersection had legal duty to maintain a lookout.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.

Headlights

The text rule is not affected by the fact that the headlight equipment on the streetcar complies with legal regulations.—Tucker v. City and County of San Francisco, 296 P. 101, 111 Cal. App. 270.

The motorman on an interurban car is charged with the duty of keeping a lookout.

Ky.—Bohmer v. Kentucky Tract., etc., Co., 279 S.W. 955, 212 Ky. 524.
Ohio.—Taylor v. Ohio Electric R. Co., 29 O.C.A. 401.

Where inability to observe whether track is clear and whether it is safe to proceed results from his own voluntary acts, operator is no more relieved from taking the precautions necessary to insure safe movement than is the driver of any other vehicle.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

12. Iowa.—Welsh v. Tri-City Ry. Co., 126 N.W. 1118, 148 Iowa 200.

N.C.—Ingle v. Asheville Power & Light Co., 90 S.E. 953, 172 N.C. 751.

13. Minn.—Corpus Juris cited in Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 353, 222 Minn. 105. Philippine.—U. S. v. Barias, 23 Philippine 434.

14. Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

15. Minn.—Wright v. Minneapolis St. Ry. Co., *supra*.

16. Ala.—Anniston Electric, etc., Co. v. Elwell, 42 So. 45, 144 Ala. 317. Ohio.—Day v. Columbus Ry. Co., 1 Ohio N.P., N.S., 371.

17. Ala.—Alabama Power Co. v. Pentecost, 97 So. 653, 210 Ala. 167.

18. Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

19. Cal.—Saphire v. Los Angeles Transit Lines, 222 P.2d 956, 99 Cal. App.2d 880.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105. Mo.—Martini v. St. Louis Public Service Co., App., 237 S.W.2d 213. 60 C.J. p 383 note 26.

20. Ill.—Gnat v. Richardson, 39 N.E. 2d 337, 378 Ill. 626—Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 196

Ill. 410, 58 L.R.A. 270—Trust Co. of Chicago v. Richardson, 8 N.E. 2d 530, 290 Ill.App. 464. 60 C.J. p 383 note 27.

21. Ind.—Indianapolis Traction, etc., Co. v. Kidd, 79 N.E. 347, 167 Ind. 402, 7 L.R.A., N.S., 143, 10 Ann.Cas. 942. 60 C.J. p 383 note 28.

22. Ala.—Birmingham R. Light, etc., Co. v. Brown, 44 So. 572, 152 Ala. 115. Puerto Rico.—Davila v. San Juan Light, etc., Co., 1 Puerto Rico Fed. 87.

23. Mo.—Levelsmeier v. St. Louis, etc., R. Co., 90 S.W. 104, 114 Mo. App. 412. Utah.—Spiking v. Consolidated R., etc., Co., 93 P. 838, 33 Utah 313.

24. Mo.—Shelton v. Metropolitan St. Ry. Co., 151 S.W. 493, 167 Mo.App. 404. 60 C.J. p 383 note 31.

25. Mo.—Papamichael v. Wells, App., 33 S.W.2d 1058.

26. Iowa.—Engvall v. Des Moines City Ry. Co., 121 N.W. 12, 145 Iowa 560.

27. Mo.—Blyston-Spencer v. United Rys. Co. of St. Louis, 132 S.W. 1175, 152 Mo.App. 113. 60 C.J. p 383 note 34.

could have seen him by keeping a lookout.²⁸ In the absence of statutory provisions ordinary vigilance is all that is required.²⁹ This does not mean ordinary care to avoid injury after the danger is actually seen but to use such care and diligence in watching for and discovering the danger.³⁰ Since, when the car is moving, a motorman is required to keep a close lookout ahead, the nature of his duties prevents him from keeping a close watch in his rear,³¹ although under some circumstances the duty may arise for the motorman to look to the rear or side of the car to discover possible danger to another vehicle or to a pedestrian.³²

The failure of the person in charge of the operation of a streetcar to keep a lookout of the kind and at the times required by law is negligence,³³ rendering the streetcar company liable for the resulting damage if such negligence is the proximate cause of the injury, as discussed *infra* § 212.

Statutes or ordinances. Some statutes or ordinances have imposed on the motorman, driver, or gripman in charge of a street railroad the duty of

maintaining a vigilant watch.³⁴ Such an ordinance requires the motorman to be prepared to stop his car at the first appearance of danger, within the shortest time and space possible,³⁵ and requires the car to be stopped only when it is perceived that a collision is imminent³⁶ and with due regard to the safety of passengers.³⁷ The duty is not conditioned on the negligence of a pedestrian who goes into a dangerous position, but on the appearance of danger, whether such danger is caused by the pedestrian's negligence or otherwise.³⁸ Ordinances of this character require a higher degree of care than is required under the common law,³⁹ and violation thereof ordinarily amounts to negligence *per se*,⁴⁰ but it has been held that noncompliance with such a requirement does not imply corporate negligence within the meaning of a statute imposing a penalty on a corporation operating a street railroad which by reason of its negligence causes the death of a person.⁴¹ A motorman who is looking backward, and talking to someone in the car, when the car is moving rapidly along a street where people are always likely to be crossing, is negligent under such an ordinance.⁴² A statute imposing a lookout duty

28. Ala.—Birmingham Ry., Light & Power Co. v. Norton, 61 So. 459, 7 Ala.App. 571.
60 C.J. p 383 note 35.

29. Ind.—Indianapolis Traction & Terminal Co. v. Smith, 128 N.E. 38, 190 Ind. 698.
60 C.J. p 383 note 36.

30. Mo.—Windle v. Southwest Missouri R. Co., 153 S.W. 282, 168 Mo. App. 59c.

31. Wis.—Bukowski v. Milwaukee Electric Ry. & Light Co., 125 N.W. 912, 142 Wis. 517.

32. Or.—Harrington v. Portland Traction Co., 124 P.2d 715, 168 Or. 548.

Lookout on rounding curves:
As to vehicles see *infra* § 228.
As to persons on or near tracks see *infra* § 254.

33. Ill.—Gnat v. Richardson, 39 N.E. 2d 337, 378 Ill. 626.

Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

Mo.—Lanio v. Kansas City Public Service Co., 162 S.W.2d 862—Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.

Culpable negligence

Cal.—Saphire v. Los Angeles Transit Lines, 222 P.2d 956, 99 Cal.App.2d 880.

Primary negligence

Mo.—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772.

34. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.
Tenn.—Memphis St. R. Co. v. Haynes, 81 S.W. 374, 112 Tenn. 712.

35. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.
Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914.

36. Tenn.—Memphis St. R. Co. v. Haynes, 81 S.W. 374, 112 Tenn. 712.

37. Minn.—Gray v. St. Paul City R. Co., 91 N.W. 1106, 87 Minn. 280.

38. Mo.—Blyston-Spencer v. United Rys. Co. of St. Louis, 132 S.W. 1175, 152 Mo.App. 118.

39. Mo.—Grossman v. Wells, 282 S.W. 710, 314 Mo. 158.
60 C.J. p 384 note 45, p 418 note 16 [a].

Humanitarian doctrine

(1) The "vigilant watch" ordinance of the City of St. Louis requires streetcar operator to act on first appearance of danger, and, thus, imposes on him higher duty than that required under humanitarian doctrine.

—Banks v. St. Louis Public Service Co., Mo.App., 249 S.W.2d 481.

(2) Motorman who observed oncoming automobile two hundred seventy to three hundred fifteen feet from car when it first entered upon track was required to stop when it first became apparent that automobile might continue to be driven on track in danger zone and while motorman had ample time and space to stop before collision.—Abernathy v. St. Louis Public Service Co., Mo., 240 S.W.2d 914.

Independent of vigilant watch ordinance common-law duty of lookout exists.—Melton v. St. Louis Public Service Co., Mo., 251 S.W.2d 663—Murray v. Kansas City Public Service Co., Mo., 61 S.W.2d 334.

Busy street

Where streetcar is being operated across, or on, a busy street, vigilant watch required by the common law is the same as that required by the ordinance.—Melton v. St. Louis Public Service Co., Mo., 251 S.W.2d 663.

40. Tex.—Dallas Ry. & Terminal Co. v. Bankston, Civ.App., 33 S.W.2d 500.
60 C.J. p 384 note 46.

41. Mass.—Caswell v. Boston El. R. Co., 77 N.E. 380, 190 Mass. 527.

42. Tex.—Dallas Rapid Transit R. Co. v. Elliott, 26 S.W. 455, 7 Tex. Civ.App. 216.

on all persons running trains upon any railroad within the state has been held not to apply to street railroads.⁴³

Duty to keep window clear. The duty of the motorman to keep the window in front of him cleared from rain to enable him to keep a lookout is a question of reasonable care under the circumstances;⁴⁴ if the extent of his vision is thereby diminished it is his duty to remove the hindrance to his view before proceeding,⁴⁵ and the company cannot avail itself of its own negligence in failing to keep its windows in such condition that the motorman could see through them.⁴⁶

§ 198. Rate of Speed and Control of Car

A street railroad company must operate its cars at a

reasonable rate of speed, and the operator must at all times so regulate the speed of the car as to have it under reasonable control.

A street railroad company must operate its cars at such a rate of speed as under all the circumstances is reasonable and compatible with the lawful and customary use of the street or highway by pedestrians and vehicles;⁴⁷ and this duty exists at common law although there are no state statutes or municipal ordinances applicable.⁴⁸ Accordingly, a motorman or driver must at all times so regulate the speed of his car as to have it under reasonable control,⁴⁹ so that it may be stopped before doing injury in any situation which is likely to arise under the circumstances,⁵⁰ or so as to be able to reduce the speed, and if necessary stop the car,

43. Ark.—Bain v. Ft. Smith Light & Traction Co., 172 S.W. 843, 116 Ark. 125, L.R.A.1915D 1021.

44. Wash.—Isitt v. City of Seattle, 248 P. 379, 140 Wash. 161.

45. Pa.—Algard v. Philadelphia Rapid Transit Co., 109 A. 647, 266 Pa. 390.

46. Mo.—Weber v. United Rys. Co. of St. Louis, 213 S.W. 535, 201 Mo. App. 685.

47. U.S.—Sullivan v. Philadelphia Suburban Transp. Co., D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.

Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720—Alberts v. Lytle, 37 P.2d 705, 1 Cal.App. 682.
60 C.J. p 384 note 54.

Customary speed

Streetcar operator must operate car in manner, and run it at speed, customary at particular place.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720—Shipley v. San Diego Electric Ry. Co., 289 P. 662, 106 Cal.App. 659.

Moderate speed

Md.—Beck v. Baltimore Transit Co., 58 A.2d 909, 190 Md. 506—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.

Limited use of streets

Where the pedestrian public makes but a limited use of street, the public interest is subordinated to the necessities of street railway operation to some extent and street railway may properly operate its cars at

greater speed and with a lesser degree of care.—Peterson v. Minneapolis St. Ry. Co., Minn., 53 N.W.2d 817—Wosika v. St. Paul City Ry. Co., 83 N.W. 386, 80 Minn. 364.

Interurban cars

(1) In absence of statutory regulation, speed of interurban cars must be regulated to necessities of traffic conditions.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.

(2) Interurban car operating in outlying district over private right of way may lawfully travel faster than streetcar in congested traffic.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.

Private right of way

A streetcar company may operate its cars on a private right of way at whatever speed it wishes, provided it does not endanger passengers, and circumstances do not require the exercise of ordinary care as to speed, in order to protect persons who may be on the tracks.—Turney v. United Rys. Co. of St. Louis, 135 S.W. 93, 155 Mo.App. 513.

Rapid transit is permitted in open country and even within city limits where tracks are separated from traveled way.—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278.

48. Ill.—East St. Louis Electric St. R. Co. v. Burns, 77 Ill.App. 529.

49. Ill.—Hill v. Richardson, 281 Ill. App. 75.

Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.

Md.—Lewis v. Baltimore Transit Co., 66 A.2d 686, 193 Md. 366.

Neb.—Corpus Juris cited in McDonald v. Omaha & C. B. St. Ry. Co., 257 N.W. 489, 490, 128 Neb. 17.

Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.
60 C.J. p 385 note 56.

Degree of control

(1) Motorman has duty to have such control of car as to avoid dangers ordinarily incident to its operation and also such unusual and unexpected dangers as he may see in time to avoid.—Hinton v. Pittsburgh Rys. Co., 59 A.2d 151, 359 Pa. 381—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Hamley v. Pittsburgh Rys. Co., 28 A.2d 911, 345 Pa. 380—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554—Tatarewicz v. United Traction Co., 69 A. 995, 220 Pa. 560—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445.

(2) However, he is required only to have the car under such control as the circumstances seem to require.—Cox v. Wilkes-Barre Ry. Corp., supra—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220—Knobelich v. Pittsburgh, H., B. & N. C. Ry. Co., 109 A. 619, 266 Pa. 140—Schnitzer v. Philadelphia Transp. Co., 45 A.2d 419, 158 Pa.Super. 444, reversed on other grounds 47 A.2d 709, 354 Pa. 576—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445.

(3) Whether the adequate control required of operator of streetcar has been exercised in a given case depends on the attending circumstances and is a matter for independent determination in each case as it arises.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608.

50. Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608—Galliano

when danger is imminent,⁵¹ or so as to avoid danger which is, or in the exercise of ordinary care should be, known to him.⁵² This rule is particularly applicable when the car is approaching a street crossing,⁵³ where it is being run on a crowded or densely populated street,⁵⁴ where there is an obstruction from any cause to the motorman's sight of his track,⁵⁵ or where there is a sign over the tracks requiring cars to run slowly,⁵⁶ although the speed need not be so regulated as to avoid injury to persons using the street or highway in an unreasonable and improper manner.⁵⁷

The company is not obliged to run its cars at as low a rate of speed when passing private entryways⁵⁸ or have them under as immediate control midway of the block⁵⁹ as it is when approaching street crossings. More care as to speed is required of the motorman of a streetcar than of an engineer on a locomotive,⁶⁰ since the performance of his

functions does not require high speeds over long distances without stops.⁶¹ Also, more care is required during the active business hours of the day than late at night.⁶² Greater care must be exercised in running a streetcar across the streets of a city than in crossing a highway in the country.⁶³ Streetcars may, however, maintain a fair rate of speed⁶⁴ or go fast;⁶⁵ and, in the absence of an express regulation limiting the rate of their speed, the mere fact that a car is running at a rapid rate does not establish that it is being run in a negligent manner or constitute negligence per se,⁶⁶ although a high rate of speed is some evidence of negligence⁶⁷ and although it may be negligence as a matter of fact.⁶⁸

Circumstances showing or tending to show negligence. What rate of speed is reasonable and, conversely, what rate of speed is unreasonable and negligent are determined by the relation of the speed to the circumstances under which it is maintained, hav-

v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

Assured clear distance ahead

In view of text rule, claim that rule with respect to "assured clear distance ahead" provided for in the vehicle code has no application to operation of trolley cars is without merit.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317.

Under control

To have a streetcar "under control" means having it under such control that it can be stopped before doing injury to any person in any situation which is reasonably likely to arise under the circumstances.—Galliano v. East Penn Electric Co., 154 A. 805, 807, 303 Pa. 498—60 C.J. p 385 note 56 [a].

51. D.C.—MacDonald to Use of Emmco Ins. Co. v. Capital Transit Co., Mun.App., 31 A.2d 862, 60 C.J. p 385 note 57.

52. Ga.—Collins v. Augusta-Aiken Ry. & Electric Corporation, 78 S. E. 944, 13 Ga.App. 124, 60 C.J. p 385 note 58.

53. Ill.—Trust Co. of Chicago v. Richardson, 8 N.E.2d 530, 290 Ill. App. 464.

Neb.—Corpus Juris cited in McDonald v. Omaha & C. B. St. Ry. Co., 257 N.W. 489, 490, 128 Neb. 17, 60 C.J. p 385 note 59.

Reduction of danger to minimum

Motorman approaching intersection must proceed at all times with such care and caution that he can reduce danger to others to the minimum. U.S.—Denver City Tramway Co. v. Norton, C.C.A.Colo., 141 F. 599.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.

Strict rule of control

Streetcars, however, are not held to the strict rule of control which attaches to a moving automobile in a street intersection.—Dopler v. Pittsburgh Ry. Co., 160 A. 592, 307 Pa. 113—Weschler v. Buffalo & Lake Erie Traction Co., 143 A. 119, 293 Pa. 472—Kilpatrick v. Philadelphia Rapid Transit Co., 138 A. 830, 290 Pa. 288—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445.

54. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. McDermott, 144 N.E. 620, 82 Ind.App. 134, 60 C.J. p 386 note 60.

55. Iowa.—Engvall v. Des Moines City Ry. Co., 121 N.W. 12, 145 Iowa 560, 60 C.J. p 386 note 61.

56. Md.—State v. Washington, B. & A. Electric R. Co., 131 A. 822, 149 Md. 443.

N.J.—Hayward v. North Jersey St. R. Co., 65 A. 737, 74 N.J.Law 678, 8 L.R.A.N.S., 1062.

57. Md.—State v. Washington, B. & A. Electric R. Co., 131 A. 822, 827, 149 Md. 443.

Mo.—Meyer v. Lindell R. Co., 6 Mo. App. 27.

58. Puerto Rico.—Morales v. San Juan Light, etc., Co., 4 Puerto Rico Fed. 361.

59. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464—United Rys. & Electric Co. of Baltimore v. Carneal, 72 A. 771, 110 Md. 211.

60. N.C.—Ingle v. Asheville Power & Light Co., 90 S.E. 953, 172 N.C. 751.

61. Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287.

62. La.—Dubose v. New Orleans Ry. & Light Co., 49 So. 696, 123 La. 1029, 60 C.J. p 386 note 67.

63. N.Y.—Gurrie v. New York & North Shore Traction Co., 135 N. Y.S. 833, 151 App.Div. 57, motion denied 136 N.Y.S. 1136, 151 App. Div. 919, 60 C.J. p 386 note 68.

64. Pa.—Yingst v. Lebanon & A. St. Ry. Co., 31 A. 687, 167 Pa. 438—Stoudt v. Philadelphia Rapid Transit Co., 97 Pa.Super. 295.

65. Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—Yingst v. Lebanon & A. St. Ry. Co., 31 A. 687, 167 Pa. 438.

66. Ill.—Marron v. Friel, 66 N.E.2d 509, 328 Ill.App. 586.

Md.—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W. Va. 112, 60 C.J. p 387 note 72.

67. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Kuhns v. Conestoga Traction Co., 138 A. 838, 290 Pa. 303.

68. Ala.—Alabama Power Co. v. Brown, 87 So. 608, 205 Ala. 167.

ing regard to all circumstances and conditions existing at the time, which may increase the danger of persons being on or near the track.⁶⁹ It is ordinarily negligence to run a car at an unusual and excessive rate of speed over a street crossing⁷⁰ or along a crowded or much used street crossing⁷¹ even though such speed is not in excess of the limit of speed fixed by ordinance or statute,⁷² if, under the circumstances, it is a dangerous rate;⁷³ the mere fact that the company is prohibited by statute or ordinance from running at a greater than a given rate of speed is not a license for it to run at that rate of speed under all circumstances.⁷⁴ So it has been held negligence to run at a high rate of speed under adverse light or atmospheric conditions,⁷⁵ without lights,⁷⁶ or without giving proper warning,⁷⁷ or to accelerate speed suddenly without warning⁷⁸ or when indicating an intention to stop.⁷⁹ The fact that a streetcar was running at an excessive speed at the time of the accident does not of itself show that that was the cause of the accident.⁸⁰

Failure to provide sand to prevent skidding is not negligence where experience has shown it ineffective for the purpose.⁸¹

§ 199. — Reducing Speed and Stopping Car

A motorman or driver has the duty, when danger is imminent, to reduce the speed of or to stop his car, if necessary, in time to avoid an accident.

A motorman or driver has the duty when danger is imminent to reduce the speed of or to stop his car, if necessary, in time to avoid an accident;⁸² and it has been held to be his duty to slacken speed as he approaches a street crossing;⁸³ but, where no danger is apparent, in the absence of statute or ordinance to that effect, he is not required to stop his car at such place for the purpose of looking and listening,⁸⁴ and it is not his duty to keep such control of his car as to be able to bring it to a full stop before striking one in the act of crossing the track without regard to the suddenness with which he came upon the track.⁸⁵ Generally, it is not negligence per se to fail to stop a streetcar on signal at a corner⁸⁶ or to fail to stop a car operated on a private right of way, although the motorman saw plaintiff standing at a safe distance from the track.⁸⁷

69. Md.—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

N.J.—Miller v. Public Service Co-Ordinated Transport, 168 A. 409, 111 N.J.Law 339.

60 C.J. p 387 note 76.

Private crossing

With respect to company's negligence as to rate of speed, private crossing, although obstructed in distance, was not "blind crossing," where traveler could see approaching interurban car for at least three hundred feet.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.

Speed held not negligent under circumstances

Iowa.—Rosenberg v. Des Moines Ry. Co., supra.

Mass.—Daigneau v. Worcester Consol. St. Ry., 120 N.E. 400, 231 Mass. 166.

60 C.J. p 387 note 76 [b].

70. Mo.—Grout v. Central Electric R. Co., 102 S.W. 1026, 125 Mo.App. 552.

60 C.J. p 388 note 77.

71. N.J.—Mosca v. Atlantic & S. Ry. Co., 124 A. 600, 100 N.J.Law 181, 1 N.J.Misc. 615.

60 C.J. p 388 note 78.

72. N.J.—Mosca v. Atlantic & S. Ry. Co., supra.

60 C.J. p 388 note 79.

73. Ill.—Quincy Horse R., etc., Co. v. Gnuse, 27 N.E. 190, 137 Ill. 264.

74. Mich.—Rouse v. Detroit Electric R. Co., 98 N.W. 253, 100 N.W. 404, 135 Mich. 545.

60 C.J. p 388 note 81.

75. Minn.—Walker v. St. Paul City R. Co., 84 N.W. 222, 81 Minn. 404, 51 L.R.A. 632.

60 C.J. p 388 note 82.

76. Ill.—Donelson v. East St. Louis, etc., R. Co., 85 N.E. 914, 235 Ill. 625.

60 C.J. p 388 note 83.

77. N.Y.—Hennessy v. Brooklyn City R. Co., 26 N.Y.S. 321, 73 Hun 569, affirmed 42 N.E. 723, 147 N.Y. 721.

60 C.J. p 388 note 84.

78. N.Y.—Hinz v. Eighth Ave. R. Co., 152 N.E. 475, 243 N.Y. 90.

60 C.J. p 388 note 85.

79. Pa.—Weiss v. Pittsburgh Rys. Co., 152 A. 674, 301 Pa. 539.

60 C.J. p 388 note 86.

80. Conn.—Morse v. Consolidated R. Co., 71 A. 553, 81 Conn. 395.

81. La.—Wolf v. New Orleans Ry. & Light Co., 63 So. 392, 133 La. 891.

82. Md.—Baltimore Transit Co. v.

State for Use of Castranda, 71 A. 2d 442, 194 Md. 421—Beck v. Baltimore Transit Co., 58 A.2d 909, 190 Md. 506—Baltimore Transit Co. v. Worth, 52 A.2d 249, 118 Md. 119, 5 A.L.R.2d 740—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.

Mo.—Martini v. St. Louis Public Service Co., App., 237 S.W.2d 213.

60 C.J. p 389 note 91.

83. Md.—United Rys. & Electric Co. of Baltimore v. Kolken, 78 A. 383, 114 Md. 160.

60 C.J. p 389 note 92.

84. Ga.—Savannah, etc., R. Co. v. Beasley, 21 S.E. 285, 94 Ga. 142.

Ky.—South Covington & C. St. Ry. Co. v. Crutcher, 123 S.W. 268, 135 Ky. 698.

Statutory and municipal regulations requiring stopping before crossing see supra § 168.

85. Ala.—Garth v. North Alabama Traction Co., 42 So. 627, 148 Ala. 96.

86. Md.—Westerman v. United Rys. & Electric Co. of Baltimore, 96 A. 355, 127 Md. 225.

60 C.J. p 389 note 95.

87. Mass.—Daigneau v. Worcester Consol. St. Ry., 120 N.E. 400, 231 Mass. 166.

§ 200. — Statutory or Municipal Regulation

The operator of a streetcar has the duty to keep within the rate of speed fixed by statutory or municipal regulations, and a violation of such regulations may constitute negligence per se or evidence of negligence.

It is the duty of a streetcar motorman to keep the speed of the car within the rate fixed by statute or ordinance.⁸⁸ There is an irreconcilable conflict in the decisions as to the effect of the violation by a street railway company, in the operation of its cars, of regulatory ordinances designed to promote the public safety.⁸⁹ In some jurisdictions it is negligence per se to run a streetcar at a rate of speed prohibited by statute or ordinance where an accident is caused thereby.⁹⁰ In others, the mere fact that a car is driven at a rate of speed forbidden by city ordinance is not considered proof of negligence as a matter of law,⁹¹ some holding it is but an evidential fact tending to prove negligence,⁹² others that it is not even evidence of negligence toward the injured person.⁹³ The mere fact that a car is running at a prohibited rate of speed does not of itself entitle a person to recover for injuries received in an accident therewith, although it may be the foundation of a recovery if

he receives injuries by reason of such excessive speed.⁹⁴ Where the regulation does not fix a uniform rate of speed applicable at all times and places, running at a speed in excess of that stipulated is not necessarily negligence.⁹⁵ An ordinance requiring the motorman to have his car under control when approaching an intersecting street applies to cars running on a space reserved for them.⁹⁶

Failure to stop before going over a steam railroad crossing, in violation of a statute or ordinance, is not, it has been held, negligence without regard to the circumstances attending such failure.⁹⁷ An ordinance requiring persons "riding or driving" to check up or halt for pedestrians, if necessary, on approaching alley or street crossings does not apply to streetcars.⁹⁸

§ 201. — Rules of Company

The rate of speed and control of streetcars may be fixed and limited by company operating rules, but the violation of a company rule regulating speed is not negligence per se.

The rate of speed and control of streetcars may be fixed and limited by company operating rules,⁹⁹ and an interurban traction company using the tracks

88. Mo.—Blyston-Spencer v. United Rys. Co. of St. Louis, 132 S.W. 1175, 152 Mo.App. 118.

60 C.J. p 389 note 99.

Regulation as to speed and movement of cars generally see supra § 168.

Speed and control at intersections

(1) Ordinance providing that control and speed of streetcars at intersections must be reasonable and proper under circumstances, apart from provision fixing fifteen-mile speed limit in congested or business areas does not create any preëminent right in favor of either streetcar or vehicle colliding with it, or fix a speed limit.—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

(2) Portion of city ordinance providing that control and speed of streetcars must be reasonable and proper at street intersections was applicable in action against street railway company for death of pedestrian struck by streetcar at intersection, regardless of whether accident occurred in thickly congested or business part of city so as to invoke ordinance provision limiting speed to fifteen miles per hour.—Baltimore Transit Co. v. State for Use of Castanda, 71 A.2d 442, 194 Md. 421.

Settled residential district

An ordinance limiting the speed of

streetcars in business or settled residential districts does not require that the district be densely settled, but is satisfied by the presence in the vicinity of a suburban business center and occasional residences. The ordinance does not say "densely settled" but "settled."—Sundstrom v. Puget Sound Tract, etc., Co., 156 P. 828, 90 Wash. 640.

89. Ark.—Ward v. Ft. Smith Light & Traction Co., 185 S.W. 1085, 123 Ark. 548.

90. Cal.—Wright v. Los Angeles Ry. Corporation, 93 P.2d 135, 14 Cal.2d 168—Stein v. United Railroads of San Francisco, 113 P. 663, 159 Cal. 368—Ring v. Los Angeles Ry. Corporation, 2 P.2d 404, 116 Cal.App. 93.

Wash.—Dye v. City of Seattle, 24 P. 2d 67, 173 Wash. 515.

60 C.J. p 389 note 2—45 C.J. p 722 note 86, p 724 note 26.

Held not conclusive evidence of negligence

Cal.—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.

91. Ark.—Ward v. Ft. Smith Light & Traction Co., 185 S.W. 1085, 123 Ark. 548.

60 C.J. p 390 note 3.

92. Mass.—Hanlon v. South Boston Horse R. Co., 129 Mass. 310. 60 C.J. p 390 note 4.

93. Ky.—Ford v. Paducah City R. Co., 99 S.W. 355, 124 Ky. 488, 124 Am.S.R. 412, 8 L.R.A., N.S., 1093, 30 Ky.L. 644.

94. Neb.—Harris v. Lincoln Traction Co., 111 N.W. 580, 78 Neb. 681. 60 C.J. p 390 note 6.

95. Mo.—Norton v. East St. Louis Ry. Co., 203 S.W. 1006, 199 Mo. App. 550. 60 C.J. p 390 note 7.

96. Mass.—Hammond v. Boston Elevated Ry. Co., 110 N.E. 266, 222 Mass. 270.

97. Mich.—Philip v. Heraty, 97 N.W. 963, 100 N.W. 186, 135 Mich. 446.

98. Tex.—Citizens' R. Co. v. Ford, 53 S.W. 575, 93 Tex. 110, 46 L.R.A. 457.

99. Cal.—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal.App.2d 590.

La.—Wolf v. New Orleans Ry. & Light Co., 63 So. 392, 133 La. 891.

Purpose

A rule requiring motormen to have their cars under control a certain distance before reaching a stopping place is intended to prevent colli-

of a city street railway is bound by the rules of the latter company regulating the speed of cars at crossings.¹ The violation of a company rule regulating speed by the operator is not negligence per se,² but is a circumstance to be considered in determining whether or not the operator was negligent.³

§ 202. Signals or Warnings

It is the duty of the employees in charge of a streetcar to give a proper signal or warning on the approach of the car to a place where, under the circumstances, there is danger of a collision with persons or vehicles.

As a part of their duty to exercise ordinary care to avoid injury, it is the duty of the employees in charge of a streetcar to give a proper signal or warning, as by sounding a bell or gong, or otherwise, on the approach of the car to a place where under the circumstances there is danger of a collision with persons or vehicles,⁴ such as on its approach to a street crossing.⁵ This duty to give a timely warning exists, although there is no statute or ordinance requiring it,⁶ but it arises only

when an ordinarily prudent person would give such warning under similar circumstances.⁷ The greater the speed of the car the greater the degree of care required in giving warning when approaching a crossing,⁸ and the fact that an emergency exists does not excuse the motorman from performing this duty where the emergency is created by his negligence.⁹ With respect to an open and obvious danger, the motorman is under no duty to warn an adult person who is apparently able to see, hear, and move.¹⁰ Ordinary care may require that other means be taken to prevent accidents,¹¹ such as that the company have a flagman stationed at a particular crossing,¹² and it is liable for his negligence,¹³ but negligence of such a flagman is not "negligence in operating the cars" within the meaning of a statute fixing the penalty therefor.¹⁴

Failure to give reasonably audible warning of the approach of the car is not necessarily negligence¹⁵ and in the absence of an ordinance requiring the giving of signals, a failure to do so is not negligence per se,¹⁶ although it is evidence of negligence,¹⁷ and may be negligence under the cir-

sion with travelers at crossings and not to give more time for would-be passengers to cross the tracks in front of a car.—*Wolf v. New Orleans Ry. & Light Co.*, *supra*.

1. Ohio.—*Interurban Ry. & Terminal Co. v. Hines*, 32 Ohio Cir.Ct.R. 355, affirmed 95 N.E. 1150, 84 Ohio St. 493.
2. Cal.—*Simon v. City and County of San Francisco*, 180 P.2d 393, 79 Cal. App.2d 590.
3. Cal.—*Simon v. City and County of San Francisco*, *supra*.
4. Cal.—*White v. Los Angeles Ry. Corp.*, 167 P.2d 530, 73 Cal.App. 2d 720.
5. Ga.—*Brown v. Savannah Electric & Power Co.*, 167 S.E. 773, 46 Ga.App. 393.
6. Md.—*Baltimore Transit Co. v. State for Use of Castranda*, 71 A.2d 442, 194 Md. 421.—*Beck v. Baltimore Transit Co.*, 58 A.2d 909, 190 Md. 506.—*Baltimore Transit Co. v. Worth*, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.—*Baltimore Transit Co. v. Alexander*, 192 A. 349, 172 Md. 454.
7. N.J.—*Smith v. Public Service Corporation*, 75 A. 937, 78 N.J.Law 478. 60 C.J. p 390 note 15.
- Duty to give warning of approach: To animals and vehicles see *infra* § 236.
- To persons on or near tracks see *infra* § 248.

Warning of starting of car

- Minn.—*Wright v. Minneapolis St. Ry. Co.*, 23 N.W.2d 347, 222 Minn. 347.
5. Ill.—*Chicago City Ry. Co. v. Tuohy*, 63 N.E. 997, 196 Ill. 410, 58 L.R.A. 270.—*Trust Co. of Chicago v. Richardson*, 8 N.E.2d 530, 290 Ill. App. 464.
 - Mo.—*Martini v. St. Louis Public Service Co.*, App., 237 S.W.2d 213. 60 C.J. p 391 note 16.
 6. Cal.—*Lininger v. San Francisco, V. & N. V. R. Co.*, 123 P. 235, 18 Cal.App. 411.
 - Ill.—*Chicago City Ry. Co. v. Tuohy*, 63 N.E. 997, 196 Ill. 410, 58 L.R.A. 270.—*Trust Co. of Chicago v. Richardson*, 8 N.E.2d 530, 290 Ill.App. 464.
 7. Ohio.—*Cincinnati Traction Co. v. Charles*, 14 Ohio Cir.Ct., N.S., 506.
 8. Pa.—*Jerdon v. Philadelphia Rapid Transit Co.*, 103 A. 733, 260 Pa. 275.
 9. N.C.—*Davis v. Durham Traction Co.*, 53 S.E. 617, 141 N.C. 134. 60 C.J. p 391 note 20.
 10. Ill.—*Kelly v. Chicago City Ry. Co.*, 119 N.E. 622, 283 Ill. 640.—*Anderson v. Cummings*, 60 N.E.2d 260, 325 Ill.App. 519.
 - Iowa.—*Elliott v. Des Moines Ry. Co.*, 271 N.W. 506, 223 Iowa 46.
 - N.Y.—*Schulman v. Houston, etc., R. Co.*, 36 N.Y.S. 439, 15 Misc. 32.

Motorman's duty to give warning as affected by vehicle driver's knowledge of approach of street car see *infra* § 236.

11. D.C.—*Eckington, etc., R. Co. v. Hunter*, 6 App.D.C. 287.
12. D.C.—*Eckington, etc., R. Co. v. Hunter*, *supra*.
13. N.Y.—*Fay v. Brooklyn Heights R. Co.*, 75 N.Y.S. 113, 69 App.Div. 563. 60 C.J. p 391 note 24.
14. Mo.—*Culbertson v. Metropolitan St. R. Co.*, 36 S.W. 834, 140 Mo. 35.
15. Md.—*State v. Washington, B. & A. Electric R. Co.*, 131 A. 822, 149 Md. 443. 60 C.J. p 391 note 26.
- Running at great speed without warning as negligence see § 198.
- Turning left**
The failure of a motorman on a street car to give proper warning before making a left turn at a street intersection may constitute negligence.—*Gnat v. Richardson*, 39 N.E. 2d 337, 378 Ill. 626.
16. Mo.—*Weishaar v. Kansas City Public Service Co.*, App., 128 S.W. 2d 332. 60 C.J. p 391 note 27.
17. Ill.—*Chicago City St. Ry. v. Tuohy*, 63 N.E. 997, 196 Ill. 410, 58 L.R.A. 270.—*Trust Co. of Chicago v. Richardson*, 8 N.E.2d 530, 290 Ill. App. 464.

cumstances of the case.¹⁸ Where the duty to sound a signal bell is fixed by statute, it has been held that noncompliance therewith may be considered in determining the motorman's negligence, although it is not controlling,¹⁹ but, in order that the violation of such regulation may be relevant on the question of negligence, it is necessary that the duty created thereby should have been for the benefit of, or should have been owed to, the person claiming to have been injured through the violation.²⁰

On its private right of way a streetcar company may operate its cars without sounding a gong or signal of approach, unless special circumstances require it.²¹

§ 203. Lights

A streetcar, in the nighttime or when it is dark, should be provided with lights sufficient to enable the operator in the exercise of ordinary care to see far enough ahead to avoid a collision, or sufficient to warn travelers of the approach of the car, and the failure to comply with such duty may constitute negligence.

Streetcars running in the nighttime or when it is dark should be provided with sufficient lights,²² and with such lights as will enable the motorman or driver in the exercise of ordinary care to see far enough ahead to avoid a collision with a person or vehicle on the track,²³ or such as will be sufficient to warn travelers of the approach of the car and put them on their guard,²⁴ particularly where such lights are required by statute or ordinance.²⁵

Where the lights in use are the ones prescribed by statute or ordinance, they are sufficient,²⁶ but the company is not bound to provide a particular kind of light, if the one in use is as good or better.²⁷ In the absence of statute or ordinance, the company discharges its duty where the streetcar carries a headlight of efficiency equivalent to those used on similar cars,²⁸ and, since streetcars usually operate where there are brilliant electric lights, they are not required to carry headlights such as are properly required of automobiles.²⁹

Where ordinary prudence requires that a streetcar have a headlight, the failure to provide such a light is negligence³⁰ and the company is liable for any injury proximately resulting from the negligent operation of its car through the dark without a headlight, as discussed *infra* § 212. The absence of lights by reason of the trolley pole leaving the wire is of itself, however, insufficient to show negligence,³¹ and turning on headlights is not negligence even if it is the proximate cause of the collision.³² So the mere fact that the injured person was momentarily blinded by the glare of the lights or confused by the lights is not sufficient to establish negligence on the part of the company,³³ and the additional fact that previous to the accident a circular letter of the board of railroad commissions to the company had advised dimming the lights does not make it so.³⁴

Company rules. Although the existence of a

18. Ky.—South Covington, etc., R. Co. v. McHugh, 77 S.W. 202, 25 Ky.L. 1112.
60 C.J. p 391 note 28.

19. N.J.—Chiapparine v. Public Service Ry. Co., 103 A. 180, 91 N.J.Law 581.

Noise of streetcar crossing tracks on intersecting street did not excuse motorman's failure to ring bell as required by law.—Virginia Electric & Power Co. v. Blunt's Adm'r, 163 S.E. 329, 158 Va. 421.

20. Conn.—Anthony v. Connecticut Co., 92 A. 672, 88 Conn. 700.

21. Mo.—Turney v. United Rys. Co. of St. Louis, 135 S.W. 93, 155 Mo. App. 513.

22. D.C.—Carter v. McDermott, 29 App.D.C. 145, 10 L.R.A., N.S., 1103, 10 Ann.Cas. 601.
60 C.J. p 391 note 23.

23. Ky.—Corpus Juris cited in Public Service Co. of Indiana v. Schnei-

der's Adm'r, 85 S.W.2d 676, 678, 260 Ky. 334.
60 C.J. p 391 note 34.

Extraordinary care required under circumstances

Streetcar operator who knew that headlight was not burning was required to exercise extraordinary care crossing city streets in order to be able safely to meet emergency.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

24. Mo.—Buren v. St. Louis Transit Co., 78 S.W. 680, 104 Mo.App. 224.
60 C.J. p 391 note 35.

25. Mich.—McGee v. Consolidated St. R. Co., 60 N.W. 293, 102 Mich. 107, 47 Am.S.R. 507, 26 L.R.A. 300.
Statutory or municipal requirements as to lights see *supra* § 169.

26. Mich.—McGee v. Consolidated St. R. Co., 60 N.W. 293, 102 Mich. 107, 47 Am.S.R. 507, 26 L.R.A. 300.
60 C.J. p 392 note 37.

27. Conn.—Currie v. Consolidated R. Co., 71 A. 856, 81 Conn. 383.
60 C.J. p 392 note 38.

28. La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

29. La.—Heydorn v. New Orleans Public Service, App., 35 So.2d 893 —Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

30. Iowa.—Watson v. Boone Electric Co., 144 N.W. 350, 163 Iowa 316.
N.Y.—Trieber v. New York & Q. C. Ry. Co., 119 N.Y.S. 439, 134 App. Div. 661, affirmed 94 N.E. 1099, 201 N.Y. 520.

31. Mo.—Higgins v. St. Louis, etc., R. Co., 95 S.W. 863, 197 Mo. 300.

32. Pa.—Clonan v. Allegheny Valley Street Ry. Co., 96 Pa.Super. 442.

33. Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334.
60 C.J. p 392 note 44.

34. Mass.—Tupper v. Union St. Ry. Co., 129 N.E. 881, 237 Mass. 485.

company operating rule as to lights does not render a violation of such rule by the operator negligence per se,³⁵ it is evidence of negligence.³⁶

§ 204. Employing Conductor

In the absence of a statute or ordinance to the contrary, a streetcar may be run without a conductor, and the failure to provide a car with a conductor is not of itself negligence.

Although it is usual to have a motorman and conductor on a train consisting of a car and trailer carrying passengers,³⁷ in the absence of statute or ordinance providing otherwise a streetcar may be run without a conductor,³⁸ and the failure of a street railroad company to provide a car with a conductor is not of itself such negligence as will render the company liable for injuries caused by such car,³⁹ unless the absence of a conductor causes the motorman so to neglect his duties as motorman, in order to perform the duties of conductor, that the injury is thereby caused.⁴⁰ The failure to keep a conductor on a car, as required by ordinance, does not of itself render the company liable for injuries received by a child who jumped on the rear end of the car in play, and fell therefrom.⁴¹

§ 205. Frightening Animals

A street railroad company is not liable for injuries to animals resulting from their fright, unless the company was negligent in doing the thing which caused the fright.

As a street railroad company generally is entitled to the use of the street on which its tracks are laid, for the operation of its cars, equally with riders and

drivers of horses, as discussed *infra* § 207, the company is not liable for injuries caused by horses on or near its tracks becoming frightened at the ordinary appearances and movements of cars under prudent and careful management,⁴² or at the usual and necessary noises incident to the operation of cars,⁴³ and a driver going into the presence of cars takes the ordinary risk of being able to control his horses when they are frightened by the ordinary movements and noises of cars.⁴⁴ At the same time, however, streetcars must be so operated as not unduly to interfere with the rights of individuals using the street or highway by other modes of travel;⁴⁵ and it is the duty of the operator of a car to exercise reasonable and ordinary care under the circumstances to avoid the danger of frightening horses,⁴⁶ and, hence, the company may be liable if the fright of a horse or team is caused by the negligent making of unusual and unnecessary noises⁴⁷ or appearances⁴⁸ in the operation of its cars.

Sounding of gong or signal. The mere sounding of a gong or other ordinary signal by a streetcar motorman or driver in the performance of his duty, near a horse, whereby it becomes frightened and causes injury, is ordinarily not negligence;⁴⁹ but, where the driver or motorman sees or by the exercise of ordinary care could see that a horse is frightened, or likely to become frightened and unmanageable, it is his duty to cease sounding the gong or other signal,⁵⁰ and, if he continues to do so, thereby increasing the fright of the horse, it is negligence for which the company is liable,⁵¹ particularly where the sounding is done in a violent and unnecessary manner,⁵² or so recklessly or wantonly as to indi-

35. Wash.—Peizer v. City of Seattle, 24 P.2d 444, 174 Wash. 95.

Lighted red lantern on rear in foggy weather
Wash.—Peizer v. City of Seattle, *supra*.

36. Wash.—Peizer v. City of Seattle, *supra*.

37. La.—Russell v. Shreveport Belt R. Co., 23 So. 466, 50 La. Ann. 501.

38. Mo.—Dunn v. Cass Ave., etc., R. Co., 21 Mo. App. 188.

39. Del.—Di Prisco v. Wilmington City R. Co., 57 A. 906, 20 Del. 527.

40. Del.—Di Prisco v. Wilmington City R. Co., *supra*.
60 C.J. p 392 note 49.

41. Ill.—Chicago West Div. R. Co. v. Hair, 57 Ill. App. 587.

42. U.S.—McDonald v. Toledo Con-

sol. St. R. Co., Ohio, 74 F. 104, 20 C.C.A. 322.

60 C.J. p 392 note 53.

43. Wis.—Gould v. Merrill Ry. & Lighting Co., 121 N.W. 161, 139 Wis. 433.

60 C.J. p 392 note 54.

44. Ill.—East St. Louis, etc., Electric St. R. Co. v. Wachtel, 63 Ill. App. 181.

45. Me.—Flewelling v. Lewiston, etc., Horse R. Co., 36 A. 1056, 89 Me. 585.

60 C.J. p 393 note 56.

46. Mich.—Reimers v. Saginaw-Bay City Ry. Co., 140 N.W. 581, 174 Mich. 457.

60 C.J. p 393 note 57.

47. Wis.—Look v. Johnson, 156 N. W. 970, 162 Wis. 584.

60 C.J. p 393 note 58.

48. Ind.—Indianapolis, etc., Rapid Transit Co. v. Haines, 69 N.E. 187, 33 Ind. App. 63.
60 C.J. p 393 note 59.

49. Mass.—Partridge v. Middlesex & B. St. Ry. Co., 108 N.E. 918, 221 Mass. 273.
60 C.J. p 393 note 60.

50. Ala.—North Alabama Traction Co. v. Thomas, 51 So. 418, 164 Ala. 191.

Mass.—Ellis v. Boston, etc., R. Co., 35 N.E. 1127, 160 Mass. 341.
60 C.J. p 393 note 62.

51. Wis.—Gould v. Merrill Ry. & Lighting Co., 121 N.W. 161, 139 Wis. 433.
60 C.J. p 393 note 62.

52. Mo.—Oates v. Metropolitan St. R. Co., 68 S.W. 906, 168 Mo. 535, 58 L.R.A. 447.
60 C.J. p 393 note 63.

cate a disregard of the safety of the horse's driver in the street.⁵³ If the gong is sounded after either the conductor or motorman discovers that the horse is being frightened thereby, the company may be liable, without regard to whether the gong is sounded by the one who made the discovery.⁵⁴

Failure to comply with city ordinance requiring a license for obstructions of the street is evidence of negligence in a suit by a person whose horse was frightened by such an unlicensed obstruction by a street railroad company.⁵⁵

§ 206. — Duty after Animal Frightened

The operators of streetcars, after discovering that an animal is frightened, have a duty to use ordinary care to avoid injury, and a failure to perform such duty may render the company liable for injuries resulting therefrom.

Where the servants of a street railroad company in charge of the operation of one of its cars see that a horse or team is frightened, it is their duty to use ordinary care to avoid injury,⁵⁶ but no greater degree of care than ordinary care is required,⁵⁷ and in fulfilling this obligation they must be governed by all the surroundings and circumstances of the case.⁵⁸ Thus, where the driver or motorman operating a car sees, or by the exercise of due diligence could see, that a horse or team is frightened at the car or its noises and is becoming unmanageable, it is his duty to use all reasonable efforts to diminish the fright of the horse,⁵⁹ and to prevent an accident,⁶⁰ and, if he fails to do so, he is

guilty of negligence rendering the company liable for injuries resulting therefrom.⁶¹ Accordingly, under such circumstances, it is the motorman's duty to reduce the speed of the car⁶² and bring it under such control that it can be stopped if necessary to prevent a collision or injury,⁶³ and to use all reasonable efforts to stop the car where this is necessary;⁶⁴ and, if a man of ordinary prudence and carefulness would have brought the car under control⁶⁵ or stopped it before the accident happened,⁶⁶ the failure to do so is an act of negligence rendering the company liable.

A motorman is not, however, required to check the speed of his car every time he is notified of a skittish horse on the street;⁶⁷ and, if he is operating his car in a prudent and careful manner and there is nothing to indicate that the horse or team is frightened or becoming unmanageable and that there is imminent peril, his failure to reduce speed or stop his car does not render the company liable for the resulting damages,⁶⁸ unless his conduct under the circumstances can be attributed only to a wanton or reckless disregard of the consequences.⁶⁹ The failure of a motorman to see the frightened condition of a horse, when he may see it by the exercise of reasonable care, is negligence;⁷⁰ but it has been held that the law does not imply that the driver of a horse is in peril because the horse is frightened by a streetcar,⁷¹ and, in the absence of manifestations other than mere fright, the fair presumption is that the driver will be able to control the horse.⁷²

53. Mass.—Partridge v. Middlesex & B. St. Ry. Co., 108 N.E. 918, 221 Mass. 273.

54. Tex.—Denison, etc., R. Co. v. Powell, 80 S.W. 1054, 35 Tex.Civ. App. 454.
60 C.J. p 393 note 65.

55. Mass.—Labuff v. Worcester Consol. St. Ry. Co., 120 N.E. 381, 231 Mass. 170.

56. Ill.—Kankakee Electric R. Co. v. Lade, 56 Ill.App. 454.
Ky.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S.W. 354, 168 Ky. 611.

57. Ind.—Evansville Electric Ry. Co. v. Folz, 93 N.E. 866, 47 Ind.App. 58.
60 C.J. p 393 note 69.

58. Ill.—Kankakee Electric R. Co. v. Lade, 56 Ill.App. 454.

59. Ala.—North Alabama Traction

Co. v. Thomas, 51 So. 418, 164 Ala. 191.
60 C.J. p 394 note 71.

60. Del.—Heidelbaugh v. People's R. Co., 65 A. 587, 22 Del. 209.
60 C.J. p 394 note 72.

61. Del.—Heidelbaugh v. People's R. Co., supra.

62. Ky.—South Covington, etc., St. R. Co. v. Cleveland, 100 S.W. 283, 30 Ky.L. 1072, 11 L.R.A., N.S., 853.
60 C.J. p 394 note 74.

63. Ga.—Dabbs v. Rome Ry. & Light Co., 69 S.E. 38, 8 Ga.App. 350.
60 C.J. p 394 note 75.

64. Ala.—North Alabama Traction Co. v. Thomas, 51 So. 418, 164 Ala. 191.
60 C.J. p 394 note 76.

65. Neb.—Novak v. Omaha & L. Ry. & Light Co., 170 N.W. 831, 103 Neb. 176.

66. Neb.—Novak v. Omaha & L. Ry. & Light Co., supra.
60 C.J. p 394 note 78.

67. Mont.—Anderson v. Missoula St. Ry. Co., 167 P. 841, 54 Mont. 83.
60 C.J. p 394 note 79.

68. Neb.—Olney v. Omaha, etc., St. R. Co., 111 N.W. 784, 78 Neb. 767.
60 C.J. p 394 note 80.

69. Ill.—Pioneer Fire-Proof Constr. Co. v. Sunderland, 87 Ill.App. 213, affirmed 58 N.E. 928, 188 Ill. 341.
60 C.J. p 394 note 81.

70. Mass.—Ellis v. Lynn, 35 N.E. 1127, 160 Mass. 341.

71. Ill.—East St. Louis, etc., Electric St. R. Co. v. Wachtel, 63 Ill. App. 181.

72. Ill.—East St. Louis, etc., Electric St. R. Co. v. Wachtel, supra.

§ 207. Reciprocal Rights and Duties of Company and Travelers on Street

The reciprocal rights and duties of a street railroad company and travelers on the street between street crossings is discussed *infra* § 208, at street crossings, *infra* § 209 and under statutory provisions or ordinances, *infra* § 210. The rights and duties of the street railroad company with respect to collision with vehicles on the street having special privileges, such as ambulances, fire apparatus, and police vehicles are considered *infra* §§ 241-243.

Examine Pocket Parts for later cases.

§ 208. — Between Street Crossings

Subject to the qualification that a street railroad company may be said to have a paramount or superior right of way over its tracks between street crossings whenever its right conflicts with the right of a traveler on the street, the rights and duties of the company

and of the traveler to use that part of the street occupied by the street railroad tracks are equal and reciprocal.

A street railroad company has no exclusive right to the use of that part of a public street or highway occupied by its tracks,⁷³ but, except where the street is so obstructed that a driver would have to stop or drive on the tracks,⁷⁴ in view of the fact that its cars run on a fixed track, and of the fact that they are run for the convenience and accommodation of the public, the company may be said to have a paramount or superior right of way over its tracks between street crossings, whenever its right conflicts with the right of a traveler on the street, whether a pedestrian, equestrian, or driver of a vehicle, to the extent that such traveler must reasonably give way to an approaching or passing car.⁷⁵ Subject to this qualification, the rights of the company and of the traveler on the street to use that part of the street occupied by the street railroad tracks are equal and reciprocal,⁷⁶ a traveler

73. D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021—MacDonald, to Use of Emmco Ins. Co. v. Capital Transit Co., Mun.App., 31 A.2d 862.

Fla.—Corpus Juris cited in Miami Beach Ry. Co. v. Dohme, 179 So. 166, 168, 131 Fla. 171.

Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R. 2d 740.

Pa.—Hinton v. Pittsburgh Rys. Co., 59 A.2d 151, 359 Pa. 381—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Harold Furniture Co. v. Philadelphia Rapid Transit Co., 100 Pa.Super. 316—Fry v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 329.

60 C.J. p 395 note 86.

74. N.Y.—Southee v. Binghamton Ry. Co., 153 N.Y.S. 689, 168 App. Div. 605, affirmed 118 N.E. 1078, 222 N.Y. 640.

75. U.S.—U. S. v. Philadelphia Transp. Co., D.C.Pa., 38 F.Supp. 246.

Cal.—Blythe v. City and County of San Francisco, 188 P.2d 40, 83 Cal. App.2d 125—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642—Salvo v. Market St. Ry. Co., 2 P.2d 585, 116 Cal.App. 339—Bibby v. Pacific

Electric Ry. Co., 209 P. 387, 58 Cal. App. 658.

D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021—MacDonald, to Use of Emmco Ins. Co. v. Capital Transit Co., Mun.App., 31 A. 2d 862.

Fla.—Corpus Juris cited in Miami Beach Ry. Co. v. Dohme, 179 So. 166, 168, 131 Fla. 171—Tampa Electric Co. v. Gibson, 161 So. 727, 119 Fla. 112.

Ill.—Olender v. Gottlieb, 101 N.E.2d 622, 344 Ill.App. 552.

Ky.—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.

N.Y.—Schlueter v. Third Ave. Transit Corp., 76 N.Y.S.2d 633, 191 Misc. 90.

Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317—Hinton v. Pittsburgh Rys. Co., 59 A.2d 151, 359 Pa. 381—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608—Kelly v. Philadelphia Transp. Co., 23 A.2d 57, 146 Pa.Super. 445—Hastings v. Northampton Transit Co., 100 Pa.Super. 348—Fry v. Conestoga Transp. Co., Com. Pl., 48 Lanc.Rev. 329.

Va.—Virginia Electric & Power Co. v. Holtz, 174 S.E. 870, 162 Va. 665. 60 C.J. p 395 note 88.

"Right of way" merely means a preference to one of two vehicles asserting right of passage at same place and at approximately the same

time.—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.

Movement across traffic lane

Movement of streetcar from main line over siding across traffic lane to car yard would not be paramount to user of highway by public, and driver of truck was not bound to assume that use of siding would imperil his safe passage.—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.

Clearance of snow

Fact that street railway company cleared tracks of snow to facilitate passage of its cars did not enlarge pedestrian's rights on tracks.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608.

76. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

Fla.—Corpus Juris cited in Miami Beach Ry. Co. v. Dohme, 179 So. 166, 168, 131 Fla. 171.

Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712—Mullins v. Cincinnati N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779—Baltimore Transit Co. v. Revere Copper & Brass, 72 A.2d 4, 194 Md. 611—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164.

Mass.—De Lodge v. Boston Elevated Ry. Co., 15 N.E.2d 488, 300 Mass. 219.

on the street having as much right, if in the exercise of due care, to go across or along such part of the street, when not occupied by cars, as across or along any other part of the street;⁷⁷ and the right of each as a traveler ends where that of the other begins.⁷⁸

In the exercise of their reciprocal rights the company and a traveler on the street are also under reciprocal duties, to the extent that the rights of each must be exercised with due regard to the rights of the other, and in such a careful and reasonable manner as not unreasonably to abridge or interfere with those rights,⁷⁹ and so as to avoid injury, the one to avoid inflicting injury, the other to avoid being injured,⁸⁰ proper consideration being given to the difference in motive power, and to the fact that the cars must run on a fixed track and rapidly acquire a greater momentum than another vehicle.⁸¹ Thus on the one hand it is the duty of the company to exercise reasonable care and diligence to keep a lookout for persons and vehicles on or near the track, as discussed generally supra § 197, warn them of the approach of the car, as considered generally supra § 202, and give them a reasonable opportunity to get off or keep off the track;⁸² and the fact that the right of way

over its tracks is expressly given to the company by a statute or ordinance does not relieve it from exercising ordinary care to avoid colliding with a person, animal, or vehicle on the track, as discussed infra § 210. The duty of a motorman is to operate his own streetcar in a proper way so as not to cause injury to others having the same right to use the street as the street railroad company.⁸³ He has no duty to protect pedestrians against injury from other streetcars on parallel tracks,⁸⁴ and the company could not confer such authority and responsibility on its motormen.⁸⁵ Although as high a degree is required,⁸⁶ the law does not require a higher degree of care of a motorman than is required of other users of the streets,⁸⁷ subject only to the modifications that the path of the car is fixed, while travelers, either on foot or in vehicles, may use the entire way, as far as it has been fitted and opened for public travel.⁸⁸ On the other hand, it is the duty of a traveler on or near the track when a car approaches to exercise reasonable care and diligence to get off or keep off the track until it passes,⁸⁹ so as not unreasonably to impede or interfere with its progress,⁹⁰ and so as not to be injured thereby,⁹¹ but he need not be constantly watching for the approach of a car from behind,⁹²

Va.—*Virginia Electric & Power Co. v. Holtz*, 174 S.E. 870, 162 Va. 665.
Wash.—*Peizer v. City of Seattle*, 24 P.2d 444, 174 Wash. 95.
60 C.J. p 396 note 89.

Permissive crossing

(1) A "permissive crossing" is a defined foot path leading to, and crossing over, tracks of street railroad, which is being habitually used, and places on company a duty of care comparable to that required at regular crossing.—*Hamley v. George*, 76 A.2d 181, 183, 365 Pa. 543.

(2) However, the doctrine of "permissive crossings" has no application to street railway tracks located in a public thoroughfare.—*Ferencz v. Pittsburgh Rys. Co.*, 19 A.2d 385, 341 Pa. 369.

Bridge

Where the area occupied by a single track for streetcars crossing on one side of a bridge was a part of the highway, a truck driver crossing bridge with tracks on his right was entitled to use such area.—*White v. Eastern Massachusetts St. Ry. Co.*, 12 N.E.2d 75, 299 Mass. 70.

Parked vehicles

Pa.—*Reynolds v. Philadelphia Transp. Co.*, 67 A.2d 668, 164 Pa. Super. 627.

77. Mass.—*Ristuccia v. Boston Elevated Ry. Co.*, 186 N.E. 592, 283 Mass. 529.
60 C.J. p 397 note 90.

78. Mass.—*Barbrick v. Boston Elevated Ry. Co.*, 100 N.E. 547, 213 Mass. 370.

79. Cal.—*White v. Los Angeles Ry. Corp.*, 167 P.2d 530, 73 Cal.App. 2d 720—*Amendt v. Pacific Elec. Ry. Co.*, 115 P.2d 588, 46 Cal.App.2d 248.

D.C.—*MacDonald, to Use of Emmco Ins. Co. v. Capital Transit Co., Mun. App.*, 31 A.2d 862.

Md.—*Baltimore Transit Co. v. Reverse Copper & Brass*, 72 A.2d 4, 194 Md. 611.

Mass.—*De Lodge v. Boston Elevated Ry. Co.*, 15 N.E.2d 488, 300 Mass. 219.

60 C.J. p 398 note 93.

80. Md.—*Bearings Service Co. v. Baltimore Transit Co.*, 77 A.2d 779—*Rumbley v. Baltimore Transit Co.*, 69 A.2d 805, 194 Md. 164.
60 C.J. p 398 note 94.

81. Ark.—*Pankey v. Little Rock Ry. & Electric Co.*, 174 S.W. 1170, 117 Ark. 337.

60 C.J. p 399 note 95.

82. N.Y.—*Normand v. Hudson Val-*

ley Ry. Co., 117 N.Y.S. 1076, 133 App.Div. 474.
60 C.J. p 399 note 98.

83. Kan.—*Harris v. Kansas City Public Service Co.*, 297 P. 718, 132 Kan. 715.

84. Kan.—*Harris v. Kansas City Public Service Co.*, supra.

85. Kan.—*Harris v. Kansas City Public Service Co.*, supra.

86. Minn.—*Watson v. Minneapolis St. R. Co.*, 55 N.W. 742, 53 Minn. 551.

87. Iowa.—*Powers v. Des Moines City Ry. Co.*, 121 N.W. 1095, 143 Iowa 427.
60 C.J. p 399 note 6.

88. Mass.—*Horsman v. Brockton & P. St. Ry. Co.*, 91 N.E. 897, 205 Mass. 519.

89. Mich.—*Wingert v. Detroit United Ry.*, 142 N.W. 1063, 177 Mich. 199.
60 C.J. p 399 note 8.

90. Cal.—*Amendt v. Pacific Elec. Ry. Co.*, 115 P.2d 588, 46 Cal.App. 2d 248.

60 C.J. p 400 note 9.

91. Del.—*Tobias v. People's Ry. Co.*, 80 A. 358, 26 Del. 69.
60 C.J. p 400 note 10.

92. Mass.—*Callahan v. Boston Ele-*

and may reasonably assume under ordinary conditions that the driver will exercise common prudence to avoid a collision with others, exercising their rights as travelers with ordinary care.⁹³ Failure of either the company or an individual lawfully using the street to exercise ordinary care may render the party at fault liable for damages,⁹⁴ and this liability is not increased or diminished by the fact that at the time of the injury one or both parties was or was not technically a traveler on the street.⁹⁵

§ 209. — At Street Crossings

Subject to the preferential right of way of a streetcar at a crossing which is applied in some jurisdictions,

in the absence of statute or ordinance it is ordinarily held that a streetcar company has no right to the use of the street occupied by its track superior to the right of a traveler.

Subject to the preferential right of way of a streetcar at an intersection which is applied in some jurisdictions,⁹⁶ in absence of a statute or ordinance to the contrary it is ordinarily held that at such place a street railroad company has no right to the use of the street occupied by its track superior or paramount to the right of a traveler coming from such intersecting street to cross the track.⁹⁷ Thus, ordinarily the rights and duties of a street railroad company and a traveler at street crossings are equal and reciprocal.⁹⁸ In jurisdictions where the streetcar is given a preferential right of way at

vated Ry. Co., 91 N.E. 388, 205 Mass. 422, 18 Ann.Cas. 510.

93. Mass.—Callahan v. Boston Elevated Ry. Co., *supra*.

94. Mich.—Hibbler v. Detroit United Ry., 137 N.W. 719, 172 Mich. 368.

60 C.J. p 400 note 13.

Temporary obstruction

(1) While one may not recklessly, carelessly, or willfully obstruct passage of cars of a street railroad, he is not bound to keep off the tracks, and, if he fairly and in a reasonable manner, with respect to paramount right of railroad, temporarily obstructs track when necessarily engaged in a lawful business and is without fault on his part injured by negligence of railroad, it is liable for damages.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.

(2) A pushcart operator has a right to wheel it on trolley tracks in the middle of a street where cars parked on both sides prevented his pushing it in any other place.—Arlia v. Philadelphia Transp. Co., 77 Pa. Dist. & Co. 25.

95. Neb.—Mercer v. Omaha & C. B. St. Ry. Co., 188 N.W. 296, 108 Neb. 532.

96. D.C.—Capital Transit Co. v. Smallwood, 162 F.2d 14, 82 U.S. App.D.C. 228—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032—Kelly Furniture Co. v. Washington Ry. & Electric Co., 76 F.2d 985, 64 App.D.C. 215—Washington Ry. & Electric Co. v. Chapman, 65 F.2d 486, 62 App.D.C. 140, certiorari denied Chapman v. Washington Ry. & Electric Co., 54 S.Ct. 75, 290 U.S. 661, 78 L.Ed. 572.

Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—McCraley v. George, 38 A.2d 360, 155 Pa.Super. 116—Augustine v. Philadelphia Rapid Transit Co., 181 A. 378, 119 Pa.Super. 577—Feldman v. Philadelphia Rapid Transit Co., 163 A. 39, 106 Pa.Super. 494.
60 C.J. p 402 note 19.

In Iowa

(1) Although an interurban car is given precedence or right of way at crossing, a car which is not an interurban car but a streetcar does not have precedence or right of way at a street intersection.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

(2) Other decisions, however, have held that a streetcar has precedence or right of way at crossing generally without distinguishing between a streetcar and an interurban car.—Moss v. Mason City & C. L. R. Co., 251 N.W. 627, 217 Iowa 354—60 C.J. p 402 note 19 [a].

97. Cal.—Saphire v. Los Angeles Transit Lines, 222 P.2d 956, 99 Cal.App.2d 880—Primm v. Market St. Ry. Co., 132 P.2d 842, 56 Cal. App.2d 480—Alberts v. Lytle, 37 P.2d 705, 1 Cal.App.2d 682.

Fla.—Tampa Electric Co. v. Gibson, 161 So. 727, 119 Fla. 112.

Ill.—Gnat v. Richardson, 39 N.E.2d 337, 378 Ill. 626.

Md.—State, for Use of Ridgway v. Capital Transit Co., 72 A.2d 245, 194 Md. 656—Phillips v. Baltimore Transit Co., 71 A.2d 430, 194 Md. 527—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Watson v. Storrs, 175 A. 263, 167 Md. 685.

Mass.—Weir v. Boston Elevated Ry., 185 N.E. 923, 283 Mass. 41.
60 C.J. p 400 note 17.

98. Cal.—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168—Erdevig v. Market St. Ry. Co., 264 P. 252, 203 Cal. 367—Blythe v. City and County of San Francisco, 188 P.2d 40, 83 Cal.App.2d 125—*Corpus Juris* cited in Primm v. Market St. Ry. Co., 132 P.2d 842, 845, 56 Cal.App.2d 480.

Fla.—Tampa Electric Co. v. Gibson, 161 So. 727, 119 Fla. 112.

Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.

Md.—Downey v. Baltimore Transit Co., 78 A.2d 666—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Neb.—McDonald v. Omaha & C. B. St. Ry. Co., 257 N.W. 489, 128 Neb. 17.

Okl.—Oklahoma Ry. Co. v. Hentzen, 194 P.2d 847, 200 Okl. 364.

Va.—Burch v. Virginia Public Service Co., 194 S.E. 698, 169 Va. 460.
60 C.J. p 400 note 17, p 401 note 19.

Right to pass over crossing

Travelers on the street and operators of streetcars both have the lawful right to pass over a crossing of an intersecting street.—Bidwell v. Los Angeles & S. D. B. Ry. Co., 148 P. 197, 169 Cal. 780.

Pedestrian had right to cross streetcar track at intersection.—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 276 Mass. 29.

Boy on skates

In a broad and general sense a boy on roller skates has the rights and obligations of a pedestrian, with respect to right to recover for injuries sustained when struck by trolley car.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

a crossing, when a car is operated reasonably,⁹⁹ it has the right of way over a traveler with vehicle or otherwise wishing to cross the track at that point if it appears that diminution of speed would be necessary to permit such traveler to cross with safety;¹ but this does not mean that one about to cross car tracks at an intersection must always yield the right of way to an approaching car.²

The rights of each must be exercised with due regard to the rights of the other, and in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other,³ and so as to avoid inflicting or receiving injury.⁴ What each must do in the exercise of ordinary care depends on the facts of the particular case,⁵ but generally each is under the duty to operate at a reasonable rate of speed⁶ and to give timely warning of approach,⁷ and, ordinarily, as between the company and another having equal rights, the one who can most readily adjust himself to the exigencies of the situation must do so when necessary to avoid injury.⁸ Each may assume that the other will exercise due care⁹ and discharge his proper duty,¹⁰ and the motorman need not assume that a traveler on the street will fail to give way to a car approach-

ing the crossing at the same time,¹¹ but neither can assume that the other will keep out of the way at his peril.¹²

The driver of a vehicle has the right of way at the crossing if, proceeding at a rate of speed which, under the circumstances of the time and locality, is reasonable, he reaches the point of crossing in time safely to go on the tracks in advance of an approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped before it reaches him,¹³ and he may have an absolute right of way where the circumstances are such as to constitute an invitation by the company to cross.¹⁴ On the other hand, it has been held that, if a street-car going at a reasonable rate of speed will reach the crossing first, it has the right of way;¹⁵ and so, where one half of the length of a streetcar has passed the point of collision with a wagon in the street, it has so occupied the street that it is entitled to preference in passage.¹⁶ Priority in time in reaching a street intersection does not, however, give absolute priority of right, but is only one of the elements to be considered in determining the care exercised by a street motorman in proceeding.¹⁷ In the absence of a governing statute or ordinance,

99. Wis.—Stafford v. Chippewa Valley Electric R. Co., 85 N.W. 1036, 110 Wis. 331.
60 C.J. p 402 note 20.

Violation

Preferential right of way depends on operation in a lawful manner and at reasonable rate of speed and, where operator violates stop signal and enters intersection at dangerous rate of speed, he has no right to assume right of way will be yielded.—Arkansas Power & Light Co. v. Cummins, 28 S.W.2d 1077, 181 Ark. 1145, 182 Ark. 1.

1. Wis.—Stafford v. Chippewa Valley Electric R. Co., 85 N.W. 1036, 110 Wis. 331.
60 C.J. p 402 note 21.

2. Wis.—Karshian v. Milwaukee Electric Ry. & Light Co., 212 N.W. 643, 192 Wis. 269.

3. Cal.—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168—Alberts v. Lytle, 37 P.2d 705, 1 Cal. App.2d 682—Aungst v. Central California Traction Co., 1 P.2d 56, 115 Cal.App. 113.

Fla.—Tampa Electric Co. v. Gibson, 161 So. 727, 119 Fla. 112.

Md.—State for Use of Ridgway v. Capital Transit Co., 72 A.2d 245, 194 Md. 656—Phillips v. Baltimore Transit Co., 71 A.2d 430, 194 Md. 527.

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

60 C.J. p 402 note 23.

4. Ind.—Carson v. Perkins, 29 N.E. 2d 772, 217 Ind. 543.

Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Girton v. Baltimore Transit Co., 65 A. 2d 329, 192 Md. 671—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.

Okl.—Oklahoma Ry. Co. v. Hentzen, 194 P.2d 847, 200 Okl. 364.
60 C.J. p 403 note 24.

5. Del.—Foulke v. Wilmington City R. Co., 60 A. 973, 21 Del. 363.
60 C.J. p 403 note 25.

6. Ky.—Louisville Ry. Co. v. Birdwell, 224 S.W. 1065, 189 Ky. 424.
Duty of street railroad company to operate at reasonable rate of speed generally see supra § 198.

7. Ky.—Louisville Ry. Co. v. Birdwell, supra.
Duty of street railroad company to give warning of approach generally see supra § 202.

8. Wash.—Helber v. Spokane St. R. Co., 61 P. 40, 22 Wash. 319.
60 C.J. p 403 note 28.

9. Del.—Igle v. People's Ry. Co., 93 A. 666, 28 Del. 376.

10. Cal.—Scott v. San Bernardino Valley Traction Co., 93 P. 677, 152 Cal. 604.

11. Cal.—Arnold v. San Francisco-Oakland Terminal Rys., 164 P. 798, 175 Cal. 1.

12. Iowa.—Wilfin v. Des Moines City Ry. Co., 156 N.W. 842, 176 Iowa 642.

Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

13. Cal.—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.
60 C.J. p 403 note 34.

14. U.S.—Sullivan v. Philadelphia Suburban Transp. Co., D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F. 2d 111.

15. Ill.—Knickerbocker Ice Co. v. Benedix, 69 N.E. 50, 206 Ill. 362.
W.Va.—Tri-City Traction Co. v. Shepherd, 15 S.E.2d 592, 123 W.Va. 227.

16. N.Y.—Warne v. Brooklyn Heights R. Co., 162 N.Y.S. 455, 175 App.Div. 559.

17. N.Y.—Geyer v. International Ry. Co., 206 N.Y.S. 715, 210 App.Div. 574, affirmed 148 N.E. 733, 240 N. Y. 626.

a streetcar is not required to stop at a street intersection for a funeral procession to pass or to give it the right of way.¹⁸

Intersection not used as crossing. Where a vehicle is proceeding along the same street as a car, and there is a mere attempt to cross to the other side, at the intersection instead of at some other point, the rule that at an intersection of streets the rights of a streetcar and of a crossing vehicle are equal has no application;¹⁹ but in such case the care required of the driver of the vehicle is the same as though there were no intersection.²⁰

Driver's motive in attempting to cross a streetcar track at a street intersection is immaterial where his rights are equal to those of the company.²¹

Interurban railroads. The legal status and reciprocal duties of an interurban street railroad company and a traveler at a public or private crossing are different from those prevailing in a city.²² In such a case the rights of the traveler ordinarily are subordinate to those of the company, in that the company is accorded the right of way or priority of passage over the crossing,²³ and, subject to such qualification, the rights and duties of the parties, even at a private crossing, are equal and reciprocal.²⁴

§ 210. — Under Statutory Provisions or Ordinances

Statutes and ordinances may fix the rights and duties of street railroad companies and others in the use of the streets between street crossings, and may supplant the common-law rule as to the rights and duties of the parties at street intersections.

Although a police regulation providing that streetcars shall have the right of way on their tracks amounts to nothing more than a declaration of a generally recognized rule of law,²⁵ statutes and ordinances may fix the rights and duties of street railroad companies and others in the use of the streets between street crossings,²⁶ and statutes and ordinances, fixing the reciprocal rights and duties of street railroad companies and others in the use of the streets, may supplant the common-law rule that the rights of the parties at street intersections are equal,²⁷ and give a right of way to the street railroad at a crossing;²⁸ but they do not give the company the exclusive right to use the street²⁹ or an absolute right of way;³⁰ nor do they give car operators full license to proceed across intersections without regard to the approach of vehicles,³¹ or relieve them from using reasonable care to avoid accidents.³² Where a streetcar has the right of way under an ordinance, it is the duty of an automobile

18. Del.—Foult v. Wilmington City R. Co., 60 A. 973, 21 Del. 363.

19. N.Y.—Schmedding v. New York, etc., R. Co., 82 N.Y.S. 1034, 85 App.Div. 24.

20. N.Y.—Schmedding v. New York, etc., R. Co., supra.

21. N.Y.—Solomon v. Buffalo R. Co., 89 N.Y.S. 99, 96 App.Div. 487.

22. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W.Va. 112—Helvey v. Princeton Power Co., 99 S.E. 180, 84 W.Va. 16.

23. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152—Baker v. Des Moines City Ry. Co., 202 N.W. 762, 199 Iowa 1256—Hawkins v. Interurban Ry. Co., 168 N.W. 234, 184 Iowa 232.

W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W.Va. 112.

52 C.J. p 181 note 88 [d]—[e].

Rule of railroads

When street railway is operated under conditions similar to those un-

der which a railroad is operated, rule as to right of way of railroads at crossings is applicable.—Arnold v. San Francisco-Oakland Terminal Rys., 164 P. 798, 175 Cal. 1—Dolton v. Green, 164 P.2d 795, 72 Cal.App.2d 427.

24. Iowa.—Dunham v. Des Moines Ry. Co., 45 N.W.2d 578, 240 Iowa 42—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152—Baker v. Des Moines City Ry. Co., 202 N.W. 762, 199 Iowa 1256—Hawkins v. Interurban Ry. Co., 168 N.W. 234, 184 Iowa 232.

W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W.Va. 112.

25. D.C.—City & Suburban Ry. of Washington v. Cooper, 32 App.D.C. 550.

Reciprocal rights of street railroad companies and travelers on street between crossings see supra § 208.

26. Md.—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

60 C.J. p 404 note 47.

27. N.Y.—Cushing v. Metropolitan St. Ry. Co., 87 N.Y.S. 314, 92 App. Div. 510.

60 C.J. p 404 note 45.

28. Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280. Ky.—Louisville Ry. Co. v. Breden, 77 S.W.2d 368, 257 Ky. 95.

Or.—Hunsaker v. Pacific Northwest Public Service Co., 20 P.2d 433, 143 Or. 583.

Tex.—Havins v. Dallas Railway & Terminal Co., 130 S.W.2d 878, error refused.

Wash.—Carlson v. City of Seattle, 27 P.2d 717, 175 Wash. 388.

29. Or.—Macchi v. Portland Ry., Light & Power Co., 148 P. 72, 76 Or. 215.

30. Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88—Smith v. City of Seattle, 19 P.2d 652, 172 Wash. 66.
60 C.J. p 404 note 49.

31. Wash.—Radford v. City of Seattle, 221 P. 597, 127 Wash. 445.

32. Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280. Ky.—Louisville Ry. Co. v. Breden, 77 S.W.2d 368, 257 Ky. 95.

Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88—Smith v. City of Seattle, 19 P.2d 652, 172 Wash. 66.

60 C.J. p 404 note 51.

driver to yield if, when he starts across the tracks, the relative position of the two vehicles is such that a reasonably prudent man would have foreseen that a collision was likely to occur unless one or the other stopped.³³

Although it has been held that the law of the road does not apply to streetcars,³⁴ and their operators need not turn to either side in compliance with the law, although the cars are vehicles within the meaning thereof,³⁵ statutes or ordinances regulating the right of way at street intersections have been applied to streetcars,³⁶ except where there is a provision specifically or by the context excluding streetcars.³⁷ Hence, under traffic regulations, a pedestrian may have the right of way at an intersection, regular crossing, or crosswalk,³⁸ and a

pedestrian crossing a roadway at any point other than at crosswalk at an intersection must yield the right of way to the streetcar,³⁹ although such privileges conferred by the right of way apply only to moving pedestrians or streetcars,⁴⁰ and a streetcar standing at an intersection has no right of way over other vehicles or pedestrians, and a pedestrian can have no right of way in the crossing over the standing streetcar.⁴¹

Furthermore, various traffic regulations have been applied in determining the right of way as between a streetcar company and a traveler on the street at an intersection or crossing,⁴² such as the relative position or direction of travel,⁴³ or first entry into the intersection,⁴⁴ or the traffic control

Duty to exercise due care to avoid collision with motorist arises only after operator knew or by exercise of reasonable care should have known that motorist was not going to yield statutory right of way.—Hunsaker v. Pacific Northwest Public Service Co., 20 P.2d 433, 143 Or. 583.

33. Va.—Virginia Ry. & Power Co. v. Wellons, 112 S.E. 843, 133 Va. 350.

34. Tex.—Magnolia Gas Products Co. v. Rydewski, Civ.App., 300 S. W. 100.

60 C.J. p 405 note 57.

35. Mass.—Foster v. Curtis, 99 N.E. 961, 213 Mass. 79, 42 L.R.A., N.S., 1188, Ann.Cas.1913E 1116.

60 C.J. p 405 note 58.

36. Ind.—Indianapolis Rys. v. Boyd, 54 N.E.2d 272, 222 Ind. 481.

Mass.—Obrey v. McCarthy, 25 N.E. 2d 150, 305 Mass. 83.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21—Deach v. St. Paul City R. Co., 9 N.W.2d 735, 215 Minn. 171.

60 C.J. p 405 note 56.

37. Wash.—Carlson v. City of Seattle, 27 P.2d 717, 175 Wash. 388.

Va.—Burch v. Virginia Public Service Co., 194 S.E. 698, 169 Va. 460—Virginia Electric & Power Co. v. Velhines, 175 S.E. 35, 162 Va. 671.

60 C.J. p 405 note 55.

38. D.C.—Simmonds v. Capital Transit Co., 147 F.2d 570, 79 U.S. App.D.C. 371.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

39. Minn.—Deach v. St. Paul City R. Co., 9 N.W.2d 735, 215 Minn. 171.

40. Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

41. Minn.—Wright v. Minneapolis St. Ry. Co., supra.

Stopping on crosswalk

Motorman had no right to stop streetcar on crosswalk so that car projected into intersection, and by so doing acquired no right to prevent use of crosswalk by pedestrians, and under such circumstances pedestrian would have had the right to remove the streetcar, if physically able to do so, or to pass over it.—Wright v. Minneapolis St. Ry. Co., supra.

42. Stopping behind streetcar

(1) Statute requiring vehicles to stop at least certain number of feet to rear of streetcar which has stopped to discharge or receive passengers is a right of way statute and applies to operation and control of streetcar approaching another streetcar stopped, or about to stop, for discharging or receiving passengers.—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205.

(2) Such statute creates a restricted right of way area to the rear of car and between car door and gates and nearest curb for benefit of pedestrians going to and from streetcar, and person alighting from streetcar loses his right of way on leaving such area.—LeVasseur v. Minneapolis St. Ry. Co., supra.

(3) Thus, person alighting from streetcar and in passing to the rear of the streetcar within the designated number of feet thereof had the right of way as to following streetcar, but on passing out of that area into path of a streetcar approaching from opposite direction plaintiff lost the right of way.—LeVasseur v. Minneapolis St. Ry. Co., supra.

43. Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288—Kuessner v. Cincinnati St. Ry. Co., App., 34 N.E.2d 275.

Tex.—Corum v. Dallas Railway & Terminal Co., Civ.App., 96 S.W.2d 751.

Wash.—Milne v. City of Seattle, 145 P.2d 888, 20 Wash.2d 30.

60 C.J. p 405 note 56 [a].

Loss of right

Even though trolley bus approaching intersection from the right lost its right of way by proceeding at an unlawful speed, that fact did not shift the absolute right to automobile approaching from the left, and the maximum effect would be to make inapplicable to the situation the statute relating to right of way, and thereupon relative obligations of the drivers of the converging vehicles would be governed by common law.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.

In Pennsylvania

(1) Under statute the vehicle or streetcar approaching on right has right of way.—Reinhard v. Lehigh Valley Transit Co., 6 A.2d 96, 334 Pa. 343—Schnitzer v. Philadelphia Transp. Co., 45 A.2d 419, 158 Pa.Super. 444, reversed on other grounds 47 A.2d 709, 354 Pa. 576.

(2) Prior to statutory amendment inserting streetcars in statute, statute was held not to apply to streetcars.—Feldman v. Philadelphia Rapid Transit Co., 163 A. 39, 106 Pa.Super. 494.

44. Minn.—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21.

Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

of intersections,⁴⁵ and, except as it may be qualified by the right of way possessed by one over the other, each must exercise reasonable care.⁴⁶ Thus, a traffic regulation giving vehicles proceeding in a certain direction the right of way at intersections over vehicles approaching from other directions does not give a streetcar traveling in the preferred direction an absolute right to the exclusive use of the street as against vehicles traveling in other directions;⁴⁷ nor does it relieve the driver of an automobile who has such right of way of the duty of looking for an approaching car before crossing the track.⁴⁸

Special ordinance

The fact that truck driver entered intersection ahead of streetcar, giving him right of way at intersection under general traffic ordinance, did not authorize him to go upon the car track after seeing that streetcar had started across the intersection, in violation of special ordinance prohibiting crossing the tracks in front of approaching streetcars.—*Havins v. Dallas Railway & Terminal Co.*, Tex. Civ.App., 130 S.W.2d 878, error refused.

Entry from same highway

Where a two-roadway boulevard was separated by parkway on which streetcar tracks were located, and truck entered the wrong traffic lane and at first intersection turned to cross the streetcar tracks in order to get into the proper traffic lane, and was struck by streetcar proceeding in same direction as truck, the statute requiring driver of vehicle approaching intersection to yield right of way to vehicle which has entered intersection from different highway was inapplicable because truck entered the intersection from the same highway and not from a different one.—*O'Neill v. Minneapolis St. Ry. Co.*, 7 N.W.2d 665, 213 Minn. 514.

45. Ind.—*Indianapolis Rys. v. Boyd*, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

Pa.—*Heaver v. Philadelphia Rapid Transit Co.*, 183 A. 110, 120 Pa.Super. 520.

Stop signs

(1) Code providing that no driver of vehicle or operator of streetcar shall disobey instructions of official traffic control device impliedly requires streetcar operators, as well as other vehicle drivers, to stop at stop signs at entrances to through highways and other street intersections and yield right of way to vehicles approaching on intersecting

highways, as provided by sections defining obedience to stop sign instructions by vehicle drivers, even though such sections are not in terms applicable to streetcars.—*Fox v. Baltimore Transit Co.*, 71 A.2d 470, 194 Md. 403.

(2) As statutory duties of vehicle drivers and streetcar operators to stop at stop signs are correlated and coordinate, and purpose of duty to stop is to give force and practicability to duty to yield right of way, statutory amendments, striking words, "or operator of a street car," after words, "driver of a vehicle," in code sections requiring such drivers to stop at stop signs and yield right of way do not prevent resort to such sections to determine meaning of words, "obeying the instructions of a stop sign," in previous section providing that no driver of vehicle or operator of streetcar shall disobey such instructions.—*Fox v. Baltimore Transit Co.*, supra.

Vehicles or pedestrians lawfully within intersection

(1) Under a statute providing that right of way shall be yielded to all vehicles and pedestrians lawfully within intersection at time traffic signal is given, operation of statute is not confined to giving right of way to those already in intersection when signal is given, but it applies to all lawfully within intersection.—*Caryl, to Use of Merchants Mut. Casualty Co. v. Baltimore Transit Co.*, 58 A.2d 239, 190 Md. 162.

(2) Under such statute pedestrian crossing the street with traffic light in his favor has right of way over streetcar making turn into such street.—*Caryl, to Use of Merchants Mut. Casualty Co. v. Baltimore Transit Co.*, supra.

(3) Furthermore, under such statute, pedestrian or operator of a vehicle, such as a streetcar operator, starting across an intersection with a favorable signal, has the right to

§ 211. Willful or Wanton Injury

Contributory negligence does not bar recovery for an injury caused by the willful, wanton, or reckless acts of the employees of a street railroad company in the course of their employment.

A person may recover for injuries received through the operation of a street railroad, notwithstanding negligence on his part, where the injuries are caused by reckless, willful, or wanton acts on the part of the servants of the company in the course of their employment.⁴⁹ In order to render the rule applicable, there must be conduct, under the tests prescribed in negligence cases generally, con-

complete the trip, even if the traffic light changes in the middle of passage.—*Eisenhower v. Baltimore Transit Co.*, 59 A.2d 313, 190 Md. 528.—*Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co.*, 58 A.2d 239, 190 Md. 162.

Equal rights

Pedestrian and streetcar proceeding across intersection with green traffic light have equal rights.—*Keller v. N. C. Public Service*, 138 So. 463, 18 La.App. 317.

Vehicles lawfully within intersection

Under act requiring vehicular traffic at intersections controlled by traffic signals to yield right of way to other vehicles lawfully within intersection when "Go" signal is exhibited, vehicle which entered intersection when light turned green before streetcar from opposite direction entered intersection to make a left turn had the right of way over streetcar.—*Indianapolis Rys. v. Boyd*, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

46. La.—*Keller v. N. C. Public Service*, 138 So. 463, 18 La.App. 317. Ohio.—*Lake Shore Electric Ry. Co. v. Rohrbacher*, 186 N.E. 507, 44 Ohio App. 529.

Fact that a traffic officer has signaled for traffic to proceed in a certain direction does not relieve the parties from the duties of continuously exercising reasonable care.—*O'Donnell v. United Electric Rys. Co.*, 134 A. 642, 48 R.I. 18.

47. N.Y.—*Boston Ins. Co. v. Brooklyn Heights R. Co.*, 169 N.Y.S. 251, 182 App.Div. 1. 60 C.J. p 404 note 52.

48. Ala.—*Mobile Light & R. Co. v. McDonnell*, 92 So. 185, 207 Ala. 161.

49. U.S.—*Perna v. Rapid R. Co.*, Mich., 250 F. 728, 163 C.C.A. 60. 60 C.J. p 535 note 11.

stituting willfulness, wantonness, or recklessness,⁵⁰ or "gross negligence," where this term is used synonymously in this connection.⁵¹

Rate of speed at which a streetcar is operated may have an important bearing in some,⁵² but is not necessarily conclusive in all,⁵³ cases on the question of willfulness, wantonness, or recklessness.

Failure to exercise reasonable care after discovery of peril. In connection with the last clear chance doctrine or the doctrine of discovered peril, discussed infra §§ 288-295, expressions, such as "willfulness," "wantonness," or "recklessness," are used where, after the motorman sees a person in peril on or near the track ahead, he fails to make reasonable efforts to avoid an accident,⁵⁴ such as to give warning of the approach of the car and to slacken the speed of, or stop, the car.⁵⁵

Contributory willful or wanton conduct. It has been held that no recovery can be had for an injury willfully and wantonly inflicted, where willful or wanton conduct for which the person injured is

responsible contributed as a proximate cause of the injury.⁵⁶

§ 212. Proximate Cause of Injury

In order that the negligence of the street railroad company in the performance or omission of the duty owed to the person injured may impose liability, it is essential that the negligence of the company be the proximate cause of such injuries.

As in the case of injuries resulting from negligence generally, in order that the negligence of the street railroad company in the performance or omission of the duty owed to the person injured may impose liability, it is essential that the negligence of the company be the proximate cause of such injuries,⁵⁷ and thus, although the street railroad company is negligent, no liability attaches where there is no causal connection between the negligence and the injury.⁵⁸ General rules as to the elements and tests of proximate cause, and as to concurrent causes, have been applied in determining whether the negligence of the company was the proximate cause of the injury,⁵⁹ and, where the injury re-

50. Ala.—Birmingham Electric Co. v. Turner, 1 So.2d 299, 241 Ala. 66. 60 C.J. p 535 note 12.
Willful or wanton acts as negligence see Negligence § 9.

Motorman's acts between intersections, approaching crossing, or at crossing, may constitute willfulness or wantonness.—Birmingham Elec. Co. v. Turner, supra—Schmidt v. Mobile Light & R. Co., 87 So. 181, 204 Ala. 694.

Failure to keep lookout

Motorman's failure to keep a proper lookout ahead would not constitute wantonness, unless it was also shown that motorman knew that place at which collision occurred was one where vehicles would probably be passing over the track.—Birmingham Elec. Co. v. Turner, 1 So.2d 299, 241 Ala. 66.

Acts held not willful or wanton

(1) In general.—Chernozsky v. City of New York, 86 N.Y.S.2d 185, affirmed 95 N.Y.S.2d 597, 276 App.Div. 995—60 C.J. p 535 note 12 [b].

(2) In determining whether streetcar motorman's failure to see pedestrian who was struck while crossing street at a T intersection amounted to willful or wanton conduct, motorman's duty to exercise due care was not as great as in an ordinary crossing, and his failure to see did not amount to willful and wanton conduct.—Rajak v. Cummings, 41 N.E. 2d 969, 314 Ill.App. 465.

51. Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893—Virginia Elec. & Power Co. v. Wright, 196 S.E. 580, 170 Va. 442. 60 C.J. p 536 note 13.

52. Ala.—Birmingham Ry., Light & Power Co. v. Strickland, 68 So. 911, 192 Ala. 596.
60 C.J. p 536 note 15.

53. Ala.—Montgomery St. R. Co. v. Rice, 38 So. 857, 142 Ala. 674.
60 C.J. p 536 note 16.

54. Mich.—Montgomery v. Lansing City Electric R. Co., 61 N.W. 543, 103 Mich. 46, 29 L.R.A. 287.
60 C.J. p 536 note 17.

In Missouri

(1) It has been stated that the failure of the motorman to exercise ordinary care to avoid the accident after discovery of the peril is sufficient to permit the humanitarian doctrine to be invoked, even if he does not act willfully, wantonly, or recklessly.—White v. St. Louis, etc., R. Co., 101 S.W. 14, 202 Mo. 539.

(2) However, it has been stated that liability in such case cannot have, nor has it, any other basis in logic except wantonness and recklessness, even though in the legal application of the rule the court has been compelled, for practical purposes of administering the law, to find and argue wanton and reckless disregard of life and limb from the facts of the case, when in truth the sentiments did not exist in the mind

or intention of the actual tort-feasor.—State v. Ellison, Mo., 182 S.W. 961, 965.

(3) Thus, the rationale of cases imposing liability on the street railroad company under the humanitarian doctrine is found in the theory that the act of the company, in failing to exercise ordinary care after discovering the peril, is willful, wanton, and reckless.—State v. Ellison, supra.

55. Minn.—Teal v. St. Paul City R. Co., 104 N.W. 945, 96 Minn. 379.
60 C.J. p 536 note 18.

56. Pa.—Elliott v. Philadelphia Transp. Co., 53 A.2d 81, 356 Pa. 643.

57. Pa.—Guca v. Pittsburgh Rys. Co., 80 A.2d 779, 367 Pa. 579.
R.I.—New England Tree Expert Co. v. United Electric Rys. Co., 169 A. 325, 54 R.I. 35.
60 C.J. p 481 note 7.

58. N.Y.—Eager v. New York Rapid Transit Corporation, 280 N.Y.S. 386, 245 App.Div. 742, affirmed 200 N.E. 316, 270 N.Y. 556—Marks v. Rochester R. Co., 58 N.Y.S. 210, 41 App.Div. 66.

59. La.—Kendall v. New Orleans Public Service, App., 45 So.2d 541.
Minn.—Carlson v. Fredsall, 37 N.W. 2d 744, 228 Minn. 461.
Pa.—Anselmo v. Philadelphia Transp. Co., 41 A.2d 550, 351 Pa. 542.

sulted from an intervening efficient cause, the company is not liable.⁶⁰ Thus, no liability attaches to the company for injuries due to the inexperience and incompetency of its employees,⁶¹ or for any injury sustained due to failure of the company properly to equip its cars,⁶² or for any injuries received by trespassers,⁶³ or for injuries resulting from defects or obstructions in the operation of the railroad,⁶⁴ unless the negligence of the company is the proximate cause of the injury.

Collision with vehicles. In order that the negli-

gence of a street railroad company may impose liability for injuries resulting from a collision of its car with a vehicle, it is essential that the negligence of the company constitute the proximate cause of such injuries.⁶⁵ General rules as to the elements and tests of proximate cause, and as to concurrent causes, are applicable.⁶⁶ Thus, where the negligence of the street railroad company and other persons proximately cause the injury, it is immaterial which was more negligent or whose negligence contributed more to the injury,⁶⁷ unless the

Unforeseeable and unjustifiable act of another

Where pedestrian on sidewalk suffered injuries when knocked down by passenger fleeing from defendant's streetcar which caught fire, and short circuit which caused fire was not an unusual occurrence, although resulting fire was, pedestrian's injury was not proximate or foreseeable consequence thereof, but was due to unforeseeable, irresponsible, and unjustifiable act of a third person for which defendant carrier was not liable.—*Kendall v. New Orleans Public Service, La.App.*, 45 So.2d 541.

60. Ohio.—*Krause v. Toledo Urban & Interurban Ry.*, 31 Ohio Cir.Ct. 652.

60 C.J. p 411 note 17.

61. Va.—*Virginia Ry. & Power Co. v. Davidson's Adm'r*, 89 S.E. 229, 119 Va. 313.

60 C.J. p 371 note 81.

Evidence must show some specific act of negligence or incompetency which is proximate cause of injury.—*Virginia Ry. & Power Co. v. Davidson's Adm'r*, supra.

62. Ala.—*Mobile Light & R. Co. v. Harold*, 101 So. 163, 20 Ala.App. 125.

La.—*Kendall v. New Orleans Public Service, App.*, 45 So.2d 541.

Pa.—*Pitcher v. People's St. R. Co.*, 34 A. 567, 174 Pa. 402.

Tenn.—*Jackson Railway & Light Co. v. Burnett*, 1 Tenn.Civ.A. 572.

Fenders

Want of fender cannot be made ground of liability against company if its absence was not proximate cause of injury, or did not contribute in any way to it.

Pa.—*Pitcher v. People's St. R. Co.*, 34 A. 567, 174 Pa. 402.

Tenn.—*Jackson Railway & Light Co. v. Barnett*, 1 Tenn.Civ.A. 572.

Lights

Company is liable for any injury proximately resulting from negligently operating car through the dark without a headlight.—*Mobile*

Light & R. Co. v. Harold, 101 So. 163, 20 Ala.App. 125.

63. N.Y.—*Marks v. Rochester R. Co.*, 58 N.Y.S. 210, 41 App.Div. 66.

64. Conn.—*Orlo v. Connecticut Co.*, 21 A.2d 402, 128 Conn. 231.

Mo.—*Bowers v. Kansas City Public Service Co.*, 41 S.W.2d 810, 328 Mo. 770.

N.Y.—*Eager v. New York Rapid Transit Corporation*, 280 N.Y.S. 386, 245 App.Div. 742, affirmed 200 N. E. 316, 270 N.Y. 556.

60 C.J. p 406 note 68 [b], p 411 note 17—52 C.J. p 649 note 35 [f].

Defective pole

Cal.—*Gibson v. Garcia*, 216 P.2d 119, 96 Cal.App.2d 681.

65. Ill.—*Marron v. Friel*, 66 N.E.2d 509, 328 Ill.App. 586.

Md.—*Gross v. Baltimore Transit Co.*, 64 A.2d 147, 192 Md. 278.

Pa.—*Guca v. Pittsburgh Rys. Co.*, 80 A.2d 779, 367 Pa. 579.

R.I.—*Ferra v. United Electric Rys. Co.*, 155 A. 668, 52 R.I. 7.

Va.—*Virginia Elec. & Power Co. v. Holland*, 37 S.E.2d 40, 184 Va. 893.

Speed

(1) There can be no recovery predicated on an excessive rate of speed unless such speed was the proximate cause of the injury.

La.—*Kahn v. Shreveport Rys. Co.*, App., 161 So. 636—*Vergo v. Shreveport Rys. Co.*, 139 So. 737, 19 La. App. 647.

Mo.—*Williams v. St. Louis Public Service Co.*, 73 S.W.2d 199, 335 Mo. 335.

Tenn.—*Memphis Street Railway Co. v. Albert*, 11 Tenn.App. 105.

60 C.J. p 419 note 36.

(2) Unless violation of an ordinance fixing and limiting speed is the proximate cause of a collision, a recovery cannot be predicated thereon.—*Schmidt v. St. Louis Transit Co.*, 120 S.W. 96, 140 Mo.App. 182—60 C.J. p 419 note 40.

Failure to maintain lookout

Mo.—*Lanio v. Kansas City Public Service Co.*, 162 S.W.2d 862.

Failure to give warning

(1) Liability cannot be predicated on failure to give warning unless it was the proximate cause of the injury.

Md.—*Gross v. Baltimore Transit Co.*, 64 A.2d 147, 192 Md. 278.

Mo.—*Weishaar v. Kansas City Public Service Co.*, App., 128 S.W.2d 332.

Pa.—*Feldman v. Philadelphia Rapid Transit Co.*, 163 A. 39, 106 Pa.Super. 494.

(2) Where an automobile is stalled on the track, failure to give warning on the part of the motorman of a car which the driver of such automobile saw approaching six hundred feet away is not the proximate cause of injury to such driver.—*Peterson v. United Rys. Co.*, etc., 192 S.W. 938, 270 Mo. 67—60 C.J. p 430 note 59.

(3) Sudden stopping of car at intersection has been held the proximate cause of damage to a vehicle which was compelled to stop to avoid running into the car, when another vehicle immediately behind the first-named vehicle ran into it.—*Mueller v. Milwaukee St. R. Co.*, 56 N.W. 914, 86 Wis. 340, 21 L.R.A. 721—60 C.J. p 436 note 46.

66. Cal.—*Saphire v. Los Angeles Transit Lines*, 222 P.2d 956, 99 Cal. App.2d 880—*Aungst v. Central California Traction Co.*, 1 P.2d 56, 115 Cal.App. 113.

Ill.—*Marron v. Friel*, 66 N.E.2d 509, 328 Ill.App. 586.

La.—*Moch v. Shreveport Rys. Co.*, App., 41 So.2d 741.

Md.—*United Rys. & Electric Co. of Baltimore v. State*, 163 A. 90, 163 Md. 313.

Mo.—*Manzella v. St. Louis Public Service Co.*, App., 202 S.W.2d 567.

Pa.—*Anselmo v. Philadelphia Transp. Co.*, 41 A.2d 550, 351 Pa. 542—*McCawley v. Wilkes-Barre Ry. Corp.*, Com.Pl., 37 Luz.Leg.Reg. 21.

67. U.S.—*Snider v. Sand Springs Ry. Co.*, C.C.A.Okl., 62 F.2d 635.

Md.—*United Rys. & Electric Co. of Baltimore v. State*, 163 A. 90, 163 Md. 313.

negligence of the other person or persons was the sole cause of the injury.⁶⁸

Person on or near tracks. As in the case of injuries resulting from negligence generally, in order that the negligence of a street railroad company may impose liability for personal injuries sustained by persons on or near the tracks, it is essential that the negligence of the company be the proximate cause of such injuries,⁶⁹ and it is not sufficient that the conditions existing at the time of the accident were such that the negligence of the company might possibly be inferred to be the proximate cause of the injury sustained.⁷⁰ Where the negligence of the streetcar company alone was the proximate or immediate cause of a pedestrian's injuries, the company is liable notwithstanding the injured person was guilty of some negligence.⁷¹ General rules as to the elements and tests of proximate cause, and as to concurrent causes, have been applied,⁷² and, hence, where a person, through defects in a street

rendering it unsafe for travel, was thrown upon a streetcar track immediately in front of a car running at a dangerous and negligent rate of speed, and was thereby killed, the negligence of both the city and the street railway company can be deemed the proximate cause of the death.⁷³ Consideration of which is the remote and which the proximate cause of injuries to a person on or near street railroad tracks is unnecessary where the negligence of the company is responsible for causes which combine to cause the injury.⁷⁴

In accordance with the general rule, an intervening cause, rather than the negligent act or omission of the street railroad company, may be the proximate cause of injuries to one who is injured while on or near the track;⁷⁵ but the fact that a third person's negligence contributed toward the injury of a pedestrian on or near a street railway track will not relieve the company of liability proximately caused by its own negligence.⁷⁶

3. DEFECTS AND OBSTRUCTIONS

§ 213. In General

Generally a street railroad company is liable for injuries resulting to persons or animals rightfully using the street or highway, from the unsafe condition of such street or highway, caused by its failure to perform its duty in the construction and keeping in repair of its tracks and equipment.

Since, as a general rule, it is the duty of a street railroad company to exercise reasonable care so to construct and maintain its tracks and equipment in a public street or highway as to restore and keep the street or highway in a reasonably safe condition for travel by pedestrians and vehicles, as dis-

Minn.—Nees v. Minneapolis St. Ry. Co., 16 N.W.2d 758, 218 Minn. 532.

Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914, 362 Mo. 214—McEntee v. Kansas City Public Service Co., App., 159 S.W.2d 336, opinion quashed State ex rel. Kansas City Public Service Co. v. Shain, 165 S.W.2d 428, 350 Mo. 316.

Tex.—El Paso City Lines v. Smith, Civ.App., 226 S.W.2d 498, error refused.

68. Mo.—Billingsley v. Kansas City Public Service Co., 191 S.W.2d 331, 239 Mo.App. 440.

Ohio.—Schnurr v. Cincinnati St. Ry. Co., 34 N.E.2d 525, 67 Ohio App. 225.

Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.

Wis.—Brager v. Milwaukee Elec. Railway & Light Co., 264 N.W. 733, 220 Wis. 65.

69. Cal.—McAlpine v. Los Angeles Ry. Corp., 154 P.2d 911, 67 Cal.App. 2d 486.

Ga.—Meriweather v. Atlanta Transit Co., 64 S.E.2d 702, 83 Ga.App. 783, followed in 64 S.E.2d 707, 83 Ga.App. 791.

Pa.—Skodis v. Philadelphia Rapid Transit Co., 158 A. 587, 103 Pa.Super. 533.
60 C.J. p 481 note 7—52 C.J. p 646 note 29 [a] (7).

Unavoidable accident

Motorman on streetcar which struck boy who had been walking along road parallel to track in same direction as streetcar and on approaching crossing had stepped onto tracks in front of streetcar was not negligent in emergency created by boy, since motorman did not have sufficient time within which to stop car before striking boy, and, hence, accident was unavoidable, precluding liability on part of street railroad.—Brennen v. Pittsburgh Rys. Co., 186 A. 743, 323 Pa. 81.

70. Tenn.—De Glopper v. Nashville R., etc., Co., 134 S.W. 609, 123 Tenn. 633, 33 L.R.A., N.S., 913.
60 C.J. p 482 note 8.

71. Del.—Culbert v. Wilmington &

P. Traction Co., 32 A. 1081, 26 Del. 253.

Injury avoidable notwithstanding contributory negligence generally see *infra* §§ 288-295.

72. Ill.—Mahan v. Richardson, 1 N.E.2d 100, 284 Ill.App. 493.

Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278.

Acts held not concurrent

Where automobile struck down person who was later struck by streetcar fender, acts of autoist and street railway were not concurrent so as to render latter liable for antecedent act of former.—Frye v. City of Detroit, 239 N.W. 886, 256 Mich. 466.

73. Ky.—City of Louisville v. Hart's Adm'r, 136 S.W. 212, 143 Ky. 171, 35 L.R.A., N.S., 207.

74. Pa.—Kraut v. Frankford, etc., R. Co., 28 A. 783, 160 Pa. 327.
60 C.J. p 483 note 11.

75. N.Y.—Madden v. Chalmers, 214 N.Y.S. 268, 215 App.Div. 549.
60 C.J. p 483 note 13.

76. Pa.—Weiss v. Pittsburgh Rys. Co., 152 A. 674, 301 Pa. 539.

cussed supra § 115, it is liable for injuries resulting to persons or animals rightfully using the street or highway, from the unsafe condition of such street or highway, caused by its failure properly to perform its duty in the construction and keeping in repair of its tracks and equipment,⁷⁷ such as the cable or trolley slot between its tracks,⁷⁸ the trolley

wire,⁷⁹ post,⁸⁰ guardrails,⁸¹ the flanges of its rails,⁸² or the structure and equipment of its elevated road,⁸³ or in keeping that part of the street occupied by its tracks in reasonably safe condition,⁸⁴ particularly where this duty and liability are imposed on it and regulated by the terms of its grant, or by statute or ordinance.⁸⁵ Where the

77. Ky.—Wigginton's Adm'r v. Louisville Ry. Co., 75 S.W.2d 1046, 256 Ky. 287.

Pa.—Yoder v. City of Philadelphia, 173 A. 275, 315 Pa. 586, 60 C.J. p 406 note 61.

78. N.Y.—Brown v. Metropolitan St. R. Co., 70 N.Y.S. 40, 60 App.Div. 184, affirmed 64 N.E. 1119, 171 N. Y. 699, 60 C.J. p 406 note 62.

79. Mass.—Ugla v. West End St. R. Co., 35 N.E. 1126, 160 Mass. 351, 39 Am.S.R. 481, 60 C.J. p 406 note 63.

Trolley wire obstructing street or highway see infra § 217.

80. Cal.—Gibson v. Garcia, 216 P.2d 119, 96 Cal.App.2d 681.

Ind.—Evansville & S. Traction Co. v. Montgomery, 98 N.E. 731, 50 Ind. App. 528, 60 C.J. p 406 note 64.

Trolley wire pole as obstruction of street see infra § 218.

Extent of duty

Where wooden poles are maintained adjacent to curbing on boulevard as a part of its street railway system, corporation had duty to select and maintain poles sufficiently strong to withstand ordinary strain of weather conditions and other tests of strength likely to be encountered along a busy highway, and was bound to exercise ordinary care to keep its poles in safe condition, so as not to expose passers-by to unreasonable risk of harm, the extent of its duty being measured by standard of foreseeability of injury by a reasonably prudent man having regard for the accompanying circumstances.—Gibson v. Garcia, 216 P.2d 119, 96 Cal.App.2d 681.

81. W.Va.—Pollock v. Wheeling Traction Co., 99 S.E. 267, 83 W. Va. 768, 60 C.J. p 406 note 65.

Subsidence of paving

In action for injuries received when plaintiff tripped over guardrail at curve of street railroad track, defendant's acquiescence in subsidence of paving along outside of rail which did not exceed quarter of an inch in depth was held insufficient to establish negligence of defendant.—Wright v. Pittsburgh Rys. Co., 181 A. 476, 320 Pa. 40.

82. Ill.—Chicago Union Traction Co. v. Fitzgerald, 138 Ill.App. 520, 60 C.J. p 406 note 66.

83. N.Y.—Dow v. Interborough Rapid Transit Co., 172 N.Y.S. 623, 185 App.Div. 10, 60 C.J. p 406 note 67.

84. Pa.—Illingsworth v. Pittsburgh Rys. Co., 200 A. 89, 331 Pa. 369, 60 C.J. p 406 note 68.

Bridge

If truck exceeding tonnage permitted broke street railroad bridge by unlawfully crossing without planking, railroad, unless having notice, would not be liable when another truck fell through bridge several minutes thereafter.—Bowers v. Kansas City Public Service Co., 41 S.W. 2d 810, 328 Mo. 770.

Discontinuance of service

In motorist's action to recover for injuries allegedly caused by deep ruts along streetcar tracks, liability of streetcar company which had been granted permission to discontinue streetcar service by public service commission depended on whether its duty with respect to tracks still existed.—Wells v. City of Jefferson, 132 S.W.2d 1006, 345 Mo. 239.

Effect of contract

Contract providing that payments of street railroad to city should be in satisfaction of all obligations and liability on part of railroad for paving and repairing of streets occupied by surface lines did not relieve railroad of liability for injuries sustained because of hole underneath rail, where hole resulted from defect in track structure, and burden of properly maintaining track structure rested on railroad.—Yoder v. City of Philadelphia, 173 A. 275, 315 Pa. 586.

Viaduct

(1) A pedestrian could recover from street railroad for injuries sustained in fall caused by ice and snow on steps from a viaduct, although responsibility of railroad arose from a contract with borough and not with pedestrian, where contract put primary duty of maintaining stairway on railroad.—Thompson v. Allegheny Valley St. Ry. Co., 194 A. 921, 328 Pa. 118.

(2) Under contract to keep in "good condition and repair" a viaduct,

street railroad was liable for injuries which pedestrian sustained in falling because snow and ice had accumulated on stairs from viaduct, as against contention that quoted phrase only required railroad to prevent viaduct from falling into decay or dilapidation, the word "repair" having a more comprehensive meaning than "mending."—Thompson v. Allegheny Valley St. Ry. Co., supra.

(3) Other decisions with respect to viaducts see 60 C.J. p 406 note 68 [d].

85. N.Y.—Pace v. Brooklyn & Queens Transit Corp., 11 N.Y.S.2d 862, 257 App.Div. 829, appeal denied—McCarthy v. Brooklyn & Queens Transit Corp., 4 N.Y.S.2d 213, 254 App.Div. 757, affirmed 18 N.E.2d 686, 279 N.Y. 737, 60 C.J. p 406 note 69.

Violation of ordinance

Violation by street railway company of ordinance as to paving of street was negligence per se.—Dallas Ry. & Terminal Co. v. Bankston, Tex.Civ. App., 33 S.W.2d 500, reversed on other grounds Com.App., 51 S.W.2d 304.

Extent of duty

Statute requiring streetcar company to keep in repair portion of streets "occupied by its tracks" used quoted phrase as meaning the rails and space between them over which cars passed and, hence, transit authority, as successor to streetcar company, was not liable for injuries sustained by pedestrian before creation of authority when he stumbled on raised portion of pavement between inner rails of inbound and outbound tracks and fell in such position that his hand was crushed under passing streetcar, in absence of showing that streetcar was negligently operated or that streetcar company was in any way responsible for condition of pavement.—Hawkes v. Metropolitan Transit Authority, 102 N.E.2d 409, 328 Mass. 140.

Release from duty

(1) Voluntary agreement of street railway company with a state park commission permitting certain work adjacent to the tracks did not relieve company of liability for failure to discharge statutory duty to keep street between tracks in repair.—Pace v. Brooklyn & Queens Transit

street is in a dangerous condition, the company cannot avail itself of the fact that it is in the same condition as any other street of that kind,⁸⁶ or that it ordered paving materials from reputable manufacturers.⁸⁷ Under a statute requiring street railroad companies to keep in repair that portion of the pavement adjacent to their tracks, "under the supervision of the local authorities," and "whenever required by them to do so," the fact that the municipal authorities have not notified or requested the company to make repairs in a pavement does not relieve the company from liability for injuries caused by defects therein.⁸⁸

The company is required to exercise only reasonable care in this respect,⁸⁹ and if it uses such care in the construction and maintenance of its tracks or equipment, it is not liable for injuries caused thereby;⁹⁰ nor is it liable for injuries caused by defects in the street which are not due to its negligence and which it is under no duty to repair.⁹¹ The fact that no other accident has ever

happened because of it does not give the company a vested right to maintain a dangerous obstruction in a public street.⁹² Where a street railroad passes over private property on an embankment, the company is under no obligation to persons who pass along such embankment without invitation to safeguard it by a fence or otherwise.⁹³

Basis of liability in absence of negligence. The liability of a street railroad company for failing to keep the street in repair does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street,⁹⁴ but the liability to maintain the pavement as such, if it exists, must either be rested on some valid statute or ordinance imposing such a duty or must arise out of the obligations of a contract,⁹⁵ and, in the absence of such statute, ordinance, or contractual obligation, the company is not liable to a traveler who is injured as a result of a defect in the street when such defect is not occasioned by the negligence of the company.⁹⁶

Corp., 11 N.Y.S.2d 862, 257 App.Div. 829, appeal denied.

(2) Although duty may be considered as suspended while municipality or other public authority is performing certain work, duty reattaches on completion of such work and company is liable for subsequent injury due to defect.—*Pace v. Brooklyn & Queens Transit Corp.*, supra—*McCarthy v. Brooklyn & Queens Transit Corp.*, 4 N.Y.S.2d 213, 254 App.Div. 757, affirmed 18 N.E.2d 686, 279 N.Y. 737.

Purpose and extent of statutory liability

(1) Statute imposing liability on a street railroad for loss or injury sustained because of the neglect of servants of street railroad in the use and maintenance of its tracks was enacted to relieve municipality from such liability.—*Berlandi v. Union Freight R. Co.*, 16 N.E.2d 17, 301 Mass. 47.

(2) Such statute comprehends any loss or injury resulting from any defect in the management, use, or construction of tracks, and liability is substantially same as that imposed by common law on persons obstructing the public highway; but, although statute only affirms common law, conditions imposed by such statute in enforcing liability must be observed, and hence motorists who are injured because of defective track are bound to proceed under such statute.—*Berlandi v. Union Freight R. Co.*, supra.

86. Pa.—*McLaughlin v. Philadelphia Traction Co.*, 34 A. 863, 175 Pa. 565.

87. Ala.—*Birmingham Ry., Light & Power Co. v. Donaldson*, 68 So. 596, 14 Ala.App. 160.

88. N.Y.—*Schuster v. Forty-Second St., etc., R. Co.*, 85 N.E. 670, 192 N.Y. 403.
60 C.J. p 407 note 72.

89. Ind.—*Gary Rys. Co. v. Michael*, 34 N.E.2d 159, 109 Ind.App. 672.
Pa.—*Langman v. City of Pittsburgh*, Com.Pl., 91 Pittsb.Leg.J. 120.
60 C.J. p 407 note 73.

90. N.J.—*Alcott v. Public Service Corp.*, 71 A. 45, 77 N.J.Law 110, reversed on other grounds 74 A. 499, 78 N.J.Law 482, 32 L.R.A., N.S., 1084, 138 Am.S.R. 619.
60 C.J. p 407 note 74.

Stairway from street

Fact that one of six screws holding a plate in place on tread of stair leading from street to trains became loose and protruded from the stair would not constitute a structural defect so as to impose liability on street railroad to person who allegedly tripped on screw and was injured.—*De Renzis v. New York Rapid Transit Corp.*, 9 N.Y.S.2d 933, 256 App.Div. 367.

Bridle path

Since street railway company, responsible for maintenance of park bridle path crossed by streetcar tracks, is not held to same degree of accountability for upkeep of such path as those charged with upkeep of highways used by pedestrians or ve-

hicles, a depression, five to six inches deep by nine to twelve inches wide, along edge of streetcar track across park bridle path, was not violation of statutory duty to keep portion of path two feet outside its tracks in repair, and, hence, did not render it liable for injuries to one riding horse when it stepped into depression and fell.—*Schwartz v. City of New York*, 2 N.Y.S.2d 818, 253 App.Div. 508.

91. Mo.—*Burow v. St. Louis Public Service Co.*, 100 S.W.2d 269, 339 Mo. 1092.
60 C.J. p 407 note 75.

Injury caused by skidding on icy streets

Ky.—*Pfeister's Adm'r v. Jones*, 163 S. W.2d 304, 291 Ky. 151.

92. N.Y.—*Wood v. Third Ave. R. Co.*, 36 N.Y.S. 253, 91 Hun 276, affirmed 51 N.E. 1094, 157 N.Y. 696.
60 C.J. p 408 note 76.

93. N.Y.—*Hooper v. Johnstown, etc., Horse R. Co.*, 13 N.Y.S. 151, 59 Hun 121, affirmed 28 N.E. 252, 128 N.Y. 613.
60 C.J. p 408 note 77.

94. N.J.—*Fielders v. North Jersey Street Ry. Co.*, 53 A. 404, 54 A. 822, 68 N.J.Law 343, 96 Am.S.R. 552, 59 L.R.A. 455.

95. N.J.—*Fielders v. North Jersey Street Ry. Co.*, supra.

96. N.J.—*Johnson v. Public Service Ry. Co.*, 85 A. 165, 83 N.J.Law 647—*Fielders v. North Jersey Street Ry. Co.*, 53 A. 404, 54 A. 822, 68 N.J.

§ 214. Obstructions in Street or Highway

A street railroad company is liable for injuries which result to persons or animals from obstructions which through its negligence in constructing, maintaining, and operating its tracks and equipment it has caused or permitted to remain in the street or highway.

A street railroad company is liable for injuries which result to persons and animals from obstructions which through its negligence in constructing, maintaining, and operating its tracks and equipment it has caused or permitted to remain in the street or highway.⁹⁷ The company has, however, a lawful right to obstruct the street temporarily for the purpose of making necessary repairs,⁹⁸ and no recovery can be had against it where the only negligence alleged is in so obstructing the highway and sidewalks.⁹⁹ So, where the city has erected barriers indicating withdrawal of the street from public travel pending repairs therein, the company is not bound to anticipate the presence of pedestrians there,¹ or that they will stumble and fall in front of a car.² In removing from its tracks an obstruction wrongfully placed there, the company is not required to place it where it will not be dangerous to travelers upon the street or highway, and if it merely shifts it from its tracks to another part of the street, without otherwise increasing the danger to travelers, it is not liable for injuries caused thereby.³

Safety zone posts. Where safety zone posts are erected by the street railroad company in the street, pursuant to an agreement with the public authorities and for the primary purpose of protecting pedestrians using the street, such posts, if properly constructed, do not constitute a dangerous obstruction so as to render the company liable to a motorist striking such a post.⁴

§ 215. — Excavations in Street

A street railroad company is liable for resulting injuries where it leaves, without proper safeguards, an excavation which it has made in the street, or which it is under a duty to guard or repair.

A street railroad company is liable for resulting injuries where it leaves, without proper safeguards, an excavation which it has made in the street,⁵ or which it is under the duty to guard⁶ or repair;⁷ and although the company is not required to guard a trench dug across the tracks by the city, or to remove and replace barriers across its track to enable the cars to pass, if its servants remove a barrier placed by the city, no one being there under the duty to replace it, and then fail to replace it, the company is liable for resulting injuries.⁸ The company is not, however, liable for excavations not made by it and which it is under no duty to repair.⁹ An ordinance requiring excavations in streets to be marked at night by red lanterns does not apply to an open space between crossties of a street railroad at a point on neutral ground not maintained as a way for pedestrians,¹⁰ nor does an act requiring railroads to fill all angles in frogs and crossties.¹¹

§ 216. — Track Protruding above Surface of Street

A street railroad company is liable for injuries caused by its negligence in permitting its track or a part thereof to protrude above the surface of the street.

When a street railway company adopts such a construction of its roadbed, rails, or switches as will normally cause an excessive wear on adjoining parts of the highway, it is under a duty of reasonable care to guard against such excessive wear

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| <p>Law 343, 96 Am.S.R. 552, 59 L.R.A. 455.</p> <p>97. N.J.—Morhart v. North Jersey St. R. Co., 45 A. 812, 64 N.J.Law 236.
60 C.J. p 408 note 82.</p> <p>98. Ill.—Orear v. Jacksonville Railway & Light Co., 217 Ill.App. 563.</p> <p>99. Ky.—Miller v. Kentucky Traction & Terminal Co., 175 S.W. 976, 164 Ky. 545.
60 C.J. p 408 note 84.</p> <p>1. Mass.—Connors v. Worcester Consol. St. Ry. Co., 117 N.E. 334, 228 Mass. 357.</p> <p>2. Mass.—Connors v. Worcester Consol. St. Ry. Co., <i>supra</i>.</p> | <p>3. R.I.—Howard v. Union R. Co., 57 A. 867, 25 R.I. 652, 65 L.R.A. 231.</p> <p>4. Ky.—Goucher v. Louisville Ry. Co., 57 S.W.2d 472, 247 Ky. 504.</p> <p>Absence of lights
Where street railway had no duty with respect to posts after erection, but duty of maintaining them was assumed by city, street railway was not liable even if absence of lights caused automobile accident.—Goucher v. Louisville Ry. Co., <i>supra</i>.</p> <p>5. Mo.—Lowe v. Metropolitan St. Ry. Co., 130 S.W. 119, 145 Mo.App. 248.
60 C.J. p 409 note 88.</p> <p>6. Mass.—Charles v. Boston Elevated Ry. Co., 120 N.E. 69, 230 Mass. 536.
60 C.J. p 409 note 89.</p> <p>7. N.Y.—McMahon v. Second Ave. R. Co., 75 N.Y. 231.
60 C.J. p 409 note 90.</p> <p>8. Mass.—Dix v. Old Colony St. R. Co., 89 N.E. 109, 202 Mass. 518, 24 L.R.A., N.S., 567.</p> <p>9. Mass.—Leary v. Boston Elevated R. Co., 62 N.E. 1, 180 Mass. 203.
60 C.J. p 409 note 92.</p> <p>10. La.—Smith v. New Orleans Ry. & Light Co., 91 So. 514, 150 La. 1070.</p> <p>11. La.—Smith v. New Orleans Ry. & Light Co., <i>supra</i>.</p> |
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creating a dangerous condition in the highway,¹² and if such care is not used, and an accident results, which might reasonably have been anticipated, the company is prima facie liable therefor.¹³ So it is liable for injuries caused by its negligence in permitting its track or a part thereof to protrude above the surface of the street,¹⁴ and this liability exists where such obstruction is permitted between intersections as well as at intersections.¹⁵ The company cannot escape liability by showing that the obstruction was caused by the wearing away or natural sinking of the street from the rails,¹⁶ or the rising of the track above the pavement,¹⁷ or that the obstruction does not practically withdraw the thoroughfare from public use.¹⁸ A small elevation of the track above the surface of the street does not of itself constitute negligence;¹⁹ and, it has been held, the company is not liable for injuries resulting from the negligence of a contractor with the city who left the tracks projecting above the street level when he abandoned paving work,²⁰ or for an accident caused by the unevenness of the surface of the street, where it has worn away below the established grade.²¹

§ 217. — Trolley Wire

A street railroad company is liable for negligence in the maintenance of its trolley wire which results in injury to persons reasonably using the street.

A street railroad company must exercise reasonable care and diligence so to construct and maintain its trolley wire as to make it reasonably safe for the passage of persons who have a right to pass under it,²² as by properly guarding it from coming

in contact with other wires,²³ and the company is liable for negligence in the maintenance of its wire which results in injury to persons reasonably using the street.²⁴ It is not, however, liable for the sagging of its trolley wire in a street from the effect of an unusual storm unless it fails to repair it within a reasonable time,²⁵ and it has been held that the company owes no duty to make the wire safe for persons who, for their own convenience or pleasure, pass under it by other than the usual methods of travel or business.²⁶

§ 218. — Trolley Wire Poles

Generally, a street railroad company is liable for an injury resulting from its erection and maintenance of a trolley wire pole in such a manner as to make the street dangerous for public travel.

The liability of a street railroad company for an injury due to the location of a trolley wire pole constituting an obstruction in the street is largely determined by the right of choice or selection of the location by the company,²⁷ although a conflict of authority exists as to the effect of official command or approval as to the location, as discussed *infra* § 223. However, in the absence of official command or approval, the company must place its poles with due regard for the public safety, and if it fails to exercise such care,²⁸ and the injured person was without fault,²⁹ the company is liable for an injury resulting from its erection and maintenance of a trolley wire pole at a point and in such a manner as to make the street dangerous for public travel.³⁰ Furthermore, the fact that a municipality produces a situation which makes the location of the pole

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| 12. N.J.—Gelse v. Mercer Bottling Co., 92 A. 24, 87 N.J.Law 224. | 13. Mo.—Asmus v. United Rys. Co. of St. Louis, 134 S.W. 92, 152 Mo. App. 521. | R. Co., 93 S.W. 295, 118 Mo.App. 103.
60 C.J. p 410 note 8. |
| 13. N.J.—Gelse v. Mercer Bottling Co., <i>supra</i> . | 19. Iowa.—McClosky v. Iowa Ry. & Light Co., 197 N.W. 989, 200 N.W. 913, 198 Iowa 1146.
60 C.J. p 410 note 3. | 25. Del.—Wagner v. People's Ry. Co., 75 A. 610, 23 Del. 393. |
| 14. Pa.—Corpus Juris cited in Culver v. Lehigh Valley Transit Co., 186 A. 70, 72, 322 Pa. 503.
60 C.J. p 409 note 97. | 20. N.Y.—Beebe v. Schenectady Ry. Co., 153 N.Y.S. 395, 167 App.Div. 492. | 26. Ill.—Gross v. South Chicago City R. Co., 73 Ill.App. 217. |
| 15. Wash.—Kincaid v. Walla Walla Valley Traction Co., 106 P. 918, 57 Wash. 334, 135 Am.S.R. 982.
60 C.J. p 409 note 98. | 21. Tex.—Galveston City R. Co. v. Nolan, 53 Tex. 139. | 27. Md.—Meese v. Goodman, 176 A. 621, 167 Md. 658, 98 A.L.R. 480. |
| 16. Ky.—Groves v. Louisville R. Co., 58 S.W. 508, 199 Ky. 76, 22 Ky.L. 599, 52 L.R.A. 448. | 22. N.Y.—Chace Trucking Co. v. Richmond Light & R. Co., 122 N. E. 210, 225 N.Y. 435.
60 C.J. p 410 note 6. | 28. N.Y.—Stern v. International Ry. Co., 115 N.E. 759, 220 N.Y. 284, 2 A.L.R. 487.
60 C.J. p 410 note 12. |
| N.Y.—Wooley v. Grand St., etc., R. Co., 83 N.Y. 121. | 23. N.J.—New York, etc., Tel. Co. v. Bennett, 42 A. 759, 62 N.J.Law 742.
60 C.J. p 410 note 7. | 29. Me.—Cleveland v. Bangor St. R. Co., 29 A. 1005, 86 Me. 232. |
| 17. N.Y.—Wooley v. Grand St., etc., R. Co., <i>supra</i> . | 24. Mo.—Smedley v. St. Louis, etc., | 30. N.Y.—Stern v. International Ry. Co., 115 N.E. 759, 220 N.Y. 284, 2 A.L.R. 487.
60 C.J. p 410 note 14.
Mode of construction as constituting nuisance see <i>supra</i> § 105. |

hazardous and is negligent in not guarding the pole will not relieve the company, having knowledge of such hazard, of its duty to the traveling public,³¹ and, if the company fails to take the required protective action, it is liable for the injury resulting.³² The company is not, however, negligent in maintaining a pole outside of the curb on property owned by another quasi-public corporation for its business where the latter refused permission to remove the pole or make any physical change of the surface of the ground and it was necessary to maintain a pole near where it was.³³

§ 219. — Cars in Street

Although a street railroad company is liable for the resulting injury where it is negligent, it is not a negligent obstruction for a company to allow its cars to stand on its tracks for a reasonable length of time.

Although a street railroad company is liable for the resulting injury where it is negligent in allowing a car to stand in the street,³⁴ it is not a negligent obstruction for a street railroad company to allow its cars to stand on its tracks for a reasonable length of time,³⁵ such as on a spur track or switch for the purpose of allowing another car to pass,³⁶ unless it is in violation of a statute or ordinance.³⁷

§ 220. — Lubricant on Track

A street railroad company is negligent when a lubricant is placed on its rails or the street in such quantities as to make the street not reasonably safe for travel.

Where a street railroad company applies a lubricant to its tracks along a public street so that its cars may pass around a curve more easily, it must

apply it so as not to endanger persons using the street,³⁸ but the company is negligent therein only when the lubricant is placed on the rails or the street in such quantities as to make the street not reasonably safe for traffic.³⁹

§ 221. — Snow Piled in Street

A street railroad company, which violates its duty of exercising reasonable care in the removal of ice or snow by depositing and leaving the ice and snow in needless and dangerous obstructions on the street, is liable for injuries caused thereby to persons or animals.

A street railroad company has a right to remove ice and snow from its tracks so as to enable it to exercise its franchise;⁴⁰ but in doing so, it is its duty to exercise reasonable care so to dispose of or distribute the removed ice and snow as not unreasonably to interfere with the use of the street by pedestrians and vehicles,⁴¹ and this duty is sometimes expressly regulated by statute or ordinance.⁴² Except in so far as prohibited by statute or ordinance,⁴³ the company may use a snowplow, electric sweeper, rotary brushes, or other similar apparatus for the purpose of removing the ice and snow,⁴⁴ and, having removed the snow, it is entitled to have the tracks left free thereof.⁴⁵ If the company violates this duty, by depositing and leaving the ice and snow in needless and dangerous obstructions on the streets, it is liable for injuries caused thereby to persons or animals,⁴⁶ or to adjacent property as by flowage,⁴⁷ and an injunction lies, at the suit of an abutting house owner, to enjoin a street railroad company from leaving snow which it removes from its tracks heaped up between them and plaintiff's premises for a period longer than is reason-

31. N.H.—Lovett v. Manchester St. Ry., 159 A. 132, 85 N.H. 345.

Notice of defect or obstruction see infra § 222.

32. N.H.—Lovett v. Manchester St. Ry., supra.

33. N.Y.—Lanigan v. Brooklyn Heights R. Co., 110 N.Y.S. 30, 125 App.Div. 622.

34. N.Y.—Heywang v. Richmond Rys., 285 N.Y.S. 329, 247 App.Div. 728.

Unlighted car in middle of block on public street

N.Y.—Heywang v. Richmond Rys., supra.

35. Cal.—Michael v. Key System Transit Co., 276 P. 591, 98 Cal.App. 189.

60 C.J. p 411 note 18.

36. Del.—Ford v. Charles Warner Co., 37 A. 39, 15 Del. 88.

37. Wis.—Mueller v. Milwaukee St. R. Co., 56 N.W. 914, 86 Wis. 340, 21 L.R.A. 721.

38. N.J.—Slater v. North Jersey St. R. Co., 69 A. 163, 75 N.J.Law 890, 15 L.R.A., N.S., 840.

60 C.J. p 411 note 21.

39. Conn.—Barrett v. Connecticut Co., 81 A. 963, 85 Conn. 705.

40. U.S.—McDonald v. Toledo Consol. St. R. Co., Ohio, 74 F. 104, 20 C.C.A. 322.

60 C.J. p 411 note 23.

41. Va.—Newport News, etc., R., etc., Co. v. Bradford, 40 S.E. 900, 100 Va. 231.

60 C.J. p 411 note 24.

42. U.S.—McDonald v. Toledo Con-

sol. St. R. Co., Ohio, 74 F. 104, 20 C.C.A. 322.

60 C.J. p 411 note 25.

43. Mass.—Ovington v. Lowell, etc., St. R. Co., 40 N.E. 767, 163 Mass. 440.

60 C.J. p 411 note 26.

44. N.Y.—Christopher, etc., St. R. Co. v. New York, 1 Abb.N.Cas. 79 note.

60 C.J. p 411 note 27.

45. N.Y.—Christopher, etc., St. R. Co. v. New York, supra.

60 C.J. p 411 note 28.

46. N.H.—Smith v. Nashua St. R. Co., 44 A. 133, 69 N.H. 504.

60 C.J. p 412 note 29.

47. Md.—Short v. Baltimore City Pass. R. Co., 50 Md. 73, 33 Am.R. 298.

60 C.J. p 412 note 30.

ably requisite for taking it away;⁴⁸ but, where the snow has been removed with due care, the company is not liable.⁴⁹ It has been held, however, that the company is not obliged to haul the ice or snow away,⁵⁰ unless required by ordinance to do so,⁵¹ and no duty rests on the company to keep the space between its tracks free from ice and snow.⁵²

§ 222. Notice of Defect or Obstruction

Generally, a street railroad company is not liable for an injury caused by a defect or obstruction except where it has neglected some duty in that respect after it has had notice of the defect or obstruction.

As a general rule, it is the duty of a street railroad company to make an exact and continuous inspection of its tracks and equipment,⁵³ and it is liable for injuries resulting therefrom if it fails to use reasonable care and diligence to repair a defect or obstruction which it is its duty to anticipate and provide against,⁵⁴ or which is visible and has existed for such length of time as to charge it with knowledge which it would have acquired by proper inspection,⁵⁵ even though no complaint thereof was ever made to the company.⁵⁶ The company is charged with notice of a defective condition which it has created;⁵⁷ and, if a defect is visible, notice to the company is not necessary in order to make it liable for an injury caused thereby.⁵⁸ It is not, however, liable for injuries caused by a defect or obstruction of which it has no knowledge and which

has occurred so recently that the company could not, in the exercise of ordinary care, have discovered and repaired it before the accident.⁵⁹ On the other hand, where the duty to remedy a defect in the street immediately connected with the track is affirmative and absolute, notice is not necessary,⁶⁰ although such rule does not apply where the street railroad is operated by a municipality.⁶¹

§ 223. Approval of Officials or Compliance with Requirements as Excuse

The fact that a street railroad company has lawful permission to operate, or that it has complied with the requirements of its charter or a municipal ordinance, will not relieve the company from liability for injuries caused by its failure to use due care in constructing and maintaining its tracks and equipment.

Although the fact that the company constructs and maintains its tracks in the manner required by ordinance cannot constitute negligence on its part,⁶² and although the company is not liable where it has constructed its tracks in accordance with the general plan supervised and approved by the municipality and it does not appear that there was any safer plan in common or known use,⁶³ if a street railroad company fails to use due care in constructing and maintaining its tracks and equipment in a reasonably safe condition for persons and vehicles using the street or highway, it is not relieved from liability for injuries caused thereby by the fact that it has lawful permission to operate its road,⁶⁴ or

48. N.Y.—*Prime v. Twenty-Third St. R. Co.*, 1 Abb.N.Cas. 63.

60 C.J. p 412 note 31—26 C.J. p 1015 note 5 [a].

49. Mass.—*Ovington v. Lowell, etc.*, St. R. Co., 40 N.E. 767, 163 Mass. 440.

60 C.J. p 412 note 32.

50. Md.—*Short v. Baltimore City Pass. R. Co.*, 50 Md. 73, 33 Am. R. 298.

60 C.J. p 412 note 33.

51. N.Y.—*Broadway, etc., R. Co. v. New York*, 1 N.Y.S. 646, 49 Hun 126.

60 C.J. p 412 note 34.

52. N.Y.—*Silberstein v. Houston, etc., R. Co.*, 22 N.E. 951, 117 N.Y. 293.

53. Mo.—*Keitel v. St. Louis Cable, etc., R. Co.*, 28 Mo.App. 657.

N.Y.—*Schild v. Central Park, etc., R. Co.*, 31 N.E. 327, 133 N.Y. 446, 28 Am.S.R. 658.

54. Ind.—*Citizens' St. R. Co. v. Marvill*, 67 N.E. 921, 161 Ind. 506.

60 C.J. p 412 note 37.

Hazard requiring protective action

Trolley motorman's knowledge of city's excavation of street beside tracks and consequent diversion of traffic to tracks was knowledge of trolley company, with respect to injury to motorist.—*Lovett v. Manchester St. Ry.*, 159 A. 132, 85 N.H. 345.

55. Pa.—*Bradwell v. Pittsburgh, etc., Pass. R. Co.*, 25 A. 623, 153 Pa. 105. 60 C.J. p 412 note 38.

56. N.Y.—*Schild v. Central Park, etc., R. Co.*, 31 N.E. 327, 133 N.Y. 446, 28 Am.S.R. 658.

57. Cal.—*Burr v. United Railroads of San Francisco*, 159 P. 584, 173 Cal. 211.

60 C.J. p 412 note 40.

58. N.Y.—*Rockwell v. Third Ave. R. Co.*, 64 Barb. 438, affirmed 53 N.Y. 625.

60 C.J. p 412 note 41.

59. Ala.—*Alabama Power Co. v. Lewis*, 141 So. 229, 224 Ala. 594.

60 C.J. p 412 note 42.

60. N.Y.—*Worster v. Forty-second Street, etc., R. R. Co.*, 50 N.Y. 203 —*MacCormack v. Brooklyn & Queens Transit Corp.*, 40 N.Y.S.2d 718, 266 App.Div. 735, overruling *Verdachi v. Brooklyn & Queens Transit Corp.*, 295 N.Y.S. 887, 251 App.Div. 744.

61. N.Y.—*D'Anna v. City of New York*, 54 N.Y.S.2d 320, 269 App.Div. 750.

Notice of defect in street with respect to municipality generally:

Necessity of notice see *Municipal Corporations* § 826.

Proof of notice see *Municipal Corporations* § 938 b.

62. Minn.—*McKillop v. Duluth St. R. Co.*, 55 N.W. 739, 53 Minn. 532.

63. D.C.—*District of Columbia v. Caton*, 48 App.D.C. 96.

64. Me.—*Haynes v. Waterville, etc., St. R. Co.*, 64 A. 614, 101 Me. 335.

60 C.J. p 412 note 43.

that in constructing and maintaining its road it has complied with the requirements of its charter or a municipal ordinance,⁶⁵ or with the plans, specifications, and requirements of a commission appointed for that purpose,⁶⁶ or by the fact that the tracks are constructed to the satisfaction of certain officers whose duty it is to pass on and approve them.⁶⁷ Thus, if the company constructs its tracks at a grade, which at some time in the future is to be the grade of the street, and such construction renders the street unsafe, it is negligence on the part of the company,⁶⁸ unless it does so under direction of the proper authorities.⁶⁹

The rights of the public, after the granting of a license to a street railway company to erect a pole in the street, are governed by the license, if the authority to erect and maintain the pole and box was exercised reasonably,⁷⁰ and, where the company does nothing not authorized by the license, it is not liable for injuries received by one who ran into it,⁷¹ even if without such license the pole would be a nuisance.⁷² However, it has been held that the company is not protected from liability based

on the maintenance of a nuisance because the tracks in the street were in accordance with the franchise granted to it by the municipality, as the municipality, having no legal right to create and maintain a street in such condition, could not authorize another to do so.⁷³

Trolley wire poles. Since acceptance by a street railroad company of a license to locate trolley wire poles at the curb does not eo instante revoke the prior authorization to locate center line poles,⁷⁴ a center line pole authorized by the prior license is not illegally in the street.⁷⁵

However, the fact that a street railroad company has been granted permission to locate trolley poles in the street does not relieve the company from liability for injury caused by negligently locating such poles without due regard for the safety of the public,⁷⁶ although it has been held that a company is not liable for an injury caused by the location of a pole where the company had no right to select the location, but placed it at a point pursuant to official command or approval,⁷⁷ but there is also authority to the contrary.⁷⁸

4. COLLISIONS

§ 224. Between Cars or Trains

It is the duty of streetcar operators on intersecting lines to use due care to avoid a collision when approaching or passing a crossing.

It is the duty of those in charge of streetcars on

intersecting lines when approaching, or passing, a crossing of the two lines to exercise reasonable care, commensurate with the danger of the situation, to avoid a collision,⁷⁹ and a flagman's signaling the motorman, approaching an intersection of

65. Tex.—Houston City St. R. Co. v. Delesdernier, 19 S.W. 366, 84 Tex. 82.

60 C.J. p 413 note 44.

66. N.Y.—Manson v. Manhattan R. Co., 55 N.Y.Super. 18, 8 N.Y.St. 118.

60 C.J. p 413 note 45.

67. Ala.—Montgomery St. R. Co. v. Smith, 39 So. 757, 146 Ala. 316.

60 C.J. p 413 note 46.

68. Minn.—McKillop v. Duluth St. R. Co., 55 N.W. 739, 53 Minn. 532.

60 C.J. p 413 note 52.

69. Pa.—Miller v. Lebanon, etc., St. R. Co., 40 A. 413, 186 Pa. 190.

70. Mass.—Sawyer v. Boston Elevated Ry. Co., 137 N.E. 648, 243 Mass. 469.

60 C.J. p 413 note 49.

Trolley wire pole as obstruction generally see supra § 218.

71. Mass.—Curran v. Boston Elevated Ry. Co., 143 N.E. 821, 249 Mass.

55—Sawyer v. Boston Elevated Ry. Co., 137 N.E. 648, 243 Mass. 469.

72. Mass.—Curran v. Boston Elevated Ry. Co., 143 N.E. 821, 249 Mass. 55.

Operation of street railroads and acts incidental thereto as nuisance generally see Nuisances § 67.

73. Ohio.—Karle v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327.

74. N.H.—Lovett v. Manchester St. Ry., 159 A. 132, 85 N.H. 345.

Implied revocation

Authority for location of center line trolley pole was impliedly revoked by later authorization for curb poles, but revocation becomes effective when substitution is accomplished.—Lovett v. Manchester St. Ry., supra.

75. N.H.—Lovett v. Manchester St. Ry., supra.

76. N.Y.—Stern v. International

Railway Co., 220 N.Y. 284, 115 N. E. 759, 2 A.L.R. 487.

60 C.J. p 413 note 44 [a] (5).

77. Md.—Meese v. Goodman, 176 A. 621, 167 Md. 658, 98 A.L.R. 480.

Increased traffic since advent of automobile was held not to have converted safe street, on which electric railway tracks were installed, with center poles between them, when only horse-drawn vehicles used street, into traffic hazard and nuisance, in view of statute applying rules of road to all vehicles.—Meese v. Goodman, supra.

78. Me.—Cleveland v. Bangor St. R. Co., 29 A. 1005, 86 Me. 232.

60 C.J. p 413 note 44 [a] (3).

79. Ill.—Chicago City R. Co. v. McLaughlin, 40 Ill.App. 496, affirmed 34 N.E. 796, 146 Ill. 353.

60 C.J. p 413 note 55.

Negligence of street railroad company as proximate cause of injury see supra § 212.

roads, to cross does not relieve the motorman from his duty of using reasonable care.⁸⁰ Where neither of two street railroad companies has any right, by usage or otherwise, of precedence at the intersection of their roads, each company owes to the other the duty of exercising reasonable care, and has a right to assume that the other will fulfill its duty until apprised to the contrary;⁸¹ and, if one car has the right to the crossing by arriving there first, the person in control of an approaching car is bound so to govern the movement thereof as that, whether the first car goes fast or slowly or even stops on the crossing, he can stop his car before striking it.⁸² Where, however, by statute or ordinance the cars of one company have a right of way over the cars of another company, such regulation should be recognized.⁸³ It is also the duty of the person in charge of a car which is approaching another car ahead on the same track to maintain such a distance from it, or so to reduce the speed of his own car, that he can stop it in time to avoid a collision,⁸⁴ particularly where such precautions are expressly required by the rules of the company.⁸⁵

Passengers on cars of other companies. The high degree of care demanded from a carrier for the protection of passengers on its cars, as discussed in Carriers § 678, is not demanded from a street railroad with respect to a passenger on the car of another company whose line crosses the line of the first mentioned company,⁸⁶ and a company on whose car he is not a passenger is bound to use toward such person only reasonable and ordinary care un-

der the circumstances.⁸⁷ In determining liability as between two different streetcar systems for injuries to a passenger sustained in a collision of their respective cars, the right of way is not the controlling factor,⁸⁸ but right of way is available as a defense only where the operator claiming it proceeded with due care.⁸⁹

Violation of ordinance regulating the right of way of cars of different companies is not necessarily negligence per se,⁹⁰ but is merely evidence of negligence.⁹¹

§ 225. — At Steam Railway Crossings

Persons in charge of a streetcar should use reasonable care to avoid a collision when approaching a grade crossing of a steam railroad.

It is the duty of the persons in charge of a streetcar to use reasonable care to avoid a collision with an engine or train of a steam railroad which the street railroad crosses at grade.⁹² It is ordinarily the duty of such persons to stop the streetcar before reaching the steam railroad crossing, and not to cross until an employee of the company has gone ahead to ascertain whether the way is clear and, where there is more than one employee, has signaled the car to proceed,⁹³ and, as discussed supra § 161, this duty is sometimes imposed by statute or ordinance, or by contract between the companies,⁹⁴ or by a custom,⁹⁵ or by instruction of the street railroad company.⁹⁶ Where the duty is thus imposed, it should be exercised at crossings having gates and

80. Mo.—Taylor v. Grand Ave. R. Co., 39 S.W. 88, 137 Mo. 363.

81. U.S.—Metropolitan St. R. Co. v. Kennedy, N.Y., 27 C.C.A. 136, 82 F. 158.
60 C.J. p 413 note 57.

82. Ill.—Metropolitan R. Co. v. Hammett, 13 App.D.C. 370—Chicago City R. Co. v. McLaughlin, 40 Ill.App. 496, affirmed 34 N.E. 796, 146 Ill. 353.

83. Mich.—Becker v. Detroit Citizens' St. R. Co., 80 N.W. 581, 121 Mich. 580.
60 C.J. p 414 note 59.

84. N.Y.—Wynne v. Atlantic Ave. R. Co., 85 N.Y.S. 1034, 14 Misc. 394, affirmed 51 N.E. 1094, 156 N.Y. 702.
60 C.J. p 414 note 60.

85. Mich.—Holman v. Union St. R. Co., 85 N.W. 202, 114 Mich. 208.
60 C.J. p 414 note 61.

86. N.Y.—Sneider v. Second Ave. R. Co., 30 N.E. 752, 133 N.Y. 583.

87. Mo.—O'Rourke v. Lindell R. Co., 44 S.W. 254, 142 Mo. 342.
60 C.J. p 414 note 65.

88. Cal.—Davis v. City and County of San Francisco, 114 P.2d 359, 45 Cal.App.2d 443.

Proceeding blindly into intersection

With respect to liability of two different streetcar systems for injuries sustained by passenger in collision of two streetcars, operator of one car cannot blindly and negligently proceed forward into intersection and cause a collision with another car merely because operator had a statutory or regulatory right of way.—Davis v. City and County of San Francisco, supra.

89. Cal.—Davis v. City and County of San Francisco, supra.

90. Pa.—Connor v. Electric Traction Co., 34 A. 238, 173 Pa. 602.
Violation of ordinances generally see Negligence § 19.

91. Pa.—Connor v. Electric Traction Co., supra.
Violation of ordinance as evidencing negligence generally see Negligence § 101.

92. Ind.—Indianapolis Union R. Co. v. Waddington, 82 N.E. 1030, 169 Ind. 448.
60 C.J. p 414 note 69.

93. Ohio.—Cincinnati St. R. Co. v. Murray, 42 N.E. 596, 53 Ohio St. 570, 30 L.R.A. 508.
60 C.J. p 414 note 70.

94. Ga.—Rome Ry. & Light Co. v. Southern Ry. Co., 157 S.E. 527, 42 Ga.App. 786.
60 C.J. p 414 note 73.

95. U.S.—Memphis St. Ry. Co. v. Illinois Cent. R. Co., Tenn., 242 F. 617, 155 C.C.A. 307.

96. U.S.—Memphis St. Ry. Co. v. Illinois Cent. R. Co., supra.

watchmen the same as at other crossings,⁹⁷ even though there is but one employee on the car,⁹⁸ but there is also authority to the contrary where there is only a single employee.⁹⁹ If the view of such employee is obscured by dust and smoke, he must delay signaling for a reasonable length of time to allow the dust and smoke to clear away.¹ On the other hand, in order that a street railroad company may be liable for its negligence in this respect, it must appear that the injury was directly caused by such negligence.² A statute requiring all trains to stop within a certain distance when approaching the crossing of another railroad has no application to a street railroad,³ and does not apply to a crossing of a railroad company and a street railroad company,⁴ or make a streetcar company a railroad by the granting of permission to an inter-urban company to use its tracks.⁵

§ 226. Collisions with Animals or Vehicles in General

A street railroad is liable for the failure of its motorman to use ordinary care to discover animals or vehicles on or near the tracks, and for injuries resulting from his failure to use reasonable and ordinary care to avoid colliding therewith.

A street railroad is liable for the failure of its motorman to use ordinary care to discover animals or vehicles on or near the tracks, and for injuries resulting from his failure to use reasonable and ordinary care to avoid colliding therewith,⁶ or

for injuries resulting to persons, animals, or other property, if through the incompetency, inattention, or carelessness of its servants a car collides with an animal or vehicle on the track ahead,⁷ or with an animal or vehicle so near the track that the car could not pass without striking it.⁸ A street railroad company is not liable for the resulting injuries, if the servants in charge of the car exercise ordinary care and prudence, and the collision is merely an accident;⁹ or if a vehicle comes into danger at a period so shortly before the accident that the motorman, exercising ordinary care, does not have a reasonable time in which to act,¹⁰ or in the face of imminent danger commits an error in judgment;¹¹ and it has been held that the street railroad is not liable if each party used due care,¹² or if each failed to use due care.¹³

A street railway company is not liable for injuries resulting from the contributory negligence of the injured person, as discussed *infra* §§ 263-287, or from some intervening independent cause;¹⁴ but a street railroad may be liable where its negligence concurs with the negligent act of an independent actor, which contributes directly to cause the injury,¹⁵ or if the injury was avoidable, notwithstanding contributory negligence, as considered *infra* §§ 288-295. The company is not liable for the failure of the motorman to keep a lookout where such failure does not contribute to the injury.¹⁶ Where an automobile, owned by a city and used by its superintendent of streets, was being taken to the

97. Pa.—Philadelphia, etc., R. Co. v. Boyer, 97 Pa. 91.
60 C.J. p 415 note 76.

98. Ohio.—Cincinnati St. R. Co. v. Murray, 42 N.E. 596, 53 Ohio St. 570, 30 L.R.A. 508.
60 C.J. p 415 note 77.

99. Pa.—Philadelphia, etc., R. Co. v. Boyer, 97 Pa. 91.
60 C.J. p 415 note 78.

1. U.S.—Memphis St. Ry. Co. v. Illinois Cent. R. Co., Tenn., 242 F. 617, 155 C.C.A. 307.

2. Ohio.—Cincinnati St. R. Co. v. Murray, 42 N.E. 596, 53 Ohio St. 570, 30 L.R.A. 508.

3. Ill.—Jeneary v. Chicago & Inter-urban Traction Co., 225 Ill.App. 122, affirmed 138 N.E. 203, 306 Ill. 392.

4. Ill.—Jeneary v. Chicago & Inter-urban Traction Co., *supra*.

5. Ill.—Jeneary v. Chicago & Inter-urban Traction Co., *supra*.

6. Del.—Garrett v. People's R. Co., 64 A. 254, 22 Del. 29.
60 C.J. p 415 note 86.

7. Va.—Richmond Pass., etc., Co. v. Allen, 49 S.E. 656, 103 Va. 532.
60 C.J. p 415 notes 87, 88.

8. N.J.—Meyer v. Public Service Ry. Co., 89 A. 1004, 85 N.J.Law 461.
N.Y.—Warren v. Union R. Co., 61 N.Y.S. 1009, 46 App.Div. 517.

9. Ala.—Mobile, etc., R. Co. v. R. O. Harris, etc., Co., 84 So. 867, 17 Ala. App. 354.
60 C.J. p 415 note 91.

10. Pa.—Gordon v. Philadelphia, etc., Co., 107 A. 811, 264 Pa. 461.
60 C.J. p 416 note 92.

11. Ind.—Indianapolis Traction, etc., Co. v. Howard, 128 N.E. 35, 190 Ind. 97.

12. Mass.—Boyd v. Boston Elevated Ry. Co., 112 N.E. 607, 608, 224 Mass. 199.
60 C.J. p 416 note 94.

13. Mo.—Wood v. Wells, 270 S.W. 332.
60 C.J. p 416 note 95.

Reciprocal duty

Where a motorist has stopped automobile near streetcar tracks, the duty imposed on motorman of determining whether automobile is a sufficient distance from tracks to permit passage of streetcar is no higher than that on motorist.—Pollock v. Philadelphia Rapid Transit Co., 11 A. 2d 665, 139 Pa.Super. 256.

14. Mo.—De Moss v. Kansas City Rys. Co., 246 S.W. 566, 296 Mo. 526.
60 C.J. p 416 note 97.
Proximate cause of injury in general see *supra* § 212.

15. Mo.—St. Louis Carbonating & Mfg. Co. v. United Rys. Co. of St. Louis, 141 S.W. 904, 162 Mo.App. 18.
60 C.J. p 416 note 98.

16. Mo.—Theobald v. St. Louis Transit Co., 90 S.W. 354, 191 Mo. 395.
60 C.J. p 416 note 2.

garage after having taken a salesman to the home of such superintendent for the purpose of transacting official business, it was not being used in violation of a law prohibiting the use of such automobiles without authority for a forbidden purpose, so as to affect the liability of a street railroad when it was struck by the negligent operation of a streetcar, notwithstanding an unexecuted purpose of taking a third person home on the chauffeur's route to the garage.¹⁷ The liability of a street railroad company where there is a collision between a local train and a vehicle will not be affected by the fact that the company operates interurban cars over the same track.¹⁸

Rear end collision. Ordinarily a streetcar motorman is not bound to look out for those who may run into the rear of his car,¹⁹ and to hold him to such a standard of duty would seriously and unnecessarily interfere with streetcar traffic.²⁰ If, however, the motorman should have perceived that the stopping of his car would imperil a following vehicle, he was under a duty to take due care to prevent damage.²¹

17. Mass.—Fitzgerald v. Boston & N. St. R. Co., 101 N.E. 1085, 214 Mass. 435.

18. Cal.—Callett v. Central California Traction Co., 171 P. 984, 986, 86 Cal.App. 240.
60 C.J. p 417 note 5.

19. Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378.
Rear end collision when swinging around curve see infra § 228.

Sudden stop

In absence of special circumstances, street railroad was not negligent because of sudden and unnecessary stopping of streetcar which was being followed by taxicab which also came to sudden and unnecessary stop, whereupon milk truck which was following taxicab collided therewith killing passenger therein.—Lutes' Adm'r v. Gray-Von Allmen Sanitary Milk Co., 72 S.W.2d 720, 254 Ky. 750.

Waiting for train to pass

Street railway company owed no duty to anticipate that during a snow storm automobile driver might run into rear end of snow sweeper stopped at railroad crossing to wait for passing of train.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378.

§ 227. Nature and Extent of Liability in General

A street railroad company and a third person may be jointly and severally liable for negligence in which each participated.

A street railroad company and the owner of a vehicle with which a street railroad car collides may be held jointly and severally liable for injuries to a third person occasioned by the negligence of the company and the owner.²² Where a nonnegligent guest is injured in a collision between the motor vehicle in which he is riding and a streetcar, due to the concurrent primary negligence of the host and the motorman, both the host and the street railroad company have been held liable.²³

§ 228. Duty and Care Required in General

In the absence of imposition of a different standard by statute or ordinance, a street railroad company is under a duty to exercise ordinary care to avoid collision with an animal or other vehicle.

In the absence of statutory or municipal regulations, a street railroad company is under a duty to use ordinary care to avoid collision with an animal or vehicle,²⁴ that is, such care as would be exercised

20. Ill.—Overstreet v. Illinois Power & Light Corporation, supra.

21. Minn.—Nees v. Minneapolis St. Ry. Co., 16 N.W.2d 758, 218 Minn. 532.
Trolley running into rear of vehicle ahead of it see infra § 234.

Continuing or signaling

If motorman suddenly stopped streetcar in intersection to accommodate pedestrians wishing to board car, and motorman should have perceived that such stopping of the car would imperil safety of vehicles immediately in the rear, it was motorman's duty either to continue on to next regular stop, or, if he elected to stop within intersection, to signal or otherwise warn such vehicles.—Nees v. Minneapolis St. Ry. Co., supra.

22. Pa.—Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.
Puerto Rico.—Hernandez v. San Juan, etc., Co., 4 Puerto Rico Fed. 138.
Joint and several liability for negligence generally see Negligence § 102.

Streetcar and taxi

Where a taxicab was negligently parked on the tracks of a street railroad, but where it could have been seen by the motorman of a streetcar which collided therewith in time to have prevented a collision, even if he had been slightly observant, as to a

passenger injured in such taxicab, the taxicab company and the street railroad were concurrently negligent and jointly and severally liable.—Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.

23. Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

24. Or.—Harrington v. Portland Traction Co., 124 P.2d 715, 168 Or. 548.
Care and duty imposed by municipal ordinance see infra § 229.
Regulation of street railroads see supra §§ 160-176.

Continuing duty

Both streetcar motorman and automobile driver are required to do whatever is reasonably necessary to prevent the happening of an accident, and the duty of due care remains on a motorman at all times as it remains on every other person in charge of any instrumentality which may be dangerous to human safety.—Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220.

Intoxicated motorist

Streetcar motorman must exercise ordinary care to avoid collision with a motorist if the latter is in fact intoxicated and in peril.—Murray v. Kansas City Public Service Co., Mo., 61 S.W.2d 334.

by a reasonably prudent man under like circumstances.²⁵ As a general rule ordinary care requires that the motorman of a car should keep a lookout ahead for animals or vehicles on or near the track,²⁶ and keep the car under such control as will probably prevent a collision,²⁷ and the motorman cannot be relieved of his duty to keep a lookout by having it imposed on others.²⁸ However, a motorman has the right to assume that drivers of vehicles on the street will use ordinary care,²⁹ until he becomes aware, or in the exercise of ordinary care should become aware, that a driver is in danger,³⁰ and, when a collision becomes imminent, he must exercise a degree of care commensurate with the circumstances of the particular case,³¹ using such means as a motorman fit for his job and intent on avoiding an impending peril would use to avoid a collision.³²

Although running a streetcar into a vehicle ordinarily is negligence,³³ negligence on the part of the company cannot be inferred from the mere fact that there was a collision between a car and an animal or vehicle, as discussed *infra* § 305. In general, no higher degree of care is required of the operators of a streetcar than is required of drivers of other vehicles;³⁴ thus, a street railroad company

is not required to exercise extraordinary precaution to avoid a collision,³⁵ and it is not an insurer of safety.³⁶

Collision on private right of way. A street railroad company is not liable for damage resulting from a collision between its car and a vehicle of a trespasser, occurring on its own private right of way, unless caused by the wanton or willful misconduct of the operator of its car.³⁷

Curves and turns. The rule of ordinary care does not require a motorman on rounding a curve either to warn a vehicle driver that the rear of the streetcar will swing out and overlap the street,³⁸ or to watch the vehicle as the streetcar continues its course,³⁹ or to keep a lookout to the rear generally,⁴⁰ and where he has stopped before starting around the curve and is unaware of a vehicle which has approached the rear of the streetcar, he is not negligent in starting the car without first determining conditions at the rear of the streetcar.⁴¹ On the other hand, where a motorman observes a vehicle and is charged with knowledge that unless it is moved the overhang of the streetcar will cause its rear to collide with the vehicle, it may be actionable negligence for him to proceed to round the curve while the vehicle remains too near the track.⁴²

25. U.S.—*Morrison v. City of Detroit*, C.C.A.Mich., 140 F.2d 625.

Fla.—*Miami Beach Ry. Co. v. Dohme*, 179 So. 166, 131 Fla. 171.
60 C.J. p 417 note 12.

26. Mo.—*Murphy v. St. Louis Public Service Co.*, 244 S.W.2d 31, 362 Mo. 772—*Murray v. Kansas City Public Service Co.*, 61 S.W.2d 334.
60 C.J. p 417 note 14.

Duty to maintain lookout at road intersections see *infra* § 338.

Common-law duty

Streetcar company had the common-law duty, independent of vigilant watch ordinance of city, to exercise ordinary care in operation of streetcar upon or across the public streets of city, including the duty to observe vehicles on or near track.—*Melton v. St. Louis Public Service Co.*, Mo., 251 S.W.2d 663.

Oncoming traffic

While a motorman is required to maintain a lookout for oncoming traffic, he is not required to maintain such a lookout as would result absolutely in discovery and avoidance of collision with an automobile.—*Billingsley v. Kansas City Public Service Co.*, 191 S.W.2d 331, 239 Mo.App. 440.

27. La.—*Geismar v. Gaisser*, 124 So. 691, 12 La.App. 112.
60 C.J. p 418 note 15.

28. Ky.—*Ohio Valley Mills v. Louisville Ry. Co.*, 182 S.W. 955, 168 Ky. 758.

29. Md.—*Gitomir v. United Rys. & Electric Co. of Baltimore City*, 146 A. 279, 281, 157 Md. 464.
60 C.J. p 418 note 18.

30. Wash.—*Yenor v. Spokane United Rys.*, 255 P. 947, 143 Wash. 541.

31. Ala.—*Alabama Power Co. v. Bass*, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.
60 C.J. p 418 note 20.

32. Ala.—*Mobile Light & R. Co. v. Logan*, 106 So. 147, 213 Ala. 672.

33. Mass.—*Riley v. Boston Elevated Ry. Co.*, 163 N.E. 752, 265 Mass. 176.

34. Minn.—*Wilson v. Minneapolis St. R. Co.*, 77 N.W. 238, 74 Minn. 436.

35. N.Y.—*Heckmuller v. New York City R. Co.*, 104 N.Y.S. 679, 54 Misc. 541.
60 C.J. p 418 note 25.

36. N.Y.—*Reardon v. Third Ave. R. Co.*, 48 N.Y.S. 1005, 24 App.Div. 163.

37. Pa.—*De Rosa v. West Penn Rys. Co.*, 182 A. 101, 120 Pa.Super. 90.

38. Or.—*Harrington v. Portland Traction Co.*, 124 P.2d 715, 168 Or. 548.

39. Or.—*Harrington v. Portland Traction Co.*, *supra*.

40. Ky.—*Louisville Ry. Co. v. Ray*, 124 S.W. 313.
Wis.—*Ryan v. Milwaukee Northern Ry. Co.*, 203 N.W. 340, 186 Wis. 537.

41. Or.—*Harrington v. Portland Traction Co.*, 124 P.2d 715, 168 Or. 548.

No duty to look to rear

A streetcar motorman who was unaware of presence of automobile at rear of streetcar had no duty to look to rear of streetcar after picking up a passenger and before starting around curve, in order to determine whether rear end of streetcar would strike the automobile when the rear end would swing out, so as to authorize occupant of automobile to recover from streetcar company for injuries sustained when automobile was struck by rear end of streetcar.—*Harrington v. Portland Traction Co.*, *supra*.

42. R.I.—*Forbes v. United Electric Rys. Co.*, 144 A. 154, 49 R.I. 465, 62 A.L.R. 305.

and a motorman is negligent in attempting to pass a buggy on a curve when it is within range of the bumpers on the car, and the motorman has an opportunity to see such fact.⁴³

When approaching a turn in the street, the motorman is under the duty to keep a lookout and have his car under reasonable control.⁴⁴

Motorman's illness. Where a streetcar motorman is suddenly stricken with illness rendering him unconscious, and he had no reason to anticipate such an occurrence, he is not negligent when the streetcar runs out of control and collides with an animal or vehicle.⁴⁵

Operation of streetcar backward without audible warning and without notice has been held negligence as a matter of law.⁴⁶

§ 229. Violation of Statute or Ordinance in General

With respect to negligence in a collision, a violation of a duty imposed by statute or ordinance on a street railroad company may constitute negligence.

43. Mo.—Averitt v. Metropolitan St. Ry. Co., 131 S.W. 752, 151 Mo.App. 265.

44. Ky.—Smith v. Ohio, etc., Ry. Co., 3 S.W.2d 604, 223 Ky. 311.

45. D.C.—Thomas v. Capital Transit Co., Mun.App., 83 A.2d 584.

Running through red light is not negligence where it happens because of sudden and unanticipated illness of the motorman rendering him unconscious.—Thomas v. Capital Transit Co., supra.

46. Cal.—Adamson v. City and County of San Francisco, 225 P. 375, 66 Cal.App. 256.

47. Mo.—Campbell v. St. Louis Public Service Co., App., 35 S.W.2d 49. "Vigilant watch" ordinances see supra § 197.

48. U.S.—Snider v. Sand Springs Ry. Co., C.C.A.Okla., 62 F.2d 635.

Right of way

With respect to issue of motorman's negligence in colliding with bus, fact that streetcars run on rails and that ordinance gives streetcars right of way over other vehicles must be considered.—Snider v. Sand Springs Ry. Co., supra.

Right-hand rule immaterial under facts

In action by automobile guest against owner of trolley bus for inju-

ries sustained in collision between automobile and bus when automobile crossed over onto its left side of street, and bus driver, to avoid collision, drove onto his left side of street, and automobile then crossed over to its right side of the street and struck bus at an angle of forty-five degrees, statutes requiring the operation of vehicles on the right-hand side of the highway have no application.—LaVigne v. Portland Traction Co., 170 P.2d 709, 179 Or. 221.

49. Minn.—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.

Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914.

Failure to comply with penal ordinance relating to the operation of streetcars in a city, and providing for the punishment of a violation thereof, is negligence.—Denver City Tramway Co. v. Carson, 123 P. 680, 21 Colo.App. 604.

Passing school

Statute requiring driver of vehicle, including streetcar, to use extreme care in passing public hospital, firehouse, or school was applicable where trolley car crossing school driveway struck automobile conveying student and members of his family and his escort to state teachers' college to enable student to attend school dance,

With respect to negligence in a collision, a statute or ordinance may impose a higher degree of care on a street railroad company than that required by common law.⁴⁷ In determining whether the company was negligent, the court may consider the duties prescribed by municipal ordinances,⁴⁸ and the violation of a duty imposed by statute or ordinance may be evidence of negligence,⁴⁹ or constitute negligence per se.⁵⁰

Coasting in street. A streetcar motorman is under no duty to anticipate that a person would violate an ordinance against coasting in the street merely because the right exists to use the street in a lawful manner.⁵¹

§ 230. Speed in General

A streetcar should be run at such a reasonable speed as will probably preclude a collision with an animal or vehicle, and what is a reasonable speed will in general depend on all the circumstances involved.

A streetcar must be run at such a reasonable speed as will probably prevent collisions.⁵² In the absence of a statute or ordinance prescribing a maximum speed,⁵³ what is a reasonable speed, with

as against contention that statute applied only while school was in session and protected only persons of school age entering and leaving public school in large numbers.—Trent v. International Ry. Co., 290 N.Y.S. 915, 249 App.Div. 17, affirmed 7 N.E. 2d 725, 273 N.Y. 622.

Lack of lookout

Violation of ordinance requiring that, when a car is in charge of one man, he shall be stationed on the front end can be relied on as an act of negligence, as where an automobile was struck by the foremost of several flat cars being pushed by an electric engine from behind, with no one on such flat cars observing a lookout.—Oswald v. Utah Light & Ry. Co., 117 P. 46, 39 Utah 245.

50. Mo.—Raymore v. Kansas City Public Service Co., App., 141 S.W. 2d 103.

51. Iowa.—Sturm v. Tri-City Ry. Co., 178 N.W. 525, 190 Iowa 387. 60 C.J. p 419 note 28.

52. Cal.—Phillips v. Pacific, etc., Ry. Co., 252 P. 628, 629, 80 Cal.App. 641.

60 C.J. p 419 note 32. Care required as to speed in general see supra §§ 198-201.

53. Wis.—Campanelli v. Milwaukee Elec. Ry. & Transport Co., 3 N.W. 2d 390, 242 Wis. 505.

respect to liability for collisions, must be determined from a consideration of all the surrounding circumstances.⁵⁴ As a general rule, a streetcar motorman should not operate his car at such a rate of speed that it cannot be stopped within the limit of his vision,⁵⁵ and ordinary care requires a motorman to slow up if by doing so he can avoid a collision.⁵⁶ Although the street railroad is liable for injuries resulting from a negligent rate of speed,⁵⁷ there can be no recovery predicated on an excessive rate of speed unless such speed was the proximate cause of the injury, as discussed supra § 212. No recovery may be had unless the person injured used ordinary care to avoid the injury,⁵⁸ and it seems that the street railroad is not liable if both the motorman and the driver of a vehicle with which a streetcar collided were running at a negligent rate of speed.⁵⁹

Operation of an interurban car or a streetcar at a speed in excess of the limit authorized by a statute or ordinance is ordinarily negligence,⁶⁰ but the speed of a streetcar may be negligently excessive although not exceeding the legal limit.⁶¹ Violation of a statute or ordinance as to rate of speed has been held to be evidence of negligence,⁶² or *prima facie* negligence,⁶³ although such ordinance imposes a penalty for its violation,⁶⁴ and it has also been held that the violation of such a statute or ordi-

nance may constitute negligence per se.⁶⁵ It has further been held that one injured in a collision with a streetcar can rely on an ordinance limiting the speed of streetcars, although he did not know of it.⁶⁶

Violation of company rule. The violation by a streetcar motorman of a company rule to run slowly at a certain point does not of itself give an injured person a right of action.⁶⁷

§ 231. Animals or Vehicles Crossing Track in Front of Car

A motorman must use due care to control his car and avoid a collision with an animal or vehicle crossing the streetcar track.

A motorman is under a general duty, applicable when an animal or vehicle crosses the track in front of him, to have his car under such control that it can be stopped in any situation that may reasonably arise under the existing circumstances.⁶⁸ After a motorman discovers, or, in the exercise of ordinary care, should discover, a vehicle attempting to cross the track in front of the car, he is bound to use every degree of care in his power, consistent with the safety of his passengers, to avoid injury,⁶⁹ according to the authorities on the ques-

Trackless trolley

Although a trackless trolley car is not a "motor vehicle" within meaning of statute relating to the operation of motor vehicles, the lawful speed of such trolley car is fixed by statute providing that speed of trolley car should not exceed that at which motor vehicles may be lawfully operated in the same area.—*Campanelli v. Milwaukee Elec. Ry. & Transport Co.*, *supra*.

54. Ind.—*Carson v. Perkins*, 29 N.E. 2d 772, 217 Ind. 543.

Md.—*Gross v. Baltimore Transit Co.*, 64 A.2d 147, 192 Md. 278.

Mo.—*Byram v. East St. Louis Ry. Co.*, App., 39 S.W.2d 376.

Ohio.—*Acker v. Columbus & Southern Ohio Elec. Co.*, App., 60 N.E.2d 932.

Open country

A streetcar company is not restricted in the speed of its cars which traverse sections of comparatively open country to the same degree as when operating cars within the confines of a congested city area.—*Baltimore Transit Co. v. Lewis*, 199 A. 879, 174 Md. 618.

55. Mich.—*Fischer v. Michigan Ry. Co.*, 169 N.W. 819, 203 Mich. 668. 60 C.J. p 419 note 33.

56. Ind.—*Indianapolis, etc., Co. v. Howard*, 128 N.E. 35, 190 Ind. 97, followed in *Indianapolis, etc., Co. v. Smith*, 128 N.E. 38, 190 Ind. 698.

57. Pa.—*Breary v. Traction Co.*, 5 Pa. Dist. 95. 60 C.J. p 419 note 35.

58. Mo.—*Campbell v. St. Louis Transit Co.*, 99 S.W. 58, 121 Mo. App. 406.

59. Mo.—*Wood v. Wells*, 270 S.W. 332.

60. Ind.—*Union Traction Co. of Indiana v. Wynkoop*, 154 N.E. 40, 90 Ind. App. 331.

60 C.J. p 419 note 38—45 C.J. p 718 note 38.

61. Cal.—*Carey v. Pacific Gas & Electric Co.*, 242 P. 97, 75 Cal. App. 129.

60 C.J. p 419 note 39.

62. Va.—*Norfolk & P. Traction Co. v. Forrest's Adm'x*, 64 S.E. 1034, 109 Va. 658.

60 C.J. p 420 note 47.

63. Ill.—*Fogelsong v. Peoria Ry., etc., Co.*, 203 Ill. App. 546.

60 C.J. p 420 note 49.

64. Va.—*Norfolk & P. Traction Co. v. Forrest's Adm'x*, 64 S.E. 1034, 109 Va. 658.

65. U.S.—*Puget Sound Electric Ry. v. Benson*, Wash., 253 F. 710, 165 C.C.A. 304.

60 C.J. p 420 note 46.

66. Mo.—*Speer v. Southwest Missouri R. Co.*, 177 S.W. 329, 190 Mo. App. 328.

67. Tex.—*Southern Traction Co. v. Wilson*, Civ. App., 187 S.W. 536, reversed on other grounds 234 S.W. 663, 111 Tex. 361.

Effect of violation of company rule with respect to speed in general see *supra* § 201.

68. Pa.—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319—*Turner v. Philadelphia Rapid Transit Co.*, 170 A. 382, 111 Pa. Super. 439.

69. Ala.—*Mobile Light & R. Co. v. Thomas*, 80 So. 693, 16 Ala. App. 629. 60 C.J. p 421 notes 60-62.

Maintenance of safe distance

Motorman of trolley car, having observed and permitted plaintiff's truck to pass in front, had duty to maintain safe distance from plaintiff's truck.—*Turner v. Philadelphia*

tion, such as slackening his speed⁷⁰ or stopping the car;⁷¹ and, if unable to stop the car, he is still under the duty of checking its speed;⁷² and, if a motorman assumes to run his car at an excessive rate of speed, he cannot be excused from his duty to give such warning as is commensurate with the increased hazard.⁷³ A motorman is not warranted in assuming that the driver of a vehicle will refrain from crossing the tracks in view of the car,⁷⁴ and cannot disregard the possibility of a motorist's crossing the track to enter a private way at right angles to the highway on which the track is laid.⁷⁵ Signaling a motorist to come ahead, and then failing to give him sufficient time to cross the track, constitutes negligence on the part of the motorman.⁷⁶

On the other hand, the rule as to the degree of care required of a motorman when approaching a street crossing, discussed *infra* § 238, does not apply to cars approaching a vehicle between street crossings where it appears that the driver will have no occasion to drive across the tracks;⁷⁷ and, where there is nothing to cause the motorman of a moving streetcar to apprehend that a person driving ahead of him will attempt to cross the track,

he need exercise only reasonable care,⁷⁸ to be measured by the apparent situation and the dangers naturally to be expected under the circumstances;⁷⁹ and a street railroad company is not liable if the motorman did everything possible to avoid injury.⁸⁰ A motorman who sees the driver of a vehicle proceeding along the track without crossing at the usual place, in the absence of anything to warn him,⁸¹ may assume, in the exercise of reasonable care, that such driver does not intend to cross,⁸² and, therefore, need not hold his car in such good control as if he saw such driver approaching a crossing.⁸³ Where a person in charge of a vehicle has safely crossed, the motorman is justified in assuming that such person will keep at a safe distance from the track until the car has passed.⁸⁴ The distance the car runs after colliding with a vehicle crossing the track has a bearing on the question of speed and proper control,⁸⁵ but the question of speed is material only when it is the direct and proximate cause of the injury, as discussed *supra* § 12.

A motorman is not negligent when a collision occurs before he has reason to suspect danger;⁸⁶ and, if an automobile attempts to cross the tracks

Rapid Transit Co., 170 A. 382, 111 Pa. Super. 439.

Motorist not going to stop

Streetcar operator who saw that motorist was not going to stop short of streetcar tracks was confronted with a situation which required him immediately to use ordinary care to prevent the collision.—*Ramel v. Kansas City Public Service Co.*, Mo. App., 187 S.W.2d 492.

70. Pa.—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319. 60 C.J. p 421 note 64.

71. Pa.—*Ward v. Lakeside R. Co.*, 20 Pa.Co. 494. 60 C.J. p 421 note 65.

Ordinary care

Motorman must exercise ordinary care to stop streetcar and avoid collision as soon as he sees, or in exercise of ordinary care should see, that motorist is going to drive across track in front of streetcar.—*Harting v. East St. Louis Ry. Co.*, Mo.App., 81 S.W.2d 973.

72. N.Y.—*Wagner v. Metropolitan St. R. Co.*, 80 N.Y.S. 191, 79 App. Div. 591, affirmed 68 N.E. 1125, 176 N.Y. 610. 60 C.J. p 422 note 66.

73. Wash.—*Peterson v. Seattle Electric Co.*, 128 P. 650, 71 Wash. 349.

74. Va.—*Virginia Ry. & Power Co. v. Meyer*, 84 S.E. 742, 117 Va. 409. 60 C.J. p 422 note 68.

75. Mass.—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E. 2d 989, 306 Mass. 231.

76. Ill.—*Jacobs v. Illinois Terminal Co.*, 262 Ill.App. 481.

77. Me.—*Malia v. Lewiston, A. & W. St. Ry. Co.*, 77 A. 541, 107 Me. 95. 60 C.J. p 420 note 52.

78. Ill.—*Eastman v. Chicago Rys. Co.*, 209 Ill.App. 567. N.J.—*Conrad v. Elizabeth, etc., R. Co.*, 58 A. 376, 70 N.J.Law 676.

79. Ill.—*Eastman v. Chicago Rys. Co.*, 209 Ill.App. 567. 60 C.J. p 420 note 54.

80. Pa.—*Kane v. People's Passenger R. Co.*, 37 A. 110, 111, 181 Pa. 53. 60 C.J. p 420 note 55.

81. Ala.—*Birmingham, R. Co., v. Clarke*, 41 So. 829, 148 Ala. 673. Ill.—*Sabo v. Aurora, etc., R. Co.*, 183 Ill.App. 34.

82. R.I.—*Hunt v. Union R. Co.*, 89 A. 714. 60 C.J. p 420 note 57.

Presumption that motorist will stop
Streetcar motorman could presume motorist would stop before reaching danger zone, if there was nothing in movement of automobile or in driver's action to indicate con-

trary.—*Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, Mo., 38 S.W. 2d 1042.

Sufficient room on highway

Where streetcar track entered highway from private right of way and continued only eighteen inches from right edge of highway, leaving more than enough room to left of track for lane of traffic, motorman owed no duty to occupants of automobile turning into path of streetcar until automobile approached so close to point where track entered on highway, and under such circumstances, as to indicate that it would be driven on track instead of portion of highway to left of track.—*Steuernagel v. St. Louis Public Service Co.*, App., 202 S.W.2d 516, affirmed 211 S.W.2d 696, 357 Mo. 904.

83. Ill.—*Mullen v. Johnson*, 196 Ill. App. 303.

84. U.S.—*Nein v. La Crosse City R. Co.*, Wis., 92 F. 85, 34 C.C.A. 224. 60 C.J. p 421 note 59.

85. Pa.—*Kuhns v. Constoga Traction Co.*, 138 A. 838, 290 Pa. 303.

86. Mich.—*Kneeshaw v. Detroit United Ry.*, 135 N.W. 903, 169 Mich. 697. 60 C.J. p 422 note 74.

Skid

A streetcar motorman is not bound so to control streetcar as to avoid injury to a vehicle which might sud-

when the car is so near that, although it was under control, he could not stop it in time to prevent a collision, the company is not negligent.⁸⁷ The operator of a street railroad vehicle may assume that other vehicles will be run at a lawful rate of speed,⁸⁸ and, until such time as risk of collision becomes imminent, may assume that an approaching vehicle will wait for the streetcar to pass before coming onto the tracks.⁸⁹ However, it has been held that ordinary care is not sufficient,⁹⁰ and that a motorman cannot wait until the danger becomes manifest,⁹¹ and, when driving at such speed that he cannot stop the car on seeing a vehicle crossing the track, he cannot excuse himself by showing that he used the utmost effort to stop after seeing such vehicle.⁹²

Although a street railroad may run its cars single or in trains,⁹³ it must do so with due regard for the safety of those who have occasion to cross the track in driving out from yards of houses situated along the track.⁹⁴ Where one driving a team of horses turned on the track to cross it, and was struck by a car going at a speed in violation of an ordinance, he could recover although he failed to look before so crossing, where it is in evidence that

the collision would not have occurred if the car had been running at a speed within such ordinance.⁹⁵

Sounding gong. Ordinarily a motorman is not required to sound the gong continuously in the middle of the block,⁹⁶ or until he sees, or should have seen, that one on either side of the track indicated a purpose to cross, or approached dangerously near,⁹⁷ but, when he sees a vehicle attempting to cross the track in front of him, he is under a duty to signal his approach.⁹⁸ Where there was a collision with an automobile crossing the track, and there is evidence tending to show that the motorman of the streetcar violated an ordinance requiring him to sound the bell, if the ordinance was violated, such violation is negligence on the part of the street railway.⁹⁹ Failure to sound the gong is not important, however, where one injured in a crossing collision had knowledge of the approach of the car,¹ or where the sounding of the gong could not have prevented the accident.² Where a motorman sees a vehicle standing in his path and time permits, he should take such measures as may be necessary to avoid collision, and merely sounding his gong while proceeding at high speed does not suffice.³

denly skid into the path of the streetcar.—*Hamley v. Pittsburgh Rys. Co.*, 28 A.2d 911, 345 Pa. 380.

Sudden turn

Where motorist pulled to right off highway onto first set of streetcar tracks to avoid head-on collision, operator of streetcar on second set of tracks was not required to anticipate that motorist would seek to pass over second set of tracks rather than return to highway, and streetcar company was not liable for accident resulting when motorist turned suddenly onto second set of tracks in front of on-coming streetcar.—*Strotsky v. Eastern Massachusetts St. Ry. Co.*, 198 N.E. 648, 292 Mass. 378.

87. U.S.—*West Helena Consol. Co. v. McCray*, Ark., 256 F. 753, 168 C.C. A. 99, certiorari denied 39 S.Ct. 494, 250 U.S. 644, 63 L.Ed. 1186.

88. Ohio.—*Plummer v. Peoples Transit Co.*, App., 104 N.E.2d 75.

Trolley bus coming out of loop

Operator of trolley bus, which was coming out of a bus loop and was moving into left lane of more remote half of street when bus collided with plaintiff's automobile which was traveling on such half of street, could assume that vehicle traveling in direction plaintiff was traveling was being operated at a lawful rate

of speed.—*Plummer v. Peoples Transit Co.*, supra.

89. W.Va.—*Wilson v. Co-op. Transit Co.*, 30 S.E.2d 749, 126 W.Va. 943.

90. Tex.—*Austin, etc., Ry. Co. v. Faust*, 133 S.W. 449, 63 Tex.Civ. App. 91.

91. Tex.—*Galveston Electric Co. v. Antonini*, Civ.App., 152 S.W. 841, 60 C.J. p 422 note 77.

92. Mo.—*Williams v. Kansas City Elevated Ry. Co.*, 131 S.W. 115, 149 Mo.App. 489.

93. Me.—*Butler v. Rockland, etc., St. R. Co.*, 58 A. 775, 99 Me. 149, 105 Am.S.R. 267.

94. Me.—*Butler v. Rockland, etc., St. R. Co.*, supra.

95. U.S.—*Hays v. Tacoma R., etc., Co.*, C.C.Wash., 106 F. 48.

Proximate cause with respect to: Contributory negligence see *infra* § 287. Negligence see *supra* § 212.

96. Mich.—*Champaign v. Detroit United Ry.*, 148 N.W. 201, 181 Mich. 672.

Duty to sound gong under adverse weather conditions see *infra* § 240.

97. Mich.—*Champaign v. Detroit United Ry.*, supra.

98. Ky.—*Price v. Kentucky Traction & Terminal Co.*, 269 S.W. 303, 207 Ky. 332.

60 C.J. p 421 note 63.

99. Va.—*Virginia Ry. & Power Co. v. Wellons*, 112 S.E. 843, 133 Va. 350, 60 C.J. p 422 note 85.

1. R.I.—*Hunt v. Union R. Co.*, 89 A. 714.

2. Pa.—*Cox v. Wilkes-Barre Ry. Corp.*, 17 A.2d 367, 340 Pa. 554.

Motorist's loss of control

Where automobile wheel struck a rut within and parallel to trolley car track, and as automobile reached end of rut it skidded across track and onto an adjoining track where it was struck, while it was still in motion, by an oncoming trolley car, the failure of the motorman to give warning of the approach of the car did not constitute negligence, so as to render street railroad company liable for death of automobile passenger resulting from injuries sustained in the collision, especially since driver of automobile had knowledge of the approach of the car, and since driver having lost control of movement of automobile would not have been aided by the giving of a warning.—*Cox v. Wilkes-Barre Ry. Corp.*, supra.

3. Pa.—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319.

Negligence in starting. It is negligence to start the car while a person is driving across the track a short distance away in front of the car.⁴

§ 232. Passing Animals or Vehicles

The duty to exercise due and reasonable care rests on a motorman in respect of vehicles passing him or which he is passing.

The duty to exercise due and reasonable care rests on a motorman with respect to a vehicle passing the car,⁵ or a vehicle which the car is passing.⁶ However, the motorman may assume that the driver of a vehicle will leave the track to permit the free passage of the car,⁷ especially when warning has been given;⁸ and, where he is running parallel to a moving vehicle, he may assume that it will not cross his track,⁹ and, although running at an excessive rate of speed, that a vehicle at the side of the track and out of the range of danger will not be moved in the direction of the passing car;¹⁰ but the question of whether notice was given of the approach of a car is immaterial when the driver of a vehicle knows that it is approaching.¹¹ Although a motorman's error in judgment in passing a vehicle may under some circumstances be actionable negligence,¹² he is not required to anticipate the unexpected swerving of a

vehicle after it has turned out sufficiently to enable the car to pass,¹³ or that a vehicle will be driven into the car after the front part has safely passed;¹⁴ and, where injury results from an unexpected cause not reasonably to be anticipated, the streetcar company is not responsible.¹⁵

§ 233. Meeting Animals or Vehicles

On meeting an animal or vehicle the motorman of a streetcar must exercise care commensurate with the circumstances.

When meeting a vehicle, the motorman of a streetcar must exercise the reasonable care of an ordinarily prudent person according to the circumstances,¹⁶ and it has been held that a motorman owes a greater duty of care to avoid injury to the occupant of a vehicle approaching from the opposite direction on the same track than in a case where the approaching vehicle is entirely on the road beside the track.¹⁷ Where an animal or vehicle is approaching the car or track, the motorman should stop his car if necessary to avoid a collision,¹⁸ and he is under the duty of having the car under such control as will permit it to be stopped in time to prevent such collision,¹⁹ and has no right to wait before stopping until the vehicle is actually on the tracks.²⁰

4. N.Y.—*Reigelman v. Third Ave. R. Co.*, 29 N.Y.S. 299, 9 Misc. 51.

5. Mass.—*Riley v. Boston, etc., Ry. Co.*, 163 N.E. 752, 265 Mass. 176. 60 C.J. p 423 note 88.

6. Me.—*Fickett v. Lewiston, etc., St. Ry.*, 85 A. 1067, 110 Me. 267. 60 C.J. p 423 note 89. Parked vehicles see *infra* § 235.

7. Mo.—*Gessner v. Metropolitan St. Ry. Co.*, 119 S.W. 528, 137 Mo.App. 47.

8. N.Y.—*Robinson v. Crosstown St. R. Co.*, 103 N.Y.S. 58, 59, 118 App. Div. 543. 60 C.J. p 423 note 92.

9. Mo.—*Robb v. St. Louis Public Service Co.*, 178 S.W.2d 443, 352 Mo. 566.

As to braking

Where streetcar and automobile were running parallel to each other, motorman was not required to apply the brakes until he saw or should have seen that the automobile would likely cross his path.—*Robb v. St. Louis Public Service Co.*, *supra*.

10. Mo.—*Farrer v. Metropolitan St. Ry. Co.*, 155 S.W. 439, 249 Mo. 210.

11. N.Y.—*Robinson v. Crosstown St. R. Co.*, 103 N.Y.S. 58, 118 App.Div. 543.

12. Mo.—*Johnson v. Springfield Traction Co.*, 163 S.W. 896, 178 Mo.App. 445. 60 C.J. p 423 note 95.

13. Ill.—*Bishop v. Chicago Rys. Co.*, 215 Ill.App. 153. 60 C.J. p 423 note 96.

14. N.Y.—*Schneiders v. Central Crosstown R. Co.*, 87 N.Y.S. 453. 60 C.J. p 423 note 97.

15. Pa.—*Reidel v. Philadelphia Rapid Transit Co.*, 157 A. 36, 103 Pa. Super. 387.

Door opening as car passed

If rear door of truck standing near tracks opened after streetcar had begun to pass, operator of streetcar, having no notice that door might then open, was not liable.—*Reidel v. Philadelphia Rapid Transit Co.*, *supra*.

16. Ky.—*Public Service Co. of Indiana v. Schneider's Adm'r.*, 85 S.W. 2d 676, 260 Ky. 334, 102 A.L.R. 712. 60 C.J. p 423 note 99.

Inability to pass parked car

(1) A motorman operating a

streetcar on a track in the middle of a street has the duty to observe parked automobiles and to know that an approaching automobile cannot pass a parked automobile without coming on the streetcar track.—*English v. Georgia Power Co.*, 17 S.E.2d 891, 66 Ga.App. 363.

(2) Motorman was under duty to see traffic entering street, observe parked automobiles, and to know approaching truck could not pass parked automobiles without coming onto tracks.—*Fasano v. Philadelphia Rapid Transit Co.*, 159 A. 219, 104 Pa. Super. 124.

17. Ohio.—*Cleveland Ry. Co. v. Duralia*, 165 N.E. 358, 361, 30 Ohio App. 389. 60 C.J. p 423 note 1.

18. N.Y.—*Sheldon v. Otsego, etc., R. Co.*, 152 N.Y.S. 702, 89 Misc. 482, affirmed 155 N.Y.S. 675, 169 App. Div. 707. 60 C.J. p 432 note 85.

19. Ohio.—*Cincinnati Traction Co. v. Harrison*, 24 Ohio Cir.Ct., N.S., 1. 60 C.J. p 432 note 86.

20. Mo.—*Albert v. United Rys. Co., etc., App.*, 232 S.W. 793.

On the other hand, when meeting an approaching vehicle the motorman is not bound so to control his car as to avoid all possible accidents,²¹ and the streetcar company is not liable for damage from a head-on collision with a vehicle where it appeared in front of the streetcar so suddenly that the motorman lacked sufficient time to avoid the accident,²² or where the streetcar company and its operator have observed all proper precautions.²³ The motorman is not required to take added precautions,²⁴ and is not bound to stop whenever he sees an approaching animal or vehicle.²⁵ The motorman need not anticipate that an approaching motor vehicle will swerve in front of the streetcar,²⁶ or that when nearing an object in its path the motor vehicle will turn onto the trolley track instead of stopping.²⁷ He may assume that the driver of the motor vehicle is in possession of his faculties,²⁸ and, until the contrary appears, he may

assume that an approaching animal or vehicle will be carefully driven,²⁹ and that the driver will see the car in time to take the necessary precautions for his safety.³⁰ He may also assume the animal or vehicle will not be driven onto the track,³¹ or, if on the track, that it will be turned off,³² and, if an accident could not have been avoided by the exercise of ordinary care on the part of the motorman, the street railroad will not be liable.³³ If a motorman, using ordinary prudence, errs in a matter of judgment as to stopping the car in time, or as to the method of stopping it, it is not negligence for which one injured in a collision can recover.³⁴

Although a motorman is not bound to anticipate negligence on the part of the driver of an approaching automobile,³⁵ he must exercise reasonable diligence in analyzing the situation.³⁶ Thus, where the necessity for such action should appear to a reasonably alert and prudent man, the motorman must give

21. Pa.—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554.

Speed of trolley held reasonable

Where trolley car was approaching intersection, on a straight track in wide thoroughfare and during the early morning when there was little vehicular traffic which was proceeding in direction opposite to that of the car, fact that the car was traveling at speed of from thirty to thirty-five miles per hour when it struck an oncoming automobile which had struck a rut and skidded across an adjoining track and into the path of the trolley car did not constitute negligence so as to render street railroad company liable for death of automobile passenger resulting from injuries sustained in collision.—Cox v. Wilkes-Barre Ry. Corp., *supra*.

22. W.Va.—Wilson v. Co-op. Transit Co., 30 S.E.2d 749, 126 W.Va. 943.

23. Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712.

24. Cal.—Taylor v. Pacific, etc., Ry. Co., 158 P. 119, 172 Cal. 638. 60 C.J. p 432 note 88.

25. Minn.—Henry v. St. Paul City Ry. Co., 124 N.W. 245, 109 Minn. 503, 134 Am.S.R. 794. 60 C.J. p 432 note 89.

26. Pa.—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554.

Sudden turn off adjoining track

Streetcar motorman was not guilty of negligence when truck driver in attempting to turn wheels of his truck out of grooves along which

rails of car track were laid suddenly steered truck toward oncoming streetcar twenty feet away on adjoining track.—Bowers v. Des Moines Ry. Co., 259 N.W. 244, 219 Iowa 944.

27. Pa.—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554.

28. Ky.—Louisville, etc., R. Co. v. Bedford's Adm'r, 262 S.W. 941, 203 Ky. 583.

29. Ala.—Boyette v. Bradley, 100 So. 647, 211 Ala. 370. 60 C.J. p 432 note 90.

30. Ga.—English v. Georgia Power Co., 17 S.E.2d 891, 66 Ga.App. 363. Ky.—Louisville, etc., R. Co. v. Bedford's Adm'r, 262 S.W. 941, 203 Ky. 583.

31. Pa.—Harvey v. Philadelphia Rapid Transit Co., 99 A. 796, 255 Pa. 220. 60 C.J. p 432 note 91.

32. Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W. 2d 676, 260 Ky. 334, 102 A.L.R. 712. Pa.—Fasano v. Philadelphia Rapid Transit Co., 159 A. 219, 104 Pa.Super. 124. 60 C.J. p 432 note 92.

Restricted to tracks

A streetcar motorman, on observing automobile approaching where there is ample room for automobile to pass, may act on assumption that before reaching place of danger automobile will turn aside and pass without injury, notwithstanding automobile and streetcar have equal rights in the street, since the street-

car path of travel is limited to the tracks.—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206.

Sufficient care shown by motorman

(1) Failure of motorist whose automobile had passed onto car tracks, due to jog in tracks to narrower part of street, to observe approaching streetcar did not charge streetcar company with negligence so as to render it liable for head-on collision where motorman, on observing automobile, had rung bell and brought car almost to stop before collision.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712.

(2) In view of superior right of streetcar company to the use of its track, a motorman was justified in assuming that an approaching truck would wait behind parked cars instead of coming onto the track and was not negligent in continuing ahead until the truck swerved onto the track, resulting in a head-on collision.—Fasano v. Philadelphia Rapid Transit Co., 159 A. 219, 104 Pa.Super. 124.

33. Tex.—Kelly v. Dallas, etc., St. Ry. Co., Civ.App., 158 S.W. 221. 60 C.J. p 433 note 93.

34. N.Y.—Adsit v. Catskill Electric R. Co., 84 N.Y.S. 393, 88 App.Div. 167.

35. Me.—Dill v. Androscoggin & K. Ry. Co., 135 A. 248, 126 Me. 1.

36. Cal.—Haber v. Pacific Electric Ry. Co., 248 P. 741, 78 Cal.App. 617. 60 C.J. p 433 note 95.

warning,³⁷ or stop his car,³⁸ as where it appears that an approaching driver is oblivious to his peril,³⁹ or will be put in peril,⁴⁰ or that the driver of an automobile is so near the track that he cannot stop,⁴¹ or if it becomes reasonably apparent that the driver is intent on going upon the track,⁴² or if his conduct is such as would lead a motorman of ordinary prudence to conclude that such driver is going upon the tracks in front of the car,⁴³ or if the danger of collision becomes imminent.⁴⁴ A motorman is chargeable with the duty, on observing that an approaching horse which is becoming unmanageable is likely to go in front of the car, to take immediate precautions to avoid a collision.⁴⁵

Sounding gong. On meeting an automobile, the motorman of a streetcar is not required to sound the gong or give warning where there is room for the automobile to pass without injury,⁴⁶ and his failure to sound the gong is immaterial where in any event the performance of such duty would have been unavailing.⁴⁷ If the street railroad fully performs its duty toward a motorist, there will be no liability on it for damage from a head-on collision even though the motorman disobeyed a company rule requiring him to signal.⁴⁸ On the other hand, where a motorman is required by an ordinance to sound his gong when he discovers, or in the exercise of ordinary care should discover, vehicles which may go upon the track, he cannot assume that a wagon being driven toward the track will be stopped,⁴⁹ and such an ordinance requires affirmative action on the part of a motorman to give due warn-

ing to vehicles moving toward the track, so that they may stop before going thereon.⁵⁰

Taking notice of law. A street railroad is bound to take notice of a law requiring vehicles using parts of a highway covered by its tracks, on meeting its cars coming from an opposite direction, to keep to the right, and to control its overtaking cars coming from an opposite direction, in anticipation that such other vehicles might so turn upon the tracks in obedience to the law.⁵¹ An ordinance which requires the agents of a street railroad to look out for vehicles approaching the tracks is continuous,⁵² and applies to all portions of the track,⁵³ and the failure of the motorman to see an approaching automobile from a point from which it could have been seen in the exercise of ordinary care affords no defense.⁵⁴

Where streetcar was standing still when an automobile approaching from the front turned onto the track to pass another automobile standing at the curb as he then had room to do, starting the streetcar toward the automobile so as to strike it before it could be turned off the track constitutes negligence.⁵⁵

§ 234. Approaching Animals or Vehicles on or near Track

Although a streetcar has the right of way, this will not excuse its motorman for a careless collision with an animal or vehicle, and he is under a duty to keep due lookout and to exercise ordinary care in respect of animals or vehicles he approaches.

37. Mo.—Good Roads Co. v. Kansas City Rys. Co., App., 217 S.W. 858.

Unless it is reasonably apparent that driver is aware of the approach of the car, the motorman must give warning thereof.—Good Roads Co. v. Kansas City Rys. Co., supra.

38. Pa.—McCuen v. Philadelphia Rapid Transit Co., 23 A.2d 860, 344 Pa. 112.

39. Cal.—Taylor v. Pacific, etc., Ry. Co., 158 P. 119, 172 Cal. 638.

Mo.—Good Roads Co. v. Kansas City Rys. Co., App., 217 S.W. 858.

40. Ohio.—Mahoning Valley, etc., Ry. Co. v. Houston, 20 Ohio Cir.Ct. 358.

41. Cal.—Taylor v. Pacific, etc., Ry. Co., 158 P. 119, 172 Cal. 638.

42. Ala.—Boyette v. Bradley, 100 So. 647, 211 Ala. 370.

Mo.—Albert v. United Rys. Co., etc., App., 232 S.W. 793.

43. Mo.—Ellis v. Metropolitan St. Ry. Co., 138 S.W. 23, 234 Mo. 657.

44. Pa.—Beam v. Pittsburgh Rys. Co., 77 A.2d 634, 366 Pa. 360, certiorari denied 71 S.Ct. 851, 341 U. S. 936, 95 L.Ed. 1364—McCuen v. Philadelphia Rapid Transit Co., 23 A.2d 860, 344 Pa. 112—McCawley v. Wilkes-Barre Railway Corp., Com. Pl., 37 Luz.Reg.Reg. 21.
60 C.J. p 433 note 2.

45. Mont.—Singer v. Missoula St. Ry. Co., 131 P. 630, 47 Mont. 218.

46. Ky.—Louisville, etc., R. Co. v. Bedford's Adm'r, 262 S.W. 941, 203 Ky. 593.

Purpose of sounding gong

The duty to sound streetcar gong is for protection of those using cross-streets and those who are so placed that they do not see approaching car, and not for those who are approaching streetcar on same street.—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206.

47. W.Va.—Wilson v. Co-op. Transit Co., 30 S.E.2d 749, 126 W.Va. 943.

48. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393.

49. Mo.—Hale v. St. Joseph Ry., Light, Heat & Power Co., 230 S.W. 113, 287 Mo. 499.

50. Mo.—Hale v. St. Joseph Ry., Light, Heat & Power Co., supra.
60 C.J. p 433 note 9.

51. N.J.—Adams v. Camden, etc., R. Co., 55 A. 254, 69 N.J.Law 424.

52. Mo.—Schroeder v. Wells, 276 S. W. 60, 310 Mo. 642.
60 C.J. p 433 notes 10, 11.

53. Mo.—Schroeder v. Wells, supra.

54. Mo.—Riggle v. Wells, App., 287 S.W. 803.

55. Iowa.—Borg v. Des Moines City Ry. Co., 181 N.W. 10, 190 Iowa 909.

Although a streetcar may be entitled to the right of way on that part of a street covered by the tracks, as discussed supra §§ 207-210, this will not excuse a careless collision with another vehicle.⁵⁶ The motorman of a streetcar is under the duty of keeping a lookout for animals and vehicles on or near the track ahead, and he is required to exercise ordinary care for their safety,⁵⁷ should regulate his speed in accordance with prevailing traffic conditions,⁵⁸ and will be guilty of negligence imposing liability on the streetcar company where through lack of due care his car collides with an overtaken vehicle.⁵⁹ However, a motorman may assume, within the limits of prudence,⁶⁰ that a vehicle will be turned off the track in time to avoid a collision when time and opportunity permit,⁶¹ and, in the absence of anything to warn him,⁶² that a vehicle will not suddenly turn onto the track

in front of him,⁶³ and negligence cannot be inferred from the failure of the motorman of a streetcar to anticipate that an automobile would go on the track in front of the streetcar.⁶⁴

On the other hand, a motorman has no right to proceed without regard for the presence of a vehicle,⁶⁵ and the assumption that the driver of the vehicle will exercise reasonable care cannot be indulged beyond the time the danger of collision becomes imminent,⁶⁶ and after the time when it is possible for him to control his car.⁶⁷ Thus, if he sees, or by the exercise of ordinary care could see, that the person in charge of the animal or vehicle is ignorant or heedless of his danger, or that a collision is otherwise likely to occur, it is his duty to use all reasonable means within his power to prevent it⁶⁸ by giving proper warning, as discussed

56. Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317.—Scerca v. Philadelphia Transp. Co., 42 A.2d 593, 352 Pa. 152. 60 C.J. p 425 note 19 [f].

Broad daylight

A streetcar motorman may not carelessly run down an automobile in plain view in broad daylight, even if he has the right of way, and be blameless for his failure to exercise ordinary care to avoid injuring another.—Scerca v. Philadelphia Transp. Co., supra.

Not absolute right

Right of way of a streetcar is not absolute or exclusive under all conditions, and possession of the right of way does not relieve a motorman of the general duty to use due care to avoid injury to others and to make reasonable efforts to prevent a collision.—Brule v. Union St. Ry. Co., 52 N.E.2d 388, 315 Mass. 268.

57. Ind.—Carson v. Perkins, 29 N.E. 2d 772, 217 Ind. 543.
Mass.—Brule v. Union St. Ry. Co., 52 N.E.2d 388, 315 Mass. 268.
Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317.

Extent of duty

All that is required of streetcar motorman approaching or overtaking a vehicle on, or in such proximity to, track as to suggest danger of collision, is to give reasonable notice of approach of car and so likewise to control its movement as in exercise of reasonable care would avoid running over or into it.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S. App.D.C. 297, certiorari denied 66 S. Ct. 824, 327 U.S. 795, 90 L.Ed. 1021.

58. Ind.—Carson v. Perkins, 29 N.E. 2d 772, 217 Ind. 543.

Position of vehicle ahead

In determining whether speed of a streetcar which allegedly overtook and ran into plaintiff's automobile traveling in the streetcar tracks near center of block was excessive, jury was required to consider whether motorman, as the situation presented itself to him, had a right to assume that plaintiff's automobile would, or would not, remain in the path of the streetcar.—Manzella v. St. Louis Public Service Co., Mo.App., 202 S. W.2d 567.

59. Ill.—Marron v. Friel, 66 N.E.2d 509, 328 Ill.App. 586.
Mo.—State ex rel. Spears v. McCullen, 210 S.W.2d 68, 357 Mo. 686. Collisions where overtaking vehicle strikes rear end of trolley see supra § 226.

Motorist on track between parked vehicles

Where a motorist was proceeding along a trolley track between parked cars, making it impossible for him to get off before reaching a free area, and, when he reached such free area, slowed down preparatory to parking therein, with automatic rear stop-lights shining, at which time the trolley struck his car, the motorman was negligent rendering the streetcar company liable for resultant damage.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317.

60. Ala.—Ross v. Brannon, 73 So. 439, 198 Ala. 124.

61. Wash.—McKinney v. City of Seattle, 245 P. 913, 915, 139 Wash. 148.
60 C.J. p 424 note 11.

62. Ill.—Bell v. East St. Louis & S. Ry. Co., 197 Ill.App. 83.
60 C.J. p 424 note 12.

63. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.
Mo.—Ziegelmeier v. East St. Louis & Suburban Ry. Co., 51 S.W.2d 1027, 330 Mo. 1013.
60 C.J. p 424 note 14.

No duty to slacken speed

Where streetcar on private right of way was approaching four-lane highway on which streetcar would run, and motorman saw automobile going in same direction for several hundred feet, motorman was not obliged to slacken speed, since motorist would not be in peril until it appeared that he would drive on tracks in highway, rather than to left of them as he might, and at slower speed than that of streetcar.—Steuernagel v. St. Louis Public Service Co., 211 S.W.2d 696, 357 Mo. 904.

64. Mass.—Behmer v. Worcester Consol. St. Ry. Co., 149 N.E. 148, 253 Mass. 494.
60 C.J. p 429 note 36.

65. N.D.—Acton v. Fargo & M. St. Ry. Co., 129 N.W. 225, 20 N.D. 434.
60 C.J. p 424 note 16.

66. Mo.—Mather v. Metropolitan St. Ry. Co., 148 S.W. 383, 385, 166 Mo. App. 142.
60 C.J. p 425 note 17.

67. Cal.—Fujise v. Los Angeles Ry. Co., 107 P. 317, 12 Cal.App. 207.
Neb.—McKenna v. Omaha & C. B. St. R. Co., 149 N.W. 826, 97 Neb. 281.

68. Mont.—Singer v. Missoula St. Ry. Co., 131 P. 630, 47 Mont. 218.
60 C.J. p 425 note 19.

infra § 236, or checking the speed of the car.⁶⁹ The mere presence of a wagon being driven along a street beside a street railroad is not such an indication that it is liable to turn onto the track as to require the motorman to slacken speed in anticipation of such a move;⁷⁰ and, although he may not be under an absolute duty to stop,⁷¹ he is under the duty of having the car under such control that it may be stopped after he becomes able to discover a vehicle on the track, and before a collision occurs.⁷² If there is an object in the path of the streetcar a sufficient distance ahead to permit the car to stop, the motorman should not deliberately run into it, but on the contrary should so govern the speed of his car as to avoid a collision.⁷³

When confronted by an emergency, prompt action is required on the part of the motorman to bring the car to a standstill,⁷⁴ particularly where there is a statutory or municipal regulation requiring a motorman to stop his car on the first appearance of danger;⁷⁵ and this duty does not necessarily cease when a driver changes his position with respect to the approaching car;⁷⁶ but if, in the exercise of due care, the motorman is unable to stop the car by the use of all reasonable means to do so, the street railroad is not guilty of actionable negligence.⁷⁷ Although a vehicle should not unreasonably obstruct the passage of a streetcar,⁷⁸ the streetcar employees are not justified in attempting to shove a vehicle aside by running against it.⁷⁹ When an approaching automobile has skidded on

track in an attempt to round a curve in the street, the motorman is required to exercise such reasonable care as a person of ordinary prudence and presence of mind would exercise under like circumstances.⁸⁰

Approaching children. A motorman whose streetcar is approaching a child cyclist of tender years is obligated to take all precautions conceivable to an intelligent man in order to avoid a collision.⁸¹

Standing car. It was negligence for the motorman of a streetcar to start the car toward an automobile and strike it before it could be turned off the track, where such automobile was turned on the track to pass another automobile while the car was standing still, and where the automobile would have had room to pass if it had remained so.⁸²

Streetcar conductor owes no duty to keep a lookout for persons driving along the track in front of the car.⁸³

Violation of ordinance relating to cars stopping to take on passengers is not negligence as to a person riding on a vehicle struck by a car.⁸⁴

§ 235. — Parked or Stalled Vehicles

Both the motorman and the conductor of a street railroad car are under a duty to use ordinary diligence in respect of parked or stalled vehicles.

When a vehicle is parked beside the track, both

69. Ind.—Indianapolis Traction & Terminal Co. v. Howard, 128 N.E. 35, 190 Ind. 97.
60 C.J. p 426 note 21.

70. Ala.—Hilton v. Birmingham Ry., Light & Power Co., 68 So. 343, 192 Ala. 474.

71. N.C.—Wright v. Fries Mfg., etc., Co., 61 S.E. 380, 147 N.C. 534.
60 C.J. p 426 note 23.

Duties as to stopping generally see supra § 199.

72. Pa.—Hope v. Southern Pennsylvania Traction Co., 112 A. 920, 270 Pa. 115.
60 C.J. p 427 note 24.

73. Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—Hoffman v. George, 38 A.2d 504, 155 Pa. Super. 501.

74. Wis.—Scheuer v. Manitowoc & Northern Traction Co., 159 N.W. 901, 164 Wis. 333.
60 C.J. p 427 note 25.

75. Tenn.—Memphis St. R. Co. v. Haynes, 81 S.W. 374, 112 Tenn. 712.
60 C.J. p 428 note 26.

76. Mich.—Clark v. Jackson Consol. Traction Co., 133 N.W. 927, 167 Mich. 694.
60 C.J. p 428 note 27.

77. Del.—McCartney v. People's Ry. Co., 78 A. 771, 25 Del. 191.
60 C.J. p 428 note 28.

78. Mo.—Averitt v. Metropolitan St. Ry. Co., 131 S.W. 752, 151 Mo. App. 265.

79. Mo.—Averitt v. Metropolitan St. Ry. Co., supra.
60 C.J. p 428 note 30.

80. Ky.—Smith v. Ohio Valley Electric Ry. Co., 3 S.W.2d 604, 223 Ky. 311.

81. La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.

Parked auto

Where a motorman observed a small boy riding a bicycle ahead of him, who kept close to the curb except when coming to parked automo-

biles, at which time the boy would turn toward the track in order to pass the parked cars, the motorman should have realized that the space between a parked car and the trolley was too narrow for the child to occupy without being struck by the passing trolley, and if the cyclist gave no indication of heeding a warning gong, the motorman should have stopped or taken other precautions to avoid striking the cyclist.—Kahn v. Shreveport Rys. Co., supra.

82. Iowa.—Borg v. Des Moines City Ry. Co., 181 N.W. 10, 190 Iowa 909.

83. Mo.—Wallack v. St. Louis Transit Co., 100 S.W. 496, 123 Mo. App. 160.
60 C.J. p 429 note 37.

Duty of conductor toward parked vehicle see infra § 235.

84. Mo.—Anderson v. Wells, 273 S.W. 233, 220 Mo.App. 19, certiorari quashed, App., 287 S.W. 603.
Duties of street railroads as to stopping cars for passengers see Carriers § 733.

the motorman and the conductor must use ordinary diligence under the circumstances;⁸⁵ it is the duty of the motorman to approach carefully,⁸⁶ and to see that the front end of the car may pass safely,⁸⁷ and the duty of the conductor to watch for, and avoid, obstructions which the car may meet at any time before it has entirely passed.⁸⁸ Where the motorman knows, or by the use of ordinary care should know, that a wagon is so close to the track that the slightest movement of the horse attached thereto will bring it into contact with the car, it is his duty to stop the car until the wagon is moved to a place of safety,⁸⁹ and, if necessary, a motorman is under the duty to stop the car until a vehicle is moved;⁹⁰ but it has been held that the operatives may assume that a parked vehicle has been so placed that it will not be moved so as to strike the car after it has partly passed,⁹¹ and that, where a wagon is standing at the side of the track far enough away for the car to pass without striking it, but the horse attached thereto becomes frightened too late to stop the car, and backs the wagon into it, the street railroad is not liable.⁹² Where the violation of an ordinance as to speed contributes directly to the injury caused by colliding with a vehicle standing at the side of the track, there can be a recovery,⁹³ if the injured person was exercising due care.⁹⁴

Where a motor vehicle is stalled on the tracks, the motorman of a streetcar is put especially on his

guard,⁹⁵ and his conduct with respect thereto is to be judged by the standard of care that would reasonably be expected from a prudent man acting in a like emergency.⁹⁶ Under his duty to keep a lookout for vehicles on the track, when he discovers, or in the exercise of ordinary care should discover, a stalled vehicle on or near the track in a place of apparent peril, it is his duty to exercise ordinary care to prevent a collision,⁹⁷ and the running of an interurban car on a public highway at such a speed that it could not be stopped within the distance within which an automobile stalled on the track could be seen is negligence.⁹⁸ When it becomes apparent that the vehicle is stalled, the motorman is under a duty to slacken speed,⁹⁹ and, if it becomes clear that a stalled vehicle cannot be moved in time to avoid a collision, it is the duty of the motorman to bring the car to a stop,¹ even if he sees it at a place on the tracks where he is under no duty to anticipate its presence.² The fact that a vehicle was stalled on the tracks at a private crossing not frequented by the general public is a circumstance for consideration as bearing on the degree of care which the motorman should have exercised in maintaining a lookout for vehicles on the track.³ The fact that a streetcar which collided with a stalled automobile was running within the maximum speed limit fixed by an ordinance or statute does not absolve the street railroad of liability,⁴ or prevent a finding that such speed was excessive.⁵

85. Cal.—Peak v. Key System Transit Co., 263 P. 578, 88 Cal.App. 354.
Mass.—O'Leary v. Brockton St. R. Co., 58 N.E. 585, 177 Mass. 187.
Passing vehicles generally see *supra* § 232.

Mail truck parked to collect from box

Where mail truck driver, on stopping to collect mail from box at time when there was no streetcar in sight, parked his truck as close to curb as possible in view of snow piled along curb, and motorman of streetcar which struck truck before driver returned thereto had a clear and unobstructed view of truck when he was three hundred feet distant, motorman was negligent.—U. S. v. Philadelphia Transp. Co., D.C.Pa., 38 F. Supp. 246.

86. N.Y.—Volosko v. Interurban St. Ry. Co., 82 N.E. 1090, 190 N.Y. 206, 15 L.R.A., N.S., 1117.
60 C.J. p 429 note 40.

87. Cal.—Peak v. Key System Transit Co., 263 P. 578, 88 Cal.App. 354.

N.Y.—Martin v. Interurban St. R. Co., 84 N.Y.S. 921.

88. Cal.—Peak v. Key System Transit Co., 263 P. 578, 88 Cal.App. 354.

N.Y.—Martin v. Interurban St. R. Co., 84 N.Y.S. 921.

89. Ky.—Louisville Ry. Co. v. Flannery, 121 S.W. 663, 134 Ky. 751, 24 L.R.A., N.S., 560.
60 C.J. p 429 note 43.

90. Ky.—Louisville Ry. Co. v. Flannery, *supra*.
60 C.J. p 429 note 44.

91. Me.—Higgins v. Portland R. Co., 75 A. 289, 106 Me. 39.
60 C.J. p 429 note 45.

92. Me.—Higgins v. Wilmington City R. Co., *supra*.

93. Mo.—Steinmann v. St. Louis Transit Co., 94 S.W. 799, 116 Mo. App. 673.

94. Mo.—Steinmann v. St. Louis Transit Co., *supra*.
60 C.J. p 430 note 48.

95. Pa.—Beaumont v. Beaver Valley Traction Co., 148 A. 87, 298 Pa. 223.

96. Mass.—Labrecque v. Donham, 127 N.E. 537, 236 Mass. 10.

97. Cal.—Whitmeyer v. Southern Pac. Co., 282 P. 1005, 102 Cal.App. 199.
60 C.J. p 430 note 52.

98. Mich.—Fischer v. Michigan Ry. Co., 169 N.W. 819, 203 Mich. 668.

99. Pa.—Roof v. Philadelphia Rapid Transit Co., 24 Pa. Dist. & Co. 199.

1. Cal.—Whitmeyer v. Southern Pac. Co., 282 P. 1005, 102 Cal.App. 199.
Iowa.—Baker v. Des Moines City Ry. Co., 188 N.W. 829, 193 Iowa 1059.

2. Iowa.—Baker v. Des Moines City Ry. Co., *supra*.
60 C.J. p 430 note 55.

3. Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn.App. 42.

4. Cal.—Whitmeyer v. Southern Pac. Co., 282 P. 1005, 102 Cal.App. 199.

5. Cal.—Whitmeyer v. Southern Pac. Co., *supra*.

§ 236. — Duty to Give Warning

Generally speaking, where a motorman sees an animal or vehicle in a dangerous position on or near the track, it is his duty to give a reasonable signal or warning of the approach of the streetcar.

As a general rule, if the motorman sees, or by the exercise of ordinary care could see, an animal or vehicle in a dangerous position on or near the track, it is his duty to give a reasonable signal or warning of the approach of the car,⁶ and failure on the part of a motorman to give audible warning of the approach of a car going at a high rate of speed is evidence of negligence.⁷ However, prudence may or may not require that a signal be given on approaching from the rear.⁸ Warning signals may be unnecessary where the person in charge of the vehicle has knowledge of the approach of the car,⁹ and, where the giving of warning would add nothing to the notice which a person in charge of an animal or vehicle already had of the approach of the streetcar, the question of warnings is usually immaterial.¹⁰

Although it has been held that a motorman cannot assume that a vehicle which he is approaching from the rear will leave the track unless warning is given of the approach of the streetcar,¹¹ or on giving warning that all within hearing will take notice that the car is approaching,¹² where he gives such warning he has the right, to a limited extent at least, to act on the assumption that an animal or vehicle will, if on the track, be turned out in time

to avoid a collision,¹³ or, if about to turn on the track, will desist from so doing,¹⁴ and, if the occupants of a vehicle can hear the warning by the exercise of reasonable care and attention, but drive suddenly onto the track so as to make it impossible to stop the car by the exercise of ordinary care and reasonable effort, there is no negligence on the part of the motorman.¹⁵ However, he may not indulge such presumption after the danger of collision becomes imminent,¹⁶ or where it appears that those in peril are unable to extricate themselves,¹⁷ and, if the person in charge of the animal or vehicle does not hear or heed the signal or warning, or it is otherwise apparent that a collision is likely to occur, it is the duty of the motorman to use all reasonable and practicable means within his power to avoid it,¹⁸ as by checking the speed of the car,¹⁹ and, if necessary, stopping altogether.²⁰

In the absence of statute or ordinance so requiring, the mere fact that a vehicle is headed toward an approaching car does not call for the sounding of gongs and the giving of warnings,²¹ until it is apparent that the driver is intent on going onto the track,²² or is obstructing the paramount rights of the streetcar.²³ However, an ordinance requiring the motorman of a streetcar to sound the gong when approaching vehicles is valid²⁴ and applies to all teams and carriages,²⁵ and especially to an automobile at a place other than at a regular street crossing,²⁶ and the violation of such an ordinance has been held negligence per se;²⁷ but failure to

6. Minn.—*Rawitzer v. St. Paul City R. Co.*, 108 N.W. 271, 98 Minn. 294. 60 C.J. p 430 note 61.

Duty as to warning on rounding curves see *supra* § 228.

7. N.J.—*Consolidated Traction Co. v. Chenoweth*, 35 A. 1067, 61 N.J. Law 554.

8. Ill.—*Sabo v. Aurora, E. & C. R. Co.*, 183 Ill.App. 34. 60 C.J. p 430 note 60.

9. Pa.—*Harper v. Philadelphia Rapid Transit Co.*, 101 A. 1004, 258 Pa. 282. 60 C.J. p 431 note 62.

10. W.Va.—*Blackwood v. Monongahela Valley Traction Co.*, 122 S.E. 359, 96 W.Va. 1. 60 C.J. p 431 note 63.

11. Ky.—*South Covington C. & St. Ry. Co. v. Miller's Adm'x*, 197 S.W. 403, 175 Ky. 701.

12. Conn.—*Riley v. Consolidated Ry. Co.*, 72 A. 562, 82 Conn. 105, 21 L. R.A.N.S., 880.

13. Mass.—*Glazebrook v. West End St. R. Co.*, 35 N.E. 553, 160 Mass. 239. 60 C.J. p 431 note 66.

14. Wis.—*Cawley v. La Crosse City R. Co.*, 82 N.W. 197, 106 Wis. 239.

15. Ark.—*Hot Springs St. R. Co. v. Hildreth*, 82 S.W. 245, 72 Ark. 572.

16. Ill.—*South Chicago City Ry. Co. v. Kinnare*, 96 Ill.App. 210, affirmed 75 N.E. 179, 216 Ill. 451.

17. Ill.—*South Chicago City Ry. Co. v. Kinnare*, *supra*. 60 C.J. p 431 note 70.

18. Me.—*Butler v. Rockland, etc., St. R. Co.*, 58 A. 775, 99 Me. 149, 105 Am.S.R. 267.

Mo.—*Clover v. Joplin, etc., Ry. Co.*, 124 S.W. 43, 140 Mo.App. 413. 60 C.J. p 431 note 71.

19. La.—*Coggin v. Shreveport Rys. Co.*, 84 So. 902, 147 La. 359. 60 C.J. p 431 note 72.

20. Mo.—*Johnson v. Springfield Traction Co.*, 161 S.W. 1193, 176 Mo.App. 174. 60 C.J. p 431 note 73.

21. N.Y.—*Stern v. Brooklyn Heights R. Co.*, 124 N.Y.S. 1043, 140 App. Div. 109.

22. N.Y.—*Stern v. Brooklyn Heights R. Co.*, *supra*.

23. N.Y.—*Stern v. Brooklyn Heights R. Co.*, *supra*.

24. Mo.—*Hale v. St. Joseph, etc., Co.*, 230 S.W. 113, 287 Mo. 499.

25. Va.—*Virginia, etc., Co. v. Wellons*, 112 S.E. 843, 133 Va. 350.

26. Va.—*Virginia, etc., Co. v. Wellons*, *supra*.

27. Mo.—*Hale v. St. Joseph, etc., Co.*, 230 S.W. 113, 287 Mo. 499.

sound the gong is not negligence per se where a person injured in a collision had knowledge of the approach of the streetcar.²⁸

A cable railway is a street railroad within the meaning of an ordinance relating to warning.²⁹

§ 237. On Approach of Animals or Vehicles

The duties of a motorman on meeting an approaching animal or a vehicle are discussed supra § 233.

28. Ark.—Hot Springs St. R. Co. v. Hildreth, 82 S.W. 245, 72 Ark. 572.

29. Mo.—Lamb v. St. Louis Cable Co., 33 Mo.App. 489.

30. Cal.—Saphire v. Los Angeles Transit Lines, 222 P.2d 956, 99 Cal. App.2d 880—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal. App.2d 195—Primm v. Market St. Ry. Co., 132 P.2d 842, 56 Cal.App.2d 480—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal. App. 1.

Okl.—Oklahoma Ry. Co. v. Hentzen, 194 P.2d 847, 200 Okl. 364.

Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1, 60 C.J. p 433 note 16.

Reciprocal care

A motor vehicle driver, observing streetcar approaching street crossing in distance, cannot recklessly drive on crossing in race with car, but is not arbitrarily required to stop and wait for its passage, but he and streetcar motorman are required only to exercise reasonable prudence to avoid injury and may go over crossing without being negligent, if they reasonably believe that crossing can be made safely.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

31. Mo.—Robards v. Kansas City Public Service Co., 125 S.W.2d 891, 233 Mo.App. 962, 60 C.J. p 434 note 19.

Dangerous intersection

(1) Streetcar motorman approaching dangerous intersection at which was located regular car stop at which people were standing would be required to exercise due diligence to discover whether automobiles coming from right on intersecting street had entered zone of imminent danger, or were about to do so.—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256.

(2) In entering a dangerous intersection, the care required of a motor-

man is that he have streetcar at such speed and under such control as to be able to avoid an accident with cross traffic if at all possible.—Gaines v. Philadelphia Transp. Co., 59 A.2d 916, 359 Pa. 610.

(3) At a dangerous public crossing, operator of trolley car, even though it has superior right of way, must exercise high degree of care toward persons reasonably to be expected to appear, such as motorists and other travelers.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

No preëminent right

Streetcars have no absolute or preëminent right of way over intersections, but must use them with due regard to the safety and rights of the general public.—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal.App.2d 195.

On making left turn

(1) Streetcar making left turn at intersection at which traffic was regulated by control signals had no greater right to use of the streets than an automobile would have had under the same circumstances, and it was motorman's duty to operate streetcar with due regard for rights and safety of others lawfully using the streets.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 223 Ind. 481.

(2) Transit company was held liable for injuries sustained when motorist making left-hand turn at intersection was struck by transit company's trolley car.—Dowret v. Brooklyn & Queens Transit Corp., 288 N.Y.S. 43, 248 App.Div. 635, affirmed 7 N.E.2d 686, 273 N.Y. 548.

(3) Where automobile in which plaintiff was riding was in the intersection and driver had signaled his intention to make a left turn before approaching streetcar had entered the intersection, streetcar operator had statutory duty to yield the right of

§ 238. At or Approaching Street Intersections

While a motorman may assume that a driver of a vehicle at or approaching a street crossing will exercise due care, it is obligatory on the motorman to exercise due care, as by controlling his car at the proper speed, maintaining a lookout, and obeying traffic signals.

The rule that travelers on the street and operators of streetcars have equal rights at street intersections, discussed supra § 209, is applicable to accidents involving streetcars and other vehicles colliding at street intersections.³⁰ Accordingly, on approaching a street intersection, the motorman must use due care,³¹ and, likewise, on approaching

way to automobile.—Scerca v. Philadelphia Transp. Co., 42 A.2d 593, 352 Pa. 152.

On making right turn

In action by motorist for damages to his automobile, which he had stopped at left of and about three feet from rear half of streetcar near intersection, and which was struck by the swinging overhang of the streetcar when it made a right turn while motorist was prevented from moving by automobile ahead of his automobile, court properly found that ordinary care required streetcar crew to observe traffic on its left before making the turn, to see that turn could be made in safety to other vehicles.—Charles P. Anderson, Inc. v. St. Paul City Ry. Co., 280 N.W. 3, 203 Minn. 119.

Ordinary care as sufficient

On meeting vehicles at street intersections, proper care on the part of the motorman is not "to do all he can to avoid a collision," but merely to exercise ordinary care.—Cincinnati Traction Co. v. Sanders, 32 Ohio Cir. Ct. 413.

Public and private crossings

(1) More care is required of trolley operator at public crossings than at private crossings.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

(2) Operators of interurban cars crossing a private road must always exercise due care, to be determined by facts and circumstances.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.

Running on private way

Fact that streetcar was running on private right of way on outskirts of city did not lessen duty of motorman on approaching highway crossing.—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220—Thompson v. Reading Transit Co., 100 Pa. Super. 294.

street intersection, must obey traffic signals,³² and make reasonable efforts to avoid a collision.³³ The mere operation of a car at a crossing in such a manner as to render it dangerous for a vehicle to cross in front of it is not negligence.³⁴ Where a motorman is confronted by a sudden and immediate danger, such as a runaway horse at a crossing, he is not required to do what, after mature deliberation, would have seemed to a prudent man to be the wisest thing to do under the circumstances;³⁵ but it has been held, in such case, that, if the motorman saw the horse and could have slowed down sufficiently to let it pass, it was his duty to do so,³⁶ and to stop the car, if it could be done in the exercise of ordinary care, in time to avoid injury.³⁷

A motorman approaching a crossing is justified

in assuming that the driver of a vehicle will take ordinary care for his own safety,³⁸ and will stop before placing himself in a perilous position;³⁹ that the driver of the vehicle will not negligently drive in front of the streetcar;⁴⁰ that the driver will not illegally attempt to pass the streetcar turning onto a spur at an intersection;⁴¹ and that a motor vehicle approaching a crossing in full view of the car will stop before reaching the track,⁴² unless the conduct of the driver is such as should reasonably lead the motorman to apprehend the contrary,⁴³ as where the driver is oblivious to danger,⁴⁴ or is unable to stop or remove himself from peril.⁴⁵ However, it has been held that a motorman has no right to assume that a traveler will wait for the car to pass unless it is so near the crossing,⁴⁶ or its rate of speed so apparent,⁴⁷ that the traveler

Stopping in intersection

A motorman of a streetcar would be negligent if he stopped streetcar across paved portion of highway so as to force approaching truck to leave highway, or strike car, and was not negligent in failing to do so.—*Lotta v. Kansas City Public Service Co.*, 117 S.W.2d 296, 342 Mo. 743.

32. Pa.—*Bruno v. Pittsburgh Rys. Co.*, 200 A. 893, 132 Pa.Super. 414.
Va.—*Virginia Elec. & Power Co. v. Holland*, 37 S.E.2d 40, 184 Va. 893.

Green light

Motorman of trolley car, proceeding on intersection when beckoned by green light, must proceed carefully and guard against injury to automobile in such intersection, since the "go" signal at street intersection confers no authority to motorman to proceed across the intersection regardless of other persons or vehicles already within it.—*Galliano v. East Penn Electric Co.*, 154 A. 805, 303 Pa. 498.

33. Mass.—*Brule v. Union St. Ry. Co.*, 52 N.E.2d 388, 315 Mass. 268.

34. Wis.—*Stafford v. Chippewa Valley Electric R. Co.*, 85 N.W. 1036, 110 Wis. 331.
60 C.J. p 435 note 22.

35. Pa.—*Phillips v. People's Pass. R. Co.*, 42 A. 686, 190 Pa. 222.

36. Ohio.—*Harris v. Cleveland, etc., R. Co.*, 19 Ohio Cir.Ct., N.S., 410.

37. Iowa.—*Christy v. Des Moines City R. Co.*, 102 N.W. 194, 126 Iowa 428.

38. Ala.—*Anniston Electric & Gas Co. v. Rosen*, 48 So. 798, 159 Ala. 195, 133 Am.S.R. 32.

R.I.—*Carney v. United Electric Rys. Co.*, 129 A. 593.

39. La.—*Casey v. Shreveport Rys. Co.*, 7 La.App. 127.

Va.—*Linton v. Virginia Electric & Power Co.*, 174 S.E. 667, 162 Va. 711.

At rural highway crossing

(1) Motorman of electric trolley on approaching rural highway crossing may presume that automobile driver will stop or turn aside until latter's conduct leads motorman to apprehend otherwise.—*Cate v. Fresno Traction Co.*, 2 P.2d 364, 213 Cal. 190.

(2) Motorman on interurban electric car approaching grade crossing had right to assume that truck driver approaching crossing would stop in place of safety.—*Brager v. Milwaukee Elec. Ry. & Light Co.*, 264 N.W. 733, 220 Wis. 65.

40. Md.—*Gross v. Baltimore Transit Co.*, 64 A.2d 147, 192 Md. 278.

R.I.—*Carney v. United Electric Rys. Co.*, 129 A. 593.

Va.—*Linton v. Virginia Electric & Power Co.*, 174 S.E. 667, 162 Va. 711.

60 C.J. p 436 note 34.

Taking of chances

A trolley car motorman was not required to anticipate danger which might attend chances taken by motorist in attempting to cross ahead of trolley car at highway grade crossing.—*Mead v. Louer*, 33 N.E.2d 534, 285 N.Y. 230.

41. N.J.—*Cairns v. Fox, Sup.*, 118 A. 453.

60 C.J. p 436 note 35.

42. Cal.—*Thompson v. Los Angeles & S. D. B. Ry. Co.*, 134 P. 709, 165 Cal. 748.

La.—*Munch v. New Orleans Public Service, App.*, 174 So. 882.

Va.—*Linton v. Virginia Electric & Power Co.*, 174 S.E. 667, 162 Va. 711.

Stop sign

The motorman of streetcar approaching street crossing had right to assume that driver of automobile, approaching crossing from right on intersecting street so far away and so slowly as to convey no intimation that he did not intend to stop, saw streetcar and would stop at intersection, until it appeared from circumstances that he was not going to stop, especially where there was stop sign on such street.—*Weishaar v. Kansas City Public Service Co.*, Mo. App., 128 S.W.2d 332.

Slow moving truck

Mo.—*Johnson v. Kansas City Public Service Co.*, 214 S.W.2d 5, 358 Mo. 253.

43. Mo.—*Newton v. Harvey, App.*, 202 S.W. 249.

60 C.J. p 436 note 37.

Duty to yield right of way

If automobile was so close to intersection that collision was imminent if streetcar proceeded into intersection, it was duty of streetcar motorman to yield right of way to automobile.—*Carlson v. Fredsall*, 37 N.W.2d 744, 228 Minn. 461.

44. Mo.—*Smith v. Kansas City Public Service Co.*, 43 S.W.2d 548, 328 Mo. 979.

60 C.J. p 436 notes 38, 39.

45. Cal.—*Thompson v. Los Angeles & S. D. B. Ry. Co.*, 134 P. 709, 165 Cal. 748.

60 C.J. p 436 note 41.

46. Iowa.—*Bridenstine v. Iowa City Electric Ry. Co.*, 165 N.W. 435, 181 Iowa 1124.

47. Iowa.—*Bridenstine v. Iowa City Electric Ry. Co.*, supra.

cannot reasonably expect to cross the street in safety.

Under an ordinance providing that "the driver of all vehicles" must look out for, and give way to, vehicles approaching simultaneously from their right at intersections, a streetcar motorman is not relieved from the duty to look out for an automobile approaching from his left.⁴⁸ The failure of a car to stop in front of a station on its way to the rear of the station to unload freight and baggage, in the course of which it collided with an automobile at a street crossing adjoining the station, has been held not to be a violation of an ordinance requiring cars to stop at stations.⁴⁹ A motorman may assume that, even though a motor vehicle enters an intersection before the streetcar, it will not violate an ordinance giving the streetcar precedence.⁵⁰

Care before starting. A motorman of a standing streetcar, at a street crossing, must use due care before starting to see that no vehicle is in dangerous proximity,⁵¹ and, if necessary, give warning, as discussed *infra* § 239, and, where he sees

that an approaching vehicle is about to cross in front, he will be negligent in starting his car before waiting for it to cross.⁵² On the other hand, the motorman is not obligated to keep his car at a standstill until all visible traffic has crossed the intersection,⁵³ and, if at the time of starting his car he is justified in believing that moving cross traffic is at a safe distance from the intersection, he is entitled to proceed.⁵⁴

Control. A motorman should have his car under such control at a road intersection as the circumstances may reasonably require,⁵⁵ but is not required to bring his car under complete control whenever he sees in the distance a motor vehicle crossing the tracks,⁵⁶ and he need not keep his car under such control as will preclude a collision under any and all circumstances which may arise.⁵⁷

Lookout. It is the duty of a motorman approaching a street intersection to keep a proper lookout,⁵⁸ but, where it does not appear that the motorman saw, or in the exercise of reasonable care ought to have seen, a vehicle at a crossing, the railroad cannot be charged with negligence.⁵⁹ A motorman

48. Tex.—El Paso Electric Ry. Co. v. Benjamin, Civ.App., 202 S.W. 996.

49. Tex.—Texas Traction Co. v. Wiley, Civ.App., 164 S.W. 1028.
60 C.J. p 437 note 55.

50. Tex.—Havins v. Dallas Railway & Terminal Co., Civ.App., 130 S.W. 2d 878, error refused.

51. W.Va.—Blackwood v. Monongahela Valley Traction Co., 122 S.E. 359, 96 W.Va. 1.

52. Iowa.—Wright v. Des Moines Ry. Co., 1 N.W.2d 259, 231 Iowa 410.

Coming at twenty-five miles per hour
Where motorman started streetcar across intersecting street when truck was thirty-five feet from tracks, in full view and approaching at about twenty-five miles per hour, and there was nothing in the conduct of the truck driver in his approach to suggest to the motorman that he intended to stop at the crossing and wait for the streetcar to pass over the intersection, and delay of one second in starting streetcar would have averted collision, motorman in starting streetcar and colliding with truck was negligent.—Wright v. Des Moines Ry. Co., *supra*.

53. La.—Falgoust v. New Orleans Public Service, App., 170 So. 431.

54. La.—Falgoust v. New Orleans Public Service, *supra*.

55. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.

Pa.—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220.
Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1.
60 C.J. p 434 note 19.

On curve

(1) On rounding curve, motorman was under duty of having car under such control as to be able to stop it if necessary to avoid hitting any vehicle on near-by crossing.—Ehrhart v. York Rys. Co., 162 A. 810, 308 Pa. 566.

(2) Care on curves generally see *supra* § 238.

56. Mich.—Rosenfeld v. City of Detroit, 265 N.W. 490, 274 Mich. 650.

Assumption as to motorist

Streetcar motorman had right to assume that motorist would not drive upon track in face of rapidly approaching streetcar unless motorist first reasonably assured himself that way was open to completely cross track to place of safety.—Rosenfeld v. City of Detroit, *supra*.

57. Cal.—Blythe v. City and County of San Francisco, 188 P.2d 40, 83 Cal.App.2d 125.

58. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.

Iowa.—Wright v. Des Moines Ry. Co., 1 N.W.2d 259, 231 Iowa 410.

Mass.—Brule v. Union St. Ry. Co., 52 N.E.2d 388, 315 Mass. 268.

Mo.—Smith v. Kansas City Public Service Co., 43 S.W.2d 548, 328 Mo. 979.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1.

Tex.—Dallas Ry. & Terminal Co. v. Darden, Com.App., 38 S.W.2d 777.
Duty to keep lookout generally see *supra* § 228.

Extent of duty

Streetcar motorman can be charged only with what he saw or would have seen if he had been keeping proper lookout, with respect to negligence in collision with automobile at street intersection.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

Vigilance

Operator of streetcar approaching street intersection must be vigilant in his watch for automobiles.—Aungst v. Central California Traction Co., 1 P.2d 56, 115 Cal.App. 113.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.

59. Mass.—Kiley v. Boston Elevated Ry. Co., 93 N.E. 632, 207 Mass. 542, 31 L.R.A.N.S., 1153.
60 C.J. p 435 note 21.

is not required to stop and look up and down the street he is crossing,⁶⁰ and a motorman need not keep a lookout for vehicles which may run into the rear of his car at a street intersection.⁶¹

Railroad crossing rules. Whether or not the rules applicable to railroad crossings, discussed in Railroads §§ 710-762, apply to collisions at an interurban railroad crossing has been the subject of some confusion due to the fact that an interurban railroad partakes of the character of a street railroad when its tracks are laid in the streets and of the nature of a railroad when its tracks are laid on its own private way.⁶² Where the tracks are laid in the streets, the strict rules of care enjoined on railroads in respect of crossings do not apply,⁶³ but, where the tracks are laid on private property, such rules do apply,⁶⁴ and the rights and duties of an interurban electric railroad in operating trains over a crossing in rural territory are similar to those of a company operating steam-propelled trains.⁶⁵ A law providing that every "railroad corporation" shall maintain cattle guards at road crossings applies to a street railroad.⁶⁶ The legal principles applicable to a crossing accident between a motor vehicle and a streetcar or train are determined by the physical surroundings and not by the motive power involved.⁶⁷

Speed. A motorman approaching a road intersection should proceed at a reasonable speed, and what constitutes a reasonable speed will depend on the surrounding circumstances.⁶⁸ The motorman must reduce speed if the circumstances indicate the necessity for so doing,⁶⁹ and he must slacken speed the moment it is apparent to him, in the exercise of ordinary care, that a warning is not going to be effective to prevent a collision.⁷⁰ It has also been held that, when approaching a crossing at an unlawful and negligent rate of speed, a motorman has no right to assume that a driver within eight feet of the track and moving at a speed of seven to ten miles an hour will not go thereon where there would have been no danger except for the motorman's negligence,⁷¹ and that, when running through a stop signal at a reckless and dangerous rate of speed, a motorman should not assume that automobiles can or will yield the right of way.⁷² On the other hand, a motorman is not necessarily under a duty to reduce the speed of the car on seeing an automobile in front of the car,⁷³ or whenever he sees an automobile approaching an intersection,⁷⁴ until the danger becomes imminent,⁷⁵ and it appears that the driver of a vehicle either will not or cannot extricate himself from danger.⁷⁶

A motorman approaching a road intersection may assume until the contrary is shown that a motorist

Failure to take second look

Operator of streetcar who saw bus moving at a moderate rate of speed a city block away from intersection was not at fault in failing to take a second look in direction of the bus before proceeding across intersection. —Blanchard v. New Orleans Public Service, La.App., 25 So.2d 741.

60. Ky.—South Covington & C. St. Ry. Co. v. Crutcher, 123 S.W. 268, 135 Ky. 698.
60 C.J. p 435 note 23.

61. Mass.—Kiley v. Boston, etc., Ry. Co., 93 N.E. 632, 207 Mass. 542, 31 L.R.A., N.S., 1153.

62. Ind.—Snow v. Indianapolis, etc., R. Co., 93 N.E. 1089, 47 Ind.App. 189.

63. Ind.—Citizens' St. R. Co. v. Abright, 42 N.E. 238, 1028, 14 Ind. App. 433.

64. Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287—Tice v. Pacific Electric Ry. Co., 96 P.2d 1022, 36 Cal.App.2d 66, rehearing denied 97 P.2d 844, 36 Cal. App.2d 66.

Ind.—Snow v. Indianapolis, etc., R. Co., 93 N.E. 1089, 47 Ind.App. 189.

Ohio.—Grove v. City Ry. Co., 64 N.E. 2d 429, 78 Ohio App. 37.

65. Cal.—Lindsey v. Pacific Electric Ry. Co., 296 P. 131, 111 Cal. App. 482.

66. N.Y.—Evans v. Utica, etc., Ry. Co., 89 N.Y.S. 1089, 44 Misc. 345.
60 C.J. p 437 note 52.

67. W.Va.—Casto v. Charleston Transit Co., 200 S.E. 841, 120 W. Va. 676.

68. Mo.—Williams v. St. Louis Public Service Co., 73 S.W.2d 199, 335 Mo. 335.
60 C.J. p 434 note 20.
Speed generally see supra § 230.

69. La.—Moch v. Shreveport Rys. Co., App., 41 So.2d 741.

Pa.—Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220—Gaines v. Philadelphia Transp. Co., 59 A.2d 916, 359 Pa. 610—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220.

Va.—Virginia Electric & Power Co. v. Veilines, 175 S.E. 35, 162 Va. 671.

Auto already committed to cross

Where automobile was committed to crossing before streetcar started

across intersection at right angles, motorman must reduce speed sufficiently to enable automobile to pass. —Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

70. Mo.—Holden v. Missouri R. Co., 76 S.W. 973, 177 Mo. 456—Good Roads Co. v. Kansas City Rys. Co., App., 217 S.W. 858.

71. Mo.—Friedman v. United Rys. Co. of St. Louis, App., 254 S.W. 556.

72. Ark.—Arkansas Power & Light Co. v. Cummins, 28 S.W.2d 1077, 181 Ark. 1145, 182 Ark. 1.
60 C.J. p 436 note 45.

73. Mo.—Flack v. Metropolitan St. Ry. Co., 145 S.W. 110, 162 Mo.App. 650.

74. Me.—Dill v. Androscoggin & K. Ry. Co., 135 A. 248, 126 Me. 1.
60 C.J. p 435 note 25.

75. Del.—Farley v. Wilmington, etc., R. Co., 52 A. 543, 19 Del. 581.
Iowa.—Delling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

76. Me.—Dill v. Androscoggin & K. Ry. Co., 135 A. 248, 126 Me. 1.
60 C.J. p 435 note 27.

will obey laws requiring him to reduce speed.⁷⁷ An ordinance regulating the speed of streetcars at intersections in congested districts is inapplicable to intersections in other districts.⁷⁸ Where a motorman runs a car at a rate of speed forbidden by an ordinance and rule of the company without giving the customary signals of approach at a street intersection, it is negligence on the part of such motorman, and the company is responsible therefor.⁷⁹ Where an eastbound car struck a vehicle thirty or forty feet west of a westbound car stopped at the northeast corner of an intersection for the purpose of letting off and taking on passengers, it was "about to pass" such car within the meaning of an ordinance prohibiting a car about to pass another car going in the opposite direction at a point where passengers may alight from, or board, it, from proceeding at more than three miles an hour.⁸⁰ The fact that an ordinance forbidding a vehicle to be driven through a procession is inapplicable to streetcars does not excuse a motorman from driving toward a procession at an unreasonable speed.⁸¹ Also, the fact that a streetcar was not exceeding the speed limit will not excuse negligent operation thereof.⁸²

It is not negligence per se to run an interurban electric car over an ordinary country highway crossing at fifty miles an hour or more,⁸³ and, where conditions at the crossing permit approaching motorists, in the exercise of reasonable care, to see the approach of the interurban, but they fail to look and a collision results, the fifty-mile an hour speed

of the interurban is not actionable negligence.⁸⁴ On the other hand, operation of a streetcar on a public highway in which the company owns no exclusive right of way, at such a speed as to prevent its stopping before reaching a crossing has been held negligence per se.⁸⁵ An ordinance limiting the speed of railway trains cannot be applied to trains propelled by electricity with respect to a collision at a street crossing.⁸⁶

Violation of company rule relating to the spacing of cars was held to be evidence tending to show negligence where a car running immediately behind another collided with a wagon which was crossing the track at an intersection.⁸⁷

§ 239. — Duty to Give Warning

Where the circumstances so require, a motorman must give warning of the approach of the streetcar to an intersection.

The motorman of a streetcar may, in the exercise of due care, be required to give a proper warning by sounding the gong, or otherwise, when approaching a street crossing⁸⁸ or driveway,⁸⁹ but in the absence of statute or ordinance so requiring, a motorman is not obligated to signal merely by virtue of the fact that he is approaching a road intersection,⁹⁰ and, where the driver of a vehicle is aware of danger from the approach of the streetcar, failure of the motorman to sound his gong is ordinarily immaterial.⁹¹ On the other hand, a mo-

77. W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W.Va. 112.

78. Md.—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278.

79. Mass.—Horsman v. Brockton & P. St. Ry. Co., 91 N.E. 897, 205 Mass. 519.

80. Mo.—Loehr v. Wells, App., 253 S.W. 461.

81. Ala.—Birmingham Elec. Co. v. Toner, 37 So.2d 584, 251 Ala. 414.

Army convoy

Where a convoy of army trucks, with their lights on in nighttime, spaced at regular intervals, were moving through intersection at steady pace, mere fact that ordinance prohibiting operator of vehicle driving through a procession was not applicable to streetcar operator did not change duty which rested on operator to drive at a prudent speed not greater than was reasonable and proper.—Birmingham Elec. Co. v. Toner, *supra*.

82. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal. App. 1.

83. Ind.—Watson v. Vanosdal, 19 N.E.2d 269, 215 Ind. 149.

84. Ind.—Watson v. Vanosdal, *supra*.

85. Va.—Sutton v. Virginia Ry. & Power Co., 99 S.E. 670, 125 Va. 449.

86. Tex.—Texas Traction Co. v. Wiley, Civ.App., 164 S.W. 1028. 60 C.J. p 437 note 54.

87. S.C.—McCormick v. Columbia Electric St. Ry., Light & Power Co., 67 S.E. 562, 85 S.C. 455, 21 Ann.Cas. 144.

88. Cal.—Saphire v. Los Angeles Electric St. Ry., 222 P.2d 956, 99 Cal. App.2d 880.

La.—Moch v. Shreveport Rys. Co., App., 41 So.2d 741. 60 C.J. p 437 note 60.

89. Mass.—Horsman v. Brockton & P. St. Ry. Co., 91 N.E. 897, 205 Mass. 519.

90. Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W. 2d 332.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

Probability as to stopping

The motorman of streetcar approaching street crossing owed no duty to warn driver of automobile approaching crossing on intersecting street until he should have concluded that automobile was approaching in such manner and under such circumstances as to indicate that it was not going to stop.—Weishaar v. Kansas City Public Service Co., Mo.App., 128 S.W.2d 332.

91. Mich.—Patterson v. Detroit United Ry., 153 N.W. 670, 187 Mich. 567.

60 C.J. p 437 note 66.

Purpose of warning

The purpose of giving a warning is to apprise a person of impending danger of which he is not aware, to enable him to protect himself against

torman cannot assume that the driver of a vehicle approaching the track at a street intersection is aware of the approach of the streetcar and neglect to give warning,⁹² unless it is reasonably apparent that the driver is aware of the approach of the car,⁹³ and the motorman will not necessarily be absolved from negligence merely because a driver should have seen the car.⁹⁴ Where there is a collision between a streetcar and a vehicle, the question of signals has been held to be of importance only where the collision occurred at a street intersection,⁹⁵ or where night or bad weather made such signals necessary in the exercise of due care to warn a vehicle ahead of the approach of the car, as discussed *infra* § 240.

A motorman of a standing streetcar at an intersection must sound a proper warning if necessary before starting his car,⁹⁶ and a motorman who starts his car from a standing position, and without warning runs it into a vehicle using a street crossing, is negligent.⁹⁷ Where a motorman of a standing car signals a motorist to come ahead while another streetcar, with which the motorist collides, is moving toward the intersection, the street railroad company is not guilty of actionable negligence where the motorist sees and is aware of the approaching car.⁹⁸

Statutory duty to give warning. The duty to

sound a gong or give other warning on approach to an intersection may be imposed by statute or ordinance,⁹⁹ and the motorman is negligent in failing to sound his signal, even though a motorist sees the approaching streetcar,¹ although the violation of an ordinance relating to the sounding of the gong at street crossings has been held not to be negligence *per se*.² The violation of an ordinance requiring the continuous ringing of a bell on a streetcar while in motion does not render the company guilty of negligence *per se* in a crossing accident,³ although the ordinance is in a condition in the grant of franchise to the company, since such condition is unreasonable.⁴

Signaling devices at road crossings. If a signaling device at an interurban railroad crossing is reasonably necessary to warn travelers of the approach of cars or trains, the interurban railroad is under a duty to install one,⁵ even though it has not been directed to do so by the public authorities,⁶ and, where it undertakes to install such a device, it is obligated to use reasonable care in the construction and maintenance thereof.⁷ The protection it should give at the crossing may depend on the number of trains and people using it.⁸ In the absence of a statutory requirement, an interurban railroad need not maintain crossing signs elsewhere than on its own property,⁹ and at an ordinary crossing is not obligated to install devices

it, and, where he is fully aware of existence of the danger, warning is unnecessary.—*O'Neill v. Minneapolis St. Ry. Co.*, 7 N.W.2d 665, 213 Minn. 514.

92. Cal.—*Carey v. Pacific Gas & Electric Co.*, 242 P. 97, 75 Cal.App. 129.

Mo.—*Good Roads Co. v. Kansas City Rys. Co.*, App., 217 S.W. 858.

93. Cal.—*Carey v. Pacific Gas & Electric Co.*, 242 P. 97, 75 Cal.App. 129.

Mo.—*Good Roads Co. v. Kansas City Rys. Co.*, App., 217 S.W. 858.

94. D.C.—*Bernhardt v. City, etc., Ry. Co.*, 263 F. 1009, 49 App.D.C. 265.

95. Ill.—*Mullen v. Johnson*, 196 Ill. App. 303.
60 C.J. p 438 note 70.

96. W.Va.—*Blackwood v. Monongahela Valley Traction Co.*, 122 S.E. 359, 96 W.Va. 1.

97. N.Y.—*McGurgan v. New York City R. Co.*, 106 N.Y.S. 201, 121 App.Div. 519.

98. N.Y.—*Hirsch v. Interurban St. Ry. Co.*, 94 N.Y.S. 330.

60 C.J. p 438 note 74.

99. Iowa.—*Swisher v. Interurban R. Co.*, 130 N.W. 404, 151 Iowa 384.

S.C.—*McCormick v. Columbia Electric St. Ry., Light & Power Co.*, 67 S.E. 562, 85 S.C. 455, 21 Ann.Cas. 144.

60 C.J. p 437 notes 62, 63.

1. Cal.—*Salvo v. Market St. Ry. Co.*, 2 P.2d 585, 116 Cal.App. 339.

2. Ohio.—*Griese v. Cleveland Electric St. R. Co.*, 24 Ohio Cir.Ct., N.S., 60.

3. Wis.—*Stafford v. Chippewa Valley Electric R. Co.*, 85 N.W. 1036, 110 Wis. 331.

4. Wis.—*Stafford v. Chippewa Valley Electric R. Co.*, *supra*.

5. Ind.—*Watson v. Brady*, 185 N.E. 516, 205 Ind. 1.

Required by topography and congestion

Failure to install special warning signal or bell at interurban railroad crossing may constitute actionable

negligence where crossing is so hazardous, by reason of topography and congested traffic, that some special warning signal or bell is reasonably necessary.—*Watson v. Brady*, *supra*.

6. Ind.—*Watson v. Brady*, *supra*.

7. Cal.—*Startup v. Pacific Elec. Ry. Co.*, 180 P.2d 896, 29 Cal.2d 866.

Improper placement of switch

Where evidence established that crossing signaling system was so constructed that, when one train followed another on track on which accident occurred within six hundred feet, signal would cease to operate when first train cleared crossing, the fact that placement of switches could have been adjusted so as to give warning of approach of all trains could be considered by jury in determining whether company used reasonable care in installation and operation of signaling system.—*Startup v. Pacific Elec. Ry. Co.*, *supra*.

8. Ind.—*Watson v. Brady*, 185 N.E. 516, 205 Ind. 1.

9. W.Va.—*McClagherty v. Tri-City Traction Co.*, 14 S.E.2d 432, 123 W. Va. 112.

of any particular type.¹⁰ Where the matter of crossing safety devices is regulated by statute or ordinance, there should be a due compliance therewith, but a substantial compliance is sufficient.¹¹ The absence of a suitable safety device at an interurban road crossing is immaterial where such absence did not contribute to the accident.¹²

§ 240. Operating at Night or under Adverse Weather Conditions

The care exercised by a motorman operating at night or in adverse weather should be commensurate with the conditions encountered.

The motorman of a streetcar is not warranted in assuming that, because of a storm and darkness, no one will be on the track,¹³ and under such conditions he is required to proceed with extra caution,¹⁴ and, where mist and darkness prevent a motorman from observing clearly the position of a motor vehicle,¹⁵ or discovering whether it has cleared the tracks,¹⁶ he should have the car under such control that he can stop it in time to avoid a collision with the vehicle after the rays of the headlight enable him to see it,¹⁷ and, when the brilliance of the lights on a streetcar is reduced under an ordinance requiring them to be screened, the operating speed must be reduced in proportion.¹⁸ A motorman's act in running at an excessive rate of speed without giving warning after seeing a lighted motor vehicle ahead may be negligence,¹⁹ and it has been held that, when because of darkness a motorman is unable to

see far enough ahead to give vehicles warning, he must continually sound the gong in anticipation of their being on the track;²⁰ but it seems that this rule does not obtain on a clear night when the car is equipped with a good headlight, where there is no unusual obstruction preventing a view of the car,²¹ and failure to sound the gong is not such negligence as will render the street railroad liable when the driver of a motor vehicle sees the lights of an approaching car in time not to go on the track.²² When running his car at night with the headlight not burning, a motorman must use extraordinary care,²³ but it has been held not to be negligent to fail to have a light on the rear of a snowsweeper streetcar while it is waiting at a railroad crossing.²⁴

It is negligence per se for a street railroad to operate cars at night at a greater rate of speed than will enable those in charge of a car to stop it within the distance covered by its own lights, to avoid collisions with vehicles on the tracks.²⁵

When operating car in fog, the motorman may be negligent in running at a high rate of speed, although he discovers the peril as soon as possible, and does everything in his power to avert a collision, where the peril, although not sooner discovered, might have been averted but for the speed.²⁶ However, if it is shown that a fog did not in any way contribute to an accident, the absence of burning headlights or the failure to sound the gong on a car which collides with a team is not material evi-

10. Ind.—Watson v. Brady, 185 N.E. 516, 205 Ind. 1.

Flashing signals

Interurban electric railroad does not owe public duty of maintaining flashing signals or similar warnings at all ordinary crossings in country where there is no unusual danger or extraordinary hazard.—Watson v. Brady, supra.

11. Signs held sufficient

A sign, with words "railroad crossing" in letters eight inches high on right side of highway pavement about twenty-five feet from interurban railroad crossing fairly warned travelers approaching crossing of proximity of tracks, as required by statute, even if character of crossing and surrounding conditions required sign on their side of tracks in addition to standard railroad sawbuck sign and crossing sign maintained by highway commission about thirty feet from tracks on opposite side.—Hitchcock v. Iowa Southern Utilities Co. of Delaware, 6 N.W.2d 29, 233 Iowa 301.

12. W.Va.—McClagherty v. Tri-City Traction Co., 14 S.E.2d 432, 123 W.Va. 112.

Car visible to motorist

W.Va.—McClagherty v. Tri-City Traction Co., supra.

13. Minn.—Heiden v. Minneapolis St. Ry. Co., 191 N.W. 254, 154 Minn. 102.

14. Minn.—Heiden v. Minneapolis St. Ry. Co., supra.
60 C.J. p 438 note 80.

15. Mich.—Travelers' Indemnity Co. v. Detroit United Ry., 159 N.W. 528, 193 Mich. 375.

16. Mich.—Travelers' Indemnity Co. v. Detroit United Ry., supra.

17. Minn.—Heiden v. Minneapolis St. Ry. Co., 191 N.W. 254, 154 Minn. 102.
60 C.J. p 438 note 83.

18. Ind.—Indianapolis & Cincinnati Traction Co. v. Senour, 122 N.E. 772, 71 Ind.App. 10.
60 C.J. p 439 note 84.

19. Mo.—Bruening v. Metropolitan St. Ry. Co., 168 S.W. 247, 181 Mo. App. 264.
60 C.J. p 439 note 85.

20. Mo.—J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co., 89 Mo.App. 391.

21. Wis.—Stafford v. Chippewa Valley Electric R. Co., 85 N.W. 1036, 110 Wis. 331.
60 C.J. p 439 note 87.

22. Md.—Upton v. United Rys., etc., Co., 110 A. 454, 136 Md. 212.
60 C.J. p 439 note 88.

23. Iowa.—Delling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

24. Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378.

25. W.Va.—Chambers v. Princeton Power Co., 117 S.E. 480, 93 W.Va. 598, 29 A.L.R. 1041.

26. N.Y.—Fisher v. Union R. Co., 83 N.Y.S. 694, 86 App.Div. 365.

dence of negligence on the part of the street railroad when it does not appear that the absence of such warnings contributed to the injury.²⁷ It has been held that, when fog or rain and snow obscure the view, it is the duty of operatives of streetcars to proceed not in the usual manner, but in a cautious manner, so as to insure the safety of others on a public thoroughfare, and to warn them of danger.²⁸

Where the surface of the street is wet and slippery, the motorman must proceed with care commensurate with such conditions,²⁹ but may assume that a motorist will likewise observe the care required under such circumstances.³⁰ The slippery condition of the intersection is immaterial if it in no way contributes to the accident.³¹

§ 241. Collision with Ambulance

Under some statutes a streetcar must yield the right of way to an ambulance even when traffic signals are set for the car and against the ambulance.

Under some statutes the right of way ordinarily accorded a streetcar at an intersection with the "go" sign in its favor will be denied on approach of an ambulance with siren sounding.³² The failure of a streetcar motorman to observe an ordinance which gave right of way at street intersections to

traffic going north and south cannot be relied on by the owner of an ambulance as necessarily creating liability for damages to it in a collision.³³ An ambulance which was under the jurisdiction of a health department, but did not belong to it, which collided with a streetcar, has been held not to be within an ordinance providing that an "ambulance of the department of health" shall have the right of way in the streets.³⁴

§ 242. Collision with Fire Apparatus

Fire apparatus ordinarily has the right of way as against streetcars.

It is the duty of the motorman or other person in charge of a streetcar to give way to, and to use due precaution to avoid colliding with, a fire engine, truck, or wagon,³⁵ and to hold himself in readiness to avoid such collision when he has reason to anticipate that such an engine, truck, or wagon may appear,³⁶ as when he is approaching and passing a house in which they are kept.³⁷ It has been held that at common law firemen going to a fire are given the right of way over streetcars,³⁸ but there is also authority to the contrary.³⁹ Fire apparatus may possess superior rights on the streets by virtue of statute,⁴⁰ ordinance,⁴¹ or custom,⁴² even though the motorman of the streetcar has a green light

27. Pa.—Mackey v. Philadelphia & West Chester Traction Co., 76 A. 201, 227 Pa. 482.

28. Mo.—Engelman v. Metropolitan St. R. Co., 113 S.W. 700, 133 Mo. App. 514.

29. Ohio.—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932.

Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

30. Tex.—Carrell v. Dallas Railway & Terminal Co., Civ.App., 151 S.W. 2d 869, error dismissed, judgment correct.

31. Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

32. Minn.—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.

Prima facie negligence

Streetcar motorman, by entering an intersection on a "go" traffic signal at a time when motorman could have seen and heard an ambulance approaching with siren sounding and red light displayed, resulting in a collision, violated statute and was prima facie guilty of negligence.—

Rogers v. Minneapolis St. Ry. Co., supra.

33. Md.—Cook v. United Rys., etc., 104 A. 37, 132 Md. 553. 60 C.J. p 441 note 26.

34. N.Y.—Dillon v. Nassau Electric R. Co., 68 N.Y.S. 1098, 59 App.Div. 614.

35. Ind.—Public Utilities Co. v. Handorf, 112 N.E. 775, 185 Ind. 254. Mo.—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103. 60 C.J. p 439 note 97, p 441 note 18.

Degree of duty

Instruction which stated that it was motorman's duty to exercise highest degree of care to discover fire department vehicle, and that on discovering such vehicle it was motorman's duty immediately to stop, imposed no higher duty than required by ordinance.—State ex rel. Kansas City Public Service Co. v. Shain, 165 S.W.2d 428, 350 Mo. 316.

Reliance on motorman

Hook and ladder fire truck had right of way over streetcar, and fireman could have relied on motorman obeying ordinance requiring streetcar to stop immediately after clear-

ing intersection.—Raymore v. Kansas City Public Service Co., Mo.App., 141 S.W.2d 103.

36. La.—Dole v. New Orleans R. & Light Co., 46 So. 929, 121 La. 945, 19 L.R.A., N.S., 623. 60 C.J. p 439 note 98.

37. La.—Dole v. New Orleans R. & Light Co., supra. 60 C.J. p 440 note 99.

38. Mo.—Duffy v. Kansas City Rys. Co., App., 217 S.W. 883.

39. N.J.—Knox v. North Jersey St. R. Co., 57 A. 423, 70 N.J.Law 347, 1 Ann.Cas. 164. 60 C.J. p 440 note 3.

40. N.J.—Knox v. North Jersey St. R. Co., supra. Pa.—Urban v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb.Leg.J. 439. 60 C.J. p 440 note 8.

41. La.—Boylan v. New Orleans, etc., Co., 71 So. 360, 139 La. 185, Ann.Cas.1918A 287. 60 C.J. p 440 note 9.

42. N.J.—Knox v. North Jersey St. R. Co., 57 A. 423, 70 N.J.Law 347, 1 Ann.Cas. 164. 60 C.J. p 440 note 10.

in his favor.⁴³ On the other hand, it has been held that negligence cannot be predicated on the mere fact that a car involved in a collision with fire apparatus was running at a high speed,⁴⁴ and that the only duty resting on a street railroad is to exercise reasonable care under the circumstances.⁴⁵

Under an ordinance specifically giving fire apparatus the right of way, the driver of a fire truck has the right to assume that the motorman of an approaching streetcar, on discovering the truck, will so control the car as to give the truck the right of way,⁴⁶ and that, regardless of intent, proof of negligence establishes a violation of such an ordinance.⁴⁷ The right of way given fire apparatus by such an ordinance is absolute,⁴⁸ the motorman need not know that it is going to a fire,⁴⁹ and he is not excused when it develops that the apparatus was going to a fire unless he did not know, or did not have good reason to believe, that it was approaching.⁵⁰ Under an ordinance providing for a penalty for the obstruction of fire apparatus, negligence on the part of a street railroad, regardless of intent, will establish a violation of the ordinance, and create a liability in favor of one injured as a result of such negligence without fault on his part.⁵¹ Violation of such an ordinance may be regarded as negligence as a matter of law⁵² or negligence per se.⁵³

Company rule. The exercise of precautions as to the peculiar rights of fire apparatus may be required by a rule or regulation of the street rail-

road.⁵⁴ However, the violation of a company rule relating to speed has been held not to be negligence per se, but evidence bearing on the question whether a faster rate is in accordance with careful management.⁵⁵

§ 243. Collision with Police Vehicle

Police vehicles ordinarily have the right of way over streetcars.

Ordinarily it is the duty of the motorman of a streetcar to yield the right of way to a police vehicle signaling its advance.⁵⁶ Under an ordinance giving a police patrol the right of way, a streetcar motorman is required to stop the car if necessary to yield such right of way,⁵⁷ and such an ordinance applies to street intersections.⁵⁸ By virtue of custom a motorman may be required to stop the car on the approach of a police vehicle,⁵⁹ and the failure of a motorman to stop when it is shown that, if he had been reasonably attentive to the approach of a police patrol, he could have stopped the car in time to have avoided a collision has been held a proximate cause of injury, notwithstanding other causes may have contributed to the accident.⁶⁰

§ 244. Collision with Dog or Other Animal Not under Control of Owner

A streetcar company is liable for damage to an animal not under the control of its owner where through negligence of the company's servants its car collides with the animal.

43. Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error dismissed.

44. N.Y.—New York v. Metropolitan St. R. Co., 85 N.Y.S. 693, 90 App. Div. 66, affirmed 75 N.E. 1128, 182 N.Y. 536.

45. N.Y.—New York v. Metropolitan St. R. Co., supra.

46. N.Y.—New York v. Metropolitan St. R. Co., supra.

47. Ind.—Indianapolis Traction & Terminal Co. v. Hensley, 115 N.E. 934, 186 Ind. 479.

48. Mo.—Hackleman v. Kansas City Rys. Co., 217 S.W. 618, 203 Mo.App. 125.

49. Mo.—Hackleman v. Kansas City Rys. Co., supra.

50. Mo.—Hackleman v. Kansas City Rys. Co., supra.
60 C.J. p 441 note 15.

51. Ind.—Indianapolis Traction & Terminal Co. v. Hensley, 115 N.E. 934, 186 Ind. 479.

52. N.C.—Spittle v. Charlotte, etc., Ry. Co., 75 S.E. 910, 175 N.C. 497.
60 C.J. p 441 note 19.

53. Ind.—Indianapolis Traction & Terminal Co. v. Hensley, 115 N.E. 934, 186 Ind. 479.
60 C.J. p 441 note 20.

54. La.—Dole v. New Orleans R. & Light Co., 46 So. 929, 121 La. 945, 19 L.R.A., N.S., 623.
60 C.J. p 440 note 7.

55. Mich.—McKernan v. Detroit Citizens' St. R. Co., 101 N.W. 812, 138 Mich. 519, 68 L.R.A. 347.

56. Mo.—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445.

Noise of streetcar

Fact that streetcar is making noise does not relieve company from liability for negligence of motorman, since

the noise placed a greater duty of care on motorman who had not heard alarm of police patrol.—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464.

Siren sounding

It was the duty of trolley bus operator approaching intersection at such speed and distance that bus could be stopped before entering intersection to yield the right of way to police car entering intersection with siren sounding and red light on.—Rowe v. Kansas City Public Service Co., Mo.App., 248 S.W.2d 445.

57. Mo.—Hogan v. Kansas City Public Service Co., 19 S.W.2d 707, 322 Mo. 1103, 65 A.L.R. 129.

58. Mo.—Nolan v. Kansas City Rys. Co., App., 247 S.W. 429.

59. Mo.—Hogan v. Fleming, 297 S.W. 404, 317 Mo. 524.

60. Mo.—Hogan v. Fleming, supra.
60 C.J. p 441 note 25.

A streetcar company is liable for damage if through the incompetency, inattention, or carelessness of its servants a car collides with an animal not under the control of its owner,⁶¹ and a motorman should slacken speed where the circumstances indicate that this is necessary to avoid injury to the animal.⁶² Although a motorman may not relieve himself of a charge of negligence by relying entirely on the alertness of an animal to avoid injury,⁶³ and may not proceed without regard to the presence of an animal near the tracks,⁶⁴ in the absence of anything to warn him to the contrary he may assume that the animal will not suddenly turn onto the tracks in front of him,⁶⁵ and need not stop the car to avoid injury to it unless there is something about the action and movements of the animal, or its inaction, to show that it is oblivious to the dan-

ger or unable to get off the track.⁶⁶ A law relating to the liability of railroad companies for stock killed or injured by its locomotives or cars does not apply to street railroads.⁶⁷

Loose horses. The rule that a motorman may assume that a person on the track will leave the track until it becomes evident that he is oblivious to danger, discussed *infra* § 251, has no application to loose horses incapable of comprehending danger and of intelligent action;⁶⁸ but it has been held that, when the motorman sees an untied horse some distance away, between the track and the gutter, he is not under the duty to slow down and get the car under such control that he can avoid a collision if the horse suddenly comes onto the track, and he can assume that the horse is gentle until the contrary appears.⁶⁹

5. INJURIES TO PERSONS ON OR NEAR TRACKS

§ 245. In General

It is the duty of a street railroad company to exercise such reasonable and ordinary care in the management and operation of its cars as the particular circumstances may require to avoid injuring persons who may be on or near its tracks.

Since travelers on a public street along which streetcar tracks are laid have an equal right with the street railroad company to use such street, as discussed *supra* § 207, it is the duty of the company to exercise such reasonable and ordinary care in the management and operation of its cars as the particular circumstances may require, to avoid injuring persons, such as pedestrians or other persons

who may be on or near its tracks in such street,⁷⁰ whether the pedestrians are children or adults,⁷¹ and if it fails to exercise such care it is guilty of negligence and liable for injuries caused thereby.⁷² What constitutes ordinary care toward a person who is injured by the operation of a streetcar, while he is on or near the tracks, depends on the circumstances of the particular case,⁷³ and greater precautions are necessary in order to fulfill the rule in some instances than in others.⁷⁴

A streetcar motorman, in the exercise of ordinary care, is not required to do everything in his power to avoid an accident to a pedestrian,⁷⁵ nor is he required to take the care that men of extreme prudence

61. Minn.—Harper v. St. Paul City R. Co., 109 N.W. 227, 99 Minn. 253, 116 Am.S.R. 415, 6 L.R.A.,N.S., 911.

60 C.J. p 415 note 87, p 426 note 21 [I] (1).

62. Ill.—West Chicago St. R. Co. v. Klecka, 94 Ill.App. 346.
60 C.J. p 426 note 21 [J].

63. Tenn.—Citizens' Rapid-Transit Co. v. Dew, 45 S.W. 790, 100 Tenn. 317, 66 Am.S.R. 754, 40 L.R.A. 518.

Dog on track

Tenn.—Citizens' Rapid-Transit Co. v. Dew, *supra*.

64. Ala.—Mobile Light & R. Co. v. Mackay, 50 So. 1035, 163 Ala. 111.

65. Ala.—Mobile Light & R. Co. v. Mackay, *supra*.

66. Mo.—Klein v. St. Louis Transit Co., 93 S.W. 281, 117 Mo.App. 691.
60 C.J. p 426 note 23 [k], [l], p 432 note 90 [c].

67. Tex.—San Antonio St. R. Co. v. Wray, Civ.App., 37 S.W. 461.

68. Mo.—Windle v. Southwest Missouri R. Co., 153 S.W. 282, 168 Mo. App. 596.

69. N.Y.—Hoffman v. Syracuse Rapid-Transit Co., 63 N.Y.S. 442, 50 App.Div. 83.

70. Ky.—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.
Mass.—Ristuccia v. Boston Elevated Ry. Co., 186 N.E. 592, 283 Mass. 529.
60 C.J. p 441 note 30.

71. Mo.—Kube v. St. Louis Transit Co., 78 S.W. 582, 103 Mo.App. 582.

72. N.Y.—O'Callaghan v. Metropolitan St. R. Co., 75 N.Y.S. 171, 69 App.Div. 574, affirmed 66 N.E. 1112, 174 N.Y. 521.
60 C.J. p 442 note 32.

Negligence of street railroad company as proximate cause of injury see *supra* § 212.

Pedestrian injured avoiding street-car

Where pedestrian was forced to run to avoid streetcar and was struck by motorcycle midway between streetcar tracks and opposite sidewalk, street railroad was not absolved from responsibility for accident because car did not come in contact with pedestrian.—Mahan v. Richardson, 1 N.E.2d 100, 284 Ill.App. 493.

73. D.C.—Capital Traction Co. v. Apple, 34 App.D.C. 559.
60 C.J. p 442 note 35.

74. Mo.—Kube v. St. Louis Transit Co., 78 S.W. 582, 103 Mo.App. 582.

75. Ohio.—Cincinnati Traction Co. v. Johnson, 32 Ohio Cir.Ct. 594.

might take,⁷⁶ but he is required to exercise such care as a person of ordinary prudence and caution according to the usual and general experience of mankind would exercise in the same situation and circumstances.⁷⁷ Thus, it is the duty of the company to exercise such care as is reasonably demanded by all the surrounding circumstances, with respect to looking out for persons on or near the track, as discussed *infra* § 248, the speed and control of the car, *infra* § 249, the sounding of the bell or gong, *infra* § 248, and the slowing down and stopping of the car, *infra* § 251. Where, however, a street railroad company exercises due care in the management and operation of its cars, it is not liable for injuries to individuals on or near its tracks, which result from unavoidable accidents, without any fault on its part.⁷⁸

Custom. Where a person on or near street railroad tracks sustains personal injuries as a direct result of a negligent or improper act of a streetcar motorman, the mere fact that the injurious act was customary will not relieve the company of liability.⁷⁹

Change of relation from passenger to pedestrian. The obligations of a street railway company to a person as a passenger having ended when on alighting he has reached a place of safety on the road,⁸⁰ the company's liability for personal injuries caused by it immediately thereafter must be based on its obligations to individuals lawfully on the street.⁸¹

§ 246. Violation of Statute or Ordinance

The violation of an ordinance by a street railroad company is not negligence toward a person injured unless the ordinance was intended for the protection of such person.

The mere violation of an ordinance in operating a streetcar does not constitute negligence toward a person on or near the track who is injured as a proximate result of such violation, where the ordi-

nance was not intended to protect against injury to such persons;⁸² but an ordinance requiring a streetcar about to pass another car going in the opposite direction at a point where passengers get on or off to reduce its speed and sound a warning is not limited in its application to one who gets off a streetcar or is about to get on.⁸³ A statute providing that no person shall operate a trolley or streetcar without due regard for the safety and rights of pedestrians and other vehicles merely prescribes a general rule of conduct and not a requirement to do or not do a specific act, so that a violation of the statute is not negligence *per se*.⁸⁴

§ 247. Equipment

A street railroad must exercise a high degree of care to equip its cars with such appliances as will prevent injuries to persons on or near its tracks.

A street railroad must exercise a high degree of care to equip its cars with such appliances as will prevent injuries to persons on or near its tracks,⁸⁵ but it has been held that the duty is only as to discovering and avoiding injury to those persons on or near the track who are using the streets in the usual way.⁸⁶

Lights. Where the headlight on a streetcar is neither different from, nor more powerful than, those in common use on streetcars at night in similar localities, its use at the time a pedestrian is injured cannot properly be found to be negligent,⁸⁷ and the mere fact that a streetcar is equipped with a powerful headlight the rays of which had a tendency to blind a pedestrian as the car approached the point where he is standing does not indicate negligence by the street railroad company.⁸⁸ As to a pedestrian who is struck while crossing the track, the fact that the car had no headlight is immaterial where there was sufficient light to permit the car to have been seen a block away.⁸⁹ With respect to

76. Mo.—Kube v. St. Louis Transit Co., 78 S.W. 582, 103 Mo.App. 582.

77. Conn.—Hurley v. Connecticut Co., 172 A. 86, 118 Conn. 276. 60 C.J. p 442 note 39.

78. Pa.—Patton v. Philadelphia Traction Co., 20 A. 682, 132 Pa. 76. 60 C.J. p 443 note 44.

79. Mo.—Gilman v. Fleming, App., 265 S.W. 104. 60 C.J. p 443 note 45.

80. Kan.—Ferguson v. Kansas City Public Service Co., 156 F.2d 869, 159 Kan. 520.

81. Kan.—Ferguson v. Kansas City Public Service Co., *supra*.

82. Kan.—Shelden v. Wichita R. & Light Co., 264 P. 732, 125 Kan. 476. 60 C.J. p 443 note 46.

83. Mo.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

84. Ohio.—Koppelman v. Springer, 104 N.E.2d 695, 157 Ohio St. 117.

85. N.C.—Ingle v. Asheville Power, etc., Co., 90 S.E. 953, 172 N.C. 751.

86. Va.—Virginia R., etc., Co. v. Winstead, 89 S.E. 83, 119 Va. 326.

87. Mass.—Anger v. Worcester Consol. St. Ry., 120 N.E. 399, 231 Mass. 163.

88. Mass.—Daigneau v. Worcester Consol. St. Ry. Co., 120 N.E. 400, 231 Mass. 166. 60 C.J. p 444 note 55.

89. Or.—Plinkiewisch v. Portland Ry., Light & Power Co., 115 P. 151, 58 Or. 499.

a pedestrian who fell over a fender on a standing streetcar, negligence of the streetcar company cannot be implied from the mere fact that the car was standing unlighted,⁹⁰ where it does not appear that the car so stood for an unreasonable length of time.⁹¹

Brakes. Failure to equip its streetcars with adequate brakes, in violation of a city ordinance, proximately resulting in injuries to a person on the track, is negligence for which the company is liable.⁹²

Fenders. In the absence of a statute requiring that a fender be used, if a proper fender would have prevented an injury, the absence of such a fender is a continuing negligence which will make the streetcar company liable for injuries proximately resulting from failure to provide such fender.⁹³ Under a statute requiring that all railway companies use practical fenders in front of all passenger cars, failure to equip a streetcar with such a fender, resulting in personal injuries to persons on the track, will make the railway company liable.⁹⁴ Under ordinances requiring streetcars to be equipped with fenders, the company may be under a duty, as to persons who are on or near its tracks, to provide its cars with suitable fenders.⁹⁵ Failure to comply with an ordinance requiring cars to be equipped with fenders,⁹⁶ as well as failure to use the particular fender required by ordinance,⁹⁷ has been held to constitute negligence per se. While a street railway company cannot be allowed to violate a statute requiring that streetcars be equipped with fenders, and escape liability on the ground that the company has substituted some other

device which, in its judgment, is better,⁹⁸ where the type of fender used is much better and safer than other types in general use, such statute is complied with.⁹⁹

Raising and lowering fender. In the ordinary operation of a streetcar there is no duty on the part of the motorman to drop the fender;¹ that duty arises only when he sees a person in danger of being run over by the car,² and even then the motorman is not negligent for failing to drop the fender, when he had no opportunity to do so.³ Similarly, the motorman cannot be convicted of negligence in failing to lower a fender, under circumstances where it is plain that he had but an instant in which to act, and that acting on impulse he did that which his judgment told him to do.⁴ Failure immediately to lift a streetcar fender at the terminus of the route resulting in injuries to a pedestrian does not constitute negligence⁵ where the fender was not permitted to remain an obstruction for an unreasonable length of time,⁶ particularly where the car was on a downgrade and a rule of the company required the motorman to attend to the brakes until the passengers were discharged and the conductor came to the front of the car,⁷ despite the fact that the motorman might have lifted the fender with a hook when the car came to a stop.⁸ A street railroad company is not negligent toward a pedestrian, who is struck by a fender on the rear of a streetcar, simply because the fender was not raised before the car was backed around a curve where the injury occurred,⁹ particularly where it does not appear that there is any necessity for,¹⁰ or custom of,¹¹ keeping the fenders on the rear end of streetcars raised; and, even where there appears to be

90. N.Y.—Adams v. Metropolitan St. R. Co., 81 N.Y.S. 553, 82 App.Div. 354.

91. N.Y.—Adams v. Metropolitan St. R. Co., supra.

92. N.Y.—Jetter v. New York, etc., R. Co., 2 Abb.Dec. 458, 2 Keyes 154.

93. N.C.—Smith v. Charlotte Electric R. Co., 92 S.E. 382, 173 N.C. 489.

60 C.J. p 444 note 61.

94. N.C.—Smith v. Charlotte Electric R. Co., supra.

60 C.J. p 444 note 62.

95. Wash.—Tecker v. Seattle, R. & S. Ry. Co., 111 P. 791, 793, 60 Wash. 570, Ann.Cas.1912B 842.

60 C.J. p 444 note 63.

96. Or.—Rudolph v. Portland Ry., Light & Power Co., 144 P. 93, 72 Or. 560.

97. Ill.—Chicago City R. Co. v. O'Donnell, 114 Ill.App. 359.

98. La.—Handy v. New Orleans Public Service, Inc., App., 120 So. 271.

99. La.—Handy v. New Orleans Public Service, Inc., supra.

60 C.J. p 444 note 67.

1. Ohio.—Vetter v. Cincinnati Tract. Co., 32 Ohio Cir.Ct. 635.

2. Ohio.—Vetter v. Cincinnati Tract. Co., supra.

60 C.J. p 445 note 69.

3. Colo.—Lutz v. Denver City Tramway Co., 131 P. 258, 54 Colo. 371.

60 C.J. p 445 note 70.

4. Mo.—Battles v. United Rys. Co., 161 S.W. 614, 178 Mo.App. 596.

60 C.J. p 445 note 71.

5. N.Y.—Poland v. United Traction Co., 95 N.Y.S. 498, 107 App.Div. 561.

6. N.Y.—Poland v. United Traction Co., supra.

7. N.Y.—Poland v. United Traction Co., supra.

8. N.Y.—Poland v. United Traction Co., supra.

60 C.J. p 445 note 75.

9. Pa.—Hoffman v. Philadelphia Rapid Transit Co., 63 A. 409, 214 Pa. 87.

10. Pa.—Hoffman v. Philadelphia Rapid Transit Co., supra.

11. Pa.—Hoffman v. Philadelphia Rapid Transit Co., supra.

a custom of keeping the rear fender raised, the company is not liable for injuries to a pedestrian where, in the particular instance, the fender is down without any want of care on the part of the company.¹²

Overhang. The mere fact that a streetcar is constructed in such a manner that the rear end extends out over the rails a distance of five feet in rounding a curve does not constitute negligence toward a pedestrian who is injured by the overhang of such a car at a curve.¹³

§ 248. Lookouts, Signals, and Other Warnings

a. Lookouts

b. Signals and other warnings

a. Lookouts

It is the duty of the motorman of a streetcar to exercise reasonable and ordinary care to discover persons using the street on or near the track, and likely to be injured by the car, in time to avoid injuring them.

It is the duty of the driver or motorman of a streetcar to exercise reasonable and ordinary care to discover persons using the street on or near the track, and likely to be injured by the car, in time to avoid injuring them,¹⁴ and, if he fails to discover a person on or near the track, when by the

exercise of ordinary care he could have done so in time to stop the car or otherwise avoid the injury, it is negligence for which the company is liable.¹⁵ Thus, the streetcar company has been held liable for injuries to persons on or near the tracks when such injuries occurred while the motorman's attention was, at the time of the accident, diverted from a proper lookout to other matters,¹⁶ as where an accident was caused by a moving car while the driver was inside the car collecting fares or making change for passengers,¹⁷ where the motorman's attention was centered on winding up the car sign over his head,¹⁸ where he was looking back into the car instead of looking ahead,¹⁹ where he left the brake and went to the side of the car to look back at some boys attempting to jump on the car and did not again look forward until too late to avoid an accident,²⁰ where the operator of the car was leaning in a listless attitude,²¹ and where he was looking in a direction opposite to that of the movement of the car.²²

The company has been held liable for a failure of the motorman to see a traffic officer who was run down by a streetcar while such officer was directing traffic at a street intersection ahead of the car.²³ It cannot be said that, if a motorman had kept a proper lookout ahead, he would not have been able to see a person on or near the track sooner than another person on the car who was looking ahead.²⁴

12. Mass.—Gargan v. West End St. R. Co., 57 N.E. 217, 176 Mass. 106, 79 Am.S.R. 298, 49 L.R.A. 421. 60 C.J. p 445 note 79.

13. Ky.—Gribbins v. Kentucky Terminal & Traction Co., 150 S.W. 338, 150 Ky. 276. 60 C.J. p 445 note 80.

14. Ky.—Brooks v. New Albany & L. Elec. Ry. Corp., 132 S.W.2d 777, 280 Ky. 157—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

La.—Phelan v. New Orleans Public Service, App., 56 So.2d 173.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.3d 347, 222 Minn. 105.

Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663—Murray v. Kansas City Public Service Co., 61 S.W.2d 334.

60 C.J. p 445 note 82.

Lookouts, signals, and warnings generally see supra § 197.

Gross negligence see infra § 250.

Lookout as to children or others under disability see infra §§ 260, 262.

Lookout while rounding curves see infra § 254.

Statutory and municipal regulations as to lookouts see supra § 169.

Obstruction to view

La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

Charged with knowledge

A motorman whose interurban car struck pedestrian in safety zone was chargeable with such knowledge of situation as exercise of ordinary care on part of motorman would have disclosed.—Elder v. Rutledge, 27 N.E.2d 358, 217 Ind. 459.

Other tracks

Motorman was under duty of vigilance to avoid danger to pedestrians crossing tracks on which his trolley car was running, but court could not assume that motorman was vigilant also to see what was happening on another track.—Hernandez v. Brooklyn & Queens Transit Corp., 32 N.E. 2d 542, 284 N.Y. 535.

15. Mo.—Murray v. Kansas City Public Service Co., 61 S.W.2d 334, 60 C.J. p 446 note 83.

16. Va.—Virginia Electric & Power Co. v. Blunt's Adm'r, 163 S.E. 329, 158 Va. 421.

17. Neb.—Brooks v. Lincoln St. R. Co., 36 N.W. 529, 22 Neb. 816. 60 C.J. p 446 note 85.

18. N.Y.—McDade v. International Ry. Co., 138 N.E. 488, 235 N.Y. 11. 60 C.J. p 446 note 86.

19. Mo.—Esckridge v. Metropolitan St. Ry. Co., 157 S.W. 105, 170 Mo. App. 548.

N.Y.—Mentz v. Second Ave. R. Co., 41 N.Y. 619, 3 Abb.Dec. 274.

20. Ky.—Leach v. Owensboro City Ry. Co., 125 S.W. 708, 137 Ky. 292.

21. Mass.—Collins v. South Boston R. Co., 7 N.E. 856, 142 Mass. 301, 86 Am.R. 675.

22. N.C.—Ingle v. Asheville Power & Light Co., 90 S.E. 953, 172 N.C. 751.

60 C.J. p 446 note 90.

23. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

24. Mo.—Esckridge v. Metropolitan St. Ry. Co., 157 S.W. 105, 170 Mo. App. 548.

60 C.J. p 447 note 92.

At particular places. A streetcar company owes a duty to maintain a careful lookout for persons who may be on or near its tracks, when operating its cars in the streets of a city,²⁵ whether the street is one which is frequently used or one which is seldom used by the public,²⁶ and this duty exists particularly in a thickly populated portion of the city.²⁷ A motorman must keep a vigilant lookout when approaching a place where he knows people are constantly on or approaching the track,²⁸ but it has been held that there is no duty to keep a lookout for persons on or near the track, at points other than crossings, in places where the streetcar tracks do not constitute part of a street.²⁹ Where a street railway company permits a public use of its tracks at a particular place for a long period of time, it is the duty of its motormen to keep a constant lookout ahead so as to avoid injuries to persons at such point.³⁰

Sufficiency of lookout. In the exercise of his duty to use reasonable and ordinary care to discover persons on or near the track the motorman is required to keep a vigilant,³¹ sharp,³² or careful³³ lookout. The motorman is not only required to keep a constant lookout for persons on the track,³⁴ but he must also keep a diligent lookout to avoid injury to one who may be in dangerous proximity to the

track;³⁵ and it has been held that the operator of a streetcar must maintain a vigilant watch³⁶ or a constant and careful lookout³⁷ for persons who may be approaching the track. Under the so-called vigilant watch ordinances motormen may be required to maintain a vigilant watch for persons on, near, or approaching the track.³⁸ In addition to his duty to maintain a vigilant, careful, or sharp lookout, the motorman may be required to maintain such a lookout as would enable him to see the first appearance of danger to a person on or near the track,³⁹ but the company will not be liable for the failure of the motorman to maintain such a lookout, unless the danger appeared soon enough to enable him to use means to avert the danger.⁴⁰

While it is the duty of the operator of a car to discover all discoverable persons who are in front of his car⁴¹ or in close proximity thereto,⁴² the duty of discovery is not absolute,⁴³ and it is not the duty of a motorman to leave his car and make a personal inspection of the fender to see that no one has attached himself thereto.⁴⁴ Although it is the motorman's duty to look along the whole line of the street to guard against collision with anyone likely to come in the way of the car,⁴⁵ the motorman is not required at each instant to have his eyes focussed on every object, on each side of the track,

25. Ala.—Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357.

Ky.—Ohio Valley Electric Ry. Co. v. Payne, 3 S.W.2d 223, 223 Ky. 197.

26. Ala.—Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357—Birmingham Elec. Co. v. Graddick, 49 So.2d 318, 35 Ala.App. 484, certiorari denied 49 So.2d 320, 254 Ala. 556.

27. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484.

28. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

29. Ala.—Birmingham Ry., Light & Power Co. v. Strickland, 68 So. 911, 192 Ala. 596.

60 C.J. p 447 note 97.

30. Mo.—Freeman v. Kansas City Public Service Co., App., 30 S.W.2d 176.

60 C.J. p 447 note 98.

31. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

60 C.J. p 447 note 1.

The term "proper lookout" as applied to an operator of an electric bus imposes on the driver the duty of being watchful and reasonably

alert so as to see persons on the road sufficiently far in advance of his vehicle to enable him to avoid striking them and he must keep his visual consciousness awake as to things in front of him and coming into his path from the sides, or back substantially as far as he can see without turning his head so as to take the part immediately in front of him out of field of vision.—Miller v. Utah Light & Traction Co., 86 P.2d 37, 96 Utah 369.

32. Mo.—Eskridge v. Metropolitan St. Ry. Co., 157 S.W. 105, 170 Mo. App. 548—Ross v. Metropolitan St. Ry. Co., 88 S.W. 144, 113 Mo.App. 600.

33. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484.

60 C.J. p 447 note 3.

34. Ala.—Mobile Light, etc., Co. v. Burch, 68 So. 509, 12 Ala.App. 421. Iowa.—Carr v. Interurban Ry. Co., 171 N.W. 167, 185 Iowa 872.

35. Ala.—Mobile Light & R. Co. v. Brooks, 66 So. 824, 11 Ala.App. 595.

60 C.J. p 447 note 5.

36. Fla.—Consumers' Electric Light & St. R. Co. v. Pryor, 32 So. 797, 44 Fla. 354.

Mo.—Bunyan v. Citizens' R. Co., 29 S.W. 842, 127 Mo. 12.

37. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

60 C.J. p 447 note 7.

38. Mo.—Heigold v. United Rys. Co. of St. Louis, 271 S.W. 773, 308 Mo. 142.

60 C.J. p 447 note 8.

39. Mo.—Draper v. Kansas City Rys. Co., 203 S.W. 646, 199 Mo.App. 485.

40. Mo.—Draper v. Kansas City Rys. Co., supra.

41. D.C.—Washington-Virginia Ry. Co. v. Himmelright, 42 App.D.C. 532.

60 C.J. p 448 note 12.

42. La.—Heydorn v. New Orleans Public Service, App., 35 So.2d 893.

60 C.J. p 448 note 13.

43. La.—Heydorn v. New Orleans Public Service, supra.

44. Iowa.—Bruhn v. Ft. Dodge St. Ry. Co., 192 N.W. 296, 195 Iowa 454.

60 C.J. p 448 note 14.

45. Wis.—Forrestal v. Milwaukee Electric Ry. & Light Co., 97 N.W. 182, 183, 119 Wis. 495.

60 C.J. p 448 note 15.

as well as on everything in front,⁴⁶ and he is not required to look in any one place all the time, so as to discover persons who may be on or near the track.⁴⁷ The operator of a streetcar is not guilty of negligence merely because he omits to keep a lookout at each side of the car to the rear of the front platform to prevent injury to persons coming laterally into collision with the side of the car,⁴⁸ unless the circumstances are such as to require such precaution.⁴⁹ Where the operator of the streetcar is not so stationed that he can observe the track, the company must provide a lookout at a place where the track may be observed and the result of the observation immediately communicated to the operator.⁵⁰

Compliance of equipment with law as not absolving from duty. Despite the fact that the equipment of a streetcar,⁵¹ such as a headlight,⁵² is in compliance with the law, the operator is nevertheless required to keep a vigilant lookout.⁵³

Whether person on or near track is prone or erect. The motorman is bound to keep a lookout for a person who is prone upon the track as well as one who is erect.⁵⁴

Conductor. It is not the duty of the conductor on a streetcar to keep a lookout for pedestrians.⁵⁵

b. Signals and Other Warnings

A person operating a streetcar is under a duty to give an adequate and timely warning of the approach

of the car to persons who may be on or near the track when the circumstances are such as to require such warning.

A person operating a streetcar is under a duty to give an adequate and timely warning of the approach of the car to persons who may be on or near the track when the circumstances are such as to require such warning.⁵⁶ Thus, it is the duty of streetcar operators to give warning of the approach of their cars to persons who may be dangerously near the cars,⁵⁷ and especially to persons who may not be aware of their presence,⁵⁸ as where a car is being run on a track in a direction opposite to that in which such cars are customarily run,⁵⁹ whether or not required by ordinance to give such warning.⁶⁰ Where a streetcar has been stopped at an unusual and dangerous place,⁶¹ and whenever a car of a street railway company is rapidly approaching a point in the highway where existing conditions render it apparent that the danger of injury to persons on or near the track will be materially lessened by sounding a warning,⁶² it is the legal duty of the company and its motormen to sound such warning, and failure to do so is negligence.

It has been held that it is clearly as much the duty to make this effort to minimize or avoid danger at any place on the highway as at street crossings.⁶³ On the other hand, it has been held that, as to persons who may be on or near its tracks, a street railroad company owes no duty constantly to ring its car bells from one end of the route to the other,⁶⁴

46. La.—*Pyette v. New Orleans Public Service*, 120 So. 483, 10 La. App. 300, followed in *Carrick v. New Orleans Public Service*, 120 So. 485, 10 La. App. 105.
60 C.J. p 448 note 16.

47. Ill.—*Segal v. Chicago City Ry. Co.*, 216 Ill. App. 11.

48. Ind.—*Elder v. Rutledge*, 27 N. E.2d 358, 217 Ind. 459.
N.Y.—*Bulger v. Albany R. Co.*, 42 N. Y. 459.
Utah.—*Miller v. Utah Light & Traction Co.*, 86 P.2d 37, 96 Utah 369.

49. Ind.—*Elder v. Rutledge*, 27 N.E. 2d 358, 217 Ind. 459.

50. W.Va.—*Prunty v. Tyler Traction Co.*, 110 S.E. 570, 90 W.Va. 194.
60 C.J. p 448 note 20.

51. Cal.—*Tucker v. City and County of San Francisco*, 296 P. 101, 111 Cal. App. 720.

52. Cal.—*Tucker v. City and County of San Francisco*, supra.

53. Cal.—*Tucker v. City and County of San Francisco*, supra.

54. Ala.—*Birmingham Ry., Light & Power Co. v. Fuqua*, 56 So. 578, 174 Ala. 631.

Duty to maintain lookout for:
Children lying on track see infra § 260.

Otherwise disabled persons see infra § 262.

Trespasser see supra § 193.

55. Mo.—*Kamoss v. Kansas City & W. B. Ry. Co.*, App., 202 S.W. 434.
60 C.J. p 448 note 25.

56. Ky.—*Brooks v. New Albany & L. Elec. Ry. Corp.*, 132 S.W.2d 777, 280 Ky. 157.

60 C.J. p 449 note 27.

Duty to give warning generally see supra § 202.

Failure to give warning as proximate cause of injury to persons on or near tracks see infra § 212.

Statutory and municipal regulations as to warnings and signals by street railroads generally see supra § 169.

57. Md.—*Storrs v. Hink*, 173 A. 66, 167 Md. 194.

Wash.—*Mitchell v. Tacoma R., etc. Co.*, 37 P. 341, 9 Wash. 120.

58. Wash.—*Mitchell v. Tacoma R., etc. Co.*, supra.

59. Mo.—*Shipley v. Metropolitan St. Ry. Co.*, 128 S.W. 768, 144 Mo. App. 7.

60. Wash.—*Mitchell v. Tacoma R., etc. Co.*, 37 P. 341, 9 Wash. 120.

61. Minn.—*Wright v. Minneapolis St. Ry. Co.*, 23 N.W.2d 347, 222 Minn. 105.
60 C.J. p 449 note 32.

62. Colo.—*Denver City Tramway Co. v. Brown*, 143 P. 364, 57 Colo. 484.

Conn.—*Murphy v. Derby St. Ry. Co.*, 47 A. 120, 73 Conn. 249.

63. Colo.—*Denver City Tramway Co. v. Brown*, 143 P. 364, 57 Colo. 484.
Duty to sound warning at street crossings see infra § 252.

64. N.Y.—*Kuhnen v. Union R. Co.*, 41 N.Y.S. 774, 10 App. Div. 308.

and that a streetcar company is not ordinarily under a duty to such persons to have its cars sound a warning while running between intersecting streets or within a street block,⁶⁵ particularly in the daytime,⁶⁶ and where the motorman has no reason to anticipate the necessity of giving warning to anyone.⁶⁷ In the absence of an ordinance requiring that a signal be given at a certain point, the rule of ordinary care must be applied,⁶⁸ and there is no want of due care toward a pedestrian, who may be near the track, if no signal is given, where the pedestrian is at a place requiring no signal.⁶⁹

Under particular circumstances, the sounding of a warning may be unnecessary, as where the person on or near the track has actual knowledge of the approach of the car,⁷⁰ since the only purpose of sounding the gong or other warning is to attract attention and give warning that the car is approaching.⁷¹ Therefore, a failure to sound a warning under such circumstances does not constitute negligence.⁷²

§ 249. Rate of Speed and Control of Car

A street railroad company has the duty, toward persons who may be on or near its track, to operate its cars at a reasonable rate of speed.

A street railroad company has the duty, toward persons who may be on or near the track, to operate its cars at a reasonable rate of speed.⁷³ What

amounts to an excessive rate of speed, so as to constitute negligence toward a person who is on or near the track, may vary with the circumstances.⁷⁴ Although the speed at which a streetcar is moving is not necessarily excessive,⁷⁵ and even though the excessive speed at which a streetcar is run, at the time of causing a personal injury to one on or near its tracks, may not of itself be sufficient to create any liability,⁷⁶ as in a case where there is no particular relation between the speed of the car and the injury sustained,⁷⁷ the speed may be a circumstance tending to increase the danger of injury to one on or near the track. Under general rules, the operation of a streetcar at a rate of speed exceeding that fixed by ordinance may constitute negligence as to persons injured while on or near the tracks, as a proximate result of such excessive speed.⁷⁸

Control of car. Persons operating streetcars, particularly in thickly populated parts of a city,⁷⁹ should exercise ordinary care to keep their cars under control,⁸⁰ or at such speed and under such control that if persons are on or dangerously near the track the car may be stopped and injury averted.⁸¹ The fact that a driver of a streetcar had his head turned toward the car rather than the opposite direction in which the car was going is a circumstance indicating inattention and careless management on his part.⁸²

65. La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

60 C.J. p 449 note 36.

Whether company required to give warning between intersecting streets as to:

Children see *infra* § 260.

Persons coming from behind other vehicles see *infra* § 253.

Workmen see *infra* § 255.

66. N.Y.—Neuman v. Union Ry. Co. of New York City, 153 N.E. 64, 243 N.Y. 249, 46 A.L.R. 1180.

67. La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

Mo.—Battles v. United Rys. Co. of St. Louis, 161 S.W. 614, 178 Mo.App. 596.

68. Mich.—Hashman v. Pollak, 224 N.W. 333, 246 Mich. 408.

69. Md.—Baltimore City Pass. R. Co. v. Cooney, 39 A. 859, 87 Md. 261, 60 C.J. p 449 note 40.

70. Ill.—Anderson v. Cummings, 60 N.E.2d 260, 325 Ill.App. 519.

Pa.—Skodis v. Philadelphia Rapid

Transit Co., 158 A. 587, 103 Pa.Super. 533.

60 C.J. p 449 note 42.

71. Ky.—Louisville Ry. Co. v. Colston, 79 S.W. 243, 244, 117 Ky. 804, 25 Ky.L. 1933.

Md.—Garvick v. United R., etc., Co., 61 A. 138, 140, 101 Md. 239.

60 C.J. p 450 note 44.

72. Pa.—Skodis v. Philadelphia Rapid Transit Co., 158 A. 587, 103 Pa.Super. 533.

60 C.J. p 450 note 45.

73. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

60 C.J. p 450 note 48.

Rate of speed and control of car: Generally see *supra* § 198.

As proximate cause see *supra* § 212.

74. Ky.—Ford v. Paducah City R. Co., 99 S.W. 355, 124 Ky. 488, 492, 30 Ky.L. 644, 124 Am.S.R. 412, 8 L.R.A., N.S., 1093.

60 C.J. p 450 note 50.

75. W.Va.—Dimmey v. West Virginia Traction & Electric Co., 99 S.E. 93, 83 W.Va. 755.

60 C.J. p 450 note 51.

76. Wash.—Beach v. Pacific Northwest Traction Co., 237 P. 737, 135 Wash. 290.

77. Wash.—Beach v. Pacific Northwest Traction Co., *supra*.

60 C.J. p 450 note 53.

78. N.C.—Ingle v. Asheville Power, etc., Co., 90 S.E. 953, 172 N.C. 751.

60 C.J. p 450 note 55.

79. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. McDermott, 144 N.E. 620, 82 Ind.App. 134.

80. N.Y.—Silberstein v. Houston, St., etc., Ferry R. Co., 4 N.Y.S. 843, 52 Hun 611, reversed on other grounds 22 N.E. 951, 117 N.Y. 293.

60 C.J. p 451 note 59.

81. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

60 C.J. p 451 note 60.

82. N.Y.—Silberstein v. Houston, St., etc., Ferry R. Co., 4 N.Y.S. 843, 52 Hun 611, reversed on other grounds 22 N.E. 951, 117 N.Y. 293.

Reducing speed and stopping car. Although a motorman may ordinarily assume that an adult person who is on or dangerously near the track ahead of the car will move out of the way before the car reaches him, the motorman may, under certain circumstances, be required to slow down or stop the car when a person is seen, or should be seen, on or near the track, as discussed *infra* 251. Failure to use reasonable care to check⁸³ or stop⁸⁴ its cars at a highway crossing may subject the company to liability to a person who receives personal injuries while on or near the track at such a point. However, it is not the duty of the motorman to stop his car so as to avoid injury to persons who may come in contact with it unless as a man of ordinary prudence he has reason, or should have reason, to believe that his failure to stop the car will cause injury.⁸⁵ In crowded streets where there is danger of running over persons who, amid other diversions, may be more or less negligent of their own safety, it is the duty of the operator of a streetcar to have his car under control so that it may readily be stopped when the danger is found to be imminent.⁸⁶ Instead of coasting down a steep grade in a main thoroughfare with his brakes off, the operator of a streetcar should restrain his car within the lawful rate whether or not anyone can be seen on the track.⁸⁷ It has been held that the mere failure of a streetcar to stop at a point where there is a "stop" sign does not constitute negligence toward persons on or near the tracks.⁸⁸ The streetcar company is not liable where a pedestrian is injured when he moves so suddenly in front of the car, from a position of safety, that it is impossible for the motorman to stop in time to avoid an accident.⁸⁹

§ 250. Failure to Keep Lookout or to Perform Other Act as Wanton or Gross Negligence

The failure of the operator of a streetcar to keep a proper lookout so as to avoid injuries to persons on or

near the track may, under particular circumstances, constitute gross negligence.

Failure of the operator of a streetcar to keep a proper lookout so as to avoid injuries to persons on or near the track may, under particular circumstances, constitute gross negligence.⁹⁰ Where the operator of a streetcar sees a pedestrian in imminent danger, and omits to do something which he may do to prevent or mitigate injury, knowing that injury will probably result from his omission,⁹¹ or runs the car at a dangerous speed and without warning signals at a point where he knows, or should know, that some person will probably be crossing and will thereby be exposed to injury, and the pedestrian is injured,⁹² the company may be liable for wanton injury.

§ 251. Precautions as to Persons Who Are, or Should Be, Seen on or near Track

- a. In general
- b. Reliance on due care by pedestrian
- c. Control of car; slackening speed and stopping

a. In General

The measure of a motorman's duty toward a person seen on or near the track is that required of a reasonably prudent and skillful man under the same circumstances.

Generally the measure of the motorman's duty toward a person seen on or near the track is that required of a reasonably prudent and skillful man under the same circumstances,⁹³ and, where he uses reasonable care to avoid striking such persons, the railway company is not liable.⁹⁴ If there exists an increase of danger by reason of the particular circumstances, an increase of diligence commensurate with the danger is required.⁹⁵ A motorman is not ordinarily required to take steps to avoid injuring a person seen on or near the track until the motorman discovers,⁹⁶ or until it becomes reason-

83. Ohio.—Detroit, etc., Short Line R. Co. v. Landesman, 7 Ohio App. 79, 28 Ohio C.A. 88.

84. Ohio.—Detroit, etc., Short Line R. Co. v. Landesman, *supra*.

85. Ohio.—Cincinnati Traction Co. v. Cahill, 13 Ohio App. 46—Cincinnati Traction Co. v. Simon, 28 Ohio Cir. Ct. 780.

86. D.C.—Capital Traction Co. v. Apple, 34 App.D.C. 559.

87. D.C.—Capital Traction Co. v. Apple, *supra*.

88. Pa.—Kilgallen v. Philadelphia Rapid Transit Co., 150 A. 746, 300 Pa. 451.

60 C.J. p 451 note 70.

89. Del.—Riccio v. People's Ry. Co., 82 A. 604, 26 Del. 235.

60 C.J. p 451 note 71.

90. N.Y.—Goldstein v. Dry Dock, etc., R. Co., 71 N.Y.S. 477, 35 Misc. 200.

60 C.J. p 452 note 73.

91. Ala.—Birmingham Ry., Light & Power Co. v. Strickland, 68 So. 911, 192 Ala. 596.

92. Ala.—Birmingham Ry., Light & Power Co. v. Strickland, *supra*.

93. Del.—Truman v. Wilmington City Ry. Co., 78 A. 636, 23 Del. 192. 60 C.J. p 452 note 77.

Duty to keep lookout see *supra* § 248. Injury avoidable notwithstanding contributory negligence see *infra* § 288 et seq.

94. Del.—Tobias v. People's Ry. Co., 80 A. 358, 26 Del. 59.

95. Del.—Riccio v. People's Ry. Co., 82 A. 604, 26 Del. 235.

96. Ky.—Ford v. Paducah City R.

ably apparent to him,⁹⁷ that such a person is not going to get out of the way.

It is the duty of the operator of a streetcar to make an intelligent use of his senses to ascertain whether persons seen on or near the tracks are in peril,⁹⁸ and, after having made this discovery,⁹⁹ or where by the exercise of reasonable care such discovery can be made,¹ it at once² becomes the duty of the motorman to use proper means,³ or all means in his power,⁴ or to use all reasonable care and diligence,⁵ or to use every possible effort,⁶ or to exercise all the reasonable care and watchfulness that under the conditions prudence demands,⁷ or to exercise ordinary care,⁸ or to do everything that a reasonably careful and prudent man would do,⁹ under the same circumstances,¹⁰ consistent with the safety of himself,¹¹ and of his passengers,¹² to avoid striking such person; and, if he fails to perform this duty and injury results therefrom, he is guilty of negligence.¹³ Thus, it is the duty of the motorman to use reasonable diligence to avoid striking a pedestrian walking on the track,¹⁴ but no duty arises until it becomes reasonably apparent to the motorman that the pedestrian will probably not step off the track.¹⁵

Whether the motorman is in the exercise of due care in a particular case will depend on what he should, in the exercise of reasonable care, have

known, rather than on his actual knowledge.¹⁶ However, where the motorman, in the exercise of the care required of him, on discovering the person in a perilous position does all he can to avert injury,¹⁷ or where there is nothing which the operator of the car could do to avert an accident,¹⁸ he is not negligent, and the company is not liable, and it has been held that, if the motorman, after he sees, or by the exercise of reasonable care could have seen, the person on or near the track in a position of danger, does all that a reasonably careful and prudent man would do under like circumstances to prevent an accident, the company is not liable.¹⁹

Duty to give warning. It is the duty of those in charge of a streetcar, on observing a person on or approaching the track under circumstances indicating the probability of danger to him from the progress of the car, to give warning of its approach.²⁰ This duty, however, does not arise where the danger is not apparent by the exercise of ordinary care on the part of the motorman or other employee.²¹ If the motorman could not by the exercise of ordinary care prevent an accident to a person seen in a perilous position on or near the track by sounding a warning, the motorman is not negligent, and the company is not liable;²² and, where the motorman has given a proper warning and is not otherwise negligent, the company is not liable.²³

Co., 99 S.W. 355, 124 Ky. 488, 30 Ky. L. 644, 124 Am.S.R. 412, 8 L.R.A., N.S., 1093.

97. Ky.—Ford v. Paducah City R. Co., *supra*.

98. N.Y.—Watson v. Broadway, etc., R. Co., 6 N.Y.St. 538, 26 N.Y.Wkly. Dig. 337, affirmed 18 N.E. 482, 110 N.Y. 677.
60 C.J. p 452 note 83.

99. Del.—Wilmington City Ry. Co. v. Truman, 72 A. 983, 23 Del. 197, affirmed 78 A. 636, 23 Del. 192.
60 C.J. p 452 note 84.

1. Mo.—Eckhard v. St. Louis Transit Co., 89 S.W. 602, 610, 190 Mo. 593.
60 C.J. p 452 note 85.

2. Ind.—Saylor v. Union Traction Co., 81 N.E. 94, 40 Ind.App. 381.
60 C.J. p 452 note 86.

3. Ala.—Mobile Light, etc., Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

4. Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.
60 C.J. p 453 note 91.

5. Ala.—Randle v. Birmingham R. etc., Co., 48 So. 114, 158 Ala. 532.

6. Mo.—Bunyan v. Citizens' R. Co., 29 S.W. 842, 127 Mo. 12.

7. Ind.—Saylor v. Union Traction Co., 81 N.E. 94, 40 Ind.App. 381.

8. Ky.—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

9. Del.—Wilmington City Ry. Co. v. Truman, 72 A. 983, 23 Del. 197, affirmed 78 A. 636, 23 Del. 192.

10. Del.—Wilmington City Ry. Co. v. Truman, *supra*.

11. Tex.—Northern Texas Traction Co. v. Mullins, 99 S.W. 433, 44 Tex. Civ.App. 566.

12. Mo.—Bunyan v. Citizens' R. Co., 29 S.W. 842, 127 Mo. 12.
60 C.J. p 453 note 98.

13. Del.—Wilmington City Ry. Co. v. Truman, 72 A. 983, 985, 23 Del. 197, affirmed 78 A. 636, 23 Del. 192.
60 C.J. p 453 note 99.

14. Tex.—Fontana v. Port Arthur Traction Co., Civ.App., 235 S.W. 1098.

15. Tex.—Fontana v. Port Arthur Traction Co., *supra*.

16. Conn.—Simenaukas v. Connecticut Co., 129 A. 790, 102 Conn. 676.

17. N.Y.—Barney v. Metropolitan St. R. Co., 88 N.Y.S. 335, 94 App.Div. 388.
60 C.J. p 453 note 4.

18. Md.—Baltimore City Pass. R. Co. v. Cooney, 39 A. 859, 87 Md. 261.
60 C.J. p 453 note 5.

19. Del.—Heinel v. People's R. Co., 67 A. 173, 22 Del. 428.

20. Ky.—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

Pa.—Burns v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb.Leg.R. 114.
60 C.J. p 457 note 72.

21. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.
60 C.J. p 458 note 73.

22. Mo.—Holzemer v. Metropolitan St. Ry. Co., 169 S.W. 102, 261 Mo. 379.

23. Mo.—Bennett v. Metropolitan St. R. Co., 99 S.W. 480, 122 Mo.App. 773.

60 C.J. p 458 note 75.

The negligence of a pedestrian in entering on a streetcar track in front of an approaching car does not relieve the motorman of his obligation to sound a gong after seeing the pedestrian, in a dangerous position, on the track.²⁴

b. Reliance on Due Care by Pedestrian

A motorman has the right to assume, until the contrary appears, that a person seen on or near the track will act with ordinary care.

Where the driver or motorman of a streetcar sees a person on, near, or approaching the track in advance of his car, he ordinarily has a right, in operating his car, to act on the assumption that such person is in full possession of all his faculties²⁵ and of his senses,²⁶ and that he will exercise them.²⁷ Thus, the motorman may properly assume that a person seen on or approaching the track will look²⁸ and see²⁹ or hear,³⁰ and, until the contrary is manifest,³¹ will be aware of,³² the approaching car, or that he will hear and heed the bell or gong when sounded.³³ The motorman has a right to presume, until the contrary appears,³⁴ that a person seen on or near the track ahead will act with ordinary care,³⁵ or will act as a reasonably prudent person,³⁶ under all the circumstances,³⁷ to avoid being injured, or, as otherwise stated, up to a certain point, to be measured by the facts of the particular case, the motorman has a right to assume that a pedes-

trian is exercising, and will continue to exercise, due care.³⁸ On the other hand, the motorman's right to rely on the presumption that a person seen on or near the track is not in danger does not relieve the motorman from his duty to exercise proper care under the particular circumstances.³⁹

In the absence of any signs of obliviousness on the part of a person in a dangerous position on or near the track,⁴⁰ if a person who is apparently capable of taking care of himself is seen on the track,⁴¹ the motorman has a right to presume that such person, in the exercise of reasonable care for his own safety, will get off or stay off the track until the car passes.⁴² Thus, if the distance is sufficient for a crossing to be made safely, the motorman has the right to assume that the pedestrian will so cross;⁴³ if the distance is insufficient, he has a right to assume that the pedestrian will maintain a position of safety at the side of the track⁴⁴ or stop before attempting to cross.⁴⁵ The motorman may properly indulge such presumption up until the time the person's danger becomes imminent,⁴⁶ or until it is apparent, or by the exercise of diligence would be apparent to the motorman, that the person is in danger, and is not aware of the danger, or is so situated that he cannot avoid the danger,⁴⁷ but not beyond that time.⁴⁸

A streetcar motorman is justified in assuming that a person near the tracks but in a position of ap-

24. Ala.—Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657.

25. Cal.—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437. 60 C.J. p 453 note 8.

26. Cal.—Kramm v. Stockton Electric R. Co., 101 P. 914, 10 Cal.App. 271. 60 C.J. p 453 note 9.

27. Cal.—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437. 60 C.J. p 453 note 10.

28. N.Y.—Curtin v. Metropolitan St. Ry. Co., 48 N.Y.S. 581, 22 Misc. 83. 60 C.J. p 457 note 70.

29. Cal.—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437. 60 C.J. p 453 note 11.

30. Cal.—Behne v. Pacific Elec. Ry. Co., supra.
La.—Schulte v. New Orleans City, etc., R. Co., 10 So. 811, 44 La. Ann. 509.

31. N.Y.—Barney v. Metropolitan St. R. Co., 88 N.Y.S. 335, 94 App. Div. 388.

32. N.Y.—Barney v. Metropolitan St. R. Co., supra.

33. Cal.—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437. 60 C.J. p 453 note 15.

34. Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386. 60 C.J. p 454 note 18.

35. Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194. 60 C.J. p 454 note 19.
Right to rely on precautions of child see *infra* § 261.

36. Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627. 60 C.J. p 454 note 20.

37. Del.—Heinel v. People's R. Co., 67 A. 173, 22 Del. 428.
Wash.—Duteau v. Seattle Electric Co., 88 P. 755, 45 Wash. 418.

38. Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.
Cal.—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463.
Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386—Slipper v. Seattle Electric Co., 128 P. 233, 71 Wash. 279.

39. Del.—Culbert v. Wilmington & P. Traction Co., 82 A. 1081, 26 Del. 253.

40. Mo.—Draper v. Dunham, App., 239 S.W. 883.

41. N.C.—Smith v. Salisbury & S. Ry. Co., 77 S.E. 966, 162 N.C. 29.

42. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.
Pa.—Elliott v. Philadelphia Transp. Co., 53 A.2d 81, 356 Pa. 643. 60 C.J. p 454 note 25.

43. Mich.—Gradyszewski v. Detroit United Ry., 138 N.W. 225, 173 Mich. 13.

44. Mich.—Gradyszewski v. Detroit United Ry., supra.

45. Cal.—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437. 60 C.J. p 455 note 28.

46. Ala.—Mobile Light & R. Co. v. Roberts, 68 So. 815, 192 Ala. 486. 60 C.J. p 455 note 29.

47. Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627. 60 C.J. p 455 note 30.

48. Cal.—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463. 60 C.J. p 455 note 31.

parent safety will not be injured,⁴⁹ and he is not bound to anticipate that the pedestrian will place himself in a position of danger.⁵⁰ Hence, the motorman is not bound to assume that a pedestrian will run so near to a track,⁵¹ or will suddenly⁵² attempt to cross it⁵³ immediately in front of the car,⁵⁴ or in such a way as to be struck by the forward corner of the car nearest to him,⁵⁵ or at a point on the track where it would be impossible to avoid an accident.⁵⁶

The motorman has a right to assume that persons seen on, near, or approaching the track will not place themselves in a position of danger,⁵⁷ and the person in charge of a car with a clear track before him has a right to assume,⁵⁸ until a different intention is apparent,⁵⁹ that persons approaching the track will use due care to protect themselves, and will not suddenly undertake to cross in front of the car.⁶⁰ However, this rule is not applicable if from all the circumstances the motorman should see that the pedestrian is caught in a trap from which he cannot extricate himself.⁶¹

Under vigilant watch ordinance. Under an ordinance requiring a motorman to maintain a vigilant

watch so as to avoid injuries to persons on or near the track, the motorman is required to anticipate that those approaching the track will come within the danger zone⁶² and that those within it will not seasonably leave it.⁶³

On giving warning. A motorman need not anticipate that a man in a place of safety near the track will, in spite of warning, cross the track in front of the car at a time when it is too late to save him.⁶⁴ At any rate, on giving such warning to a person who is seen on, near, or approaching the track, the motorman may assume,⁶⁵ unless he knows, or has some good reason to believe, that the person who is on or dangerously near the track is deaf,⁶⁶ that such person hears the warning⁶⁷ and will stay out of the way⁶⁸ or will get out of the way⁶⁹ of the danger. While the motorman may in a particular case be justified in relying on this assumption until it may be too late to avoid contact,⁷⁰ the assumption cannot be indulged beyond the time when the person's danger becomes imminent.⁷¹

Between crossings. Where no necessity is shown for pedestrians to cross street railroad tracks within a street block or between crossings, the motorman

49. Mass.—Osborne v. Bay State St. Ry. Co., 111 N.E. 43, 222 Mass. 427. 60 C.J. p 455 note 32.

50. Mich.—Gradyszewski v. Detroit United Ry., 138 N.W. 225, 173 Mich. 13.

Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194.

Pa.—Schroeder v. Pittsburgh Rys. Co., 165 A. 733, 311 Pa. 398—Skodis v. Philadelphia Rapid Transit Co., 158 A. 587, 103 Pa.Super. 533.

Va.—Lynchburg Traction & Light Co. v. Wright, 170 S.E. 569, 161 Va. 251.

51. Mass.—Anger v. Worcester Consol. St. Ry., 120 N.E. 399, 231 Mass. 163.

60 C.J. p 456 note 34.

52. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

60 C.J. p 456 note 35.

53. D.C.—Roberts v. Capital Transit Co., 131 F.2d 871, 76 U.S.App.D.C. 637.

60 C.J. p 456 note 36.

54. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

D.C.—Roberts v. Capital Transit Co., 131 F.2d 871, 76 U.S.App.D.C. 637.

60 C.J. p 456 note 37.

55. Mass.—Driscoll v. Boston Ele-

vated Ry. Co., 123 N.E. 667, 233 Mass. 232.

56. Mass.—Anger v. Worcester Consol. St. Ry., 120 N.E. 399, 231 Mass. 163.

57. Mich.—Gradyszewski v. Detroit United Ry., 138 N.W. 225, 173 Mich. 13.

58. Va.—Lynchburg Traction & Light Co. v. Wright, 170 S.E. 569, 161 Va. 251.

60 C.J. p 456 note 42.

59. R.I.—Leary v. United Electric Rys. Co., 125 A. 217, 46 R.I. 100, reargument denied 125 A. 927.

60 C.J. p 456 note 43.

60. Cal.—Driscoll v. Market St. Cable Ry. Co., 32 P. 591, 97 Cal. 553, 33 Am.S.R. 203.

60 C.J. p 456 note 44.

61. R.I.—Leary v. United Electric Rys. Co., 125 A. 217, 46 R.I. 100, reargument denied 125 A. 927.

60 C.J. p 456 note 46.

62. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.

Mo.—Heigold v. United Rys. Co. of St. Louis, 271 S.W. 773, 308 Mo. 142.

63. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.

Mo.—Heigold v. United Rys. Co. of St. Louis, 271 S.W. 773, 308 Mo. 142.

64. N.C.—Patterson v. Charlotte Electric Ry., Light & Power Co., 76 S.E. 500, 160 N.C. 577.

65. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

60 C.J. p 456 note 48.

66. Ala.—Mobile Light & R. Co. v. Burch, supra.

67. Ala.—Mobile Light & R. Co. v. Burch, supra.

68. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032.

Utah.—Jensen v. Utah Light & Ry. Co., 132 P. 8, 42 Utah 415.

69. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032.

60 C.J. p 457 note 52.

70. Cal.—Kramm v. Stockton Electric R. Co., 101 P. 914, 10 Cal.App. 271.

71. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032.

60 C.J. p 457 note 54.

is not required to anticipate that a pedestrian would step on the track in front of an oncoming car,⁷² particularly where the car is so close that only its near corner would strike him.⁷³

Persons waiting to board car; parallel tracks. A motorman has no reason to anticipate that persons standing alongside the track in order to board the streetcar will stand so near to the track as to be struck by the running board on the side of the streetcar,⁷⁴ but on the contrary the motorman can reasonably assume that such persons are not in a place of danger.⁷⁵ However, there may be negligence where the car strikes persons standing on the track waiting to board a car on parallel tracks.⁷⁶ The motorman of a streetcar is not bound to anticipate that a pedestrian, in crossing the track ahead toward a parallel track, will, in order to avoid being struck by a car coming toward him in the opposite direction on the parallel track, retrace his footsteps;⁷⁷ on the contrary the motorman may properly assume that such a pedestrian, after having crossed over the first track, will continue in the same direction in which he is going instead of stepping back on the track which he has crossed,⁷⁸ and that, if there is any danger of his being struck with a car coming in the opposite direction on the other track, he will remain in the space between the parallel tracks⁷⁹ when that space is sufficient.⁸⁰ Until the contrary appears,⁸¹ the motorman of a car being run on one of two parallel tracks in a direction opposite to that in which cars on the same track are customarily run must assume that a pedestrian on the track is not aware that a car is approaching him from the wrong direction.⁸²

Pedestrian's changing position. Where the motorman of a streetcar observes that persons walking on a sidewalk alongside the track have changed their relative positions in a manner which would permit the car to pass without striking them, the motorman has a right to assume that such pedestrians see the car coming and are preparing to be out of its way when it reaches them.⁸³

c. Control of Car; Slackening Speed and Stopping

Ordinarily, a motorman need not stop or slacken his speed on seeing a person on or near the track.

In view of the right of a motorman to assume that a person who is on, near, or approaching the track will ordinarily get out of the way or remain out of the way of an approaching car, as discussed supra subdivision b of this section, the motorman, on seeing a person so situated, is, ordinarily, under no duty to stop⁸⁴ or to slow down⁸⁵ until it becomes evident to a person of ordinary and reasonable care and prudence that the pedestrian has placed, or is about to place, himself in a perilous situation, or until the motorman becomes aware that the person in danger does not know of the approach of the car,⁸⁶ and is heedless of the danger,⁸⁷ or is unable to get out of the way of the car,⁸⁸ or does not intend to get out of the way.⁸⁹ In other words, since the motorman is not entitled to presume that persons seen on or near the track will get off or stay off until the car passes, beyond the time that the danger to such persons becomes imminent, the motorman, after reaching a point at which the pedestrian is in danger, must keep the car under control.⁹⁰ Therefore, as soon as any of the facts

72. N.Y.—Schneller v. Ninth Ave. R. Co., 220 N.Y.S. 434, 219 App.Div. 571.

60 C.J. p 457 note 56.

73. N.Y.—Schneller v. Ninth Ave. R. Co., supra.

74. Mass.—Daigneau v. Worcester Consol. St. Ry. Co., 120 N.E. 400, 231 Mass. 166.

75. Mass.—Daigneau v. Worcester Consol. St. Ry. Co., supra.

76. Cal.—Curry v. Market St. Ry. Co., 128 P.2d 715, 54 Cal.App.2d 165.

77. N.Y.—Trauber v. Third Ave. R. Co., 80 N.Y.S. 231, 80 App.Div. 37—Jackson v. Union R. Co., 78 N.Y.S. 1096, 77 App.Div. 161.

78. N.Y.—Trauber v. Third Ave. R. Co., 80 N.Y.S. 231, 80 App.Div. 37—

Jackson v. Union R. Co., 78 N.Y.S. 1096, 77 App.Div. 161.

79. N.Y.—Trauber v. Third Ave. R. Co., 80 N.Y.S. 231, 80 App.Div. 37—Jackson v. Union R. Co., 78 N.Y.S. 1096, 77 App.Div. 161.

80. N.Y.—Trauber v. Third Ave. R. Co., 80 N.Y.S. 231, 80 App.Div. 37. 60 C.J. p 457 note 65.

81. Mo.—Shipley v. Metropolitan St. Ry. Co., 128 S.W. 768, 144 Mo.App. 7.

82. Mo.—Shipley v. Metropolitan St. Ry. Co., supra.

83. Mass.—Furey v. Worcester & S. St. Ry. Co., 89 N.E. 531, 203 Mass. 434, 24 L.R.A., N.S., 1304. 60 C.J. p 457 note 69.

84. Mich.—Bloch v. Detroit United

Ry., 178 N.W. 670, 672, 211 Mich. 252.

60 C.J. p 458 note 79.

85. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421. 60 C.J. p 458 note 80.

86. La.—Farrar v. New Orleans, etc., R. Co., 26 So. 995, 997, 52 La.App. 517.

60 C.J. p 459 note 81.

87. Ala.—Randle v. Birmingham R., etc., Co., 48 So. 114, 158 Ala. 532.

88. Ky.—Ford v. Paducah City R. Co., 99 S.W. 355, 124 Ky. 488, 30 Ky.L. 644, 124 Am.S.R. 412, 8 L.R.A., N.S., 1093.

60 C.J. p 459 note 83.

89. Mich.—Bloch v. Detroit United Ry., 178 N.W. 670, 211 Mich. 252. 60 C.J. p 459 note 84.

90. Ark.—Karnopp v. Ft. Smith

heretofore stated becomes apparent to the motorman,⁹¹ then the law charges him with the duty of using proper means to avoid injury, such as sounding a warning of the approach of the car, and, if that is not effective,⁹² it becomes the duty of the motorman, if necessary,⁹³ to put his car under control,⁹⁴ or to have the car under such control that he can stop it,⁹⁵ or at least to lessen its speed,⁹⁶ until he has good reason to believe that the person in a position of peril is aware of the approach of the car, and, if necessary, in such a situation, the motorman may be required to stop his car⁹⁷ if he can do so⁹⁸ without endangering his passengers.⁹⁹

A failure to stop may, under certain circumstances, constitute negligence¹ for which the company is liable.² However, as to persons seen in a dangerous position on or near the track, if the motorman on seeing such person does all he can to stop the car, or if on discovery of the danger of the person on or near the track it is impossible to stop the car in time to avert an accident, there is no negligence on the part of the motorman, and the street railroad company is not liable for the resulting injuries.³ A motorman is not negligent in failing to stop his car which struck a pedestrian where there is nothing to put the motorman on notice that such pedestrian is in a dangerous situation.⁴

A motorman of a streetcar running down a steep grade on a main thoroughfare, instead of coasting down such a grade with his brakes off, should reduce the speed of his car when he sees a person about to cross the track,⁵ particularly where the

person would have ample time to cross safely if the speed of the car were not greater than the law permitted.⁶

Where person is attempting rescue. Where the motorman of a streetcar may see that a person crossing in front of his car is attempting to rescue a child from in front of an approaching car on a parallel track and that the rescuer may be imperiled by reason of the movement of both cars, it is the motorman's duty to stop the car.⁷

Current of air set up by movement of car. Since the fact that a moving car will set up a current of air is a matter of common knowledge,⁸ the motorman of a streetcar may properly assume that a person alongside the track will know of it,⁹ and the fact that a part of the clothing of a pedestrian is blown by such current toward a passing car resulting in injury to the pedestrian does not indicate that the car is moving at an unreasonable rate of speed¹⁰ so as to render the company guilty of negligence.¹¹

Under vigilant watch ordinance. Under a so-called vigilant watch ordinance, operators of streetcars are required on the first appearance of danger to pedestrians either on the track or moving toward it to stop such cars in the shortest time and space possible.¹² Under such an ordinance it is the duty of the motorman to give diligent heed to such persons, their appearance, conduct, etc., to ascertain whether such persons are in a dangerous position¹³ and whether or not they are conscious of the approaching car.¹⁴

Light & Traction Co., 178 S.W. 302, 119 Ark. 295.
60 C.J. p 458 note 86.

91. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

92. Ala.—Mobile Light & R. Co. v. Burch, supra.

93. Del.—Gismondi v. People's R. Co., 83 A. 136, 25 Del. 577—Truman v. Wilmington City Ry. Co.

C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

60 C.J. p 459 note 1.

98. Ky.—Mullins v. Cincinnati, N. & C. Ry. Co., supra.
60 C.J. p 460 note 2.

99. Ky.—Mullins v. Cincinnati, N. & C. Ry. Co., supra.
60 C.J. p 460 note 3.

1. Mo.—Kube v. St. Louis Transit Co., 72 S.W. 522, 102 Mo.App. 522.

6. D.C.—Capital Traction Co. v. Apple, supra.

7. N.Y.—Manzella v. Rochester R. Co., 93 N.Y.S. 457, 105 App.Div. 12.

8. Mass.—Furey v. Worcester & S. St. Ry. Co., 89 N.E. 531, 203 Mass. 434, 24 L.R.A., N.S., 1304.

9. Mass.—Furey v. Worcester & S. St. Ry. Co., supra.

10. Mass.—Furey v. Worcester & S.

As to persons approaching track. In pursuance of rules heretofore stated, ordinarily the motorman is under no obligation to stop his car¹⁵ or to slacken its speed¹⁶ merely because he sees a pedestrian approaching the track, particularly after the motorman has given proper and sufficient warning of the approach of the car,¹⁷ unless it appears that to proceed will be likely to result in injury to the person approaching the track,¹⁸ or unless the motorman discovers, or until it becomes reasonably apparent to him, that the person approaching the track is in a position of apparent danger,¹⁹ or that the car is going to strike such person,²⁰ or that such person is not going to get out of the way,²¹ or until the motorman sees, or in the exercise of ordinary care could see, that the approaching pedestrian is not going to stop before he gets into a position of peril.²²

On seeing that the person approaching the track is in a position of apparent danger, it becomes the duty of the motorman, on an approaching car, to stop the car if necessary to avoid striking the person.²³ Thus, it is negligence for the operator of a streetcar not to stop the car as soon as he may reasonably do so, after it becomes apparent that a pedestrian approaching the track intends to cross it ahead of the car,²⁴ particularly where the pedestrian could have safely crossed unless the car had been run at an unusual rate of speed.²⁵ At any rate, it is the duty of the motorman, when he discovers or should have discovered the peril of a person approaching the track, to slacken the speed of the car.²⁶

On the other hand, where the motorman does all he can to stop the car after discovering the peril of a pedestrian on the track,²⁷ or where on discovery of the person's peril it is too late to stop,²⁸ or if the motorman could not by the exercise of ordinary care prevent the accident by stopping the car²⁹ or by checking or slackening its speed³⁰ after he saw, or, in the exercise of ordinary care, could have seen, that such pedestrian was not going to stop before he got into a perilous position, the motorman is not negligent and the company is not liable.

On discovery of unknown object on track. Where the motorman of a streetcar discovers an unknown object on the track ahead and has no reason to suppose it is a human being, the motorman is not under a duty immediately to stop his car.³¹

§ 252. Duty at or Approaching Street Crossings

It is the duty of the motorman or operator of a streetcar, approaching a public street crossing, to exercise reasonable and ordinary care under the circumstances to avoid injuring persons who may be on, near, or approaching the crossing.

While those operating streetcars are obliged at all times to exercise reasonable care to avoid injuries to persons on or near the track, as discussed supra § 251, the requirement of reasonable care imposes on such operators the duty of a more exacting attention when they approach street crossings,³² particularly in a crowded city where pedestrians

15. Va.—Roanoke Ry. & Electric Co. v. Carroll, 72 S.E. 125, 127, 112 Va. 598.

60 C.J. p 461 note 27.

16. Mich.—Gradyszewski v. Detroit United Ry., 138 N.W. 225, 173 Mich. 13.

60 C.J. p 461 note 28.

17. Utah.—Jensen v. Utah Light & Ry. Co., 132 P. 8, 42 Utah 415.

60 C.J. p 462 note 44.

18. Utah.—Jensen v. Utah Light & Ry. Co., supra.

19. Wash.—Duteau v. Seattle Electric Co., 88 P. 755, 45 Wash. 418.

20. Mo.—Bunyan v. Citizens' R. Co., 29 S.W. 842, 127 Mo. 12.

21. Ky.—Ford v. Paducah City R. Co., 99 S.W. 355, 124 Ky. 488, 30 Ky. L. 644, 124 Am.S.R. 412, 8 L.R.A., N.S., 1093.

22. Mo.—Holzemer v. Metropolitan

St. Ry. Co., 169 S.W. 102, 261 Mo. 379.

23. Iowa.—McDivitt v. Des Moines City R. Co., 118 N.W. 459, 141 Iowa 689.

60 C.J. p 461 note 34.

24. Ky.—Louisville R. Co. v. Knocke, 117 S.W. 271.

60 C.J. p 462 note 35.

25. N.H.—Ledoux v. Hudson P. & S. Electric Ry. Co., 74 A. 874, 75 N.H. 598.

N.Y.—Legare v. Union R. Co., 70 N. Y.S. 718, 61 App.Div. 202.

26. N.C.—Ingle v. Asheville Power, etc., Co., 90 S.E. 953, 172 N.C. 751.

60 C.J. p 462 note 37.

27. Mass.—Driscoll v. Boston Elevated Ry. Co., 123 N.E. 667, 233 Mass. 232.

60 C.J. p 462 note 38.

28. La.—Farrar v. New Orleans, etc., R. Co., 26 So. 995, 52 La. Ann. 417.

29. Or.—Plinkiewisch v. Portland Ry., Light & Power Co., 115 P. 151, 58 Or. 499.

60 C.J. p 462 note 40.

30. Mo.—Holzemer v. Metropolitan St. Ry. Co., 169 S.W. 102, 261 Mo. 379.

31. U.S.—Stelk v. McNulta, Ill., 99 F. 138, 40 C.C.A. 357.

Mo.—Trigg v. Water, Light & Transit Co., 114 S.W. 972, 215 Mo. 521, 20 L.R.A., N.S., 987.

32. Ill.—Chicago City R. Co. v. Tuohy, 63 N.E. 997, 196 Ill. 410, 58 L.R. A. 270.

60 C.J. p 462 note 47.

Private road

Motorman need not exercise same high degree of diligence in limiting speed at private road as at public crossing.—Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 301 Pa. 72.

may always be expected to be in front of the cars,³³ and, when they are in danger³⁴ or going into danger,³⁵ to use every effort,³⁶ consistent with the safety of the passengers,³⁷ to avoid injuring such persons. Therefore it may be said that generally it is the duty of the motorman or driver of a streetcar, approaching a public street crossing, to exercise reasonable and ordinary care under the circumstances to avoid injuring persons who may be on, near, or approaching such crossing.³⁸ Thus, in approaching and crossing a public street it is the duty of the motorman to keep his car under reasonable control,³⁹ to keep a lookout,⁴⁰ to sound a warning,⁴¹ and to run at a reasonable rate of speed.⁴² Under particular circumstances it may be the duty of the operator of a streetcar to stop the car before crossing a street intersection so as to avoid injury to persons who may be on or near the track at that point;⁴³ and, in the performance of his duty to keep his car under control and to keep a lookout, he must have regard for the peculiar features of the apparent situation confronting him.⁴⁴ A motorman, however, is not required to stop in anticipation that a pedestrian who is crossing the track at a street crossing, and has time to cross the track before the car reaches him, may stop, or turn around on the track, and consequently may be run down.⁴⁵ Under a vigilant watch ordinance the

motorman may be required to keep a vigilant watch at or approaching street crossings and to check the speed of his car or to stop on first appearance of danger.⁴⁶

In the absence of a statute or ordinance imposing a duty on a streetcar motorman to sound a gong or bell at a street crossing, it has been held that failure to do so becomes negligence only when the circumstances render the ringing of the bell or gong necessary;⁴⁷ and the failure of a streetcar motorman to sound his gong on approaching a street crossing is immaterial where the injured person saw the approaching car before stepping on the track.⁴⁸ Similarly the failure to stop or give a warning to persons at street crossings is unnecessary when such persons are standing in places which require no warnings.⁴⁹

A failure to exercise proper care at a street crossing resulting in injuries to persons on or near the track is negligence for which the company is liable.⁵⁰ Ordinarily it is negligence, for which the company is liable, for the motorman of a streetcar to run his car at a rapid rate of speed⁵¹ or to fail to give a proper warning⁵² when running past a street crossing at which a car, bound in the opposite direction, is discharging passengers.

33. Ill.—Chicago City R. Co. v. Tuohy, 63 N.E. 997, 196 Ill. 410, 58 L. R.A. 270.

60 C.J. p 462 note 48.

34. Fla.—Consumers' Electric Light & St. R. Co. v. Pryor, 32 So. 797, 44 Fla. 354.

35. Fla.—Consumers' Electric Light & St. R. Co. v. Pryor, *supra*.
60 C.J. p 462 note 50.

36. Fla.—Consumers' Electric Light & St. R. Co. v. Pryor, *supra*.
60 C.J. p 462 note 51.

37. Fla.—Consumers' Electric Light & St. R. Co. v. Pryor, *supra*.

38. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

39. Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1.
60 C.J. p 463 note 54.

Public crossing

Streetcar motorman is under duty to approach public crossing on outskirts of large city with trolley under proper control.—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220.

Highway crossing

Motorman of streetcar running on private right of way should have car under such control as circumstances require when approaching highway crossing.—Thompson v. Reading Transit Co., 100 Pa.Super. 294.

40. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

60 C.J. p 463 note 55.

41. Ind.—Dieckman v. Louisville & S. I. Traction Co., 89 N.E. 909, 91 N.E. 179, 46 Ind.App. 11.

60 C.J. p 463 note 56.

42. Pa.—Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 301 Pa. 72.

60 C.J. p 463 note 57.

43. Mass.—Maloy v. Boston Elevated Ry. Co., 104 N.E. 459, 217 Mass. 108.

60 C.J. p 463 note 58.

Traffic signal

When traffic sign changes, motorman must give pedestrian reasonable time to complete crossing of street.—Taylor v. Philadelphia Rapid Transit Co., 163 A. 538, 107 Pa.Super. 124.

44. Mo.—Moore v. Metropolitan St. Ry. Co., App., 180 S.W. 408.

Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1.

45. Mo.—Aldrich v. St. Louis Transit Co., 74 S.W. 141, 101 Mo.App. 77.

46. Mo.—Esstman v. United Rys. Co. of St. Louis, 216 S.W. 526—Moore v. United Rys. Co. of St. Louis, 170 S.W. 386, 185 Mo.App. 184.

47. Mo.—Koenig v. Union Depot Ry. Co., 73 S.W. 637, 173 Mo. 725.
60 C.J. p 464 note 62.

48. Mass.—Adams v. Boston Elevated Ry. Co., 107 N.E. 360, 219 Mass. 515.

49. Mich.—Hashman v. Pollak, 224 N.W. 333, 246 Mich. 408.
60 C.J. p 464 note 64.

50. Kan.—Consolidated City, etc., R. Co. v. Carlson, 48 P. 635, 58 Kan. 62.
60 C.J. p 464 note 65.

51. Ill.—Chicago City R. Co. v. Robinson, 18 N.E. 772, 127 Ill. 9, 11 Am.S.R. 87, 4 L.R.A. 126.

La.—Schwartz v. New Orleans, etc., R. Co., 34 So. 667, 110 La. 534.

52. Del.—Culbert v. Wilmington & P. Traction Co., 82 A. 1081, 26 Del. 253.

Where view of crossing is obstructed. When the view at a street crossing is clear and unobstructed, the degree of vigilance required of the street railroad company and those operating its cars to avoid injuries to persons on or near the track is not as great as when the view is obstructed,⁵³ and the effect of an obstruction is to impose on the railway company the reciprocal duty of using special precautions to avoid an accident, depending on the particular location and circumstances.⁵⁴ Hence, it is particularly negligent for a motorman to run his car at a high rate of speed to a crossing where pedestrians are likely to be when his view of the crossing is so obstructed by a passing vehicle that he cannot see whether or not the crossing is clear.⁵⁵

Crossing intersection without signal. Where an ordinance prohibits the operator of a streetcar from crossing a particular street intersection until signaled to do so by a traffic officer, it is negligence for the streetcar to cross the intersection without such signal.⁵⁶

§ 253. Approaching or Passing Other Cars or Vehicles

One operating a streetcar is not ordinarily bound to anticipate that pedestrians will step from behind cars or other vehicles near the track into the path of the approaching car; but, where such occurrence is likely, as where another car bound in the opposite direction is receiving or discharging passengers, it is his duty to operate his car accordingly.

Persons operating streetcars are not required to

anticipate that pedestrians will step from behind cars or other vehicles near the track into the path of an approaching car,⁵⁷ but are held to the same degree of care as is required to avoid mishaps to pedestrians intending to cross a highway between or at crossings.⁵⁸ Thus, operators of streetcars traveling on a public highway between street crossings are not bound to anticipate that persons will step into the path of a car, from behind busses loading or unloading passengers,⁵⁹ from behind a motor vehicle parked near the track,⁶⁰ from behind trucks going in the same direction but in advance of the car,⁶¹ from behind a standing wagon,⁶² from behind cars approaching on a parallel track,⁶³ or from between wagons moving alongside the track.⁶⁴

If, however, the operator of a streetcar has reason to anticipate such an occurrence, as where the other car, bound in the opposite direction, is at a crossing or other point discharging⁶⁵ or receiving⁶⁶ passengers, or where a motorman can see another car approaching from the opposite direction on a parallel track and has reason to anticipate that such car will stop to discharge passengers,⁶⁷ particularly where the street is crowded with vehicles,⁶⁸ it is his duty to take such circumstances into consideration, and to operate his car accordingly, as by keeping a sharp⁶⁹ or careful⁷⁰ lookout,⁷¹ by running at a reasonable rate of speed,⁷² by giving a warning,⁷³ by keeping the car under control,⁷⁴ or under such control that it may be stopped at a moment's notice⁷⁵ or on the appearance of danger,⁷⁶ by reducing

53. Va.—Roanoke Ry. & Electric Co. v. Carroll, 72 S.E. 125, 112 Va. 598.

54. Va.—Roanoke Ry. & Electric Co. v. Carroll, *supra*.
60 C.J. p 464 note 70.

55. Mo.—Hafner v. St. Louis Transit Co., 94 S.W. 291, 197 Mo. 196.

56. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

57. Pa.—Williams v. Lehigh Traction Co., 119 A. 79, 275 Pa. 240.

58. Pa.—Williams v. Lehigh Traction Co., *supra*.
Care required as to persons at crossings see *supra* § 252.

59. Pa.—Williams v. Lehigh Traction Co., *supra*.

60. N.Y.—Neuman v. Union Ry. Co. of New York City, 153 N.E. 64, 243 N.Y. 249.
60 C.J. p 465 note 76.

61. N.Y.—Johnson v. Third Ave. R. Co., 74 N.Y.S. 599, 69 App.Div. 247.

62. Ky.—Cornelius v. South Covington, etc., St. R. Co., 93 S.W. 643, 29 Ky.L. 505.

60 C.J. p 465 note 78.

63. Mo.—Battles v. United Rys. Co. of St. Louis, 161 S.W. 614, 178 Mo. App. 596.

60 C.J. p 465 note 79.

64. Mo.—Hafner v. St. Louis Transit Co., 94 S.W. 291, 197 Mo. 196.

65. N.Y.—Stevens v. Union R. Co., 78 N.Y.S. 624, 75 App.Div. 602, affirmed 68 N.E. 1125, 176 N.Y. 607.
60 C.J. p 465 note 81.

66. Mo.—Foster v. Kansas City Rys. Co., 235 S.W. 1070.

67. Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 147 Wis. 229.

68. Puerto Rico.—Zanabria v. Ponce R., etc., Co., 4 Puerto Rico Fed. 4.

69. Minn.—Bremer v. St. Paul City Ry. Co., 120 N.W. 382, 107 Minn. 326, 21 L.R.A., N.S., 887.

60 C.J. p 466 note 95.

70. Del.—Culbert v. Wilmington & P. Traction Co., 82 A. 1081, 26 Del. 253.

71. Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 26, 147 Wis. 229.

60 C.J. p 465 note 86.

72. Ill.—Chicago City Ry. Co. v. Robinson, 18 N.E. 772, 127 Ill. 9, 11 Am.S.R. 87, 4 L.R.A. 126.

60 C.J. p 465 note 87.

73. Ill.—Stack v. East St. Louis & S. Ry. Co., 152 Ill.App. 613, affirmed 92 N.E. 241, 245 Ill. 308, 137 Am.S.R. 318.

60 C.J. p 466 notes 88, 1.

74. Del.—Culbert v. Wilmington & P. Traction Co., 82 A. 1081, 26 Del. 253.

60 C.J. p 466 note 89.

75. Ky.—Louisville City Ry. Co. v. Hudgens, 98 S.W. 275, 276, 124 Ky. 79, 7 L.R.A., N.S., 152.

60 C.J. p 466 note 98.

76. Minn.—Bremer v. St. Paul City

the speed of the car,⁷⁷ and, if necessary, stopping it,⁷⁸ so that persons who may have alighted from the standing car may cross the track safely.⁷⁹

The fact that the car which is about to be passed on a parallel track has not yet reached its stopping place and is moving slowly does not relieve the motorman of the passing car of his duty to keep a lookout for persons who may pass behind the slowly moving car, and to keep his own car under control.⁸⁰ Where a person has alighted in a safe place provided for the purpose, and, after the car from which he has alighted has proceeded for some distance, the person starts across the track into the path of an oncoming car on the other track, it is sufficient that the motorman of such car have it under such control that it can be stopped at a moment's notice, that he give the usual signals of the approach of the car, that he keep a lookout ahead, and that he exercise ordinary care to prevent injuries to persons on or so near the track as to endanger their safety.⁸¹

Rules of company. The rules of a street railway company may recognize the danger of running a car past a regular stopping place, where a car traveling in an opposite direction has stopped, at a rate of speed which will not permit an almost instantaneous stopping of such car,⁸² and while it has been held that a rule of the street railroad company, that a car on a double track passing another standing still should be under full control, that is, that the passing car should be run slowly enough to permit its being stopped within a few feet, is but a rule of law applicable to the same situation,⁸³ it has also been held that the violation of a self-imposed rule of a streetcar company requiring the motorman to come to a stop before passing a standing car on a parallel track resulting in an injury to a pedestrian is not

negligence per se.⁸⁴ However, in determining whether a motorman was in the exercise of ordinary care in passing a standing streetcar without sounding a gong, a rule of the street railroad company requiring that in passing standing cars the bell must be rung and the car must be under complete control may be considered.⁸⁵

Determining status of injured person unnecessary. It is not necessary to determine the question whether a person who is injured by the passing car after being discharged from the standing car has ceased his relation as a passenger at the time he is struck,⁸⁶ because, where he is struck while on a street crossing, his rights as a mere traveler on the street entitle him to an observance on the part of defendant of the rule requiring the exercise of reasonable care for his safety.⁸⁷

First appearance of danger. Under an ordinance requiring the motorman to stop his car on the first appearance of danger, where a pedestrian stepped from between wagons alongside the track, the first appearance of danger was when the pedestrian emerged from behind the wagon and stepped on the track immediately in front of the car.⁸⁸

§ 254. Rounding Curves

A motorman may assume that a person within the swing of the overhang of the car at a curve will draw back far enough to avoid injury, and he ordinarily need not keep a lookout or give a warning to prevent injury from the overhang of the car on a curve.

The operator of a streetcar on rounding a curve or turning a corner must use such care as the condition of the streets and the traffic require.⁸⁹ In the absence of any defect in a streetcar or its equipment,⁹⁰ since it has been held that the motorman of a streetcar is not charged with knowledge that a

Ry. Co., 120 N.W. 382, 107 Minn. 326, 21 L.R.A., N.S., 887.
60 C.J. p 466 note 99.

77. Minn.—Bremer v. St. Paul City R. Co., supra.
60 C.J. p 466 note 90.

78. Minn.—Bremer v. St. Paul City R. Co., supra.
Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 147 Wis. 229.

79. Ky.—Walker v. Louisville Ry. Co., 164 S.W. 306, 158 Ky. 47.
60 C.J. p 466 note 2.

80. Mo.—Moore v. Metropolitan St. Ry. Co., App., 180 S.W. 408.

81. Ky.—Walker v. Louisville Ry. Co., 164 S.W. 306, 158 Ky. 47.
60 C.J. p 466 note 3.

82. Mo.—Moore v. Metropolitan St. Ry. Co., App., 180 S.W. 408.

83. Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 147 Wis. 229.

84. Mo.—Foster v. Kansas City Rys. Co., 235 S.W. 1070.
60 C.J. p 467 note 6.

85. Ohio.—Cincinnati Traction Co. v. Johnson, 32 Ohio Cir.Ct. 594.

86. Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 147 Wis. 229.

87. Wis.—Coel v. Green Bay Traction Co., supra.

88. Mo.—Hafner v. St. Louis Transit Co., 94 S.W. 291, 197 Mo. 196.

89. Pa.—Heaver v. Philadelphia Rapid Transit Co., 183 A. 110, 120 Pa.Super. 520.

Traffic signal

A streetcar starting a turn at an intersection controlled by traffic signals at a time when it had a green signal could continue until it completed the crossing.—Keller v. N. C. Public Service, 138 So. 463, 18 La. App. 317.

90. Mass.—Widmer v. West End St. R. Co., 32 N.E. 899, 158 Mass. 49.

pedestrian standing near the track is within the swing of the rear end of the car as it rounds a curve at that point,⁹¹ or at any rate since the motorman may rightfully assume that a person within the swing of the rear overhang of the car at a curve will draw back far enough to avoid being struck,⁹² it has been held that the streetcar company is not negligent, and is not liable for injuries to a pedestrian who is struck by the rear end of a streetcar as it rounds a curve,⁹³ particularly where the person near the track has misjudged the distance of the overhang and has ample space within which to retreat to a safe area.⁹⁴ The rule that the company is not ordinarily liable has been held inapplicable unless the injured pedestrian has freely and voluntarily placed himself in a position of peril,⁹⁵ and special circumstances may impose special obligations on the operator of a car rounding a curve.⁹⁶ It has also been held that the motorman may not assume that a pedestrian near a curve knows of his danger from the overhang of the car,⁹⁷ particularly where the overhang of the car is unusual,⁹⁸ and it has been held that the company may be liable for injuries sustained by the pedestrian under such circumstances.⁹⁹

While it has been held that the streetcar company only owes a duty of reasonable care to avoid injury to a pedestrian on a sidewalk where the overhang of a streetcar overlaps the sidewalk,¹ it has also been held that a railway company is required to use proportionate care where the overhang sweeps a special loading place provided by the railway company and impliedly held out for use by the public as a safe place.²

Lookout. While under some circumstances the motorman of a streetcar going around a corner may be required to keep a sharp lookout,³ street railroads are ordinarily under no duty to keep a lookout for persons who may be injured by the swing or overhang as a car rounds a curve,⁴ and it has been held that the motorman is not under a duty to keep watch of the overhang zone until the rear of the car has cleared it;⁵ but a lookout may be required under circumstances of danger, as where it is unusual for a car to make a turn at such place.⁶

Warning. The operator of a streetcar has been held to be under no duty to warn pedestrians of the swing or overhang as the car rounds a curve,⁷ particularly where such pedestrians have freely and voluntarily placed themselves in a position of

91. N.J.—*Miller v. Public Service Corp.*, 92 A. 343, 86 N.J.Law 631. L.R.A.1915C 604.
60 C.J. p 467 note 14.

92. Ala.—*Birmingham Elec. Co. v. Jones*, 176 So. 203, 234 Ala. 590.
Utah.—*Miller v. Utah Light & Traction Co.*, 86 P.2d 37, 96 Utah 369.
Wis.—*Zalewski v. Milwaukee Elec. Railway & Light Co.*, 263 N.W. 577, 219 Wis. 541.
60 C.J. p 467 note 15.

93. Ala.—*Birmingham Elec. Co. v. Jones*, 176 So. 203, 234 Ala. 590.
60 C.J. p 467 note 16.

94. Ky.—*Gribbins v. Kentucky Terminal & Traction Co.*, 150 S.W. 338, 159 Ky. 276.

95. Wash.—*White v. Seattle*, 240 P. 903, 136 Wash. 544.
60 C.J. p 467 note 18.

96. Mich.—*Hering v. City of Detroit*, 221 N.W. 278, 244 Mich. 293.

Safety zone

(1) A motorman, whose interurban car struck pedestrian in safety zone, was charged with knowledge of the extent that outswing of rear end of car going around curve would encroach on safety zone, and with knowledge that automobile traffic which started immediately before the car moved would cut off possibility of

pedestrian proceeding further across the street.—*Elder v. Rutledge*, 27 N. E.2d 358, 217 Ind. 459.

(2) A safety zone established in street by municipal authorities under traffic code is place designed for pedestrians to be safe from collision with vehicular traffic, and not as place of safety from normal overhang of streetcar, either on straight track, or as car rounds a curve.—*Ferguson v. Kansas City Public Service Co.*, 156 P.2d 869, 159 Kan. 520.

(3) Where pedestrian started to cross street and stopped near safety zone when lights changed and driver of electric bus, in obedience to traffic signals and hand signal of traffic officer, proceeded to make turn, following streetcar track around turn, street railroad was not liable for injuries sustained by pedestrian struck by side of the bus due to the inward swing of the overhang at the middle of bus in negotiating the curve.—*Miller v. Utah Light & Traction Co.*, 86 P.2d 37, 96 Utah 369.

97. Mo.—*State ex rel. Siegel v. Daues*, 300 S.W. 272, 318 Mo. 256—*Laurent v. United Rys. Co.*, 191 S. W. 992.

98. Mo.—*State ex rel. Siegel v. Daues*, 300 S.W. 272, 318 Mo. 256.
60 C.J. p 467 note 21.

99. Mo.—*State ex rel. Siegel v. Daues*, supra.

1. Conn.—*Hayden v. Fair Haven & W. R. Co.*, 56 A. 613, 76 Conn. 355.
60 C.J. p 468 note 23.

2. Iowa.—*Mangan v. Des Moines City Ry. Co.*, 203 N.W. 705, 200 Iowa 597, 41 A.L.R. 368.

Mo.—*Laurent v. United Rys. Co.*, 191 S.W. 992.

3. Mo.—*Ross v. Metropolitan St. Ry. Co.*, 88 S.W. 144, 113 Mo.App. 600.
60 C.J. p 468 note 26.

Lookout as to persons on or near track generally see supra § 248.

4. Ky.—*Gribbins v. Kentucky Terminal & Traction Co.*, 150 S.W. 338, 159 Ky. 276.

Wis.—*Zalewski v. Milwaukee Elec. Railway & Light Co.*, 263 N.W. 577, 219 Wis. 541.

5. Mich.—*Hering v. City of Detroit*, 221 N.W. 278, 244 Mich. 293.

6. Ky.—*Brentlinger v. Louisville R. Co.*, 161 S.W. 1107, 156 Ky. 685.
60 C.J. p 468 note 30.

7. Ala.—*Birmingham Elec. Co. v. Jones*, 176 So. 203, 234 Ala. 590.
Wis.—*Zalewski v. Milwaukee Elec. Railway & Light Co.*, 263 N.W. 577, 219 Wis. 541.
60 C.J. p 468 note 34.

peril.⁸ However, it has also been held that the motorman should sound a warning so as to avoid injury to a person who is in danger from the overhang of a car while making a turn,⁹ and the warning is required particularly where the injured pedestrian has not freely and voluntarily placed himself in the perilous position,¹⁰ or where the injured person is standing in a safety zone.¹¹

Rate of speed; starting and stopping car. While under some circumstances the motorman of a streetcar may be required to proceed around a curve cautiously,¹² the mere fact that a streetcar rounds a curve at high speed does not constitute negligence toward a person near the track who is struck by the overhang of the car.¹³ There arises a duty to stop the car if the operator sees a pedestrian in a place of danger near a curve and apparently unaware of his peril,¹⁴ and, where the car has come to a stop before reaching the curve, the motorman has a duty not to start around the curve at a time when to do so would cause pedestrians to be struck by the overhang of the car.¹⁵ The motorman has been held negligent if he approaches the curve in such a manner as to indicate an intention to stop, and there increases his speed without warning so that persons near the track cannot extricate themselves from the danger in time to avoid injury from the overhang of the car,¹⁶ but it has also been held that the motorman is not negligent toward pedestrians who are struck by the overhang of the car in rounding a curve under such circumstances.¹⁷

§ 255. Persons Working on or near Tracks

The operator of a streetcar must exercise due care to avoid injury to persons whose employment or duty takes them into the street.

A streetcar motorman has the duty to exercise due care to avoid injury to persons whose employment or duty takes them into the street.¹⁸ Where workmen are engaged in operations on or close to street railroad tracks, the operator of a streetcar with knowledge of their presence must be watchful to avoid injuring them,¹⁹ and, if such workmen are injured as a result of the operator's failure to be watchful, the railroad company is liable.²⁰ The streetcar operator is not required to keep the same lookout at times when the workmen are not actively engaged in such operations,²¹ and is not liable for injury to a workman who is struck while standing near the track and who the motorman had no reason to suppose would be standing where he was,²² as where his duties did not necessarily require him to be there.²³ The street railroad company is not liable for personal injuries inflicted on men working near its tracks where the company is not guilty of negligence toward such workmen,²⁴ but a flagman's signal to proceed does not relieve the motorman of the duty of exercising due care.²⁵

Duty to sound warning. A street railway company cannot recklessly run its cars at a speed to exceed the limits of the law, and without ringing a bell, or sounding a gong, irrespective of the employment of a person on or near the track,²⁶ and it

8. Wash.—White v. City of Seattle, 240 P. 903, 136 Wash. 544.

9. Pa.—Rothkugel v. Philadelphia Rapid Transit Co., 92 Pa.Super. 105.
60 C.J. p 468 note 36.

10. Wash.—White v. City of Seattle, 240 P. 903, 136 Wash. 544.
60 C.J. p 468 note 37.

11. Cal.—Brandenburg v. Pacific Gas & Elec. Co., 169 P.2d 909, 28 Cal.2d 282.

12. Mo.—Ross v. Metropolitan Street Ry. Co., 88 S.W. 144, 113 Mo. 600.
60 C.J. p 468 note 39.
Rate of speed and control of car as to persons on or near track:
Generally see supra § 249.
Where person is or should be seen see supra § 251.

13. Ky.—Gribbins v. Kentucky Terminal & Traction Co., 150 S.W. 338, 150 Ky. 276.
60 C.J. p 469 note 40.

14. Tex.—Texas Electric Ry. v. Coutts, Civ.App., 250 S.W. 266.
60 C.J. p 469 note 41.

15. N.Y.—Mittleman v. New York City Ry. Co., 107 N.Y.S. 108, 56 Misc. 599.
60 C.J. p 469 note 42.

16. Ill.—Kelly v. Chicago City Ry. Co., 119 N.E. 622, 283 Ill. 640.

17. N.J.—Miller v. Public Service Corp., 92 A. 343, 86 N.J.Law 631, L. R.A.1915C 604.
R.I.—Garvey v. Rhode Island Co., 58 A. 456, 26 R.I. 80.

18. N.Y.—McDade v. International R. Co., 138 N.E. 488, 235 N.Y. 11.
60 C.J. p 469 note 46.

19. Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817.
Pa.—Russo v. Pittsburgh Rys. Co., 64 A.2d 666, 164 Pa.Super. 396.
60 C.J. p 469 note 47.

20. Pa.—Russo v. Pittsburgh Rys. Co., supra.
60 C.J. p 469 note 48.

21. Pa.—Kilgallen v. Philadelphia Rapid Transit Co., 150 A. 746, 300 Pa. 451.

22. Pa.—Kilgallen v. Philadelphia Rapid Transit Co., supra.

23. Pa.—Kilgallen v. Philadelphia Rapid Transit Co., supra.

24. N.Y.—Schmidt v. Steinway, etc., R. Co., 30 N.E. 389, 132 N.Y. 566.
60 C.J. p 470 note 52.

25. Pa.—Russo v. Pittsburgh Rys. Co., 64 A.2d 666, 164 Pa.Super. 396.

Warning of danger

Motorman of streetcar, who had received flagman's signal to proceed over portion of track being repaired, was required to exercise a greater degree of care for protection of workmen than for protection of pedestrians, after workman, who saw approaching streetcar, arose from a kneeling position and with both hands and by voice attempted to stop oncoming car.—Russo v. Pittsburgh Rys. Co., supra.

26. U.S.—Puget Sound Traction,

has been held that the company must give adequate and timely warning to persons working on or near the track,²⁷ and a failure to give such persons a proper warning constitutes negligence for which the company is liable.²⁸ On the other hand it has been held that there is no duty to warn the employee of a contractor doing work alongside the track and between intersecting streets.²⁹

Reliance on precautions or care of workmen. The motorman of a streetcar is not required to anticipate unexpected acts endangering workmen on or near the track,³⁰ and may assume that a workman will not increase his danger by a failure to exercise ordinary care in looking out for streetcars³¹ or by failing to get out of the way in time to avoid injury.³²

Duty to slow down or stop. While the motorman of a streetcar is not required to stop his car merely because he sees men at work on or near the track ahead,³³ such motorman may be required to slow down or to stop if necessary when danger to such persons becomes apparent.³⁴

§ 256. Persons on Private Premises near Tracks

Where a streetcar leaves its tracks and injures a person on private property, it has been held that the company is liable irrespective of negligence.

Although it has been held that, where a streetcar leaves its track and inflicts personal injuries on persons who are on private premises adjacent to the track, the company is liable irrespective of negligence,³⁵ recovery for such injuries has been denied where no negligence on the part of the company appeared.³⁶ Where, as a result of the operation of a street railroad, a person on private premises suffers merely fright, the company is not liable.³⁷

§ 257. Persons under Elevated Railroad

It is the duty of an elevated railroad to exercise reasonable care to prevent sparking and injury from sparks to persons under the railroad.

It is the duty of an elevated railroad to exercise reasonable care to prevent sparking³⁸ and injury from sparks to persons under the railroad.³⁹ It is bound to use the most approved means to prevent live coals from falling from its engines.⁴⁰ An elevated railroad owes persons lawfully in buildings adjacent to the streets only the duty of exercising ordinary care for their protection.⁴¹

6. INJURIES TO CHILDREN AND PERSONS UNDER DISABILITY

§ 258. Children

A street railroad company in operating its cars is bound to use ordinary care, and only ordinary care, to avoid injuring a child on or near its track, but greater caution is required to discharge this duty toward a child than toward an adult.

A street railroad company in operating its cars is

bound to use ordinary care,⁴² and only ordinary care,⁴³ to avoid injuring a child who may be on or near the track. However, acts and conduct on the part of those in charge of a streetcar, consistent with ordinary care toward a man of full age, may amount to, and be, negligence toward a child.⁴⁴

Light & Power Co. v. Schleif, Wash., 220 F. 48, 135 C.C.A. 616.

27. Pa.—Chew v. Philadelphia Rapid Transit Co., 90 Pa.Super. 155. 60 C.J. p 470 note 54.

28. Mass.—Hanley v. Boston Elevated Ry. Co., 87 N.E. 197, 201 Mass. 55. 60 C.J. p 470 note 55.

29. Pa.—Kilgallen v. Philadelphia Rapid Transit Co., 150 A. 746, 300 Pa. 451. 60 C.J. p 470 note 56.

30. Pa.—Haskin v. Philadelphia Rapid Transit Co., 140 A. 547, 291 Pa. 492. 60 C.J. p 470 note 57.

31. Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817.

32. Minn.—Peterson v. Minneapolis St. Ry. Co., supra.

33. Ala.—Mobile Light, etc., Co. v. Burch, 68 So. 509, 12 Ala.App. 421. 60 C.J. p 470 note 58.

34. Mich.—Lyons v. Bay Cities Consol. R. Co., 73 N.W. 139, 115 Mich. 114. 60 C.J. p 470 note 59.

35. Ky.—Kentucky Traction & Terminal Co. v. Grimes, 194 S.W. 1048, 175 Ky. 694. 60 C.J. p 470 note 61.

36. La.—Fitzgerald v. New Orleans Ry. & Light Co., 59 So. 26, 131 La. 92. 60 C.J. p 471 note 62.

37. N.Y.—Lehman v. Brooklyn City R. Co., 47 Hun 355. 60 C.J. p 471 note 63.

38. Mass.—Woodal v. Boston Elevated Ry. Co., 78 N.E. 446, 192 Mass. 308.

39. Mass.—Woodal v. Boston Elevated Ry. Co., supra.

40. N.Y.—Lowery v. Manhattan Ry. Co., 12 Daly 431.

41. N.Y.—Schacter v. Interborough Rapid Transit Co., 130 N.Y.S. 549, 146 App.Div. 139.

42. Cal.—Corpus Juris cited in Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 95, 130 Cal.App. 316. Mo.—Fortner v. St. Louis Public Service Co., 244 S.W.2d 10. 60 C.J. p 471 note 65.

43. Mo.—Kube v. St. Louis Transit Co., 78 S.W. 55, 103 Mo.App. 582. 60 C.J. p 471 note 66.

44. Iowa.—Hanley v. Ft. Dodge Light, etc., Co., 107 N.W. 593, 133 Iowa 326, reheard 110 N.W. 579, 133 Iowa 326. 60 C.J. p 471 note 68.

Therefore, in an abstract proposition,⁴⁵ and as a general rule, greater caution on the part of a street railroad company in the operation of its cars is required toward a child than is required toward an adult.⁴⁶ Whether a streetcar company has exercised proper care and caution toward a child, who is injured by the operation of streetcar, while such child is on or near the tracks, depends on the circumstances of the particular case,⁴⁷ taking into consideration the age,⁴⁸ apparent maturity,⁴⁹ and capacity⁵⁰ of the child. If, in the absence of contributory negligence, by the exercise of proper care, injury to the child could have been avoided, the company is liable for the resulting injuries;⁵¹ but it is not liable where it is not negligent.⁵²

A street railroad company is not required to guard against unexpected or thoughtless acts of such a child, and, if it exercises reasonable and ordinary care in the operation of its cars to discover such child and uses all reasonable means within its power to avoid injury after discovering his peril, it is not liable for injuries which result from an unavoidable accident,⁵³ as where the child puts himself in such a position of danger that he cannot be discovered by reasonable care in time to prevent an accident.⁵⁴

Where presence of children may be anticipated. A motorman must exercise a high degree of care in places where he may reasonably anticipate the presence of children.⁵⁵

§ 259. — Duty to Anticipate Presence and Danger

A motorman is bound to anticipate the presence of children and to operate the car with due regard for their safety in places where children are likely to be found in the street.

In the operation of streetcars it is the duty of the streetcar company to recognize that children may from time to time be occupying and using the streets;⁵⁶ and a motorman is bound to anticipate their presence, to anticipate danger to them, and to operate his car with due regard for their safety in a populous neighborhood,⁵⁷ or in other places where children are likely to be found in the street.⁵⁸ While it is the duty of a motorman to use reasonable care under the circumstances of the case, he is not required to anticipate that a child will rush into danger merely because he sees such child in the street or on the sidewalk,⁵⁹ and the motorman is not required to anticipate that children seen near or approaching the track will attempt to cross in front of the approaching car⁶⁰ or will run into the car.⁶¹ Similarly, while it has been said that a motorman may as a reasonably prudent motorman be found to have been negligent in failing to anticipate that children would play in the street and might run in front of a moving car,⁶² it has been held that, as a matter of law, the motorman is not required to anticipate such possibilities,⁶³ and he is not bound to anticipate the presence of a child playing in material piled on the street.⁶⁴ Furthermore, on seeing children playing in the street, the motorman is not negligent in failing to anticipate that one

45. Wash.—*Mitchell v. Tacoma R., etc., Co.*, 37 P. 341, 9 Wash. 120.

46. Mo.—*Corpus Juris* cited in *Fortner v. St. Louis Public Service Co.*, 244 S.W.2d 10, 14.
Wash.—*Armstrong v. Spokane United Rys.*, 78 P.2d 176, 194 Wash. 353.
60 C.J. p 471 note 70.

47. Mich.—*Rolle v. City Electric Co.*, 115 N.W. 727, 152 Mich. 77.
Wash.—*Mitchell v. Tacoma Ry. & Motor Co.*, 37 P. 341, 9 Wash. 120.

48. Wash.—*Mitchell v. Tacoma Ry. & Motor Co.*, *supra*.
60 C.J. p 472 note 72.

49. Wash.—*Mitchell v. Tacoma Ry. & Motor Co.*, *supra*.

50. Wash.—*Mitchell v. Tacoma Ry. & Motor Co.*, *supra*.

51. Md.—*United Rys. & Electric Co. of Baltimore v. Carneal*, 72 A. 771, 110 Md. 211.

52. Mich.—*Manoogian v. City of Detroit, Department of Street Railways*, 279 N.W. 890, 284 Mich. 432.

53. Cal.—*Gallucci v. San Diego Electric Ry. Co.*, 35 P.2d 1038, 1 Cal. App.2d 5.
60 C.J. p 472 note 77.

54. Minn.—*Wright v. Minneapolis St. Ry. Co.*, 23 N.W.2d 347, 222 Minn. 105.
60 C.J. p 472 note 79.

55. Ala.—*Mobile Light & Railroad Co. v. Nicholas*, 167 So. 298, 232 Ala. 213.
60 C.J. p 472 note 80.

56. Colo.—*Denver City Tramway Co. v. Brown*, 143 P. 364, 57 Colo. 484.

57. Conn.—*Lederer v. Connecticut Co.*, 111 A. 785, 95 Conn. 520.
60 C.J. p 472 note 83.

58. Ala.—*Mobile Light & Railroad*

Co. v. Nicholas, 167 So. 298, 232 Ala. 213.
60 C.J. p 472 note 84.

59. Md.—*State v. Washington, B. & A. Electric R. Co.*, 131 A. 822, 149 Md. 443.

Pa.—*Brennen v. Pittsburgh Rys. Co.*, 186 A. 743, 323 Pa. 81.

60. Wash.—*Armstrong v. Spokane United Rys.*, 78 P.2d 176, 194 Wash. 353.
60 C.J. p 473 note 87.

61. N.Y.—*Bulger v. Albany R. Co.*, 42 N.Y. 459.
60 C.J. p 473 note 88.

62. N.Y.—*Camardo v. New York State Rys.*, 159 N.E. 879, 247 N.Y. 111.

63. N.Y.—*Camardo v. New York State Rys.*, *supra*.

64. Ill.—*Segal v. Chicago Ry. Co.*, 216 Ill.App. 11.
60 C.J. p 473 note 92.

of them will suddenly and unexpectedly run in front of the moving car.⁶⁵ Neither is a motorman required to anticipate that a child of very tender years will be wandering unattended at a busy intersection;⁶⁶ nor is the motorman required to anticipate that a child of tender years will break away from its caretaker and suddenly dart in front of the moving car.⁶⁷

§ 260. — Lookout and Warning; Speed and Control of Car

The operator of a streetcar must maintain a lookout to discover children who may be on or near the track. Where children are in the street, the motorman must operate his car at a reasonable rate of speed, and have it under such control as a reasonably prudent man would if placed in the same circumstances.

The operator of a streetcar must maintain a lookout to discover children who may be on or near the track,⁶⁸ and under some circumstances he may be required to exercise a more vigilant lookout for children than for adults.⁶⁹ Thus a driver or motorman, when operating his car on a street where he has reason to expect the presence of children, must exercise a high degree of watchfulness,⁷⁰ since the duty of a motorman to keep a lookout to discover the peril of persons who may be on or near the track, particularly in thickly populated parts of the city, is applicable to children.⁷¹ However, where there is nothing in a situation, as known to, and

ordinarily observed by, the motorman which calls on him for extraordinary vigilance,⁷² it is ordinary, rather than extraordinary, vigilance that is required of him.⁷³ Thus the motorman may not be negligent in failing to see a small child on the sidewalk.⁷⁴

The operator of a streetcar must maintain a lookout to discover small children who may be lying on the track ahead of the car,⁷⁵ but a motorman cannot be considered careless, although he fails to see a child between crossings, if the car would not have struck such child in the exercise of reasonable care, provided some unusual event had not intervened between his beginning to cross the tracks and his being struck,⁷⁶ such as tripping and falling, or being caught in the rails or the pavement, or in some other manner having his progress impeded.⁷⁷ A streetcar motorman is not under a duty to be excessively diligent in the middle of a street block,⁷⁸ but it may be negligent for him to fail to apprehend the possibility of a child crossing in the middle of the block,⁷⁹ and to neglect to be vigilant about the likelihood of a child approaching from the curb as the car moves from crossing to crossing.⁸⁰

If by the exercise of ordinary care the motorman might have discovered the child in time to avoid injuring him, and failed to do so, the motorman is negligent, and the company is liable for injuries

65. Wis.—Holdridge v. Mendenhall, 83 N.W. 1109, 108 Wis. 1, 81 Am. S.R. 871.

66. Ill.—Spencer v. Chicago City Ry. Co., 220 Ill.App. 436. 60 C.J. p 473 note 94.

67. Pa.—Frank v. Allegheny Valley St. Ry. Co., 58 Pa.Super. 544.

68. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

La.—Tassin v. New Orleans Public Service, 139 So. 695, 19 La.App. 456.

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 165.

Mo.—Fortner v. St. Louis Public Service Co., 244 S.W.2d 10.

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353.

W.Va.—Nazionale v. Wheeling Traction Co., 158 S.E. 502, 110 W.Va. 405.

60 C.J. p 473 note 96.

Obstruction

(1) If view of motorman of streetcar striking child was obstructed, it became more imperative for motorman, knowing of frequent use of track by pedestrians, to increase care.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

(2) Street railroad was held not liable for death of child who was killed by streetcar because bushes, shrubbery, and flowers surrounding track concealed child from view of motorman, where such plants were planted, maintained, and owned by city.—Gallucci v. San Diego Electric Ry. Co., 35 P.2d 1038, 1 Cal.App.2d 5.

69. Conn.—Lederer v. Connecticut Co., 111 A. 785, 95 Conn. 520. Ohio.—Maumee Valley Rys. & Light Co. v. Hanaway, 7 Ohio App. 99.

70. N.J.—Bergen County Traction Co. v. Heitman, 40 A. 651, 61 N.J. Law 682.

60 C.J. p 473 note 98.

71. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484. 60 C.J. p 473 note 1.

72. Ill.—Spencer v. Chicago City Ry. Co., 220 Ill.App. 436.

73. Ill.—Spencer v. Chicago City Ry. Co., supra. 60 C.J. p 473 note 3.

74. La.—Praette v. New Orleans Public Service, 120 So. 483, 10 La. App. 300, followed in Carrick v. New Orleans Public Service, 120 So. 485, 10 La.App. 105. 60 C.J. p 474 note 4.

75. Mo.—Hovarka v. St. Louis Transit Co., 90 S.W. 1142, 191 Mo. 441. 60 C.J. p 474 note 5.

76. N.Y.—Madden v. Chalmers, 214 N.Y.S. 268, 215 App.Div. 549. 60 C.J. p 474 note 6.

77. N.Y.—Madden v. Chalmers, supra. 60 C.J. p 474 note 7.

78. N.Y.—Madden v. Chalmers, supra.

79. N.Y.—Madden v. Chalmers, supra.

80. N.Y.—Madden v. Chalmers, supra.

which may result therefrom,⁸¹ and, conversely, there is no liability where the motorman did not see the child and could not be expected to have seen him in the exercise of ordinary care.⁸²

Warning, speed, and control of car. There can be no hard and fast rule as to the exact rate of speed or degree of control to be exercised where children are in the street,⁸³ but there is a rule applicable in all cases that the motorman must operate his car at a reasonable rate of speed, and have it, under such control as a reasonably prudent man would if placed in the same circumstances.⁸⁴ The question of negligence must in each case be determined by the facts and circumstances as they existed at the time of the accident.⁸⁵ Whenever a car of a street railway company is rapidly approaching a point in the highway where existing conditions render it apparent that the danger of injury to the public will be materially lessened by the sounding of a warning, it is the legal duty of the company and its motormen to sound such warning toward a child who may be on or near the track, and the failure to do so is negligence.⁸⁶ Hence, whether the rate of speed and failure to sound a warning, or failure to sound a warning and to stop, constitutes negligence on the part of the motorman may depend on the circumstances of the particular case.⁸⁷ However, it has also been held that the operation of a streetcar at a rate of speed exceeding that permitted by ordinance may, when proximately resulting in injury to a child, constitute negligence per se.⁸⁸ If a carman knows a street crossing will

be thronged with school children at a certain hour of the day, that fact ought to put him on notice of the danger of a fatality if he moves over the crossing at that hour without having his car under control.⁸⁹

§ 261. — Precautions as to Children Who Are Seen or Should Be Seen on or near or Approaching Track

A motorman who sees or should see a child in a dangerous position on, near, or approaching the track must use all reasonable efforts to avoid injuring the child, and he cannot ordinarily assume that the child will discern and avoid the peril.

A motorman, who while operating his car sees, or by the exercise of ordinary care could see, a child in a dangerous situation on, near, or approaching the track, must at once use all reasonable efforts to avoid injuring it;⁹⁰ he must proceed with caution and use ordinary care,⁹¹ and for a failure to exercise due care to avoid injury to a child seen on or near the track the company is liable.⁹² Where the motorman, on discovering, in the exercise of due care, the danger of a small child on, near, or approaching the track, does all that he can to avoid injury to the child, the company is not liable.⁹³

Child seen on or approaching track. Where a motorman sees or should see that a young child is in such a situation or is acting so as to expose itself to danger from an advancing car, of which it is unaware,⁹⁴ the motorman should take such measures as will prevent injury;⁹⁵ and, when a young

81. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

Pa.—Rex v. Lehigh Valley Transit Co., 177 A. 226, 116 Pa.Super. 603. Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353.

W.Va.—Nazione v. Wheeling Traction Co., 158 S.E. 502, 110 W.Va. 405.

60 C.J. p 474 note 12.

82. Pa.—Rex v. Lehigh Valley Transit Co., 177 A. 226, 116 Pa. Super. 603.

83. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484.

84. Colo.—Denver City Tramway Co. v. Brown, supra.

60 C.J. p 475 note 14.

85. Colo.—Denver City Tramway Co. v. Brown, supra.

86. Colo.—Denver City Tramway Co. v. Brown, supra.

60 C.J. p 475 note 17.

87. Colo.—Denver City Tramway Co. v. Brown, supra.

60 C.J. p 475 note 18.

88. Wash.—Sundstrom v. Puget Sound Traction, Light & Power Co., 156 P. 828, 90 Wash. 640.

60 C.J. p 475 note 19.

89. Mo.—Kube v. St. Louis Transit Co., 78 S.W. 582, 103 Mo.App. 582.

60 C.J. p 475 note 20.

Extreme caution

There was duty upon motorman of streetcar approaching permissive track crossing at noon in school vicinity, to exercise extreme caution.—Quattrochi v. Pittsburgh Rys. Co., 164 A. 59, 309 Pa. 377.

90. N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

N.Y.—Pitts v. United Traction Co., 55 N.Y.S.2d 14, 269 App.Div. 796.

60 C.J. p 475 note 23—52 C.J. p 636 note 17 [b].

91. Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 130 Cal.App. 316.

92. W.Va.—Potts v. Union Traction Co., 83 S.E. 918, 75 W.Va. 212.

93. Cal.—Gackstetter v. Market St. Ry. Co., 285 P. 409, 104 Cal.App. 89.

Pa.—Brenen v. Pittsburgh Rys. Co., 186 A. 743, 323 Pa. 81.

60 C.J. p 476 note 26.

94. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484.

Assumption that boy heard whistle

Motorman of streetcar overtaking boy on bicycle who gave no positive indication of having heard whistle was not justified in assuming that whistle was heard.—Kahn v. Shreveport Rys. Co., La.App., 161 So. 636.

95. Colo.—Denver City Tramway Co. v. Brown, supra.

child is discovered approaching the car track with the apparent intention of crossing in front of a moving car⁹⁶ or is discovered on the track,⁹⁷ or where a child of tender years is seen near the track,⁹⁸ it is the duty of the operator of the car to exercise a high degree of care to avoid injury to such child. It has been held that a motorman is not required, on seeing a child approaching the track, to make sure that the child will be off the track at the point where it is crossing when the car reaches it.⁹⁹

Reliance on precautions of child or of its custodian. Although the operator of a streetcar may, in the first instance, properly assume that an adult seen on or near the track will get off, or stay off, the track, as discussed supra § 251 b, where the motorman sees or could, in the exercise of reasonable care, see a child of tender years on or near the track¹ or in dangerous proximity to the track,² the motorman is not permitted to assume that the child will discern and avoid the perils of its situation. Therefore, if the motorman sees or, by the exercise of ordinary care, could see a child of tender years on or near the track, he is not ordinarily entitled to act on the assumption that such child will get off or stay off the track.³ However, it has been held that the motorman may properly rely on the natural inclination toward safety on the part of even young children;⁴ and it has also been held that the motorman may, in the first instance, presume

that children on the track will get out of the way,⁵ particularly if such children are of such an age as to appreciate and avoid danger;⁶ and a motorman may assume that an adult person in charge of a child of tender years will not permit the child to come from a safe place into dangerous proximity to a moving car.⁷

Duty to sound warning, to control car, to slow up, and to stop. In pursuance of his duty to use all reasonable efforts to avoid injury to a child who is, or ought to be, seen on, near, or approaching the track, the motorman of a streetcar may be required, on seeing a child in such a situation, to sound a warning;⁸ to keep the car under control,⁹ particularly where the child seen on or dangerously near the track is of very tender years;¹⁰ to reduce the speed of the car,¹¹ and if necessary to stop,¹² if that can be done without endangering the passengers;¹³ or to use all reasonable means to stop it in time to avoid the injury.¹⁴ Under particular circumstances the motorman of a car may be required not to start his car while a child is in a dangerous place near the track.¹⁵

Where a motorman sees a child of tender years near the track and apparently intending to cross ahead of the car,¹⁶ or if the motorman sees a child approaching the track in time to stop,¹⁷ and the motorman fails to stop the car, he is negligent and the company is liable.¹⁸ However, it is not the duty of a motorman to stop his car, or to slacken

96. Ill.—Liska v. Chicago Rys. Co., 149 N.E. 469, 318 Ill. 570. 60 C.J. p 476 note 31.

97. Ill.—Perryman v. Chicago City Ry. Co., 89 N.E. 980, 242 Ill. 269. 60 C.J. p 476 note 32.

98. W.Va.—Potts v. Union Traction Co., 83 S.E. 918, 75 W.Va. 212. 60 C.J. p 476 note 33.

99. Ind.—Indianapolis St. R. Co. v. Schomberg, 72 N.E. 1041, 164 Ind. 111. 60 C.J. p 476 note 35.

1. W.Va.—Potts v. Union Traction Co., 83 S.E. 918, 75 W.Va. 212.

2. Ala.—Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357.

3. Ind.—Indianapolis St. R. Co. v. Schomberg, App., 71 N.E. 237, affirmed 72 N.E. 1041, 164 Ind. 111. 60 C.J. p 476 note 40.

4. N.Y.—Madden v. Chalmers, 214 N.Y.S. 268, 215 App.Div. 519. 60 C.J. p 477 note 41.

5. Iowa.—Hanley v. Ft. Dodge Light, etc., Co., 107 N.W. 593, 110 N.W. 579, 133 Iowa 326. 60 C.J. p 477 note 43.

6. Mo.—Jett v. Central Electric R. Co., 77 S.W. 738, 178 Mo. 664. 60 C.J. p 477 note 43.

7. Ala.—Jones v. Birmingham, Ry., Light & Power Co., 87 So. 801, 12 Ala.App. 474, certiorari denied 69 So. 1018, 193 Ala. 676. 60 C.J. p 477 note 44.

8. N.Y.—Byrnes v. Brooklyn Heights R. Co., 133 N.Y.S. 243, 148 App. Div. 794. 60 C.J. p 477 note 47.

9. Minn.—Pickell v. St. Paul City Ry. Co., 139 N.W. 616, 120 Minn. 340. 60 C.J. p 477 note 48.

10. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213. 60 C.J. p 478 note 49.

11. Ill.—Chicago City R. Co. v. Tuo-

hy, 95 Ill.App. 314, affirmed 63 N.E. 997, 196 Ill. 410, 58 L.R.A. 270. 60 C.J. p 478 note 50.

12. Mo.—Turnbow v. Dunham, 197 S.W. 103, 272 Mo. 53. 60 C.J. p 478 note 51.

13. Mo.—Cytron v. St. Louis Transit Co., 104 S.W. 109, 205 Mo. 692—Wagner v. Metropolitan St. Ry. Co., 142 S.W. 463, 160 Mo.App. 334.

14. R.I.—Nahabedian v. United Electric Rys. Co., 149 A. 19, 50 R.I. 455. 60 C.J. p 478 note 53.

15. Pa.—Wechsler v. Pittsburgh Rys. Co., 93 A. 19, 247 Pa. 96. 60 C.J. p 478 note 54.

16. Ill.—Perryman v. Chicago City Ry. Co., 89 N.E. 980, 242 Ill. 269.

17. Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 299 Pa. 79.

18. Ill.—Perryman v. Chicago City Ry. Co., 89 N.E. 980, 242 Ill. 269. Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 299 Pa. 79.

its speed, whenever he sees a child in or near the street, unless there is some circumstance sufficient to warn a person of ordinary prudence that the child is or is likely to be endangered by the operation of the car,¹⁹ or unless, as a man of ordinary care and prudence, he has reason, or should have reason, to apprehend that his failure to do so will cause injury to a child seen approaching the track,²⁰ or unless it is reasonably apparent, or would be, to a reasonably cautious man that, unless the speed of the car is checked or stopped, it will strike the child.²¹ As otherwise stated, since no such duty arises until the motorman sees²² or, in the exercise of reasonable care, can see²³ that the child so situated is about,²⁴ or is likely,²⁵ to get into the path of the approaching car, a motorman is not required to slacken the speed, or to stop his car, merely because a small child²⁶ is seen in a safe place²⁷ on the sidewalk,²⁸ or in the street,²⁹ or on the curb,³⁰ or near the curb³¹ as the car approaches; and, where on seeing a child approach the track the motorman stops as soon as he can do so, he is not negligent.³²

Similarly, since a street railway company is not liable for inevitable accidents resulting from sudden and unexpected acts of children, as discussed supra § 258, the company is not liable where the child suddenly runs in front of or against a moving car before it can be stopped or its speed slackened, although every reasonable effort to do so is exercised.³³ However, in order to relieve the company

of liability in such a case it is necessary that the car be operated at a reasonable rate of speed.³⁴

Under vigilant watch ordinance. Under the so-called vigilant watch ordinances a motorman is, on the first appearance of danger to children seen on or near, or approaching, required to stop within the shortest time and space possible, and failure to stop within such time and space, resulting in injuries to a child, constitutes negligence for which the company is liable.³⁵

§ 262. Infirm or Otherwise Disabled Persons

A street railway company must operate its cars with due regard to the rights of aged and infirm or otherwise disabled persons.

It is the duty of a street railway company to run its cars with due regard to the rights of aged and infirm persons,³⁶ and the company is liable if it does not use due and ordinary care, in proportion to the danger, to avoid injury to such persons³⁷ or persons otherwise disabled.³⁸ Thus, a streetcar motorman must be alert and watchful to avoid injury to those who, because of advanced age³⁹ or enfeebled physical condition,⁴⁰ do not get off the track at the near approach of the car. A higher degree of care must be exercised toward an adult person who, from any apparent disability or other cause, cannot be expected to exercise the usual degree of prudence and care for his own protection.⁴¹

While it has been held that the duty of a motor-

19. Iowa.—Hanley v. Ft. Dodge Light, etc., Co., 107 N.W. 593, 110 N.W. 579, 133 Iowa 326. 60 C.J. p 479 note 60.

20. Ohio.—Cincinnati Traction Co. v. Simon, 28 Ohio Cir.Ct. 780.

21. Iowa.—Hanley v. Ft. Dodge Light, etc., Co., 107 N.W. 593, 110 N.W. 579, 133 Iowa 326.

22. Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

23. Ill.—Casey v. Chicago Consol. Traction Co., 174 Ill.App. 51.

Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

24. Ill.—Casey v. Chicago Consol. Traction Co., 174 Ill.App. 51.

Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

25. Or.—Cerrano v. Portland Ry., Light & Power Co., supra.

26. Or.—Cerrano v. Portland Ry., Light & Power Co., supra. 60 C.J. p 479 note 67.

27. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

28. Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353. 60 C.J. p 479 note 68.

29. Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

30. Ill.—Casey v. Chicago Consol. Traction Co., 174 Ill.App. 51.

31. Ill.—Liska v. Chicago Rys. Co., 149 N.E. 469, 318 Ill. 570.

Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

32. La.—Pyaette v. New Orleans Public Service, 120 So. 483, 10 La. App. 300. 60 C.J. p 479 note 72.

33. Mich.—Rollo v. City Electric R. Co., 115 N.W. 727, 152 Mich. 77. 60 C.J. p 479 note 74.

34. Ky.—Netter's Adm'r v. Louisville Ry. Co., 121 S.W. 636, 134 Ky. 678.

35. Mo.—Esstman v. United Rys. Co. of St. Louis, 216 S.W. 526. 60 C.J. p 480 notes 76-78.

36. Ind.—Indianapolis St. R. Co. v. Schomberg, App., 71 N.E. 237, affirmed 72 N.E. 1041, 164 Ind. 111.

37. Ind.—Indianapolis St. R. Co. v. Schomberg, supra. 60 C.J. p 480 note 80.

38. N.C.—Smith v. Charlotte Electric R. Co., 92 S.E. 382, 173 N.C. 489. 60 C.J. p 480 note 81.

39. N.Y.—Curtin v. Metropolitan St. R. Co., 48 N.Y.S. 581, 22 Misc. 83.

40. N.Y.—Curtin v. Metropolitan St. R. Co., supra.

41. N.Y.—Curtin v. Metropolitan St. R. Co., supra.

man to keep a lookout for persons who may be on or near the track is applicable to persons who are disabled,⁴² such as those disabled by intoxication,⁴³ or otherwise,⁴⁴ it has been held that there is no duty of prevision owed to persons who may, because intoxicated⁴⁵ or for any other reason,⁴⁶ lie down in practical disguise on or near the track; but that as to such persons, the only duty of a streetcar company is to use reasonable care not to injure them after their peril has been discovered,⁴⁷ or would have been discovered by due care in the use of such facilities and equipment as were required by their duty, not to such persons, but to persons using the streets in some such way as was to be reasonably expected.⁴⁸

It has also been held that, if a human being is seen by the operator of a streetcar lying on the track, it is the operator's duty to exercise the very highest degree of care to avoid injury to the person in such position.⁴⁹ A motorman is not required to anticipate that a person will be thrown on the

track.⁵⁰ Disregard by the motorman of a signal warning of danger may constitute negligence in striking a person disabled on the tracks.⁵¹ On discovering a person on or near the track the motorman may properly assume that such person is in full possession of his faculties, as discussed supra § 251 b even though they may subsequently prove to be impaired,⁵² but the motorman is not entitled to presume that a person who is on or dangerously near the track and apparently insensible of his danger, by reason of intoxication,⁵³ or sleepiness,⁵⁴ or any other like cause,⁵⁵ will stay or remain out of danger. In any event a street railway company is not liable for injuries to disabled persons where it is impossible to stop the car in time to prevent injuring them after their perilous position is observed.⁵⁶

Error of judgment in emergency situation. In an emergency situation a motorman's error in judgment, when he acts with respect to a disabled person on the track, does not constitute negligence.⁵⁷

7. CONTRIBUTORY NEGLIGENCE

§ 263. In General

Generally it is the duty of one going on or near street railroad tracks to exercise reasonable and ordinary care to protect himself from injury, and, if he fails to do so, he is guilty of contributory negligence, which ordinarily is a defense and precludes the recovery of damages.

As a general rule it is the duty of a person going on or near a street railroad track to exercise such

reasonable and ordinary care as would be exercised by a reasonably prudent person, under the same or similar circumstances, to protect himself from injury;⁵⁸ and, if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence.⁵⁹ In order to constitute ordinary care, the care exercised must be proportionate to the known⁶⁰

42. Mo.—Griggs v. Kansas City Rys. Co., 228 S.W. 508.

43. Mo.—Griggs v. Kansas City Rys. Co., supra.

44. Mo.—Fearons v. Kansas City Elevated Ry. Co., 79 S.W. 394, 180 Mo. 228.

60 C.J. p 481 note 89.

45. Va.—Virginia Ry. & Power Co. v. Winstead's Adm'r, 89 S.E. 83, 119 Va. 326.

46. Va.—Virginia Ry. & Power Co. v. Winstead's Adm'r, supra.

47. Va.—Virginia Ry. & Power Co. v. Winstead's Adm'r, supra.

48. Va.—Virginia Ry. & Power Co. v. Winstead's Adm'r, supra.

60 C.J. p 481 note 94.

49. N.Y.—Mentz v. Second Ave. R. Co., 3 Abb.Dec. 277.

60 C.J. p 481 note 95.

50. Mich.—De Witt v. Gerard, 275 N.W. 729, 281 Mich. 676.

51. N.Y.—Kelly v. Murray, 12 N.Y.S. 2d 696, 257 App.Div. 863.

52. La.—Handy v. New Orleans Public Service, 120 So. 271, 10 La.App. 72.

60 C.J. p 481 note 97.

53. N.C.—Smith v. Salisbury & S. Ry. Co., 77 S.E. 966, 162 N.C. 29.

54. N.C.—Smith v. Salisbury & S. Ry. Co., supra.

55. N.C.—Smith v. Salisbury & S. Ry. Co., supra.

60 C.J. p 481 note 2.

56. Mo.—Trigg v. Water, Light & Transit Co., 114 S.W. 972, 215 Mo. 521, 20 L.R.A., N.S., 987.

60 C.J. p 481 note 3.

57. Pa.—Gehring v. Erie Rys. Co., 151 A. 703, 301 Pa. 103.

60 C.J. p 481 note 4.

58. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Wallace, 150 N.E. 485, 95 Ind.App. 395.

Neb.—Hughes v. Omaha & Council Bluffs St. Ry. Co., 8 N.W.2d 509, 143 Neb. 47.

Pa.—Zurcher v. Pittsburgh Rys. Co., 44 A.2d 581, 353 Pa. 212.

60 C.J. p 483 note 16.

Test of conduct

"The prudence of his conduct must be measured in the light of the situation as it appeared to him at the time, rather than as deliberate calculation might have demonstrated what it should have been, after the accident occurred."—Elder v. Rutledge, 27 N.E.2d 358, 362, 217 Ind. 459.

Boy on roller skates

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

59. Md.—Crystal v. Baltimore & B. A. Electric Ry. Co., 132 A. 629, 150 Md. 256.

60 C.J. p 483 note 17.

60. Mo.—Dey v. United Rys. Co. of St. Louis, 120 S.W. 134, 140 Mo.App. 461.

60 C.J. p 484 note 19.

danger;⁶¹ and, if a person is familiar with the track and the conditions relative to the running of cars, he must avail himself of his knowledge in exercising ordinary care.⁶² However, a person need not exercise extraordinary care, prudence, or foresight,⁶³ or take special precautions against unknown or unusual dangers.⁶⁴

The right of a person to recover, notwithstanding contributory negligence, where the company willfully, wantonly, or recklessly causes the death or injury, is discussed *supra* § 211. Comparative negligence statutes are discussed with respect to street railroads in Negligence §§ 169-173.

Rescue of property. It is not contributory negli-

gence for a person to expose himself to danger in a reasonable effort to save his property from damage from a street railroad.⁶⁵

Effect generally. Negligence on the part of a person sustaining death or injury, or on the part of another person for whose negligence he is responsible, is ordinarily a defense⁶⁶ and precludes the recovery of damages where it contributes to⁶⁷ or causes⁶⁸ the death or injury, provided it does so directly and proximately, as discussed *infra* § 287. The rule applies notwithstanding negligence on the part of the company concurs in causing the injury,⁶⁹ as in failing to keep a proper lookout for travelers or vehicles,⁷⁰ or in running at an excessive or un-

Presence of tracks as notice

Mich.—Murray v. City of Detroit, 42 N.W.2d 782, 327 Mich. 679.

61. N.Y.—Wecker v. Brooklyn, Q. C. & S. R. Co., 120 N.Y.S. 1020, 136 App.Div. 340.

60 C.J. p 484 note 20.

62. Del.—Weldon v. People's R. Co., Super., 65 A. 589.

Va.—Norfolk, etc., Traction Co. v. White, 63 S.E. 418, 109 Va. 172.

Defect near tracks

One who fell into ditch while walking on known dangerous and unlighted way along streetcar tracks was held guilty of contributory negligence.

La.—Groner v. Shreveport Rys. Co., 138 So. 148, 18 La.App. 211.

Pa.—Langman v. City of Pittsburgh, Com.Pl., 91 Pittsb.Leg.J. 120.

63. Wis.—Hanlon v. Milwaukee Electric R., etc., Co., 95 N.W. 100, 118 Wis. 210.

60 C.J. p 484 note 22.

64. Mass.—Manning v. West End St. R. Co., 44 N.E. 135, 166 Mass. 230.

60 C.J. p 484 note 23.

65. Pa.—Arlin v. Philadelphia Transp. Co., 77 Pa.Dist. & Co. 25.

66. Cal.—Urbano v. Market St. Ry. Co., 46 P.2d 817, 8 Cal.App.2d 22.

Ill.—Richter v. Cummings, 53 N.E. 2d 274, 321 Ill.App. 627.

Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164.

Mass.—Norton v. Boston Elevated Ry. Co., 57 N.E.2d 534, 317 Mass. 145.

Mo.—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772.

60 C.J. p 484 note 26.

67. Cal.—Collier v. Los Angeles Ry. Co., 140 P.2d 206, 60 Cal.App.2d 169—Babcock v. Pacific Gas & Elec-

tric Co., 7 P.2d 736, 120 Cal.App. 218.

Ind.—Gary Rys. Co. v. Michael, 34 N.E.2d 159, 109 Ind.App. 672.

La.—Petteway v. Shreveport Rys. Co., App., 41 So.2d 240—Keller v. N. C. Public Service, 138 So. 463, 18 La.App. 317.

Md.—Ford v. Baltimore Transit Co., 85 A.2d 474—Harry T. Campbell & Sons v. United Rys. & Electric Co. of Baltimore, 154 A. 552, 160 Md. 647.

Mo.—Kalbfell v. Wells, App., 49 S. W.2d 247.

Neb.—Dale v. Omaha & Council Bluffs St. Ry. Co., 48 N.W.2d 380, 154 Neb. 434.

Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.

Pa.—Gara v. Philadelphia Rapid Transit Co., 182 A. 529, 320 Pa. 497—Metz v. Pittsburgh Rys. Co., 7 A.2d 505, 135 Pa.Super. 534—Maddock v. Philadelphia Rapid Transit Co., 157 A. 629, 103 Pa.Super. 406.

Va.—Virginia Elec. & Power Co. v. Evans, 24 S.E.2d 446, 181 Va. 274.

Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386.

60 C.J. p 484 note 29.

Any one of several acts of contributory negligence is sufficient to preclude recovery.—Cannady v. Dallas Ry. & Terminal Co., Tex.Civ.App., 219 S.W.2d 816.

Voluntarily assumed risk

(1) Motorist, negligently failing to see or hear approaching streetcar before driving on tracks, voluntarily assumed risk of collision and could not recover damages, although motorman was also negligent.—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573.

(2) Where stalled automobile was pushed by streetcar at motorist's re-

quest, automobile was in gear and ignition switch was on, and motorist's wife, who was the only occupant of automobile, could not drive, and motor suddenly started and automobile crashed into wall, motorist could not recover from street railroad under the maxim, *Volenti non fit injuria*, which means, that to which a person assents is not deemed in law an injury.—Levlon v. Dallas Railway & Terminal Co., Tex.Civ.App., 117 S.W. 2d 876, error refused.

68. La.—Bianchi v. New Orleans Public Service, App., 184 So. 721.

Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, error refused.

60 C.J. p 484 note 30.

69. Pa.—Esposito v. Philadelphia Transp. Co., 70 A.2d 267, 363 Pa. 506—Gara v. Philadelphia Rapid Transit Co., 182 A. 529, 320 Pa. 497—Reidel v. Philadelphia Rapid Transit Co., 157 A. 36, 103 Pa.Super. 387.

60 C.J. p 485 note 33.

Failure to comply with statute

D.C.—Ferranti v. Capital Transit Co., Mun.App., 38 A.2d 116.

70. Ind.—Indianapolis Traction & Terminal Co. v. Croly, 96 N.E. 973, 98 N.E. 1091, 54 Ind.App. 566.

60 C.J. p 485 note 34.

Violation of "vigilant watch ordinance"

(1) The violation by a street railroad company of an ordinance requiring its motormen and conductors to keep a vigilant watch for persons on or moving toward its track, and, on the first appearance of danger to such persons, to stop the car in the shortest time and space possible will not

lawful rate of speed⁷¹ or without giving a proper signal or warning.⁷² Where the injured person is not guilty of negligence and has exercised the requisite degree of care, he is entitled to recover for injuries received by him through the company's negligence.⁷³

§ 264. Reliance on Precautions of Company Generally

A person on the street may assume that the company will exercise ordinary care in managing and operating its streetcars, although he may not abandon all precautions or reasonable care for his self-protection.

In exercising care for his own protection, a person on a public street, who, as discussed supra § 207, ordinarily has, subject to certain qualifications, an equal right with the street railroad company to use that part of the street occupied by its tracks, has a right to act on the assumption that the company will exercise ordinary care in managing its road and operating its cars,⁷⁴ unless he has knowledge to the contrary.⁷⁵ Accordingly, a failure to anticipate and guard against negligence of the company is not necessarily negligence on the part of a person injured thereby;⁷⁶ and it has been held that if the

company by its own negligence throws a person off his guard or puts him in peril, the conduct of such person will not be regarded as contributory negligence under any circumstances.⁷⁷ However, a person is not justified in abandoning all precautions or reasonable care for self-protection;⁷⁸ and his failure to exercise reasonable care and precaution for his own protection is not excused by the fact that he relied on the company's exercising ordinary care,⁷⁹ or by the company's failure to take a certain precaution, if he did not rely on such precaution.⁸⁰

§ 265. Acts in Emergency or Sudden Peril

A person is not necessarily guilty of contributory negligence if in an emergency or sudden peril, brought about without his own fault, he errs in judgment as to the best course to protect himself.

A person is not necessarily guilty of contributory negligence precluding a recovery if, in an emergency, or when suddenly confronted with unexpected and imminent peril, brought about by the negligence of the company or without his own fault, he errs in judgment or does not pursue the best course to protect himself.⁸¹ The rule does not apply where there

authorize a recovery by one injured, where he was guilty of negligence, which, with the failure of the company's employees to obey the ordinance, contributed to and caused the injury.—*Hill v. St. Louis Public Service Co.*, Mo., 64 S.W.2d 633—*Chervek v. St. Louis Public Service Co.*, Mo. App., 173 S.W.2d 599—60 C.J. p 485 note 34 [a].

(2) In this respect an action under the vigilant watch ordinance differs from an action for recovery under the "humanitarian doctrine."—*Chervek v. St. Louis Public Service Co.*, supra.

(3) "Humanitarian doctrine" or "doctrine of last clear chance" see *infra* § 288.

71. Cal.—*Collier v. Los Angeles Ry. Co.*, 140 P.2d 206, 60 Cal.App.2d 169. Mo.—*Hill v. St. Louis Public Service Co.*, 64 S.W.2d 633. Pa.—*Lieberman v. Pittsburgh Rys. Co.*, 157 A. 905, 305 Pa. 412. 60 C.J. p 485 note 35.

72. Mass.—*Daignault v. Berkshire St. Ry. Co.*, 178 N.E. 653, 277 Mass. 227.

Pa.—*Augustine v. Philadelphia Rapid Transit Co.*, 181 A. 378, 119 Pa. Super. 577. 60 C.J. p 485 note 36.

73. N.Y.—*Stastney v. Second Ave. R. Co.*, 18 N.Y.S. 800, 61 N.Y.Super. 104, affirmed 33 N.E. 1082, 138 N.Y. 609.

Pa.—*Brungo v. Pittsburgh Rys. Co.*, 200 A. 893, 132 Pa.Super. 414.

74. Mass.—*McBride v. Middlesex & B. St. Ry. Co.*, 176 N.E. 185, 276 Mass. 29. 60 C.J. p 486 note 44.

75. Mo.—*Deitring v. St. Louis Transit Co.*, 85 S.W. 140, 109 Mo.App. 524.

76. Minn.—*O'Brien v. St. Paul City R. Co.*, 108 N.W. 805, 98 Minn. 205. 60 C.J. p 486 note 46.

77. Iowa.—*Kern v. Des Moines City R. Co.*, 118 N.W. 451, 141 Iowa 620. 60 C.J. p 486 note 47.

78. Iowa.—*Rosenberg v. Des Moines Ry. Co.*, 238 N.W. 703, 213 Iowa 152. Mass.—*Will v. Boston El. R. Co.*, 142 N.E. 44, 247 Mass. 250.

79. Mass.—*Rundgren v. Boston, etc., St. R. Co.*, 87 N.E. 189, 201 Mass. 156. 60 C.J. p 486 note 49.

Reliance on automatic signal held no excuse
Ohio.—*Columbus, Delaware & Marion Electric Co. v. O'Day*, 176 N.E. 569, 123 Ohio St. 638.

80. Mass.—*Beirne v. Lawrence, etc., St. R. Co.*, 83 N.E. 359, 197 Mass. 173.

60 C.J. p 486 note 50.

81. U.S.—*Kansas City Public Service Co. v. Shephard*, C.A.Kan., 184 F. 2d 945—*U. S. v. Philadelphia Transp. Co.*, D.C.Pa., 38 F.Supp. 246. Ind.—*Elder v. Rutledge*, 27 N.E.2d 358, 217 Ind. 459.

Md.—*United Rys. & Electric Co. of Baltimore v. State*, 163 A. 90, 163 Md. 313.

N.J.—*Dunlop v. Public Service Coordinated Transport*, 4 A.2d 683, 122 N.J.Law 226.

Pa.—*Cinquina v. Philadelphia Transp. Co.*, 67 A.2d 109, 362 Pa. 546—*Zurcher v. Pittsburgh Rys. Co.*, 44 A.2d 581, 353 Pa. 212—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319—*Shearer v. Pittsburgh Rys. Co.*, 21 A.2d 482, 145 Pa.Super. 560. 60 C.J. p 486 note 51.

The law is not critical of the course pursued by one lawfully in the pathway of imminent danger, such as the imminent danger of being struck by a streetcar, where the avenue of escape he intended to take is suddenly closed.—*Humphreys v. Charleston Transit Co.*, 11 S.E.2d 745, 122 W.Va. 571.

is no unexpected peril,⁸² or where the peril or emergency is caused partially or entirely by the fault or negligence of the person killed or injured.⁸³

§ 266. Violation of Statute, Ordinance, or Rule of Company

One may be guilty of contributory negligence where at the time he is injured he is violating a statute or ordinance and such violation proximately causes or contributes to the injury.

A person may be guilty of contributory negligence precluding a recovery, notwithstanding negligence on the part of the company, where at the time he is injured he is violating a statute or ordinance,⁸⁴ and such violation is the proximate cause of,⁸⁵ or contributes to,⁸⁶ the injury. However, the violation of a statute or ordinance does not necessarily constitute contributory negligence,⁸⁷ and it does not prevent the recovery of damages unless it directly⁸⁸ and proximately⁸⁹ causes or contributes to the injury. Obviously, a claim of contributory negligence consisting of an alleged violation of an ordinance is without merit where the ordinance is not violated,⁹⁰ as where, under the circumstances, the ordinance was inapplicable.⁹¹

The violation of a statute or ordinance does not preclude recovery where the injury is caused by wantonness or recklessness on the part of the company, as discussed supra § 211.

Violation of rule or regulation of company by a person while a passenger does not proximately contribute to an injury sustained by him after he ceases to be a passenger;⁹² nor does it relieve the company from exercising due care to avoid injuring him while lawfully on the street or highway.⁹³ However, a motorman who operates a car in such a way as to violate the rules of his company is guilty of contributory negligence barring recovery for injuries received by him in a collision with a car of another company.⁹⁴

§ 267. Working in Street

One working in a street on or near streetcar tracks is not required to exercise as high a degree of care as to approaching cars as is an ordinary pedestrian; but he must exercise ordinary care under the circumstances.

A person working in a public street on or near street railroad tracks is not required to exercise as high a degree of care in looking and listening for approaching cars as is an ordinary pedestrian on the street.⁹⁵ Thus, he has a right to assume that the motorman of an approaching car will pay some attention to what is going on,⁹⁶ and that some notice of warning of the approach of the car will be given;⁹⁷ and the circumstances of the particular case may be such that he may not properly be held guilty of contributory negligence as a matter of law.⁹⁸ However, a person so engaged must exercise such care for his safety as an ordinarily careful and

Only reasonable degree of care required

A motorist, becoming aware of peril of collision with approaching streetcar after entering what proved to be position of danger because of streetcar motorman's unanticipated negligence at point from which solid line of parked automobiles extended to place of collision, was required to exercise only reasonable degree of care under circumstances.—*Bowman v. Monongahela West Penn Public Service Co.*, 21 S.E.2d 148, 124 W.Va. 504.

82. Ill.—*Binder v. Chicago City Ry. Co.*, 175 Ill.App. 503.
60 C.J. p 487 note 52.

83. Mass.—*McBride v. Middlesex & B. St. Ry. Co.*, 176 N.E. 185, 276 Mass. 29.

Pa.—*Lieberman v. Pittsburgh Rys. Co.*, 157 A. 905, 305 Pa. 412.
60 C.J. p 487 note 53.

84. Del.—*Garrett v. People's R. Co.*, 64 A. 254, 22 Del. 29.
60 C.J. p 487 note 55.

Contributory negligence as proximate cause generally see *infra* § 287.
Failure to observe law of road see *infra* § 280.

85. Tenn.—*Ijams v. Knoxville Power & Light Co.*, 1 Tenn.App. 627.

86. Iowa.—*Fisher v. Cedar Rapids & M. C. Ry. Co.*, 157 N.W. 860, 177 Iowa 406.
60 C.J. p 487 note 56.

87. Ill.—*Bolen v. Central Illinois Public Service Co.*, 237 Ill.App. 226.
60 C.J. p 487 note 57.

88. Iowa.—*Sturm v. Tri-City Ry. Co.*, 178 N.W. 525, 190 Iowa 387.
N.Y.—*Klinkenstein v. Third Ave. Ry. Co.*, 158 N.E. 886, 246 N.Y. 327, 54 A.L.R. 369.

89. Wash.—*Koch v. City of Seattle*, 194 P. 572, 113 Wash. 583.
60 C.J. p 487 note 59.

90. Mo.—*Pettyjohn v. Kansas City Public Service Co.*, App., 181 S.W. 2d 179, opinion quashed in part on other grounds 188 S.W.2d 650, 354 Mo. 79.
60 C.J. p 487 note 61.

91. Mo.—*Pettyjohn v. Kansas City Public Service Co.*, *supra*.

92. N.Y.—*Platt v. Forty-Second St., etc., R. Co.*, 2 Hun 124, 4 Thomps. & C. 406.

93. N.Y.—*Platt v. Forty-Second St., etc., R. Co.*, *supra*.

94. Tex.—*Bogue v. Texas Traction Co.*, 173 S.W. 875, 177 S.W. 954, 107 Tex. 280.

95. Pa.—*Phillips v. Philadelphia Transp. Co.*, 56 A.2d 225, 358 Pa. 265.
60 C.J. p 488 note 72.

96. Mass.—*Paschal v. Boston Elevated Ry. Co.*, 100 N.E. 1022, 214 Mass. 161.

97. N.Y.—*Dipaolo v. Third Ave. R. Co.*, 67 N.Y.S. 421, 55 App.Div. 566.
60 C.J. p 488 note 74.

98. Mass.—*Hanley v. Boston El. R. Co.*, 87 N.E. 197, 201 Mass. 55.
60 C.J. p 488 note 75.

prudent man giving attention to, and faithfully performing, his work would exercise under like circumstances;⁹⁹ and, if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence precluding a recovery.¹ One who places himself in a position of danger while working, when a position of safety was equally available, is guilty of negligence.²

§ 268. Standing, Leaning, Stooping, or Crouching, on or near Track

A person contributes to his own injury where with knowledge, or the opportunity of acquiring knowledge, that a car is approaching he stands on or in close proximity to, or takes some other dangerous position with respect to, the tracks.

A person contributes to his own injury, and may not recover damages therefor, where, with knowledge,³ or opportunity of acquiring knowledge,⁴ that a car is approaching, and without taking precautions to prevent injury to himself,⁵ such as stepping aside to a place of safety,⁶ he voluntarily and unnecessarily stands on,⁷ or in close proximity to,⁸ leans over,⁹ stoops over¹⁰ or near,¹¹ or squats or crouches near¹² a street railroad track, and is struck by, or comes in contact with, the front end, side, rear door, or overhanging rear end of the car, or the bodies of persons clinging thereto. However, a person standing in the street near a street railroad track because of a temporary blockade of the street by

wagons is, as a matter of law, not guilty of contributory negligence.¹³ So also, a person is not negligent in standing in a space in the roadway where he will not be struck by a car unless it leaves the track;¹⁴ and standing on the sidewalk in front of a depot is not contributory negligence.¹⁵

Call of third person. It is held that a person influenced in his action by the call of someone on the street, so that he stops and stands in the middle of a streetcar track immediately in front of an approaching car or train, is guilty of contributory negligence precluding a recovery for injuries caused by his being struck;¹⁶ but it is also held that the company is not relieved from liability where a third person gives a cry of alarm for the purpose of giving notice of plaintiff's peril to the men operating the car,¹⁷ even though he makes an erroneous decision in the presence of imminent danger making immediate action of some kind necessary.¹⁸

§ 269. Walking on or near Track

While it is not negligence per se for a person to walk on or near street railroad tracks, a person so doing must exercise ordinary and reasonable care to ascertain and avoid danger.

As a general rule a person has a right to walk on or near a street railroad track in a public street or highway, as discussed supra § 207, and it is not negligence per se to exercise this right,¹⁹ even at

99. Wis.—Dinan v. Chicago, etc., Electric R. Co., 159 N.W. 944, 164 Wis. 295.

60 C.J. p 488 note 76.

1. Pa.—White v. Philadelphia Rapid Transit Co., 100 Pa.Super. 213.

60 C.J. p 488 note 77.

2. Pa.—Weiner v. Philadelphia Rapid Transit Co., 165 A. 252, 310 Pa. 415.

Unloading truck from street side

Driver of refrigerator truck with opening for unloading on right side, injured by passing trolley car which struck him while removing products from truck parked on left side of one-way street, was held contributorily negligent.—Weiner v. Philadelphia Rapid Transit Co., 165 A. 252, 310 Pa. 415.

3. Va.—Norfolk, etc., Traction Co. v. White, 63 S.E. 418, 109 Va. 172.

60 C.J. p 489 note 79.

4. Pa.—Lieberman v. Pittsburgh Rys. Co., 157 A. 905, 305 Pa. 412.

60 C.J. p 489 note 80.

5. Mo.—Strutman v. United Rys. Co. of St. Louis, App., 238 S.W. 817.

N.Y.—Gargano v. Forty-Second St., etc., R. Co., 94 N.Y.S. 544.

6. Wis.—Lotharius v. Milwaukee Electric Ry. & Light Co., 146 N.W. 1122, 157 Wis. 184.

60 C.J. p 489 note 82.

7. N.Y.—Gargano v. Forty-Second St., etc., R. Co., 94 N.Y.S. 544.

60 C.J. p 489 note 83.

8. Cal.—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463.

Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194.

Mass.—Byrne v. Boston El. R. Co., 85 N.E. 78, 198 Mass. 444.

N.Y.—Kozlowski v. Rochester, S. & E. R. Co., 126 N.Y.S. 609, 142 App.Div. 245.

60 C.J. p 489 note 84.

9. Ohio.—Meeker v. C. D. & M. Traction Co., 31 Ohio Cir.Ct. 346.

10. Mass.—Jordan v. Old Colony St. R. Co., 74 N.E. 315, 188 Mass. 124.

60 C.J. p 489 note 86.

Fixing flat tire

Mo.—Young v. St. Louis Public Service Co., App., 57 S.W.2d 717.

11. Del.—Riccio v. People's Ry. Co., 82 A. 604, 26 Del. 235.

60 C.J. p 489 note 87.

12. Pa.—Rothweller v. Philadelphia Rapid Transit Co., 93 Pa.Super. 369.

60 C.J. p 489 note 88.

13. N.Y.—Hernandez v. Metropolitan St. R. Co., 74 N.Y.S. 598, 36 Misc. 793.

14. N.J.—Najarian v. Jersey City, H. & P. St. R. Co., 73 A. 527, 77 N.J. Law 704, 23 L.R.A., N.S., 751.

15. N.Y.—O'Toole v. Central Park, etc., R. Co., 12 N.Y.S. 347, affirmed 28 N.E. 251, 128 N.Y. 597.

16. Ill.—Webb v. Chicago City R. Co., 83 Ill.App. 565.

17. W.Va.—Prunty v. Tyler Traction Co., 110 S.E. 570, 90 W.Va. 194.

18. W.Va.—Prunty v. Tyler Traction Co., supra.

19. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

night.²⁰ Thus, a person is not required to stay off the track in order to avoid injuries which might possibly result from the carelessness or negligence of the company;²¹ and, if he is injured by such carelessness or negligence while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part.²² Not being a trespasser, he is not required to use the same degree of care as if walking on a private way²³ or on or along the track of a steam or ordinary railroad.²⁴

On the other hand, a person walking on or along a streetcar track is required to exercise ordinary and reasonable care to ascertain and avoid danger,²⁵ as in looking and listening for an approaching car,²⁶ and in getting out of the way so as not to make it stop or slow down;²⁷ and, if he fails to exercise ordinary care, whereby he is injured, he is guilty of contributory negligence precluding a recovery,²⁸ even though the company is negligent,²⁹ unless it could avoid the accident by proper care after discovering his peril, without endangering its passengers and employees, as discussed *infra* § 288. Thus, a person is guilty of contributory negligence where, while walking on or along the track of a street railroad, he sees or by reasonable care could see an approaching car in time to get or keep out of the way, but fails to do so,³⁰ although the walking there is better than on the street or highway,³¹ or where

he walks on the track knowing that a car is due, although he frequently looks behind for it.³² Also, a pedestrian is guilty of contributory negligence barring a recovery of damages where, with knowledge or notice of a curve in the track, he places himself in, and fails to remove himself from, danger from the overhang of an ordinary car rounding the curve.³³

Assumption. A person walking on or near a streetcar track is not bound to assume or anticipate that cars will be run contrary to custom,³⁴ or that he will be run into by a car approaching him from the rear at an excessive rate of speed in broad daylight, on a straight track, without warning;³⁵ and he may assume in a proper case that the motorman will stop before running him down.³⁶ On the other hand, a person who sees a car standing near a curve in the immediate vicinity, and knows that it is in service, does not have a right to dismiss it from his mind and assume that it will not move around the curve.³⁷

Sole cause. Fact that others saw or heard a streetcar approaching did not render the act of a person who failed to get off the track the sole cause of the accident, where the car was being operated at full speed on a dark night, with no headlight, by a motorman who had his face to the rear, and rang no gong at or near a point where, owing to the

Pa.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608—Bockstoe v. Pittsburgh Rys. Co., 48 A.2d 126, 159 Pa.Super. 237.
60 C.J. p 490 note 97.
Person under disability see *infra* § 285.

20. Mo.—Goff v. St. Louis Transit Co., 98 S.W. 49, 199 Mo. 694, 9 L. R.A.N.S., 244—Shipley v. Metropolitan St. R. Co., 128 S.W. 768, 144 Mo.App. 7.

21. Cal.—Shea v. Potrero, etc., R. Co., 44 Cal. 414.

Reliance on customary warnings

A pedestrian may rely on streetcar to sound the warnings which it customarily sounds when approaching the point where he walks.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

22. Cal.—Shea v. Potrero, etc., R. Co., 44 Cal. 414.

23. Wash.—Mallett v. Seattle, R. & S. Ry. Co., 119 P. 743, 66 Wash. 251.

24. Ind.—Muncie St. R. Co. v. Maynard, 32 N.E. 343, 5 Ind.App. 372.
Wash.—Mallett v. Seattle, R. & S. Ry. Co., 119 P. 743, 66 Wash. 251.

25. Wash.—Mallett v. Seattle, R. & S. Ry. Co., *supra*.
60 C.J. p 490 note 5.

High degree of care required

Pa.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608—Bockstoe v. Pittsburgh Rys. Co., 48 A.2d 126, 159 Pa.Super. 237.

26. Ill.—Devine v. Owsley, 153 Ill. App. 83.
60 C.J. p 490 note 6.

27. Wis.—Kowalkowski v. Milwaukee Northern Ry. Co., 146 N.W. 801, 157 Wis. 473.
60 C.J. p 490 note 7.

28. Wash.—Mey v. Seattle Electric Co., 92 P. 283, 47 Wash. 497.
60 C.J. p 490 note 8.

29. Del.—Tobias v. People's Ry. Co., 80 A. 358, 26 Del. 59.
La.—Childs v. New Orleans City R. Co., 33 La. Ann. 154.

30. Cal.—Jonas v. Los Angeles Ry.

Corp., 136 P.2d 39, 57 Cal.App.2d 824.

Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663.
60 C.J. p 490 note 11.

31. Mass.—Adams v. Boston, etc., R. Co., 78 N.E. 117, 191 Mass. 486.
60 C.J. p 490 note 12.

32. Pa.—Gilmartin v. Lackawanna Valley Rapid Transit Co., 40 A. 322, 186 Pa. 193.

33. Ala.—Honeycutt v. Birmingham Elec. Co., 181 So. 772, 236 Ala. 221.—Birmingham Elec. Co. v. Jones, 176 So. 203, 234 Ala. 590.
60 C.J. p 490 note 14.

34. Mo.—Shipley v. Metropolitan St. Ry. Co., 128 S.W. 768, 144 Mo.App. 7.

35. Ind.—Indianapolis Traction, etc., Co. v. Kidd, 79 N.E. 347, 167 Ind. 402, 7 L.R.A., N.S., 143, 10 Ann.Cas. 942.

36. Pa.—Arlia v. Philadelphia Transp. Co., 77 Pa. Dist. & Co. 25.

37. Pa.—Cornell v. Pittsburg Rys. Co., 54 Pa.Super. 230.

condition of the street, many people were accustomed to walk between or along the car tracks.³⁸

§ 270. Crossing Track

- a. In general
- b. Degree of care required
- c. Belief, assumption, or anticipation

a. In General

While it is not ordinarily negligence per se to cross street railroad tracks on which a car is approaching, a person must exercise some care for his own safety, and, if he carelessly attempts to cross in front of a car which is dangerously near, he may be guilty of contributory negligence precluding recovery.

Ordinarily it is not negligence per se to cross or attempt to cross a street railroad track on which a car is approaching,³⁹ in plain sight,⁴⁰ some distance away,⁴¹ or in front of a standing car;⁴² or between two standing cars.⁴³ However, a person, when crossing, or about to cross, a street railroad track, must exercise some care or caution for his own safety;⁴⁴ and he is not relieved of the necessity of doing so, or the responsibility for the result

of not doing so, by the company's negligence,⁴⁵ or by an ordinance or statute as to the right of way over vehicles at street intersections,⁴⁶ or by a signal to cross given him by the company's watchman.⁴⁷

Miscalculation or error of judgment. While there is some authority to the contrary,⁴⁸ it has frequently been held that a pedestrian is guilty of contributory negligence where he makes a mistake, miscalculation, or error of judgment, in deciding to attempt to cross a street railroad track when a car is approaching, and is injured while making the attempt,⁴⁹ especially where, after making the estimate or calculation, he does not verify it by looking again.⁵⁰

When car dangerously near. Where a person deliberately,⁵¹ or heedlessly or carelessly,⁵² or without excuse⁵³ or necessity,⁵⁴ steps on and attempts to cross a street railroad track in front of a car which he sees or hears, or which by ordinary care he could see or hear, approaching dangerously near,⁵⁵ as where he attempts to run or hurry across in front of such a car,⁵⁶ whereby he is run into and

38. Fla.—Hammond v. Jacksonville Electric Co., 63 So. 709, 66 Fla. 145.

39. Tex.—El Paso City Lines v. Stanley, Civ.App., 209 S.W.2d 810, error refused.
60 C.J. p 491 note 21.

40. Pa.—Shields v. Philadelphia Rapid Transit Co., 104 A. 665, 261 Pa. 422—Connor v. Pittsburgh Rys. Co., 50 Pa.Super. 629.

41. Iowa.—McDivitt v. Des Moines City R. Co., 118 N.W. 459, 141 Iowa 689.
60 C.J. p 491 note 23.

42. Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

43. N.Y.—Fitzgerald v. New York City R. Co., 92 N.Y.S. 732.

44. Cal.—Richardson v. Southern Pac. Co., 263 P. 1039, 88 Cal.App. 648.
60 C.J. p 491 note 27.

45. Ill.—Stack v. East St. Louis & S. Ry. Co., 92 N.E. 241, 245 Ill. 308, 137 Am.S.R. 318.

N.Y.—McQuade v. Metropolitan St. R. Co., 39 N.Y.S. 335, 17 Misc. 154.

46. Neb.—Hughes v. Omaha & Council Bluffs St. Ry. Co., 8 N.W.2d 509, 143 Neb. 47.

Va.—Gordon v. Virginia Electric & Power Co., 143 S.E. 681, 150 Va. 442.

47. Mo.—Culbertson v. Metropolitan St. R. Co., 36 S.W. 534, 140 Mo. 35.

48. Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 533, 164 A.L.R. 1.
Wis.—Tesch v. Milwaukee Electric R. etc., Co., 84 N.W. 823, 108 Wis. 593, 53 L.R.A. 618.

Compatibility with prudence as test
The test whether pedestrian was negligent in that he erred in judgment as to speed or danger of approaching streetcar would be whether his conduct was compatible with conduct of person of ordinary prudence.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

49. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625.
Pa.—Pessolano v. Philadelphia Transp. Co., 36 A.2d 497, 349 Pa. 73—Clark v. Pittsburgh Rys. Co., 171 A. 886, 314 Pa. 404.
60 C.J. p 492 note 45.

50. Ga.—Columbus R. Co. v. Holcombe, 97 S.E. 194, 22 Ga.App. 676.
Wash.—Knight v. City of Seattle, 222 P. 471, 128 Wash. 246.

51. Md.—Baltimore Transit v. Revere Copper & Brass, 72 A.2d 4, 194 Md. 611.
Pa.—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369.
60 C.J. p 494 note 72.

52. Cal.—Levin v. Brown, 185 P.2d 329, 81 Cal.App.2d 913.

Md.—Watson v. Storrs, 175 A. 263, 167 Md. 685.
60 C.J. p 494 note 73.

53. Mass.—Cuddy v. Boston Elevated Ry. Co., 94 N.E. 251, 208 Mass. 134.

54. Ill.—Roberts v. Chicago City Ry. Co., 198 Ill.App. 31.
60 C.J. p 494 note 75.

55. Ill.—Richter v. Cummings, 53 N.E.2d 274, 321 Ill.App. 627—Moore v. Illinois Power & Light Corp., 16 N.E.2d 768, 296 Ill.App. 650.
Kan.—Klose v. Missouri Pac. R. Co., 27 P.2d 207, 138 Kan. 495.
Va.—Virginia Transit Co. v. Owens, 55 S.E.2d 422, 190 Va. 76.
Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 356.
60 C.J. p 494 note 76.

Stepping in front of approaching interurban car
N.Y.—Benham v. Schenectady R. Co., 171 N.Y.S. 260, 183 App.Div. 760.
52 C.J. p 657 note 43 [c].

56. Ill.—National Builders Bank of Chicago v. Cummings, 53 N.E.2d 274, 321 Ill.App. 627—Pallante v. Illinois Power Co., 265 Ill.App. 46.
Md.—Phillips v. Baltimore Transit Co., 71 A.2d 430, 194 Md. 527.
60 C.J. p 495 note 77.

injured or killed, he is guilty of contributory negligence precluding a recovery of damages, in some cases as a matter of law,⁵⁷ even though the company is also guilty of contemporaneous negligence,⁵⁸ and although he has an equal right to the use of the crossing or street.⁵⁹

Traffic signals. A pedestrian does not take reasonable precaution to insure his own personal safety when he does not pay attention to preliminary gongs or bells warning all users of the street that the course of traffic is about to be changed;⁶⁰ and a pedestrian who walks into the side of a streetcar which is proceeding in accordance with the traffic signals is guilty of contributory negligence.⁶¹ On the other hand, a pedestrian obeying traffic directions given by an officer or a signal may undertake the crossing of a street railroad track, although streetcar traffic is approaching within a distance which might otherwise be dangerous;⁶² and he is not bound to anticipate that the streetcar will be negligently operated through a red traffic signal at an intersection.⁶³ So also, a pedestrian is ordinarily justified in leaving the curb and starting across the street where the traffic lights are in his favor;⁶⁴

and, where the signal changes while he is in the middle of the street, he may assume that due care will be exercised by the released streetcar.⁶⁵ Nevertheless, a pedestrian, even though crossing with the traffic signal, is bound to exercise due care,⁶⁶ and whether his conduct where the light changes while he is en route across the tracks constitutes contributory negligence depends on the circumstances of the particular case.⁶⁷

Crossing at place other than regular crossing. Ordinarily it is not negligence per se to cross or attempt to cross a street railroad track at a place other than a regular crossing or street intersection,⁶⁸ in the absence of a city ordinance requiring pedestrians to cross streets only at places indicated.⁶⁹ However, there is authority to the effect that a greater degree of care must be used in crossing at a point other than a regular crossing;⁷⁰ and a pedestrian deliberately attempting to cross the tracks between regular crossings ordinarily will be charged with such carelessness as to prevent his recovery for injuries sustained when struck by the streetcar.⁷¹

57. U.S.—Denver Tramway Corporation v. Andersen, C.C.A.Colo., 54 F. 2d 214.

Ill.—Russell v. Richardson, 31 N.E. 2d 427, 308 Ill.App. 11—Emerson v. Richardson, 16 N.E.2d 197, 296 Ill. App. 643.

Md.—Watson v. Storrs, 175 A. 263, 167 Md. 685.

Mass.—Smith v. Boston Elevated Ry., 23 N.E.2d 857, 304 Mass. 422.

Pa.—Matta v. Pittsburgh Rys. Co., 25 A.2d 716, 344 Pa. 451—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369.

Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.

60 C.J. p 495 note 78.

Pedestrian struck by side of car

In pedestrian's action for injuries sustained when struck by side of streetcar, where pedestrian had left safe place alongside his automobile, at the curb, and proceeded to cross street, pedestrian was contributorily negligent as a matter of law.—Suddard v. United Elec. Rys. Co., 199 A. 301, 60 R.I. 469.

58. Pa.—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369.

60 C.J. p 495 note 79.

59. W.Va.—Riedel v. Wheeling Traction Co., 61 S.E. 821, 63 W.Va. 522, 16 L.R.A.N.S., 1123.

Equal right of traveler and company to use of street or crossing see supra §§ 207-209.

60. Cal.—Zolkover v. Pacific Electric Ry. Co., 254 P. 926, 81 Cal.App. 772.

61. Pa.—Schroeder v. Pittsburgh Rys. Co., 165 A. 733, 311 Pa. 398.

62. Ind.—Elder v. Rutledge, 27 N.E. 2d 358, 217 Ind. 459.

60 C.J. p 494 note 71.

63. Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1—Gnesa v. City and County of San Francisco, 105 P.2d 376, 40 Cal.App.2d 640.

Pa.—Van Note v. Philadelphia Transp. Co., 45 A.2d 71, 353 Pa. 277—Sonil v. Pittsburgh Rys. Co., 186 A. 183, 122 Pa.Super. 169—Taylor v. Philadelphia Rapid Transit Co., 163 A. 538, 107 Pa.Super. 124.

Va.—Cheatwood v. Virginia Elec. & Power Co., 18 S.E.2d 301, 179 Va. 54.

64. Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1.

65. Cal.—Kirk v. Los Angeles Ry. Corp., supra.

66. Cal.—Kirk v. Los Angeles Ry. Corp., supra.

Pa.—Schroeder v. Pittsburgh Rys. Co., 165 A. 733, 311 Pa. 398.

67. Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1.

Faulty judgment not necessarily negligence

The fact that pedestrian's judgment may have been faulty in concluding that he had reached a place of safety at a point some two feet past the tracks on which defendant's streetcar was approaching did not necessarily establish pedestrian's negligence.—Kirk v. Los Angeles Ry. Corp., supra.

Duty to wait for passing of car

Pedestrian, who had started with green light and had reached center of street when light changed, should have seen approaching streetcar and awaited its passing.—Schroeder v. Pittsburgh Rys. Co., 165 A. 733, 311 Pa. 398.

68. Ill.—Anderson v. Cummings, 60 N.E.2d 260, 325 Ill.App. 519.

Mass.—Ristuccia v. Boston Elevated Ry. Co., 186 N.E. 592, 283 Mass. 529.

60 C.J. p 491 note 25.

69. Tex.—El Paso Ry. Co. v. Allen, Civ.App., 208 S.W. 739.

70. Cal.—Smith v. Southern Pac. Co., 255 P. 500, 201 Cal. 57.

71. Pa.—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369—Danks v. Pittsburgh Rys. Co., 195 A. 16, 328 Pa. 356—Weldon v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb. Leg.J. 88, affirmed 41 A.2d 856, 352 Pa. 103.

b. Degree of Care Required

The degree of care required of a pedestrian in crossing streetcar tracks depends on the facts and circumstances of the particular case, and is generally such care as would be exercised by a reasonably prudent person under similar circumstances.

The degree of care required of a person about to cross, or attempting to cross, a street railroad track depends on the facts and circumstances of the particular case,⁷² and is such care as would be exercised by a reasonably prudent person under the same or similar circumstances.⁷³ Similarly, whether or not an injured person has been guilty of contributory negligence depends on the proximity and speed of the streetcar and all other relevant circumstances.⁷⁴ Accordingly, in approaching or attempting to cross a street railroad track a pedestrian must have due regard to the conditions,⁷⁵ and must avail himself

of his knowledge of conditions with which he is familiar⁷⁶ or which are permitted⁷⁷ or required⁷⁸ by law.

He is required to exercise due⁷⁹ and proper⁸⁰ care, and to refrain from rashly or recklessly exposing himself to danger.⁸¹ It is his duty to exercise reasonable and ordinary care⁸² to learn of the approach of cars,⁸³ keep or get out of their way,⁸⁴ and avoid a collision or accident.⁸⁵ Conversely, he is required to exercise only ordinary care.⁸⁶

The danger he is bound to foresee and avoid is that of being injured by cars operated in a proper and legal manner.⁸⁷ He may not properly undertake to cross a street railway track in front of a visibly approaching car, running under normal conditions, without leaving himself sufficient time to

72. Pa.—Robb v. West Penn Rys. Co., Com.Pl., 29 West.L.J. 43.

Va.—Cheatwood v. Virginia Elec. & Power Co., 18 S.E.2d 301, 179 Va. 54.

60 C.J. p 493 note 56.

73. U.S.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

Mass.—Ristuccia v. Boston Elevated Ry. Co., 186 N.E. 592, 283 Mass. 529.

Pa.—Gutkowski v. Wilkes-Barre Ry. Corp., Com.Pl., 37 Luz.Leg.Reg. 231.

Va.—Virginia Electric & Power Co. v. Kelly, 159 S.E. 75, 156 Va. 916. 60 C.J. p 493 note 57.

74. Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.

Pa.—Styslinger v. Pittsburgh Rys. Co., Com.Pl., 91 Pittsb.Leg.J. 307.

Danger from other traffic

Fact that pedestrian in middle of street, when crossing street at night at intersection where traffic was heavy, was in place of danger from which he could escape only by moving to one side of street was material fact to be considered in deciding whether pedestrian was guilty of contributory negligence as matter of law in trying to walk across track after observing car approaching about eighty feet from him.—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275.

Pedestrian held contributorily negligent under circumstances

(1) An adult pedestrian, familiar with surroundings, who crossed street at a T intersection when a streetcar fully illuminated was proceeding at usual speed of twenty to twenty-two miles an hour where there were no passengers waiting to

board the car, was contributorily negligent in failing to get out of the way, precluding recovery for his death.—Rajak v. Cummings, 41 N.E. 2d 969, 314 Ill.App. 465.

(2) Where pedestrian crossing street to catch streetcar saw lights of approaching car seven hundred feet away, was at all times in position to judge its speed, and saw that streetcar was traveling at rapid speed, in absence of traffic to distract his attention, he was guilty of "contributory negligence" in continuing to cross street, precluding recovery for his death.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386.

75. Pa.—Gavin v. Philadelphia Rapid Transit Co., 113 A. 832, 271 Pa. 73.

76. Del.—Culbert v. Wilmington & P. Traction Co., 82 A. 1081, 26 Del. 253.

60 C.J. p 493 note 59.

Knowledge of dangerous practice

A pedestrian who, with knowledge of practice of railway operatives in switching across a sidewalk where no switchman is on duty, steps on track in front of a car which he has observed standing near the point of collision is negligent.—Amenet v. Pacific Electric Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

77. Iowa.—McDivitt v. Des Moines City R. Co., 118 N.W. 459, 141 Iowa 689.

60 C.J. p 493 note 60.

78. D.C.—Jaquette v. Capital Traction Co., 34 App.D.C. 41, 25 L.R.A., N.S., 407.

60 C.J. p 493 note 61.

79. Ill.—Cahill v. Cummings, 54 N. E.2d 634, 322 Ill.App. 662—Russell

v. Richardson, 31 N.E.2d 427, 308 Ill.App. 11.

60 C.J. p 491 note 31.

80. Mass.—Angelary v. Springfield St. Ry. Co., 99 N.E. 970, 213 Mass. 110.

60 C.J. p 491 note 32.

81. D.C.—Capital Traction Co. v. Apple, 34 App.D.C. 559.

Mass.—Morse v. Boston Elevated Ry. Co., 104 N.E. 441, 216 Mass. 579.

82. Ill.—Collins v. Metropolitan West Side Elevated Ry. Co., 166 Ill. App. 124.

60 C.J. p 491 note 34.

83. Ga.—Cain v. Macon Consol. St. R. Co., 22 S.E. 918, 97 Ga. 298.

N.J.—Newark Passenger R. Co. v. Block, 27 A. 1067, 55 N.J.Law 605, 22 L.R.A. 374.

Pa.—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del. Co. 581.

84. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032.

Ga.—Cain v. Macon Consol. St. R. Co., 22 S.E. 918, 97 Ga. 298.

Ill.—Russell v. Richardson, 31 N.E. 2d 427, 308 Ill.App. 11.

85. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248. 60 C.J. p 492 note 37.

86. Cal.—Aurenz v. Los Angeles Ry. Corp., 65 P.2d 910, 19 Cal.App.2d 401.

60 C.J. p 492 note 38.

87. Pa.—Shields v. Philadelphia Rapid Transit Co., 104 A. 665, 261 Pa. 422—Hetzlein v. Johnstown Traction Co., Com.Pl., 15 Cambria 97.

clear the track before the arrival of the car,⁸⁸ or when an attempt to cross appears hazardous.⁸⁹ On the other hand, he is not guilty of contributory negligence by the mere fact that he attempts to cross a street railroad track in front of an approaching car where it would reasonably appear to a person of ordinary prudence that he would have ample time to cross in safety,⁹⁰ but he is in fact prevented from crossing in safety by some unforeseen and unavoidable occurrence or accident,⁹¹ as by reason of his slipping or stumbling, and falling on the track,⁹² or by reason of the car's running at an excessive or unlawful rate of speed,⁹³ unless he has knowledge of such speed before attempting to cross, in which case he must take the speed into consideration.⁹⁴

Care as to different kinds of railroads. Although a higher degree of care is required in crossing an electric railroad than in crossing a horse railroad,⁹⁵ as high a degree of care is not required in crossing a street railroad as in crossing an ordinary steam railroad.⁹⁶ However, when crossing an electric or interurban railway upon a private right of way in the open country, the same standard of care has been held to apply as to the crossing of steam railroads.⁹⁷

Care of pedestrian and driver of vehicle compared. While, in crossing or attempting to cross a

street railroad track, a pedestrian is held to no higher duty,⁹⁸ and is not subject to a more stringent rule of law,⁹⁹ than a person in charge of a vehicle, nevertheless he has, in a considerable measure, a larger opportunity for protecting himself than a driver of a vehicle,¹ in that he has more thorough control over his own movements,² and has nothing to control except his own locomotion;³ and this is an important circumstance to be considered on the issue of contributory negligence.⁴

Care of pedestrian and motorman compared. A person attempting to cross a street railroad track when a car is rapidly approaching is as much obligated to look out for his own safety as is the motorman.⁵

c. Belief, Assumption, or Anticipation

A person crossing or about to cross street railroad tracks has the right to assume and believe that the company and the car operators will exercise due care and have regard for his safety; but such belief or assumption does not absolve him from exercising care for his own safety.

A person about to cross, or attempting to cross, a street railroad track has, in the absence of notice or knowledge to the contrary,⁶ a right to assume and believe that the street railroad company⁷ and the operators of its cars⁸ will exercise due care, and will

88. Pa.—Connor v. Pittsburgh Rys. Co., 50 Pa.Super. 629.

89. Pa.—Schuchalter v. Philadelphia Rapid Transit Co., 135 A. 739, 288 Pa. 189.

90. U.S.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

Pa.—Hetzlein v. Johnstown Traction Co., 75 A.2d 533, 365 Pa. 360.

Va.—Virginia Elec. & Power Co. v. Whitehurst, 8 S.E.2d 296, 175 Va. 339.

60 C.J. p 493 note 65.

91. Wis.—Grimm v. Milwaukee Electric R., etc., Co., 119 N.W. 833, 138 Wis. 44.

60 C.J. p 493 note 66.

92. Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 147 Wis. 229.

60 C.J. p 493 note 67.

93. N.Y.—Wells v. Brooklyn City R. Co., 12 N.Y.S. 67, 58 Hun 389.

94. Wis.—Grimm v. Milwaukee Electric R., etc., Co., 119 N.W. 833, 138 Wis. 44.

60 C.J. p 494 note 69.

95. Ohio.—Hawthorne v. Cincinnati St. R. Co., 2 Ohio S. & C.P. 548, 7 Ohio N.P. 385.

Utah.—Hall v. Ogden City St. R. Co., 44 P. 1046, 13 Utah 243, 57 Am.S.R. 726.

96. Ohio.—Sallee v. Cincinnati Street Ry. Co., 176 N.E. 127, 38 Ohio App. 450.

Tenn.—Tennessee Electric Power Co. v. Hunter, 13 Tenn.App. 1—Tapp v. Tennessee Electric Power Co., 9 Tenn.App. 632.

60 C.J. p 492 note 48.

97. Cal.—Dolton v. Green, 164 P.2d 795, 72 Cal.App.2d 427—Magnuson v. Market St. Ry. Co., 138 P.2d 689, 59 Cal.App.2d 233.

Or.—Stovall v. Portland Electric Power Co., 273 P. 701, 127 Or. 518.

98. Wash.—Arpagaus v. Washington Water Power Co., 149 P. 346, 86 Wash. 83.

99. N.H.—Olsen v. Boston & M. R. R., 130 A. 213, 82 N.H. 120.

60 C.J. p 492 note 50.

1. Wash.—McClelland v. Pacific Northwest Traction Co., 244 P. 710, 138 Wash. 527.

2. Wash.—McClelland v. Pacific Northwest Traction Co., supra.

3. N.H.—Olsen v. Boston & M. R. R., 130 A. 213, 82 N.H. 120.

4. N.H.—Olsen v. Boston & M. R. R., supra.

5. N.Y.—McGuire v. New York Rys. Co., 128 N.E. 905, 230 N.Y. 23—Tully v. New York City R. Co., 111 N.Y.S. 919, 127 App.Div. 688.

6. Mo.—Lackey v. United Rys. Co., 231 S.W. 956, 288 Mo. 120.

60 C.J. p 495 note 85.

7. Cal.—Curry v. Market St. Ry. Co., 128 P.2d 715, 54 Cal.App.2d 165.

Mass.—Hess v. Boston Elevated Ry., 24 N.E.2d 550, 304 Mass. 535—De Angelis v. Boston Elevated Ry. Co., 23 N.E.2d 859, 304 Mass. 461—Smith v. Boston Elevated Ry., 23 N.E.2d 857, 304 Mass. 422—De Lodge v. Boston Elevated Ry. Co., 15 N.E.2d 488, 300 Mass. 219.

Pa.—Heaver v. Philadelphia Rapid Transit Co., 183 A. 110, 120 Pa.Super. 520.

Va.—Virginia Transit Co. v. James, 49 S.E.2d 285, 188 Va. 135.

Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386.

60 C.J. p 495 note 86.

8. Pa.—Patterson v. Pittsburgh Rys. Co., 103 A. 547, 260 Pa. 214.

60 C.J. p 495 note 87.

obey the law;⁹ and he need not anticipate negligence on the part of the company,¹⁰ or assume that a motorman will not attend to his duties.¹¹ He has a right to assume and believe that a car will be run with some regard to his rights on the street,¹² and not in disregard of his safety,¹³ and, where the pedestrian has the right of way, that the operator of the streetcar will respect his right.¹⁴

A pedestrian crossing streetcar tracks may also assume that the car will not be run at night without a headlight,¹⁵ and that, where it is standing, it will not be so started and operated as to strike him,¹⁶ particularly where the motorman has by signal invited the pedestrian to place himself in the dangerous position.¹⁷ Also, in the absence of a warning to the contrary, he has a right to assume that streetcar tracks¹⁸ and a pavement crossing¹⁹ are in a reasonably safe condition, and that a motorman expects pedestrians to cross on a crosswalk.²⁰

On the other hand, no belief or assumption on his part will absolve a pedestrian crossing or about to cross street railroad tracks from the duty of attending to his own safety,²¹ by exercising proper²² care²³ and paying close attention to approaching cars.²⁴ Moreover, it is improper for a person, with knowledge that a car is approaching, to step heedlessly in front of it, under the assumption that it will not overtake him;²⁵ and it has been asserted that a pedestrian crossing a streetcar track cannot properly rely on what he thinks the motorman will do.²⁶

Speed and control of car generally. Where he is not aware that it is being run at a higher rate of speed, a person attempting to cross, or about to cross, a street railroad track has a right to assume, believe, and expect that a car is running, and will run, at the customary speed,²⁷ or at the speed reasonably required by the circumstances,²⁸ and not at a reckless²⁹ or prohibited³⁰ rate of speed, and that

Collision not unavoidable

Fact that trolley car is confined to track and cannot be turned aside to avoid collision with a pedestrian does not render inapplicable the rule that pedestrian, in deciding whether to cross a street in front of approaching vehicle which is not so close and moving at such speed as to make a collision unavoidable if pedestrian attempts to cross, has right to rely to some extent on expectation that driver of vehicle will use reasonable care to avoid colliding with pedestrians.—*Chagnon v. United Elec. Rys. Co.*, 200 A. 949, 61 R.I. 246, 275.

9. Iowa.—*Gearhart v. Des Moines R. Co.*, 21 N.W.2d 569, 237 Iowa 213.

10. Mo.—*Spencer v. Kansas City Public Service Co.*, App., 250 S.W. 2d 187.
60 C.J. p 495 note 88.

11. Pa.—*Patterson v. Pittsburgh Rys. Co.*, 103 A. 547, 260 Pa. 214.

Trackless trolley within rule

Pa.—*Di Bona v. Philadelphia Transp. Co.*, 51 A.2d 768, 356 Pa. 204.

12. Iowa.—*Dow v. Des Moines City Ry. Co.*, 126 N.W. 918, 148 Iowa 429.
60 C.J. p 495 note 90.

13. N.Y.—*Boyce v. New York City R. Co.*, 110 N.Y.S. 393, 126 App. Div. 248.
60 C.J. p 496 note 91.

14. Pa.—*Balkie v. Philadelphia Rapid Transit Co.*, 200 A. 52, 331 Pa. 93.

15. Cal.—*Phillips v. Pacific Electric Ry. Co.*, 264 P. 538, 89 Cal.App. 122.

Ind.—*Indianapolis St. R. Co. v. Taylor*, 80 N.E. 436, 39 Ind.App. 592.

16. Wash.—*Whiting v. City of Seattle*, 258 P. 824, 144 Wash. 668.
60 C.J. p 496 note 93.

17. Cal.—*Curry v. Market St. Ry. Co.*, 128 P.2d 715, 54 Cal.App.2d 165.

18. N.Y.—*Wiley v. Smith*, 49 N.Y.S. 934, 25 App.Div. 351.

19. N.J.—*Slater v. North Jersey St. R. Co.*, 69 A. 163, 75 N.J.Law 890, 15 L.R.A., N.S., 840.

20. N.J.—*Kraut v. Public Service Ry. Co.*, 81 A. 751, 82 N.J.Law 487.

21. Mass.—*Smith v. Boston Elevated Ry.*, 23 N.E.2d 857, 304 Mass. 422.

Mo.—*Grout v. Central Electric R. Co.*, 102 S.W. 1026, 125 Mo.App. 552.

Right of reliance not absolute

Wash.—*Hynek v. City of Seattle*, 111 P.2d 247, 7 Wash.2d 386.

Pedestrian out of line of traffic

While pedestrian, who is in danger through no fault of his own and in plain view, may assume that traffic will not run him down, he may not so assume if, being out of line of traffic, he steps into it when it is close to him.—*Schroeder v. Pittsburgh Rys. Co.*, 165 A. 733, 311 Pa. 398.

22. Del.—*Culbert v. Wilmington & P. Traction Co.*, 82 A. 1081, 26 Del. 253.

23. Iowa.—*Dow v. Des Moines City Ry. Co.*, 126 N.W. 918, 148 Iowa 429.

Pedestrian has duty to look to ascertain whether the motorman will do his duty to exercise reasonable care in the operation of the car.—*Reinheimer v. Atlantic City & Shore R. Co.*, 184 A. 215, 14 N.J.Misc. 253.

24. Mo.—*Gordon v. Metropolitan St. Ry. Co.*, 134 S.W. 26, 153 Mo.App. 555.

25. Wash.—*Beerman v. Puget Sound Traction, Light & Power Co.*, 139 P. 1087, 79 Wash. 137.

26. N.Y.—*Walsh v. Brooklyn, Q. C. & S. R. Co.*, 154 N.Y.S. 884, 169 App. Div. 166.

27. U.S.—*Puerto Rico Ry., Light & Power Co. v. Cognet, C.C.A. Puerto Rico*, 3 F.2d 21, certiorari denied 45 S.Ct. 511, 263 U.S. 691, 69 L.Ed. 1159.

60 C.J. p 496 note 99.

28. Ohio.—*Sallee v. Cincinnati Street Ry. Co.*, 176 N.E. 127, 38 Ohio App. 450.

60 C.J. p 496 note 1.

29. Ind.—*Indianapolis St. R. Co. v. Taylor*, 80 N.E. 436, 39 Ind.App. 592.

60 C.J. p 496 note 2.

30. Mo.—*O'Donnell v. Wells*, 21 S.W.2d 762, 323 Mo. 1170.

60 C.J. p 496 note 3.

it will be under proper³¹ and reasonable³² control.³³ However, a person using a highway crossing in the country must assume that trolley cars run faster there than in the city.³⁴

Slackening speed of car. According to some authorities a person is not guilty of contributory negligence merely because his crossing involves the slackening of the speed of the car,³⁵ where the motorman has ample opportunity to see plaintiff attempting to cross the track,³⁶ or there is reason to suppose the car will slow down and give time for the crossing,³⁷ since it may be assumed that it will slow down or slacken speed at a crossing³⁸ to protect travelers who may be expected thereon.³⁹ However, it is otherwise where the car is only a few feet away.⁴⁰ Moreover, according to other authorities a reasonably prudent man will not take a chance of a streetcar slowing down to allow him to cross.⁴¹

Signal or warning. A person approaching, or about to cross, a street railroad track has a right to assume and believe that an approaching car will give a signal or warning⁴² in accordance with law⁴³ or custom,⁴⁴ especially when a standing car ob-

structs the view;⁴⁵ and this right of reliance on a warning is entitled to consideration in determining whether a pedestrian was guilty of contributory negligence.⁴⁶ However, a motorman's signal to a pedestrian to pass in front of a standing car does not carry an assurance that the pedestrian can safely cross a parallel track.⁴⁷

Stopping car. A person has a right to assume that a car will stop on signal⁴⁸ at a regular stopping place⁴⁹ for the purpose of permitting people standing at a corner to become passengers,⁵⁰ or that it will stop at an intersection where a statute, custom, or rule so requires,⁵¹ or, as discussed supra subdivision a of this section, at a traffic signal so requiring; but he has no right to assume that because a car has slowed down it will stop.⁵²

§ 271. — Duty to Stop, Look, and Listen

- a. In general
- b. Manner and extent of looking and listening

a. In General

A person about to cross street railroad tracks frequently should, and in some instances must, stop, look,

31. N.J.—Devine v. Public Service Ry. Co., 88 A. 1080, 85 N.J.Law 243.

60 C.J. p 496 note 4.

32. N.Y.—Walsh v. Brooklyn, I. C. & S. R. Co., 154 N.Y.S. 884, 169 App. Div. 166.

60 C.J. p 496 note 5.

33. Ill.—Stack v. East St. Louis & S. Ry. Co., 152 Ill.App. 613, affirmed 92 N.E. 241, 245 Ill. 308, 137 Am.S. R. 318.

60 C.J. p 496 note 6.

34. N.Y.—Payne v. Binghamton Ry. Co., 140 N.Y.S. 877, 156 App.Div. 1.

35. Wis.—Tesch v. Milwaukee Electric R., etc., Co., 84 N.W. 823, 108 Wis. 593, 53 L.R.A. 618.

36. N.Y.—Robkin v. Joline, 114 N.Y. S. 98.

37. N.Y.—Vandenbout v. Rochester Ry. Co., 114 N.Y.S. 760, 129 App. Div. 844.

60 C.J. p 492 note 41.

38. N.Y.—Vandenbout v. Rochester R. Co., supra.

60 C.J. p 496 note 7.

39. Mass.—Shea v. Boston Elevated Ry. Co., 104 N.E. 355, 217 Mass. 163.

40. Pa.—Tyrrell v. Philadelphia Rapid Transit Co., 79 Pa.Super. 346.

41. Mich.—Davidson v. City of Detroit, Department of Street Railways, 12 N.W.2d 413, 307 Mich. 420 —Public Administrator of State of Michigan v. City of Detroit, 207 N. W. 882, 234 Mich. 314.

Difficulty in stopping

Although pedestrian crossing street and streetcar had equal rights at intersection, a reasonably prudent man in such circumstances would forego his technical right to cross the street until it was reasonably safe to do so, and would take into consideration the fact that a man on foot may stop almost instantly on appearance of danger while it requires some distance to stop a heavy streetcar.—Russell v. Richardson, 31 N.E.2d 427, 308 Ill.App. 11.

42. Ky.—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.

Ohio.—Sallee v. Cincinnati Street Ry. Co., 176 N.E. 127, 38 Ohio App. 450.

Va.—Virginia Electric & Power Co. v. Blunt's Adm'r, 163 S.E. 329, 158 Va. 421.

60 C.J. p 496 note 11.

43. Ill.—Penrod v. East St. Louis Ry. Co., 197 Ill.App. 117.

Iowa.—Dow v. Des Moines City Ry. Co., 126 N.W. 918, 148 Iowa 429.

44. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

60 C.J. p 496 note 13.

45. Cal.—Erdevig v. Market St. Ry. Co., 264 P. 252, 203 Cal. 367.

46. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

47. Kan.—Harris v. Kansas City Public Service Co., 297 P. 718, 132 Kan. 715.

48. Mo.—Diel v. St. Louis Public Service Co., 192 S.W.2d 608, 238 Mo. App. 1046.

60 C.J. p 497 note 16.

49. Mich.—Pampu v. City of Detroit, 24 N.W.2d 588, 315 Mich. 618.

Wis.—Dominiczak v. Milwaukee Elec. Ry. & Transport Co., 20 N.W.2d 635, 247 Wis. 640.

60 C.J. p 497 note 17.

50. Mo.—Goggin v. Wells, App., 273 S.W. 1107.

51. Ga.—Brown v. Savannah Electric & Power Co., 167 S.E. 773, 46 Ga.App. 393.

Mo.—Lackey v. United Rys. Co., 231 S.W. 956, 288 Mo. 120.

52. N.Y.—Thompson v. Metropolitan St. R. Co., 85 N.Y.S. 181, 89 App. Div. 10.

and listen; but the rule is not as strictly applied to street railroads as it is to steam railroads.

A person approaching, or about to cross, a street railroad track should, for his own protection, use his senses of sight and hearing;⁵³ and under some circumstances it is his duty to look and listen for approaching cars.⁵⁴ Accordingly, his failure to perform this duty constitutes contributory negligence precluding a recovery of damages for his death or injury resulting from his coming in contact with a car,⁵⁵ even though the traffic signal is in the pedestrian's favor,⁵⁶ provided the contributory negligence is the proximate cause of the injury;⁵⁷ and this is so notwithstanding negligence on the part of the company,⁵⁸ unless the company willfully or wantonly inflicts the injury, as discussed supra § 211, or fails to exercise ordinary care to avoid injuring him after discovering his peril, as discussed infra § 291.

For example, a person is guilty of contributory negligence precluding a recovery of damages where he goes upon a track without looking or listening, when he knows that cars are passing every few

minutes;⁵⁹ goes along heedlessly with his head covered or ears muffled,⁶⁰ or otherwise allows his attention to become so absorbed that he gives no heed to his danger;⁶¹ or attempts to cross immediately behind a passing or standing car or other vehicle,⁶² without looking or listening for an approaching car on the same or opposite track.

On the other hand, except in some jurisdictions,⁶³ the duty to look and listen is not an absolute one⁶⁴ or one which exists under all circumstances,⁶⁵ and it is not negligence per se or as a matter of law,⁶⁶ under all circumstances,⁶⁷ to fail to look or listen for an approaching car before attempting to cross; such failure is negligence only when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened.⁶⁸

Stopping or waiting. A person about to cross a street railroad track must stop and wait, under some circumstances⁶⁹ when necessary⁷⁰ for his safety,⁷¹ as where he sees an approaching car in close proximity,⁷² his view is temporarily obstructed,⁷³ or it is

53. N.J.—Hubbard v. Atlantic Coast Electric Ry. Co., 105 A. 192, 92 N. J. Law 242.
60 C.J. p 497 note 28.

54. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248—Lolli v. Market St. Ry. Co., 110 P.2d 436, 43 Cal.App.2d 166—*Corpus Juris* cited in Abelseth v. City and County of San Francisco, 19 P.2d 53, 55, 129 Cal.App. 552.
Pa.—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del.Co. 581.
60 C.J. p 497 note 29.

Meaning of requirement

The requirement that a man shall "look and listen" before crossing street railroad track means only that he shall observe and estimate with reasonable accuracy his distance from the car and the speed of its oncoming, and then make calculation and comparison of the time it will take the car to come and the time it will take to cross the track, and, if under the same circumstances a reasonably prudent person would attempt to cross at a given speed, he will not be negligent in doing so.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

55. Pa.—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del. Co. 581—Weldon v. Pittsburgh Rys.

Co., Com.Pl., 93 Pittsb.Leg.J. 88, affirmed 41 A.2d 856, 352 Pa. 103.
Va.—Virginia Transit Co. v. Owens, 55 S.E.2d 422, 190 Va. 76—Virginia Elec. & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619.
60 C.J. p 497 note 30.

56. Cal.—Flores v. Los Angeles Ry. Corp., 59 P.2d 856, 15 Cal.App.2d 576.
Pa.—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del.Co. 581.
57. R.I.—Coburn v. United Electric Rys. Co., 128 A. 435.
Wash.—Morris v. Seattle, R. & S. Ry. Co., 120 P. 534, 66 Wash. 691.

58. Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
60 C.J. p 498 note 31.

59. Mass.—Berg v. Old Colony St. Ry. Co., 94 N.E. 704, 208 Mass. 434.
60 C.J. p 498 note 35.

60. La.—Schulte v. New Orleans City, etc., R. Co., 10 So. 811, 44 La. Ann. 509.

61. N.Y.—Zucker v. Whitridge, 98 N. E. 209, 205 N.Y. 50, 41 L.R.A., N.S., 683, Ann.Cas.1913D 1250.
60 C.J. p 498 note 37.

62. Neb.—Critchfield v. Omaha & C. B. St. Ry. Co., 155 N.W. 1094, 99 Neb. 240.
60 C.J. p 498 note 38.

63. Kan.—Lilly v. Wichita R., etc., Co., 274 P. 205, 127 Kan. 527.
60 C.J. p 498 note 40.

64. Wash.—Beeman v. Puget Sound Traction, Light & Power Co., 139 P. 1087, 79 Wash. 137.
60 C.J. p 498 note 41.

65. Mass.—Smallwood v. Boston Elevated Ry. Co., 104 N.E. 748, 217 Mass. 378.
60 C.J. p 499 note 42.

66. Me.—Denis v. Lewiston, etc., St. R. Co., 70 A. 1047, 104 Me. 39.
60 C.J. p 499 note 43.

67. Md.—Baltimore Consol. R. Co. v. Rifcowitz, 43 A. 762, 89 Md. 338.
60 C.J. p 499 note 44.

68. Ark.—Karnopp v. Ft. Smith Light & Traction Co., 178 S.W. 302, 119 Ark. 295.
60 C.J. p 499 note 45.

69. Kan.—Thomas v. Kansas City El. R. Co., 99 P. 594, 79 Kan. 335.
60 C.J. p 502 note 79.

70. Ala.—Ross v. Brannon, 73 So. 439, 198 Ala. 124.
La.—Held v. New Orleans Ry. & Light Co., 1 La.App. 529.

71. Pa.—Lebo v. Reading Transit, etc., Co., 28 Pa.Dist. 374.

72. La.—Dieck v. New Orleans City, etc., R. Co., 25 So. 71, 51 La. Ann. 262.
Pa.—Spahr v. York R. Co., 50 Pa.Super. 602.

73. Cal.—Phillips v. Pacific Electric Ry. Co., 264 P. 538, 89 Cal.App. 122.
60 C.J. p 502 note 83.

apparent that a motorman does not intend to respect the pedestrian's right to cross first.⁷⁴ On the other hand, it is not always the duty of a person to stop before attempting to cross a street railroad track in a city⁷⁵ and he is not under an absolute duty⁷⁶ or hard and fast rule⁷⁷ to do so. Ordinarily, he is not required to stop, before attempting to cross, in order to look and listen;⁷⁸ nor is he bound to wait because a car is in sight.⁷⁹ Where he stopped before crossing the first track, he is not required to stop again between the tracks.⁸⁰

Duty with respect to steam railroads compared. The rule that it is the duty of a person approaching a steam railroad crossing to stop, look, and listen, discussed in Railroads §§ 772-790, does not apply⁸¹ with all its force,⁸² rigor,⁸³ and strictness⁸⁴ to a person approaching, or about to cross, a street railroad track; and he need not exercise the same high degree of care in this respect as is required in crossing a steam railroad.⁸⁵

b. Manner and Extent of Looking and Listening

A person about to cross streetcar tracks must look and listen with ordinary care and diligence at the appropriate time and place until he is safe.

As a general rule it is the duty of a person about to cross a street railroad track to exercise ordinary care and diligence, according to the circumstances, to look and listen for approaching cars in time to avoid an accident;⁸⁶ and he is guilty of contributory negligence precluding a recovery for injuries received where he goes on or attempts to cross the track without exercising ordinary care to look and listen for an approaching car which is in close proximity and which by ordinary care he could see or hear in time to avoid the accident.⁸⁷ So also, he is guilty of contributory negligence where, although he looks or listens, he fails to see or hear a car which is plainly visible.⁸⁸ However, it is otherwise where his failure to see or hear the car in question when looking and listening is due to the noise and lights of many automobiles traveling at the time on the street which he is attempting to cross,⁸⁹ or some other valid reason.⁹⁰ Where a pedestrian's vision of streetcars is obscured by darkness, obstructions, etc., he must exercise increased vigilance in looking out for a streetcar.⁹¹

Time and place. When a person approaching a street railroad track is required to look and listen for an approaching car, he must do so at the time and place required in the exercise of ordinary

74. N.J.—Connolly v. Public Service Ry. Co., 109 A. 507, 94 N.J.Law 157—Schwanewede v. North Hudson County R. Co., 51 A. 696, 67 N.J. Law 449.

75. U.S.—Los Angeles Traction Co. v. Conneally, Cal., 136 F. 104, 69 C.C.A. 92.

76. Wash.—Beeman v. Puget Sound Traction, Light & Power Co., 139 P. 1087, 79 Wash. 137.

77. Minn.—Bremer v. St. Paul City Ry. Co., 120 N.W. 382, 107 Minn. 326, 21 L.R.A., N.S., 887.

78. Iowa.—Dow v. Des Moines City Ry. Co., 126 N.W. 918, 148 Iowa 429.
60 C.J. p 502 note 83.

79. Pa.—Hetzlein v. Johnstown Traction Co., 75 A.2d 533, 365 Pa. 360.
60 C.J. p 502 note 89.

80. Pa.—Smyth v. Philadelphia & West Chester Traction Co., 107 A. 20, 263 Pa. 511.

81. Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386.
60 C.J. p 497 note 23.

82. Iowa.—McCormick v. Ottumwa Ry. & Light Co., 124 N.W. 889, 146 Iowa 119.
60 C.J. p 497 note 24.

83. Wis.—Dahinden v. Milwaukee Electric Ry. & Light Co., 171 N.W. 669, 169 Wis. 1.

84. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Wallace, 180 N.E. 485, 95 Ind.App. 395.
Va.—Virginia Elec. & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619.
60 C.J. p 497 note 26.

85. Minn.—Morris v. St. Paul City Ry. Co., 117 N.W. 500, 105 Minn. 276, 17 L.R.A., N.S., 598.
60 C.J. p 497 note 27.

86. Cal.—Collier v. Los Angeles Ry. Co., 140 P.2d 206, 60 Cal.App.2d 169—Amendt v. Pacific Electric Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248—Babcock v. Pacific Gas & Electric Co., 7 P.2d 736, 120 Cal.App. 218.
Pa.—Watson v. Philadelphia Transp. Co., 51 A.2d 613, 356 Pa. 103—Danks v. Pittsburgh Rys. Co., 195 A. 16, 328 Pa. 356.
60 C.J. p 499 note 46.

87. Pa.—Watson v. Philadelphia Transp. Co., 51 A.2d 613, 356 Pa. 103—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369—Ewanco v. Pittsburgh Rys. Co., 53 A.2d 856, 161 Pa.Super. 300.
Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
60 C.J. p 499 note 47.

88. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

Ill.—Moore v. Illinois Power & Light Corp., 3 N.E.2d 932, 286 Ill.App. 445.

Pa.—Pessolano v. Philadelphia Transp. Co., 36 A.2d 497, 349 Pa. 73—Danks v. Pittsburgh Rys. Co., 195 A. 16, 328 Pa. 356—Richards v. Pittsburgh Rys. Co., 184 A. 854, 122 Pa.Super. 88.
60 C.J. p 500 note 48.

89. La.—Leininger v. New Orleans Ry. & Light Co., 91 So. 521, 150 La. 1089.
60 C.J. p 500 note 49.

90. Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.

Curbliner suddenly making left turn
Where pedestrian and curbliner entered intersection traveling in the same direction with green light, and curbliner struck pedestrian as it made left turn, pedestrian could rely on driver's care and was not contributorily negligent as a matter of law in failing to see curbliner.—Gearhart v. Des Moines R. Co., supra.

91. N.Y.—Wecker v. Brooklyn Q. C. & S. R. Co., 120 N.Y.S. 1020, 136 App.Div. 340.
60 C.J. p 500 note 50.

care,⁹² which will be reasonably effective⁹³ to afford him information of the presence of an approaching car⁹⁴ and enable him to act safely with respect to any danger observed.⁹⁵ According to some authorities, it is necessary to look immediately before entering on the track,⁹⁶ or at the last moment or opportunity before passing the line between safety and peril;⁹⁷ and it is not sufficient to look only while at the curb,⁹⁸ when first entering on the street,⁹⁹ or at the instant when struck.¹ However, according to other authorities, a person is not required to look or listen at any particular place.² It has been held that a person is charged with the duty to look and listen for approaching cars on the street which he is crossing³ but not those whose route is confined to the street on which he is proceeding.⁴

Subsequent or continuous look. Generally speaking, the duty of a person about, or attempting, to cross a street railroad track to look and listen continues until he is safely across,⁵ or until the point of danger is reached,⁶ or until he has reached the track,⁷ or at least he is bound to look again or keep on looking where his view is somewhat obscured at one time;⁸ and his failure to look again or keep a lookout may constitute contributory negligence,⁹ as where he looks only when he is some distance from the track, and, although there is nothing to obstruct his view, he fails to look or listen when he is about to step on it,¹⁰ or where he has seen the car approaching when he first looked, but failed to continue to look or look again.¹¹ However, he need not look constantly¹² at every step¹³ from the time he leaves the curb until he reaches the car track;¹⁴

92. Or.—Donohoe v. Portland Ry. Co., 107 P. 964, 56 Or. 58.

93. La.—Friedman v. New Orleans Ry. & Light Co., 96 So. 821, 153 La. 951.

94. Colo.—Denver City Tramway Co. v. Gustafson, 121 P. 1015, 21 Colo. App. 478.
60 C.J. p 500 note 54.

95. Iowa.—Glessner v. Waterloo, C. F. & N. Ry. Co., 249 N.W. 138, 216 Iowa 850.
60 C.J. p 500 note 55.

96. Pa.—Watson v. Philadelphia Transp. Co., 51 A.2d 613, 356 Pa. 103—Weldon v. Pittsburgh Rys. Co., 41 A.2d 856, 352 Pa. 103—Pessolano v. Philadelphia Transp. Co., 36 A.2d 497, 349 Pa. 73—Sinnig v. Pittsburgh Rys. Co., 175 A. 405, 316 Pa. 328—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421.
60 C.J. p 500 note 56.

Negligence per se

Traveler must look for approaching cars immediately before entering upon a streetcar track, failure to do so being negligence per se.—Weldon v. Pittsburgh Rys. Co., 41 A.2d 856, 352 Pa. 103—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421.

Rule held violated

A pedestrian did not discharge such duty by pausing on elevated roadbed of railroad nearly ten feet from streetcar tracks to look toward oncoming car.—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369.

Rule held not violated

Rule is not violated where pedestrian makes observations within less than four feet from rail.—Kunzler v.

Pittsburgh Rys. Co., 34 A.2d 66, 348 Pa. 88.

97. Wis.—Meissner v. Southern Wisconsin Ry. Co., 152 N.W. 291, 160 Wis. 507—Schlesler v. Milwaukee Electric Ry. & Light Co., 134 N. W. 144, 147 Wis. 668.

Limitation on rule

The rule that, in crossing a streetcar track, pedestrian must look for approaching car at last moment before entering zone of danger is not applicable unless to a pedestrian intending to board approaching car directly from a stopping place for the car without crossing ahead of it or to one crossing the street ahead of car, who fails to look when nearing car rail first reached.—Dominiczak v. Milwaukee Elec. Ry. & Transport Co., 20 N.W.2d 635, 247 Wis. 640.

98. N.Y.—Tully v. New York City R. Co., 111 N.Y.S. 919, 127 App.Div. 688.

Pa.—Patton v. George, 131 A. 245, 284 Pa. 342.

99. Pa.—Patton v. George, supra.

1. Ill.—Myhre v. Chicago City Ry. Co., 216 Ill.App. 128.
60 C.J. p 500 note 60.

2. Or.—Donohoe v. Portland Ry. Co., 107 P. 964, 56 Or. 58.

3. Pa.—Heaps v. Southern Pennsylvania Traction Co., 120 A. 548, 276 Pa. 551.

4. Pa.—Heaps v. Southern Pennsylvania Traction Co., supra.

5. Iowa.—Glessner v. Waterloo, C. F. & N. Ry. Co., 249 N.W. 138, 216 Iowa 850.

Pa.—Pessolano v. Philadelphia Transp. Co., 36 A.2d 497, 349 Pa. 73—Danks v. Pittsburgh Rys. Co., 195 A. 16, 328 Pa. 356—Porter v.

Philadelphia Suburban Transp. Co., Com.Pl., 28 Del.Co. 581.
60 C.J. p 501 note 70.

Pedestrian must watch approaching car and not assume that it will stop for passengers.—Phillips v. Baltimore Transit Co., 71 A.2d 430, 194 Md. 527.

6. Md.—State, for Use of Ridgway v. Capital Transit Co., 72 A.2d 245, 194 Md. 656.

7. Pa.—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421.

8. Mo.—Pettyjohn v. Kansas City Public Service Co., App., 181 S.W. 2d 179, opinion quashed in part on other grounds 188 S.W.2d 650, 354 Mo. 79.
60 C.J. p 501 note 71.

9. Pa.—Lebo v. Reading Transit, etc., Co., 28 Pa.Dist. 374.
Wash.—Zettler v. City of Seattle, 279 P. 570, 153 Wash. 179.

10. Cal.—Deike v. East Bay St. Rys., 46 P.2d 812, 7 Cal.App.2d 544.
Mass.—Sullivan v. Boston Elevated Ry. Co., 186 N.E. 559, 253 Mass. 507—Daignault v. Berkshire St. Ry. Co., 178 N.E. 653, 277 Mass. 227.
60 C.J. p 501 note 73.

11. Mo.—Epstein v. Kansas City Public Service Co., App., 78 S.W.2d 534.

Pa.—Clark v. Pittsburgh Rys. Co., 171 A. 886, 314 Pa. 404.

12. Iowa.—Dow v. Des Moines City Ry. Co., 126 N.W. 918, 148 Iowa 429.

13. Ohio.—Community Traction Co. v. Reno, 164 N.E. 429, 30 Ohio App. 143.

14. Iowa.—Barboe v. Sioux City Service Co., 215 N.W. 740, 205 Iowa 1074.

and, except in some jurisdictions,¹⁵ it is not negligence for him to attempt to cross without looking and listening again where, when he first looks and starts to cross, it is reasonably apparent that he will have plenty of time under ordinary circumstances to do so.¹⁶

Crossing at place other than regular crossing. A pedestrian crossing the street at a place other than the regular crossing or intersection has the duty of looking to avoid being hit by a streetcar.¹⁷

Direction. Ordinarily, a person must look in both directions,¹⁸ and is guilty of contributory negligence where he looks only in one direction when he can see the approaching car if he also looks in the opposite direction.¹⁹ However, in some jurisdictions a failure to look in both directions is not negligence per se,²⁰ and whether it is²¹ or is not²² negligence in fact depends on the circumstances. Certainly, an ordinarily prudent man is under the duty, before placing himself in a position of danger, to look in the direction of the anticipated peril.²³

Distance. Before attempting to cross a street railroad track, a person need look only far enough to warrant an ordinarily prudent person under like circumstances to conclude that no car is so near as to endanger his safety in crossing.²⁴

Traffic signals. Where a traffic light, which was in favor of the pedestrian when he started to cross, changes and the pedestrian continues to cross without looking in the direction of the released traffic he is guilty of contributory negligence and cannot recover.²⁵

§ 272. Passing under Elevated Structure

There is no negligence in passing under the structure of an elevated railroad or in looking up as the train passes, but a pedestrian must use due caution in crossing a street in which a street railroad track is laid above the street surface.

A person on the surface of the street is not bound to wait until a train on an elevated railroad has passed, or until no train is passing overhead, before going under such structure;²⁶ nor is it necessarily contributory negligence for a person to look up as an elevated train is passing.²⁷ However, in crossing a street in which a street railroad track is laid above the street's surface, a pedestrian must bring to bear a degree of care and prudence referable to the changed condition wrought by the presence of the street railway track so constructed,²⁸ provided he is aware, or reasonable prudence would advise an ordinarily prudent man, that the street railway track is so located.²⁹

§ 273. Riding Bicycle or Motorcycle

A person riding a bicycle or motorcycle is guilty of contributory negligence precluding recovery where he fails to exercise due care at street railroad tracks and such failure is the proximate cause of injury.

A bicycle rider on a public street in the exercise of ordinary care has the right to assume that a street railroad company has performed or will properly perform its duty;³⁰ and a person who is unaccustomed to riding a bicycle is not guilty of contributory negligence so as to preclude a recovery where he loses control of the bicycle, and is in-

15. La.—Heebe v. New Orleans, etc., R., etc., Co., 35 So. 251, 110 La. 970.

16. Iowa.—Kern v. Des Moines City R. Co., 118 N.W. 451, 141 Iowa 620. 60 C.J. p 502 note 78.

17. D.C.—Roberts v. Capital Transit Co., 131 F.2d 871, 76 U.S.App.D.C. 367.

18. Ill.—Moore v. Illinois Power & Light Corp., 3 N.E.2d 932, 286 Ill.App. 445.

19. Mo.—Zlotnikoff v. Wells, 295 S.W. 129, 220 Mo.App. 869. 60 C.J. p 501 note 64.

20. Mich.—McGee v. Consolidated St. R. Co., 60 N.W. 293, 102 Mich. 107, 47 Am.S.R. 507, 26 L.R.A. 300. 60 C.J. p 501 note 65.

21. Ohio.—Cincinnati Street Ry. Co. v. Snell, 43 N.E. 207, 54 Ohio St. 197, 32 L.R.A. 276—Schausten v.

Toledo Consol. St. R. Co., 18 Ohio Cir.Ct. 691, 7 Ohio Cir.Dec. 389.

22. Ill.—Von Holland v. Chicago City Ry. Co., 148 Ill.App. 320. 60 C.J. p 501 note 67.

23. Ill.—Penrod v. East St. Louis Ry. Co., 197 Ill.App. 117. 60 C.J. p 501 note 68.

24. Cal.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App. 2d 248.

Extent of duty

While a pedestrian must look ahead and toward any quarter from which danger might come in order to avoid a collision, he need not look continuously backward for a streetcar which he has seen standing, and he is not required to oscillate his head like a clock pendulum in order to look in both directions.—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248.

25. Mo.—Pettyjohn v. Kansas City Public Service Co., App., 181 S.W. 2d 179, opinion quashed in part on other grounds 188 S.W.2d 650, 354 Mo. 79. 60 C.J. p 501 note 69.

26. Mich.—Beaulieu v. City of Detroit, 292 N.W. 332, 293 Mich. 364.

27. Mass.—Woodall v. Boston El. R. Co., 78 N.E. 446, 192 Mass. 308.

28. Mass.—Walsh v. Boston El. R. Co., 78 N.E. 451, 192 Mass. 423.

29. Ala.—Benton v. City of Montgomery, 75 So. 473, 200 Ala. 97.

30. Ala.—Benton v. Montgomery, supra.

31. Ind.—Kokomo R., etc., Co. v. Studebaker, 83 N.E. 260, 41 Ind. App. 11. 60 C.J. p 502 note 95.

jured through the negligent operation of a car.³¹ However, except where by the exercise of ordinary care the company could have avoided the rider's injury after discovering his peril, as discussed *infra* § 291, a bicyclist is guilty of contributory negligence barring a recovery where he rides his wheel between or so near to street railroad tracks as to be in danger because of passing cars, without looking and listening for the approach of cars from in front or behind,³² and without exercising reasonable care to turn out for such a car;³³ or where he rides between tracks which are close together while two cars are passing;³⁴ or where he heedlessly or carelessly attempts to ride across in front of an approaching car, which he sees or hears, or which he should see or hear,³⁵ as where he heedlessly or carelessly rides from behind one car on the adjacent track in front of an approaching car.³⁶

Excuse for failure to hear. A bicycle rider is excused from hearing the sound of an approaching car where, at the time, there is another car in the immediate vicinity, going in the opposite direction, and he believes that all the noise he hears emanates from the latter car.³⁷

Duty to stop. A bicycle rider is not bound as a matter of law to stop, alight from his wheel, and look intently for cars before attempting to cross, in order to relieve himself of the charge of contributory negligence;³⁸ nor is he negligent as a matter of law if he does not stop and wait until a car, which he sees approaching some distance away, has passed.³⁹

Motorcycle. Damages cannot be recovered for the

death of, or injury to, a motorcycle rider in a collision with a streetcar where he so negligently rode his motorcycle on or toward the car track as to bring about the collision.⁴⁰ It has been held to be negligence for three men to ride on a single-seated motorcycle.⁴¹ A motorcyclist may recover for injuries received as a result of the wheel becoming stuck in a rut, which defect or obstruction is due to the negligence of the street railway company, where the motorist is not contributorily negligent.⁴²

§ 274. Driving, Occupying, or Alighting from Vehicle; Riding or Driving Horse

- a. In general
- b. Assumptions as to conduct of company and its servants

a. In General

While more care than usual has been held necessary in the case of heavy trucks and tractor-trailers, generally a person driving a motor vehicle or other vehicle on a street occupied by a street railroad must use ordinary care, and only such care, to avoid the incidental dangers.

While a person driving a motor vehicle, or riding or driving a horse or team, on a street occupied by a street railroad has an equal right to the use of the street, as discussed *supra* § 207, the streetcar tracks are a warning to him of possible danger,⁴³ and it is his duty to exercise his right to use the street with due regard for the right of the streetcar,⁴⁴ and to exercise reasonable and ordinary care and precaution under the circumstances to avoid death or injury through dangers incident to the management and operation of the road,⁴⁵ and to per-

31. Ky.—Louisville R. Co. v. Blaydes, 52 S.W. 960, 21 Ky.L. 668.

32. Ind.—Robards v. Indianapolis St. R. Co., 66 N.E. 66, 67 N.E. 953, 32 Ind.App. 297.
60 C.J. p 502 note 97.

33. Mass.—Dechene v. Greenfield, etc., St. R. Co., 74 N.E. 600, 188 Mass. 423.
60 C.J. p 503 note 98.

34. Minn.—Gagne v. Minneapolis St. R. Co., 79 N.W. 671, 77 Minn. 171.
60 C.J. p 503 note 99.

35. Conn.—De Maras v. Connecticut Co., 145 A. 30, 109 Conn. 651.
60 C.J. p 503 note 2.

36. Minn.—Medcalf v. St. Paul City R. Co., 84 N.W. 633, 82 Minn. 18.
60 C.J. p 503 note 3.

37. Ind.—Indianapolis St. R. Co. v. Taylor, 80 N.E. 436, 39 Ind.App. 592.

38. Ind.—Indianapolis St. R. Co. v. Taylor, *supra*.

39. N.Y.—Brooks v. International R. Co., 98 N.Y.S. 765, 112 App.Div. 555, affirmed 80 N.E. 1105, 187 N.Y. 574.

40. N.J.—Sharpe v. Public Service Ry. Co., 137 A. 526, 103 N.J.Law 583.
60 C.J. p 503 note 8.

41. Va.—Braswell v. Virginia Electric & Power Co., 173 S.E. 365, 162 Va. 27.

42. Pa.—Boliver v. City of Philadelphia, 9 A.2d 192, 137 Pa.Super. 437.

Motorcyclist occupied by traffic
A motorcyclist, who while in the

midst of heavy traffic was injured when he lost control of motorcycle after wheel thereof became stuck in rut adjacent to trolley rail, was not contributorily negligent because of his failure to see the defect, since motorcyclist was required to regard the traffic as well as the roadway ahead of him.—Boliver v. City of Philadelphia, *supra*.

43. Md.—Downey v. Baltimore Transit Co., 78 A.2d 666.

44. D.C.—MacDonald, to Use of Emmco Ins. Co., v. Capital Transit Co., Mun.App., 31 A.2d 862.

45. Cal.—Aungst v. Central California Traction Co., 1 P.2d 56, 115 Cal.App. 113—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.

Fla.—Miami Beach Ry. Co. v. Dohme, 179 So. 166, 131 Fla. 171.

form specific duties imposed on him by the law.⁴⁶ Accordingly, if he fails to exercise such care, he is guilty of contributory negligence which will preclude a recovery of damages for his death or personal injury, or for injury to property,⁴⁷ even though the company or its servants are also negligent,⁴⁸ unless the servants of the company fail to exercise ordinary care to avoid the accident after discovering his peril, as discussed *infra* § 291, or the case is one of an emergency or a sudden and imminent peril brought about by the negligence of the streetcar company and without the fault of the injured person, as discussed *supra* § 265.

On the other hand, a driver of an automobile or other vehicle need not exercise more than ordinary and reasonable care,⁴⁹ and, if he exercises such care as would be exercised by a reasonably prudent man under the same or similar circumstances, he is not guilty of contributory negligence,⁵⁰ and may recover for injuries received by reason of negligence in the operation of streetcars,⁵¹ or defects or ob-

structions in or near the tracks due to the negligence of the company.⁵²

Heavy trucks and tractor-trailers. It has been held that in the case of heavy trucks and tractor-trailers which are unwieldy the exercise of more care than usual is necessary.⁵³

Neglecting opportunity to escape. It has been held that to show contributory negligence by the driver of a vehicle struck by a streetcar, it must appear that after he saw his own danger, or could have seen it by using ordinary care, he had an opportunity to escape and failed to avail himself of it.⁵⁴

b. Assumptions as to Conduct of Company and Its Servants

Depending on the circumstances, the driver of a vehicle may make various assumptions, as that the company and its servants will use reasonable care to avoid injuring him, or with respect to the control, speed, or stopping of the car; but he cannot rely absolutely on such assumptions.

Md.—Baltimore Transit Co. v. Revere Copper & Brass, 72 A.2d 4, 194 Md. 611—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.
Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.
Pa.—Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220.
60 C.J. p 503 note 12.

Control of vehicle

Driver of motor vehicle must have car under control at all times.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

Alighting from left side of vehicle

(1) Alighting from left door of automobile into street is not of itself "negligence," but is negligence if a person of ordinary prudence under all the circumstances then existing would not have done so.—Stricklin v. Rosemeyer, 126 P.2d 665, 52 Cal.App.2d 558.

(2) Where motorist intending to alight from left door of automobile and to walk around automobile to sidewalk was struck by trolley bus in attempting to alight from left door, motorist was not rendered guilty of "negligence per se" by section of city traffic code making it unlawful for any person to be in any roadway other than a safety zone or crosswalk but providing that the section should not be construed to prevent necessary use of roadway by a pedestrian.—Stricklin v. Rosemeyer, 123 P.2d 151, reheard 126 P. 2d 665, 52 Cal.App.2d 558.

46. Md.—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A.2d 450, 185 Md. 158.

47. Kan.—Keuchenmeister v. Wichita Transp. Co., 20 P.2d 457, 137 Kan. 344—Canestro v. Joplin-Pittsburg R. Co., 10 P.2d 902, 135 Kan. 337.

Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.
60 C.J. p 504 note 13.

Motorist who attempted to pass truck, and, in order to avoid collision with automobile approaching from opposite direction, drove across interurban tracks, and was struck by interurban car, was held guilty of contributory negligence.—Moore v. East St. Louis & S. Ry. Co., Mo.App. 54 S.W.2d 767.

48. Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.
60 C.J. p 504 note 14.

49. Iowa.—Delling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.
60 C.J. p 504 note 17.

In Missouri

(1) The rule stated in the text prevails.—Smith v. Kansas City Rys. Co., App., 258 S.W. 458.

(2) Under an earlier statute, since repealed, the highest degree of care was required of a motorist.—Threadgill v. United Rys. Co. of St. Louis, 214 S.W. 161, 279 Mo. 466—60 C.J. p 504 note 16.

50. Mich.—Flokstra v. Grand Rapids Ry. Co., 165 N.W. 641, 198 Mich. 629.
60 C.J. p 504 note 18.

51. Ind.—Indianapolis St. R. Co. v. Coyner, 80 N.E. 168, 39 Ind.App. 510.

52. Ariz.—Warren Co. v. Whitt, 165 P. 1097, 19 Ariz. 104.
60 C.J. p 504 note 20.

Effect of notice of defect or obstruction

(1) Motorist noticing men working on street was held bound to be vigilant to observe character of obstruction.—Stewart v. Philadelphia Rapid Transit Co., 157 A. 37, 103 Pa.Super. 366.

(2) Other defects or obstructions see 60 C.J. p 504 note 20 [a].

53. Mo.—Robards v. Kansas City Public Service Co., 125 S.W.2d 891, 233 Mo.App. 962.

Reason for rule

The increasing number of heavy trucks and tractor-trailer combinations on public highways imposes a servitude thereon which, in comparison with less unwieldy and less dangerous vehicles, calls for the exercise of more than usual care to avoid injury.—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A.2d 450, 185 Md. 158.

54. Ind.—Schilling v. Indianapolis & C. Traction Co., 96 N.E. 167, 97 N. E. 124, 51 Ind.App. 131.

In exercising reasonable care for his own protection, a driver of a motor vehicle, or of a horse, team, or other vehicle, or a rider of a horse, has a right, to a limited extent at least, and until he sees or knows the contrary, to assume that the street railroad company and its servants will operate their cars properly, and are exercising, and will exercise, ordinary and reasonable care to avoid running into and injuring him,⁵⁵ particularly when the traffic signals are in the motorist's favor,⁵⁶ and that they do and will obey the law.⁵⁷ However, he is not justified in relying altogether on such assumption,⁵⁸ but must take proper measures for his own safety;⁵⁹ and he cannot properly place himself in a position of manifest danger on the assumption that another person who controls the sources of danger will act so as to control them for his safety.⁶⁰

Control. Unless there are circumstances indicating the contrary,⁶¹ a driver of an automobile or

other vehicle has a right to assume that the motor-man of an approaching car has,⁶² and will keep,⁶³ it under control, or will bring, or attempt to bring, it under control.⁶⁴

Speed. Unless he has knowledge of facts to the contrary,⁶⁵ a driver of a vehicle has a right to assume and expect that a streetcar is being, and will be, run at a rate of speed which is lawful,⁶⁶ ordinary,⁶⁷ customary,⁶⁸ reasonable or moderate,⁶⁹ and not excessive.⁷⁰ Also, it has been held that he may properly assume that the speed of the streetcar will be checked or reduced where it is excessive,⁷¹ where he is driving on the track under exigent circumstances and a reduction of speed is necessary to prevent a collision,⁷² where a crossing is being approached,⁷³ or where he is attempting to cross the track ahead of the car and a reduction of the speed of the car is necessary to enable him to do so.⁷⁴ However, he has no right to trust solely to a slow-

55. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625.
Cal.—Bate v. Los Angeles Ry. Corp., 86 P.2d 856, 30 Cal.App.2d 604.
Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.
Conn.—Clark Dairy v. Feeley, 181 A. 626, 120 Conn. 557.
Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.
Mass.—White v. Eastern Massachusetts St. Ry. Co., 12 N.E.2d 75, 299 Mass. 70.
N.J.—Higbee v. Atlantic City & Shore R. Co., 32 A.2d 587, 130 N.J.Law 282.
Pa.—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Ehrhart v. York Rys. Co., 162 A. 810, 308 Pa. 566—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319—Shearer v. Pittsburgh Rys. Co., 21 A.2d 482, 145 Pa.Super. 560—Turner v. Philadelphia Rapid Transit Co., 170 A. 382, 111 Pa.Super. 439.
60 C.J. p 504 note 23.
56. Pa.—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.
57. Iowa.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687—Glessner v. Waterloo, C. F. & N. Ry. Co., 249 N.W. 138, 216 Iowa 850.
58. Cal.—New York Lubricating Oil Co. v. United Railroads of San Francisco, 215 P. 72, 191 Cal. 96.
Md.—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A. 2d 450, 185 Md. 158.
60 C.J. p 505 note 24.
59. Va.—Roanoke Ry. & Electric Co. v. Loving, 119 S.E. 82, 137 Va. 331.
60 C.J. p 505 note 25.
60. Iowa.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.
Pa.—Weschler v. Buffalo & Lake Erie Traction Co., 143 A. 119, 293 Pa. 472.
61. N.Y.—Nardi v. Richmond Light & R. Co., 138 N.Y.S. 496, 153 App. Div. 388.
60 C.J. p 505 note 33.
62. Iowa.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.
Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.
W.Va.—Simms v. Charleston Interurban R. Co., 161 S.E. 8, 111 W.Va. 180.
60 C.J. p 505 note 34.
63. Wash.—Beeman v. Tacoma Ry. & Power Co., 191 P. 813, 112 Wash. 164.
60 C.J. p 505 note 35.
64. Wash.—Reed v. Tacoma Ry. & Power Co., 188 P. 409, 110 Wash. 334.
60 C.J. p 505 note 36.
65. Mo.—Knight v. Kansas City Public Service Co., App., 49 S.W.2d 1074.
60 C.J. p 505 note 37.
66. Cal.—Ring v. Los Angeles Ry. Corporation, 2 P.2d 404, 116 Cal. App. 93.
Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164.
Mo.—Knight v. Kansas City Public Service Co., App., 49 S.W.2d 1074.
Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.
67. Mo.—Knight v. Kansas City Public Service Co., App., 49 S.W.2d 1074.
68. Cal.—Runnels v. United Railroads of San Francisco, 166 P. 18, 175 Cal. 528.
Pa.—Flounders v. Southern Pennsylvania Traction Co., 124 A. 323, 280 Pa. 85.
69. Iowa.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.
Mo.—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 38 S.W.2d 1042.
60 C.J. p 506 note 41.
70. Va.—Roanoke Ry. & Electric Co. v. Loving, 119 S.E. 82, 137 Va. 331.
60 C.J. p 506 note 42.
71. N.J.—Consolidated Traction Co. v. Lambertson, 36 A. 100, 59 N.J. Law 297, affirmed 38 A. 683, 60 N.J. Law 452, and 38 A. 684, 60 N.J. Law 457.
72. Mo.—Smith v. Metropolitan St. Ry. Co., 155 S.W. 54, 169 Mo.App. 610.
73. N.Y.—Bertsch v. Metropolitan St. R. Co., 74 N.Y.S. 236, 68 App. Div. 228, affirmed 66 N.E. 1104, 173 N.Y. 634.
60 C.J. p 506 note 45.
74. Mo.—Mason v. United Rys. Co. of St. Louis, 246 S.W. 318.
60 C.J. p 506 note 46.

ing down of the car;⁷⁵ and there is, ordinarily, less reason for expecting the speed of a streetcar to be reduced, in order to avoid danger of a collision with another vehicle, between, than at, crossings.⁷⁶ Moreover, a driver crossing a street in front of an approaching streetcar is not justified in assuming that the speed of the streetcar will not be increased.⁷⁷

Stopping. A driver of a vehicle has no right to assume that a streetcar will stop between street intersections,⁷⁸ at a point which is not a regular stopping place,⁷⁹ or even at a crossing or street intersection,⁸⁰ unless there is a custom to stop there for passengers,⁸¹ or unless there is an ordinance or legislative direction requiring it to do so.⁸² Moreover, even where he may assume that the car will stop, as where there are passengers waiting at a regular stopping place,⁸³ a motorist cannot rely thereon absolutely but must make use of his own senses.⁸⁴ Also, a driver is not warranted in concluding that a car will stop because it has slowed down.⁸⁵

On the other hand, a driver may properly assume that the servants in charge of a car will, on the first appearance of danger, stop the car in the shortest time possible,⁸⁶ and, in the absence of any

indication to the contrary,⁸⁷ that the command of a traffic signal will be obeyed.⁸⁸ It may also be assumed, in the absence of any indication to the contrary, that a streetcar will observe the legislative direction with respect to stopping and will not stop suddenly at a place other than a regularly established stop.⁸⁹

Yielding right of way. Where the circumstances warrant it, the driver of a motor vehicle has a right to assume that a motorman will grant or yield the right of way,⁹⁰ particularly where all indications are that he will do so.⁹¹

Status of company. A driver is justified in assuming that the tracks he is about to cross are those of an ordinary street railroad company, where they appear to be such and the company has never given notice to the public that it is operating under a steam railroad charter.⁹²

Other matters. A driver crossing the tracks at a street intersection may properly assume that a car standing at the corner will not be put in motion while he is crossing.⁹³ So also, he may properly assume and anticipate that a proper lookout for vehicles is being, and will be, kept by the servants of a street railroad company in charge of a car,⁹⁴ that the

75. Conn.—McKeon v. Connecticut Co., 75 A. 139, 83 Conn. 53.

76. Conn.—McKeon v. Connecticut Co., supra.

77. Cal.—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

78. Ill.—Mullen v. Johnson, 196 Ill. App. 303.

79. D.C.—Capital Traction Co. v. Diver, 33 App.D.C. 332.

80. Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779 —Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Pa.—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501—Powell v. Pittsburgh Rys. Co., 168 A. 369, 110 Pa.Super. 268.

60 C.J. p 506 note 51.

81. Mo.—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256.

60 C.J. p 506 note 52.

82. Tenn.—Memphis Street Railway Co. v. Albert, 11 Tenn.App. 105.

83. Md.—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

84. Md.—Girton v. Baltimore Transit Co., supra.

85. Pa.—Long v. Philadelphia Rapid Transit Co., 65 Pa.Super. 281.

86. Mo.—Petersen v. St. Louis Transit Co., 97 S.W. 860, 199 Mo. 331.

60 C.J. p 506 note 54.

87. Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

88. La.—Fitzpatrick v. New Orleans Public Service, App., 22 So.2d 473.

Pa.—Zurcher v. Pittsburgh Rys. Co., 44 A.2d 581, 353 Pa. 212—Rea v. Pittsburgh Rys. Co., 25 A.2d 730, 344 Pa. 421—Bruno v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

89. N.J.—Higbee v. Atlantic City & Shore R. Co., 32 A.2d 587, 130 N.J. Law 282.

Motorist traveling behind trolley

A motorist who was traveling in same direction at distance of approximately fifteen feet directly behind trolley car was warranted in assuming, until he discovered that it was contrary to the facts, that operator of trolley car would observe legislative direction with respect to stopping trolley car at places established as "regular stops" and other-

wise exercise reasonable care in use of streets.—Higbee v. Atlantic City & Shore R. Co., supra.

90. Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164.

Minn.—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21.

Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 431.

60 C.J. p 506 note 55.

Circumstances held not to warrant assumption

Md.—Harry T. Campbell & Sons v. United Rys. & Electric Co. of Baltimore, 154 A. 552, 160 Md. 647.

91. Pa.—Balkie v. Philadelphia Rapid Transit Co., 200 A. 52, 331 Pa. 93.

92. N.Y.—Freihon v. Public Service R. Co., 142 A. 452, 6 N.J.Misc. 663.

93. N.Y.—Gelb v. Third Ave. Ry. Co., 204 N.Y.S. 251, 123 Misc. 136.

94. Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.

60 C.J. p 505 note 27.

streetcar will have a proper headlight in operation at night,⁹⁵ and that proper and timely signals warning of the approach of a car will be given;⁹⁶ but it is improper for him to rely wholly on such assumption.⁹⁷ It has been held that, in the absence of anything to put a motorist on notice to the contrary, he may assume that he is seen by the motorman of an approaching car;⁹⁸ but there is also some authority to the contrary.⁹⁹

§ 275. — Driving Horse near Cars

Generally it is not contributory negligence to drive a horse on a street near streetcars, unless the driver knows of danger of his horse becoming frightened and another street is available.

It is not contributory negligence per se for a person to drive a horse in a street on which a street railroad is operated,¹ where there is no reason to believe that it will become frightened and unmanageable by the operation of cars,² although he can drive on another street.³ However, except in some jurisdictions,⁴ it is contributory negligence for a person who knows that there is danger of his horse becoming frightened to drive it on a street near streetcars,⁵ if he can drive on another street without serious inconvenience.⁶

A person in charge of horses on a street on which cars run must handle the horses in a reasonably prudent manner;⁷ but it cannot be laid down as a hard and fast rule that a person who is driving, or is with, a horse on a car track must at all times have the horse under his control.⁸

§ 276. — Driving on or along Track in General

A person driving on or along a street railroad track must exercise ordinary and reasonable care commensurate with the danger; and he must look for approaching cars.

A person driving on, or along and close to, a street railroad track is required to exercise ordinary and reasonable care;⁹ and, while he is not required to exercise more than ordinary and reasonable care,¹⁰ nevertheless the care exercised must be commensurate with the danger,¹¹ which is greater on or along the track than in another part of the street,¹² particularly where it is dark and there are no street lights,¹³ or where the streetcars are operated by electricity rather than drawn by horses.¹⁴

Looking and listening. It is the duty of a person driving on or along a street railroad track to exercise reasonable care, under the circumstances, to ascertain whether or not a car is approaching.¹⁵

95. Iowa.—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

96. Cal.—Runnels v. United Railroads of San Francisco, 166 P. 18, 175 Cal. 528.

60 C.J. p 505 note 28.

Custom to sound bell before making left turn

Motorist had right to rely on custom of streetcar motormen to sound bell before making left turn.—Zator v. Cummings, 42 N.E.2d 858, 315 Ill. App. 210.

97. Mass.—Pigeon v. Massachusetts Northeastern St. Ry. Co., 119 N.E. 762, 230 Mass. 392.

N.Y.—Paladino v. Staten Island Midland R. Co., 111 N.Y.S. 715, 127 App.Div. 183.

98. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625. N.J.—Wilhelm v. Public Service Ry. Co., 113 A. 239, 95 N.J.Law 505.

99. N.Y.—Harvey v. Nassau Electric R. Co., 55 N.Y.S. 20, 35 App.Div. 307.

1. Pa.—Gibbons v. Wilkes-Barre, etc., St. R. Co., 26 A. 417, 155 Pa. 279.

2. Ind.—Marion City R. Co. v. Bu-
boise, 55 N.E. 266, 23 Ind.App. 342
—Muncie St. R. Co. v. Maynard, 32
N.E. 343, 5 Ind.App. 372.

3. Ind.—Muncie St. R. Co. v. Mayn-
ard, supra.

4. Ala.—Montgomery St. R. Co. v.
Hastings, 35 So. 412, 138 Ala. 432.
Ind.—Cincinnati, L. & A. St. R. Co.
v. Cook, 90 N.E. 1052, 45 Ind.App.
401.

5. Iowa.—Doran v. Cedar Rapids,
etc., R. Co., 90 N.W. 815, 117 Iowa
442.

60 C.J. p 506 note 62.

6. Iowa.—Doran v. Cedar Rapids,
etc., R. Co., 90 N.W. 815, 117 Iowa
442.

7. N.Y.—Sheldon v. Otsego & H. R.
Co., 152 N.Y.S. 702, 89 Misc. 482,
affirmed 155 N.Y.S. 675, 169 App.
Div. 707.

8. Vt.—Pollica v. Twin State Gas &
Electric Co., 92 A. 150, 88 Vt. 205,
Ann.Cas.1917C 1240.

9. S.C.—Dozier v. Charleston Con-
sol. Ry. & Lighting Co., 131 S.E.
592, 133 S.C. 335.

60 C.J. p 507 note 66.

10. Mich.—Hibbler v. Detroit Unit-
ed Ry., 137 N.W. 719, 172 Mich.
368.

N.Y.—Burns v. New York & L. I.
Traction Co., 123 N.Y.S. 474, 139
App.Div. 145.

11. Ala.—Merrill v. Sheffield Co., 53
So. 219, 169 Ala. 242.

Mo.—McGauley v. St. Louis Transit
Co., 79 S.W. 461, 179 Mo. 583.

12. Iowa.—Clear Transfer Co. v.
Omaha & Council Bluffs St. Ry. Co.,
181 N.W. 755, 191 Iowa 124.
60 C.J. p 507 note 69.

13. Mo.—McGauley v. St. Louis
Transit Co., 79 S.W. 461, 179 Mo.
583.

14. Ala.—Merrill v. Sheffield Co., 53
So. 219, 169 Ala. 242.

15. Mich.—Bruer v. City of Detroit,
Dept. of St. Rys., 52 N.W.2d 206,
332 Mich. 613.

Pa.—Steffenson v. Lehigh Valley
Transit Co., 64 A.2d 785, 361 Pa.
317.

60 C.J. p 507 note 72.

Backing onto car tracks

Motorist backing onto streetcar
tracks, having clear view of ap-
proaching streetcar until he was

Thus, he must look for approaching cars,¹⁶ not only at the time of entry on the track,¹⁷ but also from time to time thereafter;¹⁸ and he must look in both directions,¹⁹ not only ahead,²⁰ but also to the rear,²¹ although he is not bound constantly to look back.²² Accordingly, he is guilty of contributory negligence precluding a recovery of damages where he is struck by a streetcar by reason of his failure to comply with the requirements hereinbefore mentioned.²³ It is sometimes held or stated that he must listen,²⁴ at least where he does not look behind him.²⁵

Particular acts as contributory negligence. It is not contributory negligence per se to drive a vehicle on, or in close proximity to, a street railroad track on a public street,²⁶ particularly where the public has been in the habit of using the tracks for that purpose,²⁷ or where it is necessary to drive on the tracks by reason of the street outside the tracks being torn up for repairs or otherwise obstructed,²⁸ even though the street, except where so obstructed, is of sufficient width to permit of driving off the track, out of the way of passing cars,²⁹ and even

though the rear of the vehicle is closed so as to obstruct the driver's view in that direction.³⁰ Also, the mere fact that a driver enters on a track, or proceeds along it for some distance, without looking around, or without looking back more than once, does not charge him with contributory negligence if, under all the circumstances, his conduct is consistent with ordinary prudence;³¹ and, where he does not know that a car is approaching, his failure to signal the motorman to stop is not contributory negligence.³²

On the other hand, it has been held that motorists have the duty as a rule to keep away from a streetcar, since they have greater freedom of motion than the streetcar;³³ and the driving of a vehicle on a street railroad track, or along it and so close thereto as to be in the path of a moving car, may constitute contributory negligence under some circumstances,³⁴ as where the driver knows or should know that a car is approaching,³⁵ the vehicle is suddenly driven onto the track when a moving streetcar is so near that the motorman cannot, in the exercise of due

within twenty-four feet of tracks, and failing to see approaching car, was held contributorily negligent.—*Szewczyk v. Milwaukee Electric Ry. & Light Co.*, 247 N.W. 854, 211 Wis. 265.

16. Mich.—*Bruer v. City of Detroit*, Dept. of St. Rys., 52 N.W.2d 206, 332 Mich. 613.
60 C.J. p 507 note 73.

17. Wis.—*Kornwolf v. Milwaukee Electric Ry. & Light Co.*, 185 N.W. 546, 176 Wis. 160.

On pulling away from curb

Motorist had duty to look for streetcars immediately before entering on tracks when pulling away from curb.—*Sharpe v. Philadelphia Rapid Transit Co.*, 157 A. 370, 103 Pa. Super. 357.

18. Mich.—*Bruer v. City of Detroit*, Dept. of St. Rys., 52 N.W.2d 206, 332 Mich. 613.
60 C.J. p 507 note 75.

19. Ala.—*Merrill v. Sheffield Co.*, 53 So. 219, 169 Ala. 242.

20. Ky.—*Louisville & I. R. Co. v. Bedford's Adm'r*, 262 S.W. 941, 208 Ky. 583.
60 C.J. p 507 note 77.

21. Mo.—*McGauley v. St. Louis Transit Co.*, 79 S.W. 461, 179 Mo. 583.
60 C.J. p 507 note 78.

22. Cal.—*Berguin v. Pacific Electric Ry. Co.*, 263 P. 220, 203 Cal. 116.
60 C.J. p 507 note 79.

23. Mich.—*Bruer v. City of Detroit*, Dept. of St. Rys., 52 N.W.2d 206, 332 Mich. 613.

Pa.—*Sharpe v. Philadelphia Rapid Transit Co.*, 157 A. 370, 103 Pa. Super. 357.

Wash.—*Campbell v. Spokane United Rys. Co.*, 24 P.2d 1068, 174 Wash. 347.

24. Idaho.—*Holmes v. Sandpoint & I. R. Co.*, 137 P. 532, 25 Idaho 345.
60 C.J. p 507 note 80.

25. N.Y.—*Belford v. Brooklyn Heights R. Co.*, 83 N.Y.S. 836, 86 App.Div. 338—*Bossert v. Nassau Electric R. Co.*, 57 N.Y.S. 896, 40 App.Div. 144.

26. Mass.—*White v. Eastern Massachusetts St. Ry. Co.*, 12 N.E.2d 75, 299 Mass. 70.

Wash.—*Peizer v. City of Seattle*, 24 P.2d 444, 174 Wash. 95.
60 C.J. p 507 note 83.

Directly behind trolley car

Fact that automobile which collided with rear end of trolley car was moving in close proximity to trolley car traveling in same direction did not establish "negligence per se" on part of motorist.—*Higbee v. Atlantic City & Shore R. Co.*, 32 A.2d 587, 130 N.J.Law 282.

27. Md.—*United Rys., etc., Co. v. Seymour*, 48 A. 850, 92 Md. 425.
60 C.J. p 508 note 84.

28. Mo.—*Latson v. St. Louis Transit Co.*, 91 S.W. 109, 192 Mo. 449.
60 C.J. p 508 note 85.

29. Mich.—*Ablard v. Detroit United R. Co.*, 102 N.W. 741, 139 Mich. 248.
60 C.J. p 508 note 86.

30. Md.—*United Rys., etc., Co. v. Cloman*, 69 A. 379, 107 Md. 681.
60 C.J. p 508 note 87.

31. Tex.—*Marshall Traction Co. v. Dunn*, Civ.App., 238 S.W. 692.
60 C.J. p 508 note 88.

32. Ala.—*Watts v. Montgomery Traction Co.*, 57 So. 471, 175 Ala. 102.

33. Or.—*Harrington v. Portland Traction Co.*, 124 P.2d 715, 168 Or. 548.

34. Cal.—*Taylor v. Pacific Electric Ry. Co.*, 44 P.2d 680, 6 Cal.App.2d 531.
60 C.J. p 508 note 90.

35. Mich.—*Hildebrandt v. Detroit United Ry.*, 167 N.W. 29, 200 Mich. 52.
60 C.J. p 508 note 91.

Head-on collision

Motorist colliding head-on with streetcar in broad daylight, after driving two hundred feet astride rails with nothing to prevent him from seeing streetcar, was contributorily negligent as matter of law.—*Taylor v. Pacific Electric Ry. Co.*, 44 P.2d 680, 6 Cal.App.2d 531.

care, avoid a collision,³⁶ the driver's view is obstructed,³⁷ or he fails to make any effort,³⁸ by looking³⁹ or listening,⁴⁰ to ascertain whether a car is approaching, and, by the exercise of reasonable care, an approaching car could be discovered by him in time to avoid a collision.⁴¹

§ 277. — Duty to Turn Out for Cars

The driver of a vehicle on or along street railroad tracks must use reasonable care to turn off or away from the tracks when he knows or should know of an approaching streetcar, and must keep out of the way when passing streetcars.

It is the duty of a person driving a vehicle on or along street railroad tracks to exercise reasonable care to turn off or away from the tracks when he sees or hears, or by ordinary care should see or hear, a car approaching;⁴² and, if he fails to exercise proper care to turn out after he is aware or should have become aware of the car's approach,⁴³ or willfully neglects or refuses to turn out, although he has ample opportunity to do so,⁴⁴ whereby a collision or accident is caused, he is guilty of con-

tributory negligence precluding a recovery for his injuries, notwithstanding concurring negligence on the part of the company,⁴⁵ unless the servants of the company willfully or wantonly cause the injury, as discussed supra § 211.

When driving past a car, the driver must keep out of its way,⁴⁶ and at curves in the street he must drive further from the car than at other points;⁴⁷ but, where the track gradually and imperceptibly approaches the curb, a person is not bound as a matter of law to discover the situation and danger created thereby unless every prudent user of a motor vehicle over the same street would ordinarily discover the situation and danger at that particular point.⁴⁸ On the other hand, a driver ordinarily is not guilty of contributory negligence if he turns off or uses every reasonable effort to do so, after he knows, or should know of the car's approach;⁴⁹ and, where he drives on or near a street railroad track to avoid an obstacle, he is not bound to turn out to avoid an approaching car until he has passed the obstacle.⁵⁰

36. Ill.—Garvey v. Chicago Rys. Co., 171 N.E. 271, 339 Ill. 276. 60 C.J. p 509 note 92.

To avoid another vehicle

(1) In general.—Fina v. Richardson, 11 N.E.2d 842, 293 Ill.App. 133.

(2) Where truck driver, driving large truck on left side of one-way street within a few inches of streetcar tracks at a speed of fifteen miles per hour, approached a parked automobile which made it necessary for him either to stop or turn off onto streetcar tracks, and truck driver turned abruptly onto tracks and was struck by streetcar after truck moved about twenty-five feet after entering the track space, truck driver was guilty of contributory negligence precluding recovery from streetcar company for injuries and damage to truck.—Tarbit v. Philadelphia Transp. Co., 29 A.2d 487, 346 Pa. 234.

To turn wheels out of rail grooves

Truck driver who in attempting to turn wheels of truck out of grooves along streetcar rails suddenly steered truck toward on-coming streetcar, about 20 feet distant on adjoining track, was held guilty of negligence as matter of law.—Bowers v. Des Moines Ry. Co., 259 N.W. 244, 219 Iowa 944.

To pass another vehicle

Where track was almost eighteen feet from curb, motorist who, attempting to pass automobile ahead of

him, darted to left in front of approaching interurban car was held contributorily negligent.—Terre Haute, Indianapolis & Eastern Traction Co. v. Sawyer, 179 N.E. 554, 95 Ind.App. 8.

37. Iowa.—Claar Transfer Co. v. Omaha & Council Bluffs St. Ry. Co., 181 N.W. 755, 191 Iowa 124. 60 C.J. p 509 note 93.

38. Wash.—Bardshar v. Seattle Electric Co., 130 P. 101, 72 Wash. 200. 60 C.J. p 509 note 94.

39. Pa.—Benamy v. Reading Transit & Light Co., 112 A. 437, 269 Pa. 372. 60 C.J. p 509 note 95.

40. Pa.—Benamy v. Reading Transit & Light Co., supra. 60 C.J. p 509 note 96.

41. Wis.—Vetter v. Southern Wisconsin Ry. Co., 122 N.W. 731, 140 Wis. 296. 60 C.J. p 509 note 97.

42. D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App. D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021. 60 C.J. p 509 note 99. Stopped or standing vehicle see infra § 281.

43. Minn.—Carlson v. Duluth St. Ry. Co., 231 N.W. 246, 180 Minn. 505. 60 C.J. p 509 note 1.

44. N.Y.—Pechesky v. Metropolitan St. R. Co., 62 N.Y.S. 478, 30 Misc. 432. 60 C.J. p 509 note 2.

45. Ill.—Chicago West Div. R. Co. v. Bert, 69 Ill. 388. N.Y.—Kerin v. United Traction Co., 102 N.Y.S. 423, 117 App.Div. 314.

46. Ky.—South Covington, etc., St. R. Co. v. Besse, 108 S.W. 848, 33 Ky.L. 52, 16 L.R.A., N.S., 890.

47. Ky.—South Covington, etc., St. R. Co. v. Besse, supra. 60 C.J. p 509 note 6.

Obvious fact

Fact that the rear end of a streetcar passing around a curve will swing out and overlap the street beyond the tracks is an "obvious fact" and, hence, motorists are charged with knowledge of that fact.—Harrington v. Portland Traction Co., 124 P.2d 715, 168 Or. 548.

48. Iowa.—Knudson v. Des Moines City Ry. Co., 228 N.W. 270, 209 Iowa 429.

49. Iowa.—Wilfin v. Des Moines City Ry. Co., 156 N.W. 842, 176 Iowa 642. 60 C.J. p 510 note 8.

50. Mass.—Hall v. Bay State St. Ry. Co., 105 N.E. 434, 218 Mass. 119. 60 C.J. p 510 note 9.

§ 278. — Attempting to Cross in Front of Car

The driver of a vehicle must approach a streetcar crossing with due regard for the rights of the streetcar, and must exercise reasonable and ordinary care; and a failure to do so constitutes contributory negligence precluding recovery.

The driver of a vehicle must approach a streetcar crossing with due regard for the rights of the streetcar.⁵¹ Moreover, in attempting to cross a street railroad track a driver of a horse, team, or

vehicle must exercise reasonable and ordinary care and prudence, or such care as an ordinarily prudent person similarly situated would exercise,⁵² even though the driver may technically have the right of way,⁵³ as where the traffic signal or control is in his favor.⁵⁴ The nature and extent of the care and precaution to be exercised depend on the circumstances of the particular case;⁵⁵ and, if the driver fails to exercise such care, he is guilty of contributory negligence precluding a recovery of damages,⁵⁶ in some cases as a matter of law,⁵⁷

51. Cal.—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168—Saphire v. Los Angeles Transit Lines, 222 P.2d 956, 99 Cal.App.2d 880—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal. App.2d 195—Primm v. Market St. Ry. Co., 132 P.2d 842, 56 Cal.App.2d 480.

Reciprocal rights and duties at street crossings generally see *supra* § 209.

52. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

Cal.—Aurenz v. Los Angeles Ry. Corp., 96 P.2d 397, 35 Cal.App.2d 615.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

La.—Favaza v. New Orleans Public Service, App., 154 So. 457, followed in *Frere v. New Orleans Public Service*, 154 So. 462.

Md.—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113.

Wis.—Schmidt v. Milwaukee Electric Railway & Transport Co., 296 N.W. 609, 237 Wis. 220.

60 C.J. p 511 note 18.

Control of vehicle at intersection

(1) A vehicle driver must have vehicle under such control that he can stop before getting in path of approaching car.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Schaeffer v. Reading Transit Co., 163 A. 323, 302 Pa. 220—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa.Super. 86—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa. Super. 393—Goldfine & Brenner v. Philadelphia Rapid Transit Co., 181

A. 514, 119 Pa.Super. 581—Augustine v. Philadelphia Rapid Transit Co., 181 A. 378, 119 Pa.Super. 577—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Brugh v. Philadelphia Suburban Transp. Co., Com.Pl., 33 Del. Co. 131—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del. Co. 581—Bradosky v. West Penn. Rys. Co., Com.Pl., 28 West.L.J. 69—60 C.J. p 511 note 18 [b].

(2) Presence of fellow employee in street directing his movements does not relieve a motorist of the duty to have his vehicle under control before entering on the streetcar tracks.—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319.

53. D.C.—Capital Transit Co. v. Smallwood, 162 F.2d 14, 82 U.S. App.D.C. 228.

Pa.—Brugh v. Philadelphia Suburban Transp. Co., Com.Pl., 33 Del.Co. 131.

Seconds of precedence

Even if, as a general proposition, a preferential right of way of a streetcar at intersection must yield to right of way conferred by traffic regulation on an automobile which precedes streetcar into intersection, where motorist has precedence under traffic regulations by less than two seconds, motorist is negligent if he proceeds into path of streetcar so close at hand when he is able to stop within three or four feet and save himself from injury.—Capital Transit Co. v. Smallwood, 162 F.2d 14, 82 U.S.App.D.C. 228.

54. Pa.—McCraley v. George, 38 A. 2d 360, 155 Pa.Super. 116—Brugh v. Philadelphia Suburban Transp. Co., Com.Pl., 33 Del.Co. 131.

55. Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280. Md.—Rumbley v. Baltimore Transit Co., Md., 69 A.2d 805, 194 Md. 164. 60 C.J. p 511 note 19.

Circumstances to be considered

(1) Speed and distance of approaching car, presence or absence

of traffic signals, traffic conditions, etc., must be considered.—McCraley v. George, 38 A.2d 360, 155 Pa.Super. 116.

(2) Elements to be considered were the distance of the streetcar from the automobile and the speed at which the streetcar and the automobile were traveling.—Bruno v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

56. Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280. Mich.—Rosenfeld v. City of Detroit, 265 N.W. 490, 274 Mich. 650. 60 C.J. p 511 note 20.

Heavy traffic on other side of track

Truck driver who, when he started across interurban car track, saw, or should have seen, that crossing in all probability would be blocked by automobiles passing on other side of crossing, and that he would either have to stop or move slowly to avoid automobiles, and continued across track when streetcar was only six hundred seventy feet away, was held negligent, precluding recovery for collision.—Virginia Elec. & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619.

57. Cal.—Glickman v. Pacific Elec. Ry. Co., 129 P.2d 132, 54 Cal.App.2d 454—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

Mo.—Smith v. East St. Louis Ry. Co., App., 152 S.W.2d 204.

Pa.—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa.Super. 86.

60 C.J. p 512 note 24.

Tractor driver who proceeded to cross intersection at rate of seven miles per hour after having seen streetcar three hundred feet distant approaching at rate of twenty-five to thirty miles per hour, and whose tractor was struck by streetcar, was contributorily negligent as matter of law in view of undisputed physical facts.—Robards v. Kansas City Public Service Co., 125 S.W.2d 891, 233 Mo.App. 962.

notwithstanding concurring negligence on the part of the servants of the company,⁵⁸ unless they act willfully or wantonly, as discussed supra § 211, or fail to exercise reasonable care to avert the accident after discovering the driver's peril, as discussed infra § 288.

The above rules have been applied to the driver of a vehicle where he carelessly or negligently attempts to drive across ahead of a car which he sees or hears approaching in dangerous proximity,⁵⁹ or which by the exercise of ordinary care he could see or hear so approaching, as discussed infra § 279 c (1), or where he suddenly and without warning turns his horse, team, or vehicle across the track directly in front of an approaching car,⁶⁰ or where he crosses the tracks when an approaching car which he has seen is about to make a turn.⁶¹ The fact that a street railway maintains an automatic warning signal does not absolve a motorist from exercising reasonable care on crossing the tracks.⁶²

Where a funeral procession crossing or turning at an intersection has the right of way over streetcars, the individual drivers of the vehicles in the procession are not relieved from exercising ordinary care.⁶³

On the other hand, only ordinary, and not extraordinary, care is required;⁶⁴ and the degree of caution required with respect to street railways is not the same as that required as to railroad crossings, since streetcars do not have such a paramount right to the use of the street as to have an exclusive right of way there.⁶⁵ Accordingly, if a driver, in attempting to cross a streetcar track, exercises what under the circumstances is reasonable and ordinary care, he may recover for injuries received through the negligence of the street railroad company.⁶⁶ Unless his view is obstructed, as discussed infra § 279 d, it is not negligence for him to attempt to cross where there is no approaching car within view;⁶⁷ nor is it contributory negligence as a

58. La.—Commercial Standard Ins. Co. v. Shreveport Rys. Co., App., 53 So.2d 410.
60 C.J. p 513 note 25.

59. Cal.—Cate v. Fresno Traction Co., 2 P.2d 364, 213 Cal. 190—Glickman v. Pacific Elec. Ry. Co., 129 P.2d 132; 54 Cal.App.2d 454—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737—Rasmussen v. Fresno Traction Co., 32 P.2d 1091, 138 Cal.App. 540.

Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

La.—Commercial Standard Ins. Co. v. Shreveport Rys. Co., App., 53 So.2d 410—Moch v. Shreveport Rys. Co., App., 41 So.2d 741.

Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779—Baltimore Transit Co. v. Revere Copper & Brass, 72 A.2d 4, 194 Md. 611—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Mo.—Smith v. East St. Louis Ry. Co., App., 152 S.W.2d 204.

Pa.—Reinhard v. Lehigh Valley Transit Co., 6 A.2d 96, 334 Pa. 343—Wiley v. Philadelphia Transp. Co., 49 A.2d 865, 160 Pa.Super. 5—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa.Super. 86—Sklaroff v. Philadelphia Rapid Transit Co., 100 Pa.Super. 237.

60 C.J. p 513 note 21.

Favorable traffic signal

Motorist who crossed trolley tracks, although she was aware that speed of trolley car approaching down grade thirty or forty feet away

at rate of fifteen or twenty miles per hour was being increased instead of reduced and that trolley car was not controlled by traffic signals, was guilty of contributory negligence as matter of law, even though motorist was proceeding in accordance with traffic light at intersection.—McCraley v. George, 38 A.2d 360, 155 Pa.Super. 116.

After stopping

Mich.—Miller v. City of Detroit, Department of Street Railways, 14 N.W.2d 514, 308 Mich. 611.

Neb.—Dale v. Omaha & Council Bluffs St. Ry. Co., 48 N.W.2d 380, 154 Neb. 434.

60. La.—Washington v. New Orleans Public Service, App., 162 So. 213.

Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278.

Ohio.—Lake Shore Electric Ry. Co. v. Kellar, 168 N.E. 853, 33 Ohio App. 214.

60 C.J. p 512 note 23.

61. Pa.—Bahan v. Pittsburgh Rys. Co., 179 A. 802, 118 Pa.Super. 569.

One-way street becoming two-way street

Chauffeur driving on north side of eastbound one-way street, who was crossing intersection diagonally to reach south side of street beyond intersection at which point street became two-way, and who crossed streetcar tracks at time when westbound car was making turn to proceed south on intersecting street and was only ten to fifteen feet away, and

who had observed moving streetcar continuously from point one hundred fifty feet distant to point of collision, was held contributorily negligent, precluding recovery by his employer for injuries sustained in accident.—Bahan v. Pittsburgh Rys. Co., 179 A. 802, 118 Pa.Super. 569.

62. Ohio.—Columbus, Delaware & Marion Electric Co. v. O'Day, 176 N.E. 569, 123 Ohio St. 638.

Failure of automatic signal maintained by street railway to operate was held not implied invitation to traveler to cross.—Columbus, Delaware & Marion Electric Co. v. O'Day, supra.

63. Pa.—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393.

64. Iowa.—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

65. Ill.—Hill v. Richardson, 281 Ill. App. 75.

66. Kan.—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51.

60 C.J. p 510 note 11.

67. Mich.—Reichle v. Detroit United Ry., 168 N.W. 972, 203 Mich. 276.

Car lacking headlight

Motorist would have right to proceed into intersection if, when starting into intersection, she could not reasonably see or know of approach of streetcar by reason of want of headlight or signal and by obstruction of her view created by glaring lights.—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

matter of law to attempt to drive across in front of or between standing cars.⁶⁸ Moreover, it is not ordinarily contributory negligence per se, or as a matter of law, for him to drive his vehicle on a street railroad track in an attempt to cross in front of an approaching car,⁶⁹ at least where the circumstances are such that he has reasonable grounds for believing, or it would appear to an ordinarily prudent person, that he can cross in safety, if both he and the persons in charge of the car act with reasonable regard to the rights of each other,⁷⁰ or where he has ample time to cross when he starts to do so, but is delayed in crossing by some intervening agency.⁷¹

Miscalculation. A driver has no right to calculate close chances,⁷² or speculate on the chances,⁷³ of crossing a track ahead of a streetcar; and a recovery of damages is precluded where he miscalculates time, distance, or speed and then attempts to cross.⁷⁴ Accordingly, an honest belief of a motorist that he can cross an intersection before an approaching streetcar will reach it will not excuse his negligence in so attempting;⁷⁵ but absolute accuracy of judgment is not required.⁷⁶

U-turn. Under a statutory provision to that effect, a motorist making a U-turn across streetcar tracks is required to exercise the highest degree of care for his own safety and the safety of others;⁷⁷ and the making of such a turn across the tracks

in front of a car rapidly approaching which could have been seen had the motorist looked is contributory negligence as a matter of law.⁷⁸

Streetcar crossing intersection. Under some statutes or ordinances it is negligence for a driver to proceed on or across car tracks in front of a streetcar which has started to cross an intersection.⁷⁹ However, it has been held that such a provision does not apply to an intersection where traffic is controlled by traffic signals.⁸⁰

§ 279. — Duty to Stop, Look, and Listen

- a. General rule
- b. Stopping or waiting
- c. Looking and listening
- d. Where view or hearing obstructed

a. General Rule

The "stop, look, and listen rule" applies to drivers of vehicles at crossings of suburban or interurban railroads in the country, but does not apply, at least not to the same extent, to trolley crossings in city streets.

While the "stop, look, and listen rule" applied in railroad cases, as discussed in Railroads §§ 772-790, has been held not to apply to drivers of vehicles at trolley crossings in city streets,⁸¹ at least not to the extent that it is imposed on travelers in other cases,⁸² the rule does apply to the crossing of an electric suburban or interurban railroad in the country,⁸³ and has been held to be applicable

68. Mo.—Walker v. St. Louis, etc., R. Co., 80 S.W. 282, 106 Mo.App. 321.

N.Y.—McGurgan v. New York City R. Co., 106 N.Y.S. 201, 121 App.Div. 519.

69. Mo.—Hall v. St. Louis, etc., R. Co., 101 S.W. 1137, 124 Mo.App. 661.
60 C.J. p 510 note 15.

70. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Pa.—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501—Shannon v. Philadelphia Rapid Transit Co., 175 A. 720, 115 Pa.Super. 494—Powell v. Pittsburgh Rys. Co., 168 A. 369, 110 Pa. Super. 268.

Va.—Virginia Elec. & Power Co. v. Wright, 196 S.E. 580, 170 Va. 442.
60 C.J. p 510 note 16.

71. Pa.—Wilson v. North Side Traction Co., 10 Pa.Super. 325.
60 C.J. p 511 note 17.

72. Conn.—McKeon v. Connecticut Co., 75 A. 139, 83 Conn. 53.

73. Utah.—Goan v. Ogden, L. & I. Ry. Co., 169 P. 949, 51 Utah 285.

74. Ky.—Louisville Ry. Co. v. Basler, 248 S.W. 1027, 198 Ky. 500.
60 C.J. p 513 note 30.

75. Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

76. Pa.—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

Estimate of speed

In motorist's action for injuries received when automobile was struck by streetcar in front of which motorist attempted to pass in making left turn at intersection at which traffic light was in favor of motorist, the motorist was not required to estimate the speed of the streetcar in miles per hour in order to establish that

he was free from contributory negligence, the test being whether he acted as a reasonably prudent person would have acted under all the circumstances.—Brungo v. Pittsburgh Rys. Co., supra.

77. Mo.—Hill v. St. Louis Public Service Co., 64 S.W.2d 633.

78. Mo.—Hill v. St. Louis Public Service Co., supra.

79. Tex.—Havins v. Dallas Railway & Terminal Co., Civ.App., 130 S.W.2d 878, error refused.

80. Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

81. Cal.—Martz v. Pacific Electric R. Co., 161 P. 16, 31 Cal.App. 592.

82. Ind.—Brooks v. Muncie, etc., Tract. Co., 95 N.E. 1006, 176 Ind. 298.

83. Cal.—Rasmussen v. Fresno Traction Co., 59 P.2d 617, 15 Cal. App.2d 356—Rasmussen v. Fresno

even within city limits when streetcar tracks are separated from the traveled way of the street or highway.⁸⁴ However, where traffic signals at the intersection are in favor of the driver, and against the streetcar, the driver is not required to stop, look, and listen before crossing the intersection.⁸⁵

b. Stopping or Waiting

Under some circumstances the driver of a vehicle must stop and wait for a streetcar to pass before crossing the track, but there is no invariable rule requiring him to stop under all circumstances.

Under some circumstances it is the duty of a driver to stop⁸⁶ and wait for a car to pass,⁸⁷ before attempting to cross the track, and under such circumstances his failure to stop constitutes contributory negligence.⁸⁸

On the other hand, except in a few jurisdictions,⁸⁹ there is no fixed, absolute, arbitrary, and invariable rule that a driver must, under all circumstances, stop before attempting to cross a street railroad track.⁹⁰ Also, he is not bound or required to wait merely because a car is in sight,⁹¹ if he has a reasonable time to cross,⁹² particularly where the traf-

fic signal is in the motorist's favor,⁹³ or the car is such distance from him that, as a prudent person, he believes that he has ample time to cross.⁹⁴

Stopping in safe place. Where the circumstances are such as to make it his duty to stop, the driver of a vehicle must stop in a safe place.⁹⁵

c. Looking and Listening

- (1) In general
- (2) Time, place, distance, and direction
- (3) Looking and listening again or continuously

(1) In General

The driver of a vehicle should use ordinary care to look and listen for approaching streetcars before attempting to cross streetcar tracks; but this is not generally regarded as an absolute duty.

Ordinary care for his own protection requires a driver to exercise such precaution and diligence to look and listen for approaching cars before he attempts to cross a street railroad track as an ordinarily prudent person would exercise under the same or similar circumstances,⁹⁶ even where the traffic

Traction Co., 32 P.2d 1091, 138 Cal. App. 540.

Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217.

52 C.J. p 304 note 99.

The purpose of the rule is to cause motorist to become aware of any possible danger which might exist from the fact that an interurban car or train was approaching and in close proximity.—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168.

84. Md.—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

85. Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

86. Md.—Fox v. Baltimore Transit Co., 71 A.2d 470, 194 Md. 403. 60 C.J. p 515 note 49.

87. La.—Greer v. New Orleans R., etc., Co., 9 La.A., Orleans, 86.

Md.—Fox v. Baltimore Transit Co., 71 A.2d 470, 194 Md. 403.

Knowledge of streetcar's right of way

It has been held that the driver of an automobile is charged with knowledge of a streetcar's preferential right of way.—Landfair v. Capital Transit Co., 165 F.2d 255, 83 U.S.App. D.C. 60.

88. Pa.—Reinhard v. Lehigh Valley Transit Co., 6 A.2d 96, 334 Pa. 343. 60 C.J. p 515 note 51.

Proceeding slowly until struck

Truck driver who, having allegedly seen motorman of trolley car approaching from left make preparations to stop, proceeded slowly into intersection, with result that right front of car and left front of truck met, was held contributorily negligent.—Augustine v. Philadelphia Rapid Transit Co., 181 A. 378, 119 Pa. Super. 577.

89. La.—Blank v. St. Charles St. R. Co., 1 La.A., Orleans, 291.

Puerto Rico.—Morales v. Puerto Rico Ry., Light & Power Co., 27 Puerto Rico 704.

90. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

Md.—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164.

Mo.—Kalbfell v. Wells, App., 49 S.W. 2d 247.

Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa. Super. 86—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa. Super. 251, affirmed 25 A.2d 730, 344 Pa. 421.

60 C.J. p 515 note 53.

91. Kan.—Moore v. Kansas City R. Co., 196 P. 430, 108 Kan. 503. 60 C.J. p 516 note 54.

92. Pa.—Flounders v. Southern Pennsylvania Traction Co., 124 A. 323, 280 Pa. 85—McCraley v. George, 38 A.2d 360, 155 Pa. Super. 116—Shannon v. Philadelphia Rapid Transit Co., 175 A. 720, 115 Pa. Super. 494.

93. Pa.—Bruno v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa. Super. 414.

94. Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—Weschler v. Buffalo & Lake Erie Traction Co., 143 A. 119, 293 Pa. 472—Hoffman v. George, 38 A.2d 504, 155 Pa. Super. 501.

95. Mo.—Guffey v. Harvey, App., 179 S.W. 729.

Pa.—Bready v. Philadelphia Rapid Transit Co., 68 Pa. Super. 298.

96. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393.

Iowa.—Crull v. Des Moines Ry. Co., 250 N.W. 905, 217 Iowa 83.

Md.—Ford v. Baltimore Transit Co., 85 A.2d 474—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.

Minn.—Syck v. Duluth St. R. Co., 177 N.W. 944, 140 Minn. 118.

Ohio.—Grove v. City Ry. Co., 64 N. E.2d 429, 78 Ohio App. 37.

signals are in his favor,⁹⁷ at least where the motorist knows that streetcars are being operated at such crossing;⁹⁸ and he is guilty of contributory negligence precluding a recovery of damages where he attempts to cross when a car is approaching in dangerous proximity and, by reason of his failure to exercise ordinary and proper care in looking or listening, he does not discover it in time to avoid a collision.⁹⁹ This is true unless the servants of the company are guilty of willful or wanton negligence, as discussed supra § 211, or fail to exercise due care after discovering the driver's peril to avoid injuring him, as discussed infra § 288.

On the other hand, a driver is required to exercise only ordinary,¹ and not extraordinary,² care

in looking and listening; and, if he has his horse, team, or vehicle under control, as discussed supra § 278, and exercises every reasonable effort to ascertain whether a car is approaching before he attempts to go across the tracks, he is not guilty of contributory negligence, notwithstanding he fails to see the car in time to avoid being injured.³ Indeed, in a number of jurisdictions, there is no absolute rule of law that a driver must, under all circumstances, look and listen for an approaching car before attempting to cross the track of a street railroad,⁴ and it is not contributory negligence as a matter of law in all cases for him to fail to look and listen.⁵ However, in some jurisdictions he is bound to look and listen;⁶ and in other jurisdictions he

Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—Rea v. Pittsburgh Rys. Co., 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393—Goldfine & Brenner v. Philadelphia Rapid Transit Co., 181 A. 514, 119 Pa.Super. 581—Powell v. Pittsburgh Rys. Co., 168 A. 369, 110 Pa.Super. 268—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Gallagher v. Philadelphia Rapid Transit Co., 157 A. 321, 103 Pa.Super. 232.

60 C.J. p 513 note 33.

Duty of occupant other than driver of vehicle to look and listen see infra § 282 a.

Unfamiliar crossing

Motorist coming on a street railway crossing with which he was entirely unfamiliar was required to take every reasonable opportunity to look and listen.—Cash v. Los Angeles Ry. Corporation, 45 P.2d 280, 6 Cal.App.2d 738.

Fellow employee directing movements

The presence of a fellow employee in the street directing his movements does not relieve a motorist of the duty to look for streetcars.—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319.

97. Pa.—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

Signal as qualified permission to go

It has been held that a green or "go" traffic signal is merely a qualified permission to a motorist to proceed lawfully and carefully, and does not relieve him of the duty to look

for a streetcar approaching on an intersecting street.—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414.

98. Mo.—Hill v. St. Louis Public Service Co., 64 S.W.2d 633.

Neb.—Dale v. Omaha & Council Bluffs St. Ry. Co., 48 N.W.2d 380, 154 Neb. 434.

Tex.—Gross v. Dallas Railway & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct.

99. Cal.—Cate v. Fresno Traction Co., 2 P.2d 364, 213 Cal. 190—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

Iowa.—Crull v. Des Moines Ry. Co., 250 N.W. 905, 217 Iowa 83.

Md.—Baltimore Transit Co. v. Revere Copper & Brass, 72 A.2d 4, 194 Md. 611—United Rys. & Electric Co. of Baltimore v. Sherwood Bros., 157 A. 280, 161 Md. 304.

Minn.—Geldert v. Boehland, 274 N.W. 245, 200 Minn. 332, motion denied 275 N.W. 299, 200 Minn. 332.

Mo.—Parkville Milling Co. v. Massman, App., 83 S.W.2d 128.

Neb.—Dale v. Omaha & Council Bluffs St. Ry. Co., 48 N.W.2d 380, 154 Neb. 434.

Ohio.—Grove v. City Ry. Co., 64 N.E.2d 429, 78 Ohio App. 37.

Pa.—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573—Favazzo v. Philadelphia Transp. Co., 82 A.2d 538, 169 Pa.Super. 433—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa.Super. 86—Sharpe v. Philadelphia Rapid Transit Co., 157 A. 370, 103 Pa.Super. 357—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del.Co. 581.

R.I.—Lebrun v. United Electric Rys. Co., 169 A. 599, 54 R.I. 54.

Va.—Virginia Electric & Power Co. v. Veilines, 175 S.E. 35, 162 Va. 671

—Virginia Electric & Power Co. v. Bennett, 159 S.E. 93, 156 Va. 910.

W.Va.—Casto v. Charleston Transit Co., 200 S.E. 841, 120 W.Va. 676. 60 C.J. p 513 note 33.

Subsequent efforts as no excuse

If motorist, through carelessness, was not aware of danger of colliding with streetcar until it was too late to avoid it, then any effort thereafter made to avoid collision would not avail as an excuse for such carelessness in getting into danger.—Wilkinson v. Cummings, 58 N.E.2d 280, 324 Ill.App. 331.

1. Iowa.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687. 60 C.J. p 514 note 36.

2. Iowa.—Deilling v. Des Moines Ry. Co., supra. 60 C.J. p 514 note 37.

3. Iowa.—Stanley v. Cedar Rapids, etc., R. Co., 93 N.W. 489, 119 Iowa 526. 60 C.J. p 514 note 39.

Streetcar without headlight

Motorist would not be negligent in crossing intersection at night if motorist stopped twenty-six feet away from intersection and did not see streetcar which was one hundred seventy feet away and did not have headlight.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

4. Okl.—Flanagan v. Oklahoma Ry. Co., 206 P.2d 190, 201 Okl. 362.

Pa.—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa.Super. 86. 60 C.J. p 514 note 40.

5. N.J.—Dennis v. North Jersey St. R. Co., 45 A. 807, 64 N.J.Law 439. 60 C.J. p 515 note 41.

6. N.C.—Lindley v. Pries Mfg. & Power Co., 69 S.E. 274, 153 N.C. 394. 60 C.J. p 515 note 42.

is under an absolute and imperative duty to look.⁷

Tracks curving in front of vehicle. A motorist should maintain a reasonable alertness in looking in the direction from which danger is to be anticipated, as where the streetcar tracks turn left in front of the course of the automobile;⁸ but the motorist's ignorance of the presence of tracks and his inability to see them because of darkness are factors to be taken into consideration in determining whether he was guilty of contributory negligence.⁹

Vehicle turning to cross tracks. It is the duty of a person driving along a street, before turning to cross streetcar tracks, to use reasonable care to ascertain whether or not a car is approaching,¹⁰ especially where the attempt to cross is made in the middle of a block or at any place other than a regular crossing;¹¹ and he is guilty of contributory negligence where he suddenly turns his team or vehicle across the tracks without properly looking or listening for an approaching car.¹² However, where, after a streetcar passes a driver, he turns to cross the street behind the car, no negligence is attributable to him in not looking to see if the car is backing.¹³

U-turns. A motorist attempting a U-turn has the duty to look for oncoming vehicles including streetcars.¹⁴

Funeral procession. Where a funeral procession crossing or turning at an intersection has the right of way over streetcars, the individual drivers of the vehicles in the procession have the duty of looking before entering on the tracks.¹⁵

(2) Time, Place, Distance, and Direction

The driver of a vehicle approaching a crossing of street railroad tracks should look and listen at such time and place as make the looking and listening effective; and he should look in both directions and for such distance as will enable him to determine whether he may safely attempt to cross.

It is the duty of the driver of a vehicle approaching a street railroad crossing to look and listen at such time and place and in such manner as will make the looking and listening effective;¹⁶ and he should look and listen at such a point that he can stop if necessary to avoid a collision.¹⁷ In some jurisdictions it is declared that the law does not require a driver to look and listen at any particular time¹⁸ or place,¹⁹ but in other jurisdictions a driver is required to look immediately before entering on the track,²⁰ or, in other words, at the last moment of opportunity before passing from the zone of safety into the zone of danger.²¹ Moreover, when crossing a double line of tracks the motorist must look for approaching streetcars at the entrance of each track before he attempts to cross it.²²

Looking when first entering the street is insuffi-

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| <p>7. Pa.—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299.
60 C.J. p 515 note 43.</p> <p>8. Md.—Ford v. Baltimore Transit Co., 85 A.2d 474.</p> <p>9. Cal.—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal. App.2d 195.</p> <p>10. Md.—Bearings Service Co. v. Baltimore Transit Co., 77 A.2d 779.</p> <p>Va.—Lynchburg Traction & Light Co. v. Garbee, 164 S.E. 391, 158 Va. 656.</p> <p>W.Va.—Casto v. Charleston Transit Co., 200 S.E. 841, 120 W.Va. 676.
60 C.J. p 515 note 44.</p> <p>11. Mich.—Fritz v. Detroit Citizens' St. R. Co., 62 N.W. 1007, 105 Mich. 50.</p> <p>12. Md.—Lewis v. Baltimore Transit Co., 66 A.2d 686, 193 Md. 366.</p> <p>Va.—Lynchburg Traction & Light Co. v. Garbee, 164 S.E. 391, 158 Va. 656.
60 C.J. p 515 note 46.</p> | <p>13. Ill.—Central R. Co. v. Knowles, 93 Ill.App. 561, affirmed 60 N.E. 829, 191 Ill. 241.</p> <p>14. D.C.—Landfair v. Capital Transit Co., 165 F.2d 255, 83 U.S.App.D.C. 60.</p> <p>15. Pa.—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393.</p> <p>16. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610.</p> <p>Ohio.—Grove v. City Ry. Co., 64 N. E.2d 429, 78 Ohio App. 37.</p> <p>Pa.—Robb v. West Penn Rys. Co., Com.Pl., 29 West.L.J. 43.</p> <p>W.Va.—Casto v. Charleston Transit Co., 200 S.E. 841, 120 W.Va. 676.</p> <p>17. Mich.—Colborne v. Detroit United Ry., 143 N.W. 32, 177 Mich. 139.</p> <p>Ohio.—Columbus, Delaware & Marion Electric Co. v. O'Day, 176 N.E. 569, 123 Ohio St. 638.</p> <p>18. Or.—Lane v. Portland Ry., Light & Power Co., 114 P. 940, 58 Or. 364.</p> <p>19. Ind.—Union Traction Co. v.</p> | <p>Moneyhun, 136 N.E. 18, 192 Ind. 258, 28 A.L.R. 211.
60 C.J. p 516 note 58.</p> <p>20. Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A. 2d 589, 358 Pa. 625—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Augustine v. Philadelphia Rapid Transit Co., 181 A. 378, 119 Pa.Super. 577—Sklaroff v. Philadelphia Rapid Transit Co., 100 Pa. Super. 237—Brugh v. Philadelphia Suburban Transp. Co., Com.Pl., 33 Del.Co. 131—Robb v. West Penn Rys. Co., Com.Pl., 29 West.L.J. 43.
60 C.J. p 516 note 59.</p> <p>21. Wis.—Goldmann v. Milwaukee Electric R., etc., Co., 101 N.W. 384, 123 Wis. 108.
60 C.J. p 516 note 60.</p> <p>22. Pa.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393—Widson v. Philadelphia Rapid Transit Co., 172 A. 164, 113 Pa. Super. 168.</p> |
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cient care,²³ as is also looking half a block before reaching the crossing.²⁴ Also, it is contributory negligence to fail to look within two minutes before attempting to cross,²⁵ or when within fifteen²⁶ or even sixty²⁷ feet of the crossing; and under the circumstances the failure of a driver to see a car until it is within twenty feet of him may be contributory negligence.²⁸ So, also, it is negligence to delay looking until it is no longer possible to avoid a collision with the approaching car,²⁹ as when the horse, team, or vehicle, or part thereof, is actually on the track.³⁰ However, a driver is not required to look over or beyond walls for cars brought out of sheds or barns.³¹

Direction. In exercising ordinary and reasonable care, a driver should ordinarily, when he has an opportunity for doing so, look along the track in both directions;³² and his failure to look in the direction from which a car is approaching is contributory negligence where, if he had looked in that direction, he might have discovered and avoided the car.³³

Distance. He is bound to view the tracks for, and only for, such distance as will enable him, as a reasonably prudent man, to determine whether he may safely attempt to cross.³⁴ The probable,³⁵ lawful,³⁶ and reasonable³⁷ speed of a car is to be taken into consideration in determining the distance he should look.

(3) Looking and Listening Again or Continuously

The duty of a driver to look and listen continues until he reaches the track, and, where his observation was made some distance from the track, he should look and listen again just before crossing.

The duty of a driver to look and listen for approaching cars before attempting to cross a street railroad track continues,³⁸ as far as possible under the circumstances,³⁹ generally until he reaches the track.⁴⁰ Where he has looked and listened at some distance from the point of crossing, he should look, or look and listen, again just before driving onto the tracks;⁴¹ and he is guilty of contributory negligence precluding recovery,⁴² in some instances as

23. Pa.—Burke v. Union Traction Co., 48 A. 470, 198 Pa. 497—Woomer v. Altoona & Logan Valley Electric Ry. Co., 80 Pa.Super. 261.

24. N.Y.—Enders v. Brooklyn Union El. Ry. Co., 115 N.Y.S. 155, 131 App. Div. 170.

25. Ill.—Ashland Auto Garage v. Chicago Rys. Co., 183 Ill.App. 207.

26. Conn.—Cohn—Gianotta v. New York, N. H. & H. R. Co., 120 A. 560, 98 Conn. 743.

27. Mich.—Puffer v. Muskegon Traction & Lighting Co., 139 N.W. 19, 173 Mich. 193.

28. Colo.—Colorado Springs & I. Ry. Co. v. Cohn, 180 P. 307, 66 Colo. 149.

29. Iowa.—Glessner v. Waterloo, C. F. & N. Ry. Co., 249 N.W. 138, 260 Iowa 850.

30. Pa.—Robbolatto v. Philadelphia Rapid Transit Co., 97 A. 691, 252 Pa. 470.
60 C.J. p 516 note 63.

31. Mo.—Huber v. United Rys. Co. of St. Louis, 189 S.W. 1163.

32. Md.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.
60 C.J. p 518 note 80.

33. Md.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.
60 C.J. p 518 note 81.

Failure to look not excused
Fact that motorist's attention was

directed to streetcar approaching from opposite direction might explain conduct in being hit by another car but would not excuse negligence in undertaking to cross track without taking reasonable precaution.—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 162 Va. 671.

34. N.J.—Miller v. Public Service Co-ordinated Transport, 168 A. 409, 111 N.J.Law 339.
60 C.J. p 518 note 82.

35. Mo.—Voelker Products Co. v. United Rys. Co. of St. Louis, 170 S.W. 332, 185 Mo.App. 310.

36. Iowa.—Doherty v. Des Moines City Ry. Co., 121 N.W. 690, 144 Iowa 26.

N.J.—Miller v. Public Service Co-ordinated Transport, 168 A. 409, 111 N.J.Law 339.

37. N.J.—Miller v. Public Service Co-ordinated Transport, supra.

38. Pa.—Boyle v. Lehigh Valley Transit Co., 27 A.2d 682, 150 Pa. Super. 86—Phillipsburg Beef Co. v. Pennsylvania R. Co., 100 Pa.Super. 364.

Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.
60 C.J. p 517 note 72.

39. Pa.—Shannon v. Philadelphia Rapid Transit Co., 175 A. 720, 115 Pa.Super. 494.

40. Md.—Downey v. Baltimore Transit Co., 78 A.2d 666—Bearings

Service Co. v. Baltimore Transit Co., 77 A.2d 779—Rumbley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 164—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A.2d 450, 185 Md. 158—United Rys. & Electric Co. of Baltimore v. Sherwood Bros., 157 A. 280, 161 Md. 304.

Pa.—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573—Bradosky v. West Penn Rys. Co., Com.Pl., 28 West. L.J. 69.
60 C.J. p 517 note 73.

41. Cal.—Vilhauer v. Pacific Electric Ry. Co., 4 P.2d 960, 118 Cal.App. 240.

60 C.J. p 517 note 74.

Circumstances may require more than one satisfying look on part of motorist before entering an intersection, in order to fulfill motorist's duty of observation.—Ashworth v. City of Detroit, 292 N.W. 345, 293 Mich. 397.

42. Cal.—Vilhauer v. Pacific Electric Ry. Co., 4 P.2d 960, 118 Cal.App. 240.

Md.—Downey v. Baltimore Transit Co., 78 A.2d 666—Crawford v. Baltimore Transit Co., 58 A.2d 680, 190 Md. 381.

Pa.—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393.
Tenn.—Tapp v. Tennessee Electric Power Co., 9 Tenn.App. 632.
60 C.J. p 517 note 75.

a matter of law,⁴³ where, although he looks and listens at some distance from the track, he carelessly and heedlessly attempts to cross without looking and listening again before going onto the track.

On the other hand, a driver is not required to look constantly⁴⁴ at all points of his approach to the crossing.⁴⁵ Accordingly, it has been held that, where at the time he looks, or looks and listens, along the track, and starts to drive across, he has reasonable grounds for believing that he can cross in safety, taking into consideration his distance from the track and the distance at which a car is approaching, or could be seen approaching, if in sight, and the relative speed of his own vehicle and that of the car under ordinary circumstances, he is not guilty of contributory negligence in attempting to cross without further looking or listening,⁴⁶ particularly where his progress across the track is interfered with by a diverting circumstance such as a defect or obstruction of which he had no knowledge.⁴⁷

d. Where View or Hearing Obstructed

Where the view or sound of approaching streetcars is obstructed, a driver should use increased care, and, where his view is obstructed he should resort to other means.

If the view or sound of approaching cars is obstructed, a driver should use increased care and caution, as to stopping, listening, or looking, in proportion to such condition;⁴⁸ and where driver cannot rely on either sight or hearing for protection, as where a car is passing on a near-by parallel track,⁴⁹ or his vision is obstructed and his vehicle is making a continuous noise,⁵⁰ he should stop, rather than attempt to cross at that time.

View obstructed. The duty of a driver to look for approaching streetcars before attempting to cross a street railroad track is not performed by looking from a point where the view is obstructed.⁵¹ In such case, he should look again⁵² from a place of safety where his view is unobstructed;⁵³ and, if necessary, he should resort to other means,⁵⁴ such as listening⁵⁵ or, under other circumstances, listen-

Streetcar crossing over to other track

Motorist's testimony that he did not see that only west streetcar track crossed railroad tracks did not excuse him from responsibility for collision with streetcar which had crossed over to such track.—Campbell v. Spokane United Rys. Co., 24 P.2d 1068, 174 Wash. 347.

43. Iowa.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.

Md.—Rumley v. Baltimore Transit Co., 69 A.2d 805, 194 Md. 611—Girton v. Baltimore Transit Co., 65 A.2d 329, 192 Md. 671.

Mo.—State ex rel. Kansas City Public Service Co. v. Bland, 188 S.W. 2d 650, 354 Mo. 79.

44. Cal.—Bate v. Los Angeles Ry. Corp., 86 P.2d 856, 30 Cal.App.2d 604.

Conn.—Clark Dairy v. Feeley, 181 A. 626, 120 Conn. 557.

Iowa.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152. 60 C.J. p 517 note 76.

Human impossibility

The rule that motorist must look and continue to look in crossing streetcar tracks does not require something humanly impossible; nor is it a rule requiring observance with universal uniformity or with mathematical precision, since motorist is also under duty to look in other directions.—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501.

Traffic light in motorist's favor

Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

45. Mo.—Pienleng v. Wells, 271 S.W. 62. 60 C.J. p 517 note 77.

46. Cal.—Bate v. Los Angeles Ry. Corp., 86 P.2d 856, 30 Cal.App.2d 604.

60 C.J. p 517 note 78.

47. Mo.—Frank v. St. Louis Transit Co., 87 S.W. 88, 112 Mo.App. 496.

Necessity of manipulating automobile choke was held not "diverting circumstance," as regards contributory negligence of driver of automobile struck by interurban car at private crossing.—Rosenberg v. Des Moines Ry. Co., 238 N.W. 703, 213 Iowa 152.

48. Ill.—Little v. Illinois Terminal R. Co., 50 N.E.2d 123, 320 Ill.App. 163.

Mich.—Ashworth v. City of Detroit, 292 N.W. 345, 293 Mich. 397. 60 C.J. p 518 note 85.

49. Mass.—Saltman v. Boston El. R. Co., 72 N.E. 950, 187 Mass. 243.

Ohio.—Cincinnati Traction Co. v. Manning, 13 Ohio Cir.Ct., N.S., 306.

50. Ohio.—Ohio Tract. Co. v. Smith, 15 Ohio Cir.Ct., N.S., 124. 60 C.J. p 519 note 2.

51. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610.

Ill.—Little v. Illinois Terminal R. Co., 50 N.E.2d 123, 320 Ill.App. 163. 60 C.J. p 518 note 86.

52. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610. Pa.—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573—Bradosky v. West Penn. Rys. Co., Com.Pl., 28 West. L.J. 69.

60 C.J. p 518 note 87.

53. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610. 60 C.J. p 518 note 88.

Duty to leave vehicle

Under some circumstances, but not necessarily in every case, it may be the duty of a motorist, on reaching a railroad crossing, to leave the automobile and avail himself of a view of the track both ways before driving across.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.

54. Ala.—Bradley v. Powers, 106 So. 799, 214 Ala. 122.

Ill.—Little v. Illinois Terminal R. Co., 50 N.E.2d 123, 320 Ill.App. 163. Mich.—Ashworth v. City of Detroit, 292 N.W. 345, 293 Mich. 397.

55. Md.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.

Pa.—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Gallagher v. Philadelphia Rapid Transit Co., 157 A. 321, 103 Pa.Super. 232.

60 C.J. p 518 note 90.

ing more intently,⁵⁶ stopping⁵⁷ and waiting,⁵⁸ or at least having his vehicle under such control that it can be stopped in time to avoid injury.⁵⁹ The taking of these extra precautions is a positive duty,⁶⁰ and an attempt to cross without taking the proper precautions in this respect constitutes contributory negligence, generally, as a matter of law.⁶¹

On the other hand, undue emphasis should not be placed on an obstruction of view where it continues only a few seconds and both before and after it exists the view is unobstructed.⁶² So, also, it cannot be said that a driver is, under all circumstances, to be conclusively charged with negligence if, before reaching a point which commands a clear view, he approaches a crossing without discovering a car coasting down grade;⁶³ and, where a driver looks at a point where he has an unobstructed view, his failure to stop, listen, or look again at another point nearer the track where his view is obstructed is not necessarily contributory negligence.⁶⁴ Where the view is obscured to within a few feet of the tracks and the driver of a motor vehicle exercises the care required of him by stopping before going onto the tracks or having the vehicle under control, he is not required to get

out of the vehicle and look for approaching street-cars.⁶⁵

§ 280. — Failure to Observe Law of Road

Except where there may be a violation of a statute or regulation, a driver's failure to observe the rule of keeping to the right is not necessarily contributory negligence.

Except where there is a violation of an applicable statutory or municipal regulation requiring vehicles to keep to the right-hand side of the street,⁶⁶ the mere fact that a driver of a vehicle on a public street fails to observe the rule of keeping to the right is not such negligence as will preclude him from recovering for injuries sustained through the negligence of the street railroad company.⁶⁷ Thus, the mere fact that a driver, on meeting a streetcar, turns to the left to allow it to pass instead of to the right is not of itself contributory negligence.⁶⁸ Indeed, it may be contributory negligence not to turn to the left, when by so doing an accident can be avoided.⁶⁹ However, under some circumstances, it may be contributory negligence to turn to the left in front of an approaching car.⁷⁰

§ 281. — Stopping Horse or Vehicle on or near Track

Whether one stopping or leaving a vehicle on street

56. N.Y.—Enders v. Brooklyn Union El. R. Co., 115 N.Y.S. 155, 131 App. Div. 170.

60 C.J. p 518 note 91.

Duty to stop engine to improve listening

N.J.—Devine v. Public Service Coordinated Transport, 158 A. 764, 10 N.J.Misc. 274.

57. Md.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618. Pa.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407.

60 C.J. p 518 note 92.

58. Mass.—Saltman v. Boston El. R. Co., 72 N.E. 950, 187 Mass. 243.

60 C.J. p 518 note 93.

Duty to resolve uncertainty

A motorist who allegedly stopped his automobile before crossing streetcar track, and whose view of the approaching streetcar was partially obstructed, had the duty to settle, on the side of safety, the uncertainty as to whether a streetcar was approaching, which existed because of the obstruction.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.

59. Mich.—Donlin v. Detroit United Ry., 164 N.W. 447, 198 Mich. 327. 60 C.J. p 518 note 94.

Duty to have vehicle under control generally see supra § 278.

60. Md.—Baltimore Transit Co. v. Lewis, 199 A. 879, 174 Md. 618.

61. Mich.—Ashworth v. City of Detroit, 292 N.W. 345, 293 Mich. 397. Pa.—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573—Gallagher v. Philadelphia Rapid Transit Co., 157 A. 321, 103 Pa.Super. 232.

Driving through cloud of steam

Ill.—Little v. Illinois Terminal R. Co., 50 N.E.2d 123, 320 Ill.App. 163.

62. Va.—Jones v. Virginia Electric & Power Co., 151 S.E. 133, 153 Va. 704.

63. Iowa.—Bridenstine v. Iowa City Electric Ry. Co., 165 N.W. 435, 181 Iowa 1124.

64. Mass.—Horsman v. Brockton & P. St. Ry. Co., 91 N.E. 897, 205 Mass. 519.

60 C.J. p 519 note 98.

65. Mo.—Kalbfell v. Wells, App., 49 S.W.2d 247.

66. Ohio.—Cleveland Ry. Co. v. Kuncic, 160 N.E. 734, 27 Ohio App. 47. 60 C.J. p 519 note 4.

Statute held not violated

Fact that driver of truck drove

with wheels of truck astride one rail of streetcar track was insufficient to show a violation of statute requiring all vehicles to keep as close to right-hand side of highway as practicable, in absence of any evidence as to surrounding conditions at time and place so that driver of truck would not be precluded from recovering for injuries sustained in collision with streetcar.—Burris v. Kansas City Public Service Co., Mo.App., 226 S.W.2d 743.

Regulation held inapplicable

Cal.—Paulos v. Market St. Ry. Co., 28 P.2d 94, 136 Cal.App. 163. 60 C.J. p 519 note 4 [b].

67. Ga.—Atlanta St. R. Co. v. Walker, 21 S.E. 48, 93 Ga. 462. Wash.—Spurrier v. Front St. Cable R. Co., 29 P. 346, 3 Wash. 659.

68. Wash.—Spurrier v. Front St. Cable R. Co., supra. 60 C.J. p 519 note 6.

69. Mo.—Culbertson v. Metropolitan St. R. Co., 36 S.W. 834, 140 Mo. 35.

60 C.J. p 519 note 7.

70. N.Y.—Schlitz v. Nassau Electric R. Co., 60 N.Y.S. 822, 44 App.Div. 542.

60 C.J. p 519 note 8.

railway tracks is guilty of contributory negligence depends on the circumstances of the particular case.

On the ground that the street railway's right to use the track is superior to that of others to occupy it,⁷¹ stopping or leaving a horse, team, or vehicle on a street railroad track, or so near thereto as to be in the path of a moving car, may constitute contributory negligence under the circumstances,⁷² as where it is done voluntarily⁷³ and unnecessarily,⁷⁴ after dark,⁷⁵ or on a dark and foggy day,⁷⁶ with knowledge that a car is approaching,⁷⁷ or that at any time one may pass.⁷⁸

On the other hand, stopping a horse, team, or vehicle on, or in close proximity to, a street railroad track is not negligence per se, or as a matter of law, in all cases,⁷⁹ as where it is not safe or feasible to move,⁸⁰ or no car is seen approaching and there is no reason to apprehend that one will approach before the vehicle is moved;⁸¹ and even where it is negligence, it does not preclude recovery unless it is the proximate cause of the injury.⁸² So,

also, notwithstanding the railway's superior right to the use of the tracks, occupation of them for a short period of time for a legal purpose is not necessarily negligence,⁸³ as in the case of a truck driver who, acting in a reasonable manner, stops his truck on the tracks to make or pick up a delivery, where there is no other available space convenient to the premises,⁸⁴ and the vehicle temporarily stopped on the tracks is in clear unobstructed view of the approaching streetcar.⁸⁵ Moreover, it has been held that such temporary stopping of a truck for the purpose of unloading is not contributory negligence as a violation of "parking" provisions of a vehicle code.⁸⁶

Stalling of motor vehicle. The accidental stalling of a motor vehicle on a street railroad track may be the proximate cause of the injury or damage in question.⁸⁷ However, where an automobile or traction engine stalls on a track, it is the duty of the person in charge thereof to give a signal or warning, with reasonable promptness, to the persons operating

71. Pa.—Lukaszewicz v. Pittsburgh Rys. Co., 73 A.2d 400, 365 Pa. 29.

Knowledge of streetcar's limitations

Driver, when parking or stopping truck, was bound to consider that streetcar is confined to tracks.—Reidel v. Philadelphia Rapid Transit Co., 157 A. 36, 103 Pa.Super. 387.

72. Pa.—Reynolds v. Philadelphia Transp. Co., 67 A.2d 668, 164 Pa. Super. 627.—Glassman v. Philadelphia Rapid Transit Co., 169 A. 241, 111 Pa.Super. 58.

Va.—Virginia Elec. & Power Co. v. Evans, 24 S.E.2d 446, 181 Va. 274.—Virginia Electric & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619. 60 C.J. p 519 note 10.

Violation of statute

Pa.—Rieck-McJunkin Co. v. Pittsburgh Rys. Co., Co., 95 Pittsb.Leg. J. 436.—Metz v. Pittsburgh Rys. Co., Com.Pl., 87 Pittsb.Leg.J. 484, affirmed 7 A.2d 505, 135 Pa.Super. 534.

Misjudgment of motorist as to clearance of car

In motorist's action to recover damages suffered when motorist who had passed streetcar stopped automobile at intersection near streetcar tracks and was struck by car approaching from rear, fact that motorist mistakenly believed that position of automobile would not interfere with free movement of streetcar would not relieve him from being guilty of contributory negligence resulting from stopping so close to tracks.—Pollock v. Philadelphia Rapid Transit Co., 11 A.2d 665, 139 Pa.Super. 256.

73. Pa.—Glassman v. Philadelphia Rapid Transit Co., 169 A. 241, 111 Pa.Super. 58.

60 C.J. p 519 note 11.

74. U.S.—U. S. v. Philadelphia Transp. Co., D.C.Pa., 38 F.Supp. 246.

Pa.—Pollock v. Philadelphia Rapid Transit Co., 11 A.2d 665, 139 Pa. Super. 256.—Glassman v. Philadelphia Rapid Transit Co., 169 A. 241, 111 Pa.Super. 58.—Fry v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 329.—Robb v. West Penn Rys. Co., Com.Pl., 29 West.L.J. 43.

Va.—Virginia Elec. & Power Co. v. Evans, 24 S.E.2d 446, 181 Va. 274.—Virginia Electric & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619. 60 C.J. p 519 note 12.

75. N.Y.—New York Condensed-Milk Co. v. Nassau Electric R. Co., 60 N. Y.S. 234, 29 Misc. 127.

Pa.—Winter v. Federal St., etc., Pass. R. Co., 25 A. 1028, 153 Pa. 26, 19 L.R.A. 232.

76. Va.—Virginia Elec. & Power Co. v. Evans, 24 S.E.2d 446, 181 Va. 274.

77. Me.—Dyer v. Cumberland County Power & Light Co., 115 A. 194, 120 Me. 411.

60 C.J. p 519 note 14.

78. Mich.—King v. Grand Rapids Ry. Co., 143 N.W. 36, 176 Mich. 645.

79. Pa.—Marzan v. Lehigh Valley Transit Co., Com.Pl., 23 Leh.L.J. 49. 60 C.J. p 520 note 16.

80. Pa.—Connor v. Philadelphia Rapid Transit Co., 98 Pa.Super. 250.

81. Pa.—Fenner v. Wilkes-Barre, etc., Traction Co., 51 A. 1034, 202 Pa. 365.

82. Pa.—Metz v. Pittsburgh Rys. Co., 7 A.2d 505, 135 Pa.Super. 534. Wash.—Redford v. Spokane St. R. Co., 46 P. 650, 15 Wash. 419.

83. Pa.—Lukaszewicz v. Pittsburgh Rys. Co., 73 A.2d 400, 365 Pa. 29.

84. Pa.—Lukaszewicz v. Pittsburgh Rys. Co., supra.

85. U.S.—U. S. v. Philadelphia Transp. Co., D.C.Pa., 38 F.Supp. 246.

Motorist need not anticipate that the motorman would negligently attempt to pass the truck when it was evident that streetcar could not clear it.—Lukaszewicz v. Pittsburgh Rys. Co., 73 A.2d 400, 365 Pa. 29.

86. Pa.—Rieck-McJunkin Dairy Co. v. George, 56 A.2d 261, 162 Pa.Super. 132.

While waiting for payment for delivered goods

Pa.—Rieck-McJunkin Dairy Co. v. George, supra.

87. Ala.—Mobile Light & R. Co. v. R. O. Harris Grocery Co., 84 So. 867, 17 Ala.App. 354.

Pa.—Jacobs v. Pittsburgh Rys. Co., 26 A.2d 442, 344 Pa. 651.

an approaching streetcar;⁸⁸ and a failure to do so properly constitutes contributory negligence.⁸⁹ The failure of a driver of a stalled motor vehicle on the trolley tracks to push his vehicle off the tracks where he has sufficient time to do so may similarly preclude him from recovering for personal injury or damage sustained when the streetcar struck the vehicle.⁹⁰

Stopping for traffic lights. The fact that a motorist stops because of a change in the traffic lights does not prevent him from being contributorily negligent in stopping too near the streetcar tracks at the time that a streetcar was close behind him and moving rapidly,⁹¹ at least where there was room for the motorist to have stopped his vehicle where it would not have encroached on the car tracks.⁹²

§ 282. — Occupant of Vehicle Driven by Another

- a. In general
- b. Reliance on driver; anticipation of danger

a. In General

The occupant of a vehicle driven by another, where he is not guilty of contributory negligence, may recover for injury resulting from the negligence of the streetcar

company. The occupant must exercise ordinary care, should look for approaching streetcars, and warn or protest to the driver about dangerous conditions.

Where an occupant, such as a guest or passenger, of an automobile or other vehicle is not guilty of contributory negligence,⁹³ and he is killed or injured in a collision between the vehicle and a streetcar, which is caused by the negligence of the street railroad company alone,⁹⁴ or by the concurring negligence of the driver and the motorman,⁹⁵ damages for his death or injury may be recovered from the street railroad company.

Under rules of general application, as discussed in Negligence § 168, the negligence of the driver cannot be imputed to the occupant⁹⁶ unless the driver is the servant or agent of the occupant,⁹⁷ or the occupant otherwise has the right to direct and control the driver's actions.⁹⁸ However, this rule does not relieve the occupant from the duty of exercising ordinary and reasonable care for his own safety;⁹⁹ and, where he fails to exercise such care, he is guilty of contributory negligence preventing a recovery of damages for his death or injury,¹ unless his negligence does not cause or contribute to his death or injury.² In order to show contributory negligence as a matter of law, the occupant of the vehicle must have been so situated

88. Pa.—*Jacobs v. Pittsburgh Rys. Co.*, supra—*Mead v. Central Pennsylvania Traction Co.*, 54 Pa.Super. 400.

89. Mich.—*Vought v. Michigan United Traction Co.*, 160 N.W. 631, 194 Mich. 343.

Pa.—*Jacobs v. Pittsburgh Rys. Co.*, 26 A.2d 442, 344 Pa. 651.

90. Va.—*Harrell v. Virginia Elec. & Power Co.*, 12 S.E.2d 833, 177 Va. 59.

91. Pa.—*Pollock v. Philadelphia Rapid Transit Co.*, 11 A.2d 665, 139 Pa.Super. 256.

92. Pa.—*Pollock v. Philadelphia Rapid Transit Co.*, supra.

93. Miss.—*Coccora v. Vicksburg Light & Traction Co.*, 89 So. 257, 126 Miss. 713.
60 C.J. p 520 note 24.

No duty to act until emergency created

Where motorist's act in suddenly driving automobile on tracks in front of approaching streetcar created emergency from which neither motorist nor motorman could extricate himself so as to avoid collision, circuit court erred in holding that au-

tomobile guest injured in the collision was contributorily negligent, in absence of anything indicating that until emergency was created guest had any cause to do anything to relieve herself from consequences of motorist's negligence.—*Wilson v. Cop. Transit Co.*, 30 S.E.2d 749, 126 W.Va. 943.

94. Puerto Rico.—*Pla v. San Juan Light & Transit Co.*, 4 Puerto Rico Fed. 138.

95. Miss.—*Coccora v. Vicksburg Light & Traction Co.*, 89 So. 257, 126 Miss. 713.
60 C.J. p 520 note 26.

96. Ark.—*Arkansas Power & Light Co. v. Nuckols*, 31 S.W.2d 415, 182 Ark. 17.
60 C.J. p 520 note 28.

97. Kan.—*Spencer v. Kansas City Public Service Co.*, 22 P.2d 425, 137 Kan. 738.
60 C.J. p 520 note 29.

98. Mass.—*Peabody v. Haverhill, etc., St. R. Co.*, 85 N.E. 1051, 200 Mass. 277.
60 C.J. p 520 note 30.

99. U.S.—*Kansas City Public Serv-*

ice Co. v. Knight, C.C.A.Kan., 116 F.2d 233.
60 C.J. p 520 note 31.

1. Ky.—*Cincinnati, N. & C. R. Co. v. Cooper*, 132 S.W.2d 324, 279 Ky. 831.

Ohio.—*Acker v. Columbus & Southern Ohio Elec. Co.*, 60 N.E.2d 932.
60 C.J. p 521 note 32.

Contributory negligence of occupants of vehicles generally see Negligence §§ 150-156.

Participation in driver's negligent act

Pa.—*Sharpe v. Philadelphia Rapid Transit Co.*, 157 A. 370, 103 Pa. Super. 357.

2. Mo.—*Corn v. Kansas City, C. C. & St. J. Ry. Co.*, 228 S.W. 78—*Davis v. City Light & Traction Co.*, 222 S.W. 884, 204 Mo.App. 174.

Permitting hand to rest on handle of door of automobile was held not material negligence which would preclude guest riding on right-hand side of front seat of automobile from recovering from streetcar company for injuries sustained to right hand and thumb when rear of automobile was struck by streetcar.—*Larsen v. Minneapolis St. Ry. Co.*, 272 N.W. 595, 199 Minn. 501.

that by ordinary care on his part, for his own safety, he could and should have appreciated the danger and failed to take steps to avoid it.³ No recovery may be had from the street railroad company where the collision is caused solely by the negligence of the driver.⁴

Care required of driver compared. A guest or passenger in a vehicle is not required to exercise the same care as the driver.⁵ Thus, it has been held that, while it is the driver's duty to exercise the highest degree of care, the guest is required to use only ordinary care.⁶ Moreover, even where the standard of duty has been held to be the same for both occupant and driver, each being bound to exercise ordinary and reasonable care, the measure of, or conduct required to fulfill, that duty is ordinarily different.⁷

Where driver is not negligent, it is not necessary, according to some authorities, for a guest to take any steps for his own safety;⁸ but, according to other authorities, it is incorrect to say that a passenger has no duty of care for his own safety so long as the driver is not negligent.⁹

Mere passiveness or inaction on the part of a

guest or passenger in a motor vehicle when danger is imminent may constitute contributory negligence;¹⁰ but this is so only when he knows of the danger, or the nature of the situation is such that it can be reasonably inferred that he must realize the peril.¹¹ In order to exercise reasonable care and be free from contributory negligence, it is not necessary for an occupant to alight from a vehicle before it starts on the track.¹²

Looking for cars. The occupant of an automobile or other vehicle driven by another is not required to look constantly,¹³ or under all circumstances,¹⁴ but frequently the circumstances may be such as to require the occupant to look for approaching streetcars;¹⁵ and his failure to see the car in question constitutes contributory negligence precluding a recovery of damages for his death or injury where he could have seen the car in time to avoid the collision if he had looked properly.¹⁶

Warning or protest. The failure of an occupant of a vehicle to warn the driver of a threatened danger, or to object to, or protest against, the driver's conduct may constitute contributory negligence under some circumstances,¹⁷ as where the danger arises from an approaching streetcar¹⁸ and an at-

3. Tex.—Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103, affirmed Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, motion granted 58 S.W.2d 820.

4. Mo.—Beeson v. Fleming, 285 S.W. 708, 315 Mo. 177.
60 C.J. p 521 note 34.

5. Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.
Pa.—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.
60 C.J. p 521 note 36.

6. Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

7. Conn.—Clarke v. Connecticut Co., 76 A. 523, 83 Conn. 219.
60 C.J. p 521 note 39.

8. Pa.—Kilpatrick v. Philadelphia Rapid Transit Co., 138 A. 830, 290 Pa. 288.

9. N.J.—Schroeder v. Public Service Ry. Co., Sup., 118 A. 337.

10. Ky.—Cincinnati, N. & C. R. Co. v. Cooper, 132 S.W.2d 324, 279 Ky. 831.
60 C.J. p 521 note 42.

Failure to step out of vehicle

Where truck, which attempted to cross interurban track, became blocked by traffic on other side of crossing

and was struck by interurban car, occupant of truck who saw oncoming car and made no attempt to step out of truck, although his side of truck was open, but relied on motorman to stop car, was held contributorily negligent.—Driscoll v. Virginia Electric & Power Co., 181 S.E. 402, 609, 166 Va. 538.

11. Pa.—Kilpatrick v. Philadelphia Rapid Transit Co., 138 A. 830, 290 Pa. 288.

Divination of driver's intention

If guest could divine driver's intention to cross tracks sufficiently soon to prevent collision with streetcar, he was negligent in not doing so, but, if occurrence happened so quickly that guest had no time to protest, motorman was not negligent for failure to divine driver's intention in time.—Feldman v. Philadelphia Rapid Transit Co., 163 A. 39, 106 Pa.Super. 494.

12. Mo.—Stussy v. Kansas City Rys. Co., App., 228 S.W. 531.

13. Pa.—Barth v. Lackawanna & W. V. R. Co., 165 A. 251, 310 Pa. 168.
60 C.J. p 522 note 58.

14. Conn.—Clarke v. Connecticut Co., 76 A. 523, 83 Conn. 219.
60 C.J. p 522 note 59.

15. U.S.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.
60 C.J. p 522 note 60.

16. Kan.—Gilbert v. Kansas City Rys. Co., 197 P. 872, 109 Kan. 107.
60 C.J. p 522 note 61.

Failure to see car held not negligence

Guest in automobile struck by trolley at grade crossing was held not contributorily negligent in failure to see or warn driver of trolley's approach where track was visible for two hundred forty-seven feet and trolley was running fifty miles per hour.—Barth v. Lackawanna & W. V. R. Co., 165 A. 251, 310 Pa. 168.

17. U.S.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

Cal.—Cate v. Fresno Traction Co., 2 P.2d 364, 213 Cal. 190.

Ky.—Cincinnati, N. & C. R. Co. v. Cooper, 132 S.W.2d 324, 279 Ky. 831.

Pa.—Shepilikian v. Philadelphia Rapid Transit Co., 164 A. 107, 107 Pa. Super. 416.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

18. Ky.—Cincinnati, N. & C. R. Co.

tempt of the driver to drive on, along, or across the track in front of the car,¹⁹ where the occupant has knowledge of the danger or in the exercise of reasonable care should have knowledge of it,²⁰ and the driver apparently is unaware of the danger,²¹ or is driving recklessly or carelessly.²² However, the failure of an occupant to give an alarm or warning which would be of no avail to avoid the accident does not constitute contributory negligence;²³ and, where the driver is not negligent in attempting to cross ahead of the streetcar in question, a passenger, confronted with the same conditions, is not negligent in taking no active steps to prevent the driver's attempt.²⁴

Riding on running board of automobile. Whether or not riding on the running board or fender of an automobile constitutes contributory negligence usually depends on all the circumstances of the particular case.²⁵

b. Reliance on Driver; Anticipation of Danger

The extent to which the occupant of a vehicle may rely on the driver thereof or on the conduct of the motorman, and the extent to which he should anticipate peril, depends on the circumstances in each case.

An occupant of a vehicle is entitled to rely somewhat on the care of the driver,²⁶ at least if the driver's conduct is such as to induce a reasonably prudent person to think there is no danger;²⁷ and he may rightfully assume that the driver can properly handle the vehicle,²⁸ and will look and listen at a crossing.²⁹ However, he is not entitled, under all circumstances,³⁰ to rely entirely³¹ and implicitly³² on the care and caution of the driver, as when he knows that the automobile is being driven in a reckless manner into a known dangerous place.³³

The occupant has a right to rely, at least to some extent, on the assumption that the motorman will perform the duties imposed on him by law³⁴ and will exercise care to avoid a collision.³⁵

Anticipation. The extent to which a guest or passenger in an automobile should anticipate an impending peril depends on the facts of each case.³⁶ In general, he is under no duty to anticipate that the driver will omit to exercise proper care in crossing a track;³⁷ nor is he bound to anticipate negligence on the part of the motorman³⁸ or that a trolley car will advance at an excessive speed³⁹ and not under reasonable control.⁴⁰

v. Cooper, 132 S.W.2d 324, 279 Ky. 831.
60 C.J. p 522 note 64.

19. Ky.—Cincinnati, N. & C. R. Co. v. Cooper, supra.
60 C.J. p 522 note 65.

20. Ky.—Cincinnati, N. & C. R. Co. v. Cooper, supra.
Pa.—Shepilikian v. Philadelphia Rapid Transit Co., 164 A. 107, 107 Pa. Super. 416.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.
60 C.J. p 522 note 66.

21. Ky.—Cincinnati, N. & C. R. Co. v. Cooper, 132 S.W.2d 324, 279 Ky. 831.

Pa.—Shepilikian v. Philadelphia Rapid Transit Co., 164 A. 107, 107 Pa. Super. 416.

Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

22. Pa.—Shepilikian v. Philadelphia Rapid Transit Co., 164 A. 107, 107 Pa. Super. 416.
60 C.J. p 522 note 68.

23. Mo.—Beall v. Kansas City Rys. Co., App., 228 S.W. 834.
60 C.J. p 523 note 69.

24. Wis.—Lindquist v. Duluth St. Ry. Co., 184 N.W. 690, 175 Wis. 158.

25. Ala.—Alabama Power Co. v. Elmore, 130 So. 413, 222 Ala. 6.
Pa.—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.

26. Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

Pa.—Siegfried v. Lehigh Valley Transit Co., Com.Pl., 18 Lehigh L.J. 136, affirmed 6 A.2d 97, 334 Pa. 346.

60 C.J. p 521 note 46.

27. Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

28. Ohio.—Smith v. Cleveland Ry. Co., 164 N.E. 59, 30 Ohio App. 21.

29. Pa.—Kuhns v. Conestoga Traction Co., 138 A. 838, 290 Pa. 303.
60 C.J. p 522 note 51.

30. Mo.—Ross v. Wells, 253 S.W. 28, 212 Mo. App. 62.

Vehicle stalled on tracks

Belief by an occupant of an automobile whose engine had stalled on an interurban railway track that the chauffeur would succeed in his efforts to start the engine in time to get the automobile off the track does not excuse the occupant's remaining in the automobile until too late to escape before it was struck by an approaching car.—Krouse v. Southern Michigan Ry. Co., 183 N.W. 768, 215 Mich. 139.

31. Iowa.—Hutchinson v. Sioux City Service Co., 230 N.W. 387, 210 Iowa 9.
60 C.J. p 521 note 48.

32. Ark.—Miller v. Ft. Smith Light & Traction Co., 206 S.W. 329, 136 Ark. 272.

45 C.J. p 1017 note 78 [a].

33. Tex.—Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103, affirmed Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, motion granted 58 S.W.2d 820.

34. Ky.—Paducah Ry. Co. v. Nave, 265 S.W. 289, 204 Ky. 733.

35. Mass.—Bombard v. Worcester Consol. St. Ry. Co., 124 N.E. 484, 234 Mass. 1.

36. Pa.—Kilpatrick v. Philadelphia Rapid Transit Co., 138 A. 830, 290 Pa. 288.—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.

37. Ala.—Birmingham Ry., Light & Power Co. v. Barranco, 84 So. 839, 203 Ala. 639.

38. Pa.—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.

39. Pa.—Suchy v. Buffalo & Lake Erie Traction Co., 129 A. 571, 283 Pa. 533.

40. Pa.—Suchy v. Buffalo & Lake Erie Traction Co., supra.

§ 283. Driver or Occupant of Emergency Vehicle

While the driver and occupants of emergency vehicles may assume that streetcars will yield the right of way, they are nevertheless required to use ordinary care; but only ordinary care in the light of the special circumstances is required.

The driver and occupants of an emergency vehicle, such as a police car, fire apparatus, or ambulance, in crossing or driving along streetcar tracks, have a right to assume that the motorman of an approaching streetcar will stop it or otherwise comply with a statute, ordinance, or custom as to yielding the right of way to such vehicle,⁴¹ or other rule or regulation as to traffic generally.⁴² However, the mere fact that such vehicle has a right of way over streetcars, whether by statute, ordinance, or otherwise, does not relieve the driver thereof from exercising ordinary care, in driving across streetcar tracks, to avoid a collision;⁴³ and, if by reason of his failure to exercise due care a collision with a streetcar occurs, resulting in injuries to him or to his vehicle, there can be no recovery therefor from the street railroad company.⁴⁴

On the other hand, the driver and occupants of emergency vehicles are required to exercise only what is ordinary and reasonable care in view of the facts, circumstances, and exigencies of the particular situation;⁴⁵ and by reason of the necessity of proceeding with haste and the greatest practicable speed, the loud alarm sounded by them, and the law or custom as to yielding the right of way to them, many of the rules governing the conduct of an ordinary traveler in the pursuit of his private business

are inapplicable,⁴⁶ since they are permitted to exercise less care, caution, and deliberation,⁴⁷ and are often required to take greater risks,⁴⁸ than a private person.

Imputed negligence. The negligence of the driver cannot be imputed to another fireman on his truck or wagon;⁴⁹ and it is not necessarily imputable to the captain of the fire company where the captain cannot, and does not attempt to, control the action of the driver.⁵⁰ Also, the negligence of the driver of a patrol wagon is not to be imputed to a police officer whose duty it is to go with the wagon wherever it is driven by the chauffeur and who has no control over the latter;⁵¹ but it is imputable to an occupant who is in charge of the wagon and in control of the driver,⁵² especially where he knows that the driver is inexperienced in the particular work in which he is engaged.⁵³

Right of emergency vehicle to pass stop signal. Under some statutes an authorized emergency vehicle, such as an ambulance, when responding to an emergency call, may, on approaching a red or stop signal, proceed cautiously past the signal after sounding the siren and displaying red lights so as to warn streetcars and other vehicles.⁵⁴

§ 284. Children

While a child of tender years may be declared as a matter of law to be free from contributory negligence, a child of sufficient mental capacity and experience may be guilty of contributory negligence, as where he fails to exercise such care as can be expected from such a child under the circumstances.

Where a child, of such tender years that he is

41. Minn.—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.

Mo.—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445 —Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.

60 C.J. p 523 note 78.

Right of way as between streetcar and emergency vehicle see supra §§ 241-243.

42. Pa.—Balkie v. Philadelphia Rapid Transit Co., 200 A. 52, 331 Pa. 93.

Stopping at red light

Pa.—Balkie v. Philadelphia Rapid Transit Co., supra.

43. N.J.—Woods v. Public Service Co., 85 A. 1016, 84 N.J.Law 171.

60 C.J. p 523 note 72.

44. Ala.—Birmingham R., etc., Co. v. Baker, 28 So. 87, 126 Ala. 135.

Mo.—Guiney v. Southern Electric R. Co., 67 S.W. 296, 167 Mo. 595.

45. Mo.—Malone v. Kansas City Rys. Co., App., 232 S.W. 782.

60 C.J. p 523 note 74.

46. Wis.—Hanton v. Milwaukee Electric R., etc., Co., 95 N.W. 100, 118 Wis. 210.

60 C.J. p 523 note 75.

47. Mo.—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.

60 C.J. p 523 note 76.

48. Minn.—Warren v. Mendenhall, 79 N.W. 661, 77 Minn. 145.

Okl.—Oklahoma Ry. Co. v. Thomas, 164 P. 120, 83 Okl. 219, L.R.A.1917E 405.

49. N.C.—Spittle v. Charlotte Elec-

tric Ry. Co., 95 S.E. 910, 175 N.C. 497.

60 C.J. p 523 note 80.

50. Kan.—Spellman v. Metropolitan St. Ry. Co., 124 P. 363, 87 Kan. 415, Ann.Cas.1915E 230.

51. Mo.—Hogan v. Fleming, 265 S. W. 875, 218 Mo.App. 172.

52. La.—Bofill v. New Orleans Ry. & Light Co., 66 So. 339, 135 La. 996, L.R.A.1915C 419.

53. La.—Bofill v. New Orleans Ry. & Light Co., supra.

54. Minn.—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.

To "proceed cautiously" means to go forward in the exercise of due care in order to avoid a collision.—Rogers v. Minneapolis St. Ry. Co., supra.

incapable of appreciating and avoiding danger, is injured through the negligent operation of a street railroad, he may be declared as a matter of law to be free from contributory negligence.⁵⁵ On the other hand, while a child of sufficient mental capacity and experience to appreciate, to a limited extent at least, the danger of going on or near a street railroad track, is not required in doing so to exercise the same degree and care and caution as a person of mature years,⁵⁶ he is capable of contributory negligence,⁵⁷ and is required to exercise such, and only such, care and precaution as may be reasonably expected of a child of his age, experience, intelligence, judgment, and capacity, under the circumstances,⁵⁸ as where he is attempting to cross in front of an approaching car;⁵⁹ and, if he fails to exercise such care and precaution, whereby he is killed or injured, he is guilty of contributory negligence precluding a recovery.⁶⁰

It has accordingly been held that a child is guilty of contributory negligence precluding a recovery if he is of sufficient age and intelligence to appreciate danger and take such precautions as such a child would be reasonably expected to take, where he carelessly or heedlessly attempts to cross in front of a car which he sees approaching in dangerous proximity,⁶¹ or he goes on the tracks without prop-

erly looking or listening for an approaching car which he could have discovered in time to avoid the accident,⁶² as where he attempts to cross, without properly looking or listening, immediately behind another car.⁶³

§ 285. Old, Infirm, or Afflicted Persons

A person afflicted with a physical disability, who walks on or across a street on which there are car tracks, is not contributorily negligent as a matter of law, but he must exercise greater and unusual care in proportion to his disability. One suddenly or temporarily incapacitated may be incapable of contributory negligence.

While a person who is afflicted with some physical disability, as where he is aged, feeble, crippled, deformed, very large, deaf, nearsighted, or without the use of one eye, has a right, in the exercise of due care, to walk or drive unattended on or across a public street on which there are street railroad tracks,⁶⁴ and his exercise of this right does not constitute contributory negligence as a matter of law,⁶⁵ or under all circumstances,⁶⁶ his disability, instead of relieving him from the duty of exercising ordinary care in going on or near a street railroad track,⁶⁷ imposes on him the duty of exercising greater and unusual care and precaution, in proportion to the disability, to avoid injury.⁶⁸

55. Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 299 Pa. 79.

60 C.J. p 524 note 86.

Contributory negligence as to children generally see Negligence §§ 144-149.

Child under seven years of age

Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

56. La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.

60 C.J. p 524 note 87.

57. La.—Kahn v. Shreveport Rys. Co., supra.

Average bright boy, experienced in getting on and off cars, was held, as a matter of law, capable of contributory negligence.—Foard v. Tidewater Power Co., 86 S.E. 804, 170 N.C. 48.

58. Mass.—Barksdale v. Union St. Ry. Co., 193 N.E. 533, 289 Mass. 95.

N.Y.—Coleman v. Brooklyn & Queens Transit Corp., 298 N.Y.S. 513, 252 App.Div. 215.

60 C.J. p 524 note 88.

Child riding bicycle

Ind.—Indianapolis Rys. v. Williams, 59 N.E.2d 586, 115 Ind.App. 383.

La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.

Child riding horse

N.H.—Katsikas v. Manchester Street Ry., 3 A.2d 821, 90 N.H. 21.

Child on roller skates

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.

59. Ind.—Citizens' St. R. Co. v. Hammer, 62 N.E. 658, 63 N.E. 778, 29 Ind. App. 426.

60 C.J. p 524 note 89.

60. W.Va.—Humphreys v. Charleston Transit Co., 11 S.E.2d 745, 122 W.Va. 571.

60 C.J. p 524 note 90.

61. Minn.—McGuigan v. St. Paul City Ry. Co., 40 N.W.2d 435, 229 Minn. 534.

N.C.—Foard v. Tidewater Power Co., 86 S.E. 804, 170 N.C. 48.

Pa.—Ewanco v. Pittsburgh Rys. Co., Com.Pl., 91 Pittsb.Leg.J. 510, affirmed 53 A.2d 856, 161 Pa.Super. 300.

60 C.J. p 524 note 91.

62. Mass.—Kelley v. Boston & N. St. Ry. Co., 111 N.E. 1045, 223 Mass. 449.

60 C.J. p 525 note 92.

63. La.—Loyocano v. New Orleans Ry. & Light Co., 98 So. 269, 154 La. 852.

60 C.J. p 525 note 93.

64. Mass.—Smallwood v. Boston Elevated Ry. Co., 104 N.E. 748, 217 Mass. 375.

Mich.—Spreng v. Detroit United Ry., 163 N.W. 926, 197 Mich. 343.

65. Mass.—Robbins v. Springfield St. R. Co., 42 N.E. 334, 165 Mass. 30—Neff v. Wellesley, 20 N.E. 111, 148 Mass. 487, 2 L.R.A. 500.

Negligence as to persons under disability generally see Negligence §§ 140-143.

66. N.Y.—Drusky v. Schenectady Ry. Co., 149 N.Y.S. 762, 164 App.Div. 406.

67. Pa.—Flynn v. Pittsburgh Rys. Co., 83 A. 207, 234 Pa. 335, 39 L.R.A.N.S., 1055.

60 C.J. p 525 note 98.

68. Pa.—Flynn v. Pittsburgh Rys. Co., 83 A. 207, 234 Pa. 335, 39 L.R.A.N.S., 1055.

60 C.J. p 525 note 99.

If some of his senses are impaired, he must be more vigilant in the use of his remaining senses.⁶⁹ So, where his hearing is defective, he should be more alert in the use of his other senses;⁷⁰ and, if a deaf person carelessly goes on, along, or in close proximity to, the tracks without properly looking for an approaching car, which he could have discovered in time to avoid injury, he is guilty of contributory negligence precluding a recovery.⁷¹

Sudden or temporary incapacity. Under some circumstances, a person who becomes suddenly or temporarily incapacitated, as by reason of being drugged,⁷² or becoming sick or otherwise providentially incapacitated,⁷³ may be incapable of contributory negligence.

Intoxication. The fact that a person was intoxicated when killed or injured does not preclude the recovery of damages unless the intoxication contributed to the death or injury;⁷⁴ but there can be no recovery of damages for death or injury caused by contributory negligence arising from voluntary intoxication.⁷⁵

§ 286. Permitting Animal at Large, Unrestrained, or Unattended

The owner of an animal is not entitled to recover for its death or injury where the animal is at large as a result of his negligence; but allowing an animal to run at large is not necessarily contributory negligence.

The owner of an animal is not entitled to recover

damages for its death or injury at night where it escaped by reason of his negligence,⁷⁶ or where he drove it along the highway without having it fastened, and without giving any signal to the motorman of an approaching streetcar.⁷⁷ However, it is not contributory negligence for the owner of a hog or cow to allow it to run at large outside the "stock limit."⁷⁸ Also, where a horse is permitted to break loose from a group of horses and continue on the street loose, but closely followed and watched by the owner and his employees, the owner is not guilty of contributory negligence as a matter of law.⁷⁹

Horse attached to vehicle. It is not negligence per se temporarily to leave a horse, not of restive or vicious habits, attached to a vehicle, unattended and untied or unfastened in a street along which a street railroad runs;⁸⁰ but so to leave a horse may constitute contributory negligence under the circumstances of the particular case.⁸¹

§ 287. Proximate Cause

Negligence is contributory and will preclude recovery by plaintiff only when it causes or contributes to the injury directly or proximately.

Negligence is contributory and will preclude recovery by plaintiff, in accordance with the general discussion supra § 263, only when such negligence causes or contributes to the injury directly⁸² and proximately.⁸³ Accordingly, negligence on the part

69. Ark.—Ft. Smith Light, etc., Co. v. Barnes, 96 S.W. 976, 80 Ark. 169.

70. Me.—Foster v. Cumberland County Power & Light Co., 100 A. 833, 116 Me. 184, L.R.A.1917E 1044. 60 C.J. p 525 note 2.

71. Wash.—Worsey v. Tacoma Ry. & Power Co., 233 P. 282, 133 Wash. 74. 60 C.J. p 525 note 3.

72. Wash.—Herrick v. Washington Water Power Co., 134 P. 934, 75 Wash. 149, 48 L.R.A.N.S., 640.

73. Conn.—King v. Connecticut Co., 149 A. 219, 110 Conn. 615. 60 C.J. p 525 note 5.

74. Cal.—Germ v. City and County of San Francisco, 222 P.2d 122, 99 Cal.App.2d 404.

Mass.—Brule v. Union St. Ry. Co., 52 N.E.2d 388, 315 Mass. 268—Labrecque v. Donham, 127 N.E. 537, 236 Mass. 10.

75. Minn.—Kaiser v. Minneapolis St.

Ry. Co., 181 N.W. 569, 147 Minn. 278.

Tex.—Scates v. Rapid Transit Ry. Co., Civ.App., 171 S.W. 503.

76. Mich.—Nissly v. Detroit, J. & C. Ry., 131 N.W. 145, 135 N.W. 268, 168 Mich. 676, Ann.Cas.1913C 719.

77. Pa.—Keller v. Conestoga Traction Co., 45 Pa.Super. 462. 60 C.J. p 488 note 68.

78. Ark.—Little Rock Traction, etc., Co. v. Hicks, 96 S.W. 355, 79 Ark. 248—Little Rock R., etc., Co. v. Newman, 92 S.W. 864, 77 Ark. 599.

79. Mo.—Windle v. Southwest Missouri R. Co., 153 S.W. 282, 168 Mo. App. 596.

80. Me.—Moulton v. Lewiston, etc., St. R. Co., 66 A. 388, 102 Me. 186, 10 L.R.A.N.S., 845. 60 C.J. p 488 note 70.

81. Mass.—Stacey v. Haverhill, etc., St. R. Co., 77 N.E. 714, 191 Mass. 326.

60 C.J. p 488 note 71.

82. Md.—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A.2d 450, 155 Md. 158.

Ohio.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288. 60 C.J. p 484 note 27.

83. Cal.—Glickman v. Pacific Elec. Ry. Co., 129 P.2d 132, 54 Cal.App.2d 454—Behne v. Pacific Elec. Ry. Co., 86 P.2d 843, 30 Cal.App.2d 437.

Ind.—Gary Rys. Co. v. Michael, 34 N.E.2d 159, 109 Ind.App. 672.

La.—Moch v. Shreveport Rys. Co., App., 41 So.2d 741—Salone v. Shreveport Rys. Co., App., 41 So. 2d 240—Falgoust v. New Orleans Public Service, App., 170 So. 431—Washington v. New Orleans Public Service, App., 162 So. 213—Vergo v. Shreveport Rys. Co., 139 So. 737, 19 La.App. 647—Keller v. N. C. Public Service, 138 So. 463, 18 La. App. 317.

Mich.—Spencer v. City of Detroit, 241 N.W. 828, 257 Mich. 601.

Neb.—McDonald v. Omaha & C. B. St. Ry. Co., 257 N.W. 489, 128 Neb. 17.

of a person sustaining death or injury does not preclude the recovery of damages where it does not cause or contribute to the death or injury proximately,⁸⁴ or directly,⁸⁵ or where it is not the efficient cause,⁸⁶ or where it only remotely causes or contributes to the injury,⁸⁷ as where it occurs after the accident,⁸⁸ or where plaintiff would not have escaped the injury even had he not been negligent.⁸⁹ So, also, as discussed *infra* § 288, negligence on the part of a person will not preclude recovery where it is a mere condition before the accident, and

the death or injury could be prevented by the exercise of reasonable care and prudence on the part of the company after his peril is discovered or should be discovered.

There can of course be no recovery by plaintiff where his negligence is the sole proximate cause of his injuries.⁹⁰ Violation of a statute, ordinance, or rule of the company by the person injured as contributory negligence proximately causing the injury is discussed *supra* § 266.

8. INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE

§ 288. In General

Notwithstanding the negligence of the person killed or injured through the operation of a street railroad, recovery of damages may be had under the rule variously known as "the doctrine of last clear chance," "the humanitarian doctrine," and "the doctrine of discovered peril."

Under a rule referred to by various descriptive terms, the most common being "the doctrine of last clear chance," "the humanitarian doctrine," and "the doctrine of discovered peril," the fact that a

person killed or injured through the operation of a street railroad was negligent in placing himself in a position of peril on or near a track will not preclude the recovery of damages from the street railroad company where the company or its servants had notice of his perilous position and thereafter, by the exercise of ordinary and reasonable care, could have avoided injuring him.⁹¹ It may apply not only where plaintiff sustained personal injury, but also where an animal⁹² or inanimate object⁹³

Pa.—Metz v. Pittsburgh Rys. Co., 7 A.2d 505, 135 Pa.Super. 534.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816 —Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, error refused.

Va.—Virginia Transit Co. v. Owens, 55 S.E.2d 422, 190 Va. 76.

W.Va.—Humphreys v. Charleston Transit Co., 11 S.E.2d 745, 122 W. Va. 571.

60 C.J. p 484 note 28.

84. Cal.—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal.App.2d 758.

Pa.—Ginsburg v. Pittsburgh Rys. Co., 49 A.2d 367, 355 Pa. 193.

60 C.J. p 485 note 37.

Lack of rear view mirror

The statute requiring a rear view mirror on a truck when the driver's view of the rear is obstructed does not apply when the truck is so loaded that the driver has a view to the rear.—The Memphis St. Ry. Co. v. Aycock, 11 Tenn.App. 260.

85. Ky.—Louisville Ry. Co. v. Breden, 77 S.W.2d 368, 257 Ky. 95.

86. Va.—Virginia Elec. & Power Co. v. Wright, 196 S.E. 580, 170 Va. 442.

87. Ind.—Indianapolis Traction & Terminal Co. v. Croly, 96 N.E. 973, 98 N.E. 1091, 54 Ind.App. 566. 60 C.J. p 586 note 38.

88. N.Y.—Lowery v. Manhattan R.

Co., 1 N.E. 608, 99 N.Y. 158, 52 Am. R. 12.

89. Mo.—Chervak v. St. Louis Public Service Co., App., 173 S.W.2d 599.

Tenn.—Memphis Street Railway Co. v. Albert, 11 Tenn.App. 105.

90. Fla.—Tampa Electric Co. v. McCulloch, 156 So. 259, 115 Fla. 680.

Ill.—Weinberg v. Richardson, 10 N.E. 2d 893, 291 Ill.App. 618.

La.—Schmidt & Ziegler v. New Orleans Public Service, 137 So. 871, 18 La.App. 722.

60 C.J. p 484 note 30 [a].

Operation of motorcycle

No recovery may be had where, as a physical fact, a motorcycle rider's negligence must have proximately contributed to his death or injury.—Hamilton v. Birmingham Ry., Light & Power Co., 73 So. 950, 198 Ala. 630 —60 C.J. p 503 note 9.

Occupant of vehicle

La.—McQuiston v. Shreveport Rys. Co., 124 So. 706, 12 La.App. 277.

91. Iowa.—Elliott v. Des Moines Ry. Co., 271 N.W. 506, 223 Iowa 46.

60 C.J. p 526 note 9.

Doctrine of last clear chance, etc., in general see Negligence §§ 136-139.

Recovery notwithstanding contributory negligence where injury is willful or wanton see *supra* § 211.

Essential elements of "discovered peril" are exposed situation brought

about by plaintiff's negligence, actual discovery of situation by defendant's agent in time to avert injury to plaintiff by use of all means at agent's command commensurate with safety to agent, to vehicle agent is operating, and to passengers therein, and agent's subsequent failure to use such means.—Texas Elec. Ry. Co. v. Wooten, Tex.Civ.App., 173 S.W.2d 463, error refused.

Qualification of general rule

The "last clear chance" doctrine has been formulated as a qualification of the rule that no recovery may be had for injuries resulting from a peril to which the injured person was exposed through his own fault or negligence, and if pedestrian's exposure to the danger of collision with trolley car was not due to any negligence on his part, doctrine was inapplicable.—Hernandez v. Brooklyn & Queens Transit Corp., 32 N.E.2d 542, 284 N.Y. 535.

In Illinois

The humanitarian rule does not apply in Illinois.—Harting v. East St. Louis Ry. Co., Mo.App., 81 S.W.2d 973, stating Illinois law.

92. N.Y.—Swift & Co. v. New York & I. C. Ry. Co., 120 N.Y.S. 203, 1148, 136 App.Div. 34, 926.

Vt.—Pollica v. Twin State Gas & Electric Co., 92 A. 150, 88 Vt. 205, Ann.Cas.1917C 1240.

93. Conn.—Smith v. Waterbury &

belonging to plaintiff was injured or damaged in a collision with a streetcar. The doctrine has been held to apply where the injury complained of was received subsequent to the time of original impact with the car;⁹⁴ but, where it is a matter of mere conjecture whether the whole injury happened at the very moment of collision or partly then and partly afterward, and the rule is otherwise inapplicable, it does not apply to alleged negligence of defendant in failing to stop the car more quickly;⁹⁵ or in moving it ahead, after the collision occurred;⁹⁶ and, where the car was reversed before striking plaintiff, the negligence, if any, of defendant in permitting the reverse action to continue in operation after the forward motion of the car was overcome was part of the original negligence and is not an independent ground of recovery under the doctrine of discovered peril.⁹⁷ By the very nature of things, the doctrine cannot often be applicable in cases for damages resulting from collisions at intersections of streets.⁹⁸

§ 289. Cause of Injury

The humanitarian or last clear chance doctrine applies only where the negligence of the street railroad company was the sole proximate cause of the accident.

The humanitarian or last clear chance doctrine applies in an action to recover damages for death or injury sustained through the operation of a

street railroad when, and only when, the negligence of plaintiff or decedent was a mere condition before the accident, or was only a remote, and not a direct or proximate, cause thereof, and the negligence of the company in failing to avoid the accident after it discovered, or under the rules subsequently considered should have discovered, the perilous position of plaintiff or decedent was the sole proximate cause of the accident.⁹⁹

§ 290. — Cessation or Continuance of Plaintiff's Negligence

No recovery can be had where the plaintiff's negligence continues as an operative, proximate, and concurring cause of injury up to the time of the accident or until there is no chance left for the defendant to avoid it in the exercise of the care demanded under the circumstances.

There can be no recovery under the last clear chance doctrine where plaintiff's negligence continues as an operative, proximate, and concurring cause of injury up to the time of the accident¹ or until, as discussed *infra* §§ 294, 295, there is no chance left for defendant to avoid it by the exercise of the care demanded under the circumstances. In other words, in order to render the doctrine applicable, defendant's negligence must have been the last negligence² and independent of plaintiff's negligence³ and any prior negligence of its own.⁴ However, notwithstanding plaintiff's negligence

Milldale Tramway Co., 121 A. 873, 99 Conn. 446.

60 C.J. p 526 note 13.

94. Iowa.—Tessell v. Des Moines City Ry. Co., 197 N.W. 629, 197 Iowa 563.

60 C.J. p 526 note 14.

95. Or.—Plinkewisch v. Portland Ry., Light & Power Co., 115 P. 151, 58 Or. 499.

96. N.Y.—Healy v. United Traction Co., 101 N.Y.S. 331, 115 App.Div. 868.

60 C.J. p 527 note 16.

97. Mich.—Stenzhorn v. City Electric Ry. Co., 123 N.W. 621, 159 Mich. 82.

98. Wash.—MacDonald v. City of Seattle, 127 P. 39, 126 Wash. 1.

99. Ala.—Mobile Light & R. Co. v. Gadik, 100 So. 337, 211 Ala. 582. 60 C.J. p 527 note 20.

1. Cal.—Rather v. City and County of San Francisco, 184 P.2d 727, 81 Cal.App.2d 625—Magnuson v. Market St. Ry. Co., 138 P.2d 689, 59 Cal. App.2d 233—McHugh v. Market St.

Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

Kan.—Corpus Juris cited in Spencer v. Kansas City Public Service Co., 22 P.2d 425, 427, 137 Kan. 738.

La.—Moch v. Shreveport Rys. Co., App., 41 So.2d 741.

Me.—Ward v. Cumberland County Power & Light Co., 187 A. 527, 134 Me. 430.

Md.—National Hauling Contractors Co. v. Baltimore Transit Co., 44 A. 2d 450, 185 Md. 158—United Rys. & Electric Co. of Baltimore v. Sherwood Bros., 157 A. 280, 161 Md. 304.

N.Y.—Hernandez v. Brooklyn & Queens Transit Corp., 32 N.E.2d 542, 284 N.Y. 535—Panarese v. Union Ry. Co. of New York City, 185 N.E. 84, 261 N.Y. 233.

Ohio.—Cincinnati St. Ry. Co. v. Keehan, 186 N.E. 812, 45 Ohio App. 75.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn. App. 42.

Va.—Virginia Elec. & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 162 Va. 671—

Wilson v. Virginia Electric & Power Co., 169 S.E. 64, 160 Va. 469—Dick v. Virginia Electric & Power Co., 163 S.E. 75, 158 Va. 77.

Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386. 60 C.J. p 527 note 21.

Sole negligence

In guest's action for injuries sustained in collision between automobile and streetcar, recovery can be had under humanitarian doctrine only on establishing negligence of defendant, and guest cannot recover if injuries were caused solely by negligence of driver of automobile.—Billingsley v. Kansas City Public Service Co., 191 S.W.2d 331, 239 Mo.App. 440.

2. Me.—Blanchette v. Waterville, F. & O. Ry., 136 A. 116, 126 Me. 40. 60 C.J. p 528 note 23.

3. Me.—Blanchette v. Waterville, F. & O. Ry., 136 A. 116, 126 Me. 40—Philbrick v. Atlantic Shore Line Ry., 78 A. 481, 107 Me. 429.

4. Me.—Welch v. Lewiston, A. & W. St. Ry., 100 A. 934, 116 Me. 191. 60 C.J. p 528 note 25.

placing him in a position of peril continues up to the time of the injury, it will not bar a recovery where defendant has actual knowledge of his peril in time to prevent injury to him and does not fulfill its duty as to the exercise of care to prevent it,⁵ unless plaintiff becomes conscious of his peril and is guilty of further negligence.⁶ The rule imposing liability in case of actual knowledge does not apply, according to some authorities, where plaintiff's peril was not actually seen although it should have been seen,⁷ although there is other authority applying it to either state of facts.⁸ Where plaintiff's negligence has ceased before the injury, the last clear chance or humanitarian doctrine applies where the other attendant circumstances are proper for its application,⁹ as where he has made every reasonable effort to extricate himself from his position of peril.¹⁰

§ 291. Danger or Peril

a. In general

b. Manner of arising

a. In General

The doctrine of last clear chance applies only when

the person injured actually comes into, or is actually in, or entering, a position of peril or danger.

The doctrine of last clear chance does not apply in the operation of a street railroad, and the duty of a motorman to stop the car or take other measures to avoid injury to a person on or near the track does not begin, unless and until the person actually comes into,¹¹ or, according to some authorities, is actually in, or entering, a position of peril or danger.¹² A place of danger or position of peril, or "danger zone," as it is sometimes termed, may be either on the track or in the path of a moving car,¹³ or near the track, where the person is approaching either on foot or in a vehicle and it is apparent that he will not, or cannot, stop, and that a collision will occur unless prompt measures to avoid it are taken by the motorman.¹⁴

b. Manner of Arising

The manner in which the plaintiff's peril or danger arose is immaterial.

Although a distinction has been drawn in some decisions in this respect between the humanitarian doctrine and the last clear chance doctrine,¹⁵ the

5. Cal.—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal.App.2d 579.

Va.—Virginia Elec. & Power Co. v. Whitehurst, 8 S.E.2d 296, 175 Va. 339.

60 C.J. p 528 note 26.

6. Cal.—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal.App.2d 579.

60 C.J. p 528 note 27.

7. Wash.—Zettler v. City of Seattle, 279 P. 570, 153 Wash. 179.

60 C.J. p 528 note 28.

8. Va.—Virginia Ry. & Power Co. v. Smith & Hicks, 105 S.E. 532, 129 Va. 269.

60 C.J. p 528 note 29.

9. Iowa.—Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., 154 N.W. 890, 172 Iowa 527.

60 C.J. p 528 note 30.

10. Cal.—Nicolai v. Pacific Electric Ry. Co., 267 P. 758, 92 Cal.App. 100.

60 C.J. p 528 note 31.

11. Conn.—Emmons v. New York & Stamford Ry. Co., 142 A. 676, 108 Conn. 113.

60 C.J. p 529 note 32.

12. Mo.—McGowan v. Wells, 24 S.W. 2d 633, 324 Mo. 652.

60 C.J. p 529 note 33.

Imminent peril

(1) A truck approaching intersec-

tion with private right of way of street railroad at time streetcar was about to enter crossing would not be in imminent peril, within the humanitarian rule, if truck was approaching a position where there was a danger of collision between truck and streetcar.—Lotta v. Kansas City Public Service Co., 117 S.W.2d 296, 342 Mo. 743.

(2) Where driver of automobile is not oblivious and has means at hand to avert collision, streetcar operator is under no duty to act unless it becomes, or should on proper watch become, apparent that automobile is not going to stop before going upon tracks.—Banks v. St. Louis Public Service Co., Mo.App., 249 S.W.2d 481.

13. Mich.—Griewski v. Ironwood & Bessemer Ry. & Light Co., 176 N.W. 439, 209 Mich. 10.

S.D.—Miller v. Sioux Falls Traction Co., 184 N.W. 233, 44 S.D. 405.

14. Ala.—Mobile Light & R. Co. v. Gadik, 100 So. 837, 211 Ala. 582.

60 C.J. p 529 note 35.

15. In Missouri

(1) A distinction has been drawn between the last clear chance and the humanitarian doctrines, it being stated that the last chance doctrine proceeds on the theory of prior negligence on the part of plaintiff while the humanitarian doctrine is based on the rule which requires every person to protect every other person seen

to be in, or about to become in, a position of peril if he may do so by exercising ordinary care for himself and those the conveyance of whom he has charge.—Smith v. Heibel, 137 S.W. 70, 157 Mo.App. 177—60 C.J. p 529 note 36 [a].

(2) In action by motorist for damages sustained in collision with streetcar, motorist's contributory negligence was a defense to defendant's primary negligence, but not to defendant's humanitarian negligence.—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772.

(3) Antecedent negligence of person in peril cannot be considered in determining liability of street railroad under humanitarian rule.—Kloekener v. St. Louis Public Service Co., 53 S.W.2d 1043, 331 Mo. 396.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

(4) Pedestrian who was struck by streetcar which pedestrian was racing could recover for injuries under humanitarian doctrine, notwithstanding pedestrian was grossly negligent.—Walratt v. St. Joseph Ry., Light, Heat & Power Co., Mo.App., 70 S.W.2d 367.

(5) Under humanitarian doctrine in action against street railway by automobile passenger, whether driver was intoxicated was immaterial.—Millhouser v. Kansas City Public Service Co., 55 S.W.2d 673, 331 Mo. 933.

last clear chance doctrine, strictly speaking, implies prior negligence on the part of plaintiff.¹⁶ It is not, however, material in what manner plaintiff's danger arose.¹⁷ He may, for example, have been standing,¹⁸ walking,¹⁹ riding a bicycle,²⁰ or driving a vehicle;²¹ or he may have been proceeding along or near,²² or attempting to cross,²³ the track; and he may either have failed to exercise proper care to look or look and listen,²⁴ or proceeded into, or continued in, the path of a moving car after seeing or hearing it,²⁵ or he may have stopped the vehicle he was driving on the track,²⁶ or have failed to alight from or abandon it when it was stalled on the track.²⁷ Likewise, the doctrine may apply where an occupant, other than the driver, of a vehicle standing so close to a track as to be in the path of a moving car failed to exercise any care in looking out for himself.²⁸

§ 292. — Plaintiff's Knowledge or Ignorance of Peril

Recovery may be had where the plaintiff was ignorant or oblivious of his danger or peril, or where he was aware of it but unable to avoid or escape it.

A person injured through the operation of a street railroad may recover damages under the humanitarian or last clear chance doctrine where he was ignorant or oblivious of his danger or peril and the other elements of the doctrine are present.²⁹ Ordinarily, the injured person's obliviousness of his

peril is an element absolutely necessary to a right of recovery under the humanitarian or last clear chance doctrine,³⁰ but it is otherwise where he was aware of the peril and unable to avoid or escape it,³¹ or where he is a child of such tender age as to give as much notice to the motorman that he must act as obliviousness in an adult would give.³²

Where plaintiff knew car was approaching, but was not aware of danger,³³ as where he believed the car would stop before reaching him,³⁴ or that he had time to cross the track ahead of the car,³⁵ his knowledge does not preclude him from recovering under the humanitarian doctrine.

§ 293. — Defendant's Knowledge or Ignorance of Peril

- a. In general
- b. Of plaintiff's presence on or near track
- c. Of plaintiff's ignorance of, or inability to escape from, danger

a. In General

The last clear chance doctrine applies only where the operator of the streetcar actually knew, or in some jurisdictions should, by the exercise of ordinary and reasonable care, have seen, discovered, or known of plaintiff's peril or danger.

The humanitarian or last clear chance doctrine does not apply in a street railroad accident case

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| <p>16. Iowa.—Elliott v. Des Moines Ry. Co., 271 N.W. 506, 223 Iowa 46.
60 C.J. p 529 note 37.</p> <p>17. Ind.—Terre Haute I. & E. Traction Co. v. Stevenson, 123 N.E. 785, 126 N.E. 3, 189 Ind. 100.
60 C.J. p 529 note 38.</p> <p>18. Puerto Rico.—Bird v. Puerto Rico Ry., Light & Power Co., 33 Puerto Rico 162.</p> <p>19. Conn.—Emmons v. New York & S. Ry. Co., 142 A. 676, 108 Conn. 133.
N.Y.—Bisogno v. New York Rys. Co., 185 N.Y.S. 411, 194 App.Div. 316, appeal dismissed 135 N.E. 947, 233 N.Y. 629.</p> <p>20. Cal.—Harrington v. Los Angeles R. Co., 74 P. 15, 140 Cal. 514, 98 Am.S.R. 85, 63 L.R.A. 238.</p> <p>21. Ind.—Hammond, etc., Electric R. Co. v. Eads, 69 N.E. 555, 32 Ind. App. 249.
N.J.—Consolidated Traction Co. v. Haight, 37 A. 135, 59 N.J.Law 577.</p> <p>2. Conn.—Emmons v. New York &</p> | <p>S. Ry. Co., 142 A. 676, 108 Conn. 133.
60 C.J. p 530 note 43.</p> <p>23. Mo.—Lavine v. United Rys. Co. of St. Louis, App., 217 S.W. 574.</p> <p>24. N.C.—Norman v. Charlotte Electric Ry. Co., 83 S.E. 835, 167 N.C. 533, Ann.Cas.1916E 508.
60 C.J. p 530 note 45.</p> <p>25. Mo.—McGowan v. Wells, 24 S. W.2d 633, 324 Mo. 652.
60 C.J. p 530 note 46.</p> <p>26. Mich.—King v. Grand Rapids Ry. Co., 143 N.W. 36, 176 Mich. 645.</p> <p>27. Mo.—Perry v. Flemming, 296 S. W. 167, 221 Mo.App. 1071—Myers v. St. Louis Transit Co., 73 S.W. 379, 99 Mo.App. 363.</p> <p>28. Mo.—McClellan v. Kansas City Public Service Co., App., 19 S.W.2d 902.</p> <p>29. Mo.—Davis v. Kansas City Public Service Co., 233 S.W.2d 669, 361 Mo. 168.
60 C.J. p 530 note 51.</p> <p>30. Mo.—Johnson v. Kansas City</p> | <p>Public Service Co., 214 S.W.2d 5, 358 Mo. 253.
60 C.J. p 530 note 53.</p> <p>31. Mo.—Newton v. Harvey, App., 202 S.W. 249.</p> <p>32. Mo.—Bryant v. Kansas City Rys. Co., App., 217 S.W. 632.</p> <p>33. Mo.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536—Brungs v. St. Louis Public Service Co., App., 235 S.W.2d 81.
60 C.J. p 530 note 56.</p> <p>Entitled to warning
Where pedestrian came into a position of imminent peril of which he was oblivious after he had seen the streetcar which struck him, pedestrian was entitled to warning bell required by ordinance.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.</p> <p>34. Mo.—Angle v. Fleming, App., 259 S.W. 143.</p> <p>35. Mo.—Woodis v. United Rys. Co. of St. Louis, 203 S.W. 489, 199 Mo. App. 348.</p> |
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where it does not appear that the company or its servants knew, or, in the exercise of ordinary and reasonable care, should have known, of plaintiff's peril or danger in time to avoid the accident.³⁶ Indeed, in a number of jurisdictions the doctrine applies only where the motorman had actual knowledge of plaintiff's peril or danger in time to avoid injury to him;³⁷ but in other jurisdictions the doctrine may apply either where the motorman actually saw, discovered, or knew of plaintiff's peril or danger, or, by the exercise of ordinary and reasonable care, should have seen, discovered, or known of it in time to avoid the collision and injury.³⁸ Where knowledge of plaintiff's peril has been acquired, it creates a special duty to take care on the part of the company and its employees.³⁹

b. Of Plaintiff's Presence on or near Track

Mere knowledge of the presence of a person on or near the track without knowledge of his danger or that he is about to put himself in a position of danger will not render the street railroad company liable for a failure to avoid injuring him.

Mere knowledge of the presence of a person near the track, or on the track some distance away, without knowledge of his actual peril, and without notice, warning, or knowledge that he is about to put himself in a position of danger, does not make the street railroad company liable for a failure to avoid injuring him,⁴⁰ since the company has the right, in the absence of knowledge to the contrary, to act on the assumption that such person will keep out of danger,⁴¹ or at least exercise ordinary and rea-

36. La.—Phelan v. New Orleans Public Service, App., 56 So.2d 173.
Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194.
Mo.—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256.
N.Y.—Hernandez v. Brooklyn & Queens Transit Corp., 32 N.E.2d 542, 284 N.Y. 535.
60 C.J. p 530 note 60.

37. Ala.—Honeycutt v. Birmingham Elec. Co., 181 So. 772, 236 Ala. 221.
Cal.—Taylor v. Pacific Electric Ry. Co., 44 P.2d 680, 6 Cal.App.2d 531.
Ind.—Sowers v. Indiana Service Corporation, 188 N.E. 865, 98 Ind.App. 261.
N.Y.—Panarese v. Union Ry. Co. of New York City, 185 N.E. 84, 261 N.Y. 233.
60 C.J. p 530 note 62.

38. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.
Ky.—Brooks v. New Albany & L. Elec. Ry. Corp., 132 S.W.2d 777, 280 Ky. 157—Cincinnati, N. & C. R. Co. v. Cooper, 132 S.W.2d 324, 279 Ky. 831—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156.

Mo.—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Jants v. St. Louis Public Service Co., 204 S.W.2d 698, 356 Mo. 985—Bootee v. Kansas City Public Service Co., 183 S.W.2d 892, 353 Mo. 716—Lotta v. Kansas City Public Service Co., 117 S.W.2d 296, 342 Mo. 743—Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319—Millhouser v. Kansas City Public Service Co., 55 S.W.2d 673, 331 Mo. 933—Kloekner v. St. Louis Public Service Co., 53 S.W.2d 1043, 331 Mo. 396—Cain v. St. Louis Public Service Co.,

App., 59 S.W.2d 734—Flynn v. St. Louis Public Service Co., App., 41 S.W.2d 885.
Tenn.—Agle v. Knoxville Power & Light Co., 8 Tenn.App. 153.
Va.—Virginia Elec. & Power Co. v. Whitehurst, 8 S.E.2d 296, 175 Va. 339.
Wash.—Scott v. City of Seattle, 83 P.2d 351, 196 Wash. 464.
60 C.J. p 531 note 64.

Circumstances as determinant

How far motorman of a streetcar should see a man's body lying on or near the track in order to charge him with negligence under the doctrine of discovered peril is to be determined from all surrounding circumstances; and a streetcar motorman was not negligent for failure to see an intoxicated pedestrian lying in the shadows of bushes with no part of his body extending across the rails as the car approached him where he lay one hundred feet from street intersection at which motorman was required to stop.—Heydorn v. New Orleans Public Service, La. App., 35 So.2d 893.

39. Ind.—Terre Haute I. & E. Trac-tion Co. v. Stevenson, 123 N.E. 785, 189 Ind. 100.
60 C.J. p 532 note 66.

40. Cal.—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.
Mich.—Beaulieu v. City of Detroit, 292 N.W. 332, 293 Mich. 364.
Mo.—Stith v. St. Louis Public Service Co., 251 S.W.2d 693—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914, 362 Mo. 214—Johnson v. Kansas City Public Service Co., 214 S.W.2d 5, 358 Mo. 253—Elkin v. St. Louis Public Service Co., 74 S.W.2d 600, 335 Mo. 951—Setser v. St. Louis Public Service Co., App., 209 S.W.2d 746—Diel v. St. Louis Public Service Co., 192 S.W.2d 608, 238 Mo.App. 1046—Miller v. Kansas

City Public Service Co., 178 S.W.2d 824, 238 Mo.App. 247—Robards v. Kansas City Public Service Co., 177 S.W.2d 709, 238 Mo.App. 165.
60 C.J. p 532 note 67.

Imminent peril

Motorman's duty under humanitarian doctrine to stop or slacken speed of streetcar, or to warn, in order to avoid collision with automobile, did not arise until driver of automobile was in a position of imminent peril, and in order to bring the case within the humanitarian rule, more is required than a showing of a mere possibility that the accident might have been avoided.—Smith v. St. Louis Public Service Co., Mo.App., 252 S.W.2d 83.

Failure to warn

A motorman was not negligent under the humanitarian rule in not giving warning of his intention to begin crossing paved part of highway at intersection between highway and private right of way of street railroad, where truck driver saw streetcar before it entered paved portion of highway and when truck driver was two hundred feet from it; and where the truck swerved abruptly to left, running parallel with streetcar crossing intersection, ran along street railroad private right of way, truck passenger was thrown out and under rear wheels of streetcar, and truck finally stopped behind front vestibule of streetcar, humanitarian rule did not apply.—Lotta v. Kansas City Public Service Co., 117 S.W.2d 296, 342 Mo. 743.

41. Mo.—Johnson v. St. Louis Public Service Co., 251 S.W.2d 70.
Va.—Virginia Elec. & Power Co. v. Ford, 186 S.E. 84, 166 Va. 619—Driscoll v. Virginia Electric & Power Co., 181 S.E. 402, 609, 166 Va. 538.
60 C.J. p 532 note 68.

sonable care,⁴² and it need not anticipate that a person not in a position of danger will foolishly, heedlessly, or negligently put himself in such a position.⁴³ It is otherwise, however, where the motorman is cognizant of appearances indicating or strongly suggesting danger.⁴⁴ Under an ordinance providing that a motorman shall keep a vigilant watch, more is required of the motorman than is required under the humanitarian doctrine,⁴⁵ and he is required to stop his car on the first appearance of danger,⁴⁶ and he must anticipate that those approaching the track will come within the danger zone and that those within the zone will not seasonably leave it.⁴⁷

c. Of Plaintiff's Ignorance of, or Inability to Escape from, Danger

The last clear chance doctrine will apply where it should have been apparent to the motorman that the plaintiff was oblivious of the peril or that he could not escape therefrom.

Where the motorman of an approaching streetcar saw plaintiff in a position of peril or danger, it is necessary and sufficient to render the humanitarian or last clear chance doctrine applicable that it shall

have been apparent to the motorman either that plaintiff was unaware or oblivious of the peril or danger⁴⁸ or was unable to escape, or extricate himself, therefrom.⁴⁹ Likewise, the doctrine will apply where the operator fails to discover an oblivious pedestrian approaching tracks.⁵⁰

§ 294. Ability and Opportunity to Avoid Injury

Ordinarily, the humanitarian or last clear chance doctrine does not apply where the accident was unavoidable by the exercise of the care required under the circumstances.

Ordinarily, the humanitarian doctrine or doctrine of last clear chance does not apply so as to warrant a recovery of damages from a street railroad company where, after the motorman of the car in question became aware, or, in some jurisdictions, after he, by the exercise of ordinary and reasonable care, should have become aware, of plaintiff's perilous position on or near the track, he did not have time⁵¹ and opportunity,⁵² and it was impossible for him,⁵³ to avoid the collision and injury, by stopping the car or otherwise, with the means at hand⁵⁴ or any

Duty of motorman

Streetcar motorman, having right to assume that driver of slowly approaching truck would stop before going on track, owed no duty to slacken speed of car or sound warning until it was or should have been apparent to him that driver did not intend to stop.—*Elkin v. St. Louis Public Service Co.*, 74 S.W.2d 600, 335 Mo. 951.

Knowledge of danger

A streetcar motorman does not indicate knowledge that a pedestrian is in danger, so as to make the last clear chance doctrine applicable in action for injuries to passenger struck by streetcar, merely by clanging his gong.—*Jackson v. Capitol Transit Co.*, 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032.

42. R.I.—*Halliday v. Rhode Island Co.*, 107 A. 86, 42 R.I. 350. 60 C.J. p 532 note 69.

43. Cal.—*Levin v. Brown*, 185 P.2d 329, 81 Cal.App.2d 913.
Iowa.—*Lynch v. Des Moines Ry. Co.*, 245 N.W. 219, 215 Iowa 1119. 60 C.J. p 532 note 70.

44. Iowa.—*Lynch v. Des Moines Ry. Co.*, supra. 60 C.J. p 532 note 71.

45. Mo.—*Abernathy v. St. Louis Public Service Co.*, 240 S.W.2d 914, 362 Mo. 214.

46. Mo.—*Melton v. St. Louis Public Service Co.*, 251 S.W.2d 663—*Abernathy v. St. Louis Public Service Co.*, 240 S.W.2d 914, 362 Mo. 214.

Under humanitarian rule, the duty to stop streetcar arose when motorman saw or should have seen pedestrian walking alongside track and should have realized that pedestrian was oblivious of approach of streetcar and was intent on pursuing his course in dangerous proximity to track.—*Melton v. St. Louis Public Service Co.*, Mo., 251 S.W.2d 663.

47. Mo.—*Melton v. St. Louis Public Service Co.*, supra.

48. Mo.—*Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, 73 S.W.2d 205, 335 Mo. 319. 60 C.J. p 532 note 73.

49. Cal.—*Darling v. Pacific Electric Ry.*, 242 P. 703, 197 Cal. 702. 60 C.J. p 532 note 74.

50. Mo.—*Crews v. Kansas City Public Service Co.*, 111 S.W.2d 54, 341 Mo. 1090.

51. Md.—*National Hauling Contractors Co. v. Baltimore Transit Co.*, 44 A.2d 450, 185 Md. 158—*Watson v. Storrs*, 175 A. 263, 167 Md. 685. Mich.—*Rosenfeld v. City of Detroit*, 265 N.W. 490, 274 Mich. 650.

N.H.—*Katsikas v. Manchester Street Ry.*, 3 A.2d 821, 90 N.H. 21.
N.Y.—*Snyder v. Union Ry. Co. of*

New York City, 255 N.Y.S. 155, 234 App.Div. 320. 60 C.J. p 533 note 78.

Elements for consideration

In applying rule of last clear chance to street railroad company, questions of motorman's attention, control of car, and speed are important elements.—*Washington Ry. & Electric Co. v. Chapman*, 65 F.2d 486, 62 App.D.C. 140, certiorari denied *Chapman v. Washington Ry. & Electric Co.*, 54 S.Ct. 75, 290 U.S. 661, 78 L.Ed. 572.

52. La.—*Washington v. New Orleans Public Service, App.*, 162 So. 213—*Favaza v. New Orleans Public Service, App.*, 154 So. 457, followed in *Frere v. New Orleans Public Service*, 154 So. 462—*Schmidt & Ziegler v. New Orleans Public Service*, 137 So. 871, 18 La.App. 722. N.Y.—*Esposito v. City of New York*, 89 N.Y.S.2d 781, 275 App.Div. 912. Va.—*Lynchburg Traction & Light Co. v. Wright*, 170 S.E. 569, 161 Va. 251. 60 C.J. p 533 note 79.

53. Cal.—*Powell v. Pacific Elec. Ry. Co.*, 216 P.2d 448, 35 Cal.2d 40. Md.—*Baltimore Transit Co. v. Revere Copper & Brass*, 72 A.2d 4, 194 Md. 611—*Phillips v. Baltimore Transit Co.*, 71 A.2d 430, 194 Md. 527. 60 C.J. p 533 note 80.

54. La.—*Soards v. Shreveport Rys. Co.*, App., 8 So.2d 343—*Washington*

reasonable means,⁵⁵ by the exercise of ordinary and reasonable care,⁵⁶ the care required by the circumstances,⁵⁷ or the utmost care.⁵⁸ Conversely, where the other elements of the doctrine are present, it applies where the car could have been stopped in time to avoid the collision.⁵⁹ Also, inability to avoid the injury, by stopping the car or otherwise, does not prevent the application of the doctrine where such inability was due to the company's own negligence in not having a competent driver or motorman on the car,⁶⁰ not having it properly equipped,⁶¹ or in running the car, at the time, at a reckless or unlawful rate of speed.⁶²

§ 295. Care Required after Peril Is, or Should Be, Discovered

After he discovers, or, in some jurisdictions after he, in the exercise of ordinary and reasonable care, should discover, the peril or danger, the motorman must use that degree of care which an ordinarily and reasonably prudent person, skilled as a motorman, would use under similar circumstances to avoid a collision.

After the motorman of an approaching streetcar discovers, or, according to the rule obtaining in some jurisdictions, after he, in the exercise of ordinary and reasonable care, should discover, the perilous position of a person or his property on, or in close proximity to, the track he should use due⁶³ and proper⁶⁴ care to avoid a collision. In some decisions it is stated that he is required to exercise ordinary and reasonable care,⁶⁵ and in other decisions it is declared that he is required to exercise a high degree of care.⁶⁶ These statements are not irreconcilable, as the motorman must use that degree of care which an ordinarily and reasonably prudent person, skilled as a motorman, would use under similar circumstances to avoid injury,⁶⁷ and such a person would be expected to act with a high degree of intelligent diligence where an emergency requiring quick action to prevent injury arose.⁶⁸ The motorman should act promptly⁶⁹ and use all possible, available, and reasonable means, consistent with safety, to avoid a collision and injury.⁷⁰ More

v. New Orleans Public Service, App., 162 So. 213—Vergo v. Shreveport Rys. Co., 139 So. 737, 19 La. App. 647.

Md.—State, for Use of Ridgway v. Capital Transit Co., 72 A.2d 245, 194 Md. 656—Phillips v. Baltimore Transit Co., 71 A.2d 430, 194 Md. 527—Watson v. Storrs, 175 A. 263, 167 Md. 685.

Va.—Lynchburg Traction & Light Co. v. Wright, 170 S.E. 569, 161 Va. 251.

60 C.J. p 533 note 81.

55. Conn.—Petrillo v. Connecticut Co., 102 A. 607, 92 Conn. 235.

Tex.—San Antonio Traction Co. v. Kumpf, Civ.App., 99 S.W. 863.

56. Conn.—Curtis v. Bristol & Plainville Electric Co., 128 A. 517, 102 Conn. 238.

60 C.J. p 533 note 83.

57. Mo.—Taylor v. Metropolitan St. Ry. Co., 165 S.W. 327, 256 Mo. 191.

58. Cal.—Arnold v. San Francisco-Oakland Terminal Rys., 164 P. 798, 175 Cal. 1.

60 C.J. p 533 note 85.

59. Kan.—Frogge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.

Mo.—Conroy v. St. Joseph Ry., Light, Heat & Power Co., App., 130 S.W.2d 689.

60 C.J. p 533 note 87.

Circumstances for consideration

In action for injuries sustained by plaintiffs' minor son in a collision at intersection between an automobile

in which he was riding and an electric trolley bus, condition of road, weather, and brakes were circumstances to be considered in determining whether accident could have been avoided under the humanitarian rule.—Conroy v. St. Joseph Ry., Light, Heat & Power Co., supra.

Right of way

A motorman who had right of way could rely to a reasonable extent on expectation that motorist would exercise due care, but could not rest exclusively on such assumption and proceed unmindful of attending circumstances which might imperil his own safety or that of others.—Brule v. Union St. Ry. Co., 52 N.E.2d 388, 315 Mass. 268.

60. Ark.—Little Rock Traction, etc., Co. v. Morrison, 62 S.W. 1045, 69 Ark. 289.

61. Ark.—Little Rock Traction, etc., Co. v. Morrison, supra.

Cal.—Scott v. San Bernardino Valley Traction Co., 93 P. 677, 152 Cal. 604.

62. Mo.—Bumgardner v. St. Louis Public Service Co., 102 S.W.2d 594, 340 Mo. 521.

60 C.J. p 533 note 90.

Antecedent excessive speed

Fact that humanitarian doctrine, notwithstanding antecedent excessive speed of streetcar which struck rear of automobile, became applicable to situation did not therefore transform antecedent negligent speed into non-negligent or lawful speed, where antecedent negligent speed continued

until collision occurred, since otherwise no recovery could be had for primary negligence based on negligent speed.—Bumgardner v. St. Louis Public Service Co., supra.

63. Okl.—Pittsburg Ry. Co. v. Campbell, 236 P. 27, 110 Okl. 79.

64. Cal.—Berguin v. Pacific Electric Ry. Co., 263 P. 220, 203 Cal. 116.

65. N.J.—Miller v. Public Service Co-ordinated Transport, 168 A. 409, 111 N.J.Law 339.

R.I.—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275.

60 C.J. p 534 note 95.

66. Mo.—Millhouser v. Kansas City Public Service Co., 55 S.W.2d 673, 331 Mo. 933.

60 C.J. p 534 note 96.

67. Mo.—Williams v. Fleming, 267 S.W. 6, 218 Mo.App. 563.

60 C.J. p 534 note 97.

68. Ala.—Montgomery Light & Traction Co. v. Baker, 67 So. 269, 190 Ala. 144.

69. Ala.—Mobile Light & R. Co. v. Gadik, 100 So. 837, 211 Ala. 582.

60 C.J. p 534 note 99.

70. U.S.—Mills v. Denver Tramway Corp., C.C.A.Colo., 155 F.2d 808.

Tex.—Dallas Ry. & Terminal Co. v. Glenn, Civ.App., 144 S.W.2d 961, error dismissed, judgment correct.

60 C.J. p 534 note 1.

Duty to passengers

A part of the duty, required of motorman operating a streetcar across a highway at intersection with pri-

specifically, he should, where he has time and opportunity to do so, stop the car,⁷¹ or at least reduce its speed,⁷² and give a warning by sounding a gong or otherwise.⁷³ On the other hand, the street railroad company is not liable under the humanitarian or last clear chance doctrine where, after it discovered, or by reasonable care could have discovered, the injured person's peril, it exercised all reasonable care to avoid the accident,⁷⁴ as where the motorman acted promptly⁷⁵ and did all that it was possible for him to do to avoid the accident.⁷⁶

Also, there can be no recovery under the humanitarian doctrine for a mere error in judgment on the part of the motorman in attempting to stop the car by means of brakes, which he knew to be defective, instead of reversing the power.⁷⁷

A supervisor of the company directing a motorman may, under some circumstances, be charged with the same duty as the motorman in respect of exercising ordinary care to avert injury to a person about to enter the danger zone.⁷⁸

9. ACTIONS FOR INJURIES

§ 296. In General

Actions for injuries resulting from the operation of street railroads are subject to the general rules governing actions of like character.

In actions for injuries resulting from the operation of street railroads, the cause of action, and the defenses which are available to defendant, are governed by the law of the place where the injury occurred.⁷⁹ A franchise contract requiring the railroad to comply with municipal ordinances does not give a person, injured as a result of the operation of

the railroad, the right to sue for breach of contract.⁸⁰

§ 297. Jurisdiction and Venue

In the absence of a special statute providing otherwise, questions with respect to jurisdiction and venue in actions against street railroads for injuries are governed by the general rules applied in civil actions.

Except in so far as regulated by special statutory provisions, the rules governing civil actions for injuries generally apply in actions for injuries against street railroad companies, with respect to questions of jurisdiction⁸¹ and venue.⁸² A statute prescribing

vate right of way of street railroad when truck was approaching intersection, was not to do something which would endanger his passengers.—*Lotta v. Kansas City Public Service Co.*, 117 S.W.2d 296, 342 Mo. 743.

71. U.S.—*Mills v. Denver Tramway Corp.*, C.C.A.Colo., 155 F.2d 808. 60 C.J. p 534 note 3.

72. Mo.—*Hill v. Kansas City Rys. Co.*, 233 S.W. 205, 289 Mo. 193. 60 C.J. p 534 note 4.

73. U.S.—*Mills v. Denver Tramway Corp.*, C.C.A.Colo., 155 F.2d 808. Mo.—*Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, 73 S.W.2d 205, 335 Mo. 319. 60 C.J. p 534 note 5.

Failure to warn

In order to constitute negligence under humanitarian rule in failing to warn motorist of approach of streetcar by sounding gong, motorman must be able to warn motorist and prevent collision thereby, see or be able to see motorist in place of danger in time to sound gong, and know that there will be collision unless gong is sounded.—*Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, *supra*.

74. N.Y.—*Hernandez v. Brooklyn &*

Queens Transit Corp., 32 N.E.2d 542, 284 N.Y. 535. 60 C.J. p 534 note 6.

75. Md.—*State v. United Rys. & Electric Co. of Baltimore*, 115 A. 109, 139 Md. 306. 60 C.J. p 535 note 7.

76. Cal.—*Behne v. Pacific Elec. Ry. Co.*, 86 P.2d 843, 30 Cal.App.2d 437—*Guyer v. Pacific Elec. Ry. Co.*, 75 P.2d 550, 24 Cal.App.2d 499—*Korchak v. Pacific Electric Ry. Co.*, 48 P.2d 752, 9 Cal.App.2d 89. Conn.—*Skelton v. Connecticut Co.*, 180 A. 302, 120 Conn. 689. Iowa.—*Hitchcock v. Iowa Southern Utilities Co. of Delaware*, 6 N.W. 2d 29, 233 Iowa 301. 60 C.J. p 535 note 8.

Attempt to clear intersection

Where truck was one hundred ten feet from intersection of highway with private right of way of street railroad at time streetcar was halfway across twenty-four-foot strip of paved highway, motorman was not negligent, under humanitarian rule, in using full power to get car off highway, instead of stopping and blocking paved portion of highway.—*Lotta v. Kansas City Public Service Co.*, 117 S.W.2d 296, 342 Mo. 743.

77. Mo.—*Greear v. Harvey*, 177 S.W. 780, 195 Mo.App. 8, certiorari

quashed, *Sup.*, *State v. Ellison*, 182 S.W. 961.

78. Mo.—*Bocklitz v. Wells*, 261 S.W. 955, 214 Mo.App. 612. 60 C.J. p 535 note 10.

79. Mo.—*Smith v. East St. Louis Ry. Co.*, App., 152 S.W.2d 204.

80. Tex.—*Northern Texas Traction Co. v. Hill*, Civ.App., 297 S.W. 778.

81. Mass.—*Brookhouse v. Union R. Co.*, 132 Mass. 178. 60 C.J. p 537 note 25.

82. Ill.—*Chicago City R. Co. v. McMeen*, 102 Ill.App. 318, affirmed 68 N.E. 1093, 206 Ill. 108. 60 C.J. p 537 note 26.

Interurban electric railroad operating over private right of way was a "railroad" within statute authorizing bringing of personal injury action in any county through which railroad passes.—*Watson v. Brady*, 185 N.E. 516, 205 Ind. 1.

Purpose of statute

The purpose of the statute, stating places where an action for injuries or death against a railroad company, interurban, suburban, or street railroad, and stage companies, should be brought, is to prevent the filing of actions in a court far removed from place where cause of action arose,

the place where the action may be brought should be liberally construed where it is purely procedural and does not create a new remedy.⁸³

§ 298. Time to Sue and Limitations

Where special statutes exist, suit must be brought within the time prescribed thereby.

Suit to recover for injuries caused by a street railroad must be brought within the time prescribed by special statutory provisions.⁸⁴ The application of general statutes of limitation is discussed in Limitations of Actions § 1 et seq.

§ 299. Parties

Subject to statutory variations the general rules as to parties in civil actions apply in actions for damages caused by the operation of street railroads.

The general rules applicable to parties in civil actions, and the provisions of statutes governing actions against street railroads for injuries resulting from operation of the railroad determine who are necessary⁸⁵ and proper⁸⁶ parties, and control the joinder of parties,⁸⁷ the substitution of parties,⁸⁸ or the bringing in of new parties.⁸⁹ Although a permissive statute allows the assignee of a chose in action to sue in his own name, the owner of a motor vehicle damaged by collision with a streetcar may sue in his own name for damages, although he has assigned his claim to an insurer.⁹⁰

§ 300. Process and Appearance

Service of process in accordance with a statute applicable only to railroads does not confer jurisdiction over a street railroad.

Service of process in accordance with a statute applicable only to railroads does not confer jurisdiction over a street railroad.⁹¹ A statute permitting service to be made on any conductor of a railroad company owning or operating an interurban electric railway, except conductors of electric railroads operating within cities, does not prevent valid service within a city on the conductor of an electric interurban railroad.⁹²

The construction and operation of general statutes relating to process, and the general rules governing process in civil actions are discussed in Process § 1 et seq.

§ 301. Notice of Claim

Where a statute so requires, the plaintiff must give proper notice, within the time prescribed, of the time, place, and cause of injury.

In order that an injured person may bring an action against a street railroad company, he must comply with a statute requiring that the company be given notice within the time prescribed of the time, place, and cause of the injury.⁹³ The purpose of such a statute is to give the street railroad an opportunity to investigate while the facts are fresh and thus protect itself against unfounded claims.⁹⁴ Failure to file a claim against a city within the prescribed time is not excused on the ground that the injured person's mental faculties were continuously impaired by the injury until after expiration of the statutory period,⁹⁵ or on the ground that literal compliance was not necessary where the officials of the city operating the streetcar in its

with exception that plaintiff may maintain action in the county where he resides.—New York, C. & St. L. R. Co. v. Matzinger, 25 N.E.2d 349, 136 Ohio St. 271.

83. Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

84. Mass.—McMahon v. Lynn, etc., R. Co., 77 N.E. 826, 191 Mass. 295.

85. Ind.—Indianapolis Traction & Terminal Co. v. Springer, 93 N.E. 707, 47 Ind.App. 35.

Iowa.—Caligiuri v. Des Moines Ry. Co., 288 N.W. 702, 227 Iowa 466.

86. Ohio.—Connors v. Cincinnati St. Ry. Co., 4 Ohio Supp. 197.

Pa.—Johnson v. Pittsburgh Rys. Co., 34 Pa. Dist. & Co. 209, 86 Pittsb. Leg. J. 585.

Tex.—Brooks v. Galveston City R.

Co., Civ.App., 74 S.W. 330—Dallas Consolidated Traction R. Co. v. Hurley, 31 S.W. 73, 10 Tex.Civ.App. 246.

87. Mo.—Camden v. St. Louis Public Service Co., 206 S.W.2d 699, 239 Mo. App. 1199.

Ohio.—Connors v. Cincinnati St. Ry. Co., 4 Ohio Supp. 197.

Pa.—Weiss v. Pittsburgh Rys. Co., 152 A. 674, 301 Pa. 539.

88. Ohio.—Ksenich v. Lorain St. Ry. Co., App., 31 N.E.2d 266.

89. Wis.—Ertel v. Milwaukee Electric Ry. & Light Co., 160 N.W. 263, 164 Wis. 380.

90. Conn.—Smith v. Waterbury, etc., Tramway Co., 121 A. 873, 99 Conn. 446.

91. Ohio.—Greene v. Woodland Ave.,

etc., St. R. Co., 56 N.E. 642, 62 Ohio St. 67.

92. Mich.—Halladay v. Detroit United R. Co., 119 N.W. 445, 155 Mich. 436, followed in Watkins v. Detroit United R. Co., 119 N.W. 447, 155 Mich. 440.

93. Mass.—Berlandi v. Union Freight R. Co., 16 N.E.2d 17, 301 Mass. 47.

60 C.J. p 538 notes 35, 36.

Liability imposed by statute
Mass.—Berlandi v. Union Freight R. Co., supra.

94. Conn.—Delaney v. Waterbury & Milldale Tramway Co., 99 A. 503, 91 Conn. 177—Peck v. Fair Haven, etc., R. Co., 58 A. 757, 77 Conn. 161.

95. Cal.—O'Brien v. City and County of San Francisco, App., 116 P.2d 450.

proprietary capacity had full knowledge of the accident.⁹⁶

Sufficiency of notice. The sufficiency of the notice is to be tested with respect to its purpose in furnishing the recipients such available information as is calculated to assist them in self-protection, and in applying the test the circumstances of each case are to be considered.⁹⁷ For the purpose of a husband's recovering consequential damages resulting from injury to his wife, a notice given by his wife is sufficient.⁹⁸

Waiver of notice. While it may be that a street railroad may waive the statutory notice, the waiver must be clear and relied on by plaintiff.⁹⁹

§ 302. Complaint, Declaration, or Petition

- a. In general
- b. Duty of defendant
- c. Breach of duty or negligence
- d. Proximate cause
- e. Power of defendant to avoid injury; last clear chance
- f. Willful or wanton acts or gross negligence
- g. Negating defenses; contributory negligence

a. In General

The plaintiff's initial pleading in an action against a

street railroad must state facts sufficient to constitute a legal cause of action.

In an action against a street railroad for injury caused by negligent management or operation of the street railroad, the complaint, declaration, or petition should set out with such reasonable certainty as is necessary to inform defendant of the acts or omissions on which its liability is based all the facts essential to constitute a legal cause of action.¹ Thus, the complaint must set out clear and distinct allegations showing the injured person's right to be on or near the tracks,² and that the acts or omissions constituting the negligence were caused by defendant's servant³ in the course of his employment.⁴ The complaint should be a concise, summary recital of the material facts relied on,⁵ and need not allege immaterial or irrelevant matters,⁶ although the fact that it does allege such matters does not render the pleading bad.⁷ Mere conclusions of law should not be alleged.⁸ In construing a count to determine whether its averments are sufficient, it is not permissible to segregate one part from another, but all of its averments must be construed and considered together.⁹

Ownership or operation. A complaint for injuries caused by negligence with respect to the condition or use of cars or other property must show that such property was owned by, or in possession or control of, defendant at the time of the injuries.¹⁰

Alleging separate acts of negligence. In accord-

96. Cal.—O'Brien v. City and County of San Francisco, *supra*.

97. Conn.—Delaney v. Waterbury & Milldale Tramway Co., 99 A. 503, 91 Conn. 177.
60 C.J. p 538 note 38.

98. Conn.—Peck v. Fair Haven, etc., R. Co., 58 A. 757, 77 Conn. 161.

99. Conn.—Shalley v. Danbury, etc., Horse R. Co., 30 A. 135, 64 Conn. 381.
60 C.J. p 538 note 40.

1. Ill.—Butler v. Illinois Traction, Inc., 253 Ill.App. 135.
R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.
60 C.J. p 539 note 44.

Complaint held sufficient

Cal.—Gibson v. Garcia, 216 P.2d 119, 96 Cal.App.2d 681.

Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543—Terre Haute, Indianapolis & Eastern Traction Co. v. Sawyer, 179 N.E. 554, 95 Ind.App. 8.

Notice of injury

The statutory notice of injuries motorists sustained because of a defective railroad track in a street necessary to enforce motorists' actions must be pleaded.—Berlandi v. Union Freight R. Co., 16 N.E.2d 17, 301 Mass. 47.

2. Ala.—Birmingham Ry., Light & Power Co. v. Nicholas, 61 So. 361, 181 Ala. 491.
60 C.J. p 539 note 45.

3. Ala.—Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657.
60 C.J. p 539 note 48.

4. Ala.—Birmingham Ry., Light & Power Co. v. Fox, *supra*.
60 C.J. p 539 note 49.

Emergency authorizing employment of assistance by motorman

Ala.—Burkhalter v. Birmingham Elec. Co., 6 So.2d 864, 242 Ala. 388.

5. Pa.—Philadelphia Rapid Transit Co. v. King, 169 A. 23, 110 Pa.Super.

475—Walaconis v. Maguire, Com. Pl., 43 Sch.Leg.Rec. 228.

6. Mo.—Koenig v. Union Depot R. Co., 73 S.W. 637, 173 Mo. 698.
60 C.J. p 539 note 51.

7. Ind.—Hammond, etc., Electric R. Co. v. Eads, 69 N.E. 555, 32 Ind. App. 249.
60 C.J. p 539 note 52.

8. Ala.—Kilgore v. Birmingham Ry., Light & Power Co., 75 So. 996, 200 Ala. 238—Birmingham Ry., Light & Power Co. v. Nicholas, 61 So. 361, 181 Ala. 491.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn. App. 42.
60 C.J. p 539 note 53.

9. Ala.—Birmingham Ry., Light & Power Co. v. Morris, 50 So. 198, 163 Ala. 190.
60 C.J. p 539 note 54.

10. Ala.—Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657.
60 C.J. p 540 note 55.

ance with general rules, plaintiff may allege several acts of negligence, not inconsistent with each other, in one paragraph or count,¹¹ such as ordinary negligence and last clear chance doctrine.¹²

Amendment. In accordance with, and subject to, general rules, an amendment to the complaint may be allowed where it is not inconsistent with, or contradictory of, the allegations of the complaint,¹³ or where it does not introduce a new or different cause of action.¹⁴ Where the general charge of negligence causing the injury is alleged in the original petition, it is not necessary to repeat it in an amended petition charging specific acts of negligence.¹⁵

Incapacity of person injured. Where it is claimed that the person injured is non sui juris, such incapacity, it has been held, being a matter of fact, should be pleaded.¹⁶

Certainty, definiteness, and particularity. In accordance with, and subject to, general rules, material facts must be stated with a reasonable degree of particularity and certainty in order that defendant may be apprised of what it will be called on to defend,¹⁷ but plaintiff is required to state the facts only as far as they appear to be properly within his knowledge.¹⁸

Consistency or repugnancy. While a petition is defective where its allegations are inconsistent and repugnant,¹⁹ an allegation of the humanitarian doctrine with other allegations not inconsistent there-

with is proper.²⁰ Thus, allegations of negligence in running a streetcar at an excessive rate of speed and negligence under the humanitarian doctrine are not inconsistent.²¹ Where the humanitarian doctrine does not necessarily presuppose that the injured person was negligent, an allegation of due care is not inconsistent with a pleading of the humanitarian doctrine.²²

b. Duty of Defendant

The existence of a legal duty on the part of the defendant to exercise care as to the person or property injured, at the time and place of the injury, must be shown by the plaintiff's pleading.

The complaint must show the existence of a legal duty on the part of defendant to exercise care as to the person or property injured, at the time and place of the injury,²³ and advantage may be taken by demurrer of a failure to allege such duty owed.²⁴ Where it is the duty of a street railroad company to exercise reasonable care so to construct and maintain its tracks as to keep the street in a reasonably safe condition for travel, it is not necessary, it has been held, to allege such duty.²⁵

Knowledge of danger or defect. Where knowledge by defendant of the danger or defective condition which caused the injuries is an essential element of its duty and consequent negligence with respect thereto, plaintiff must allege the existence of actual or constructive knowledge of the danger or defect by defendant.²⁶

11. Mo.—Dunn v. Kansas City Rys. Co., App., 204 S.W. 592.
60 C.J. p 540 note 57.

12. Mo.—Roemer v. Wells, App., 257 S.W. 1056—Dunn v. Kansas City Rys. Co., App., 204 S.W. 592.

13. Mo.—Carey v. Metropolitan St. Ry. Co., 101 S.W. 1123, 125 Mo.App. 188.
60 C.J. p 540 note 60.

14. R.I.—Butler v. Rhode Island Co., 68 A. 425.
60 C.J. p 540 note 61.

15. Ky.—Louisville R. Co. v. Will, 66 S.W. 628, 23 Ky.L. 1961.

16. Ind.—Citizens' St. R. Co. v. Hamer, 62 N.E. 658, 63 N.E. 778, 29 Ind. App. 426.

17. Kan.—Frogge v. Kansas City Public Service Co., 157 P.2d 537, 159 Kan. 687.

Mo.—Rosemann v. United Rys. Co. of St. Louis, App., 180 S.W. 452.
60 C.J. p 540 note 66.

Allegations held sufficient

Ind.—Evansville & S. Traction Co. v. Montgomery, 98 N.E. 731, 50 Ind. App. 528.

60 C.J. p 540 note 66 [a].

18. Ill.—Chicago City R. Co. v. Jennings, 41 N.E. 629, 157 Ill. 274.

19. Ala.—Birmingham Elec. Co. v. Echols, 32 So.2d 379, 249 Ala. 589.
60 C.J. p 541 note 69.

20. Mo.—Heinzle v. Metropolitan St. R. Co., 111 S.W. 536, 213 Mo. 102—Gaedis v. Metropolitan St. R. Co., 143 S.W. 565, 161 Mo.App. 225.

21. Mo.—Farrar v. Metropolitan St. Ry. Co., 155 S.W. 439, 249 Mo. 210.
60 C.J. p 541 note 72.

22. Mo.—Bybee v. Dunham, App., 198 S.W. 190—Keyes v. Metropolitan St. Ry. Co., 144 S.W. 166, 161 Mo.App. 545.

23. Ala.—Clark v. Birmingham Elec. Co., 181 So. 294, 236 Ala. 108.
60 C.J. p 541 note 75.

Allegations held sufficient

Cal.—Gibson v. Garcia, 216 P.2d 119, 96 Cal.App.2d 681.

Ill.—Valuch v. Rawson, 270 Ill.App. 583.
60 C.J. p 541 note 75 [a].

24. Ala.—Mobile Light & R. Co. v. Harold, 101 So. 163, 20 Ala.App. 125.
Ind.—Evansville Electric Ry. Co. v. Folz, 93 N.E. 866, 47 Ind.App. 58.

25. Tex.—San Antonio Traction Co. v. Cassanova, Civ.App., 154 S.W. 1190.
60 C.J. p 541 note 78.

26. Mo.—Asmus v. United Rys. Co. of St. Louis, 140 S.W. 933, 160 Mo. App. 616.
60 C.J. p 541 note 80.

Allegations held sufficient

Pa.—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503.

Duty imposed by statute or ordinance. Where the injury occurs through the neglect of a street railroad to comply with a city ordinance and the action is based on such violation, the ordinance should be pleaded.²⁷ It need not be set out in *hæc verba*,²⁸ but that part of the ordinance relied on, or all the substantial part thereof, should be set out,²⁹ and it should be averred that the ordinance was in force at the time of the injury.³⁰

c. Breach of Duty or Negligence

The plaintiff must allege facts showing a breach of duty or negligence on the part of the defendant, and, where the negligence charged is a breach of a duty imposed by statute or ordinance, the plaintiff must allege facts showing a breach of duty in violation of such statute or ordinance.

Having set out the duty owing to plaintiff by defendant, in accordance with, and subject to, rules of pleading in actions for negligence generally, plaintiff must clearly allege facts showing that defendant's acts or omissions causing the injury were in breach of such duty.³¹ The complaint fails to state a cause of action in negligence where it does not allege an act done or omitted negligently, or allege facts from which the court can say that the acts done or omitted constituted negligence.³² Although there are some decisions to the contrary,³³ it is ordinarily sufficient to allege such negligence in general terms, without setting forth the specific

acts constituting it,³⁴ or averring the name of the negligent servant,³⁵ unless there is a motion to make more specific.³⁶ An allegation of sufficient acts causing the injury, coupled with an averment that they were negligently done, is sufficient;³⁷ but, if the allegations undertake to set forth such acts without stating that they were negligently done, it must appear by direct averment that the acts causing the injury were per se the result of negligence, or negligence must appear from a statement of such facts as certainly raise the presumption that the injury was the result of defendant's negligence.³⁸

In order to hold a complaint sufficient it is not necessary that the acts of negligence charged be negligence per se,³⁹ or in violation of a statutory duty or a duty imposed by ordinance,⁴⁰ but it is sufficient if all the acts of negligence charged, when taken together, show a duty owing the injured person, and that the failure to perform such duty resulted in the injuries complained of.⁴¹ While the duty of a motorman to stop the car after he has discovered or should have discovered the peril of a person on or near the tracks may be subordinate to his duty to safeguard the passengers, whether the stop could have been made without injury to the passengers need not be specially pleaded,⁴² but a general averment that the motorman negligently failed to exercise due care is sufficient.⁴³

27. Ala.—Birmingham Ry., Light & Power Co. v. Fuqua, 56 So. 578, 174 Ala. 631.
60 C.J. p 542 note 83.

28. Ala.—Birmingham Ry., Light & Power Co. v. Fuqua, *supra*.

29. Ala.—Birmingham Ry., Light & Power Co. v. Fuqua, *supra*.

30. Ala.—Birmingham Ry., Light & Power Co. v. Fuqua, *supra*.
60 C.J. p 542 note 86.

31. Fla.—Tampa Electric Co. v. McCulloch, 156 So. 259, 115 Fla. 680.
Wash.—Lamoreaux v. Tacoma Ry. & Power Co., 28 P.2d 1019, 176 Wash. 307.
60 C.J. p 542 note 89.

Allegations held sufficient

(1) An allegation of petition that plaintiff's automobile was violently struck in rear by defendant's streetcar, which was being operated by defendant's employee in negligent manner, was not allegation of general negligence, restricted by allegations of particular or specific negligence, but was allegation of specific negligence and, hence, complete within it-

self.—State ex rel. Spears v. McCullen, 210 S.W.2d 68, 357 Mo. 686.

(2) Other allegations held sufficient see 60 C.J. p 542 note 89 [a].

32. Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393.
60 C.J. p 543 note 90.

33. Del.—Loteman v. People's Ry. Co., 76 A. 478, 24 Del. 568.
60 C.J. p 543 note 91.

34. Ala.—Birmingham Elec. Co. v. Jones, 176 So. 203, 234 Ala. 590.
R.I.—Reichwein v. United Elec. Rys. Co., 27 A.2d 845, 68 R.I. 365.
60 C.J. p 543 note 92.

Allegations held sufficient

Ga.—Georgia Power Co. v. Gillespie, 173 S.E. 755, 48 Ga.App. 688.
Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.
60 C.J. p 543 note 92 [c].

35. Ala.—Anniston Electric, etc., Co. v. Rosen, 48 So. 798, 159 Ala. 195, 133 Am.S.R. 32—Birmingham R., etc., Co. v. City Stable Co., 24 So. 558, 119 Ala. 615, 72 Am.S.R. 955.

36. U.S.—Southern Electric R. Co. v.

Hageman, Mo., 121 F. 262, 57 C.C.A. 348, certiorari denied 24 S.Ct. 843, 191 U.S. 572, 48 L.Ed. 307.
60 C.J. p 543 note 94.

37. Mo.—Quinly v. Springfield Traction Co., 165 S.W. 346, 180 Mo.App. 287.
60 C.J. p 544 note 95.

38. Fla.—Consumers' Electric Light, etc., Co. v. Pryor, 32 So. 797, 44 Fla. 354.
60 C.J. p 544 note 96.

39. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. McDermott, 141 N.E. 362, modified on other grounds 144 N.E. 620, 82 Ind. App. 134.

40. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. McDermott, 144 N.E. 620, 82 Ind.App. 134.

41. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. McDermott, 144 N.E. 620, 82 Ind.App. 134.

42. Mo.—Wagner v. Metropolitan St. Ry. Co., 142 S.W. 463, 160 Mo.App. 334.

43. Mo.—Wagner v. Metropolitan St. Ry. Co., *supra*.

Breach of statutory duty. Where the negligence charged consists of acts or omissions in violation of a duty imposed by statute or ordinance, in order to allege a cause of action the declaration must allege facts which show a breach of duty in violation of such statute or ordinance.⁴⁴ A complaint setting up a violation of an ordinance which has been repealed prior to the accident does not state a cause of action.⁴⁵ Where the ordinance is merely declaratory of the common law, the legal effect of pleading it specially is the same as if the facts were alleged without reference to the ordinance.⁴⁶

d. Proximate Cause

The plaintiff must show by his pleading that the negligence of the defendant was the proximate cause of his injury.

Since defendant is liable only for injuries which are proximately caused by its negligence, plaintiff, having set out defendant's duty to him, and a breach of that duty, must also show that the negligence of defendant was the proximate cause of the injury complained of.⁴⁷ A mere allegation of negligence on the part of defendant and of the loss or injury sustained does not charge defendant with responsibility for the damage.⁴⁸ The complaint must allege that defendant's alleged negligence was the sole cause of the injury or that it contributed to the injury.⁴⁹ The complaint is insufficient to state a cause of action as against a demurrer where it fails to show that the negligence charged was the cause

of the injury,⁵⁰ or where it appears that the injury was not proximately caused by the negligence charged⁵¹ but by an independent intervening agency.⁵²

e. Power of Defendant to Avoid Injury; Last Clear Chance

In some jurisdictions, but not others, the last clear chance or humanitarian doctrine may be invoked and relied on without being specially pleaded.

While in some jurisdictions plaintiff cannot recover on negligence which warrants the application of the last clear chance doctrine without allegations bringing the case within such doctrine,⁵³ in other jurisdictions recovery may be had under a general allegation of negligence.⁵⁴ An allegation of initial negligence is insufficient.⁵⁵ If recovery is sought under the discovered peril doctrine the essential elements must be alleged, or implied, from plaintiff's allegations.⁵⁶ An allegation that defendant failed to exercise due care after discovering plaintiff's peril is sufficient,⁵⁷ without alleging that defendant negligently failed to use due care.⁵⁸ In jurisdictions where actual knowledge of plaintiff's peril is required, an allegation that defendant actually knew is necessary.⁵⁹ In jurisdictions where actual knowledge of plaintiff's peril is not necessary, an allegation that defendant failed to exercise due care to avoid injury after it had or could have discovered plaintiff's peril is sufficient.⁶⁰

44. Ind.—Union Traction Co. v. Taylor, 135 N.E. 255, 81 Ind.App. 257. 60 C.J. p 544 note 5.

45. Mont.—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124.

46. Tex.—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W. 2d 884, affirmed 114 S.W.2d 859, 131 Tex. 319.

47. Ga.—Annis v. Georgia Power Co., 157 S.E. 242, 42 Ga.App. 754. 60 C.J. p 545 note 12.

48. Ala.—Kilgore v. Birmingham Ry., Light & Power Co., 75 So. 996, 200 Ala. 238.

49. Ala.—Ex parte McNeil, 85 So. 568, 17 Ala.App. 317, certiorari granted 85 So. 569, 204 Ala. 81. 60 C.J. p 545 note 14.

50. Ga.—Kirk v. Savannah Electric & Power Co., 178 S.E. 470, 50 Ga. App. 468.

51. Md.—State, for Use of Aronoff v. Baltimore Transit Co., 80 A.2d 13. 60 C.J. p 545 note 15.

52. Ga.—Annis v. Georgia Power Co., 157 S.E. 242, 42 Ga.App. 754.

53. Ga.—Annis v. Georgia Power Co., supra. 60 C.J. p 545 note 17.

54. Or.—Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421. 60 C.J. p 545 note 20.

55. Cal.—Langford v. San Diego Electric Ry. Co., 164 P. 398, 174 Cal. 729.

56. Ala.—Hilton v. Birmingham Ry., Light & Power Co., 68 So. 343, 192 Ala. 474. 60 C.J. p 546 note 24.

57. Tex.—Dallas Railway & Terminal Co. v. Bishop, Civ.App., 153 S.W.2d 298.

58. Tex.—Northern Texas Traction Co. v. Thetford, Civ.App., 28 S.W. 2d 906. 60 C.J. p 546 note 25.

59. Ala.—Birmingham Ry., Light & Power Co. v. Bush, 56 So. 731, 175 Ala. 49.

In Missouri

(1) A petition alleging that plaintiff was in a position of imminent peril, and that defendant's motorman saw, or in the exercise of ordinary care could have seen him in that position in time, by the exercise of ordinary care thereafter, to have avoided the collision, and thereafter failed to exercise ordinary care to avoid the collision, and that as a direct result of such failure the collision occurred is sufficient under the humanitarian doctrine.—Flynn v. St. Louis Public Service Co., Mo.App., 41 S.W.2d 885.

(2) Other particulars of pleading required in Missouri see 60 C.J. p 546 note 26 [a].

59. Ala.—Anniston Electric, etc., Co. v. Rosen, 48 So. 798, 159 Ala. 195, 133 Am.S.R. 32.

60. Tex.—Dallas Railway & Terminal Co. v. Redman, Civ.App., 88 S.W.2d 126, error dismissed.

60. Conn.—Delaney v. Waterbury & Milldale Tramway Co., 99 A. 503, 91 Conn. 177.

f. Willful or Wanton Acts or Gross Negligence

Where the gravamen of the complaint is willful or wanton injury it must, in accordance with the general rules of negligence, allege that the injury was willful and wanton.

Where the gravamen of the complaint is willful or wanton injury, it must allege a willful or wanton injury.⁶¹ The complaint must allege that the injurious act was intentionally and purposely done, with the intent willfully and purposely to inflict the injury complained of,⁶² and, unless it avers such conscious knowledge or facts showing it, the mere fact that the acts are charged to have been willfully, wantonly, or recklessly done is not sufficient.⁶³ Ordinarily a general averment that defendant's servants by certain acts or omissions wantonly, willfully, or recklessly caused the injury is sufficient, without setting out the facts showing the wantonness, willfulness, or recklessness.⁶⁴ While plaintiff may allege simple negligence and willful misconduct in separate counts,⁶⁵ but not in the same count,⁶⁶ where the gist of the action is willful or wanton injury, an allegation of simple negligence alone is insufficient.⁶⁷

Gross negligence. Where it is necessary that the act or omission causing the injury be willful or wanton in order to constitute gross negligence, an allegation that defendant carelessly and negligently did or omitted to do an act causing the injury is not a charge of gross negligence, but ordinary negligence.⁶⁸

g. Negating Defenses; Contributory Negligence

Under the rules of pleading in actions for negligent injuries generally, the plaintiff need not negative matters of defense in his pleading, and in most, but not all, jurisdictions, need not negative contributory negligence.

Matters of defense to be alleged by defendant need not be negated by plaintiff in his complaint, declaration, or petition.⁶⁹

Contributory negligence. Except where the complaint states a cause of action under the last clear chance or humanitarian doctrine,⁷⁰ a complaint is ordinarily bad if it discloses contributory negligence on the part of the person injured.⁷¹ As discussed in Negligence § 194, there is a conflict of authority as to whether plaintiff must negative contributory negligence on his part in his complaint. While in some jurisdictions, plaintiff must allege freedom from contributory negligence,⁷² the general rule, sometimes by virtue of statute,⁷³ is to the effect that the fact of contributory negligence is an affirmative defense and need not be negated by plaintiff in his original pleading.⁷⁴

§ 303. Plea or Answer and Other Pleadings

The general rules of pleading in civil actions, and particularly actions for negligence, govern the plea or answer of the defendant in actions for injuries from operation of street railroads.

Under the general rules governing pleas and answers in civil actions generally, and in particular those in actions for negligence, a plea that plaintiff was guilty of contributory negligence,⁷⁵ or that he

61. Ala.—Bessierre v. Alabama City, G. & A. Ry. Co., 60 So. 82, 179 Ala. 317.

60 C.J. p 546 note 34.

Allegations held sufficient

Ohio.—Conners v. Cincinnati St. Ry. Co., 4 Ohio Supp. 197.
60 C.J. p 546 note 34 [a].

Allegations held demurrable

Ala.—Birmingham Elec. Co. v. Echols, 32 So.2d 379, 249 Ala. 589.

62. Ala.—Bessierre v. Alabama City, G. & A. Ry. Co., 60 So. 82, 179 Ala. 317.—Birmingham R., etc., Co. v. Jaffee, 45 So. 469, 154 Ala. 548.

63. Ala.—Birmingham R., etc., Co. v. Jaffee, supra.—Anniston Electric, etc., Co. v. Elwell, 42 So. 45, 144 Ala. 317.

64. Ala.—Birmingham Ry., Light & Power Co. v. Johnson, 61 So. 79, 183 Ala. 352.

60 C.J. p 547 note 38.

65. Ala.—Birmingham Ry., Light & Power Co. v. Norton, 61 So. 459, 7 Ala.App. 571.

66. Ala.—Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242.

67. Ala.—Bessierre v. Alabama City, G. & A. Ry. Co., 60 So. 82, 179 Ala. 317.

60 C.J. p 547 note 41.

68. Wis.—Gould v. Merrill Ry. & Lighting Co., 121 N.W. 161, 139 Wis. 433.

69. Mich.—Bowen v. Detroit City R. Co., 20 N.W. 559, 54 Mich. 496, 52 Am.R. 822.

60 C.J. p 547 note 45.

70. Tex.—Wichita Falls Traction Co. v. McAbee, Civ.App., 21 S.W.2d 97.

60 C.J. p 547 note 47.

71. Ga.—Haddon v. Savannah Electric & Power Co., 136 S.E. 285, 36 Ga.App. 183.

60 C.J. p 547 note 49.

Contributory negligence held not disclosed

Ga.—Savannah Electric & Power Co. v. Russo, 31 S.E.2d 87, 71 Ga.App. 397.

Mo.—Flynn v. St. Louis Public Service Co., App., 41 S.W.2d 885.
60 C.J. p 547 note 49 [b].

72. Ill.—Wilkerson v. Cummings, 58 N.E.2d 280, 324 Ill.App. 331.

Neb.—Olson v. Omaha & C. B. St. Ry. Co., 267 N.W. 246, 131 Neb. 94, applying Iowa rule.
60 C.J. p 548 note 52.

73. Mass.—Gagnon v. Worcester Consol. St. Ry. Co., 120 N.E. 381, 231 Mass. 160.

60 C.J. p 548 note 54.

74. Cal.—Erdevig v. Market St. Ry. Co., 264 P. 252, 203 Cal. 367.

Mo.—Williams v. East St. Louis Ry. Co., App., 100 S.W.2d 51.
60 C.J. p 548 note 55.

75. Ala.—Birmingham Ry., Light &

was a trespasser,⁷⁶ may be interposed to a complaint averring simple negligence; but, where contributory negligence is not a defense, it is no answer.⁷⁷ Thus, a plea setting up contributory negligence is an insufficient answer to a complaint charging defendant with wantonness or willfulness,⁷⁸ or with the power, notwithstanding plaintiff's negligence, to avoid the injury after discovering plaintiff's peril.⁷⁹ Where plaintiff attempted to cross in front of an approaching car knowing that he was in peril in doing so, a plea setting out that plaintiff, fully appreciating his peril, attempted to cross,⁸⁰ or that his contributory negligence continued up to, and concurred in, the injury,⁸¹ is sufficient.

Necessity of special plea. In jurisdictions where in contributory negligence of the person injured must be specially pleaded, such a plea must be sufficient.⁸² A plea must aver the facts and circumstances constituting the contributory negligence relied on and not the mere conclusion of the pleader,⁸³ and, while the word "negligently" is not necessary where the facts alleged show negligence,⁸⁴ the employment of the word "negligently" or other similar conclusion-expressing words will not serve as a substitute for allegations of facts and circumstances.⁸⁵ A plea setting up contributory negligence, which attributes to the person injured conduct which may or may not have been negligent, and which fails to aver that such conduct was negligent, except as a conclusion of law resulting necessarily from the act or omission charged, is insufficient and subject to demurrer,⁸⁶ as is also a plea which does not with certainty impute to the person injured the omission

of any duty or the commission of any act, negligent or otherwise.⁸⁷ An averment that defendant owned and operated a street railroad can be reached only by a special plea denying that defendant owned or operated the street railroad.⁸⁸

Causal connection. The plea must set out facts showing a causal connection between the contributory negligence and the injury.⁸⁹

Imputed negligence. In accordance with general rules, a plea or answer which seeks to avoid liability because of the negligence of a third person must allege facts which in law would allow such person's negligence to be imputed to plaintiff.⁹⁰

Failure to stop, look, and listen. A plea setting up the failure of a driver to stop, to look, and to listen at a crossing must allege facts from which it can be concluded that a duty arose to stop, look, and listen.⁹¹

Amendment. Where it is not necessary for plaintiff to file a notice of the injury within a specified time, an application by defendant on the trial for leave to amend its answer to plead a failure to file notice is properly denied.⁹²

Replication or reply. Under the general rules relating to such pleadings, a replication or reply may and should be made to affirmative averments in defendant's plea or answer.⁹³ Subject to such general rules, a replication is to be construed in the light of, and with respect to, the other pleadings, and particularly to the allegations of the plea it purports to answer.⁹⁴ A replication is insufficient

Power Co. v. Bush, 56 So. 731, 175 Ala. 49.
60 C.J. p 548 note 60.

76. Ala.—Snyder v. Mobile Light & Ry. Co., 107 So. 451, 214 Ala. 310.

77. Ala.—Birmingham Ry., Light & Power Co. v. Bush, 56 So. 731, 175 Ala. 49.

78. Ala.—Alabama Power Co. v. Armour & Co., 92 So. 111, 207 Ala. 15.
60 C.J. p 548 note 64.

79. Ala.—Appel v. Selma St. & Suburban Ry. Co., 59 So. 164, 177 Ala. 457—Birmingham Ry., Light & Power Co. v. Bush, 56 So. 731, 175 Ala. 49.

80. Ala.—Birmingham Ry., Light & Power Co. v. Saxon, 59 So. 534, 179 Ala. 136.

81. Ala.—Harrison v. Mobile Light

& Railroad Co., 171 So. 742, 233 Ala. 393.
60 C.J. p 548 note 68.

82. Ala.—Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657.
60 C.J. p 548 note 70.

83. Ala.—Mobile Light & R. Co. v. Forcheimer, 127 So. 825, 221 Ala. 139.
60 C.J. p 549 note 71.

84. Ala.—Birmingham Ry., Light & Power Co. v. Ayer, 69 So. 56, 192 Ala. 593.

85. Ala.—Jordan v. Alabama City, G. & A. Ry. Co., 60 So. 309, 179 Ala. 291—Mobile Light & R. Co. v. Fuller, 92 So. 90, 18 Ala.App. 301.

86. Ala.—Montgomery St. R. Co. v. Shanks, 37 So. 166, 139 Ala. 489.

87. Ala.—Montgomery St. R. Co. v. Shanks, *supra*.

88. Ill.—Brunhild v. Chicago Union Traction Co., 88 N.E. 199, 239 Ill. 621.
60 C.J. p 549 note 78.

89. Ala.—Mobile Light & R. Co. v. McDonnell, 92 So. 185, 207 Ala. 161.
60 C.J. p 549 note 79.

90. Ala.—Birmingham Ry., Light & Power Co. v. Barranco, 84 So. 839, 203 Ala. 639.
60 C.J. p 549 note 82.

91. Ala.—Schmidt v. Mobile Light & R. Co., 87 So. 181, 204 Ala. 694.
60 C.J. p 549 note 84.

92. Wis.—Gould v. Merrill Ry. & Lighting Co., 121 N.W. 161, 139 Wis. 433.

93. Ala.—Mobile Light & R. Co. v. McDonnell, 92 So. 185, 207 Ala. 161.
60 C.J. p 549 note 90.

94. Ala.—Mobile Light & R. Co. v. Dooks, 66 So. 824, 11 Ala.App. 595.
60 C.J. p 550 note 92.

where it does not aver that defendant's failure to observe a statutory duty was the proximate cause of the injury.⁹⁵

Motion to make more definite and certain will be denied where the complaint contains a plain and concise statement constituting the cause of action.⁹⁶

§ 304. Issues, Proof, and Variance

- a. Issues
- b. Proof
- c. Variance

a. Issues

In an action against a street railroad company, only such matters as are put in issue by the pleadings may be adjudicated or made the basis of recovery.

In accordance with, and subject to, general rules in civil actions generally, and in particular those relating to actions for negligence, in an action to recover damages caused by the operation of a street railroad only such matters may be adjudicated or made a basis of recovery as are put in issue by the pleadings.⁹⁷ Thus, plaintiff or complainant, in such an action, may rely for recovery only on such matters of negligence as are put in issue by his pleadings.⁹⁸ Plaintiff cannot state a particular cause of action and recover on an entirely different ground of liability.⁹⁹ Under a general allegation of negli-

gence plaintiff may recover on proof of any acts or omissions constituting negligence which caused the injury,¹ but, where specific acts of negligence are alleged, recovery can be had only on the grounds alleged.² Although a matter is not alleged by plaintiff, a material averment of defense may be deemed controverted by plaintiff to raise an issue without express denial.³

Defenses. Defendant may rely on only such matters as are properly put in issue by the pleadings.⁴ It cannot rely on a defense which might have been put in issue only by special pleading, but was not so pleaded.⁵ A plea of the general issue or general denial puts in issue all the material allegations of the complaint or petition,⁶ but does not put in issue mere matters of inducement,⁷ such as the ownership and operation of the car causing the injury.⁸

b. Proof

- (1) Matters to be proved
- (2) Evidence admissible under pleadings

(1) Matters to Be Proved

Plaintiff, in order to recover for injuries resulting from the operation of a street railroad, must prove as alleged every material allegation of his complaint, declaration or petition, where such matters are in issue, and have not been admitted.

In order that plaintiff or complainant may recover,

95. Ala.—Mobile Light & R. Co. v. McDonnell, 92 So. 185, 207 Ala. 161.

96. N.Y.—Agnew v. Brooklyn City R. Co., 13 N.Y.Civ.Proc. 25, 20 Abb. N.Cas. 235, affirmed 5 N.Y.S. 756, affirmed 22 N.E. 1132, 117 N.Y. 651.

97. La.—Cloud v. Alexandria Electric R. Co., 46 So. 1017, 121 La. 1061, 18 L.R.A.N.S., 371, 60 C.J. p 550 note 1.

Particular issues held raised

(1) Defendant's common-law duty to exercise the care of an ordinarily prudent person in the same or similar circumstances and not care required under vigilant watch ordinance of city.—Melton v. St. Louis Public Service Co., Mo., 251 S.W.2d 663.

(2) Issue of sole proximate cause.—Dallas Ry. & Terminal Co. v. Guthrie, Civ.App., 206 S.W.2d 638, reversed on other grounds 210 S.W.2d 550, 146 Tex. 585.

(3) Humanitarian negligence, instead of a case of primary negligence.—Massman v. Kansas City Public Service Co., Mo., 119 S.W.2d 833.

(4) Other issues held raised see 60 C.J. p 550 note 1 [b].

98. Conn.—Zeldwig v. City of Derby, 31 A.2d 24, 129 Conn. 693.

Tex.—San Antonio Co. v. Upson, 71 S.W. 565, 31 Tex.Civ.App. 50.

99. Ill.—Springfield City R. Co. v. De Camp, 11 Ill.App. 475, 60 C.J. p 550 note 4.

1. Cal.—Charves v. San Francisco-Oakland Terminal Rys., 186 P. 154, 44 Cal.App. 221, 60 C.J. p 550 note 5.

Allegation of simple negligence

In motorist's action for damages allegedly caused by collision with defendant's streetcar at street intersection, motorist's count for simple negligence, in general terms, sufficed for a recovery on theory of subsequent negligence by defendant's motorman.—Hayes v. Alabama Power Co., 194 So. 505, 239 Ala. 207.

2. Tex.—Houston City St. R. Co. v. Farrell, Civ.App., 27 S.W. 942, 60 C.J. p 551 note 6.

3. Tex.—Northern Texas Traction Co. v. Smith, Civ.App., 223 S.W. 1013, 60 C.J. p 551 note 7.

4. Wash.—Engelker v. Seattle Electric Co., 96 P. 1039, 50 Wash. 196, 60 C.J. p 551 note 9.

Flea in short by consent

In action for injuries resulting when motorman, allegedly after becoming aware of pedestrian's peril, failed to use all means at his command to prevent streetcar from colliding with pedestrian, plea in short by consent included defense based on "subsequent contributory negligence" or want of care on part of pedestrian after discovery of his own peril.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.

5. Mich.—Putnam v. Detroit United Ry., 129 N.W. 860, 164 Mich. 342, 60 C.J. p 551 note 11.

6. Ala.—Johnson v. Birmingham R. etc., Co., 43 So. 33, 149 Ala. 529, 60 C.J. p 551 note 15.

7. Ill.—Brunhild v. Chicago Union Traction Co., 144 Ill.App. 193, affirmed 88 N.E. 199, 239 Ill. 621.

8. Ill.—Brunhild v. Chicago Union Traction Co., 88 N.E. 199, 239 Ill. 621, 60 C.J. p 551 note 17.

in an action for injuries against a street railroad company, every material allegation of negligence or of other matters, contained in the complaint or petition, and necessary to establish his cause of action, must be proved as alleged;⁹ but it is not necessary to prove allegations which are mere surplusage and not essential to the cause of action;¹⁰ and defendant is not required to prove allegations in its answer which are not matters of affirmative defense.¹¹

Facts alleged, but not put in issue, need not be proved.¹²

Matters admitted by pleadings. In accordance with general rules, a fact essential to a cause of action or defense in a suit against a street railroad need not be proved if admitted by the pleadings of the adverse party,¹³ but, unless such fact is expressly or impliedly admitted, it must be proved.¹⁴

Specific allegations. In accordance with general rules, where the petition or complaint alleges specific acts of negligence as a ground of recovery, such acts must be proved as pleaded.¹⁵

Several acts or omissions alleged. Where plaintiff alleges several separate and distinct acts or omissions not dependent on each other, every act alleged need not be proved, but it is sufficient to prove one act or omission sufficient to cause, and which did cause, the injury independent of any other.¹⁶

Causal connection. Not only must plaintiff plead that defendant's negligence was the proximate cause, but it must also be shown that the negligence proved was connected with the injury sustained as the proximate, or proximately contributing, cause thereof.¹⁷

Ownership, operation, or control. The ownership, operation, or control of the road or car causing the injury must be shown to be in defendant,¹⁸ unless the answer admits it,¹⁹ or the matter is not in issue,²⁰ or the ownership of the car is not material,²¹ or unless it otherwise appears from the evidence that the tracks or cars were in the possession of defendant and operated by it.²²

(2) Evidence Admissible under Pleadings

Any evidence, otherwise admissible, may be introduced if it tends to support or controvert issues made by the pleadings.

In an action for injuries arising from the operation of a street railroad, any evidence, not otherwise inadmissible, may be introduced on behalf of plaintiff if it tends to support or controvert an issue made by the pleadings,²³ but evidence as to matters not alleged or on which there is no issue is inadmissible.²⁴ Thus an ordinance,²⁵ such as a speed²⁶ or vigilant watch²⁷ ordinance, is inadmissible to show defendant's negligence unless pleaded. However such evidence is admissible as is an incident of the cause of action for the purpose of

9. Mo.—Holden v. Missouri R. Co., 84 S.W. 133, 108 Mo.App. 665. 60 C.J. p 551 note 21.

10. Mo.—Dunlap v. Kansas City Public Service Co., 130 S.W.2d 658, 234 Mo.App. 351. 60 C.J. p 551 note 22.

11. Mo.—Smith v. Kansas City Public Service Co., 43 S.W.2d 548, 328 Mo. 979.

12. Ill.—Brunhild v. Chicago Union Traction Co., 88 N.E. 199, 239 Ill. 621—Smaoska v. Chicago City Ry. Co., 150 Ill.App. 599.

Failure to demand proof

In action for death of plaintiff's intestate who was struck by a street-car, failure of street car company to make statutory demand on plaintiff to prove that the site of the accident was located within a public way barred company from contesting plaintiff's allegation that intestate was injured on a public way.—Sears v. Boston Elevated Ry. Co., 47 N.E. 2d 282, 313 Mass. 326.

13. Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

Pa.—Fazio v. Pittsburgh Rys. Co., 182 A. 686, 321 Pa. 7. 60 C.J. p 552 note 26.

14. N.Y.—Gargano v. Forty-Second St., etc., R. Co., 94 N.Y.S. 544. 60 C.J. p 552 note 27.

15. Mo.—Israel v. United Rys. Co. of St. Louis, 155 S.W. 1092, 172 Mo. App. 656. 60 C.J. p 552 note 29.

16. Mo.—State ex rel. Kansas City Rys. Co. v. Trimble, 260 S.W. 746. 60 C.J. p 552 notes 32, 33.

17. Mo.—Moore v. Metropolitan St. Ry. Co., App., 180 S.W. 408. 60 C.J. p 552 note 35.

18. N.Y.—Gargano v. Forty-Second St., etc., R. Co., 94 N.Y.S. 544.

19. N.Y.—Schnell v. Metropolitan St. R. Co., 64 N.Y.S. 67, 50 App. Div. 616.

20. Ill.—Brunhild v. Chicago Union Traction Co., 88 N.E. 199, 239 Ill.

621—Smaoska v. Chicago City Ry. Co., 150 Ill.App. 599.

21. Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

22. Ill.—Chicago Junction R. Co. v. McAnrow, 114 Ill.App. 501. 60 C.J. p 552 note 40.

23. Ohio.—Karle v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327.

Pa.—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503. 60 C.J. p 553 note 44.

24. Ky.—Wigginton's Adm'r v. Louisville Ry. Co., 75 S.W.2d 1046, 256 Ky. 287. 60 C.J. p 553 note 45.

25. Ill.—Kankakee Electric R. Co. v. Lade, 56 Ill.App. 454. 60 C.J. p 553 note 46.

26. Mich.—Yeoman v. Muskegon Traction & Lighting Co., 181 N.W. 1021, 214 Mich. 68. 60 C.J. p 553 note 47.

27. Mo.—Lackey v. United Rys. Co., 231 S.W. 956, 288 Mo. 120.

showing the situation and surrounding circumstances at the time and place of accident, and, therefore, as tending to prove or disprove matters in issue,²⁸ such as freedom from contributory negligence.²⁹ So, also, an ordinance³⁰ or rule or custom of the company³¹ may be admissible, although not pleaded where the ordinance or rule is introduced as tending to prove the negligence alleged and not as a ground of negligence. Evidence may be admissible on new matter put in issue by defendant's answer, which is deemed controverted by plaintiff without express denial.³²

Under general and specific allegations. Where defendant's negligence is alleged in general terms, plaintiff is not confined in his evidence to any one particular act of negligence, and evidence of any fact which is a circumstance tending to show the negligence alleged is admissible, although no mention is made of such fact in the pleading.³³ Thus, under a general allegation of negligence, proof may be made and a recovery sustained under the last clear chance doctrine.³⁴ Where specific acts of negligence are alleged, the proof must be confined to

the acts alleged,³⁵ and evidence of other acts of negligence is not admissible unless the complaint is amended to cover them.³⁶

Under plea of contributory negligence, plaintiff may avail himself of any facts which tend to disprove such negligence,³⁷ even though not alleged in his declaration or complaint.³⁸

On behalf of defendant, any proper evidence is admissible under a general denial which tends to disprove the matters put in issue by plaintiff's allegations.³⁹ Thus, evidence is admissible under a general denial or general issue to show that defendant is not responsible for the cause of the injury,⁴⁰ or that it was caused by the injured person's own contributory negligence,⁴¹ or to show that he was intoxicated at the time as tending to impair his credibility.⁴² Under a plea of contributory negligence, any evidence tending to show the existence of such negligence at the time is admissible,⁴³ and, under such a plea, defendant may show as evidence of negligence that plaintiff's automobile was not legally registered.⁴⁴ Matters of affirmative defense

28. Del.—Wilmington City R. Co. v. White, 66 A. 1009, 22 Del. 363.

60 C.J. p 553 note 49.

29. Mich.—Millette v. Detroit United Ry., 153 N.W. 10, 186 Mich. 634.

60 C.J. p 553 note 50.

30. U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 932.

60 C.J. p 554 note 51.

31. Mo.—Foster v. Kansas City Rys. Co., 235 S.W. 1070.

32. Tex.—Northern Texas Traction Co. v. Smith, Civ.App., 223 S.W. 1013.

60 C.J. p 554 note 54.

33. Cal.—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733.

Iowa.—Watson v. Des Moines Ry. Co., 251 N.W. 31, 217 Iowa 1194.

Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278.

60 C.J. p 554 note 56.

Under res ipsa loquitur doctrine

In action for death of child resulting when child was struck by streetcar, where defendants' negligence was pleaded in general terms, evidence that after streetcar struck child and while child was lying in front of wheel motorman attempted to back car up steep grade so that child could be released and car lurched down grade presumably running over child a second time was admissible and sufficient under the res ipsa loquitur doctrine to raise an inference of negligence since plaintiff was

entitled to inference arising out of the doctrine without specially pleading issue.—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733.

34. R.I.—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.

60 C.J. p 555 note 57.

Declaration held to authorize proof R.I.—Malfetano v. United Elec. Rys. Co., supra.

35. Tex.—Dallas Railway & Terminal Co. v. Bishop, Civ.App., 153 S.W.2d 298.

60 C.J. p 555 note 58.

36. N.Y.—Coyle v. Third Ave. R. Co., 40 N.Y.S. 1131, 18 Misc. 9.

37. Mo.—Lackey v. United Rys. Co., 231 S.W. 956, 288 Mo. 120.

38. Va.—Lackey v. United Rys. Co., supra—Roanoke Ry. & Electric Co. v. Loving, 119 S.E. 82, 137 Va. 331.

60 C.J. p 555 note 61.

39. Ky.—Smith v. Paducah Traction Co., 200 S.W. 460, 179 Ky. 322.

60 C.J. p 555 note 62.

Evidence as to site of accident

In action for death of intestate who was struck by a streetcar, evidence that place where intestate was injured was on a reservation limited to operation of streetcars was admissible, notwithstanding streetcar company did not make the statutory demand on plaintiff to prove that the site of the accident was located with-

in a public way, since the portion of the street occupied by the reservation continued as part of the way.—Sears v. Boston Elevated Ry. Co., 47 N.E.2d 282, 313 Mass. 326.

40. Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.

60 C.J. p 555 note 63.

Negligence of third person

Ala.—Caudle v. Birmingham Elec. Co., 22 So.2d 417, 247 Ala. 34.

41. S.C.—Sharpton v. Augusta, etc., R. Co., 51 S.E. 553, 72 S.C. 162.

60 C.J. p 555 note 64.

42. S.C.—Sharpton v. Augusta, etc., R. Co., supra.

43. S.C.—Sharpton v. Augusta, etc., R. Co., supra.

60 C.J. p 555 note 66.

Negligence of third person

In action by automobile passengers against streetcar company to recover for injuries sustained by passengers in collision with streetcar, evidence as to conduct of automobile driver, not being in issue, was admissible only to extent that it might aid in determining ultimate question of defendants' negligence.—Krupp v. Los Angeles Ry. Corp., 135 P.2d 424, 57 Cal.App.2d 695.

44. Mass.—MacDonald v. Boston Elevated Ry. Co., 160 N.E. 327, 262 Mass. 475.

cannot be proved unless pleaded.⁴⁵

c. Variance

As in other civil actions the proof must conform substantially to the pleadings.

In accordance with, and subject to, rules in civil actions generally, the proof, in an action for injuries against a street railroad company, must substantially correspond with the pleadings,⁴⁶ and, unless cured by an amendment,⁴⁷ if there is a material variance therein, it is fatal to a recovery⁴⁸ or matter of defense.⁴⁹ However, if the proof substantially supports the pleading, any variance therein which does not materially affect the cause of action and by which defendant is not misled to his prejudice may be disregarded as immaterial.⁵⁰

§ 305. Presumptions and Burden of Proof

General rules as to presumptions and burden of proof apply in an action for injuries caused by the operation of a street railroad; the burden is on the plaintiff to establish the material facts of his cause of action and on the defendant to establish affirmative defenses.

General rules relating to presumptions and burden of proof, particularly those which apply in actions for negligence in general, ordinarily govern and control the presumptions and burden of proof in an action for injuries caused by the operation of a street railroad.⁵¹ Accordingly, the burden of proof is on plaintiff to establish the material facts which

constitute his alleged cause of action.⁵² Thus, it is incumbent on plaintiff to prove the place of the injury,⁵³ that defendant or his servants were guilty of negligence or other misconduct as alleged, which was the proximate cause of the injury complained of, as discussed *infra* § 306, and that defendant owned, managed, or controlled the car which caused the injury.⁵⁴

In accordance with general rules, one presumption cannot be based on another presumption;⁵⁵ and there can be no presumption as against facts which are proved.⁵⁶ In the absence of evidence that the place of injury was on defendant's exclusive property it will be presumed that the injured person was not a trespasser,⁵⁷ but one injured on subway tracks a substantial distance from the station is presumed to be a trespasser.⁵⁸ In the absence of special evidence it may be presumed that streetcar tracks are laid in a public street,⁵⁹ and that the occupation and use of the street by the railroad are lawful;⁶⁰ and there is no presumption that the prosecution of a work by a corporation in the public streets is unauthorized and its employees trespassers.⁶¹ There is a strong presumption that cars operated on the tracks of a street railway are being run by the authority of the company, and not by strangers or by employees acting beyond the scope of their duties.⁶²

The company will be presumed to have knowledge of a defect which had existed for several days;⁶³ but there is no presumption of law that a street rail-

45. N.Y.—Nuccio v. Long Island R. Co., 27 N.Y.S.2d 655, 262 App.Div. 763.

46. Ariz.—City of Phoenix v. Green, 66 P.2d 1041, 49 Ariz. 376.

Ill.—Chicago Union Traction Co. v. Fitzgerald, 138 Ill.App. 520. 60 C.J. p 555 note 70.

47. Ky.—South Covington & C. St. Ry. Co. v. Wintermeyer, 206 S.W. 157, 182 Ky. 94.

48. Mont.—Flaherty v. Butte Electric Ry. Co., 107 P. 416, 40 Mont. 454, 135 Am.S.R. 630. 60 C.J. p 556 note 72.

49. Tex.—El Paso Electric St. R. Co. v. Ballinger, Civ.App., 72 S.W. 612. 60 C.J. p 556 note 73.

50. Tenn.—Memphis St. R. Co. v. Berry, 102 S.W. 85, 118 Tenn. 581. 60 C.J. p 556 note 74.

51. Mo.—McClanahan v. St. Louis Public Service Co., App., 242 S.W.2d 265. 60 C.J. p 556 note 81.

52. Md.—Baltimore Transit Co. v. Bramble, 2 A.2d 416, 175 Md. 334. 60 C.J. p 557 note 83.

Injury to passenger of street railroad see Carriers § 776 et seq.

53. Ill.—Brun v. P. Nacey Co., 108 N.E. 301, 267 Ill. 353. 60 C.J. p 557 note 84.

54. Ala.—Mobile Light & R. Co. v. Mackay, 48 So. 509, 158 Ala. 51. 60 C.J. p 557 note 87.

55. Ala.—Wilkerson v. Rushton, 84 So. 775, 17 Ala.App. 332. 60 C.J. p 557 note 90.

56. Pa.—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299. 60 C.J. p 557 note 97.

57. Pa.—Mars v. Philadelphia Rapid Transit Co., 154 A. 290, 303 Pa. 80. 60 C.J. p 557 note 91.

58. N.Y.—Chernozsky v. City of New York, 86 N.Y.S.2d 185, affirmed 95 N.Y.S.2d 597, 276 App.Div. 995.

59. Mass.—Vincent v. Norton & T.

St. Ry. Co., 61 N.E. 822, 180 Mass. 104.

60. Ohio.—Columbus, Delaware & Marion Electric Co. v. Brown, 181 N.E. 654, 42 Ohio App. 109.

61. N.J.—Daum v. North Jersey St. R. Co., 54 A. 221, 69 N.J.Law 1, affirmed 57 A. 1132, 70 N.J.Law 338.

62. Mo.—Baker v. Metropolitan St. Ry. Co., 126 S.W. 764, 142 Mo.App. 354.

63. N.Y.—Worster v. Forty-Second St., etc., Ferry R. Co., 50 N.Y. 203.

Dangerous condition of pavement

In action by motorist for damages sustained in head-on collision with streetcar, street railroad was presumed to have known of dangerous condition of pavement inside streetcar tracks, and whether such condition existed so as to prevent motorist proceeding thereon from turning out on approach of streetcar as a cause of the collision was for jury.—Geers v. Des Moines Ry. Co., 38 N.W.2d 89, 240 Iowa 783.

road obstructs the ordinary travel on the highway⁶⁴ or makes it dangerous.⁶⁵

One is presumed to have seen what he would have seen had he looked.⁶⁶

Affirmative defenses. The burden is on defendant to establish matters of affirmative defense.⁶⁷ Thus, where the failure of a driver to register his automobile is an affirmative defense, the burden is on defendant to prove the failure to register.⁶⁸ Where defendant claims an exemption from liability because of the operation of the street railroad by a licensee, it has the burden of proving such exemption.⁶⁹

§ 306. — Negligence of Defendant

- a. In general
- b. Happening of accident; *res ipsa loquitur*

a. In General

In an action for injuries caused by the operation of a street railroad, the plaintiff has the burden of proving the defendant's negligence, and that such negligence was the proximate cause of the injury; and, where he relies on the last clear chance or humanitarian doctrine, he has the burden of establishing the conditions required for the application of the doctrine.

In an action for injuries caused by the operation of a street railroad, plaintiff has the burden of proving the negligence of defendant relied on,⁷⁰ and the burden is not on defendant to prove itself free from negligence.⁷¹ Plaintiff is not relieved of the burden of proving defendant's negligence, although a presumption of due care on the part of plaintiff is recognized.⁷² In accordance with general rules, the burden is on defendant to introduce evidence sufficient to overcome or rebut plaintiff's showing where he makes out a *prima facie* case of negligence on the part of defendant,⁷³ or, in some jurisdictions, where defendant has suffered a default;⁷⁴ but the burden of proof of his right to recover remains on plaintiff.⁷⁵

As a general rule there is no presumption that defendant was guilty of negligence,⁷⁶ but, on the contrary, in accordance with general principles, in the absence of contrary evidence it will be presumed that defendant acted with due care.⁷⁷ In the absence of evidence to the contrary it may be presumed that a streetcar was traveling at a lawful rate of speed,⁷⁸ that defendant had equipped its cars with proper appliances in compliance with the law,⁷⁹ and that a motorman was looking ahead and performing his duty,⁸⁰ especially at night.⁸¹ It will not be presumed that the lights on the car were not burning⁸² or that defendant violated an ordinance.⁸³

64. Mass.—Hawks v. Northampton, 121 Mass. 10.

65. Mass.—Hawks v. Northampton, *supra*.

66. La.—Favaza v. New Orleans Public Service, App., 154 So. 457, followed in Frere v. New Orleans Public Service, 154 So. 462.

67. N.C.—Smith v. Charlotte Electric Ry. Co., 92 S.E. 382, 173 N.C. 489.
60 C.J. p 557 note 1.

68. Mass.—Dean v. Boston Elevated Ry. Co., 105 N.E. 616, 217 Mass. 495—Conroy v. Mather, 104 N.E. 487, 217 Mass. 91, 52 L.R.A., N.S., 801.

69. Tenn.—Memphis Street Ry. Co. v. Kohn, 7 Tenn.Civ.App. 396.

70. D.C.—Kelly Furniture Co. v. Washington Ry. & Electric Co., 76 F.2d 985, 64 App.D.C. 215.

Iowa.—Geers v. Des Moines Ry. Co., 38 N.W.2d 89, 240 Iowa 783.

Md.—Eisenhower v. Baltimore Transit Co., 59 A.2d 313, 190 Md. 528—Baltimore Transit Co. v. Bramble, 2 A.2d 416, 175 Md. 334.

Minn.—Flom v. St. Paul City Ry. Co., 16 N.W.2d 551, 218 Minn. 474.

Pa.—Poitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220—Reidel v. Philadelphia Rapid Transit Co., 157 A. 36, 103 Pa.Super. 387.

R.I.—Hughes v. United Electric Ry. Co., 160 A. 463.
60 C.J. p 558 note 9.

71. Mont.—Osterholm v. Butte Electric Ry. Co., 199 P. 252, 60 Mont. 193.

N.Y.—Szpyrka v. International Ry. Co., 210 N.Y.S. 553, 213 App.Div. 390.

72. Conn.—Simuaskas v. Connecticut Co., 127 A. 918, 102 Conn. 61—Morse v. Consolidated R. Co., 71 A. 553, 81 Conn. 395.

Presumption of due care see *infra* § 307.

73. Ky.—Frankfort, etc., Traction Co. v. Hulette, 106 S.W. 1193, 32 Ky.L. 732.
60 C.J. p 558 note 15.

74. Conn.—Lawler v. Hartford St. R. Co., 43 A. 545, 72 Conn. 74.
60 C.J. p 559 note 16.

75. R.I.—O'Donnell v. United Electric Rys. Co., 134 A. 642, 48 R.I. 18.

76. Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.
60 C.J. p 559 note 19.

77. Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—McCawley v. Wilkes-Barre Ry. Corp., Com.Pl., 37 Luz.Leg.Reg. 21.
60 C.J. p 559 note 21.

78. Iowa.—Wilfin v. Des Moines City Ry. Co., 156 N.W. 842, 176 Iowa 642.

79. Mo.—Kinlen v. Metropolitan St. Ry. Co., 115 S.W. 523, 216 Mo. 145.
60 C.J. p 559 note 23.

80. Ala.—Mobile Light & R. Co. v. Dooks, 66 So. 824, 11 Ala.App. 595.
Pa.—Crone v. Harrisburg Rys. Co., 143 A. 108, 293 Pa. 428.

81. Pa.—Beaumont v. Beaver Valley Traction Co., 148 A. 87, 298 Pa. 223.

82. Md.—Crystal v. Baltimore & B. A. Electric Ry. Co., 132 A. 629, 150 Md. 256.

Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.

83. Mo.—J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co., 89 Mo.App. 534.

It cannot be presumed that the use of a headlight, however powerful, is negligence.⁸⁴

Cause of injury. In accordance with general rules, plaintiff must show that defendant's negligence was the proximate cause of the injury.⁸⁵ While the cause of the injury may be inferred from circumstances, as discussed *infra* § 321, ordinarily it will not be presumed that defendant's misconduct was the cause of the injury.⁸⁶ Where the negligence of defendant consists of the violation of a statute or ordinance, there is no presumption that such violation caused the injury,⁸⁷ and plaintiff has the burden of proving that the violation relied on was the proximate cause of his injury.⁸⁸

Power of defendant to avoid injury; last clear chance. Where plaintiff relies on the last clear chance or humanitarian doctrine, he has the burden of establishing the conditions required for the application of the doctrine.⁸⁹ Accordingly, he has the burden of showing that the circumstances in which the injury occurred were such that defendant, after perceiving plaintiff's peril, had the last clear chance to avoid the accident and could by the exercise of ordinary care have avoided injuring him.⁹⁰ In jurisdictions where the application of the doctrine is dependent on the actual knowledge of defendant as distinguished from knowledge implied from the duty

to discover, the burden of proof is on plaintiff to show the fact of actual discovery of plaintiff's peril.⁹¹ In jurisdictions where actual knowledge is not necessary, plaintiff must at least prove that defendant ought to have known of plaintiff's peril and could by the exercise of reasonable care have avoided the injury.⁹²

In ascertaining whether a motorman had actual knowledge of the peril of an injured person if it appears that he had an unobstructed view of the track, it may be presumed from his duty to keep a lookout that he, in fact, saw the injured person in a position of peril,⁹³ but this presumption may be rebutted.⁹⁴ No presumption exists that a motorman realized the peril in time to avoid injury,⁹⁵ but it is presumed that the motorman acted to avoid injury as soon as he realized the peril.⁹⁶

Willful or wanton injury. Where plaintiff relies for a recovery on a willful or wanton injury, he has the burden of proving the essential elements to constitute willful or wanton injury.⁹⁷ Thus, he has the burden of proving defendant's actual knowledge of plaintiff's peril⁹⁸ and that defendant, on discovery of the peril, had the time and opportunity to use means to avert the accident.⁹⁹ A motorman approaching a busy crossing will be presumed to be conscious of the surroundings.¹ Since a street rail-

84. Ala.—Kilgore v. Birmingham Ry., Light & Power Co., 75 So. 996, 200 Ala. 238.

85. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

Ill.—Brewster v. Rockford Public Service Co., 257 Ill.App. 182.

Md.—Baltimore Transit Co. v. Bramble, 2 A.2d 416, 175 Md. 334.

Mass.—Kenney v. Boston Elevated Ry., 185 N.E. 503, 282 Mass. 615.

N.Y.—Corriera v. Third Ave. Transit Corp., 98 N.Y.S.2d 136, 277 App. Div. 82, affirmed 96 N.E.2d 898, 302 N.Y. 610.

Pa.—Niziolek v. Wilkes-Barre Ry. Corp., 185 A. 581, 322 Pa. 29—Fonzzone v. Lehigh Valley Transit Co., 178 A. 671, 318 Pa. 514.

Tex.—Dallas Ry. & Terminal Co. v. Guthrie, 210 S.W.2d 550, 146 Tex. 585.

60 C.J. p 563 note 90.

Contributory cause

Where contributive but not concerted action of motorist and streetcar company injured pedestrian, burden was on pedestrian in action against streetcar company to show what injuries were caused by streetcar company's negligence.—Grzybowski v. Connecticut Co., 164 A. 632, 116 Conn. 292.

86. Mo.—Hoagland v. Dunham, App., 186 S.W. 1145.

87. Mo.—Callanan v. United Rys. Co. of St. Louis, App., 232 S.W. 213.

60 C.J. p 563 note 94.

88. Mo.—Callanan v. United Rys. Co. of St. Louis, supra.

60 C.J. p 563 note 95.

89. Ala.—Davis v. Birmingham Elec. Co., 33 So.2d 355, 250 Ala. 98.

Mo.—Johnson v. Kansas City Public Service Co., 214 S.W.2d 5, 358 Mo. 253.

Pa.—Rex v. Lehigh Valley Transit Co., 177 A. 226, 116 Pa.Super. 603.

Va.—Virginia Transit Co. v. Owens, 55 S.E.2d 422, 190 Va. 76.

60 C.J. p 563 note 99.

90. Ala.—Davis v. Birmingham Elec. Co., 33 So.2d 355, 250 Ala. 98.

Mo.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

60 C.J. p 563 note 1.

91. Ala.—Alabama City, G. & A. Ry. Co. v. Bessiere, 66 So. 805, 190 Ala. 59.

60 C.J. p 563 note 3.

92. Conn.—Budaj v. Connecticut Co., 143 A. 527, 528, 108 Conn. 474.

60 C.J. p 563 note 5.

93. Iowa.—Carr v. Interurban Ry. Co., 171 N.W. 167, 185 Iowa 872.

60 C.J. p 564 note 8.

94. Iowa.—Carr v. Interurban Ry. Co., supra.

95. Tex.—Fontana v. Port Arthur Traction Co., Civ.App., 235 S.W. 1098.

96. Tex.—Fontana v. Port Arthur Traction Co., supra.

97. Ala.—Becknell v. Alabama Power Co., 143 So. 897, 225 Ala. 689—Alabama City, G. & A. Ry. Co. v. Bessiere, 66 So. 805, 190 Ala. 59—Birmingham Elec. Co. v. Graddick, 49 So.2d 318, 35 Ala.App. 484, certiorari denied 49 So.2d 320, 254 Ala. 556.

98. Ala.—Alabama City, G. & A. Ry. Co. v. Bessiere, 66 So. 805, 190 Ala. 59.

99. Ala.—Alabama City, G. & A. Ry. Co. v. Bessiere, supra.

1. Ala.—Birmingham Ry., Light & Power Co. v. Leach, 59 So. 358, 5 Ala.App. 546.

road is under no duty to exercise active vigilance to look out for trespassers on its cars or tracks, no presumption arises that the motorman was looking ahead,² but the actual knowledge necessary to authorize recovery may be inferred from proof that the motorman was looking ahead.³

b. Happening of Accident; Res Ipsa Loquitur

Ordinarily mere proof of an accident or injury in connection with the operation of a street railroad is not a sufficient basis for a presumption of the railroad's negligence unless the circumstances are such as to make the doctrine of *res ipsa loquitur* applicable.

In accordance with general rules, in the absence of statute mere proof of an accident or injury in connection with the operation of a street railroad ordinarily is not a sufficient basis for a presumption of negligence on the part of defendant.⁴ The mere fact that the person injured may be presumed to have exercised due care raises no presumption of defendant's negligence from the mere happening of the accident.⁵

Res ipsa loquitur. In accordance with, and subject to, rules considered in Negligence § 220 (2) et seq, the doctrine of *res ipsa loquitur* applies where the accident or injury is such that in the ordinary course of events it does not occur if the person controlling the instrumentality uses proper care, and proof of the happening of the accident in the absence of evidence to the contrary is presumptive evidence of negligence on the part of defendant.⁶ Whether the doctrine should be held applicable to a given state of facts is a question not always easy of determination.⁷ While in some decisions the maxim may be limited to cases where there is a contractual relationship,⁸ generally a contractual relationship such as passenger and carrier is not necessary.⁹

The doctrine has been held applicable where a person has been injured by reason of the derailment of a car,¹⁰ the deflection of a car by a split switch,¹¹ by being struck or caught by a trolley rope,¹² pole,¹³

2. Ala.—Snyder v. Mobile Light & Ry. Co., 107 So. 451, 214 Ala. 310.

3. Ala.—Snyder v. Mobile Light & Ry. Co., supra.

4. Cal.—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal.App.2d 758.

Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113—Metrick v. Philadelphia Rapid Transit Co., 100 Pa.Super. 422.

R.I.—Hughes v. United Electric Rys. Co., 160 A. 463.
60 C.J. p 559 note 33.

Injury to minor

The occurrence of an accident resulting in injury to a minor would not of itself charge street railway, which had legal right and was under public duty to maintain tracks and operate cars for carriage of passengers on certain street, with liability, unless it failed in some duty it owed the minor.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353.

5. Ill.—Casey v. Chicago Rys. Co., 109 N.E. 984, 269 Ill. 386, L.R.A. 1916B 824.

6. Cal.—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733.
60 C.J. p 560 note 38.

In Michigan, it would appear that the doctrine of *res ipsa loquitur* is not recognized.—Felske v. Detroit United Ry., 130 N.W. 676, 166 Mich. 367—60 C.J. p 561 note 64.

7. Mo.—Gibbons v. Wells, App., 293 S.W. 89.

8. Ga.—Atlanta R., etc., Co. v. Johnson, 48 S.E. 389, 120 Ga. 908.
60 C.J. p 560 note 40.

In Pennsylvania

(1) The doctrine of *res ipsa loquitur* is said to apply only in cases where there is an absolute duty or a contractual relationship with the street railroad.—Kepner v. Harrisburg Traction Co., 38 A. 416, 183 Pa. 24—60 C.J. p 561 note 67.

(2) Thus, in actions for injuries to persons other than passengers through the operation of a street railroad, it would appear that mere proof of the fact of the accident or injury without more does not raise a presumption of negligence in any case.—Benson v. Philadelphia Rapid Transit Co., 93 A. 1009, 248 Pa. 302—McCoy v. George, 27 A.2d 658, 149 Pa.Super. 630—60 C.J. p 561 note 66.

(3) However, proof of the injury coupled with other evidence, although circumstantial, may be sufficient to warrant a presumption of negligence.—Dougherty v. Philadelphia Rapid Transit Co., 101 A. 344, 257 Pa. 118—60 C.J. p 562 note 69.

(4) Negligence was presumed where the injury occurred by reason of the deflection of a car by a split switch.—Geiser v. Pittsburgh Rys. Co., 72 A. 351, 223 Pa. 170—60 C.J. p 562 note 70.

(5) Negligence was presumed where injury resulted from the derailment of a car.—Caffrey v. Phil-

adelphia Rapid Transit Co., 94 A. 924, 249 Pa. 364—60 C.J. p 562 note 71.

(6) Negligence was presumed when trailer attached to work car left track and ran into automobile.—Maerkle v. Pittsburgh Rys. Co., 165 A. 503, 311 Pa. 517.

(7) Negligence was presumed where injury resulted from a detached trolley pole.—Dougherty v. Philadelphia Rapid Transit Co., supra.

9. Mo.—Gallagher v. St. Louis Public Service Co., 59 S.W.2d 619, 332 Mo. 944.
60 C.J. p 560 note 43.

Degree of care

Whether plaintiff tripping over object dangling from rear of streetcar, after alighting therefrom, was passenger at time of accident was material only as regards degree of care owing by street railroad, not as regards applicability of *res ipsa loquitur* doctrine.—Gallagher v. St. Louis Public Service Co., supra.

10. Ill.—Chicago Union Traction Co. v. Giese, 82 N.E. 232, 229 Ill. 260.
60 C.J. p 560 note 44.

11. Neb.—Mercer v. Omaha & C. B. St. Ry. Co., 188 N.W. 296, 105 Neb. 532.
60 C.J. p 560 note 45.

12. Cal.—Sallee v. United Railroads of San Francisco, 180 P. 74, 40 Cal. App. 51.

13. R.I.—Washington v. Rhode Island Co., 70 A. 913.
60 C.J. p 560 note 47.

or wire,¹⁴ or by objects projecting from the car,¹⁵ or by the escape of electricity from the rails,¹⁶ or by the fall of a bolt or bar or other object from an elevated structure,¹⁷ or where a car is running along the street with no one in control.¹⁸

The doctrine of *res ipsa loquitur* has been held not to apply where the circumstances of the accident do not warrant an inference of negligence,¹⁹ where the proof leaves room for a different presumption or inference,²⁰ where it is shown that the accident might have happened as the result of one of several causes,²¹ where there is no want of evidence as to the cause of the accident and the manner in which it occurred,²² where the injury was caused by the unlawful act of a passenger,²³ or where the railroad did not have complete control over the situation,²⁴ as where the object producing the injury was not in the custody or under control of defendant;²⁵ nor does it apply ordinarily, where there is merely a showing of a collision.²⁶

Where the proof of the accident gives rise to the application of the doctrine of *res ipsa loquitur*, the burden is on defendant to rebut the presumption of negligence²⁷ but the application of the doctrine does not operate to shift the burden of proof.²⁸

Statutory provisions. By statute in some jurisdictions on proof by plaintiff of a loss or damage to person or property incurred or sustained by reason of the operation of a street railroad, a presumption arises that the injury was caused by the negligence of defendant and the burden of proving freedom from negligence is on defendant.²⁹ Statutes pertaining to such presumption in actions for injuries against railroads have been held applicable,³⁰ and inapplicable,³¹ in actions for injuries due to the operation of a street railroad. The statutes are inapplicable where plaintiff fails to show that the injury was caused by defendant.³² The statutes are said to be a concrete and modified expression of the doctrine of *res ipsa loquitur*,³³ and to the extent that the statutes raise a presumption in cases other than those of injuries to passengers they are in derogation of the common law³⁴ and must be strictly construed.³⁵ When the fact of an injury in such a manner and at such a place as contemplated by the statute is proved, the statute operates to give rise to a presumption of negligence on the part of defendant,³⁶ to the extent of all acts of negligence alleged,³⁷ and to cast on it the burden of rebutting such presumption by proving that it was not negligent.³⁸ The presumption

14. N.Y.—*Melia v. Southern Boulevard R. Co.*, 286 N.Y.S. 501, 159 Misc. 293.
60 C.J. p 560 note 48.

15. Mo.—*Burns v. United Rys. Co. of St. Louis*, 158 S.W. 394, 176 Mo. App. 330.

16. N.J.—*Trenton Pass. R. Co. v. Cooper*, 37 A. 730, 60 N.J.Law 219, 64 Am.S.R. 592, 38 L.R.A. 637.

17. N.Y.—*Morseman v. Manhattan R. Co.*, 10 N.Y.S. 105, 16 Daly 249.
60 C.J. p 560 note 51.

18. Ill.—*Chicago City R. Co. v. Barker*, 70 N.E. 624, 209 Ill. 321—*Chicago City R. Co. v. Eick*, 111 Ill. App. 452, affirmed 70 N.E. 624, 209 Ill. 321.

19. N.Y.—*Riles v. Murray*, 12 N.Y.S. 2d 648.

W.Va.—*Goff v. City Lines of West Virginia*, 43 S.E.2d 800, 130 W.Va. 220.

Failure of appliance

In action for death of person run over by streetcar, mere failure of fender on streetcar to effect its intended purpose to lift from tracks person lying or standing thereon was held not to raise presumption of negligence.—*Nelis v. Community Trac-tion Co.*, 4 N.E.2d 399, 53 Ohio App. 184.

Pedestrian struck at intersection
Pa.—*Ashby v. Philadelphia Transp. Co.*, 52 A.2d 578, 356 Pa. 610.

20. N.Y.—*Adams v. Metropolitan St. R. Co.*, 81 N.Y.S. 553, 82 App.Div. 354.
60 C.J. p 561 note 54.

21. Mass.—*Carney v. Boston Elevated Ry.*, 98 N.E. 605, 212 Mass. 179.
60 C.J. p 561 note 55.

22. La.—*Armstrong v. New Orleans Public Service, App.*, 188 So. 189.
60 C.J. p 561 note 53.

23. Cal.—*McAlpine v. Los Angeles Ry. Corp.*, 154 P.2d 911, 67 Cal.App. 2d 486.

24. Ohio.—*Koch v. Cincinnati St. Ry. Co.*, 37 N.E.2d 222, 68 Ohio App. 33.

25. Mo.—*Gallagher v. St. Louis Public Service Co.*, 59 S.W.2d 619, 332 Mo. 944.
60 C.J. p 561 note 56.

26. Mass.—*Reardon v. Boston Elevated Ry. Co.*, 141 N.E. 857, 247 Mass. 124.
60 C.J. p 561 note 57.

27. N.Y.—*Melia v. Southern Boulevard R. Co.*, 286 N.Y.S. 501, 159 Misc. 293.
60 C.J. p 561 note 60.

28. N.Y.—*Melia v. Southern Boulevard R. Co.*, supra.
60 C.J. p 561 note 62.

29. Miss.—*Krebs v. Pascagoula St. Ry. & Power Co.*, 78 So. 753, 117 Miss. 771.
60 C.J. p 562 note 74.

30. Fla.—*Tampa Electric Co. v. McCulloch*, 156 So. 259, 115 Fla. 680.
60 C.J. p 562 note 76.

31. Ala.—*Montgomery B. & T. Co. v. Woods*, 70 So. 119, 194 Ala. 329.
60 C.J. p 562 note 77.

32. Ga.—*Atlanta R., etc., Co. v. Johnson*, 48 S.E. 389, 120 Ga. 908.

33. Ga.—*Atlanta R., etc., Co. v. Johnson*, supra.

34. Ga.—*Atlanta R., etc., Co. v. Johnson*, supra.

35. Ga.—*Atlanta R., etc., Co. v. Johnson*, supra.

36. Fla.—*Tampa Electric Co. v. McCulloch*, 156 So. 259, 115 Fla. 680.
60 C.J. p 562 note 82.

37. Ga.—*Georgia Ry & Electric Co. v. Bailey*, 70 S.E. 607, 9 Ga.App. 106.

38. Fla.—*Tampa Electric Co. v. McCulloch*, 156 So. 259, 115 Fla. 680.
60 C.J. p 562 note 84.

of negligence ceases when facts are shown explaining how the injury occurred,³⁹ or when defendant has made it appear that it has exercised ordinary and reasonable care and diligence.⁴⁰

§ 307. — Contributory Negligence

In actions for injuries from the operations of a street railroad, the burden of proof on the issue of contributory negligence is, in some jurisdictions, on the defendant; in others, on the plaintiff.

The sharp conflict, discussed in Negligence § 210, as to where the burden of proof lies on the issue of contributory negligence also exists in actions for injuries arising from the operation of street railroads, and in a majority of jurisdictions, it is held, sometimes by reason of statute, that the burden is on defendant to prove plaintiff's contributory negligence⁴¹ and that such negligence proximately and directly contributed to the injury,⁴² provided plaintiff has established a prima facie case without disclosing contributory negligence.⁴³ The minority view is that the burden is on plaintiff to establish

his freedom from contributory negligence,⁴⁴ except, under statute in actions for wrongful death.⁴⁵ The rules discussed in Negligence § 218 with respect to the presumptions of care and capacity on the part of an infant as regards the issue of contributory negligence have been applied where an infant is injured by a street railroad.⁴⁶

A statute changing the rule as to burden of proof does not change the substantive law of contributory negligence.⁴⁷ Where defendant, having the burden of proof, makes out a prima facie case of contributory negligence, the burden is on plaintiff to rebut defendant's case,⁴⁸ but the burden of proof of contributory negligence does not shift.⁴⁹ While plaintiff's reliance on the last clear chance or humanitarian doctrine may dispense with the burden of proving freedom from contributory negligence, the burden is not dispensed with where there is no evidence showing that the doctrine is applicable.⁵⁰

Where the contributory negligence of plaintiff relied on as a defense consists of a violation of an

39. Miss.—*Krebs v. Pascagoula St. Ry. & Power Co.*, 78 So. 753, 117 Miss. 771.

40. Fla.—*Tampa Electric Co. v. Bazemore*, 96 So. 297, 85 Fla. 164. 60 C.J. p 562 note 86.

41. Cal.—*Wahrenbrock v. Los Angeles Transit Lines*, 190 P.2d 272, 84 Cal.App.2d 236—*Abelseth v. City and County of San Francisco*, 19 P.2d 53, 129 Cal.App. 552.

Mass.—*Norton v. Boston Elevated Ry. Co.*, 57 N.E.2d 534, 317 Mass. 145—*Ambrose v. Boston Elevated Ry. Co.*, 34 N.E.2d 656, 309 Mass. 219—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E.2d 989, 306 Mass. 231—*Hess v. Boston Elevated Ry.*, 24 N.E.2d 550, 304 Mass. 535—*De Angelis v. Boston Elevated Ry. Co.*, 23 N.E.2d 859, 304 Mass. 461—*Kenney v. Boston Elevated Ry.*, 185 N.E. 503, 282 Mass. 615.

N.H.—*Lovett v. Manchester St. Ry.*, 159 A. 132, 85 N.H. 345.

Ohio.—*Sallee v. Cincinnati Street Ry. Co.*, 176 N.E. 127, 38 Ohio App. 450. 60 C.J. p 564 note 27, p 566 note 77.

In Indiana

(1) While the common-law rule requiring plaintiff to establish his freedom from contributory negligence has been altered by statute so that in personal injury actions the burden is on defendant to establish contributory negligence, the burden is still on plaintiff to establish his freedom from negligence in actions for injury to property.—*Evansville & S. I. Trac-*

tion Co. v. Williams, 109 N.E. 963, 183 Ind. 633—*Potter v. Ft. Wayne, etc., Traction Co.*, 87 N.E. 694, 43 Ind. App. 427—60 C.J. p 566 note 77 [a], p 567 note 80.

(2) Indiana law as to burden of proof on issue of contributory negligence generally see Negligence § 210.

42. Ind.—*Indianapolis Traction & Terminal Co. v. Croly*, 96 N.E. 973, 98 N.E. 1091, 54 Ind.App. 566.

43. Pa.—*Perry v. Pittsburgh Rys. Co.*, 55 A.2d 354, 357 Pa. 608—*Clark v. Pittsburgh Rys. Co.*, 171 A. 886, 314 Pa. 404—*Rieck-McJunkin Dairy Co. v. George*, 56 A.2d 261, 162 Pa. Super. 132—*Brungo v. Pittsburgh Rys. Co.*, 200 A. 893, 132 Pa.Super. 414—*Siegfried v. Lehigh Valley Transit Co., Com.Pl.*, 18 Lehigh Leg.J. 136, affirmed 6 A.2d 97, 334 Pa. 346—*Gutkowski v. Wilkes-Barre Ry. Corp., Com.Pl.*, 37 Luz. Leg.Reg. 231.

Burden of proof as to contributory negligence as affected by plaintiff's evidence generally see Negligence § 212.

44. Ill.—*Wilkinson v. Cummings*, 58 N.E.2d 280, 324 Ill.App. 331—*Richer v. Cummings*, 53 N.E.2d 274, 321 Ill.App. 627—*Little v. Illinois Terminal R. Co.*, 50 N.E.2d 123, 320 Ill. App. 163—*Rajek v. Cummings*, 41 N.E.2d 969, 314 Ill.App. 465.

Iowa.—*Geers v. Des Moines Ry. Co.*, 38 N.W.2d 89, 240 Iowa 783.

Neb.—*Olson v. Omaha & C. B. St. Ry.*

Co., 267 N.W. 246, 131 Neb. 94, applying Iowa law. 60 C.J. p 564 note 31.

Negligence of bailee

Plaintiff suing for damages to automobile from collision with street-car need not prove lack of contributory negligence, where automobile was driven by bailee.—*Bedell v. Androscoggin & K. Ry. Co.*, 177 A. 237, 133 Me. 268.

Willful or wanton conduct of defendant.—*Rajek v. Cummings*, 41 N.E.2d 969, 314 Ill.App. 465.

45. N.Y.—*Angueira v. Brooklyn & Queens Transit Corp.*, 31 N.Y.S.2d 168, 263 App.Div. 43—*Porter v. New York City Interborough Ry. Co.*, 257 N.Y.S. 757, 235 App.Div. 525, affirmed *Sarfaty v. New York City Interborough R. Co.*, 155 N.E. 750, 261 N.Y.S. 557.

60 C.J. p 567 note 81.

46. Wash.—*Armstrong v. Spokane United Rys.*, 78 P.2d 176, 194 Wash. 353.

60 C.J. p 565 note 38 [a].

47. Mass.—*Duggan v. Bay State St. Ry. Co.*, 119 N.E. 757, 230 Mass. 370.

48. Ind.—*Evansville & S. Traction Co. v. Spiegel*, 94 N.E. 718, 49 Ind. App. 412.

49. Ind.—*Evansville & S. Traction Co. v. Spiegel*, supra.

50. Mass.—*Carney v. Boston Elevated Ry.*, 107 N.E. 411, 219 Mass. 552. 60 C.J. p 565 note 33.

ordinance or statute, in jurisdictions where contributory negligence is an affirmative defense, the burden is on defendant to show the violation of the statute or ordinance.⁵¹ It will be presumed that the violation of a statute or ordinance is contributory negligence,⁵² but not that such violation was a proximate cause of the accident.⁵³

It will be presumed that a pedestrian knows that a streetcar in rounding a curve will overhang at the rear end,⁵⁴ and that it is dangerous to go on the tracks when cars are passing.⁵⁵ In the absence of contrary evidence it will be presumed that a moving automobile is under control.⁵⁶ There is no presumption that a driver of an automobile is going to drive so as to collide with a car⁵⁷ and it will not be presumed that a guest in an automobile struck by a streetcar was negligent.⁵⁸ A presumption of negligence in leaving a team unattended in a street is merely a presumption of fact.⁵⁹ In the absence of statute or ordinance, a driver is not presumed to be negligent merely because he drives on the left side of the road.⁶⁰ Where plaintiff does not testify that he was familiar with a speed ordinance and relied on its observance by defendant, it cannot be

presumed that he relied on its observance so as to excuse his contributory negligence.⁶¹

Presumption of due care generally. In accordance with the rules considered generally in Negligence § 206, in some jurisdictions there is a presumption that the person injured was in the exercise of due care,⁶² especially in the case of death.⁶³ The presumption is a rebuttable one,⁶⁴ and has no application where the facts as to how the injury occurred are shown.⁶⁵ Where plaintiff must prove freedom from contributory negligence, a presumption of due care does not arise⁶⁶ even in cases of wrongful death.⁶⁷

In some jurisdictions, in the absence of evidence to the contrary, it may be presumed that a person about to cross a street railroad track was duly careful of his own safety,⁶⁸ especially in cases of death.⁶⁹ According to other decisions it cannot be assumed that a person looked before or after entering a position of peril on the tracks.⁷⁰ The mere proof that plaintiff's hearing was good does not warrant the inference that he was listening for an approaching car,⁷¹ and the mere fact that he could have looked affords no basis for inferring

51. Tex.—El Paso Electric Ry. Co. v. Terrazas, Civ.App., 208 S.W. 387.

60 C.J. p 565 note 36.

52. Ohio.—Plummer v. Peoples Transit Co., App., 104 N.E.2d 75—Childe v. Cincinnati St. Ry. Co., 74 N.E.2d 436, 80 Ohio App. 128.

53. Ohio.—Childe v. Cincinnati St. Ry. Co., supra.

54. Mich.—Hering v. City of Detroit, 221 N.W. 278, 244 Mich. 293.

55. Mo.—Dey v. United Rys. Co. of St. Louis, 120 S.W. 134, 140 Mo.App. 461.

N.Y.—Byrnes v. Brooklyn Heights R. Co., 133 N.Y.S. 243, 148 App.Div. 794.

56. Pa.—Beaumont v. Beaver Valley Traction Co., 148 A. 87, 298 Pa. 223.

57. Pa.—Beaumont v. Beaver Valley Traction Co., supra.

58. Pa.—Suchy v. Buffalo & Lake Erie Traction Co., 129 A. 571, 283 Pa. 533.

60 C.J. p 565 note 41.

59. Pa.—Supplee-Wills-Jones Milk Co. v. Southern Pennsylvania Traction Co., 98 Pa.Super. 550.

60. Ark.—Pankey v. Little Rock Ry. & Electric Co., 174 S.W. 1170, 117 Ark. 337.

61. Mo.—Voelker Products Co. v. United Rys. Co. of St. Louis, 170 S.W. 332, 185 Mo.App. 310—Paul v. United Rys. Co. of St. Louis, 140 S.W. 1196, 160 Mo.App. 599.

62. Cal.—Wahrenbrock v. Los Angeles Transit Lines, 190 P.2d 272, 84 Cal.App.2d 236.

60 C.J. p 565 note 48, p 567 note 86.

63. Cal.—Wahrenbrock v. Los Angeles Transit Lines, supra—Ryan v. San Diego Elec. Ry. Co., 126 P.2d 401, 52 Cal.App.2d 460.

Pa.—Guca v. Pittsburgh Rys. Co., 80 A.2d 779, 367 Pa. 579—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Ehrhart v. York Rys. Co., 162 A. 810, 308 Pa. 566—Malia v. West Penn Railways Co., Com. Pl., 2 Fay.L.J. 135.

60 C.J. p 565 note 49, p 567 note 86.

Infant

In action for death of child resulting when child was struck by streetcar, it was presumed that child's parents and child exercised ordinary care in absence of proof which would compel conclusion that parents were contributorily negligent in permitting child to play in the open unattended.—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733.

64. Pa.—Lieberman v. Pittsburgh Rys. Co., 157 A. 905, 305 Pa. 412. 60 C.J. p 565 note 50.

65. Ill.—Wilkerson v. Cummings, 58 N.E.2d 280, 324 Ill.App. 331.

Mo.—Lackey v. United Rys. Co., 231 S.W. 956, 288 Mo. 120.

Pa.—Ferencz v. Pittsburgh Rys. Co., 19 A.2d 385, 341 Pa. 369—Lieberman v. Pittsburgh Rys. Co., 157 A. 905, 305 Pa. 412.

60 C.J. p 567 note 87.

66. N.Y.—Keating v. Metropolitan St. R. Co., 94 N.Y.S. 117, 105 App. Div. 362—Fortunato v. Union Ry. Co. of New York City, 172 N.Y.S. 119.

67. Ind.—Evansville St. R. Co. v. Gentry, 44 N.E. 311, 147 Ind. 408, 62 Am.S.R. 421, 37 L.R.A. 378.

N.Y.—O'Reilly v. Brooklyn Heights R. Co., 81 N.Y.S. 572, 82 App.Div. 492.

68. Mo.—Byerley v. Metropolitan St. Ry. Co., 158 S.W. 413, 172 Mo.App. 470.

60 C.J. p 566 note 57.

69. Mo.—Cihla v. United Rys. Co. of St. Louis, 221 S.W. 427.

60 C.J. p 566 note 58.

70. Conn.—Kerr v. Connecticut Co., 140 A. 751, 107 Conn. 304.

71. N.Y.—Belford v. Brooklyn Heights R. Co., 83 N.Y.S. 836, 86 App.Div. 388.

that he did look.⁷² When, from the physical facts of the case the person injured would have seen a car had he looked it is presumed either that he failed to look or, having looked failed to exercise the proper care to avoid injury.⁷³ Where defendant's car was being operated during darkness at a dangerous rate of speed without a lighted headlight and without any warning of its approach, it will not be presumed that a driver of a vehicle failed to look, or having looked, failed to heed.⁷⁴

Happening of accident. The happening of the accident ordinarily does not alone make out a case of contributory negligence⁷⁵ or freedom therefrom.⁷⁶ The mere fact that there is a collision between a streetcar and a vehicle raises no presumption of contributory negligence,⁷⁷ but, where a collision occurs between a car and a vehicle progressing side by side with a space between them, the driver of the vehicle may be presumed negligent.⁷⁸

Imputed negligence. Where defendant alleges that the injury was occasioned by plaintiff's servant so as to impute the servant's negligence to his master, the burden is on defendant to prove the relationship of master and servant.⁷⁹ It has been held that a statute making contributory negligence an affirmative defense as to which defendant has the burden of proof relates only to the personal conduct of plaintiff so that plaintiff has the burden of proving that his servants or others whose negligence is imputable to him were not guilty of negligence contributing to the injury.⁸⁰ So, too, it has been

held that a statutory presumption of due care extends no further than to the person injured and is inapplicable as to servants of the injured person.⁸¹

§ 308. Admissibility of Evidence

General rules as to the competency, relevancy, and materiality of evidence govern and control, as far as applicable, in actions for damages sustained through the operation of a street railroad.

General rules as to the competency, relevancy, and materiality of evidence, particularly those applying in actions for negligence in general, govern and control, as far as applicable, in actions for damages sustained through the operation of a street railroad.⁸² Subject to these rules evidence is admissible on behalf of plaintiff or defendant of all facts and circumstances which tend to prove or disprove plaintiff's cause of action,⁸³ or defendant's matters of defense,⁸⁴ but evidence which is irrelevant, immaterial, or incompetent is inadmissible on behalf of plaintiff⁸⁵ or defendant.⁸⁶ In an action against a street railroad for assault, evidence that the railroad defended its employee in a criminal action is relevant and admissible on the issue whether the employee was acting in the scope of his employment in assaulting plaintiff.⁸⁷

Res gestæ; declarations. General rules relating to the admissibility of evidence as part of the res gestæ apply in actions for injuries from the operation of a street railroad.⁸⁸ Declarations or statements of a motorman made immediately be-

72. N.Y.—O'Reilly v. Brooklyn Heights R. Co., 81 N.Y.S. 572, 82 App.Div. 492.

73. Mo.—Markowitz v. Metropolitan St. Ry. Co., 85 S.W. 351, 186 Mo. 350.
60 C.J. p 566 note 62.

74. Ind.—Indianapolis & Cincinnati Traction Co. v. Senour, 122 N.E. 772, 71 Ind.App. 10.

75. N.J.—Merkl v. Jersey City, etc., St. R. Co., 68 A. 74, 75 N.J.Law 654.
60 C.J. p 566 note 64.

76. N.Y.—Carley v. Joline, 144 N.Y.S. 1018, 159 App.Div. 780, affirmed 107 N.E. 1074, 213 N.Y. 691.

77. N.Y.—O'Neill v. Dry Dock, etc., R. Co., 15 N.Y.S. 84, 59 N.Y.Super. 123, affirmed 29 N.E. 84, 129 N.Y. 125, 26 Am.S.R. 512.

78. N.Y.—Suydam v. Grand St., etc., R. Co., 41 Barb. 375, 17 Abb.Pr. 304.

79. Mo.—Moon v. St. Louis Transit Co., 141 S.W. 870, 237 Mo. 425, Ann. Cas.1913A 183.

80. Mass.—Pitman & Brown Co. v. Eastern Massachusetts St. Ry. Co., 151 N.E. 315, 255 Mass. 292.
60 C.J. p 567 note 83.

81. Mass.—Pitman & Brown Co. v. Eastern Massachusetts St. Ry. Co., 151 N.E. 315, 255 Mass. 292—Bulard v. Boston Elevated Ry. Co., 115 N.E. 294, 226 Mass. 262.

82. Mo.—Senn v. Southern R. Co., 18 S.W. 1007, 108 Mo. 142.
60 C.J. p 567 note 1.

Admissibility of evidence in action for injury to passenger of street railroad see Carriers § 765.

83. Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.
60 C.J. p 567 note 2.

Owner's application for registration of automobile was held properly

admitted.—Crean v. Boston Elevated Ry. Co., 198 N.E. 172, 292 Mass. 226.

84. N.Y.—Cunningham v. Metropolitan St. R. Co., 60 N.Y.S. 277, 29 Misc. 123.

85. Ga.—Elliott v. Georgia Power Co., 197 S.E. 914, 55 Ga.App. 151. Mass.—Crean v. Boston Elevated Ry. Co., 198 N.E. 172, 292 Mass. 226.
60 C.J. p 568 note 4.

86. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 295, 232 Ala. 213.
60 C.J. p 568 note 5.

Whether tracks were rightfully in public street was held immaterial.—Mobile Light & Railroad Co. v. Nicholas, supra.

87. Mo.—State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

88. Ala.—Mobile Light, etc., Co. v. Burch, 68 A. 509, 12 Ala.App. 421.
60 C.J. p 569 note 7.

fore⁸⁹ or after⁹⁰ the accident are admissible. A declaration of the conductor may be introduced for the purpose of impeaching his other testimony.⁹¹ Declarations of a third person to the motorman after the accident have been held inadmissible.⁹²

§ 309. — Negligence of Defendant

- a. In general
- b. Municipal ordinances and regulations
- c. Rules of company
- d. Defects in tracks, streets, cars, or other equipment
- e. Operation of cars
- f. Speed
- g. Incompetency or insufficiency of employees

a. In General

Any evidence which is competent, relevant, and material is admissible on the issue of negligence.

In accordance with general rules any evidence which is competent, relevant, and material is admissible on the issue of negligence,⁹³ and evidence which is incompetent, irrelevant, and immaterial is not admissible.⁹⁴

Opinion evidence. General rules as to the exclusion of opinion evidence apply in an action for injuries from the operation of a street railroad.⁹⁵ While a motorman must state what he did to stop his car rather than that he stopped it as soon as he could,⁹⁶ he may state that he could not have done anything further than he did to prevent the injury.⁹⁷ Testimony that there were no obstacles in

the way to prevent a motorman seeing the person on or near the track is not a mere expression of opinion.⁹⁸ Where there is evidence that a car was stopped within a certain space after the accident, there is no need of expert testimony to show within what distance the car could have been stopped.⁹⁹

Other accidents or acts. Ordinarily, evidence of other accidents or acts is inadmissible to show negligence on the part of the company at the time and place of the injury,¹ unless the conditions and circumstances surrounding the different acts or occasions are shown to be the same and in the same locality.²

b. Municipal Ordinances and Regulations

Where a violation of a valid ordinance tends to show negligence on the part of the street railroad, the ordinance is admissible in evidence.

Where a violation of an ordinance, together with other evidence, tends to show negligence on the part of a street railroad, the ordinance is admissible,³ but an ordinance which is irrelevant or immaterial is inadmissible.⁴ Where the right to enact an ordinance is withdrawn from a city, and the power vested in a public utility commission so that the ordinance is of no effect,⁵ or an ordinance is superseded by a later ordinance,⁶ the ordinance is inadmissible. An ordinance passed after the accident has been held inadmissible.⁷ Since, ordinarily on the acceptance by a street railroad of its charter or grant of franchise, it is bound to observe ordinances without expressly accepting them, for the purpose of offering an ordinance in evidence, it is not necessary to prove that it was accepted.⁸

89. Ill.—Chicago City R. Co. v. McDonough, 77 N.E. 577, 221 Ill. 69. 60 C.J. p 569 note 9.

90. Ky.—Floyd v. Paducah R., etc., Co., 64 S.W. 653, 23 Ky.L. 1077. 60 C.J. p 569 note 10.

91. Ill.—Chicago, etc., R. Co. v. Ingraham, 23 N.E. 350, 131 Ill. 659.

92. Mich.—Stenzhorn v. City Electric Ry. Co., 123 N.W. 621, 159 Mich. 82. 60 C.J. p 569 note 12.

93. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

94. Tex.—Osterloh v. San Antonio Public Service Co., Civ.App., 77 S.W.2d 290, error dismissed.

95. Mass.—Bickford v. Boston Ele-

vated Ry. Co., 7 N.E.2d 276, 296 Mass. 580. 60 C.J. p 569 note 15.

96. Ala.—Birmingham R., etc., Co. v. Randle, 43 So. 355, 149 Ala. 539.

97. Ala.—Birmingham R., etc., Co. v. Randle, supra.
Mo.—Hogan v. Citizens' R. Co., 51 S.W. 473, 150 Mo. 36.

98. Mo.—Levin v. Metropolitan St. R. Co., 41 S.W. 968, 140 Mo. 624.

99. Mo.—Huckshold v. United Rys. Co. of St. Louis, 234 S.W. 1072. 60 C.J. p 569 note 19.

1. Ky.—Basham v. Owensboro City R. Co., 183 S.W. 492, 169 Ky. 155. 60 C.J. p 569 note 22.

2. Tex.—San Antonio Edison Co. v. Beyer, 57 S.W. 851, 24 Tex.Civ.App. 145.

60 C.J. p 569 note 23.

3. Ala.—Birmingham, E. & B. R. Co. v. Williams, 66 So. 653, 190 Ala. 53.

60 C.J. p 569 note 26.

4. Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287.
Tex.—Dallas Ry. & Terminal Co. v. Strickland Transp. Co., Civ.App., 225 S.W.2d 901.

60 C.J. p 570 note 27.

5. Ill.—Northern Trust Co. v. Chicago Rys. Co., 149 N.E. 422, 318 Ill. 402.—Ewald v. Chicago Rys. Co., 247 Ill.App. 77.

6. Iowa.—McBride v. Des Moines City R. Co., 109 N.W. 618, 134 Iowa 398.

7. Ala.—Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242.

8. Mo.—Sheehan v. Citizens' R. Co., 72 Mo.App. 524.

Equipment of cars. Ordinances requiring street-cars to be equipped with certain appliances are admissible where with other testimony they tend to prove negligence of the street railroad,⁹ but such an ordinance is not admissible where it is irrelevant and immaterial.¹⁰

Tracks and repair of street. Where the evidence discloses that plaintiff's injury resulted from the failure of a street railroad to maintain its tracks in proper condition, an ordinance or contract with the city relating to the maintenance of tracks is admissible.¹¹ Likewise, where the injury results from a failure to keep the street in repair as required by ordinance, the ordinance is admissible,¹² but, where plaintiff had knowledge of the defect so that defendant's negligence is not the cause of the injury, the exclusion of an ordinance is proper.¹³

Speed ordinance. Although a speed ordinance prescribes only a penalty for a violation of its provisions,¹⁴ where the evidence establishes that a streetcar was exceeding the speed limit, a speed ordinance limiting the speed of streetcars within the corporate limits is admissible in evidence in connection with other testimony to show that defendant's operation of the car at the time and place of the injury was negligent.¹⁵ In the absence of evidence fixing the rate of speed of defendant's car involved in the accident, it is proper to exclude a city ordinance regulating the speed of streetcars within the corporate limits.¹⁶ A speed ordinance, in

order to be admissible, must be applicable¹⁷ as to the place of the injury¹⁸ and as to the person injured.¹⁹

c. Rules of Company

There is conflict as to whether the rules of the street railroad company are admissible to show its negligence. Rules have been held not admissible to disprove negligence.

According to some authorities, the rules of the company regulating its employees in the operation of its cars are inadmissible to prove the company's negligence,²⁰ at least where the rules were not known to plaintiff,²¹ or where they impose a higher duty on the employees than is required by law.²² According to other authorities, the rules of the company, when relevant and applicable, are admissible,²³ at least where plaintiff had knowledge of them,²⁴ even if the rules are intended solely for the benefit of the company's employees.²⁵ The admission of such rules as evidence has been held to be similar to the admission of an ordinance regulating the operation of street railroads.²⁶ A rule of the company is inadmissible when it is inapplicable under the evidence in the case.²⁷ On behalf of the company to disprove its negligence such rules have been held inadmissible.²⁸ Thus on behalf of the company a rule as to the speed allowed is inadmissible to prove that the company was not negligent,²⁹ but the admission of a rule requiring employees to sound the gong at crossings has been held not to constitute reversible error.³⁰

9. Cal.—Lagomarsino v. Market St. Ry. Co., 261 P. 465, 202 Cal. 474.
60 C.J. p 570 note 35.

10. Ark.—Miller v. Ft. Smith Light & Traction Co., 206 S.W. 329, 136 Ark. 272.
60 C.J. p 570 note 36.

11. Ala.—Birmingham Union R. Co. v. Alexander, 9 So. 525, 93 Ala. 133.
60 C.J. p 571 note 39.

12. Ill.—Valuch v. Rawson, 270 Ill. App. 583.
60 C.J. p 571 note 41.

13. Wash.—Oriental Express Co. v. Puget Sound Traction, Light & Power Co., 194 P. 781, 113 Wash. 520.
60 C.J. p 571 note 42.

14. Va.—Norfolk R., etc., Co. v. Corletto, 41 S.E. 740, 100 Va. 355.

15. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal.App. 1.
60 C.J. p 571 note 46.

16. Ohio.—Furrer v. Ohio Electric

Ry. Co., 7 Ohio App. 491, 27 Ohio C.A. 410.

17. Del.—Maxwell v. Wilmington City R. Co., 40 A. 945, 15 Del. 199.
60 C.J. p 571 note 48.

18. Ohio.—Ulrich v. Toledo Consol. St. R. Co., 10 Ohio Cir.Ct. 635, 5 Ohio Cir.Dec. 111.
60 C.J. p 571 note 49.

19. Mich.—Brown v. Detroit United Ry., 146 N.W. 278, 179 Mich. 404.
60 C.J. p 571 note 50.

20. Ky.—Louisville R. Co. v. Gaugh, 118 S.W. 276, 278, 133 Ky. 467.
60 C.J. p 578 note 85.

21. Minn.—Isackson v. Duluth St. R. Co., 77 N.W. 433, 75 Minn. 27.
60 C.J. p 578 note 86.

22. Minn.—Isackson v. Duluth St. R. Co., supra.

23. Cal.—Holder v. Key System, 200 P.2d 98, 88 Cal.App.2d 925—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal.App.2d 590.

Conn.—Hurley v. Connecticut Co., 172 A. 86, 118 Conn. 276.
60 C.J. p 578 note 89.

24. Ill.—Chicago City R. Co. v. McDonough, 125 Ill.App. 223, affirmed 77 N.E. 577, 221 Ill. 69.

25. S.C.—McCormick v. Columbia Electric St. Ry., Light & Power Co., 67 S.E. 562, 85 S.C. 455, 21 Ann. Cas. 144.

26. Mass.—Stevens v. Boston Elevated Ry. Co., 69 N.E. 338, 184 Mass. 476.

27. Mass.—Mercier v. Union St. Ry. Co., 119 N.E. 764, 230 Mass. 397.
60 C.J. p 578 note 94.

28. Tex.—Blevins v. Houston Electric Co., Civ.App., 235 S.W. 987.
60 C.J. p 579 note 95.

29. N.Y.—Anastasio v. Hedges, 202 N.Y.S. 109, 207 App.Div. 406—O'Keefe v. Eighth Ave. R. Co., 53 N.Y.S. 940, 33 App.Div. 324.

30. Ill.—Fitzpatrick v. Bloomington City R. Co., 73 Ill.App. 516.

d. Defects in Tracks, Streets, Cars, or Other Equipment

Any evidence, otherwise competent, which tends to show negligence in the construction or maintenance of the streets, tracks, cars, or other equipment is admissible.

As bearing on the question of the company's negligence in the construction and maintenance of the street, tracks, or other equipment, evidence not otherwise incompetent is admissible of any fact or circumstance which tends to show that the company failed to exercise due care and diligence.³¹ Where the evidence shows that no change occurred in the condition before or after the accident,³² evidence of the condition before³³ or after³⁴ the accident is admissible to show the existence of a dangerous condition at the time of the accident. The admissibility of the evidence in each case depends on the degree of probability afforded by it that the condition shown before the injury continued at the time of the injury,³⁵ and is a matter resting largely within the discretion of the court.³⁶

For the purpose of showing the defective condition at the time and place of the injury, evidence is ordinarily inadmissible of the defective condition at other times and places,³⁷ or of precautions taken by the company after the accident.³⁸ On the question of negligent or defective construction or maintenance, evidence is admissible to show that structures of a similar class are or are not constructed

in a similar manner,³⁹ and that certain methods could have been adopted to eliminate the defective condition existing.⁴⁰ While evidence of accidents to others at the place has been held inadmissible,⁴¹ it has also been held that such evidence is admissible to show the existence of a dangerous condition.⁴²

As tending to disprove negligence evidence is admissible on behalf of defendant to show that other persons or vehicles were constantly crossing the track safely at the place and about the time of the accident,⁴³ but evidence that the company never heard of anyone walking off an elevated railroad platform is inadmissible where it is not shown that there were other unguarded platforms such as the one in question.⁴⁴ On behalf of the company to show that the road was constructed to the satisfaction of the road commissioner as required by statute, testimony of an assistant commissioner that he saw the work done and was satisfied is admissible to show that the work was done to the commissioner's satisfaction.⁴⁵

Notice of defect. Evidence is admissible to show that the company had actual or constructive notice of the defect.⁴⁶ For the purpose of showing that the company had notice of the defect and to charge it with a failure to repair, evidence is admissible to show the condition of the track or street before the accident,⁴⁷ that the defect was brought to the attention of the company,⁴⁸ that on prior occasions

31. N.H.—*Lovett v. Manchester St. Ry.*, 159 A. 132, 85 N.H. 345. 60 C.J. p 571 note 53.

Duty to protect

Conditions of trolley company's application for location of curb poles were held admissible to show company obligation to take care of danger created by unguarded center pole pending removal.—*Lovett v. Manchester St. Ry.*, *supra*.

32. Ala.—*Birmingham Union R. Co. v. Alexander*, 9 So. 525, 93 Ala. 133. 60 C.J. p 572 note 54.

33. N.J.—*Alcott v. Public Service Corp.*, 74 A. 499, 78 N.J.Law 482, 32 L.R.A., N.S., 1084, 138 Am.S.R. 619. 60 C.J. p 572 note 57.

34. Mo.—*Reynolds v. Metropolitan St. Ry. Co.*, 116 S.W. 1135, 136 Mo. App. 282. 60 C.J. p 572 note 58.

35. Ky.—*Frankfort, etc., Traction Co. v. Hulette*, 106 S.W. 1193, 32 Ky.L. 732.

"Limitation to such evidence is that it must be such in character and point of time as to justify the inference that the switch was in a defective condition at the time of the accident."—*Reynolds v. Metropolitan St. Ry. Co.*, 116 S.W. 1135, 138 Mo.App. 282.

36. Ky.—*Frankfort & V. Traction Co. v. Hulette*, 106 S.W. 1193, 32 Ky.L. 732.

37. Conn.—*Cunningham v. Fair Haven, etc., R. Co.*, 43 A. 1047, 72 Conn. 244. 60 C.J. p 572 note 61.

38. Utah.—*Christensen v. Utah Rapid Transit Co.*, 27 P.2d 468, 83 Utah 231. 60 C.J. p 572 note 62.

39. N.Y.—*Jarvis v. Brooklyn El. R. Co.*, 16 N.Y.S. 96, affirmed 30 N.E. 1150, 133 N.Y. 623. 60 C.J. p 572 note 63.

40. N.Y.—*Manson v. Manhattan R. Co.*, 55 N.Y.Super.Ct. 18, 8 N.Y.St. 118. 60 C.J. p 572 note 64.

41. Mich.—*Gregory v. Detroit United R. Co.*, 101 N.W. 546, 138 Mich. 368. 60 C.J. p 572 note 65.

42. Mo.—*Wood v. St. Louis Public Service Co.*, 246 S.W.2d 807. N.H.—*Lovett v. Manchester St. Ry.*, 159 A. 132, 85 N.H. 345. 60 C.J. p 572 note 67.

43. Ala.—*Birmingham Union R. Co. v. Alexander*, 9 So. 525, 93 Ala. 133.

44. N.Y.—*Jarvis v. Brooklyn El. R. Co.*, 16 N.Y.S. 96, affirmed 30 N.E. 1150, 133 N.Y. 623.

45. Mass.—*Mahoney v. Natick, etc., St. R. Co.*, 54 N.E. 349, 173 Mass. 587.

46. N.Y.—*Verdacchi v. Brooklyn & Queens Transit Corp.*, 295 N.Y.S. 887, 251 App.Div. 744.

47. Conn.—*Cunningham v. Fair Haven, etc., R. Co.*, 43 A. 1047, 72 Conn. 244. 60 C.J. p 573 note 75.

48. Pa.—*Musser v. Lancaster City St. R. Co.*, 35 A. 206, 176 Pa. 621. 60 C.J. p 573 note 76.

the defect or obstruction caused injuries to others,⁴⁹ and the condition of other equipment of the same nature near the place of injury.⁵⁰

Condition or equipment of cars. As tending to show negligence, evidence, if otherwise competent, is admissible with respect to the equipment and condition thereof on the car at the time and place of the injury,⁵¹ but evidence which is immaterial is properly excluded.⁵² Where the evidence shows that no change occurred in the condition before or after the accident, in view of the presumption of the persistence of conditions of a continuing nature once shown to exist, evidence is admissible as to the defective condition of the equipment of the car causing the injury before and after the accident,⁵³ or that the car was dismantled shortly after the accident, and the equipment sold as old iron,⁵⁴ but evidence that the equipment on other cars was defective or out of repair is not admissible.⁵⁵ While evidence that other cars in common use are better equipped has been held inadmissible,⁵⁶ it has been held that for the purpose of determining whether a car was properly equipped at the time of the injury evidence may be admitted as to whether a certain improvement had extensively been known and used prior to the time of the accident.⁵⁷

e. Operation of Cars

Any evidence, otherwise competent, which tends to show that the street railroad company was negligent in the operation of its cars, is ordinarily admissible.

As bearing on the question of the company's negligence in the operation of its cars, evidence, not otherwise incompetent, is admissible of any fact or circumstance which tends to show that the company failed to exercise due care and diligence,⁵⁸ but evidence which is irrelevant and immaterial is inadmissible.⁵⁹ As bearing on the question of the manner in which a car should have been operated at the time and place of the injury, evidence is admissible as to the condition of the brakes⁶⁰ and the tracks.⁶¹ For such purpose evidence is also admissible as to the condition of the locus in quo,⁶² the amount of travel there,⁶³ that it was a thickly populated neighborhood,⁶⁴ and that children customarily were there.⁶⁵ Where a collision occurs with a vehicle driving on the track, for the purpose of showing the care required in the operation of the cars at such point, evidence is admissible that the public under certain circumstances were in the habit of driving on the track.⁶⁶ Evidence of the populousness of the territory surrounding and beyond the scene of the injury is inadmissible.⁶⁷ In order to demonstrate that the car in question could not be safely run at as high a rate of speed as others better equipped, it has been held competent to show that other cars differently equipped could be stopped in a shorter distance and time.⁶⁸

Customary methods and acts. Evidence of the customary methods and acts of the company in the operation of its cars is admissible on the question

49. Mo.—Wood v. St. Louis Public Service Co., 246 S.W.2d 807.
60 C.J. p 573 note 77.

50. Ind.—Evansville & S. Traction Co. v. Montgomery, 98 N.E. 731, 50 Ind.App. 528.
60 C.J. p 573 note 78.

51. Ky.—Frankfort & U. Traction Co. v. Hulette, 106 S.W. 1193, 32 Ky.L. 732.
60 C.J. p 573 note 81.

52. Wis.—Fisher v. Waupaca Electric Light & Ry. Co., 124 N.W. 1005, 141 Wis. 515.
60 C.J. p 573 note 82.

Similar conditions

Evidence of extent of street car light was held properly refused as based on observations on other cars at another time, without showing similarity of conditions.—Oddwycz v. Connecticut Co., 155 A. 824, 113 Conn. 648.

53. Ky.—Frankfort, etc., Traction

Co. v. Hulette, 106 S.W. 1193, 32 Ky.L. 732.
60 C.J. p 573 note 85.

54. Ky.—Frankfort, etc., Traction Co. v. Hulette, supra.
60 C.J. p 573 note 86.

55. N.C.—Moore v. Charlotte Electric R., etc., Co., 48 S.E. 822, 136 N.C. 554, 67 L.R.A. 470.
60 C.J. p 573 note 87.

56. Ohio.—Columbus R. Co. v. Connor, 27 Ohio Cir.Ct. 229.

57. Conn.—Currie v. Consolidated R. Co., 71 A. 356, 81 Conn. 383.
60 C.J. p 573 note 90.

58. Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.
60 C.J. p 574 note 92.

59. Mass.—Gadbois v. Bay State St. Ry. Co., 103 N.E. 294, 216 Mass. 188.
60 C.J. p 574 note 93.

60. Ill.—South Chicago City R. Co.

v. Purvis, 61 N.E. 1046, 193 Ill. 454.

61. Md.—Capital Traction Co. v. Contner, 87 A. 904, 120 Md. 78.

62. Mo.—Ellis v. Metropolitan St. Ry. Co., 138 S.W. 23, 234 Mo. 657.

63. Mo.—Wagner v. Metropolitan St. Ry. Co., 142 S.W. 463, 160 Mo.App. 334.
60 C.J. p 574 note 97.

64. Ind.—Indianapolis St. R. Co. v. Taylor, 72 N.E. 1045, 164 Ind. 155.
60 C.J. p 574 note 98.

65. Colo.—Denver City Tramway Co. v. Brown, 143 P. 364, 57 Colo. 484.
60 C.J. p 574 note 99.

66. Mich.—Rascher v. East Detroit, etc., R. Co., 51 N.W. 463, 90 Mich. 413, 30 Am.S.R. 447.
60 C.J. p 574 note 1.

67. Ala.—Jordan v. Alabama City, G. & A. Ry. Co., 60 So. 309, 179 Ala. 291.

68. Ohio.—Columbus R. Co. v. Connor, 27 Ohio Cir.Ct. 229.

of negligent operation at the time and place of the injury.⁶⁹ Thus, for the purpose of showing negligence in the operation of a car evidence is admissible as to the customary mode of running cars on double tracks,⁷⁰ and the custom of stopping cars at certain times and places.⁷¹ The mere fact that cars on prior occasions stopped at a crossing to permit plaintiff's steam roller to pass is insufficient to charge the company with notice so as to require it to operate its cars at a decreased speed at such point.⁷² On behalf of the company to show that it was not negligent at the time and place of the injury, evidence is admissible as to customary conduct of automobile drivers at intersections.⁷³

Other accidents and acts. Ordinarily evidence of other accidents or acts of negligence in the operation of cars at other places or on other occasions, previous or subsequent, is inadmissible to show negligence on the part of the company in the operation of its car at the time and place of the injury,⁷⁴ unless the conditions and circumstances surrounding the different acts or occasions are shown to be the same and in the same locality,⁷⁵ or the acts are continuous in their nature and are closely connected with the acts complained of in point of time, place, and circumstances,⁷⁶ but evidence of similar occurrences is admissible to prove the company's negligence in the operation of its car when it appears that the essential physical conditions are similar.⁷⁷ Thus it has been held that, as tending to show negli-

gence on the part of an employee on a car, evidence is admissible as to his conduct just prior to the accident;⁷⁸ but on the other hand it has been held that evidence of his acts after the accident is inadmissible.⁷⁹ On behalf of defendant testimony of the motorman as to acts immediately preceding the accident is admissible,⁸⁰ but evidence that a motorman has been careful on other similar occasions is ordinarily inadmissible.⁸¹

Arrest or prosecution. While the admission of evidence of the arrest of a motorman at the time of the accident has both been held proper,⁸² and improper,⁸³ at least it is error to refuse to permit evidence to be given as to the cause and reason of the arrest.⁸⁴ Evidence of the motorman's arrest some time after the accident has been held inadmissible as part of the *res gestae*.⁸⁵ The fact that plaintiff unsuccessfully prosecuted the motorman has been held immaterial.⁸⁶

Intoxication. Evidence that a motorman was intoxicated is admissible to show that the car was operated in a reckless manner.⁸⁷ While evidence which is too remote is inadmissible to prove intoxication at the time and place of the injury,⁸⁸ as bearing on the question of the motorman's intoxication at the time of the accident, evidence has been held admissible to show that he had a drink just before starting on the trip,⁸⁹ and that during the trip his conduct was such as to indicate his condition.⁹⁰

69. Iowa.—Carter v. Sioux City Service Co., 141 N.W. 26, 160 Iowa 78.

60 C.J. p 574 note 5.

70. Ill.—North Chicago St. R. Co. v. Irwin, 66 N.E. 1077, 202 Ill. 345. 60 C.J. p 574 note 6.

71. Ill.—Harmon v. Peoria Ry. Co., 160 Ill.App. 458. 60 C.J. p 575 note 7.

72. Mich.—Good Roads Const. Co. v. Port Huron St. C. & M. C. Ry. Co., 138 N.W. 320, 173 Mich. 1.

73. N.H.—Jordan v. Boston & M. R. R., 113 A. 390, 80 N.H. 105.

Custom contrary to traffic regulations
A custom or usage contrary to a traffic ordinance or regulation or to the general law of the road should not be admitted to excuse a violation of such regulation.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

74. Ga.—Elliott v. Georgia Power Co., 197 S.E. 914, 58 Ga.App. 151.

Ky.—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206.

60 C.J. p 575 note 11.

75. N.Y.—Perras v. United Traction Co., 84 N.Y.S. 992, 88 App.Div. 260.

76. N.Y.—Pyne v. Broadway, etc., R. Co., 19 N.Y.S. 217, affirmed 33 N.E. 1083, 138 N.Y. 627.

77. Ark.—Ft. Smith Light & Traction Co. v. Hendrickson, 189 S.W. 1064, 126 Ark. 377. 60 C.J. p 575 note 19.

78. Ohio.—Mt. Adams, etc., Inclined R. Co. v. Doherty, 8 Ohio Cir.Ct. 349, 6 Ohio Cir.Dec. 810. 60 C.J. p 575 note 14.

79. N.Y.—Netterfield v. New York City R. Co., 113 N.Y.S. 434, 129 App. Div. 56. 60 C.J. p 575 note 15.

80. Va.—Ashby v. Virginia Ry. & Power Co., 122 S.E. 104, 138 Va. 310. 60 C.J. p 575 note 16.

81. Ill.—Sunderland v. Pioneer Fire Proof Constr. Co., 78 Ill.App. 102. 60 C.J. p 575 note 17.

82. Ill.—Chicago City R. Co. v. Reddick, 139 Ill.App. 160.

83. N.Y.—Luby v. Hudson River Co., 17 N.Y. 131.

84. Ill.—Chicago City R. Co. v. Reddick, 139 Ill.App. 160.

85. N.Y.—Seipp v. Dry Dock, etc., R. Co., 61 N.Y.S. 409, 45 App.Div. 489. 60 C.J. p 575 note 23.

86. Ala.—Mobile Light & R. Co. v. Burch, 68 So. 509, 12 Ala.App. 421.

87. Kan.—Ayres v. Kansas City Rys. Co., 193 P. 1069, 108 Kan. 49.

88. Ill.—Kackley v. Central Illinois Traction Co., 201 Ill.App. 164. 60 C.J. p 575 note 27.

89. N.Y.—Pyne v. Broadway, etc., R. Co., 19 N.Y.S. 217, affirmed 33 N.E. 1083, 138 N.Y. 627.

90. N.Y.—Pyne v. Broadway, etc., R. Co., supra. 60 C.J. p 576 note 29.

Length of service and discharge. On the question of a motorman's negligence in the operation of a car, the length of time he has been employed as a motorman has been variously held admissible,⁹¹ and inadmissible.⁹² Evidence that following the injury the motorman was discharged is inadmissible on the question of the company's negligence.⁹³

Lights and warnings. On the question of the company's negligence in the operation of the car causing the injury, it may be shown that the motorman failed to sound the warning signal,⁹⁴ but evidence that the motorman,⁹⁵ or another motorman,⁹⁶ failed to give proper warning at another time and place is inadmissible. A witness testifying that no warning was given may further testify that there was no reason to have prevented him hearing a warning if it had been given.⁹⁷ On the question of the company's negligence in running a car at night without lights, evidence that the public were in the habit of driving on the track is admissible.⁹⁸

Vigilance of motorman. The negligence of a motorman in the operation of a car may be shown by his failure to keep a vigilant watch for persons or property on or near the tracks.⁹⁹ On the question

of a motorman's failure to keep a vigilant watch, evidence that a short distance from the accident he was not looking ahead is admissible.¹ The failure of the motorman to see what was in his range of vision may be considered as evidence of a failure to keep a vigilant lookout.²

f. Speed

Evidence is admissible with respect to the speed at which the car which caused the injury was running and the control under which it was at the time of the accident.

As tending to show negligence in the operation of a streetcar, evidence is admissible in respect of the speed at which the car which caused the injury was running and the control under which it was at the time and place of the accident.³ On the issue of the speed of the car at the time of the accident, evidence is admissible as to its speed at, or immediately before, the accident.⁴ Particular matters of which evidence may be received on the question of speed include the distance which the car traveled before coming to a stop after the accident,⁵ its speed prior to the accident where the evidence also shows that such rate of speed continued up to the

91. Ga.—Georgia Ry. & Power Co. v. Simms, 126 S.E. 850, 33 Ga.App. 535.
60 C.J. p 576 note 30.

92. Mass.—Pendleton v. Boston Elevated Ry. Co., 165 N.E. 36, 266 Mass. 214.
60 C.J. p 576 note 31.

93. N.Y.—Engel v. United Traction Co., 96 N.E. 731, 203 N.Y. 321, Ann. Cas.1913A 859.

94. Cal.—O'Donnell v. Market Street Ry. Co., 86 P.2d 1077, 30 Cal.App.2d 630.
60 C.J. p 576 note 34.

Knowledge that car was approaching

(1) Even though the person injured knew that the car was approaching, evidence that the motorman failed to sound the warning signal is admissible to prove negligence. Cal.—O'Donnell v. Market Street Ry. Co., supra.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.

(2) On the other hand, it has been held that under such circumstances, evidence of a failure to sound a warning is not admissible.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504.

(3) The exclusion of evidence that a witness would have heard a warn-

ing if it were given is proper.—Anger v. Worcester Consol. St. Ry., 120 N.E. 399, 231 Mass. 163.

(4) Where truck driver was fully aware that streetcar was approaching and of risk incident to crossing in front of the streetcar, exclusion of evidence of failure of streetcar motorman to give warning of approach was not error.—O'Neill v. Minneapolis St. Ry. Co., 7 N.W.2d 665, 213 Minn. 514.

(5) Excluding proof of failure of streetcar motorman to warn by bell or gong, even though boy on bicycle testified he heard car start behind him, was error if he was not aware of the danger.—Newton v. Minneapolis Street Ry. Co., 243 N.W. 654, 186 Minn. 439.

95. R.I.—Dyer v. Union R. Co., 55 A. 688, 25 R.I. 221.

96. Cal.—Spear v. United Railroads of San Francisco, 117 P. 956, 16 Cal. App. 637.

97. Cal.—Lawyer v. Los Angeles Pac. Co., 138 P. 920, 23 Cal.App. 543.

98. Mich.—Rascher v. East Detroit, etc., R. Co., 51 N.W. 463, 90 Mich. 413, 30 Am.S.R. 447.

99. Mo.—Williams v. Fleming, 267 S.W. 6, 218 Mo.App. 563.

1. Ill.—Perryman v. Chicago City Ry. Co., 59 N.E. 980, 242 Ill. 269.
60 C.J. p 576 note 44.

2. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal. App. 1.

3. Cal.—Holder v. Key System, 200 P.2d 98, 83 Cal.App.2d 925.
60 C.J. p 576 note 47.

Regulation of public utilities commission

(1) In action against corporation operating interurban electric train, evidence that train was traveling at speed in excess of speed regulation fixed by the Public Utilities Commission when the commission granted corporation permission to connect track circuits with traffic control system at the intersection was relevant on issue of negligence.—Holder v. Key System, supra.

(2) Admissibility of municipal speed ordinances and regulations see supra subdivision b of this section.

4. Ohio.—Northern Ohio Traction Co. v. Drown, 28 Ohio Cir.Ct. 735.
60 C.J. p 577 note 48.

5. Cal.—Bennett v. Central California Traction Co., 1 P.2d 47, 115 Cal. App. 1.
60 C.J. p 577 note 49.

time of the accident,⁶ the distance a vehicle was carried after being struck,⁷ the condition, after the collision, of the vehicle which was struck,⁸ the nature and extent of the injuries,⁹ and the space within which the car could have been stopped.¹⁰ For the purpose of showing the average rate of speed as a basis of comparison with the speed at the time of the accident,¹¹ evidence of the length of the car's trip and the scheduled time for making such a trip is admissible.¹² Evidence that the car was late has been held both admissible¹³ and inadmissible.¹⁴ The length of time elapsing between the impact of the car against the injured person and the application of the brakes has been held immaterial.¹⁵ Evidence that the cars customarily stopped a block or more away from the scene of the accident is inadmissible to show the rate of speed at the time of the accident.¹⁶ In justification, defendant cannot show that other cars traveled at the same rate of speed.¹⁷

Customary speed. While in some jurisdictions evidence of the speed at which defendant habitually runs its cars at or near the place of the accident is admissible,¹⁸ in other jurisdictions evidence of the speed of other cars at the place of the accident,¹⁹ or elsewhere,²⁰ or evidence of the speed of the car at the same place some time after the accident,²¹ is not admissible.

An opinion or estimate of the speed of a street-

car may be admissible,²² but an opinion or estimate of the speed of a streetcar is inadmissible where it is based, not on observation, but merely on the results of the collision.²³ The fact that the witness is some distance from the accident does not render his estimate inadmissible,²⁴ but merely affects the weight of the evidence.²⁵

Form of statement. It is improper, it has been held, to permit a witness to state whether a car was running "slowly or fast,"²⁶ or "coming down at a terrible speed."²⁷

g. Incompetency or Insufficiency of Employees

Evidence as to the insufficiency or incompetency of the street railroad's employees may be admissible.

For the purpose of showing negligence on the part of the company in the operation of the car which caused the injury, evidence is admissible with other testimony that there were an insufficient number of employees in charge of such car,²⁸ but unless it is shown that a conductor is necessary in the proper management of the car, evidence that no conductor was on the car is inadmissible.²⁹ As bearing on a driver's or motorman's condition or incompetency at the time of the accident, evidence is admissible to show his competency at the time he was hired;³⁰ that he had a drink just before starting on the trip,³¹ or that he was intoxicated;³² but evidence is inadmissible that he had some trouble on another line in managing his car,³³ or had previ-

6. Va.—Portsmouth St. R. Co. v. Peed, 47 S.E. 850, 102 Va. 662. 60 C.J. p 577 note 50.

7. Tex.—Northern Texas Traction Co. v. Smith, Civ.App., 223 S.W. 1013.

8. Tex.—Northern Texas Traction Co. v. Smith, supra. 60 C.J. p 577 note 52.

9. N.Y.—Greenbaum v. Interurban St. R. Co., 84 N.Y.S. 588. 60 C.J. p 577 note 53.

10. N.Y.—McDonald v. Brooklyn Heights R. Co., 64 N.Y.S. 480, 51 App.Div. 186. 60 C.J. p 577 note 54.

11. Ill.—Central R. Co. v. Allmon, 35 N.E. 725, 147 Ill. 471.

12. Ohio.—Acker v. Columbus & Southern Ohio Elec. Co., 60 N.E.2d 932. 60 C.J. p 577 note 56.

13. Mass.—Godfrey v. Old Colony St. Ry. Co., 111 N.E. 878, 223 Mass. 419.

14. Del.—Hearn v. Wilmington City Ry. Co., 76 A. 629, 24 Del. 271.

15. Cal.—Lawyer v. Los Angeles Pac. Co., 118 P. 237, 161 Cal. 53.

16. Ala.—Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242.

17. Ala.—Manley v. Birmingham Ry., Light & Power Co., 68 So. 60, 191 Ala. 531.

18. Ind.—Union Traction Co. v. Vandercook, 69 N.E. 486, 32 Ind.App. 621. 60 C.J. p 577 note 62.

19. Wash.—Atherton v. Tacoma R., etc., Co., 71 P. 39, 30 Wash. 395. 60 C.J. p 577 note 63.

20. Ark.—Ward v. Ft. Smith Light & Traction Co., 185 S.W. 1085, 123 Ark. 548. 60 C.J. p 577 note 64.

21. N.Y.—Hewlett v. Brooklyn Heights R. Co., 71 N.Y.S. 531, 63 App.Div. 423.

22. Ohio.—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932.

23. Ohio.—Cleveland Elec. Ry. Co. v. Boltz, 16 Ohio Cir.Ct., N.S., 383.

24. Va.—Portsmouth St. R. Co. v. Peed, 47 S.E. 850, 102 Va. 662. 60 C.J. p 577 note 68.

25. Va.—Portsmouth St. R. Co. v. Peed, supra.

26. Neb.—Lindgren v. Omaha St. R. Co., 103 N.W. 307, 73 Neb. 628.

27. Ill.—Chicago City R. Co. v. Wall, 93 Ill.App. 411.

28. Wash.—Christensen v. Union Trunk Line, 32 P. 1018, 6 Wash. 75. 60 C.J. p 578 note 74.

29. Wash.—Christensen v. Union Trunk Line, supra.

30. Wis.—Fisher v. Waupaca Electric Light & Ry. Co., 124 N.W. 1005, 141 Wis. 515.

31. N.Y.—Pyne v. Broadway, etc., R. Co., 19 N.Y.S. 217, affirmed 33 N.E. 1083, 138 N.Y. 627.

32. N.Y.—Pyne v. Broadway, etc., R. Co., supra.

33. Conn.—Monroe v. Hartford St. R. Co., 56 A. 498, 76 Conn. 201.

ously been concerned with an accident,³⁴ or as to the number of hours each day other employees were required to work.³⁵ For the purpose of showing the general incompetency of a motorman, evidence of different specific acts of negligence by him is admissible.³⁶

Reputation. Evidence of the reputation of a motorman in charge of the car for negligence has been held inadmissible.³⁷

§ 310. — Contributory Negligence

Evidence of any material or relevant facts, not otherwise incompetent, which tends to establish or disprove contributory negligence, is admissible.

On the issue of contributory negligence, evidence of any material or relevant facts, not otherwise incompetent, which tends to establish or disprove contributory negligence on the part of the person injured is admissible,³⁸ but evidence which is irrelevant and immaterial is inadmissible.³⁹

Persons on or near tracks or premises. On the question of contributory negligence of a person on or near the track, evidence is admissible as to the conditions prevailing at the time of the injury.⁴⁰ In order to establish the contributory negligence of the injured person, it is competent to show that he stepped on to the track a short distance from the

approaching car,⁴¹ that on crossing a street he unnecessarily exposed himself to danger,⁴² that the crossing was one not customarily used,⁴³ and that he crossed at a place which was not a crosswalk.⁴⁴ Where an injury results to a bystander as a result of a collision between a vehicle and streetcar, the contributory negligence of the driver of the vehicle is immaterial.⁴⁵

On behalf of the injured person to show due care evidence is admissible that he was blinded by the glare of the car's headlight,⁴⁶ that he was working near the track as he had a right to do,⁴⁷ that the public customarily crossed the track or street at the locus in quo,⁴⁸ and of the company's usual custom in running its cars in the street where the accident occurred.⁴⁹ Evidence that the person killed in an accident was a careful and cautious man is inadmissible, where there were several eye witnesses to the occurrence.⁵⁰

Drivers of vehicles. As tending to show contributory negligence of a driver of a vehicle on or near the tracks, evidence is admissible to show that the person charged with negligence was a reckless driver,⁵¹ but evidence which is irrelevant and immaterial is properly excluded.⁵² Where the street on which the accident occurred is not obstructed or it is not probable that driving thereon will result in injury, evidence that the injured person could have driven on another street safely is inad-

34. N.Y.—American Ice Co. v. New York City R. Co., 98 N.Y.S. 219, 50 Misc. 183.
60 C.J. p 578 note 80.

35. Pa.—Philadelphia City Pass. R. Co. v. Henrice, 92 Pa. 431, 37 Am. R. 699.
60 C.J. p 578 note 81.

36. Ala.—Bessierre v. Alabama City, G. & A. Ry. Co., 60 So. 82, 179 Ala. 317.

37. Va.—Virginia Ry. & Power Co. v. Davidson's Adm'r, 89 S.E. 229, 119 Va. 313.

38. Mass.—De Lodge v. Boston Elevated Ry. Co., 15 N.E.2d 488, 300 Mass. 219.
60 C.J. p 579 note 1.

Knowledge of turn in tracks

In action against street railroad for injuries sustained by automobile passenger in collision, permitting plaintiff's counsel to question plaintiff and husband whether they knew tracks made turn at scene of accident was held not error under circumstances.—Grubbs v. Kansas City Pub-

lic Service Co., 45 S.W.2d 71, 329 Mo. 390.

Suicide

In action by pedestrian against street railroad for personal injuries evidence that pedestrian had had a quarrel at home on the afternoon of the accident, and that he admitted that he "had attempted to end it all" was admissible.—Perry v. Boston Elevated Ry. Co., 76 N.E.2d 653, 322 Mass. 206.

39. Conn.—Budd v. Meriden Electric R. Co., 37 A. 683, 69 Conn. 272.
60 C.J. p 579 note 2.

40. N.Y.—Lhowe v. Third Ave. R. Co., 36 N.Y.S. 463, 14 Misc. 612.
60 C.J. p 579 note 3.

41. Okl.—Sand Springs Ry. Co. v. Woods, 217 P. 363, 95 Okl. 179.

42. Va.—Newport News, etc., R. etc., Co. v. Bradford, 37 S.E. 807, 99 Va. 117.
60 C.J. p 579 note 5.

43. Mo.—Henry v. Grand Ave. R. Co., 21 S.W. 214, 113 Mo. 525.
60 C.J. p 579 note 6.

44. Mass.—Ristuccia v. Boston Elevated Ry. Co., 186 N.E. 592, 283 Mass. 529.

45. N.Y.—Knoll v. Third Ave. R. Co., 62 N.Y.S. 16, 46 App.Div. 527, affirmed 60 N.E. 1113, 168 N.Y. 592.

46. Cal.—Simoneau v. Pacific Electric Ry. Co., 136 P. 544, 166 Cal. 264, 49 L.R.A., N.S., 737.

47. Pa.—Owens v. People's Pass. R. Co., 26 A. 748, 155 Pa. 334.

48. Ill.—Pabis v. Friel, 66 N.E.2d 471, 328 Ill.App. 583.
60 C.J. p 580 note 10.

49. Cal.—Simoneau v. Pacific Electric Ry. Co., 115 P. 320, 159 Cal. 494.
Ill.—Canfield v. North Chicago St. R. Co., 98 Ill.App. 1.

50. Utah.—Spiking v. Consol. R., etc., Co., 93 P. 838, 33 Utah 313.

51. Ark.—Arkansas Power & Light Co. v. Cummins, 28 S.W.2d 1077, 181 Ark. 1145, 182 Ark. 1.

52. Tex.—Texas Traction Co. v. Wiley, Civ.App., 164 S.W. 1028.
60 C.J. p 580 note 16.

missible.⁵³ With respect to the distance which a car might have been seen so as to determine the injured person's care in crossing in front of it, evidence of witnesses, under less favorable circumstances, is admissible.⁵⁴ On behalf of the injured person to show due care, evidence is admissible that the motorman failed to sound a warning,⁵⁵ that the gong was defective,⁵⁶ or that the driver heard no warning;⁵⁷ that he expected the streetcar to stop;⁵⁸ that the condition of the weather necessitated the use of side curtains;⁵⁹ that it was necessary to pull out on to the tracks to avoid other vehicles;⁶⁰ and that the condition of the street outside the tracks was such as necessitated driving on the tracks.⁶¹

In passing on the conduct of the injured person, his knowledge of the company's methods of operating its cars,⁶² as to the rate of speed⁶³ and warning,⁶⁴ is admissible. Evidence of the injured person's knowledge of the distance in which a car can be stopped has been held both admissible,⁶⁵ and inadmissible.⁶⁶ Where it is customary for a watchman to give vehicles warnings when cars are backed out, the failure of the watchman to give such warning is relevant on the question of due care.⁶⁷

Evidence of a custom existing at the time of the accident allowing funeral processions to pass is admissible,⁶⁸ but the custom must be shown to have existed at the time of the accident.⁶⁹ Where the injured person sustains injuries by striking trolley posts in the nighttime, evidence by other witnesses that under substantially like circumstances they were blinded by lights was admissible.⁷⁰

Occupants of vehicles. For the purpose of showing the careless character of the driver, so as to show the care exercised by a guest, evidence of the habits of the driver with respect to driving carelessly is admissible.⁷¹ Evidence that a fireman had previously ridden on a fire truck at a similar rate of speed,⁷² or that he knew when he boarded the truck that it would proceed at any particular rate of speed⁷³ has been held inadmissible to show his contributory negligence. On behalf of an occupant of a vehicle to disprove contributory negligence, evidence is admissible that the driver was driving carefully,⁷⁴ that the motorman failed to sound a warning,⁷⁵ and that streetcars customarily slackened their speed at crossings;⁷⁶ but evidence that the

53. Ohio.—Masters v. Cincinnati Traction Co., 16 Ohio App. 99.

54. N.Y.—Northrop v. Poughkeepsie City, etc., R. Co., 93 N.Y.S. 602, 104 App.Div. 615.

55. Ill.—Rauen v. Chicago Rys. Co., 205 Ill.App. 464.
60 C.J. p 580 note 19.

Knowledge of car's approach

In action for injuries to driver of automobile which collided with defendant's streetcar proceeding in opposite direction, where questions of plaintiff's contributory negligence, as well as defendant's primary negligence, were involved, evidence of streetcar motorman's failure to sound bell was admissible, although plaintiff admittedly became conscious of car's approach when it was a block away.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E. 2d 148, 124 W.Va. 504.

Custom

In motorist's action for injuries sustained when streetcar making left turn struck motorist, in passing on question of negligence of motorist, jury had right to take into consideration evidence as to custom of streetcar motormen to sound gong before making left turn and motorist's reliance thereon.—Zator v. Cummings, 42 N.E.2d 858, 315 Ill.App. 210.

56. Iowa.—Dow v. Des Moines City

Ry. Co., 126 N.W. 918, 148 Iowa 429.

57. Iowa.—Flannery v. Interurban Ry. Co., 153 N.W. 1027, 171 Iowa 238.

58. Mo.—Hogan v. Fleming, 265 S. W. 875, 218 Mo.App. 172.
60 C.J. p 580 note 22.

Custom

Testimony as to custom of street railroad company to have its car stop at such intersection was admissible as bearing on right of driver of car in which deceased was riding to believe that particular streetcar would so stop.—Hill v. Richardson, 281 Ill.App. 75.

59. Iowa.—Waring v. Dubuque Electric Co., 186 N.W. 42, 192 Iowa 1240.

60. Mass.—Austin v. Eastern Massachusetts St. Ry. Co., 169 N.E. 484, 269 Mass. 420.

61. Ill.—Murphy v. Evanston Electric R. Co., 85 N.E. 334, 235 Ill. 275.
60 C.J. p 580 note 26.

62. Mass.—Horsman v. Brockton & P. St. Ry. Co., 91 N.E. 897, 205 Mass. 519.

63. Mass.—Horsman v. Brockton & P. St. Ry. Co., supra.
Mo.—Alexander v. Springfield Traction Co., 249 S.W. 971, 215 Mo.App. 427.

64. Mass.—Horsman v. Brockton & P. St. Ry. Co., 91 N.E. 897, 205 Mass. 519.

65. N.Y.—Cass v. Third Ave. R. Co., 47 N.Y.S. 356, 20 App.Div. 591.

66. Wash.—Blair v. Calhoun, 151 P. 259, 87 Wash. 154.

67. Mich.—Tiley v. Detroit United Ry., 155 N.W. 728, 190 Mich. 7.

68. Del.—White v. Wilmington City R. Co., 63 A. 931, 22 Del. 105—Foulke v. Wilmington City R. Co., 60 A. 973, 21 Del. 363.

69. Del.—White v. Wilmington City R. Co., 63 A. 931, 22 Del. 105.

70. Minn.—Aubin v. Duluth St. Ry. Co., 211 N.W. 580, 169 Minn. 342.

71. Cal.—Bresee v. Los Angeles Traction Co., 85 P. 152, 149 Cal. 131, 5 L.R.A., N.S., 1059.

72. Okl.—Oklahoma Ry. Co. v. Thomas, 164 P. 120, 63 Okl. 219, L. R.A.1917E 405.

73. Okl.—Oklahoma Ry. Co. v. Thomas, supra.

74. Mo.—Clooney v. Wells, 252 S.W. 72.

75. Cal.—Berguin v. Pacific Electric Ry. Co., 263 P. 220, 203 Cal. 116.

76. Ohio.—Toledo R., etc., Co. v. Ward, 25 Ohio Cir.Ct. 399.
60 C.J. p 581 note 43.

driver was a careful driver has been held both admissible⁷⁷ and inadmissible.⁷⁸

Persons under disability. It is competent, as tending to show contributory negligence, for defendant to show that the person injured was intoxicated at the time of the accident.⁷⁹ On the issue of intoxication at the time of the injury, evidence has been held admissible to show that shortly before the accident the injured person took a drink⁸⁰ and was boisterous;⁸¹ that he was intoxicated on repeated occasions before and after the injury,⁸² that he was convicted for intoxication at the time of the injury,⁸³ and for the same offense on other occasions.⁸⁴

On the question of contributory negligence of a child, evidence has been held inadmissible to show that he was accustomed to play in the street unattended,⁸⁵ or that he noticed the manner of operation of cars on previous occasions.⁸⁶

Ordinances. On the question of the contributory negligence of the injured person, an ordinance, together with other testimony, is admissible on behalf of plaintiff⁸⁷ or defendant;⁸⁸ but, where there is no evidence that the ordinance was violated⁸⁹ or where the ordinance is inapplicable⁹⁰ as to the person injured,⁹¹ it is inadmissible.

Rules and regulations. Where it appears that the injured person knew of the particular rule of the street railroad company⁹² it is admissible to show his due care.⁹³ On behalf of the street rail-

road, in an action for injuries sustained by a trainman in a collision between a railroad train and a streetcar, evidence of the rules of the railroad company has been held inadmissible to show the contributory negligence of the trainman.⁹⁴ Rules of a fire department have been held both admissible⁹⁵ and inadmissible⁹⁶ on the question of due care of a fireman. It has been held that the regulations of the Interstate Commerce Commission relating to the operation of motor vehicles engaged in interstate commerce are not admissible in an action for damages to a motor vehicle engaged in interstate commerce because of its collision with a streetcar.⁹⁷

§ 311. — Last Clear Chance

Under the humanitarian or last clear chance doctrine, evidence is admissible as to when the motorman first saw the injured person in a position of peril.

On the issue whether defendant by proper care and caution could have avoided the accident after he knew or was chargeable with knowledge of the injured person's perilous condition, evidence is admissible to show when the motorman first saw the injured person in a perilous condition.⁹⁸ The failure of the street railroad to sound a warning is admissible to establish liability under the humanitarian doctrine, even though the injured person admittedly had knowledge of the car's approach.⁹⁹ It has been held that evidence of plaintiff's contributory negligence in placing himself in a position of danger is not admissible in an action based on the humanitarian rule.¹ Evidence to support a theory

77. Ark.—Arkansas Power & Light Co. v. Cummins, 28 S.W.2d 1077, 181 Ark. 1145, 182 Ark. 1.

78. N.Y.—Wooster v. Broadway, etc., R. Co., 25 N.Y.S. 378, 72 Hun 197.

79. Ala.—Caudle v. Birmingham Elec. Co., 22 So.2d 417, 247 Ala. 34, 60 C.J. p 581 note 47.

80. Mass.—Labrecque v. Donham, 127 N.E. 537, 236 Mass. 10.

81. Mass.—Labrecque v. Donham, supra.

82. Ga.—Hardeman v. Georgia Power Co., 156 S.E. 642, 42 Ga.App. 435, 60 C.J. p 581 note 50.

83. Ga.—Hardeman v. Georgia Power Co., supra.

84. Ga.—Hardeman v. Georgia Power Co., supra.

85. N.Y.—Smith v. Grand St., etc., R. Co., 11 Abb.N.Cas. 62.

86. Mass.—Jennings v. Boston Elevated Ry. Co., 161 N.E. 608, 263 Mass. 574.

87. N.Y.—Geary v. Metropolitan St. R. Co., 82 N.Y.S. 1016, 84 App.Div. 514, affirmed 69 N.E. 1123, 177 N.Y. 535.

60 C.J. p 581 note 58.

88. Ill.—Ovens v. Chicago City Ry. Co., 171 Ill.App. 647.

60 C.J. p 581 note 59.

89. Minn.—Wosika v. St. Paul City R. Co., 83 N.W. 386, 80 Minn. 364, 60 C.J. p 581 note 60.

90. Ala.—Watts v. Montgomery Traction Co., 57 So. 471, 175 Ala. 102.

91. Ohio.—Toledo R., etc., Co. v. Ward, 25 Ohio Cir.Ct. 399, 60 C.J. p 581 note 62.

92. Ill.—Chicago City R. Co. v. McDonough, 125 Ill.App. 223, affirmed 77 N.E. 577, 221 Ill. 69.

60 C.J. p 581 note 65.

93. Ill.—Chicago City R. Co. v. McDonough, 77 N.E. 577, 221 Ill. 69, 60 C.J. p 581 note 66.

94. Iowa.—Carter v. Sioux City Service Co., 141 N.W. 26, 160 Iowa 78.

95. Pa.—Follmer v. Shamokin & Edgewood Electric Ry. Co., 5 Pa. Dist. & Co. 783.

96. Iowa.—McBride v. Des Moines City R. Co., 109 N.W. 618, 134 Iowa 398.

97. Iowa.—Wright v. Des Moines Ry. Co., 1 N.W.2d 259, 231 Iowa 410.

98. Ala.—Birmingham Ry., Light & Power Co. v. Morris, 50 So. 198, 163 Ala. 190, 60 C.J. p 581 note 72.

99. W.Va.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504.

1. Mo.—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174.

which is purely conjectural is not admissible.² With respect to a trespasser on the tracks, evidence of the frequency of the use of a crossing has been held not to be material to charge the motorman with knowledge of his presence.³ For the purpose of showing in what distance and time a motorman could have stopped the car so as to avoid injuring a trespasser on the tracks, evidence of the distance and time within which other cars differently equipped could be stopped is inadmissible.⁴

§ 312. Weight and Sufficiency of Evidence

In actions for damages resulting from the operation of a street railroad, the matters essential to the cause of action, such as the defendant's negligence, must be established by a preponderance of the evidence.

General rules relating to the weight and sufficiency of evidence in civil actions, particularly those applicable in actions based on negligence, apply in actions for damages resulting from the operation of a street railroad.⁵ Accordingly, each and every fact essential to the cause of action must be established by a preponderance of the evidence.⁶ Thus, where such facts are in issue, the place of the accident⁷

and the injured person's position at the time⁸ must be established by a preponderance of the evidence.

Affirmative defenses. Defendant must prove matters of affirmative defense by a preponderance of the evidence.⁹

Right to go on or near tracks. Under general rules the right of the injured person to be on or near the tracks must be proved by a preponderance of the evidence.¹⁰

Negligence of defendant generally. Plaintiff, having the burden of proof, must prove, by a preponderance of the evidence, the negligence of defendant,¹¹ and that the injury could have been reasonably anticipated by defendant.¹² The existence of negligence, contributory negligence, or proximate cause need not be established by direct and positive evidence, but it may be inferred from circumstances adduced in evidence sufficient to authorize a finding of negligence;¹³ but these facts must themselves be shown by direct testimony, and cannot be inferred from other facts.¹⁴ The inference must be based on something other than mere

2. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610.

3. Ala.—Turbeville v. Mobile Light & R. Co., 127 So. 519, 221 Ala. 91.
—Synder v. Mobile Light & Ry. Co., 107 So. 451, 214 Ala. 310.

4. Va.—Richmond Pass., etc., Co. v. Racks, 44 S.E. 709, 101 Va. 487.

5. Conn.—Doherty v. Connecticut Co., 52 A.2d 436, 133 Conn. 469.
60 C.J. p 582 note 80.

Evidence held sufficient

(1) To support findings, judgment, or verdict for plaintiff.

Ill.—Scott v. Chicago Transit Authority, 105 N.E.2d 922, 347 Ill.App. 76—Smorawski v. Chicago City Ry. Co., 211 Ill.App. 557.

Ohio.—Readnour v. Cincinnati St. Ry. Co., 71 N.E.2d 533, 79 Ohio App. 345—Cleveland Ry. Co. v. McManus, App., 32 N.E.2d 66—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.

Pa.—Harold Furniture Co. v. Philadelphia Rapid Transit Co., 100 Pa. Super. 316.

R.I.—Finnegan v. United Electric Ry. Co., 166 A. 552.

Wash.—Scott v. City of Seattle, 83 P.2d 351, 196 Wash. 464.

(2) To support findings, verdict, or judgment for defendant.

La.—Vlosca v. Shreveport Rys. Co., App., 164 So. 341—Matkins v. City of Monroe, App., 144 So. 758.

N.Y.—Kelly v. Manhattan & Queens Traction Corp., 1 N.Y.S.2d 564, 253 App.Div. 836, appeal dismissed 15 N.E.2d 74, 278 N.Y. 484—Frank v. City of New York, 43 N.Y.S.2d 177, 179 Misc. 895.

Evidence held insufficient

To support verdict for plaintiff.

Ill.—Moore v. Illinois Power & Light Corp., 3 N.E.2d 932, 286 Ill.App. 445.

N.J.—Mailot v. Public Service Co-ordinated Transport, 156 A. 273, 9 N. J.Misc. 973.

N.Y.—Finkelstein v. Coney Island & B. R. Co., 4 N.Y.S.2d 144, 254 App. Div. 747—Sackal v. New York Rapid Transit Corp., 1 N.Y.S.2d 447, 253 App.Div. 819.

Power to control vehicle

Pa.—Beam v. Pittsburgh Rys. Co., 77 A.2d 634, 366 Pa. 360, certiorari denied 71 S.Ct. 851, 341 U.S. 936, 95 L.Ed. 1364.

6. La.—Moch v. Shreveport Rys. Co., App., 41 So.2d 741.
60 C.J. p 582 note 81.

7. Ala.—Anniston Electric, etc., Co. v. Elwell, 42 So. 45, 144 Ala. 317.
60 C.J. p 582 note 85.

8. Conn.—Morse v. Consolidated R. Co., 71 A. 553, 81 Conn. 395.
60 C.J. p 582 note 86.

9. Mass.—Conroy v. Mather, 104 N.

E. 487, 217 Mass. 91, 52 L.R.A., N.S., 801.
60 C.J. p 583 note 93.

10. Cal.—Ross v. San Francisco-Oakland Terminal Rys. Co., 191 P. 703, 47 Cal.App. 753.
60 C.J. p 584 note 13.

11. Pa.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608.
60 C.J. p 584 note 17.

Evidence held sufficient

N.Y.—Frank v. City of New York, 43 N.Y.S.2d 177, 179 Misc. 895.

Pa.—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 608.
60 C.J. p 584 note 17 [a].

Evidence held insufficient

Cal.—Tice v. Pacific Elec. Ry. Co., 96 P.2d 1022, 36 Cal.App.2d 66, rehearing denied 97 P.2d 844, 36 Cal. App.2d 66.

Pa.—McKim v. Philadelphia Transp. Co., 72 A.2d 122, 364 Pa. 237.
60 C.J. p 584 note 17 [b].

12. Me.—Murray v. Cumberland County Power & Light Co., 103 A. 66, 117 Me. 165.
60 C.J. p 584 note 21.

13. Mo.—Beier v. St. Louis Transit Co., 94 S.W. 876, 197 Mo. 215.
60 C.J. p 585 note 25.

14. La.—Gannon v. New Orleans City, etc., R. Co., 20 So. 223, 48 La. Ann. 1002.

conjecture, speculation, or probability.¹⁵ Since negligence may be established without showing a violation of a statute or ordinance, the evidence may be sufficient without proof of such a violation.¹⁶ Where the burden is shifted to defendant by plaintiff's prima facie case, in order to sustain a finding of due care on its part defendant must introduce evidence sufficient to rebut plaintiff's case.¹⁷

§ 313. — Relation of Defendant to Cause of Injury

The relation of the street railroad company to the cause of the injury must be established by a preponderance of the evidence.

In order to sustain a recovery plaintiff, by a preponderance of the evidence, must prove the relation of the company to the cause of injury,¹⁸ and that defendant at the time and place of the injury owned or operated the road or car,¹⁹ or other agency causing the injury.²⁰ Direct and positive evidence, however, of ownership or operation is not essential, but it may be shown by proof of facts from which the ownership or operation at the time of the accident may reasonably be inferred.²¹

§ 314. — Acts of Employees

It must be proved by a preponderance of the evi-

dence that the person causing the injury was an employee of the defendant acting within the scope of his employment.

Plaintiff must prove by a preponderance of the evidence that the person causing the injury was an employee of defendant at the time and place of the injury,²² and that the act causing the injury was within the scope of his employment.²³

§ 315. — Defects in Tracks, Street, or Equipment

Where a defective condition of the tracks, street, or equipment is relied on to establish the defendant's negligence, the defective condition must be proved by sufficient evidence.

Under general rules, in order to prove the negligence of defendant with respect to the condition of its tracks or equipment or of the street which it is under a duty to keep in repair, plaintiff must show by sufficient evidence that at the time and place of the injury a defective condition existed.²⁴ Thus, the evidence must be sufficient as to the condition of the wires,²⁵ tracks,²⁶ or street,²⁷ and as to the company's actual or constructive notice of the defect.²⁸ Where plaintiff is injured in a collision due to obstructions in the street, a prima facie case of negligence is made out when it is shown that the tracks projected above the street which caused the

15. Conn.—Simuaskas v. Connecticut Co., 127 A. 918, 102 Conn. 61. 60 C.J. p 585 note 28.

16. Wis.—Speakes Lime & Cement Co. v. Duluth St. Ry. Co., 179 N.W. 596, 172 Wis. 475. 60 C.J. p 585 note 30.

17. N.Y.—Volkmar v. Manhattan R. Co., 31 N.E. 870, 134 N.Y. 418, 30 Am.S.R. 678. 60 C.J. p 585 note 32.

18. Ill.—Valuch v. Rawson, 270 Ill. App. 583. 60 C.J. p 583 note 95.

19. N.Y.—Smith v. Brooklyn Heights R. Co., 81 N.Y.S. 838, 82 App.Div. 531. 60 C.J. p 583 note 2.

Evidence held sufficient

Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

20. N.Y.—Sandler v. Garrison, 164 N.E. 36, 249 N.Y. 236.

21. Mo.—Burbridge v. Kansas City Cable R. Co., 36 Mo.App. 669. 60 C.J. p 583 note 4.

22. Ky.—Louisville Ry. Co. v. Holmes, 117 S.W. 953. 60 C.J. p 584 note 7.

23. N.Y.—Hewson v. Interurban St. Ry. Co., 88 N.Y.S. 816, 95 App.Div. 112. 60 C.J. p 584 note 8.

24. Cal.—Curtis v. Pacific Elec. Ry. Co., 223 P.2d 52, 100 Cal.App.2d 112. 60 C.J. p 585 note 36.

Evidence held insufficient

Cal.—Curtis v. Pacific Elec. Ry. Co., supra.

Minn.—LaCombe v. Minneapolis St. Ry. Co., 51 N.W.2d 839.

N.Y.—Eager v. New York Rapid Transit Corporation, 280 N.Y.S. 386, 245 App.Div. 742, affirmed 200 N.E. 316, 270 N.Y. 556.

Warning sign

In action for death of occupant of automobile which collided with streetcar, evidence established that railway company was not guilty of actionable negligence in failing to erect sign warning of presence of tracks.—Link v. Shreveport Rys. Co., La.App., 153 So. 77.

25. N.Y.—Melia v. Southern Boulevard R. Co., 286 N.Y.S. 501, 159 Misc. 293. 60 C.J. p 585 note 38.

Evidence held insufficient

N.Y.—Melia v. Southern Boulevard R. Co., supra.

26. Pa.—Wright v. Pittsburgh Rys. Co., 181 A. 476, 320 Pa. 40. 60 C.J. p 585 note 39.

Evidence held insufficient

Pa.—Wright v. Pittsburgh Rys. Co., supra.

27. Minn.—LaCombe v. Minneapolis St. Ry. Co., 51 N.W.2d 839. 60 C.J. p 585 note 40.

Evidence held sufficient

Ind.—Gary Rys. Co. v. Michael, 34 N.E.2d 159, 109 Ind.App. 672.

Minn.—LaCombe v. Minneapolis St. Ry. Co., 51 N.W.2d 839.

N.H.—Rousseau v. Public Service Co. of New Hampshire, 21 A.2d 160, 91 N.H. 447.

Evidence held insufficient

Kan.—Staton v. Union Elec. Ry. Co., 145 P.2d 456, 158 Kan. 132.

N.Y.—North v. South Brooklyn Ry. Co., 288 N.Y.S. 607, 248 App.Div. 743.

28. Md.—Central R. Co. v. State, 33 A. 265, 82 Md. 647. 60 C.J. p 586 note 42.

vehicle to skid.²⁹ In an action against an elevated railroad company, evidence that the injuries were occasioned by the fall of an iron plate with part of a bolt, due to the breaking of the bolt while passing under the structure, is sufficient to make out a prima facie case.³⁰ So, also, a case of negligence with respect to the equipment of defendant's locomotives on its elevated railroad is established by evidence of the fall therefrom of coals and cinders of unusual sizes or quantities at the time of the accident, together with proof that proper appliances could have been used to prevent the fall of such coals and cinders,³¹ although the condition of the locomotive which caused the injury is not shown.³² Where plaintiff makes out a prima facie case of negligence on the part of defendant the evidence of defendant must be sufficient to rebut the presumption of negligence.³³

Condition or equipment of cars. In order to prove negligence on the part of defendant with respect to the condition or equipment of its cars, plaintiff must show by a preponderance of the evidence that at the time and place of the injury the car did not have the necessary equipment or that the equipment

was in a defective condition.³⁴ Thus, the evidence must be sufficient as to the condition of the brakes,³⁵ fenders,³⁶ the reverser,³⁷ or headlights.³⁸ Where plaintiff makes a prima facie case of negligence on the part of defendant, under general rules, in order to sustain a finding of due care on its part defendant must introduce evidence sufficient to rebut plaintiff's case.³⁹

Violation of statute or ordinance. Where plaintiff relies on the violation of an ordinance or statute, the evidence must be sufficient to prove a violation,⁴⁰ and this rule applies where the violation relied on is of an ordinance or statute with respect to the equipment of cars.⁴¹

§ 316. — Operation of Cars

Negligence in the operation of a street railroad car must be established by a preponderance of the evidence.

Where plaintiff relies on the negligence of defendant in the operation of its car he must prove by a preponderance of the evidence that at the time and place of the injury defendant was negligent.⁴²

29. Tex.—San Antonio Traction Co. v. Cassanova, Civ.App., 154 S.W. 1190.

30. N.Y.—Volkmar v. Manhattan R. Co., 31 N.E. 870, 134 N.Y. 418, 30 Am.S.R. 678.

31. Mass.—Woodall v. Boston El. R. Co., 78 N.E. 446, 192 Mass. 308. 60 C.J. p 586 note 45.

32. N.Y.—McNaier v. Manhattan R. Co., 46 Hun 502. 60 C.J. p 586 note 46.

33. N.Y.—Volkmar v. Manhattan R. Co., 31 N.E. 870, 134 N.Y. 418, 30 Am.S.R. 678. 60 C.J. p 586 note 47.

34. Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740. 60 C.J. p 586 note 53.

Evidence held sufficient

Md.—Baltimore Transit Co. v. Worth, supra.

35. Cal.—Grossetti v. Sweasey, 169 P. 687, 176 Cal. 793. 60 C.J. p 586 note 55.

36. Mo.—Battles v. United Rys. Co. of St. Louis, 161 S.W. 614, 178 Mo. App. 596. 60 C.J. p 587 note 56.

37. Me.—Malia v. Lewiston, A. & W. St. Ry. Co., 77 A. 541, 107 Me. 95. 60 C.J. p 587 note 57.

38. Va.—Wilkie v. Richmond Traction Co., 54 S.E. 43, 105 Va. 290. 60 C.J. p 587 note 58.

Evidence held insufficient

Wash.—Poland v. City of Seattle, 93 P.2d 379, 200 Wash. 208.

39. Mich.—Burghardt v. Detroit United Ry., 173 N.W. 360, 206 Mich. 545, 5 A.L.R. 1333. 60 C.J. p 587 note 60.

40. Ind.—Indianapolis Traction & Terminal Co. v. Lee, 118 N.E. 959, 67 Ind.App. 105. 60 C.J. p 586 note 49.

Wires

Failure of street railroad and telephone companies to comply with ordinance as to the maintenance of their wires is prima facie showing of negligence.—Southwestern Tel., etc., Co. v. Myane, 111 S.W. 987, 86 Ark. 548.

41. Ill.—Roberts v. Chicago City Ry. Co., 198 Ill.App. 31. 60 C.J. p 587 note 61.

Violation prima facie negligence

The violation of an ordinance requiring the equipment of streetcars with fenders is prima facie evidence of negligence.—Chicago, etc., R. Co. v. Freeman, 125 Ill.App. 318.

42. Ala.—Clark v. Birmingham Electric Co., 181 So. 294, 236 Ala. 108. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, cer-

tiorari denied 59 S.Ct. 464, 306 U. S. 630, 83 L.Ed. 1032.

La.—Caruso v. New Orleans Public Service, App., 142 So. 860.

Mass.—Faulkner v. Eastern Massachusetts St. Ry. Co., 178 N.E. 527, 277 Mass. 291.

Pa.—Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220. 60 C.J. p 587 note 67.

Evidence held sufficient

Conn.—Doherty v. Connecticut Co., 52 A.2d 436, 133 Conn. 469.

Ill.—Marron v. Friel, 66 N.E.2d 509, 328 Ill.App. 586.

Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278. 60 C.J. p 587 note 67 [a].

Evidence held insufficient

Cal.—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal. App.2d 758.

Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712.

N.Y.—Massa v. Brooklyn & Queens Transit Corp., 8 N.Y.S.2d 241, 255 App.Div. 984.

60 C.J. p 587 note 67 [b].

Right of way

In determining legal sufficiency and weight of evidence of negligence, as affected by right of way at stop signs at highway intersections, courts

Negligence in the operation of the cars may be established by circumstantial evidence.⁴³

Positive and negative testimony. Under general rules the positive testimony of witnesses who were in a position to have heard a bell or gong, if it had been sounded, that they did not hear it is sufficient to justify a finding that it was not sounded;⁴⁴ but such testimony is of little or no weight when given by witnesses who had no means of knowledge or who paid no attention to the occurrence, and may be too insubstantial to offer any opposition to positive contradictory testimony.⁴⁵

On approaching street crossing. Where the negligence relied on consists of a failure to operate the

car with due care on approaching a street crossing, the evidence must be sufficient to prove such negligence.⁴⁶ Thus, the evidence must be sufficient as to the motorman's failure to have the car under control,⁴⁷ to keep a vigilant watch,⁴⁸ to have a light on the car at the proper time,⁴⁹ to sound a warning,⁵⁰ to slacken speed,⁵¹ or to stop the car.⁵²

On approaching person on or near track. Where the negligence relied on consists of a failure to operate the car with due care on approaching a person on or near the track, the evidence must be sufficient to prove such negligence.⁵³ Thus, the evidence must be sufficient as to the motorman's failure to keep the car under control,⁵⁴ to keep a vigilant watch,⁵⁵ to give a proper warning of the approach

and juries cannot ignore differences between streetcars and automobiles, but cannot determine in advance consequences of such differences in any particular case.—*Fox v. Baltimore Transit Co.*, 71 A.2d 470, 194 Md. 403.

Adoption of statement

A streetcar motorman's testimony that police officer's written memorandum as to what witness told such officer after car struck a man lying on track was correct, "as much as I know of it," cannot be taken as adoption of witness' alleged prior declaration to officer that witness saw the man when ninety feet from him as true, where witness' previous testimony left his meaning conjectural.—*Desmond v. Boston Elevated Ry. Co.*, 64 N.E.2d 357, 319 Mass. 13.

43. Pa.—*Delmer v. Pittsburgh Rys. Co.*, 34 A.2d 502, 348 Pa. 147.

Violation of company's rule forbidding unnecessary conversation with passengers was held evidence of negligence.—*Barksdale v. Union St. Ry. Co.*, 193 N.E. 583, 289 Mass. 95.

44. Ill.—*Chicago City R. Co. v. Loomis*, 66 N.E. 348, 201 Ill. 118. 60 C.J. p 587 note 70.

45. Mo.—*Bennett v. Metropolitan St. R. Co.*, 99 S.W. 480, 122 Mo.App. 703. 60 C.J. p 588 note 71.

46. **Evidence held sufficient**
Ill.—*Trust Co. of Chicago v. Cummings*, 51 N.E.2d 616, 320 Ill.App. 437. 60 C.J. p 588 note 74 [a].

Evidence held insufficient
La.—*Keller v. N. C. Public Service*, 138 So. 463, 18 La.App. 317.
N.Y.—*Wieland v. Third Ave. Transit Corp.*, 61 N.Y.S.2d 359, 270 App. Div. 885, affirmed 73 N.E.2d 914, 296 N.Y. 1047.

Va.—*Virginia Transit Co. v. Owens*, 55 S.E.2d 422, 190 Va. 76. 60 C.J. p 588 note 74 [b].

47. Ill.—*Brisch v. Chicago City R. Co.*, 176 Ill.App. 341. 60 C.J. p 588 note 76.

48. **Evidence held sufficient**
Ill.—*Klooster v. Friel*, 75 N.E.2d 773, 332 Ill.App. 652.
Md.—*Baltimore Transit Co. v. State for Use of Castranda*, 71 A.2d 442, 194 Md. 421. 60 C.J. p 588 note 77 [a].

49. Ind.—*Indianapolis Traction & Terminal Co. v. Vaughn*, 117 N.E. 673, 65 Ind.App. 581. 60 C.J. p 588 note 78.

50. Ind.—*Indiana Union Traction Co. v. Love*, 99 N.E. 1005, 180 Ind. 442. 60 C.J. p 588 note 79.

51. **Evidence held sufficient**
Ill.—*Klooster v. Friel*, 75 N.E.2d 773, 332 Ill.App. 652.
Md.—*Baltimore Transit Co. v. State for Use of Castranda*, 71 A.2d 442, 194 Md. 421. 60 C.J. p 588 note 80.

52. **Evidence held sufficient**
Pa.—*Cinquina v. Philadelphia Transp. Co.*, 67 A.2d 109, 362 Pa. 546.
Va.—*Cheatwood v. Virginia Elec. & Power Co.*, 18 S.E.2d 301, 179 Va. 54. 60 C.J. p 588 note 81.

53. R.I.—*Hutchings v. Bay State St. Ry. Co.*, 108 A. 285. 60 C.J. p 589 note 84.

Evidence held sufficient
Cal.—*Paris v. Los Angeles Ry. Corp.*, 179 P.2d 1, 78 Cal.App.2d 950.
Ill.—*Kuenazkes v. Chicago Transit Authority*, 89 N.E.2d 427, 339 Ill. App. 249.
Minn.—*LaCombe v. Minneapolis St. Ry. Co.*, 51 N.W.2d 839.

Pa.—*Perry v. Pittsburgh Rys. Co.*, 55 A.2d 354, 357 Pa. 608. 60 C.J. p 589 note 84 [a].

Evidence held insufficient
U.S.—*Jaffe v. Philadelphia & W. R. Co.*, C.A.Pa., 180 F.2d 1010.
Cal.—*Lolli v. Market St. Ry. Co.*, 110 P.2d 436, 43 Cal.App.2d 166.
La.—*Tassin v. New Orleans Public Service*, 139 So. 695, 19 La.App. 456.
Minn.—*Kruchowski v. St. Paul City Ry. Co.*, 254 N.W. 587, 191 Minn. 454.
N.Y.—*Menkelunas v. City of New York*, 60 N.Y.S.2d 97, 270 App.Div. 827.—*Slater v. Brooklyn & Queens Transit Corp.*, 33 N.Y.S.2d 938, 263 App.Div. 1017.

Pa.—*Niziolek v. Wilkes-Barre Ry. Corp.*, 185 A. 581, 322 Pa. 29.
Utah.—*Miller v. Utah Light & Traction Co.*, 86 P.2d 37, 96 Utah 369. 60 C.J. p 589 note 84 [b].

54. Va.—*Virginia Ry. & Power Co. v. Winstead's Adm'r*, 89 S.E. 83, 119 Va. 326. 60 C.J. p 589 note 86.

55. Mo.—*Eskridge v. Metropolitan St. Ry. Co.*, 157 S.W. 105, 170 Mo. App. 548. 60 C.J. p 589 note 87.

Evidence held sufficient
N.Y.—*Mikorski v. City of New York*, 59 N.Y.S.2d 457, 270 App.Div. 769, appeal denied 60 N.Y.S.2d 295, 270 App.Div. 819.
Va.—*Virginia Electric & Power Co. v. Blunt's Adm'r*, 163 S.E. 329, 158 Va. 421. 60 C.J. p 589 note 87 [a].

Evidence held insufficient
Conn.—*Oddwyc v. Connecticut Co.*, 155 A. 824, 113 Conn. 648.
Mass.—*Chatterton v. Eastern Massachusetts St. Ry. Co.*, 154 N.E. 259, 257 Mass. 550. 60 C.J. p 589 note 87 [b].

of the car,⁵⁶ to reduce the speed of the car,⁵⁷ or to attempt to stop the car in order to avoid the injury.⁵⁸ Where plaintiff relies on the violation of an ordinance or statute as the ground of negligence on approaching a person on or near the track, the evidence must be sufficient to prove such violation.⁵⁹

On approaching child or infirm or helpless person. Where the negligence relied on consists of a failure to operate the car with due care on approaching a child or an infirm or helpless person, the evidence must be sufficient to prove such negligence.⁶⁰ Thus, the evidence must be sufficient as to the motorman's failure to keep the car under such control as to stop it in time to avoid injuring a child;⁶¹ to anticipate that children will run on or near the track;⁶² to give a child warning of the approach of the car;⁶³ to keep a vigilant watch for children on or

near the track,⁶⁴ or for persons lying helpless on the track;⁶⁵ and to stop the car in time to avoid injury to a child,⁶⁶ or infirm or helpless person.⁶⁷ To run down a small child in an unobstructed street in daylight is evidence of negligence⁶⁸ unless the child suddenly darts into the path of the car.⁶⁹ Where the negligence relied on by plaintiff consists of a violation of a statute or ordinance, the evidence must be sufficient to prove the violation of the ordinance or statute,⁷⁰ and this is true where the negligence relied on consisted of a violation of a rule of the company.⁷¹

On approaching vehicles on or near track. Where the negligence relied on consists of a failure to operate the car with due care on approaching a vehicle on or near the track, the evidence must be sufficient to prove such negligence.⁷²

56. Evidence held sufficient

Md.—Storrs v. Hink, 173 A. 66, 167 Md. 194.
60 C.J. p 589 note 88 [a].

Evidence held insufficient

Va.—Virginia Electric & Power Co. v. Blunt's Adm'r, 163 S.E. 329, 158 Va. 421.
60 C.J. p 589 note 88 [b].

57. Evidence held sufficient

Ill.—Klooster v. Eriel, 75 N.E.2d 773, 332 Ill.App. 652.
Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421.
60 C.J. p 590 note 89 [a].

Evidence held insufficient

U.S.—Jaffe v. Philadelphia & W. R. Co., 180 F.2d 1010.
60 C.J. p 590 note 89 [b].

58. Conn.—Skelton v. Connecticut Co., 180 A. 302, 120 Conn. 689.
60 C.J. p 590 note 90.

59. Mo.—Papamichael v. Wells, App., 33 S.W.2d 1058.
60 C.J. p 590 notes 91–92.

60. Evidence held sufficient

Cal.—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733.
Conn.—Doherty v. Connecticut Co., 52 A.2d 486, 133 Conn. 469.
Ind.—Indianapolis Rys. v. Williams, 59 N.E.2d 586, 115 Ind.App. 383.
La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.
N.Y.—Corriera v. Third Ave. Transit Corp., 98 N.Y.S.2d 136, 277 App.Div. 82, affirmed 96 N.E.2d 898, 302 N.Y. 610.
60 C.J. p 590 note 95 [a].

Evidence held insufficient

La.—Shill v. New Orleans Public Service, App., 175 So. 113—Smith

v. New Orleans Public Service, App., 174 So. 158.

Mich.—Basmajian v. City of Detroit, 240 N.W. 87, 256 Mich. 539.

N.Y.—Porrovecchio v. Brooklyn & Queens Transit Corp., 8 N.Y.S.2d 412, 255 App.Div. 1010—Schroeder v. Brooklyn & Queens Transit Corp., 7 N.Y.S.2d 591, 255 App.Div. 866.

Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353.
60 C.J. p 590 note 95 [b].

61. Me.—Grant v. Bangor Ry. & Electric Co., 83 A. 121, 109 Me. 133.
60 C.J. p 590 note 97.

62. Mass.—O'Donnell v. Bay State St. Ry. Co., 115 N.E. 672, 226 Mass. 418.
60 C.J. p 590 note 98.

Evidence held sufficient

N.Y.—Pitts v. United Traction Co., 55 N.Y.S.2d 14, 269 App.Div. 796.
60 C.J. p 590 note 98 [a].

63. Ill.—Harm v. Chicago City Ry. Co., 187 Ill.App. 71.
60 C.J. p 590 note 99.

64. N.Y.—Kostenbaum v. New York City R. Co., 105 N.Y.S. 65, 120 App. Div. 160.
60 C.J. p 591 note 1.

Evidence held sufficient

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 688, 122 N.J.Law 226.
60 C.J. p 591 note 1 [a].

65. Cal.—Tucker v. City and County of San Francisco, 296 P. 101, 111 Cal.App. 663.
60 C.J. p 591 note 2.

66. Mo.—Gabriel v. Metropolitan St. R. Co., 109 S.W. 1042, 130 Mo.App. 651.
60 C.J. p 591 note 3.

Evidence held sufficient

Pa.—Magerko v. West Penn Rys. Co., 76 A.2d 618, 365 Pa. 609.
60 C.J. p 591 note 3 [a].

67. Pa.—Coll v. Easton Transit Co., 37 A. 89, 180 Pa. 618.
60 C.J. p 591 note 4.

68. Tex.—Galveston City R. Co. v. Hewitt, 3 S.W. 705, 67 Tex. 473, 60 Am.R. 32.
60 C.J. p 591 note 5.

69. Pa.—Goldberg v. Philadelphia Rapid Transit Co., 149 A. 104, 299 Pa. 79.
60 C.J. p 591 note 6.

70. Mo.—Knittel v. United Rys. Co. of St. Louis, 128 S.W. 5, 147 Mo. App. 677.
60 C.J. p 591 note 7–8.

71. Mass.—Barksdale v. Union St. Ry. Co., 193 N.E. 583, 289 Mass. 95.

72. N.Y.—Orchard Stables v. Interurban St. R. Co., 91 N.Y.S. 330.
60 C.J. p 592 note 11.

Evidence held sufficient

Mass.—Faulkner v. Eastern Massachusetts St. Ry. Co., 178 N.E. 527, 277 Mass. 291.

N.Y.—Damelio v. Brooklyn & Queens Transit Corp., 300 N.Y.S. 947, 253 App.Div. 739.

Ohio.—Clark v. Co-operative Transit Co., App., 77 N.E.2d 725—Eversole v. Seelbach, App., 73 N.E.2d 223.
Pa.—Anselmo v. Philadelphia Transp. Co., 41 A.2d 550, 351 Pa. 542—Stoll v. Curry, 175 A. 724, 115 Pa.Super. 484.

Tex.—El Paso Electric Co. v. Portillo, Civ.App., 45 S.W.2d 404, error dismissed.
60 C.J. p 592 note 11 [a].

Vehicle crossing tracks. Where a vehicle is struck while crossing the track the evidence must be sufficient to prove negligence in the operation of the car.⁷³ Thus, the evidence must be sufficient as to the motorman's failure to operate the car at a lawful speed,⁷⁴ to keep a vigilant watch,⁷⁵ to sound a warning,⁷⁶ to keep the car under control,⁷⁷ to keep the headlight burning,⁷⁸ or to stop

the car in time to avoid injury.⁷⁹

Vehicle at rest on or near track. On the question of the negligent operation of a streetcar causing a collision with a vehicle stalled or at rest on or in close proximity to the track the evidence must be sufficient⁸⁰ to show that the motorman operated the car at an excessive speed,⁸¹ or that he failed to keep a vigilant watch,⁸² or to stop the car in time

Evidence held insufficient

La.—Link v. Shreveport Rys. Co., App., 153 So. 77.

Mo.—Lotta v. Kansas City Public Service Co., 117 S.W.2d 296, 342 Mo. 743.

N.Y.—Smith v. Brooklyn & Queens Transit Corp., 31 N.Y.S.2d 716, 263 App.Div. 851—Cicccone v. Brooklyn & Queens Transit Corp., 28 N.Y.S.2d 271, 262 App.Div. 864.

Ohio.—Prok v. City of Cleveland, App., 102 N.E.2d 253.

Pa.—Nassar v. Pittsburgh Rys. Co., 161 A. 605, 105 Pa.Super. 352.

Wash.—Hinton v. City of Seattle, 62 P.2d 46, 188 Wash. 218.
60 C.J. p 592 note 11 [b].

73. Evidence held sufficient

Ariz.—City of Phoenix v. Green, 66 P.2d 1041, 49 Ariz. 376.

Cal.—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal.App.2d 195—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal.App.2d 579—O'Donnell v. Market Street Ry. Co., 86 P.2d 1077, 30 Cal.App.2d 630—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.

Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

Kan.—Frogge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.

La.—Lotspeich v. Shreveport Rys. Co., App., 193 So. 600.

Me.—Bedell v. Androscoggin & K. Ry. Co., 177 A. 237, 133 Me. 268.

Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Mich.—Booth v. City of Detroit, Department of Street Railways, 290 N.W. 344, 292 Mich. 102.

Ohio.—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464—Cincinnati St. Ry. Co. v. Waterman, 198 N.E. 494, 50 Ohio App. 380.

Pa.—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Balkie v. Philadelphia Rapid Transit Co., 200 A. 52, 331 Pa. 93—Ehrhart v. York Rys. Co., 162 A. 810, 308 Pa. 566—Siegfried v. Lehigh Valley Trans-

it Co., Com.Pl., 18 Lehigh L.J. 136, affirmed 6 A.2d 97, 334 Pa. 346.

R.I.—Curley v. United Elec. Rys. Co., 183 A. 634, 56 R.I. 11.

Va.—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 162 Va. 671.

60 C.J. p 592 note 13 [a].

Evidence held insufficient

Ky.—Public Service Co. of Indiana v. Schneider's Admr., 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712.

La.—Commercial Standard Ins. Co. v. Shreveport Rys. Co., App., 53 So.2d 410—Keller v. New Orleans Public Service, App., 181 So. 824—Munch v. New Orleans Public Service, App., 174 So. 582.

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

Neb.—Greco v. Shaver, 2 N.W.2d 526, 141 Neb. 1.

Pa.—Donaldson v. Pittsburgh Rys. Co., 55 A.2d 759, 358 Pa. 33.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

60 C.J. p 592 note 13 [b], [c].

Stop sign

Motorman's failure to stop at streetcar stop sign, even where ordinance requires it, is not substantive proof of negligence.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113.

74. Evidence held sufficient

Mo.—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475—Manzella v. St. Louis Public Service Co., App., 202 S.W.2d 567.
60 C.J. p 592 note 14 [a].

Evidence held insufficient

La.—Commercial Standard Ins. Co. v. Shreveport Rys. Co., App., 53 So.2d 410.

75. Iowa.—Engvall v. Des Moines City Ry. Co., 121 N.W. 12, 145 Iowa 560.

Evidence held sufficient

Ill.—Parker v. Illinois Terminal R. Co., 104 N.E.2d 119, 345 Ill.App. 604.

Kan.—Frogge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.

Minn.—Lacheck v. Duluth-Superior

Transit Co., 273 N.W. 366, 199 Minn. 519.

60 C.J. p 592 note 15 [a].

76. Evidence held sufficient

Mass.—McBride v. Middlesex & B St. Ry. Co., 176 N.E. 165, 276 Mass. 29.

N.J.—Hedges v. McManus, 159 A. 67, 10 N.J.Misc. 336.

60 C.J. p 593 note 16 [a].

77. Evidence held sufficient

Pa.—Rea v. Pittsburgh Rys. Co., 25 A.2d 730, 344 Pa. 421.

60 C.J. p 593 note 17 [a].

Evidence held insufficient

Pa.—Cox v. Wilkes-Barre Ry. Corp., 17 A.2d 367, 340 Pa. 554.

78. Mass.—Gaffney v. Bay State St. Ry. Co., 109 N.E. 361, 221 Mass. 457.

60 C.J. p 593 note 18.

79. Evidence held sufficient

Mo.—Schaller v. St. Louis Public Service Co., 223 S.W.2d 409—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475—Harting v. East St. Louis Ry. Co., App., 81 S.W.2d 973.

N.Y.—Massa v. Brooklyn & Queens Transit Corp., 13 N.Y.S.2d 40, 257 App.Div. 973.

60 C.J. p 593 note 19 [a].

80. Evidence held sufficient

Ind.—Gary Rys. Co. v. Michael, 34 N.E.2d 159, 109 Ind.App. 672.

Ohio.—Ashbrook v. Cleveland Ry. Co., App., 34 N.E.2d 992.

Pa.—Kennedy v. Southern Pennsylvania Traction Co., 3 A.2d 395, 333 Pa. 406.

60 C.J. p 593 note 20 [a].

Evidence held insufficient

Mo.—Sammons v. Kansas City Public Service Co., App., 179 S.W.2d 620.

Wis.—Quinn v. City Cab Co., 279 N.W. 606, 228 Wis. 467.

60 C.J. p 593 note 20 [b].

81. Cal.—Whitmeyer v. Southern Pac. Co., 282 P. 1005, 102 Cal.App. 199.

60 C.J. p 593 note 21.

82. Cal.—Whitmeyer v. Southern Pac. Co., supra.

60 C.J. p 593 note 22.

to avoid a collision.⁸³

Vehicle traveling in same direction. Where a vehicle is proceeding along or near a track in the same direction as an oncoming streetcar, the evidence of defendant's negligence must be sufficient⁸⁴ as to the motorman's failure to keep a vigilant watch,⁸⁵ to slacken his speed,⁸⁶ to give a warning of the approach of the car,⁸⁷ or to have a headlight burning on the car.⁸⁸ Where a motorman runs down a vehicle proceeding in the same direction it has been held to constitute prima facie negligence⁸⁹ or at least evidence of negligence⁹⁰ which is rarely capable of explanation.⁹¹

Vehicle traveling in opposite direction. Where a vehicle is proceeding in a direction opposite to that of a streetcar, the evidence must be sufficient to show negligence⁹² as to the motorman's failure to operate the car at a proper speed,⁹³ to have a light burning,⁹⁴ or to stop the car in time to avoid the injury.⁹⁵

Rate of speed. The negligence of the company

may be established by sufficient proof that the car causing the injury was traveling at an excessive rate of speed.⁹⁶ Where the negligence charged is as to the speed of the car, in the absence of statute or municipal regulation, it is not sufficient to support a finding of negligence to show merely the speed of the car,⁹⁷ for, since the rate of speed is negligent only with relation to existing circumstances, the evidence must be such as to show that the particular rate of speed with relation to the circumstances existing at the time and place of the injury was negligent.⁹⁸ Thus, the evidence must show that the condition of the street was such that the particular speed was excessive,⁹⁹ as that the street was a popular one,¹ or that the place of the accident was used by the public as a safety zone.² The fact that the car on passing creates a current of air is not evidence of excessive speed.³

Where there is evidence that the injury resulted from the violation of a municipal speed ordinance, a finding of actionable negligence may be sustained.⁴ Where a violation of a rule of the company as to

83. Iowa.—Joyner v. Interurban Ry. Co., 154 N.W. 936, 172 Iowa 727. 60 C.J. p 593 note 23.

84. Me.—Harmon v. Cumberland County Power & Light Co., 130 A. 273, 124 Me. 418. 60 C.J. p 593 note 24.

Evidence held sufficient

Wis.—Rasmussen v. Milwaukee Elec. Ry. & Transport Co., 47 N.W.2d 730, 259 Wis. 130, rehearing denied and mandate modified on other grounds 49 N.W.2d 272—Barutha v. Chicago, N. S. & M. R. Co., 28 N.W.2d 923, 251 Wis. 324. 60 C.J. p 593 note 24 [a].

85. Wis.—Alshuler v. Milwaukee Electric Ry. & Light Co., 173 N.W. 304, 169 Wis. 477. 60 C.J. p 593 note 25.

86. Mass.—Faulkner v. Eastern Massachusetts St. Ry. Co., 178 N.E. 527, 277 Mass. 291. 60 C.J. p 594 note 26.

87. Cal.—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal. App. 129. 60 C.J. p 594 note 27.

88. Mo.—Maness v. Joplin & P. Ry. Co., 130 S.W. 87, 149 Mo.App. 259. 60 C.J. p 594 note 28.

89. Mo.—Rosenblum v. St. Louis Public Service Co., 242 S.W.2d 304. 60 C.J. p 594 note 29.

90. Cal.—Berguin v. Pacific Electric Ry. Co., 236 P. 220, 203 Cal. 116. 60 C.J. p 594 note 30.

91. Cal.—O'Connor v. United Railroads of San Francisco, 141 P. 809, 168 Cal. 43.

Evidence held sufficient

W.Va.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504. 60 C.J. p 594 note 32 [a].

Evidence held insufficient

Pa.—Fasano v. Philadelphia Rapid Transit Co., 159 A. 219, 104 Pa.Super. 124. 60 C.J. p 594 note 32 [b].

93. Wis.—Speakes Lime & Cement Co. v. Duluth St. Ry. Co., 179 N.W. 596, 172 Wis. 475. 60 C.J. p 594 note 33.

Evidence held sufficient

Tex.—Dallas Railway & Terminal Co. v. Little, Civ.App., 109 S.W.2d 289, error dismissed. 60 C.J. p 594 note 34 [a].

95. Wash.—Hall v. Washington Water Power Co., 89 P. 553, 46 Wash. 207. 60 C.J. p 594 note 35.

96. Pa.—Balkie v. Philadelphia Rapid Transit Co., 200 A. 52, 331 Pa. 93—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113.

Wis.—Campanelli v. Milwaukee Electric Railway & Transport Co., 8 N.W.2d 390, 242 Wis. 505. 60 C.J. p 594 note 37.

97. N.J.—Smith v. Public Service Corporation of New Jersey, 75 A. 937, 78 N.J.Law 478, 20 Ann.Cas. 151. 60 C.J. p 594 note 40.

98. Ky.—Louisville Ry. Co. v. Cunningham, 163 S.W. 764, 157 Ky. 597. 60 C.J. p 594 note 42.

Evidence held sufficient

Mass.—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 276 Mass. 29.

Ohio.—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464. 60 C.J. p 594 note 42 [c].

Evidence held insufficient

La.—Caruso v. New Orleans Public Service, App., 142 So. 860—Keller v. N. C. Public Service, 138 So. 463, 18 La.App. 317. 60 C.J. p 594 note 42 [d].

99. Mo.—Higgins v. St. Louis, etc., R. Co., 95 S.W. 863, 197 Mo. 300. 60 C.J. p 595 note 43.

1. Ala.—Alabama Power Co. v. Bailey, 126 So. 847, 220 Ala. 540. 60 C.J. p 595 note 44.

2. Cal.—Erdevig v. Market St. Ry. Co., 264 P. 252, 203 Cal. 367. 60 C.J. p 595 note 45.

3. Mass.—Selibedea v. Worcester Consol. St. Ry. Co., 111 N.E. 767, 223 Mass. 76.

4. Cal.—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168. 60 C.J. p 596 note 68.

speed is relied on as a ground of negligence, the evidence must be sufficient to show a violation of the rule.⁵ Since it may be negligent to run a streetcar at an excessive rate of speed irrespective of a speed ordinance, the evidence may be sufficient without proof that a speed ordinance was violated.⁶

The finding of excessive speed at the time and place of the injury may be sustained where the physical facts show its existence.⁷ Thus, the finding of excessive speed may be sustained where the evidence shows that the vehicle struck was badly demolished,⁸ or that the injured person⁹ or the vehicle¹⁰ was carried or thrust forward a great distance. Evidence that the streetcar traveled a considerable distance after the collision may justify a finding of excessive speed,¹¹ but the locality of the accident¹² and the condition of the track¹³ and of the car after the collision¹⁴ are to be considered. A finding against an excessive rate of speed may be sustained where the evidence shows that the vehicle was carried but a very short distance¹⁵ or the car stopped within a short distance from the scene of the accident,¹⁶ or the passengers on the streetcar were not jarred by the impact,¹⁷ or the extent of injuries was small.¹⁸ Where the injured person

was crossing the track, a finding of excessive speed of the car may be sustained on evidence of the speed at which the injured person was traveling and the relative positions of the car and such person immediately before the accident.¹⁹

In order to prove an excessive rate of speed at the time and place of the injury testimony of a witness is of little probative value that the streetcar was traveling "fast,"²⁰ "pretty fast,"²¹ "very fast,"²² or similar expressions.²³

Injury to animals unattended or running at large. Where the ground of negligence consists of a failure to use due care in the operation of a car so as to avoid injury to animals unattended or running at large, the evidence must be sufficient to prove such negligence.²⁴

Injuries resulting from fright of animals. Where plaintiff's ground of negligence consists of defendant's failure to operate its car so as not to frighten an animal, the evidence must be sufficient to prove such negligence.²⁵ Thus, the evidence must be sufficient to show that the motorman negligently frightened an animal by sounding his whistle or gong,²⁶

5. Mass.—Barksdale v. Union St. Ry. Co., 193 N.E. 583, 289 Mass. 95. 60 C.J. p 597 note 70.

Violation of rule warrants finding of negligence

Mass.—Barksdale v. Union St. Ry. Co., supra.

6. Utah.—Cowan v. Salt Lake & U. R. Co., 189 P. 599, 56 Utah 94. 60 C.J. p 595 note 49.

7. Pa.—Gaines v. Philadelphia Transp. Co., 59 A.2d 916, 359 Pa. 610. 60 C.J. p 595 note 50.

8. N.Y.—Thomas F. White & Co. v. Joline, 121 N.Y.S. 852, 67 Misc. 156.

9. N.C.—Ingle v. Asheville Power & Light Co., 90 S.E. 953, 172 N.C. 751. 60 C.J. p 595 note 52.

Evidence held insufficient

La.—Craig v. New Orleans Public Service, App., 185 So. 485.

10. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049. Ohio.—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932. Pa.—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147. 60 C.J. p 595 note 53.

11. Me.—Banks v. Adams, 195 A. 206, 135 Me. 270.

Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217—Siegfried v. Lehigh Valley Transit Co., 6 A.2d 97, 337 Pa. 346 —Brennen v. Pittsburgh Rys. Co., 186 A. 743, 323 Pa. 81—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501.

60 C.J. p 595 note 54.

12. Pa.—Moses v. Northwestern Pennsylvania Ry. Co., 102 A. 166, 258 Pa. 537.

60 C.J. p 595 note 55.

13. Pa.—Beaumont v. Beaver Valley Traction Co., 148 A. 87, 298 Pa. 223.

60 C.J. p 595 note 56.

14. La.—Riley v. Shreveport Traction Co., 38 So. 83, 114 La. 135.

15. Wis.—Stafford v. Chippewa Electric R. Co., 85 N.W. 1036, 110 Wis. 331.

60 C.J. p 595 note 58.

16. Ill.—National Builders Bank of Chicago v. Cummings, 42 N.E.2d 883, 315 Ill.App. 212.

Pa.—Weldon v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb.Leg.J. 88, affirmed 41 A.2d 856, 352 Pa. 103.

60 C.J. p 595 note 59.

17. Mo.—McCreery v. United Rys. Co., 120 S.W. 24, 221 Mo. 18.

Wis.—Stafford v. Chippewa Electric R. Co., 85 N.W. 1036, 110 Wis. 331.

18. Wis.—Stafford v. Chippewa Valley Electric R. Co., supra.

60 C.J. p 596 note 61.

19. Mo.—Irwin v. United Railways Co., 191 S.W. 1130, 196 Mo.App. 666.

60 C.J. p 596 note 62.

20. Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.

60 C.J. p 596 note 63.

21. Pa.—Dopler v. Pittsburgh Rys. Co., 160 A. 592, 307 Pa. 113.

60 C.J. p 596 note 64.

22. Pa.—Fasano v. Philadelphia Rapid Transit Co., 159 A. 219, 104 Pa. Super. 124.

60 C.J. p 596 note 65.

23. Pa.—Wolf v. Philadelphia Transit Co., 97 A. 684, 252 Pa. 448.

60 C.J. p 596 note 66.

24. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Krause, 109 N.E. 760, 153 Ind. 493.

60 C.J. p 597 note 73.

25. Or.—Coughtry v. Willamette St. R. Co., 27 P. 1031, 21 Or. 245.

60 C.J. p 597 note 77.

26. Iowa.—Rogers v. Interurban Ry. Co., 129 N.W. 946, 150 Iowa 270.

60 C.J. p 597 note 79.

or that after discovering that an animal is frightened the motorman failed to reduce the speed of²⁷ or stop²⁸ the car.

§ 317. — Power of Defendant to Avoid Injury; Last Clear Chance

The conditions necessary for the application of the humanitarian or last clear chance doctrine must be established by a preponderance of the evidence.

Where plaintiff relies on the last clear chance, discovered peril, or humanitarian doctrine, the conditions necessary for the application of the doctrine must be established by a preponderance of the evidence.²⁹ Thus, the evidence must be sufficient as to the fact that the person injured was in a position of peril,³⁰ as to the injured person's obliviousness to the peril,³¹ and as to the duty of the street-car employees, after the peril was or should have been discovered, to use all reasonable means to

warn the person of the peril,³² and to avert the accident,³³ as by stopping the car.³⁴ Where defendant claims that plaintiff's negligence continued up to the time of the injury so as to constitute a proximate cause and to make the doctrine of last clear chance inapplicable, the evidence must be sufficient to prove that the person injured on discovering the danger failed to exercise reasonable care to avoid injury.³⁵

Knowledge of peril. The evidence must be sufficient to prove actual knowledge of the peril of the injured person³⁶ or, in some jurisdictions, that defendant's employees knew or could or should have discovered the peril of the person injured in time to avoid the injury.³⁷ In order to establish defendant's knowledge of the injured person's position of danger positive evidence is not essential,³⁸ but the fact may be shown by circumstantial evidence³⁹ which must be of such strength and character as to warrant an inference or reasonable probability, from

27. Wis.—Fisher v. Waupaca Electric Light & Ry. Co., 124 N.W. 1005, 141 Wis. 515.
60 C.J. p 597 note 80.

28. Me.—Malia v. Lewiston, A. & W. St. Ry. Co., 77 A. 541, 107 Me. 95.
60 C.J. p 597 note 81.

29. U.S.—Puerto Rico Ry., Light & Power Co. v. Miranda, C.C.A. Puerto Rico, 62 F.2d 479, certiorari denied 53 S.Ct. 593, 289 U.S. 731, 77 L.Ed. 1480.
60 C.J. p 597 note 86.

Evidence held sufficient

U.S.—Puerto Rico Ry., Light & Power Co. v. Miranda, supra.
Cal.—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.
Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.
N.Y.—Hernandez v. Brooklyn & Queens Transit Corp., 19 N.Y.S.2d 511, 259 App.Div. 853, reversed on other grounds 32 N.E.2d 542, 284 N.Y. 535.
60 C.J. p 597 note 86 [a].

Evidence held insufficient

D.C.—Roberts v. Capital Transit Co., 131 F.2d 871, 76 U.S.App.D.C. 367.
La.—Lotspeich v. Shreveport Rys. Co., App., 193 So. 600.
Mich.—Bruer v. City of Detroit, Dept. of St. Rys., 52 N.W.2d 206, 332 Mich. 613—Spencer v. City of Detroit, 241 N.W. 828, 257 Mich. 601.
R.I.—Lebrun v. United Electric Rys. Co., 169 A. 599, 54 R.I. 54.
Tex.—Dallas Ry. & Terminal Co. v. Glenn, Civ.App., 144 S.W.2d 961, error dismissed, judgment correct.
Va.—Virginia Transit Co. v. Owens, 55 S.E.2d 422, 190 Va. 76.

Wash.—Hinton v. City of Seattle, 62 P.2d 46, 188 Wash. 218.
60 C.J. p 597 note 86 [b].

30. Mo.—Ziegelmeier v. East St. Louis & Suburban Ry. Co., 51 S.W. 2d 1027, 330 Mo. 1013.
60 C.J. p 598 note 87.

31. Mo.—Bumpus v. St. Louis Public Service Co., App., 251 S.W.2d 371.
60 C.J. p 598 note 89.

32. Pa.—Dick v. West Penn Rys. Co., 33 A.2d 792, 153 Pa.Super. 281.
60 C.J. p 598 note 90.

33. Cal.—Gackstetter v. Market St. Ry. Co., 285 P. 409, 104 Cal.App. 89.
60 C.J. p 598 note 91.

34. Mo.—Stith v. St. Louis Public Service Co., 251 S.W.2d 693—Smith v. St. Louis Public Service Co., App., 252 S.W.2d 83.
60 C.J. p 598 note 92.

Evidence held sufficient

Cal.—Sills v. Los Angeles Transit Lines, App., 246 P.2d 65.
Mo.—Pettyjohn v. Kansas City Public Service Co., App., 181 S.W.2d 179, opinion quashed in part on other grounds 188 S.W.2d 650, 354 Mo. 79.
60 C.J. p 598 note 92 [a].

Evidence held insufficient

D.C.—Landfair v. Capital Transit Co., 165 F.2d 255, 83 U.S.App.D.C. 60.
Ill.—Nelson v. Evanston Ry. Co., 261 Ill.App. 4.
Mo.—Smith v. St. Louis Public Service Co., App., 252 S.W.2d 83.
N.Y.—Clarke v. City of New York, 50 N.Y.S.2d 333, affirmed 56 N.Y.S.

2d 413, 269 App.Div. 821, appeal denied 57 N.Y.S.2d 843, 269 App.Div. 928, reversed on other grounds 67 N.E.2d 261, 295 N.Y. 861.
60 C.J. p 598 note 92 [b].

35. Cal.—Darling v. Pacific Electric Ry., 242 P. 703, 197 Cal. 702.
60 C.J. p 599 note 94.

Evidence held sufficient

Mo.—Bresler v. Kansas City Public Service Co., 186 S.W.2d 524, 239 Mo. App. 228, certiorari quashed State ex rel. Kansas City Public Service Co. v. Bland, 191 S.W.2d 660, 354 Mo. 868.
60 C.J. p 599 note 96 [a].

Evidence held insufficient

N.Y.—Kelly v. Murray, 12 N.Y.S.2d 696, 257 App.Div. 863.
60 C.J. p 599 note 96 [b].

37. Mo.—Smith v. Metropolitan St. Ry. Co., App., 201 S.W. 569.
60 C.J. p 599 note 2.

Evidence held insufficient

La.—Heydorn v. New Orleans Public Service, App., 35 So.2d 893.
Md.—Gross v. Baltimore Transit Co., 64 A.2d 147, 192 Md. 278.
Mo.—Ziegelmeier v. East St. Louis & Suburban Ry. Co., 51 S.W.2d 1027, 330 Mo. 1013.
60 C.J. p 599 note 2 [b].

38. Or.—Dorfman v. Portland Electric Power Co., 286 P. 991, 132 Or. 648.

39. Ind.—Terre Haute, I. & E. Traction Co. v. Stevenson, 123 N.E. 785, 788, 126 N.E. 3, 189 Ind. 100.
60 C.J. p 599 note 98.

the facts proved, that defendant's employees had actual knowledge.⁴⁰ It has been held that the jury need not believe the motorman's testimony that he did not see the injured person,⁴¹ but it has also been held that, where a motorman testifies that he was on the lookout and did not see the injured person, it must be accepted as a fact, in the absence of evidence to the contrary, that the person injured could not have been seen in time to have stopped the car.⁴²

§ 318. — Willful or Wanton Injury and Gross Negligence

Willful or wanton negligence must be established by a preponderance of the evidence.

Where plaintiff relies for a recovery on a willful or wanton injury, he must prove by a preponderance of the evidence either an actual intent to injure or such a conscious or intentional disregard of the rights of others as to warrant a conclusion that an injury was intended.⁴³ Thus, the evidence must be sufficient to show that the car was propelled at a reckless speed⁴⁴ or that on discovery of the injured person's peril the motorman willfully failed to stop the car in time to avoid the injury.⁴⁵ Mere proof that a car is propelled at a high rate of speed does not alone establish willful negligence,⁴⁶ and

mere violation of a speed ordinance does not show gross negligence.⁴⁷ Evidence of simple negligence is insufficient to support a finding of willful or wanton misconduct.⁴⁸

Licensees. Where a licensee is injured by reason of the operation of a street railroad, the evidence must be sufficient to support a recovery.⁴⁹

Trespassers. Where the person injured was a trespasser on the car, the evidence must be sufficient to show willfulness or wantonness in order to show liability for the injury.⁵⁰

§ 319. — Contributory Negligence

In an action for injuries arising from the operation of a street railroad, general rules apply as to the weight and sufficiency of the evidence on the issue of contributory negligence.

In actions for injuries arising from the operation of a street railroad, general rules apply as to the weight and sufficiency of the evidence on the issue of contributory negligence.⁵¹ A preponderance of the evidence is required to establish the existence of contributory negligence⁵² or freedom therefrom.⁵³

40. Ala.—Mobile Light & R. Co. v. Fuller, 92 So. 89, 18 Ala.App. 301.

41. Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.

42. Mo.—Smith v. Metropolitan St. Ry. Co., App., 201 S.W. 569.

43. Ill.—Buglio v. Cummings, 45 N.E.2d 542, 317 Ill.App. 73.

Evidence held insufficient
Ill.—Buglio v. Cummings, supra.
60 C.J. p 600 note 8.

Pa.—De Rosa v. West Penn. Rys. Co., 182 A. 101, 120 Pa.Super. 90.
60 C.J. p 600 note 8 [b].

44. Ala.—Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357.
60 C.J. p 600 note 10.

45. Ga.—Atlanta Ry. & Power Co. v. Monk, 45 S.E. 494, 118 Ga. 449.
60 C.J. p 600 note 11.

46. Ill.—Foster v. East St. L. & S. Ry. Co., 158 Ill.App. 478.

47. Mass.—Adams v. Boston Elevated Ry. Co., 100 N.E. 1012, 214 Mass. 1.

48. Ala.—Jones v. Birmingham Ry., Light & Power Co., 67 So. 801, 12 Ala.App. 474, certiorari denied 69 So. 1018, 193 Ala. 676.

Ill.—Foster v. East St. L. & S. Ry. Co., 158 Ill.App. 478.

49. Ohio.—Cincinnati, G. & P. Ry. Co. v. Dameron, 33 Ohio Cir.Ct. 123.
60 C.J. p 600 note 17.

50. Mass.—Kallio v. Worcester Consolidated St. Ry., 109 N.E. 814, 222 Mass. 121.
60 C.J. p 600 note 19.

51. Plaintiff not bound by railroad's evidence
Mass.—De Angelis v. Boston Elevated Ry. Co., 23 N.E.2d 859, 304 Mass. 461.

All evidence considered
Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

52. Minn.—Aubin v. Duluth St. Ry. Co., 211 N.W. 580, 189 Minn. 342.
60 C.J. p 601 note 24.

Evidence held sufficient
U.S.—Jaffe v. Philadelphia & W. R. Co., C.A.Pa., 180 F.2d 1010.

Ala.—Caudle v. Birmingham Elec. Co., 22 So.2d 417, 247 Ala. 34.
Cal.—Lolli v. Market St. Ry. Co., 110 P.2d 436, 43 Cal.App.2d 166.

Ill.—Fina v. Richardson, 11 N.E.2d 842, 293 Ill.App. 133.

La.—Gough v. New Orleans Public Service, App., 174 So. 649—Link v.

Shreveport Rys. Co., App., 153 So. 77.
60 C.J. p 601 note 24 [a].

Evidence held insufficient
Cal.—Paris v. Los Angeles Ry. Corp., 179 P.2d 1, 78 Cal.App.2d 950.
Ill.—Kuenazkes v. Chicago Transit Authority, 89 N.E.2d 427, 339 Ill. App. 249.

Passenger in vehicle
Where evidence, when viewed in light of theories of either plaintiff or defendant, indicated that plaintiff as guest in automobile could have done nothing to prevent collision with defendant's street car, defendant's plea of contributory negligence was not sustained.—Chervek v. St. Louis Public Service Co., Mo.App., 173 S.W.2d 599.

53. N.Y.—Wood v. Coney Island & B. R. Co., 117 N.Y.S. 703, 133 App. Div. 270.

Evidence held sufficient
Mass.—Slowik v. Union St. Ry. Co., 184 N.E. 469, 282 Mass. 249.
60 C.J. p 601 note 25 [a].

Evidence held insufficient
Ill.—Viecelli v. Cummings, 54 N.E.2d 717, 322 Ill.App. 559.
60 C.J. p 601 note 25 [b].

As in the case of proving the existence of defendant's negligence, direct evidence is not necessary to establish either contributory negligence⁵⁴ or the absence thereof.⁵⁵ The burden is sustained by plaintiff only by proving that he has made such use of his faculties as an ordinarily prudent man would have done under similar circumstances.⁵⁶ The burden is not sustained by an inference of careful conduct where it is merely conjectural, and is no more probable than an inference of carelessness,⁵⁷ but the inference must be the only one which can fairly and reasonably be drawn from the facts.⁵⁸ Proof of facts tending to show that the injured person entered upon the tracks without taking any precaution for his own safety makes out a prima facie case of contributory negligence.⁵⁹ Failure to have an automobile registered at the time of the accident has been held to be evidence of negligence in operating an automobile,⁶⁰ but it is not conclusive.⁶¹

The presumption of due care on the part of plaintiff, where applicable, will, in the absence of other

evidence, justify a finding that he proceeded with due care and caution,⁶² but the presumption, being rebuttable, is of no avail where the evidence shows that the injured person was guilty of contributory negligence.⁶³

Reliance on precautions by defendant. The above rules apply as to the weight and sufficiency of the evidence of contributory negligence in reliance on the assumption of proper precautions being taken by a street railroad company.⁶⁴

Person working in street. The evidence must be sufficient to show that a person working in the street was contributorily negligent.⁶⁵

Persons injured because of obstructions in street. On the question of contributory negligence of a person injured because of obstructions in the street, the evidence must be sufficient to show contributory negligence⁶⁶ or freedom therefrom.⁶⁷

Person or vehicle crossing track. The evidence must be sufficient to prove contributory negligence,⁶⁸

54. Minn.—Aubin v. Duluth St. Ry. Co., 211 N.W. 580, 169 Minn. 342. 60 C.J. p 601 note 29.

55. Conn.—Fay v. Hartford & Springfield Ry. Co., 71 A. 364, 81 Conn. 330.

56. N.Y.—Fortunato v. Union Ry. Co. of New York City, 172 N.Y.S. 119. 60 C.J. p 601 note 31.

57. Conn.—Martino v. Connecticut Co., 147 A. 20, 109 Conn. 559. 60 C.J. p 601 note 32.

58. Mass.—Cox v. South Shore & B. St. Ry. Co., 65 N.E. 823, 182 Mass. 497.

N.Y.—O'Reilly v. Brooklyn Heights R. Co., 81 N.Y.S. 572, 82 App.Div. 492.

59. Ind.—Evansville & S. Traction Co. v. Spiegel, 94 N.E. 718, 49 Ind. App. 412.

60. Mass.—Pigeon v. Massachusetts Northeastern St. Ry. Co., 119 N.E. 762, 230 Mass. 392.

61. Mass.—Pigeon v. Massachusetts Northeastern St. Ry. Co., *supra*.

62. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A.2d 732, 356 Pa. 217. 60 C.J. p 602 note 40.

63. Wis.—Pinz v. Milwaukee Electric Ry. & Light Co., 176 N.W. 67, 171 Wis. 11. 60 C.J. p 602 note 42.

64. Mo.—Cihla v. United Rys. Co. of St. Louis, App., 221 S.W. 427. 60 C.J. p 602 note 43.

Custom of railroad
Cal.—Bryant v. Market St. Ry. Co., 163 P.2d 33, 71 Cal.App.2d 508.

65. Mass.—Kelly v. Boston El. R. Co., 83 N.E. 865, 197 Mass. 420, 15 L.R.A., N.S., 282. 60 C.J. p 602 note 45-46.

Evidence held sufficient
Kan.—Elgin v. Kansas City Public Service Co., 298 P. 758, 133 Kan. 105. 60 C.J. p 602 notes 45, 46 [a].

Evidence held insufficient
Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435. 60 C.J. p 602 notes 45, 46 [b].

66. Mass.—Dix v. Old Colony St. Ry. Co., 89 N.E. 109, 202 Mass. 518, 24 L.R.A., N.S., 567. 60 C.J. p 602 note 47.

67. Me.—Mansell v. Lewiston, A. & W. St. Ry., 85 A. 473, 109 Me. 580. 60 C.J. p 602 note 48.

68. La.—Carnahan v. New Orleans Public Service, App., 145 So. 311. 60 C.J. p 602 note 52.

Evidence held sufficient
Cal.—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal. App.2d 626—Southern California Freight Lines v. San Diego Elec. Ry. Co., 152 P.2d 470, 66 Cal.App.

2d 672—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248 —Flores v. Los Angeles Ry. Corp., 59 P.2d 856, 15 Cal.App.2d 576.

Ill.—Nelson v. Evanston Ry. Co., 261 Ill.App. 4. Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690.

La.—Soards v. Shreveport Rys. Co., App., 8 So.2d 343—Carnahan v. New Orleans Public Service, App., 145 So. 311.

Md.—State, for Use of Ridgway v. Capital Transit Co., 72 A.2d 245, 194 Md. 656.

Minn.—La Barre v. St. Paul City Ry. Co., 241 N.W. 674, 185 Minn. 514.

N.Y.—Denning v. Brooklyn & Queens Transit Corp., 17 N.Y.S.2d 662, 258 App.Div. 1056.

Ohio.—Monsey v. Cincinnati St. Ry. Co., 89 N.E.2d 683, 86 Ohio App. 61.

Pa.—Lieberman v. Pittsburgh Rys. Co., 157 A. 905, 305 Pa. 412.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816 —Havins v. Dallas Railway & Terminal Co., Civ.App., 130 S.W.2d 878, error refused.

Wash.—Carlson v. City of Seattle, 27 P.2d 717, 175 Wash. 388.

Evidence held insufficient

Kan.—Frogge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.

Minn.—Moeller v. St. Paul City Ry. Co., 16 N.W.2d 289, 218 Minn. 353, 156 A.L.R. 371.

or due care⁶⁹ on the part of the person injured while walking or driving across railroad tracks. Thus the evidence must be sufficient to prove contributory negligence⁷⁰ or freedom therefrom⁷¹ as to the distance of the streetcar when the injured person crossed the track; or contributory negligence⁷² or due care⁷³ in walking or driving on the track in front of an approaching car.

Failure to stop, look, and listen. The failure of a person to look and listen before crossing a track may be strong evidence of negligence.⁷⁴ Where the particular ground of contributory negligence relied on consists of the failure of a driver or pedestrian to stop, look, and listen before crossing, the evidence must be sufficient to show contributory negligence⁷⁵ or freedom therefrom.⁷⁶ Where it ap-

pears that the car was so close and visible just before the accident that it must have been seen if the person injured had looked properly, evidence that he did look and did not see it is incredible, as a matter of law, as being in contradiction of matters of common knowledge or the laws of nature.⁷⁷

Person driving or walking on or near track. Where the contributory negligence relied on consists of the failure of a person driving or walking on or near the track to use due care, under general rules the evidence must be sufficient to show such negligence⁷⁸ or due care.⁷⁹ Thus, for injuries occasioned by the operation of a streetcar, the evidence must be sufficient to show the contributory negligence⁸⁰ or due care⁸¹ of the driver of a vehicle proceeding in the same direction on, astride,

N.J.—Mesgleski v. Public Service Coordinated Transport, 160 A. 321, 10 N.J.Misc. 766.

Wash.—Milne v. City of Seattle, 145 P.2d 888, 20 Wash.2d 30.

W.Va.—Damron v. Ohio Valley Elec. Ry. Co., 188 S.E. 126, 117 W.Va. 725.

Crossing street elsewhere than on crosswalk, although deceased pedestrian had legal right to do so, is a material circumstance for consideration of jury.—Ristuccia v. Boston Elevated Ry. Co., 186 N.E. 592, 283 Mass. 529.

69. Mass.—Kinsley v. Boston Elevated Ry. Co., 95 N.E. 856, 209 Mass. 467.

60 C.J. p 602 note 53.

Evidence held sufficient

Ill.—Lampkin v. Friel, 67 N.E.2d 894, 329 Ill.App. 273.

Evidence held insufficient

Conn.—Oddwyicz v. Connecticut Co., 155 A. 824, 113 Conn. 648.

70. Pa.—Stoudt v. Philadelphia Rapid Transit Co., 97 Pa.Super. 295.

60 C.J. p 603 note 55.

Evidence held sufficient

U.S.—Kansas City Public Service Co. v. Knight, C.C.A.Kan., 116 F.2d 233.

Cal.—McHugh v. Market St. Ry. Co., 85 P.2d 467, 29 Cal.App.2d 737.

D.C.—Capital Transit Co. v. Smallwood, 162 F.2d 14, 82 U.S.App.D.C. 228—Kelly Furniture Co. v. Washington Ry. & Electric Co., 76 F.2d 985, 64 App.D.C. 215—Wolff v. Capital Transit Co., Mun.App., 32 A. 2d 872.

La.—Commercial Standard Ins. Co. v. Shreveport Rys. Co., App., 53 So.2d 410.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

Evidence held insufficient

Cal.—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.

Tex.—Houston Electric Co. v. Settle, Civ.App., 51 S.W.2d 648, error dismissed.

Car in sight

Fact that trolley car was in sight when truck driver started to cross street was not conclusive evidence of contributory negligence.—Harold Furniture Co. v. Philadelphia Rapid Transit Co., 100 Pa.Super. 316.

71. N.Y.—Walsh v. Brooklyn, Q. C. & S. R. Co., 154 N.Y.S. 884, 169 App.Div. 166.

60 C.J. p 603 note 56.

72. Minn.—McDonald v. Mesaba Ry. Co., 163 N.W. 298, 137 Minn. 275.

60 C.J. p 603 note 57.

73. N.Y.—Porter v. New York City Interborough Ry. Co., 257 N.Y.S. 757, 235 App.Div. 525, affirmed Sarfaty v. New York City Interborough R. Co., 185 N.E. 750, 261 N. Y. 587.

60 C.J. p 603 note 58.

74. Me.—Clancey v. Cumberland County Power & Light Co., 147 A. 157, 128 Me. 274.

75. Pa.—Griffiths v. Lehigh Valley Transit Co., 141 A. 300, 292 Pa. 489.

60 C.J. p 604 note 61.

Evidence held sufficient

La.—Favaza v. New Orleans Public Service, App., 154 So. 457, followed in Frere v. New Orleans Public Service, 154 So. 462.

Ohio.—Ziebro v. City of Cleveland, 106 N.E.2d 161, 157 Ohio St. 489.

Tenn.—Topp v. Tennessee Electric Power Co., 9 Tenn.App. 632.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816.

76. Pa.—Goldfine & Brenner v. Phil-

adelphia Rapid Transit Co., 181 A. 514, 119 Pa.Super. 581.

60 C.J. p 604 note 62.

77. D.C.—Landfair v. Capital Transit Co., 165 F.2d 255, 83 U.S.App.D.C. 60.

Pa.—Favazzo v. Philadelphia Transp. Co., 82 A.2d 538, 169 Pa.Super. 433.

60 C.J. p 605 note 63.

Evidence held sufficient

Ill.—Live Stock Nat. Bank of Chicago v. Richardson, 48 N.E.2d 597, 318 Ill.App. 537.

Ky.—Public Service Co. of Indiana v. Schneider's Adm'r, 85 S.W.2d 676, 260 Ky. 334, 102 A.L.R. 712.

Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197—Karle v. Cincinnati St. Ry. Co., 43 N.E. 2d 762, 89 Ohio App. 327.

Pa.—Skodis v. Philadelphia Rapid Transit Co., 158 A. 587, 103 Pa.Super. 533—Stewart v. Philadelphia Rapid Transit Co., 157 A. 37, 103 Pa.Super. 366.

R.I.—Lebrun v. United Electric Rys. Co., 169 A. 599, 54 R.I. 54—Corbesero v. United Electric Rys. Co., 167 A. 109.

60 C.J. p 605 note 68.

Evidence held insufficient

Pa.—Hinton v. Pittsburgh Rys. Co., 59 A.2d 151, 359 Pa. 381—Stoll v. Curry, 175 A. 724, 115 Pa.Super. 484.

Va.—Braswell v. Virginia Electric & Power Co., 173 S.E. 365, 162 Va. 27.

79. Ill.—Wilkerson v. Cummings, 58 N.E.2d 280, 324 Ill.App. 331.

60 C.J. p 605 note 69.

80. N.J.—Markowski v. Public Service Ry. Co., 135 A. 783, 5 N.J.Misc. 182.

60 C.J. p 605 note 71.

81. Conn.—Small v. Connecticut Co., 146 A. 850, 109 Conn. 481.

60 C.J. p 606 note 72.

or alongside the track; or contributory negligence⁸² or due care⁸³ of a driver proceeding in the opposite direction.

Children and others under disability. On the question of contributory negligence of a person under a disability, the evidence must be sufficient to show the existence of contributory negligence.⁸⁴ Thus, as to children, the evidence must be sufficient to show contributory negligence⁸⁵ or due care.⁸⁶

§ 320. — Violation of Municipal Ordinances and Regulations

The evidence must be sufficient to establish the violation of an ordinance relied on to establish contributory negligence.

On the question of contributory negligence of a person in violating a municipal ordinance or regulation, under general rules the evidence must be sufficient to prove such violation.⁸⁷

82. R.I.—Hermann v. Rhode Island Co., 90 A. 813.

60 C.J. p 608 note 73.

83. N.Y.—Charles v. New York Rys. Co., 173 N.Y.S. 436.

60 C.J. p 606 note 74.

84. Wis.—Pinz v. Milwaukee Electric Ry. & Light Co., 176 N.W. 67, 171 Wis. 11.

60 C.J. p 606 note 77.

Evidence held sufficient

Cal.—Cloud v. Market St. Ry. Co., 168 P.2d 191, 74 Cal.App.2d 92.

85. Minn.—Hughes v. Minneapolis St. Ry. Co., 178 N.W. 607, 146 Minn. 475.

60 C.J. p 606 note 79.

Evidence held sufficient

Pa.—Spitzer v. Philadelphia Transp. Co., 38 A.2d 503, 348 Pa. 548.

Va.—Lynchburg Traction & Light Co. v. Wright, 170 S.E. 569, 161 Va. 251.

60 C.J. p 606 note 79 [a].

86. N.Y.—Seisler v. Joline, 120 N.Y. S. 54.

60 C.J. p 607 note 80.

87. Evidence held sufficient

La.—Link v. Shreveport Rys. Co., App., 153 So. 77.

60 C.J. p 607 note 83 [a].

Evidence held insufficient

Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

Prima facie evidence

Violation of ordinance is only prima facie evidence of negligence.—Buttner v. Richardson, 8 N.E.2d 217, 290 Ill.App. 601.

88. D.C.—Collins v. District of Co-

lumbia, 48 F.2d 1012, 60 App.D.C. 100.

Neb.—Peterson v. Omaha & Council Bluffs St. Ry. Co., 269 N.W. 510, 131 Neb. 676.

Tenn.—The Memphis St. Ry. Co. v. Aycock, 11 Tenn.App. 260.

60 C.J. p 607 note 91.

Evidence held sufficient

Ariz.—City of Phoenix v. Green, 66 P. 2d 1041, 49 Ariz. 376.

Cal.—Germ v. City and County of San Francisco, 222 P.2d 122, 99 Cal. App.2d 404—Paris v. Los Angeles Ry. Corp., 179 P.2d 1, 78 Cal.App. 2d 950—Bencich v. Market St. Ry. Co., 85 P.2d 556, 29 Cal.App.2d 641.

La.—Blanchard v. New Orleans Public Service, App., 25 So.2d 741, followed in Margavio v. Capone, 25 So.2d 743.

Minn.—Lacheck v. Duluth-Superior Transit Co., 273 N.W. 366, 199 Minn. 519.

Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278.

N.J.—Mesgleski v. Public Service Coordinated Transport, 160 A. 321, 10 N.J.Misc. 766.

W.Va.—Damron v. Ohio Valley Elec. Ry. Co., 188 S.E. 126, 117 W.Va. 725.

60 C.J. p 607 note 91 [a].

Evidence held insufficient

Ga.—Elliott v. Georgia Power Co., 197 S.E. 914, 58 Ga.App. 151.

N.Y.—Cohen v. City of New York, 108 N.Y.S.2d 836, 279 App.Div. 766—De Renzis v. New York Rapid Transit Corp., 9 N.Y.S.2d 983, 256 App.Div. 367—Pasiak v. International Ry. Co., 281 N.Y.S. 14, 245 App.Div. 244, motion denied 2 N.E.

§ 321. — Proximate Cause of Injury

In an action for injuries from the operation of a street railroad, it must be established by a preponderance of the evidence that the defendant's negligence was the proximate cause of the injury.

In order to sustain a recovery, plaintiff must, under general rules, show by a preponderance of the evidence that defendant's negligent act or omission was the proximate cause of the injury complained of.⁸⁸ This fact may be shown by circumstantial evidence,⁸⁹ which must be of such strength and character as to warrant an inference or reasonable probability, from the facts proved, that defendant's negligence caused the injury;⁹⁰ and such evidence is not sufficient if it merely raises a surmise or conjecture that such was the fact.⁹¹

The rules as to the weight and sufficiency of the evidence as to proximate cause apply in actions for injuries by reason of negligence with respect to the condition of the street⁹² or tracks,⁹³ the con-

2d 696, 271 N.Y. 563, affirmed 3 N. E.2d 847, 272 N.Y. 414.

Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.

W.Va.—Tri-City Traction Co. v. Shepherd, 15 S.E.2d 592, 123 W.Va. 227.

60 C.J. p 607 note 91 [b].

Unavoidable accident

La.—Johns v. Shreveport Rys. Co.,

App., 187 So. 812.

60 C.J. p 607 note 91 [c].

Unanticipated illness

Evidence was sufficient to establish that collision had occurred when streetcar motorman had been rendered unconscious by sudden unanticipated illness.—Thomas v. Capital Transit Co., D.C.Mun.App., 83 A.2d 584.

89. Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Pa.—Mars v. Philadelphia Rapid Transit Co., 154 A. 290, 303 Pa. 80.

60 C.J. p 607 note 94.

90. Mo.—Schmidt v. St. Louis Transit Co., 120 S.W. 96, 140 Mo. App. 182.

91. Mont.—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124.

60 C.J. p 608 note 96.

92. N.Y.—Hayden v. Joline, 122 N. Y.S. 629, 137 App.Div. 755.

60 C.J. p 608 note 98.

Evidence held sufficient

Ill.—Valuch v. Rawson, 270 Ill.App. 583.

60 C.J. p 608 note 98 [a].

93. Wash.—Kincaid v. Walla Walla

dition or equipment of the car,⁹⁴ or with respect to the management and operation of the car⁹⁵ as to speed,⁹⁶ warnings,⁹⁷ or duty to keep a vigilant watch.⁹⁸

Violation of statute or ordinance. Plaintiff must show by a preponderance of the evidence that the violation was the proximate cause of the injury.⁹⁹ Thus, the causal connection must be sufficiently proved between the injury and a violation of an ordinance with respect to speed,¹ or the duty to keep a vigilant watch,² to equip the car with a fender,³ or to keep the street in repair.⁴

Violation of rules of company. Where plaintiff relies on the failure of an employee to adhere to a rule of the company the evidence must be sufficient

to show that such violation was the proximate cause of the injury.⁵

Contributory negligence. On the question of plaintiff's negligence the evidence must be sufficient to show that such negligence was a proximate cause of the injury complained of.⁶ Thus the evidence must be sufficient to show that the contributory negligence of the injured person was the proximate cause when the injury results from walking⁷ or driving⁸ across the track. Where the evidence shows that a collision occurred by reason of plaintiff being in a place of threatened danger, to which his own negligence has exposed him, in the absence of rebutting evidence the court may infer that the injury received was the proximate result of plaintiff's want of due care.⁹

Valley Traction Co., 106 P. 918, 57 Wash. 334, 135 Am.S.R. 982.
60 C.J. p 608 note 99.

94. La.—Gannon v. New Orleans City, etc., R. Co., 20 So. 223, 48 La. Ann. 1002.
60 C.J. p 608 note 1.

95. Ill.—Chicago City R. Co. v. Bruley, 74 N.E. 441, 215 Ill. 464.
60 C.J. p 608 note 2.

Evidence held sufficient

Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.
Mich.—Booth v. City of Detroit, Department of Street Railways, 290 N.W. 344, 292 Mich. 102.
N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 683, 122 N.J.Law 226.
60 C.J. p 608 note 2 [a].

96. Conn.—Swayne v. Connecticut Co., 85 A. 634, 737, 86 Conn. 439.
60 C.J. p 608 note 3.

Evidence held sufficient

Cal.—O'Donnell v. Market Street Ry. Co., 86 P.2d 1077, 30 Cal.App.2d 630.
Mo.—Brungs v. St. Louis Public Service Co., App., 235 S.W.2d 81—Manzella v. St. Louis Public Service Co., App., 202 S.W.2d 567.
Pa.—Gaines v. Philadelphia Transp. Co., 59 A.2d 916, 359 Pa. 610—Shearer v. Pittsburgh Rys. Co., 21 A.2d 482, 145 Pa.Super. 560.
Wis.—Campanelli v. Milwaukee Elec. Railway & Transport Co., 8 N.W.2d 390, 242 Wis. 505.
60 C.J. p 608 note 3 [a].

97. Evidence held sufficient

Cal.—Vincent v. Los Angeles Transit Lines, 183 P.2d 713, 81 Cal.App.2d 195.
60 C.J. p 608 note 4 [a].

Evidence held insufficient

Mo.—Weishaar v. Kansas City Public

Service Co., App., 128 S.W.2d 332—Whitley v. Kansas City Public Service Co., App., 66 S.W.2d 952.
60 C.J. p 608 note 4 [b].

98. Cal.—Schooley v. Fresno Traction Co., 206 P. 481, 56 Cal.App. 705.
60 C.J. p 608 note 5.

Evidence held sufficient

Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421.
60 C.J. p 608 note 5 [a].

99. Mo.—Schmidt v. St. Louis Transit Co., 120 S.W. 96, 140 Mo.App. 182.

1. Mo.—Callanan v. United Rys. Co. of St. Louis, App., 232 S.W. 213.
60 C.J. p 609 note 9.

2. Mo.—Keeney v. Wells, 257 S.W. 1075, 214 Mo.App. 79.
60 C.J. p 609 note 10.

3. Or.—Thornton v. Portland Ry., Light & Power Co., 128 P. 850, 63 Or. 478.
60 C.J. p 609 note 11.

4. Mo.—Callanan v. United Rys. Co. of St. Louis, App., 263 S.W. 443.
60 C.J. p 609 note 12.

5. Evidence held sufficient

Mass.—Barksdale v. Union St. Ry. Co., 193 N.E. 583, 289 Mass. 95.
60 C.J. p 609 note 15.

6. Va.—Virginia Elec. & Power Co. v. Wright, 196 S.E. 580, 170 Va. 442.
60 C.J. p 609 note 19.

Evidence held sufficient

Cal.—Collier v. Los Angeles Ry. Co., 140 P.2d 206, 60 Cal.App.2d 169.
Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690.
Ohio.—Monsey v. Cincinnati St. Ry. Co., 89 N.E.2d 683, 86 Ohio App. 61

—Kunkel v. Cincinnati St. Ry. Co., 80 N.E.2d 442, 82 Ohio App. 341—Eversole v. Seelbach, App., 73 N.E. 2d 223.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816.

Va.—Linton v. Virginia Electric & Power Co., 174 S.E. 667, 162 Va. 711.

60 C.J. p 609 note 19 [a].

7. Evidence held sufficient

Cal.—Curtis v. Pacific Elec. Ry. Co., 223 P.2d 52, 100 Cal.App.2d 112.
Ohio.—Ziebro v. City of Cleveland, 106 N.E.2d 161, 157 Ohio St. 489—Evegan v. Cincinnati St. Ry. Co., 87 N.E.2d 109, 85 Ohio App. 138.
60 C.J. p 609 note 20 [a].

8. Kan.—Fair v. Union Traction Co., 171 P. 649, 102 Kan. 611.
60 C.J. p 609 note 21.

Evidence held sufficient

D.C.—Wolff v. Capital Transit Co., Mun.App., 32 A.2d 872.

La.—Price v. Shreveport Rys. Co., App., 32 So.2d 337—Green v. New Orleans Public Service, App., 185 So. 485—Craig v. New Orleans Public Service, App., 185 So. 485—Keller v. New Orleans Public Service, App., 181 So. 824—Munch v. New Orleans Public Service, App., 174 So. 852.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816—Carrell v. Dallas Railway & Terminal Co., Civ.App., 151 S.W.2d 869, error dismissed, judgment correct.
60 C.J. p 609 note 21 [a].

9. Ind.—Indianapolis Traction & Terminal Co. v. Croly, 96 N.E. 973, 98 N.E. 1091, 54 Ind.App. 566—Evansville & S. Traction Co. v. Spiegel, 94 N.E. 718, 49 Ind.App. 412.

§ 322. Questions of Law and Fact

In an action for injuries caused by the management or operation of a street railroad, questions of law are ordinarily to be determined by the court, and questions of fact by the jury under proper instructions.

In an action for injuries caused by the management or operation of a street railroad, as in other civil actions, questions of law are ordinarily to be determined by the court and questions of fact are to be determined by the jury under proper instructions from the court.¹⁰ Thus, if there is any evidence from which the jury might justifiably find the existence or nonexistence of facts in issue, and the evidence is disputed, or if undisputed is such that reasonable minds might arrive at different conclusions therefrom, the issues should be submitted to

the jury under appropriate instructions from the court;¹¹ but, where there is no evidence on an issue of fact, or the evidence of its existence or nonexistence is so slight that a finding thereof would not be sustained, or is conclusive of its existence or nonexistence, the question becomes one of law for the court and should not be submitted to the jury.¹²

Accordingly, provided the evidence is sufficient to establish at least a prima facie case for plaintiff,¹³ or more than a scintilla to sustain his theory,¹⁴ even though the weight thereof seems to favor the defendant,¹⁵ the issues should be submitted to the jury where it is conflicting or not conclusive as to whether the street railroad company was guilty of

10. Neb.—*Ross v. Omaha & C. B. St. Ry. Co.*, 192 N.W. 507, 109 Neb. 823.
Pa.—*Kins v. Pittsburgh Rys. Co.*, Com.Pl., 92 Pittsb.Leg.J. 46, affirmed 34 A.2d 809, 154 Pa.Super. 29.

In actions for injuries to passengers see Carriers § 768.
Instructions see *infra* §§ 330-335.

11. Cal.—*Burr v. United Railroads of San Francisco*, 126 P. 873, 163 Cal. 663.

Ill.—*Marron v. Friel*, 66 N.E.2d 509, 328 Ill.App. 586.

Me.—*Kirouac v. Androscoggin & K. Ry. Co.*, 154 A. 81, 130 Me. 147.

Mo.—*Neal v. Kansas City Public Service Co.*, 184 S.W.2d 441, 353 Mo. 779.

Pa.—*Voitasefski v. Pittsburgh Rys. Co.*, 69 A.2d 370, 363 Pa. 220—*Reese v. City of Pittsburgh*, 169 A. 366, 313 Pa. 32—*Burns v. Pittsburgh Rys. Co.*, Com.Pl., 93 Pittsb. Leg.J. 114.

60 C.J. p 612 note 29.

Weight and sufficiency of evidence in general see *supra* §§ 312-321.

Evidence held to warrant submission to jury

Kan.—*Quail v. Kansas Power & Light Co.*, 64 P.2d 565, 145 Kan. 95.

Mo.—*Bowers v. Kansas City Public Service Co.*, 41 S.W.2d 810, 328 Mo. 770—*Mahany v. Kansas City Rys. Co.*, 254 S.W. 16, 29 A.L.R. 817—*Polkowski v. St. Louis Public Service Co.*, 68 S.W.2d 884, 229 Mo. App. 24—*Callanan v. United Rys. Co. of St. Louis*, App., 263 S.W. 443.

N.C.—*Myers v. Southern Public Utilities Co.*, 180 S.E. 694, 208 N.C. 293.

Pa.—*Kins v. Pittsburgh Rys. Co.*, 34 A.2d 809, 154 Pa.Super. 29.

Tenn.—*Ogle v. Knoxville Power & Light Co.*, 8 Tenn.App. 153.

60 C.J. p 612 note 29 [b].

Credibility of witnesses is ordinarily a question for jury.

Ill.—*Felhour v. East St. Louis Ry. Co.*, 169 Ill.App. 36.

Ind.—*Smith v. Mills*, 185 N.E. 327, 98 Ind.App. 543.

Md.—*Baltimore Transit Co. v. State to Use of Schriefer*, 40 A.2d 678, 184 Md. 250.

Mo.—*Mollman v. St. Louis Public Service Co.*, App., 192 S.W.2d 618—*Haddow v. St. Louis Public Service Co.*, App., 38 S.W.2d 284.

N.Y.—*Melia v. Southern Boulevard R. Co.*, 286 N.Y.S. 501, 159 Misc. 293.

Pa.—*Delmer v. Pittsburgh Rys. Co.*, 34 A.2d 502, 348 Pa. 147—*Galliano v. East Penn Electric Co.*, 154 A. 805, 303 Pa. 498.

Weight of expert testimony held for jury.—*Goldstuck v. Interborough Rapid Transit Co.*, 147 N.Y.S. 42, 85 Misc. 24.

Reconciliation of conflicting testimony

In action for injuries received by child struck by streetcar, reconciliation of conflicting testimony as to position and actions of child immediately before being struck was for jury.—*Gackstetter v. Market St. Ry. Co.*, 52 P.2d 998, 10 Cal.App.2d 713.

Trespasser

(1) Whether infant, injured when streetcars collided, was trespasser stealing a ride on rear step of streetcar or pedestrian was question for jury.—*Serina v. New York Rys. Corporation*, 195 N.E. 196, 266 N.Y. 552.

(2) An infant pedestrian, who was struck by defendant's trolley car while crossing tracks on defendant's right of way, was not as a matter of law a trespasser to whom defendant owed no duty of vigilance, where public way existed at place of crossing until six months before the accident with implied permission of defendant.—*Zambardi v. South Brook-*

lyn Ry. Co., 24 N.E.2d 312, 281 N.Y. 516.

(3) Evidence with respect to whether defendant intended to give notice of withdrawal of permission to pedestrians to cross tracks at place where accident occurred by placing fence and signs on one side of track presented question of fact.—*Zambardi v. South Brooklyn Ry. Co.*, *supra*.

(4) Whether defendant company operating elevated trains acquiesced in practice of contractor's workmen, cleaning and painting structure underneath track, going upon track incident to employment was question for jury under evidence.—*Simon v. Philadelphia Rapid Transit Co.*, 160 A. 111, 306 Pa. 466.

Operator of vehicle

If motor vehicle was operated contrary to law, because temporary number plate was used without authority, it cannot be ruled as matter of law that momentary acts of a rider on a truck in attempting to crank the truck at a time of imminent peril because of a streetcar, in order to get it off the track, made him an operator within statute.—*Labrecque v. Donham*, 127 N.E. 537, 236 Mass. 10.

12. Ala.—*Randle v. Birmingham R., etc., Co.*, 48 So. 114, 158 Ala. 532.
Mass.—*Murphy v. Boston El. R. Co.*, 73 N.E. 1018, 188 Mass. 8.

13. Ind.—*Gary Rys. Co. v. Michael*, 34 N.E.2d 159, 109 Ind.App. 672.
Ky.—*Louisville Ry. Co. v. Buckner's Adm'r*, 113 S.W. 90.
60 C.J. p 610 note 31.

14. Ky.—*Louisville Ry. Co. v. Buckner's Adm'r*, *supra*.

15. Ky.—*Louisville Ry. Co. v. Buckner's Adm'r*, *supra*.

negligence or the person injured was guilty of contributory negligence.¹⁶ Under such state of the evidence the case should not be taken from the jury by a dismissal¹⁷ or nonsuit,¹⁸ or by sustaining a demurrer to the evidence,¹⁹ or directing a verdict.²⁰

Where, however, the evidence on such issues is undisputed, or is such that reasonable minds can arrive at but one conclusion therefrom, the case should not be submitted to the jury,²¹ but the court alone should dispose of it, as by a dismissal or nonsuit,²² or by directing a verdict.²³

Effect and reasonableness of regulations. It is a question of law for the court to determine the legal force or effect of a statutory or municipal regulation as to the operation or equipment of a street railroad or the speed of a car²⁴ or the reasonableness or unreasonableness thereof,²⁵ unless it depends, in the opinion of the court, on the existence of particular facts which are disputed.²⁶

Employee acting for company. In an action for damages for assault and battery, the question whether an employee of a street railway company was acting for the company at the time of the altercation is for the jury on conflicting evidence.²⁷

§ 323. — Companies and Persons Liable

On conflicting evidence it is for the jury to determine whether the defendant company was operating the car, or created the dangerous condition, by which the injuries were caused or from which the injuries resulted.

Where the facts are in dispute, or where more than one inference may be drawn therefrom, in an action against a street railroad company for injuries resulting from the management or operation of its road, it is a question of fact for the jury to determine whether the company was operating the car by which the injuries were caused,²⁸ or whether the dangerous condition from which the injuries resulted was created by the company.²⁹ Where, however, there is no evidence tending to show, or from which a legitimate inference may be drawn, that defendant company is the one liable for the injury, the case should not be submitted to the jury.³⁰

§ 324. — Negligence of Defendant

- a. In general
- b. Defects in tracks, structures, cars, equipment, or street

16. Ark.—Capital Transp. Co. v. Carter, 161 S.W.2d 746, 204 Ark. 295.

Cal.—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal. App.2d 579.

Ill.—Kuenazkes v. Chicago Transit Authority, 89 N.E.2d 427, 339 Ill. App. 249.

Mich.—Kneeshaw v. City of Detroit, 41 N.W.2d 542, 327 Mich. 259.

Minn.—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205.

Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914, 362 Mo. 214.

Neb.—Ross v. Omaha & C. B. St. Ry. Co., 192 N.W. 507, 109 Neb. 823.

N.Y.—Wojdag v. Brooklyn & Queens Transit Corp., 42 N.E.2d 737, 288 N.Y. 634—Webley v. City of New York, 100 N.Y.S.2d 833, 277 App. Div. 1061—Mead v. Louer, 23 N.Y. S.2d 249, 260 App.Div. 963, reversed on other grounds 33 N.E.2d 534, 285 N.Y. 230.

Pa.—Koren v. George, 48 A.2d 139, 159 Pa.Super. 182.
60 C.J. p 610 note 32.

Contributory negligence as question of law or fact see *infra* § 325.

Negligence of defendant as question of law or fact see *infra* § 324.

17. N.Y.—Reilly v. Interurban St.

R. Co., 95 N.Y.S. 721, 108 App.Div. 254.

60 C.J. p 611 note 38.

18. Conn.—Hoyt v. Connecticut Co., 139 A. 647, 107 Conn. 160.

N.J.—Devine v. Public Service Ry. Co., 88 A. 1050, 85 N.J.Law 243.
60 C.J. p 611 note 39.

19. N.C.—Moore v. Charlotte Electric St. R. Co., 39 S.E. 57, 128 N.C. 455.

60 C.J. p 611 note 40.

20. Cal.—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal.App.2d 590.

Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914, 362 Mo. 214.

Neb.—Ross v. Omaha & C. B. St. Ry. Co., 192 N.W. 507, 109 Neb. 823.

Ohio.—Ashbrook v. Cleveland Ry. Co., 34 N.E.2d 992.

R.I.—Malfetano v. United Electric Rys. Co., 191 A. 491, 58 R.I. 129—Souza v. United Electric Rys. Co., 161 A. 231, 52 R.I. 412, reargument denied Souza v. United Electric Rys. Co., 163 A. 927—Quinn v. Rhode Island Co., 67 A. 364.
60 C.J. p 611 note 41.

21. Ala.—Mobile Light & R. Co. v. Roberts, 68 So. 815, 192 Ala. 486.
60 C.J. p 611 note 42.

22. Or.—LaVigne v. Portland Traction Co., 170 P.2d 709, 179 Or. 221.

Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353.
60 C.J. p 611 note 42.

23. Ga.—Willis v. Georgia Power Co., 176 S.E. 657, 49 Ga.App. 729.

Me.—Ward v. Cumberland County Power & Light Co., 187 A. 527, 134 Me. 430.

Tex.—Jacobe v. Houston Electric Co., Civ.App., 187 S.W. 247.
60 C.J. p 611 note 43.

24. Mo.—Sanders v. Southern Electric R. Co., 48 S.W. 855, 147 Mo. 411.

25. Ga.—Metropolitan St. R. Co. v. Johnson, 16 S.E. 49, 90 Ga. 500.

26. Ga.—Metropolitan St. R. Co. v. Johnson, *supra*.

27. Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

28. N.J.—Devine v. Public Service Ry. Co., 88 A. 1050, 85 N.J.Law 243.
60 C.J. p 611 note 44.

29. Mo.—Smith v. Wilson, App., 296 S.W. 1036.

30. Neb.—Peterson v. Omaha & C. B. St. Ry. Co., 279 N.W. 561, 134 Neb. 322.

60 C.J. p 611 note 46.

- c. Operation of car in general
- d. Movement, speed, and control of car
- e. Maintaining lookout
- f. Lights, signals, and warnings
- g. Approaching crossing or street intersection
- h. Approaching person, vehicle, or animal on or near track
- i. Approaching or passing other cars
- j. Incompetency of motorman
- k. Acts in emergencies; mistakes of judgment

a. In General

In actions for injuries resulting from the management or operation of a street railroad, questions of negligence are for the jury to determine if there is any legally sufficient evidence to go to the jury and it is conflicting or such that reasonable minds might arrive at different conclusions therefrom.

Questions of negligence, in actions for injuries resulting from the management or operation of a street railroad, are primarily for the jury;³¹ and if there is any legally sufficient evidence to go to the jury, and it is conflicting or such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury, and should be submitted to them, as to whether or not under all the circumstances the commission or omission of

particular acts by the street railroad company in the operation of its road or car at the time and place of the accident was negligence as to the person injured thereby,³² and the court should not dispose of such a case, without the intervention of a jury, by granting a nonsuit,³³ or dismissal,³⁴ or by directing a verdict.³⁵

Where, however, the evidence is legally insufficient or is undisputed and is such that reasonable minds can arrive at but one conclusion therefrom, with respect to the company's negligence, such question is for the court and should not be submitted to the jury;³⁶ but the court should itself dispose of the case by granting or directing a nonsuit,³⁷ or by a dismissal,³⁸ or by directing a verdict.³⁹

b. Defects in Tracks, Structures, Cars, Equipment, or Street

Except where the evidence is legally insufficient to justify submission or is undisputed, it is for the jury to determine whether a street railroad company was guilty of negligence in failing to maintain its tracks, structures, cars, or equipment, or the streets on which its tracks are laid, in proper and safe condition.

Except where the evidence is legally insufficient to justify submission,⁴⁰ or is undisputed and such that but one conclusion can reasonably be drawn

31. Md.—Baltimore Consol. R. Co. v. Rifeowitz, 43 A. 762, 89 Md. 338.

Pa.—Cohen v. Transit Co., 16 Pa. Dist. 491.

Ultimate negligence under humanitarian doctrine as question for court or jury see *infra* § 326.

Willful injury or gross negligence as question for jury see *infra* § 327.

32. Cal.—Aungst v. Central California Traction Co., 1 P.2d 56, 115 Cal.App. 113.

Iowa.—Blowers v. Waterloo, Cedar Falls & Northern Ry. Co., 8 N.W. 2d 751, 233 Iowa 258.

Md.—Beck v. Baltimore Transit Co., 58 A.2d 909, 190 Md. 506.

Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

Pa.—Hersch v. Philadelphia Rapid Transit Co., 100 Pa.Super. 200, 60 C.J. p 612 note 53.

Ordering or frightening child off car

It is ordinarily a question for the jury whether or not defendant's employee exercised proper care in ordering or frightening a child off his car.—McCann v. Sixth Ave. R. Co.,

23 N.E. 164, 117 N.Y. 505, 15 Am.S.R. 539—60 C.J. p 613 note 64.

33. N.J.—Shay v. Camden, etc., R. Co., 49 A. 547, 66 N.J.Law 334, 60 C.J. p 612 note 54.

34. N.Y.—Hammer v. New York & Queens Transit Corp., 283 N.Y.S. 450, 246 App.Div. 628, 60 C.J. p 612 note 55.

35. R.I.—Quinn v. Rhode Island Co., 67 A. 364, 60 C.J. p 612 note 56.

36. Ala.—Becknell v. Alabama Power Co., 143 So. 897, 225 Ala. 689, 60 C.J. p 613 note 65.

Humanitarian or primary negligence

In action for death of pedestrian against street railroad company where plaintiff pleaded that pedestrian was struck by both company's streetcar and an automobile after streetcar motorman saw pedestrian's perilous position in crossing street, and evidence showed a case of humanitarian negligence based on pedestrian's position of imminent peril because of streetcar instead of a case of primary negligence in forcing pedestrian to remain in path of automobile, failure to submit issue

whether streetcar imperiled pedestrian so that he could not escape from automobile was not error.—Massman v. Kansas City Public Service Co., Mo., 119 S.W.2d 833.

37. Or.—LaVigne v. Portland Traction Co., 170 P.2d 709, 179 Or. 221. Wash.—Armstrong v. Spokane United Rys., 78 P.2d 176, 194 Wash. 353, 60 C.J. p 613 note 66.

38. N.Y.—Winterfield v. Second Ave. R. Co., 20 N.Y.S. 801, 66 Hun 627, affirmed 39 N.E. 495, 143 N.Y. 680.

39. Minn.—Phellon v. Duluth-Superior Transit Co., 277 N.W. 552, 202 Minn. 224.

W.Va.—Goff v. City Lines of West Virginia, 43 S.E.2d 800, 130 W.Va. 220, 60 C.J. p 613 note 68.

40. Mass.—Bickford v. Boston Elevated Ry. Co., 7 N.E.2d 276, 296 Mass. 580.

Minn.—Phellon v. Duluth-Superior Transit Co., 277 N.W. 552, 202 Minn. 224.

Pa.—Stewart v. Philadelphia Rapid Transit Co., 157 A. 37, 103 Pa. Super. 366, 60 C.J. p 613 note 70.

therefrom,⁴¹ it is for the jury, in an action for injuries resulting therefrom, to determine whether or not a street railroad company was guilty of negligence in failing to maintain its track or the street in proper and safe condition, or in permitting a defect therein or obstruction thereof,⁴² or in improperly constructing or maintaining a trolley wire, pole, or other structure.⁴³

Equipment and condition of car. It is ordinarily for the jury to determine whether the street railroad company was negligent with respect to the equipment of the car,⁴⁴ as whether it was properly equipped with appliances for controlling or stopping it,⁴⁵ or with a suitable and proper fender,⁴⁶ or whether the operation of the car without a fender constituted negligence as to the injured person,⁴⁷ and whether the car and its equipment were in

proper and safe condition at the time of the accident;⁴⁸ but, in the absence of any evidence of defects in the construction, maintenance, or equipment of a car the matter should not be submitted to the jury.⁴⁹

c. Operation of Car in General

It is ordinarily for the jury, on conflicting evidence, to determine where or how an accident involving the operation of a streetcar occurred, and whether such operation was negligent.

It is ordinarily for the jury, in an action for injuries or death resulting from the operation of a streetcar, to determine where or how the accident occurred,⁵⁰ and whether or not such operation was negligent under the circumstances existing at the time and place of the accident,⁵¹ except where there

41. Ohio.—Cincinnati Traction Co. v. Cramer, 31 Ohio Cir.Ct. 576.

42. Mo.—Murray v. Kansas City Public Service Co., 61 S.W.2d 334—Dunlap v. Kansas City Public Service Co., 130 S.W.2d 658, 234 Mo. App. 351.

N.Y.—Payne v. City of New York, 14 N.E.2d 449, 277 N.Y. 393, 115 A.L.R. 1495—Parrish v. New York Rys. Corporation, 253 N.Y.S. 701, 142 Misc. 79.

60 C.J. p 613 note 72.

Tracks protruding above street level
Pa.—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503.

60 C.J. p 613 note 72 [a].

Whether defect was embraced within crossing limits

In action for injuries sustained by pedestrian who stepped into a hole while crossing right of way, whether hole was embraced within limits of public crossing was question for jury.—Illingsworth v. Pittsburgh Rys. Co., 200 A. 89, 331 Pa. 369.

Weight of load

Whether bridge maintained by street railway would have safely carried five-ton load without planking or heavier load with planking and whether truck with load which broke through bridge weighed more or less than five tons were questions for jury.—Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.

Notice

Whether street railway maintaining bridge was entitled, as prerequisite to liability, to notice of breaking thereof by truck which crossed ten minutes before plaintiff's truck was question for jury.—Bowers v. Kansas City Public Service Co., 41 S.W.2d 810, 328 Mo. 770.

43. Cal.—Gibson v. Garcia, 216 P.2d 119, 96 Cal.App.2d 681.

N.H.—Lovett v. Manchester St. Ry., 159 A. 132, 85 N.H. 345.

Pa.—Yoder v. City of Philadelphia, 173 A. 275, 315 Pa. 586.

Utah.—Christensen v. Utah Rapid Transit Co., 27 P.2d 465, 83 Utah 231.

W.Va.—Monteleone v. Co-operative Transit Co., 36 S.E.2d 475, 128 W. Va. 340.

60 C.J. p 614 note 73.

44. Mass.—James v. Interstate Consol. St. R. Co., 79 N.E. 264, 193 Mass. 264.

N.Y.—Drucker v. Brooklyn & Queens Transit Corp., 40 N.Y.S.2d 124, 266 App.Div. 671.

45. N.Y.—Penny v. Rochester R. Co., 40 N.Y.S. 172, 7 App.Div. 595, affirmed 49 N.E. 1101, 154 N.Y. 770.

60 C.J. p 614 note 75.

46. Wash.—Tecker v. Seattle, R. & S. R. Co., 111 P. 791, 60 Wash. 570, Ann.Cas.1912B 842.

60 C.J. p 614 note 76.

47. Neb.—Gross v. Omaha & C. B., St. R. Co., 147 N.W. 1121, 96 Neb. 390, L.R.A.1915A 742.

60 C.J. p 614 note 77.

48. Md.—Baltimore Transit Co. v. State, to Use of Schrieffer, 40 A.2d 678, 184 Md. 250.

60 C.J. p 614 note 78.

49. Pa.—Benson v. Philadelphia Rapid Transit Co., 93 A. 1009, 248 Pa. 302—Clark v. Philadelphia Rapid Transit Co., 88 A. 683, 241 Pa. 437.

50. Ga.—Atlanta Northern Ry. Co. v. Seals, 31 S.E.2d 94, 71 Ga.App. 475.

Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

Mo.—Burris v. Kansas City Public Service Co., App., 226 S.W.2d 743.

60 C.J. p 614 note 51.

51. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625.

Ala.—Birmingham Elec. Co. v. Turner, 1 So.2d 299, 241 Ala. 66.

Cal.—Bryant v. Market St. Ry. Co., 158 P.2d 18, reheard 163 P.2d 33, 71 Cal.App.2d 508—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374—Alberts v. Lytle, 37 P.2d 705, 1 Cal. App.2d 682.

Ga.—Atlanta Northern Ry. Co. v. Seals, 31 S.E.2d 94, 71 Ga.App. 475—Georgia Power Co. v. Gillespie, 173 S.E. 755, 48 Ga.App. 688—Brown v. Savannah Electric & Power Co., 167 S.E. 773, 46 Ga.App. 393.

Ill.—Marron v. Friel, 66 N.E.2d 509, 328 Ill.App. 586—Engel v. Chicago City Ry. Co., 20 N.E.2d 365, 299 Ill. App. 616—Jacobs v. Illinois Terminal Co., 262 Ill.App. 481.

Ind.—Elder v. Rutledge, 27 N.E.2d 358, 217 Ind. 459.

Ky.—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206.

Mass.—Kenney v. Boston Elevated Ry., 185 N.E. 503, 282 Mass. 615—Gould v. Boston & M. R. R., 184 N. E. 449, 282 Mass. 160—Guay v. Eastern Massachusetts St. Ry. Co., 177 N.E. 890, 277 Mass. 133—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 279 Mass. 29.

Minn.—Luck v. Minneapolis St. Ry. Co., 254 N.W. 609, 191 Minn. 503—Holt v. St. Paul City Ry. Co., 252 N.W. 76, 190 Minn. 441.

Mo.—Lanio v. Kansas City Public Service Co., 162 S.W.2d 862—Mollman v. St. Louis Public Service Co., App., 192 S.W.2d 618.

is not sufficient evidence of any want of due care,⁵² or the existence of negligence is left to conjecture,⁵³ or the evidence as to care or negligence is such that but one conclusion can reasonably be drawn therefrom.⁵⁴

d. Movement, Speed, and Control of Car

In an action for injuries resulting from the operation of a streetcar, it is generally for the jury to determine whether, under the circumstances of the case, the railway company was negligent with respect to the movement, speed, and control of the car.

In general, in an action for injuries resulting from the operation of a streetcar, it is for the jury to determine whether, under the facts and circumstances existing at the time and place of the accident, it was negligence to start or move the car,⁵⁵ or allow it to proceed,⁵⁶ or to stop it suddenly,⁵⁷ and whether the car was under proper control,⁵⁸ or was being operated in a negligent and improper manner,⁵⁹ or was running at an excessive speed,⁶⁰ such as at a rate in excess of that prescribed by statute or ordinance,⁶¹ or at a rate inconsistent with the cus-

- N.J.—Wood v. Atlantic City & Shore R. Co., 33 A.2d 400, 130 N.J.Law. 401.
- Ohio.—Hrovat v. Cleveland Ry. Co., 180 N.E. 549, 125 Ohio St. 67, 84 A.L.R. 215—Feldhaus v. City Ry. Co., App., 45 N.E.2d 802.
- Okl.—Oklahoma Ry. Co. v. Strong, 214 P.2d 939, 202 Okl. 434.
- Pa.—Scerba v. Philadelphia Transp. Co., 42 A.2d 593, 352 Pa. 152—Graheck v. Pittsburgh Rys. Co., 185 A. 641, 322 Pa. 336—Simon v. Philadelphia Rapid Transit Co., 160 A. 111, 306 Pa. 466—Hastings v. Northampton Transit Co., 100 Pa.Super. 348—Greenberg v. Philadelphia Rapid Transit Co., 100 Pa.Super. 605.
- Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.
- Wash.—Dye v. City of Seattle, 24 P. 2d 67, 173 Wash. 515—Eastwood v. City of Seattle, 14 P.2d 1116, 169 Wash. 680.
- 60 C.J. p 614 note 82.
- Violation of company rules**
- (1) Whether motorman had violated company rules was a question of fact for jury.—Powell v. Pacific Elec. Ry. Co., 216 P.2d 448, 35 Cal.2d 40—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal.App. 2d 590.
- (2) Whether violation of rules constituted negligence was a question of fact for the jury and not a question of law for the court.—Powell v. Pacific Elec. Ry. Co., supra—Simon v. City and County of San Francisco, supra.
52. Colo.—Denver Tramway Corporation v. Wells, 9 P.2d 927, 91 Colo. 1.
- Ga.—English v. Georgia Power Co., 17 S.E.2d 891, 66 Ga.App. 363.
- Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378—Lepey v. Chicago Ry. Co., 71 N.E.2d 379, 330 Ill.App. 289.
- Md.—Fillings v. Diehlman, 177 A. 400, 168 Md. 306.
- N.Y.—Porter v. New York City Interborough Ry. Co., 257 N.Y.S. 757, 235 App.Div. 525, affirmed Sarfoty v. New York City Interborough R. Co., 185 N.E. 750, 261 N.Y. 587.
- Or.—LaVigne v. Portland Traction Co., 170 P.2d 709, 179 Or. 221.
- Pa.—Metrick v. Philadelphia Rapid Transit Co., 100 Pa.Super. 422.
- W.Va.—Niland v. Monongahela West Penn Public Service Co., 24 S.E.2d 83, 125 W.Va. 231.
- Wis.—Quinn v. City Cab Co., 279 N. W. 606, 228 Wis. 467.
- 60 C.J. p 616 note 83.
53. Wash.—Herrett v. Puget Sound Traction, Light & Power Co., 173 P. 1024, 103 Wash. 101.
- 60 C.J. p 616 note 84.
54. R.I.—Suddard v. United Elec. Rys. Co., 199 A. 301, 60 R.I. 469.
- 60 C.J. p 616 note 85.
55. Mich.—Canerdy v. Port Huron, etc., R. Co., 120 N.W. 582, 156 Mich. 211.
- 60 C.J. p 616 note 86.
56. Cal.—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374.
- 60 C.J. p 616 note 87.
- Failure to stop on discovering peril to person or vehicle on or near track as raising question for jury see infra subdivision h of this section.
57. Iowa.—Westergard v. Des Moines Ry. Co., 52 N.W.2d 39.
58. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 977.
- Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678, 184 Md. 250—Baltimore Transit Co. v. Alexander, 192 A. 349, 172 Md. 454.
- Mass.—Weir v. Boston Elevated Ry., 185 N.E. 923, 283 Mass. 41.
- Minn.—Deach v. St. Paul City Ry. Co., 9 N.W.2d 735, 215 Minn. 171.
- Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317.
- 60 C.J. p 616 note 88.
59. Ala.—Birmingham Elec. Co. v. Graddick, 49 So.2d 313, 35 Ala.App. 484, certiorari denied 49 So.2d 320, 254 Ala. 556.
- Cal.—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374.
- Cal.App.2d 374.
- Mass.—Diamato v. Eastern Massachusetts St. Ry. Co., 6 N.E.2d 391, 296 Mass. 476.
- N.Y.—Angueira v. Brooklyn & Queens Transit Corp., 31 N.Y.S.2d 168, 263 App.Div. 43.
- Pa.—Hoffman v. George, 38 A.2d 504, 155 Pa.Super. 501.
- R.I.—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.
- Tex.—El Paso Electric Co. v. Portillo, Civ.App., 45 S.W.2d 404, error dismissed.
- 60 C.J. p 616 note 89.
60. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 977.
- Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.
- Ga.—Atlanta Northern Ry. Co. v. Seals, 31 S.E.2d 94, 71 Ga.App. 475.
- Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678, 184 Md. 250.
- Mass.—Marturano v. Eastern Massachusetts St. Ry. Co., 27 N.E.2d 989, 306 Mass. 231—De Angelis v. Boston Elevated Ry. Co., 23 N.E.2d 859, 304 Mass. 461.
- Minn.—Deach v. St. Paul City Ry. Co., 9 N.W.2d 735, 215 Minn. 171—Schuman v. Minneapolis St. Ry. Co., 296 N.W. 174, 209 Minn. 334—Drown v. Minneapolis St. Ry. Co., 277 N.W. 423, 202 Minn. 66—Drown v. Minneapolis St. Ry. Co., 271 N. W. 586, 199 Minn. 193.
- Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278—Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 408.
- R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.
- Tex.—San Antonio Public Service Co. v. Murray, Civ.App., 59 S.W.2d 851, error dismissed 90 S.W.2d 830, 127 Tex. 77.
- Va.—Virginia Elec. & Power Co. v. Courtney, 27 S.E.2d 917, 182 Va. 175.
- 60 C.J. p 616 note 90.
61. Cal.—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374.

tomary use of the street by others,⁶² or constituting negligence under the existing circumstances,⁶³ as where the car was at or approaching a street intersection or public crossing.⁶⁴ Evidence that the car ran on a considerable distance after the accident without stopping is ordinarily sufficient to take the issue to the jury.⁶⁵

Submission of the question to the jury is not proper, however, where there is no evidence of the speed at which the car was running,⁶⁶ or no evidence that it was running at an excessive speed⁶⁷ or that the speed in any way contributed to the accident,⁶⁸ or that the car was not under proper control,⁶⁹ or that the motorman of the trolley car

was in any way negligent,⁷⁰ or where the evidence is purely conjectural.⁷¹

e. Maintaining Lookout

It is ordinarily for the jury to determine whether the motorman operating a streetcar kept a proper lookout under the existing circumstances or was negligent in that respect.

In an action against a street railroad company for injuries growing out of the operation of its car, it is ordinarily for the jury to determine whether or not the motorman operating such car kept a proper lookout for persons, animals or vehicles in peril on or near the track, or was negligent in that respect, under the circumstances existing at the time and place of the accident,⁷² as at

N.Y.—*Angueira v. Brooklyn & Queens Transit Corp.*, 31 N.Y.S.2d 168, 263 App.Div. 43.

S.C.—*Worrell v. South Carolina Power Co.*, 195 S.E. 638, 186 S.C. 306. 60 C.J. p 617 note 91.

62. Ill.—*Savage v. Chicago, etc., Electric R. Co.*, 87 N.E. 377, 238 Ill. 392.

Pa.—*Friedland v. Altoona & Logan Valley Electric Ry. Co.*, 59 Pa.Super. 539.

63. Iowa.—*Geers v. Des Moines Ry. Co.*, 38 N.W.2d 89, 240 Iowa 783—*Allen v. Des Moines Ry. Co.*, 253 N.W. 143, 218 Iowa 286.

Kan.—*Quail v. Kansas Power & Light Co.*, 21 P.2d 332, 137 Kan. 478.

Mass.—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E.2d 989, 306 Mass. 231.

N.Y.—*Stewart v. Brooklyn & Queens Transit Corp.*, 35 N.Y.S.2d 229, 264 App.Div. 257.

N.C.—*Alexander v. Southern Public Utilities Co.*, 177 S.E. 427, 207 N.C. 438.

Ohio.—*Ashbrook v. Cleveland Ry. Co.*, App., 34 N.E.2d 992—*Martin v. Cincinnati St. Ry. Co.*, 22 N.E.2d 735, 61 Ohio App. 375.

Pa.—*O'Connor v. Philadelphia Suburban Transp. Co.*, 66 A.2d 818, 362 Pa. 404—*Schnitzer v. Philadelphia Transp. Co.*, 47 A.2d 709, 354 Pa. 576—*Mars v. Philadelphia Rapid Transit Co.*, 154 A. 290, 303 Pa. 80.

R.I.—*Malfetano v. United Elec. Rys. Co.*, 191 A. 491, 58 R.I. 129.

60 C.J. p 617 note 93.

64. U.S.—*Snider v. Sand Springs Ry. Co.*, C.C.A.Okl., 62 F.2d 635—*Sullivan v. Philadelphia Suburban Transp. Co.*, D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.

Ga.—*Georgia Power Co. v. Clark*, 25 S.E.2d 91, 69 Ga.App. 273.

Iowa.—*Dunham v. Des Moines Ry. Co.*, 35 N.W.2d 578, 240 Iowa 421.

Mass.—*Lydon v. Boston Elevated Ry.*, 34 N.E.2d 642, 309 Mass. 205.

Mo.—*Williams v. St. Louis Public Service Co.*, 73 S.W.2d 199, 335 Mo. 335—*Lotz v. St. Louis Public Service Co.*, App., 61 S.W.2d 258—*Byram v. East St. Louis Ry. Co.*, App., 39 S.W.2d 376.

Ohio.—*Eversole v. Seelbach*, App., 73 N.E.2d 223—*Kuessner v. Cincinnati St. Ry. Co.*, App., 34 N.E.2d 275.

Pa.—*Gaines v. Philadelphia Transp. Co.*, 59 A.2d 916, 359 Pa. 610.

60 C.J. p 617 note 94.
Precautions at crossing or intersection as question for jury in general see *infra* subdivision g of this section.

65. U.S.—*Sullivan v. Philadelphia Suburban Transp. Co.*, D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.

Cal.—*White v. Los Angeles Ry. Corp.*, 167 P.2d 530, 73 Cal.App.2d 977.

Minn.—*Deach v. St. Paul City Ry. Co.*, 9 N.W.2d 735, 215 Minn. 171.

60 C.J. p 618 note 95.

66. Iowa.—*Wilfin v. Des Moines City R. Co.*, 156 N.W. 842, 176 Iowa 642.

Pa.—*Stoudt v. Philadelphia Rapid Transit Co.*, 97 Pa.Super. 295.

67. Ky.—*Hauser v. Public Service Co. of Indiana*, 111 S.W.2d 657, 271 Ky. 206.

Mass.—*Gibson v. Union St. Ry. Co.*, 186 N.E. 503, 283 Mass. 433.

60 C.J. p 618 note 97.

68. Ky.—*Hauser v. Public Service Co. of Indiana*, 111 S.W.2d 657, 271 Ky. 206.

69. Tex.—*McCallum v. Houston Electric Co.*, Civ.App., 250 S.W. 342.

Sudden stop

Evidence that trolley car suddenly stopped in middle of block without warning and automobile behind it crashed into it was insufficient.—

Sessa v. Brooklyn & Queens Transit Corp., 291 N.Y.S. 525, 249 App.Div. 658, affirmed 12 N.E.2d 171, 276 N.Y. 489.

70. Cal.—*Ellerman v. Pacific Electric Ry. Co.*, 47 P.2d 521, 7 Cal.App. 2d 385.

Md.—*Lewis v. Baltimore Transit Co.*, 66 A.2d 686, 193 Md. 366.

Evidence not establishing negligence as matter of law

Pa.—*Nassar v. Pittsburgh Rys. Co.*, 161 A. 605, 105 Pa.Super. 352.

71. Md.—*Crystal v. Baltimore, etc., Electric R. Co.*, 132 A. 629, 150 Md. 256.

Wash.—*Hoopman v. Seattle*, 210 P. 783, 122 Wash. 379.

72. U.S.—*Illinois Terminal R. Co. v. Feltrop*, C.C.A.Mo., 130 F.2d 982.

Ark.—*Arkansas Power & Light Co. v. Connelly*, 49 S.W.2d 387, 155 Ark. 693.

Cal.—*White v. Los Angeles Ry. Corp.*, 167 P.2d 530, 73 Cal.App.2d 815.

Ill.—*Marron v. Friel*, 66 N.E.2d 509, 325 Ill.App. 586.

Iowa.—*Geers v. Des Moines Ry. Co.*, 38 N.W.2d 89, 240 Iowa 783—*Dunham v. Des Moines Ry. Co.*, 35 N.W.2d 578, 240 Iowa 421—*Allen v. Des Moines Ry. Co.*, 253 N.W. 143, 218 Iowa 286.

Kan.—*Leonard v. Kansas City Public Service Co.*, 204 P.2d 760, 167 Kan. 51—*Quail v. Kansas Power & Light Co.*, 21 P.2d 332, 137 Kan. 478.

Mass.—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E.2d 989, 306 Mass. 231.

Minn.—*Schuman v. Minneapolis St. Ry. Co.*, 296 N.W. 174, 209 Minn. 334—*Elkins v. Minneapolis St. Ry. Co.*, 270 N.W. 914, 199 Minn. 63.

Mo.—*Wood v. St. Louis Public Service Co.*, 228 S.W.2d 665, 17 A.L.R. 2d 868—*Jants v. St. Louis Public Service Co.*, 204 S.W.2d 698, 356 Mo. 985—*Spencer v. Kansas City*

a street intersection⁷³ or railroad crossing,⁷⁴ and whether or not such person, animal, or vehicle was seen by him in time to avoid the accident,⁷⁵ or by the exercise of proper vigilance could have been seen, in time to avoid the accident.⁷⁶ It is also ordinarily a question for the jury as to whether it is actionable negligence for the conductor of a car to fail promptly to notify the motorman of danger to a person or animal on or near the track, which the conductor has discovered.⁷⁷ Failure to see a pedestrian on the street is usually evidence of negligence requiring the issue to be submitted to the jury.⁷⁸

The submission of the question to the jury is not necessary or proper, however, where there is no evidence as to the vigilance or lack of it of the persons in charge of the car,⁷⁹ or the evidence is undisputed and is such that but one reasonable conclusion can be drawn therefrom,⁸⁰ or is insufficient to show any lack of vigilance;⁸¹ and where plaintiff was contributorily negligent as a matter of law,

the issue of primary negligence of defendant in violating a vigilant watch ordinance was not a submissible issue and the trial court did not abuse its discretion in withdrawing the issue from the jury.⁸²

f. Lights, Signals, and Warnings

Whether there was negligence on the part of the street railway company with respect to lights, signals, and warnings is a question for the jury on conflicting evidence.

Where the evidence is conflicting, or is such that reasonable minds might draw different conclusions therefrom, it is ordinarily the province of the jury, in an action for injuries resulting from the operation of a streetcar, to determine whether, at and just before the time of the accident, the car carried proper and sufficient lights, under the circumstances then existing, for illuminating the tracks and warning the public of its approach, or its operation without them was negligent,⁸³ and to determine whether the bell or gong on the car was sounded, or other proper warning given, just before the accident,⁸⁴ and if not, whether or not

Public Service Co., App., 250 S.W. 2d 187—Diel v. St. Louis Public Service Co., 192 S.W.2d 608, 238 Mo.App. 1046—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599—Lotz v. St. Louis Public Service Co., App., 61 S.W.2d 258—Byram v. East St. Louis Ry. Co., App., 39 S.W.2d 376.
Ohio.—Wilson v. Peoples Ry. Co., 21 N.E.2d 860, 135 Ohio St. 547.
Pa.—Cheslock v. Pittsburgh Rys. Co., 69 A.2d 108, 363 Pa. 157—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317—Scerca v. Philadelphia Transp. Co., 42 A.2d 593, 352 Pa. 152—Wilkerson v. Philadelphia Transp. Co., 76 A.2d 430, 167 Pa.Super. 616—Russo v. Pittsburgh Rys. Co., 64 A.2d 666, 164 Pa.Super. 396.
R.I.—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.
Va.—Virginia Elec. & Power Co. v. Courtney, 27 S.E.2d 917, 182 Va. 175.
W.Va.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504.
Wis.—Dominiczak v. Milwaukee Elec. Ry. & Transport Co., 20 N.W.2d 635, 247 Wis. 640.
60 C.J. p 618 note 1.

73. Iowa.—Deilling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.
60 C.J. p 618 note 2.
Precautions at intersection as ques-

tion for jury in general see infra subdivision g of this section.

74. Mo.—Threlkeld v. Wabash R. Co., 68 Mo.App. 127.
60 C.J. p 619 note 3.
Precautions at railroad crossing as question for jury in general see infra subdivision g of this section.

75. Minn.—Seward v. Minneapolis St. Ry. Co., 25 N.W.2d 221, 222 Minn. 454—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.
Pa.—Cheslock v. Pittsburgh Rys. Co., 69 A.2d 108, 363 Pa. 157.
60 C.J. p 619 note 4.

76. Ill.—Spencer v. Chicago City Ry. Co., 7 N.E.2d 862, 366 Ill. 120.
Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817.
Mo.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.
N.Y.—Noseworthy v. City of New York, 80 N.E.2d 744, 298 N.Y. 76.
Pa.—Rex v. Lehigh Valley Transit Co., 199 A. 324, 330 Pa. 275—Quattrochi v. Pittsburgh Rys. Co., 164 A. 59, 309 Pa. 377.
60 C.J. p 619 note 5.

Actual or constructive notice

Question of defendant's negligence was properly a matter for jury on basis of either actual or constructive notice to motorman of presence of deceased lying along track.—Cheslock v. Pittsburgh Rys. Co., 69 A.2d 108, 363 Pa. 157.

77. Mass.—Carey v. Milford, etc., R. Co., 78 N.E. 1001, 193 Mass. 161.

78. Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817.

79. Ill.—Hon v. Chicago City R. Co., 177 Ill.App. 27.
Tex.—Nicholson v. Houston Electric Co., Civ.App., 220 S.W. 632.

80. Mo.—Reno v. St. Louis, etc., R. Co., 79 S.W. 464, 180 Mo. 469.

81. W.Va.—Niland v. Monongahela West Penn Public Service Co., 24 S.E.2d 83, 125 W.Va. 231.
60 C.J. p 619 note 9.

82. Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663.

83. N.Y.—Ziegler v. International Ry. Co., 250 N.Y.S. 115, 232 App. Div. 563.

Pa.—George v. Philadelphia Rapid Transit Co., 132 A. 184, 285 Pa. 362.
Wash.—Peizer v. City of Seattle, 24 P.2d 444, 174 Wash. 95.
60 C.J. p 619 note 10.

Evidence held insufficient to require submission to jury

Ky.—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206.

84. Mo.—Setser v. St. Louis Public Service Co., App., 209 S.W.2d 746—Corbin v. Kansas City, C. & St. J. Ry. Co., App., 41 S.W.2d 832.

Va.—Virginia Elec. & Power Co. v. Courtney, 27 S.E.2d 917, 182 Va. 175.
60 C.J. p 619 note 11.

failure so to do was negligence under the circumstances,⁸⁵ as where the car was approaching a public crossing or street intersection.⁸⁶ Where, however, there is no evidence to indicate that a warning, if it had been given, would have been effective to avoid the accident, submission to the jury of the question of negligence in failing to warn is not necessary or proper.⁸⁷

Negative evidence as making question for jury.

Evidence that the witness heard no warning signal is ordinarily sufficient to justify submission to the jury of the question whether it was given,⁸⁸ provided the evidence shows that the witness had opportunity to hear a signal if given;⁸⁹ but evidence of failure to see lights does not make their presence

a question for the jury where under the circumstances they could not have been seen, at the time of looking for them, even if properly burning or displayed.⁹⁰

g. Approaching Crossing or Street Intersection

Whether a streetcar was being operated with proper care when at or approaching a street intersection or public crossing, or a railroad or street railroad crossing, is ordinarily a question for the jury.

In an action for injuries resulting from the operation of a streetcar, it is ordinarily for the jury to determine whether or not such car was, under the circumstances then existing, being operated with proper care and precaution when at or approaching a public crossing or street intersection,⁹¹

85. Kan.—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51—Quail v. Kansas Power & Light Co., 21 P.2d 332, 137 Kan. 478.

Mass.—Niles v. Boston Elevated Ry. Co., 119 N.E. 752, 230 Mass. 316.

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

N.Y.—Stewart v. Brooklyn & Queens Transit Corp., 35 N.Y.S.2d 229, 264 App.Div. 257.

N.C.—Alexander v. Southern Public Utilities Co., 177 S.E. 427, 207 N.C. 438.

Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Schroeder v. Pittsburgh Ry. Co., 165 A. 733, 311 Pa. 398.

R.I.—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.

60 C.J. p 620 note 12.

Signaling system at grade crossing on interurban line

Cal.—Startup v. Pacific Elec. Ry. Co., 180 P.2d 896, 29 Cal.2d 866.

Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

Whether signals would have been effective to avoid accident

(1) Where findings disclosed that interurban car motorman could have given other blasts of whistle before collision, whether other blasts could have been heard by occupants of wagon in time to have avoided collision was question for jury.—State ex rel. Estes v. Trimble, 43 S.W.2d 1040, 329 Mo. 16.

(2) Whether one struck by streetcar, after being knocked down by bus, might have become aware of car's near approach and got off track in time to avoid injury had gong been sounded was question for jury.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App.

1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

(3) In action for death of six-year old child who allegedly saw streetcar approaching, court could not assume as matter of law that sounding of gong would have been wholly inefficacious.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

Evidence held insufficient to require submission to jury

Tenn.—Clarke v. Tennessee Electric Power Co., 64 S.W.2d 203, 16 Tenn. App. 256.

W.Va.—Niland v. Monongahela West Penn Public Service Co., 24 S.E.2d 83.

86. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

Ga.—Georgia Power Co. v. Gillespie, 173 S.E. 755, 48 Ga.App. 688.

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332—Lotz v. St. Louis Public Service Co., App., 61 S.W.2d 258.

N.J.—Wood v. Atlantic City & Shore R. Co., 33 A.2d 400, 130 N.J.Law 401—Devine v. Public Service Coordinated Transport, 158 A. 764, 10 N.J.Misc. 274.

Ohio.—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932.

60 C.J. p 620 note 13.

Precautions at crossing or intersection as question for jury in general see infra subdivision g of this section.

87. Ala.—Turbeville v. Mobile Light, etc., Co., 127 So. 519, 221 Ala. 91.

60 C.J. p 620 note 14.

88. Cal.—Carey v. Pacific Gas & Electric Co., 242 P. 97, 75 Cal.App. 129.

Mo.—Estes v. Kansas City, C. C. & St. J. Ry. Co., App., 23 S.W.2d 198,

reversed on other grounds 43 S.W. 2d 1040, 329 Mo. 16.

Neb.—Moran v. Omaha & C. B. St. Ry. Co., 189 N.W. 287, 108 Neb. 758.

Tenn.—Tapp v. Tennessee Electric Power Co., 9 Tenn.App. 632.

Utah.—Jackson v. Utah Rapid Transit Co., 290 P. 970, 77 Utah 21.

60 C.J. p 620 note 15.

89. Cal.—Richardson v. Southern Pac. Co., 263 P. 1039, 88 Cal.App. 648.

90. Md.—Crystal v. Baltimore, etc., Electric R. Co., 132 A. 629, 150 Md. 256.

60 C.J. p 621 note 16.

Testimony held not merely negative, but sufficient to take to jury question whether car had light when automobile collided therewith.—Kelso v. Philadelphia Rapid Transit Co., 170 A. 436, 112 Pa.Super. 124.

91. U.S.—Sullivan v. Philadelphia Suburban Transp. Co., D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.

Cal.—Powell v. Pacific Elec. Ry. Co., 216 P.2d 448, 35 Cal.2d 40—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 165—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1—Wahrenbrock v. Los Angeles Transit Lines, 190 P.2d 272, 84 Cal.App.2d 236—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

Ill.—Chandler v. Chicago Transit Authority, 86 N.E.2d 289, 337 Ill.App. 655—Parthie v. Cummings, 55 N.E. 2d 402, 323 Ill.App. 296—Edmiers' Motor Service v. Cummings, 56 N.E.2d 491, 323 Ill.App. 653—Cahill v. Cummings, 54 N.E.2d 634, 322 Ill. App. 662—Trust Co. of Chicago v. Richardson, 8 N.E.2d 530, 290 Ill. App. 464—Mahan v. Richardson, 1 N.E.2d 100, 284 Ill.App. 493.

Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421.

or a crossing over a railroad track⁹² or another street railroad line.⁹³ Where, however, there is no evidence tending to show negligence in the operation of the car, the question should not be submitted to the jury.⁹⁴

h. Approaching Person, Vehicle, or Animal on or near Track

It is ordinarily for the jury to determine whether a person, vehicle, or animal on or near the track was in a position of such apparent peril when he or it was, or in the exercise of due care should have been, discovered by the operator of a streetcar as to call for affirmative measures to avoid the accident, and whether reasonable care was used to avoid the accident.

In an action for injuries resulting from the opera-

tion of a streetcar, it is ordinarily for the jury to determine whether or not a person, vehicle, or animal on or near the track was in a position of such apparent peril, when he or it was, or in the exercise of reasonable care should have been, discovered by the operator of the car as to call for affirmative measures by such operator to avoid the accident,⁹⁵ and whether the operator could have avoided the accident after he discovered or should have discovered such peril,⁹⁶ as by slackening speed or stopping his car,⁹⁷ or sounding a warning signal,⁹⁸ and, hence, whether he used reasonable care to avoid the accident,⁹⁹ as whether he gave, or was negligent in failing to give, suitable and timely

Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Minn.—Carlson v. Fredsall, 37 N.W. 2d 744, 228 Minn. 461—Flom v. St. Paul City Ry. Co., 16 N.W.2d 551, 218 Minn. 474.

Mo.—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256—Jenkins v. Springfield Traction Co., 96 S.W.2d 620, 230 Mo. App. 1235—Curtis v. Kansas City Public Service Co., App., 74 S.W.2d 255.

N.J.—Wood v. Atlantic City & Shore R. Co., 33 A.2d 400, 130 N.J.Law 401—Hughes v. Public Service Coordinated Transport, 68 A.2d 351, 5 N. J.Super. 15.

N.Y.—Loyd v. Third Avenue Rys. Co., 35 N.Y.S.2d 883, 264 App.Div. 568, appeal denied 44 N.E.2d 421, 289 N. Y. 636, affirmed 48 N.E.2d 706, 290 N.Y. 602—Capitelli v. Brooklyn & Queens Transit Corp., 16 N.Y.S.2d 44, 258 App.Div. 889.

Ohio.—Keller v. City Ry. Co., App., 84 N.E.2d 69—Eversole v. Seelbach, App., 73 N.E.2d 223—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464—Lake Shore Electric Ry. Co. v. Rohrbacher, 186 N.E. 507, 44 Ohio App. 529.

Pa.—Longden v. Conestoga Transp. Co., 169 A. 884, 313 Pa. 561—Schaeffer v. Reading Transit Co., 153 A. 323, 302 Pa. 220—Shearer v. Pittsburgh Rys. Co., 21 A.2d 482, 145 Pa.Super. 560—Sonil v. Pittsburgh Rys. Co., 186 A. 183, 122 Pa.Super. 169—Heaver v. Philadelphia Rapid Transit Co., 183 A. 110, 120 Pa. Super. 520—Taylor v. Philadelphia Rapid Transit Co., 163 A. 538, 107 Pa.Super. 124.

R.I.—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275—Correa v. United Electric Rys. Co., 171 A. 921.

Va.—Virginia Transit Co. v. James,

49 S.E.2d 285, 188 Va. 135—Virginia Elec. & Power Co. v. Courtney, 27 S.E.2d 917, 182 Va. 175—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.

60 C.J. p 621 note 18.

Particular precautions when approaching crossings or intersections:

Maintaining lookout see supra subdivision e of this section.

Signals and warnings see supra subdivision f of this section.

Speed of car see supra subdivision d of this section.

92. Iowa.—Carter v. Sioux City Service Co., 141 N.W. 26, 160 Iowa 78.

Mich.—Philip v. Heraty, 97 N.W. 963, 100 N.W. 186, 135 Mich. 446.

93. Mo.—McLain v. St. Louis, etc., R. Co., 73 S.W. 909, 100 Mo.App. 374.

94. Cal.—Pacheco v. Southern Pac. Co., 19 P.2d 251, 129 Cal.App. 610. D.C.—Washington Ry. & Electric Co. v. Chapman, 65 F.2d 486, 62 App.D. C. 140, certiorari denied Chapman v. Washington Ry. & Electric Co., 54 S.Ct. 75, 290 U.S. 661, 78 L.Ed. 572.

Md.—Eisenhower v. Baltimore Transit Co., 59 A.2d 313, 190 Md. 528.

Pa.—Ashby v. Philadelphia Transp. Co., 52 A.2d 578, 356 Pa. 610—Jones v. Pittsburgh Rys. Co., 167 A. 332, 313 Pa. 450.

60 C.J. p 621 note 21.

95. Iowa.—Geers v. Des Moines Ry. Co., 38 N.W.2d 89, 240 Iowa 783.

Ky.—Louisville & I. Ry. Co. v. Pulliam's Adm'x, 82 S.W.2d 191, 259 Ky. 82.

Mass.—Gould v. Boston & M. R. R., 176 N.E. 807, 276 Mass. 114.

Pa.—Lesutis v. Philadelphia Rapid

Transit Co., 181 A. 796, 120 Pa. Super. 63.

60 C.J. p 610 notes 33, 36, p 611 note 37, p 622 note 22.

Maintenance of proper lookout as question for jury see supra subdivision e of this section.

96. Mo.—Dingman v. St. Louis Public Service Co., App., 52 S.W.2d 584. 60 C.J. p 622 note 23.

Avoidability of accident notwithstanding contributory negligence as jury question see infra § 326.

97. Ill.—Engelman v. Chicago Transit Authority, 86 N.E.2d 890, 338 Ill.App. 129.

Mass.—Gould v. Boston & M. R. R., 176 N.E. 807, 276 Mass. 114.

Mo.—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914—Murray v. Kansas City Public Service Co., 61 S.W.2d 334—Gay v. Kansas City Public Service Co., App., 77 S.W.2d 133.

Pa.—Magerko v. West Penn Rys. Co., 76 A.2d 618, 365 Pa. 609—Shannon v. Philadelphia Rapid Transit Co., 175 A. 720, 115 Pa.Super. 494.

60 C.J. p 622 note 24.

98. Iowa.—Allen v. Des Moines Ry. Co., 253 N.W. 143, 218 Iowa 286.

60 C.J. p 622 note 25.

Negligence in connection with warnings and signals as question for jury in general see supra subdivision f of this section.

99. Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Barnes v. Berkshire St. Ry. Co., 183 N.E. 416, 281 Mass. 47.

Mo.—Schaller v. St. Louis Public Service Co., 223 S.W.2d 409.

Ohio.—Ashbrook v. Cleveland Ry. Co., App., 34 N.E.2d 992.

Pa.—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404.

Tex.—Northern Texas Traction Co. v. Bruce, Civ.App., 77 S.W.2d 889, error dismissed.

60 C.J. p 622 note 26.

warning of the car's approach,¹ or used, or was at fault in failing to use, all reasonable means to control or slacken its speed² or, if necessary, to stop it.³

Thus, if there is legally sufficient evidence to go to the jury, and it is disputed, or, if undisputed, is such that different inferences might be drawn therefrom, it is a question for the jury as to whether or not under the circumstances the defendant company was guilty of negligence in running into or over a child,⁴ or bicycle rider,⁵ or person working on the tracks or in the street,⁶ in crushing a pe-

destrian between trolley cars traveling in opposite directions on parallel tracks;⁷ in running into an animal⁸ or vehicle⁹ on or near the tracks; or in running into and injuring a person or vehicle crossing the tracks.¹⁰ The submission of the question to the jury is not requisite or proper, however, where there is no evidence which would warrant a finding of negligence in failing to observe the injured person, vehicle, or animal, or discover or anticipate the peril, before the accident,¹¹ or no evidence tending to show negligence in operating the car or in failing to slow or stop it,¹² or where the evidence

1. Cal.—*Brandenburg v. Pacific Gas & Elec. Co.*, 169 P.2d 909, 28 Cal. 2d 282—*Simon v. City and County of San Francisco*, 180 P.2d 393, 79 Cal.App.2d 590.
- Mo.—*Epstein v. Kansas City Public Service Co.*, App., 78 S.W.2d 534.
- Ohio.—*Wilson v. Peoples Ry. Co.*, 21 N.E.2d 860, 135 Ohio St. 547.
- Wis.—*Brophy v. Milwaukee Elec. Ry. & Transport Co.*, 30 N.W.2d 76, 251 Wis. 558.
- 60 C.J. p 623 note 27.
2. U.S.—*Illinois Terminal R. Co. v. Feltrop*, C.C.A.Mo., 130 F.2d 982.
- Cal.—*Simon v. City and County of San Francisco*, 180 P.2d 393, 79 Cal. App.2d 590.
- Mass.—*Lydon v. Boston Elevated Ry.*, 34 N.E.2d 642, 309 Mass. 205—*White v. Eastern Massachusetts St. Ry. Co.*, 12 N.E.2d 75, 299 Mass. 70.
- Mo.—*Wood v. St. Louis Public Service Co.*, 228 S.W.2d 665, 17 A.L.R. 2d 868.
- N.H.—*Katsikas v. Manchester Street Ry.*, 3 A.2d 821, 90 N.H. 21.
- Pa.—*McCuen v. Philadelphia Rapid Transit Co.*, 23 A.2d 860, 344 Pa. 112—*Hastings v. Northampton Transit Co.*, 100 Pa.Super. 348.
- Wis.—*Brophy v. Milwaukee Elec. Ry. & Transport Co.*, 30 N.W.2d 76, 251 Wis. 558.
- 60 C.J. p 623 note 28.
3. U.S.—*Illinois Terminal R. Co. v. Feltrop*, C.C.A.Mo., 130 F.2d 982.
- Cal.—*Howard v. Clark*, 84 P.2d 529, 29 Cal.App.2d 374.
- Ill.—*Lenchard v. Friel*, 61 N.E.2d 768, 326 Ill.App. 461.
- Mass.—*Landrigan v. Metropolitan Transit Authority*, 105 N.E.2d 849.
- Mo.—*Wood v. St. Louis Public Service Co.*, 246 S.W.2d 807—*Wood v. St. Louis Public Service Co.*, 228 S.W.2d 665, 17 A.L.R.2d 868—*Baldwin v. Kansas City Public Service Co.*, 210 S.W.2d 115, 240 Mo.App. 527—*Millhouser v. Kansas City Public Service Co.*, App., 71 S.W.2d 160.
- Ohio.—*Wilson v. Peoples Ry. Co.*, 21 N.E.2d 860, 135 Ohio St. 547.
- Pa.—*Hamley v. Pittsburgh Rys. Co.*, 28 A.2d 911, 345 Pa. 380—*Dick v. West Penn Rys. Co.*, 33 A.2d 792, 153 Pa.Super. 281.
- 60 C.J. p 623 note 29.
4. Cal.—*Gackstetter v. Market St. Ry. Co.*, 20 P.2d 93, 130 Cal.App. 316.
- Ill.—*Spencer v. Chicago City Ry. Co.*, 7 N.E.2d 862, 366 Ill. 120.
- Mass.—*Martin v. Union St. Ry. Co.*, 178 N.E. 734, 277 Mass. 369.
- Minn.—*Deach v. St. Paul City Ry. Co.*, 9 N.W.2d 735, 215 Minn. 171.
- Mo.—*Petty v. Kansas City Public Service Co.*, 191 S.W.2d 653, 354 Mo. 823—*Spencer v. St. Louis Transit Co.*, 121 S.W. 108, 222 Mo. 310.
- N.H.—*Katsikas v. Manchester Street Ry.*, 3 A.2d 821, 90 N.H. 21.
- N.J.—*Dunlop v. Public Service Coordinated Transport*, 4 A.2d 683, 122 N.J.Law 226.
- N.Y.—*Coleman v. Brooklyn & Queens Transit Corp.*, 298 N.Y.S. 513, 252 App.Div. 215.
- Ohio.—*Wilson v. Peoples Ry. Co.*, 21 N.E.2d 860, 135 Ohio St. 547.
- Pa.—*Magerko v. West Penn Rys. Co.*, 76 A.2d 618, 365 Pa. 609—*Rex v. Lehigh Valley Transit Co.*, 199 A. 324, 330 Pa. 275—*Dick v. West Penn Rys. Co.*, 33 A.2d 792, 153 Pa. Super. 281.
- 60 C.J. p 612 note 57.
5. Wis.—*Brophy v. Milwaukee Elec. Ry. & Transport Co.*, 30 N.W.2d 76, 251 Wis. 558.
- 60 C.J. p 610 note 35, p 612 note 59.
6. Minn.—*Peterson v. Minneapolis St. Ry. Co.*, 53 N.W.2d 817—*Peterson v. Minneapolis St. Ry. Co.*, 279 N.W. 588, 202 Minn. 630.
- 60 C.J. p 610 note 34, p 612 note 59.
7. N.J.—*Rizzolo v. Public Service Coordinated Transport*, 166 A. 456, 111 N.J.Law 107.
8. N.J.—*Hanley v. North Jersey St. R. Co.*, 47 A. 630, 65 N.J.Law 447.
- 60 C.J. p 610 note 36, p 611 note 37, p 612 note 60.
9. Mo.—*Hughes v. St. Louis Public Service Co.*, App., 251 S.W.2d 360.
- Pa.—*Hinton v. Pittsburgh Rys. Co.*, 59 A.2d 151, 359 Pa. 351.
- 60 C.J. p 611 note 37, p 612 note 61.
10. Ill.—*Murphy v. Friel*, 66 N.E.2d 450, 328 Ill.App. 586.
- Mass.—*De Angelis v. Boston Elevated Ry. Co.*, 23 N.E.2d 859, 304 Mass. 461.
- Mich.—*Pampu v. City of Detroit*, 24 N.W.2d 588, 315 Mich. 618.
- N.Y.—*Cosentino v. Brooklyn & Queens Transit Corp.*, 4 N.Y.S.2d 625, 254 App.Div. 763.
- Pa.—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319—*Turner v. Philadelphia Rapid Transit Co.*, 170 A. 382, 111 Pa.Super. 439.
- Tex.—*Northern Texas Traction Co. v. Bruce*, Civ.App., 77 S.W.2d 889, error dismissed.
- 60 C.J. p 612 note 62.
11. Ohio.—*Nellis v. Community Traction Co.*, 4 N.E.2d 399, 53 Ohio App. 184.
- Wash.—*Armstrong v. Spokane United Rys.*, 78 P.2d 176, 194 Wash. 353.
- W.Va.—*Goff v. City Lines of West Virginia*, 43 S.E.2d 800, 130 W.Va. 220.
- 60 C.J. p 624 note 30.
12. D.C.—*Landfair v. Capital Transit Co.*, 165 F.2d 255, 83 U.S.App. D.C. 60—*Capital Transit Co. v. Gamble*, 160 F.2d 283, 82 U.S.App. D.C. 57.
- Ohio.—*Nellis v. Community Traction Co.*, 4 N.E.2d 399, 53 Ohio App. 184.
- Wash.—*Armstrong v. Spokane United Rys.*, 78 P.2d 176, 194 Wash. 353.
- W.Va.—*Goff v. City Lines of West Virginia*, 43 S.E.2d 800, 130 W.Va. 220.
- 60 C.J. p 624 note 31.

Evidence held to require directed verdict for defendant

Mass.—*O'Leary v. Boston Elevated Ry. Co.*, 194 N.E. 131, 289 Mass. 273.

as to care or negligence is undisputed and the inference to be drawn therefrom is clear and certain.¹³ What constitutes due care under the circumstances is a question of law.¹⁴

Animal frightened by car. In an action for injuries resulting from a horse or other animal becoming frightened at the operation of a streetcar, where the evidence is in conflict or is such that different inferences might reasonably be drawn therefrom, it is for the jury to determine whether or not the street railroad company operating the car was negligent in respect of the particular act or omission which caused the fright,¹⁵ and whether the operator of the car saw or should have seen the peril caused by the animal's fright,¹⁶ and thereafter exercised proper care to avert the threatened injury,¹⁷ as whether he should have stopped the car.¹⁸ The matter should not be submitted to the jury, however, where there is no evidence tending to show negligence in the operation of the car¹⁹ or failure to use due care after discovering the fright of the animal or the threatened danger therefrom,²⁰ or where but one conclusion as to negligence may reasonably be drawn from the evidence.²¹

I. Approaching or Passing Other Cars

It is ordinarily for the jury to determine whether the persons in charge of one car, in approaching or passing another, exercised due care or were guilty of negligence.

In an action for injuries resulting from the operation of a street railroad, it is ordinarily for the jury to determine whether the persons in charge of one car, in approaching or passing another, exercised due care or were guilty of negligence under

the circumstances then existing.²² Thus, if there is legally sufficient evidence to go to the jury, and it is disputed, or, if undisputed, is such that different inferences might be drawn therefrom, it is a question for the jury as to whether or not, under the circumstances, the defendant company was guilty of negligence in running into, or over, a person emerging from behind a passing or standing car or vehicle.²³

J. Incompetency of Motorman

The questions of the incompetency of the operator of the streetcar, the company's knowledge thereof, and its want of due care in employing or retaining him should not be submitted to the jury in the absence of evidence.

The question of the incompetency of the motorman should not be submitted to the jury where there is no evidence, in an action for injuries resulting from the operation of a streetcar, sufficient to show any such incompetency²⁴ or any knowledge on the part of the street railroad company of his incompetency, or want of due care in employing or retaining him.²⁵

K. Acts in Emergencies; Mistakes of Judgment

It is ordinarily for the trier of facts to determine whether there was negligence in respect of an act done or omitted in an emergency, or a mistake of judgment.

In an action for injuries growing out of the operation or management of a street railroad, it is ordinarily for the jury or trier of facts to determine whether or not the street railroad company or its servant or employee was negligent in respect of an act done or omitted in an emergency,²⁶ or a mistake of judgment.²⁷

13. Ala.—Randle v. Birmingham R. Co., 48 So. 114, 158 Ala. 532.
Ky.—Kentucky Traction, etc., Co. v. Wright, 152 S.W. 604, 168 Ky. 493.

14. Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.

15. Neb.—Gross v. Omaha & C. B. St. R. Co., 147 N.W. 1121, 96 Neb. 390, L.R.A.1915A 742.
60 C.J. p 624 note 33.

16. Neb.—Gross v. Omaha & C. B. St. R. Co., supra.
60 C.J. p 624 note 34.

17. Neb.—Gross v. Omaha & C. B. St. R. Co., supra.
60 C.J. p 624 note 35.

18. Neb.—Gross v. Omaha & C. B. St. R. Co., supra.
60 C.J. p 624 note 36.

19. N.Y.—Hoag v. South Dover Mar-

ble Co., 85 N.E. 667, 192 N.Y. 412, 21 L.R.A., N.S., 283.
60 C.J. p 625 note 37.

20. Mass.—Hansen v. Fitchburg & L. St. Ry. Co., 109 N.E. 813, 222 Mass. 116—O'Brien v. Blue Hill St. R. Co., 71 N.E. 951, 186 Mass. 446.

21. Pa.—Smith v. Holmesburg, etc., Electric R. Co., 41 A. 479, 187 Pa. 451.
60 C.J. p 625 note 39.

22. Minn.—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205.
60 C.J. p 625 note 40.

23. N.J.—Consolidated Traction Co. v. Scott, 34 A. 1094, 58 N.J.Law 682, 55 Am.S.R. 620, 33 L.R.A. 122.
60 C.J. p 613 note 63.

24. Iowa.—Guy v. Des Moines City

Ry. Co., 180 N.W. 294, 191 Iowa 302.
60 C.J. p 625 note 41.

25. Ala.—Alabama City, G. & A. Ry. Co. v. Bessiere, 66 So. 805, 190 Ala. 59.

26. Minn.—Nees v. Minneapolis St. Ry. Co., 16 N.W.2d 758, 218 Minn. 532.

N.H.—Giguere v. Boston & M. R. R., 167 A. 561, 86 N.H. 294.

N.J.—U-Drive-It Co. v. Public Service Coordinated Transport, 154 A. 197, 9 N.J.Misc. 358.

N.Y.—Kelly v. Murray, 12 N.Y.S.2d 696, 257 App.Div. 863.
60 C.J. p 625 note 43.

27. Ala.—Alabama City, G. & A. Ry. Co. v. Lee, 76 So. 908, 200 Ala. 550.
N.Y.—Koster v. Coney Island & B. R. Co., 151 N.Y.S. 56, 165 App.Div. 224.

§ 325. — Contributory Negligence

- a. In general
- b. Collision with streetcar
- c. Looking and listening
- d. Avoidance of injury from defect or obstruction in street
- e. Children and persons under disability
- f. Acts in emergencies

a. In General

The question of negligence on the part of one injured as a result of the management or operation of a street railroad is primarily for the jury in an action for such injuries.

The question of negligence on the part of one injured as a result of the management or operation of a street railroad is primarily for the jury, in an action for such injuries, to be determined from the facts of the particular case;²⁸ and so, where the evidence is sufficient to justify a finding of such negligence or its absence, and the facts are in dispute, or if undisputed are such that more than one inference may reasonably be drawn therefrom, the question should be submitted to the jury,²⁹ and should not be disposed of by the court, by a dismissal³⁰ or nonsuit,³¹ or by directing a verdict.³²

The question whether or not the injured person

was guilty of negligence contributing to his injuries is one of law for the court, and should not be submitted to the jury, however, where the evidence is insufficient to support a finding of contributory negligence,³³ or, in those jurisdictions in which plaintiff has the burden of proving due care, where the evidence is insufficient to show freedom from contributory negligence,³⁴ or where it is undisputed and such that reasonable minds can arrive at but one conclusion therefrom,³⁵ but should be disposed of by the court by dismissal or nonsuit,³⁶ or by the direction of a verdict,³⁷ except as other evidence may make the case proper to go to the jury on the question of last clear chance, as discussed *infra* § 326.

b. Collision with Streetcar

In an action for injuries to a person, or to his animal or vehicle, by being struck by a streetcar, it is ordinarily for the jury to determine whether such person exercised due care or was guilty of contributory negligence under the existing circumstances.

In an action for injuries to a person, or to his animal or vehicle, by being struck by a streetcar, it is ordinarily for the jury on conflicting evidence to determine whether such person exercised due care or was guilty of contributory negligence, under the circumstances existing at the time and place of the accident.³⁸

28. U.S.—*Morrison v. City of Detroit*, C.C.A.Mich., 140 F.2d 625.
Pa.—*Boliver v. City of Philadelphia*, 9 A.2d 193, 137 Pa.Super. 437.
60 C.J. p 625 note 45.

Inferences favorable to plaintiff's case

The question of contributory negligence of pedestrian killed by streetcar must be considered in the light of all the inferences favorable to plaintiff's case that may be fairly deduced from the evidence.—*Baltimore Transit Co. v. State for Use of Castranda*, 71 A.2d 442, 194 Md. 421.

29. Cal.—*Bryant v. Market St. Ry. Co.*, App., 158 P.2d 18, reheard 163 P.2d 33, 71 Cal.App.2d 508—*Bryant v. Market St. Ry. Co.*, 163 P.2d 33, 71 Cal.App.2d 508—*Bate v. Los Angeles Ry. Corp.*, 86 P.2d 556, 30 Cal. App.2d 604.

Ill.—*Kuenazkes v. Chicago Transit Authority*, 89 N.E.2d 427, 339 Ill. App. 249.

Mass.—*Barnes v. Berkshire St. Ry. Co.*, 183 N.E. 416, 281 Mass. 47.

Pa.—*Kazan v. Wilkes-Barre Ry. Corp.*, 32 A.2d 32, 347 Pa. 232—*Culver v. Lehigh Valley Transit Co.*, 156 A. 70, 322 Pa. 503—*Longden v. Conestoga Transp. Co.*, 169

A. 584, 313 Pa. 561—*Turner v. Philadelphia Rapid Transit Co.*, 100 Pa.Super. 291—*Gutkowski v. Wilkes-Barre Ry. Corp.*, Com.Pl., 37 Luz.Leg.Reg. 231.

Wash.—*Peizer v. City of Seattle*, 24 P.2d 444, 174 Wash. 95.

60 C.J. p 625 note 46.

30. N.Y.—*G'Sell v. Metropolitan St. R. Co.*, 71 N.Y.S. 1020, 35 Misc. 387.

31. Pa.—*Raulston v. Philadelphia Traction Co.*, 13 Pa.Super. 412.

32. R.I.—*Quinn v. Rhode Island Co.*, 67 A. 364.

60 C.J. p 625 note 49.

33. Mass.—*Dooley v. Greenfield, etc.*, St. R. Co., 68 N.E. 203, 154 Mass. 204.

34. Mass.—*McManus v. Boston Elevated R.*, 103 N.E. 301, 216 Mass. 191.

N.Y.—*Lamb v. Union Ry. Co. of New York City*, 88 N.E. 371, 195 N.Y. 260.

Burden of proof as to contributory negligence see *supra* § 307.

35. Mo.—*Pettyjohn v. Kansas City Public Service Co.*, 188 S.W.2d 650, 354 Mo. 79—*Diel v. St. Louis Pub-*

lic Service Co., 192 S.W.2d 608, 238 Mo.App. 1046.

60 C.J. p 626 notes 53, 54.

36. Pa.—*Mease v. United Traction Co.*, 57 A. 820, 208 Pa. 434.

60 C.J. p 627 note 55.

37. Ohio.—*Schaefer v. Cincinnati St. Ry. Co.*, 62 N.E.2d 102, 75 Ohio App. 258.

60 C.J. p 627 note 56.

38. U.S.—*Sullivan v. Philadelphia Suburban Transp. Co.*, D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.

Ala.—*McKinney v. Birmingham Elec. Co.*, 193 So. 139, 238 Ala. 627—*Harrison v. Mobile Light & Railroad Co.*, 171 So. 742, 233 Ala. 393.

Cal.—*Simon v. City and County of San Francisco*, 150 P.2d 393, 79 Cal. App.2d 590—*Stricklin v. Rosemeyer*, 126 P.2d 665, 52 Cal.App.2d 555—*Paulos v. Market St. Ry. Co.*, 28 P.2d 94, 136 Cal.App. 163.

Conn.—*Hoyt v. Connecticut Co.*, 139 A. 647, 107 Conn. 160.

Ill.—*Cahill v. Cummings*, 54 N.E.2d 634, 322 Ill.App. 662—*Zator v. Cummings*, 42 N.E.2d 558, 315 Ill. App. 210—*Hill v. Richardson*, 281 Ill.App. 75.

The general rule that contributory negligence is ordinarily a question for the jury to determine applies in the case of one working in the street,³⁹ or crossing or attempting to cross the track or the street in which it was laid;⁴⁰ and thus it is for the jury to determine whether he was negligent in at-

- Iowa.—Blowers v. Waterloo, Cedar Falls & Northern Ry. Co., 8 N.W. 2d 751, 233 Iowa 254—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.
- Kan.—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51.
- Mass.—White v. Eastern Massachusetts St. Ry. Co., 12 N.E.2d 75, 299 Mass. 70—Weir v. Boston Elevated Ry., 155 N.E. 923, 283 Mass. 41—Gould v. Boston & M. R. R., 181 N.E. 449, 252 Mass. 160—Gould v. Boston & M. R. R., 176 N.E. 807, 276 Mass. 114.
- Minn.—Solberg v. Minneapolis St. Ry. Co., 7 N.W.2d 926, 214 Minn. 274—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21—Elkins v. Minneapolis St. Ry. Co., 270 N.W. 914, 199 Minn. 63.
- Mo.—Roznowski v. East St. Louis Ry. Co., App., 81 S.W.2d 969—Flynn v. St. Louis Public Service Co., App., 41 S.W.2d 885.
- N.J.—Lee v. North Jersey St. R. Co., 49 A. 528, 66 N.J.Law 336—Hanley v. North Jersey St. R. Co., 47 A. 630, 65 N.J.Law 447—Reinheimer v. Atlantic City & Shore R. Co., 184 A. 215, 14 N.J.Misc. 253.
- N.Y.—Mead v. Louer, 23 N.Y.S.2d 249, 260 App.Div. 963, reversed on other grounds 33 N.E.2d 534, 285 N.Y. 230—Capitelli v. Brooklyn & Queens Transit Corp., 16 N.Y.S.2d 44, 258 App.Div. 589.
- Ohio.—Readnour v. Cincinnati St. Ry. Co., 93 N.E.2d 587, 154 Ohio St. 69—Childe v. Cincinnati St. Ry. Co., 74 N.E.2d 436, 80 Ohio App. 128—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.
- Pa.—Dodson v. Philadelphia Transp. Co., 77 A.2d 353, 366 Pa. 287—Hetzlein v. Johnstown Traction Co., 75 A.2d 533, 365 Pa. 360—Perry v. Pittsburgh Rys. Co., 55 A.2d 354, 357 Pa. 605—Kazan v. Wilkes-Barre Ry. Corp., 32 A.2d 32, 347 Pa. 232—Graheek v. Pittsburgh Rys. Co., 155 A. 641, 322 Pa. 336—Simon v. Philadelphia Rapid Transit Co., 160 A. 111, 306 Pa. 466—Wilkerson v. Philadelphia Transp. Co., 76 A.2d 430, 167 Pa.Super. 616—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414—Hastings v. Northampton Transit Co., 100 Pa. Super. 348—Hersch v. Philadelphia Rapid Transit Co., 100 Pa.Super. 200—Doran v. Pittsburgh Rys. Co., 35 Berks Co. 351, affirmed 22 A.2d 351, 343 Pa. 204—John v. Pittsburgh Rys. Co., Com.Pl., 92 Pittsb.
- Leg.J. 555, affirmed 36 A.2d 818, 349 Pa. 159.
- R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.
- Tex.—El Paso Electric Co. v. Hedrick, Com.App., 60 S.W.2d 761—Houston Electric Co. v. Settle, Civ. App., 51 S.W.2d 646, error dismissed.
- Utah.—Barlow v. Utah Light & Traction Co., 295 P. 386, 77 Utah 556.
- Wash.—Smith v. City of Seattle, 35 P.2d 27, 178 Wash. 477—Lamoreaux v. Tacoma Ry. & Power Co., 28 P. 2d 1619, 176 Wash. 307—Pelzer v. City of Seattle, 24 P.2d 444, 174 Wash. 35.
- 60 C.J. p 627 note 58.
- Contributory negligence of children and persons under disability as question for jury see infra subdivision e of this section.
- Drivers or occupants of emergency vehicles**
- (1) Ambulance driver.—Rogers v. Minneapolis St. Ry. Co., 16 N.W.2d 516, 218 Minn. 454.
- (2) Fireman.
- Cal.—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374.
- Mo.—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.
- Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error dismissed.
- (3) Police officer.—Rowe v. Kansas City Public Service Co., Mo.App., 248 S.W.2d 445.
39. Cal.—Scott v. City and County of San Francisco, 206 P.2d 45, 91 Cal.App.2d 587.
- Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Schuman v. Minneapolis St. Ry. Co., 296 N.W. 174, 209 Minn. 334—Peterson v. Minneapolis St. Ry. Co., 279 N.W. 588, 202 Minn. 630.
- N.Y.—Stewart v. Brooklyn & Queens Transit Corp., 35 N.Y.S.2d 229, 264 App.Div. 257.
- Pa.—Phillips v. Philadelphia Transp. Co., 56 A.2d 225, 358 Pa. 265.
- 60 C.J. p 610 note 34—p 625 note 59.
40. U.S.—Sullivan v. Philadelphia Suburban Transp. Co., D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.
- Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 533, 164 A. L.R. 1—Holder v. Key System, 200 P.2d 98, 88 Cal.App.2d 925—Wahrenbrock v. Los Angeles Transit Lines, 190 P.2d 272, 84 Cal.App.2d 236—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720—Costerisan v. Los Angeles Ry. Corp., 122 P.2d 593, 50 Cal.App.2d 143—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 588, 46 Cal.App.2d 248—Gnesa v. City and County of San Francisco, 105 P.2d 376, 40 Cal.App. 2d 640.
- Ill.—Kelly v. Friel, 70 N.E.2d 87, 329 Ill.App. 651—Edmiers' Motor Service v. Cummings, 56 N.E.2d 491, 323 Ill.App. 653—Parthie v. Cummings, 55 N.E.2d 402, 323 Ill.App. 296—Cahill v. Cummings, 54 N.E.2d 634, 322 Ill.App. 662—Brown v. Richardson, 20 N.E.2d 106, 299 Ill. App. 619—Trust Co. of Chicago v. Richardson, 8 N.E.2d 520, 290 Ill. App. 464—Moore v. Illinois Power & Light Corp., 3 N.E.2d 932, 286 Ill.App. 445.
- Iowa.—Dunham v. Des Moines Ry. Co., 35 N.W.2d 578, 240 Iowa 421—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687—Johnson v. Omaha & Council Bluffs St. Ry. Co., 190 N.W. 977, 194 Iowa 1230.
- Ky.—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.
- La.—Fitzpatrick v. New Orleans Public Service, App., 22 So.2d 473.
- Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421—Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678, 184 Md. 250—Davidson Transfer & Storage Co. v. Baltimore Transit Co., 37 A.2d 326, 183 Md. 263.
- Mass.—Ambrose v. Boston Elevated Ry. Co., 34 N.E.2d 656, 309 Mass. 219—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205—Hess v. Boston Elevated Ry., 24 N.E.2d 550, 304 Mass. 535—De Angellis v. Boston Elevated Ry. Co., 23 N.E.2d 559, 304 Mass. 461—Noble v. Boston Elevated Ry. Co., 191 N.E. 641, 287 Mass. 364—Callahan v. Boston Elevated Ry. Co., 190 N.E. 27, 286 Mass. 223—Kenney v. Boston Elevated Ry., 185 N.E. 503, 282 Mass. 615.
- Mich.—Kneeshaw v. City of Detroit, 41 N.W.2d 542, 327 Mich. 259—Wilson v. City of Detroit, 300 N.W. 849, 299 Mich. 473—Secrist v. City of Detroit, 300 N.W. 137, 299 Mich. 393.
- Minn.—LaCombe v. Minneapolis St. Ry. Co., 51 N.W.2d 839—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205—Moeller v. St. Paul City Ry. Co., 16 N.W. 2d 289, 218 Minn. 353, 156 A.L.R. 371.
- Mo.—Paisley v. Kansas City Public Service Co., 173 S.W.2d 33, 351 Mo.

tempting to cross in front of a car which he saw approaching, or in assuming that he could cross in safety ahead of it,⁴¹ and, likewise, whether he was negligent in attempting to cross in front of a

465—Powers v. St. Louis Transit Co., 100 S.W. 655, 202 Mo. 267—Williams v. East St. Louis Ry. Co., App., 100 S.W.2d 51—Harting v. East St. Louis Ry. Co., App., 81 S.W.2d 973.

N.J.—Miller v. Public Service Co-ordinated Transport, 168 A. 409, 111 N.J.Law 359.

N.Y.—Webley v. City of New York, 100 N.Y.S.2d 532, 277 App.Div. 1061—Gordon v. Brooklyn & Queens Transit Corp., 52 N.Y.S.2d 324, 265 App.Div. 1044—Lloyd v. Third Avenue Rys. Co., 35 N.Y.S.2d 883, 264 App.Div. 568, appeal denied 44 N.E.2d 421, 289 N.Y. 636, affirmed 45 N.E.2d 706, 290 N.Y. 602—Ciaccio v. New York Rys. Corporation, 275 N.Y.S. 871, 243 App.Div. 545.

Ohio.—Lake Shore Electric Ry. Co. v. Rohrbacher, 186 N.E. 507, 44 Ohio App. 529.

Pa.—Hetzlein v. Johnstown Traction Co., 75 A.2d 533, 365 Pa. 360—O'Connor v. Philadelphia Suburban Transp. Co., 66 A.2d 818, 362 Pa. 404—Hisak v. Lehigh Valley Transit Co., 59 A.2d 900, 360 Pa. 1—Leaman Transp. Corp. v. Philadelphia Transp. Co., 57 A.2d 889, 358 Pa. 625—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Manning v. Pittsburgh Rys. Co., 39 A.2d 578, 350 Pa. 402—Delmer v. Pittsburgh Rys. Co., 34 A.2d 502, 348 Pa. 147—Ehrhart v. York Rys. Co., 162 A. 810, 308 Pa. 566—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319—Carter v. Pittsburgh Rys. Co., 194 A. 900, 327 Pa. 586—Valentine v. Philadelphia Transp. Co., 76 A.2d 471, 167 Pa.Super. 592—Hoffman v. George, 35 A.2d 504, 155 Pa.Super. 501—Sonil v. Pittsburgh Rys. Co., 186 A. 153, 122 Pa.Super. 169—Heaver v. Philadelphia Rapid Transit Co., 183 A. 110, 120 Pa.Super. 520—Turner v. Philadelphia Rapid Transit Co., 170 A. 382, 111 Pa.Super. 429—Powell v. Pittsburgh Rys. Co., 168 A. 369, 110 Pa.Super. 268—Taylor v. Philadelphia Rapid Transit Co., 163 A. 538, 107 Pa.Super. 124.

R.I.—Payne v. United Elec. Rys. Co., 65 A.2d 713, 75 R.I. 281—Finnegan v. United Electric Rys. Co., 186 A. 552.

Tex.—Lee v. Houston Elec. Co., Civ. App., 152 S.W.2d 379, affirmed Houston Elec. Co. v. Lee, 162 S.W.2d 692, 139 Tex. 166.

Va.—Virginia Elec. & Power Co. v. Courtney, 27 S.E.2d 917, 182 Va. 175—Virginia Elec. & Power Co. v. Steinman, 14 S.E.2d 313, 177 Va. 468.

Wash.—Jackman v. City of Seattle,

60 P.2d 75, 187 Wash. 446—Eastwood v. City of Seattle, 14 P.2d 1116, 169 Wash. 680—Crozier v. City of Seattle, 6 P.2d 406, 166 Wash. 107.

Wis.—Dominiczak v. Milwaukee Elec. Ry. & Transport Co., 20 N.W.2d 635, 247 Wis. 640.

60 C.J. p 610 notes 33, 36-p 625 note 60.

Crossing without looking or listening see infra subdivision c of this section.

Pedestrian crushed between passing cars

In action for death of pedestrian, crushed between trolley cars traveling in opposite directions, on parallel tracks, evidence as to decedent's contributory negligence was for jury.—Rizzolo v. Public Service Co-ordinated Transport, 166 A. 456, 111 N.J.Law 107.

41. Cal.—Spendlove v. Pacific Elec. Ry. Co., 184 P.2d 573, 30 Cal.2d 632—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 533, 164 A.L.R. 1—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—Amendt v. Pacific Elec. Ry. Co., 115 P.2d 585, 46 Cal.App.2d 248—Gnesa v. City and County of San Francisco, 105 P.2d 376, 40 Cal.App.2d 640—Date v. Los Angeles Ry. Corp., 86 P.2d 856, 30 Cal.App.2d 604—Cowan v. Market St. Ry. Co., 47 P.2d 752, 5 Cal.App.2d 642.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 250.

D.C.—Wright v. Capital Transit Co., Mun.App., 35 A.2d 182.

Ill.—Gnat v. Richardson, 39 N.E.2d 337, 378 Ill. 626—Parker v. Illinois Terminal R. Co., 104 N.E.2d 119, 345 Ill.App. 604—King v. Chicago Transit Authority, 89 N.E.2d 751, 339 Ill.App. 276—Klooster v. Friel, 75 N.E.2d 773, 332 Ill.App. 652—Lampkin v. Friel, 67 N.E.2d 894, 329 Ill.App. 273—Pabis v. Friel, 66 N.E.2d 471, 325 Ill.App. 553—Cahill v. Cummings, 54 N.E.2d 634, 322 Ill.App. 662—Schro v. Cummings, 53 N.E.2d 489, 321 Ill.App. 640—Scully v. Richardson, 5 N.E.2d 583, 255 Ill.App. 615.

Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 451, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

Md.—Caryl, to Use of Merchants

Mut. Cas. Co. v. Baltimore Transit Co., 58 A.2d 239, 190 Md. 162.

Mass.—Landrigan v. Metropolitan

Transit Authority, 105 N.E.2d 849

—De Angelis v. Boston Elevated

Ry. Co., 23 N.E.2d 559, 304 Mass.

461—De Lodge v. Boston Elevated Ry. Co., 15 N.E.2d 458, 300 Mass. 219.

Minn.—Moeller v. St. Paul City Ry. Co., 16 N.W.2d 289, 215 Minn. 353, 156 A.L.R. 371—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21.

Mo.—Rowe v. Kansas City Public Service Co., App., 245 S.W.2d 445—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332—Harting v. East St. Louis Ry. Co., App., 81 S.W.2d 973.

N.Y.—Angueira v. Brooklyn & Queens Transit Corp., 31 N.Y.S.2d 163, 263 App.Div. 42.

Ohio.—Lake Shore Electric Ry. Co. v. Rohrbacher, 186 N.E. 507, 44 Ohio App. 529.

Okl.—Oklahoma Ry. Co. v. Hentzen, 194 P.2d 847, 200 Okl. 364.

Pa.—McClintock v. Pittsburgh Rys. Co., 92 A.2d 185, 371 Pa. 540—Hetzlein v. Johnstown Traction Co., 75 A.2d 533, 365 Pa. 360—Van Note v. Philadelphia Transp. Co., 45 A.2d 71, 353 Pa. 377—Kunzler v. Pittsburgh Rys. Co., 34 A.2d 66, 348 Pa. 88—Dillon v. Pittsburgh Rys. Co., 188 A. 106, 324 Pa. 340—Valentine v. Philadelphia Transp. Co., 76 A.2d 471, 167 Pa.Super. 592—Hoffman v. George, 35 A.2d 504, 155 Pa.Super. 501—Swilley v. Philadelphia Transp. Co., 34 A.2d 270, 153 Pa.Super. 467—Shearer v. Pittsburgh Rys. Co., 21 A.2d 482, 145 Pa.Super. 560—Brungo v. Pittsburgh Rys. Co., 200 A. 893, 132 Pa.Super. 414—Lesutis v. Philadelphia Rapid Transit Co., 181 A. 796, 120 Pa.Super. 63—Shannon v. Philadelphia Rapid Transit Co., 175 A. 720, 115 Pa.Super. 494—Dowbenko v. Philadelphia Transp. Co., 63 Pa. Dist. & Co. 502—Hetzlein v. Johnstown Traction Co., Com.Pl., 15 Cambria 97.

R.I.—Payne v. United Elec. Rys. Co., 65 A.2d 713, 75 R.I. 281—Chagnon v. United Elec. Rys. Co., 200 A. 949, 61 R.I. 246, 275.

Va.—Virginia Elec. & Power Co. v. Wright, 196 S.E. 550, 170 Va. 442.

Wash.—Hynek v. City of Seattle, 111 P.2d 247, 7 Wash.2d 386.

Wis.—Dominiczak v. Milwaukee Elec. Ry. & Transport Co., 20 N.W.2d 635, 247 Wis. 640.

60 C.J. p 629 note 61.

Statements not inconsistent as matter of law

Automobilist's statement in deposition that he did not see streetcar at any time before collision and his testimony at trial that he saw streetcar ten feet away when he was four or five feet from track, and addition-

standing car which was suddenly moved,⁴² or in crossing behind a standing or passing car or vehicle, whereby he was struck by an approaching car,⁴³ or in crossing the track at a place where it or the street was defective,⁴⁴ or pausing on or near the track while crossing the street.⁴⁵

The general rule that contributory negligence is ordinarily a question for the jury applies also in the case of one traveling on or along the track,⁴⁶ or

standing close to or on the track,⁴⁷ or permitting his horse or vehicle to stand near the track,⁴⁸ or failing to turn his vehicle out or away from the track in such manner as to avoid being struck by an approaching car,⁴⁹ or riding or driving a spirited or restive horse in a street in which the street railroad was operated,⁵⁰ or failing to get out of or away from a vehicle when danger threatened.⁵¹

Similarly, questions for the jury include whether

al testimony that, when he went upon track, streetcar was two, three, four, or five feet away, were not inconsistent as matter of law.—*Cunningham v. Kansas City Public Service Co.*, 77 S.W.2d 161, 229 Mo.App. 174.

42. Cal.—*Kirk v. Los Angeles Ry. Corp.*, 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1.—*Bush v. Los Angeles Ry. Corp.*, 146 P.2d 941, 63 Cal.App. 2d 464.—*Amendt v. Pacific Elec. Ry. Co.*, 115 P.2d 588, 46 Cal.App. 2d 248.

Iowa.—*Wright v. Des Moines Ry. Co.*, 1 N.W.2d 259, 231 Iowa 410.

Minn.—*Drown v. Minneapolis St. Ry. Co.*, 277 N.W. 423, 202 Minn. 66.—*Drown v. Minneapolis St. Ry. Co.*, 271 N.W. 586, 199 Minn. 193.

N.Y.—*Angueira v. Brooklyn & Queens Transit Corp.*, 31 N.Y.S.2d 168, 263 App.Div. 43.

R.I.—*Duffy v. United Elec. Ry. Co.*, 186 A. 596, 56 R.I. 450.

Va.—*Virginia Transit Co. v. James*, 49 S.E.2d 285, 185 Va. 135.—*Virginia Electric & Power Co. v. Blunt's Adm'r*, 163 S.E. 329, 155 Va. 421. 60 C.J. p 631 note 62.

43. Minn.—*LeVasseur v. Minneapolis St. Ry. Co.*, 21 N.W.2d 522, 221 Minn. 205. 60 C.J. p 631 note 63.

44. Mich.—*Axford v. Detroit United Ry.*, 188 N.W. 294, 218 Mich. 514.

Mo.—*Smith v. Union R. Co.*, 61 Mo. 558.

Care to avoid injury from defect or obstruction in street as jury question in general see infra subdivision d of this section.

45. Mich.—*Pampu v. City of Detroit*, 24 N.W.2d 588, 315 Mich. 618. Mo.—*Spencer v. Kansas City Public Service Co.*, App., 250 S.W.2d 187. Ohio.—*Feldhaus v. City Ry. Co.*, App., 45 N.E.2d 802.—*Sallee v. Cincinnati Street Ry. Co.*, 176 N.E. 127, 36 Ohio App. 450. 60 C.J. p 631 note 65.

46. Ark.—*Capital Transp. Co. v. Carter*, 161 S.W.2d 746, 204 Ark. 295.

Cal.—*Bailey v. Market St. Ry. Co.*, 40 P.2d 281, 3 Cal.App.2d 525.

Fla.—*Miami Beach Ry. Co. v. Dohme*, 179 So. 166, 131 Fla. 171.

Iowa.—*Westergard v. Des Moines Ry. Co.*, 52 N.W.2d 39.—*Geers v. Des Moines Ry. Co.*, 38 N.W.2d 89, 240 Iowa 783.

Kan.—*Jewel Tea Co. v. Kansas City Public Service Co.*, 32 P.2d 200, 139 Kan. 565.

Mass.—*White v. Eastern Massachusetts St. Ry. Co.*, 12 N.E.2d 75, 299 Mass. 70.—*Diamato v. Eastern Massachusetts St. Ry. Co.*, 6 N.E. 2d 391, 296 Mass. 476.—*Finn v. Eastern Massachusetts St. Ry. Co.*, 181 N.E. 127, 279 Mass. 196.—*Guay v. Eastern Massachusetts St. Ry. Co.*, 177 N.E. 890, 277 Mass. 133.

Mich.—*Murray v. City of Detroit*, 42 N.W.2d 782, 327 Mich. 679.

Minn.—*Holt v. St. Paul City Ry. Co.*, 252 N.W. 76, 190 Minn. 441.

Mo.—*Manzella v. St. Louis Public Service Co.*, App., 202 S.W.2d 567.—*Knight v. Kansas City Public Service Co.*, App., 49 S.W.2d 1074.

Neb.—*Wiegand v. Lincoln Traction Co.*, 236 N.W. 188, 121 Neb. 130.

N.J.—*Higbee v. Atlantic City & Shore R. Co.*, 32 A.2d 587, 130 N.J. Law 252.

N.Y.—*Ziegler v. International Ry. Co.*, 250 N.Y.S. 115, 232 App.Div. 563.

Ohio.—*Childe v. Cincinnati St. Ry. Co.*, 74 N.E.2d 436, 80 Ohio App. 125.

Or.—*Kirkley v. Portland Electric Power Co.*, 298 P. 237, 136 Or. 421.

Pa.—*Hinton v. Pittsburgh Rys. Co.*, 59 A.2d 151, 359 Pa. 381.—*Steffenson v. Lehigh Valley Transit Co.*, 64 A.2d 755, 361 Pa. 317.—*Perry v. Pittsburgh Rys. Co.*, 55 A.2d 354, 357 Pa. 603.—*Graheck v. Pittsburgh Rys. Co.*, 155 A. 641, 322 Pa. 336.—*Koren v. George*, 48 A.2d 139, 159 Pa.Super. 152.—*Bockstoe v. Pittsburgh Rys. Co.*, 48 A.2d 126, 159 Pa.Super. 237.—*Powell v. Pittsburgh Rys. Co.*, 168 A. 369, 110 Pa. Super. 268.

S.C.—*Worrell v. South Carolina Power Co.*, 195 S.E. 638, 186 S.C. 306.

Wash.—*Peizer v. City of Seattle*, 24 P.2d 444, 174 Wash. 95.—*Smith v.*

City of Seattle, 19 P.2d 652, 172 Wash. 66.

60 C.J. p 610 notes 33, 35, 36, p 631 note 66.

47. Cal.—*Brandenburg v. Pacific Gas & Elec. Co.*, 169 P.2d 909, 28 Cal.2d 282.—*Lolli v. Market St. Ry. Co.*, 110 P.2d 436, 43 Cal.App.2d 166.

Mo.—*Maher v. St. Louis Public Service Co.*, App., 53 S.W.2d 1099.

Pa.—*Guca v. Pittsburgh Rys. Co.*, 80 A.2d 779, 367 Pa. 579.

60 C.J. p 610 note 33, p 611 note 37, p 632 note 67.

48. Md.—*Beck v. Baltimore Transit Co.*, 58 A.2d 909, 190 Md. 506.

Pa.—*Lukaszewicz v. Pittsburgh Rys. Co.*, 73 A.2d 400, 365 Pa. 29.—*Rieck-McJunkin Dairy Co. v. George*, 56 A.2d 261, 162 Pa.Super. 132.

60 C.J. p 632 note 68.

49. Iowa.—*Geers v. Des Moines Ry. Co.*, 38 N.W.2d 89, 240 Iowa 783.

Minn.—*Elkins v. Minneapolis St. Ry. Co.*, 270 N.W. 914, 199 Minn. 63.

Mo.—*Wood v. St. Louis Public Service Co.*, 246 S.W.2d 807, 362 Mo. 1103.

Ohio.—*Gearhart v. Columbus Ry. Power & Light Co.*, 29 N.E.2d 621, 65 Ohio App. 225.

W.Va.—*Bowman v. Monongahela West Penn Public Service Co.*, 21 S.E.2d 148, 124 W.Va. 504.

60 C.J. p 632 note 69.

50. Mass.—*Benjamin v. Holyoke St. R. Co.*, 35 N.E. 95, 160 Mass. 3, 39 Am.S.R. 446.

60 C.J. p 632 note 70.

51. Ark.—*Arkansas Power & Light Co. v. Kennedy*, 70 S.W.2d 506, 159 Ark. 95.—*Arkansas Power & Light Co. v. Crooks*, 67 S.W.2d 193, 155 Ark. 513.

Cal.—*Blythe v. City and County of San Francisco*, 158 P.2d 40, 83 Cal. App.2d 125.

Ohio.—*Schaaf v. Coen*, 2 N.E.2d 605, 131 Ohio St. 279.—*Ashbrook v. Cleveland Ry. Co.*, App., 34 N.E.2d 992.

Tenn.—*Ogle v. Knoxville Power & Light Co.*, 8 Tenn.App. 153.

60 C.J. p 632 note 71.

or not an occupant of a vehicle driven by another exercised proper care and precaution for his own protection,⁵² and whether or not the negligence of such driver was imputable to him.⁵³

The question becomes one of law for the court, however, and should not be submitted to the jury, but should be disposed of by a nonsuit or directed verdict, where the burden is on plaintiff to show due care and the evidence thereof is insufficient⁵⁴ or purely conjectural,⁵⁵ or where the evidence of contributory negligence is clear and such that but one conclusion may reasonably be drawn therefrom,⁵⁶ unless there is other evidence calling for submission

of the case to the jury on the question of last clear chance, as discussed *infra* § 326.

c. Looking and Listening

It is ordinarily for the jury to determine whether one injured by the operation of a street car exercised proper care under the existing circumstances as to looking or listening for the car, or was negligent in that respect.

It is ordinarily for the jury, in an action for injuries to a person or his animal or vehicle resulting from the operation of a streetcar, to determine whether such person exercised proper care and precaution, under the circumstances existing at the time and place of the accident, as to looking or listening for the car, or was negligent in that respect.⁵⁷

52. Cal.—*Silva v. Market St. Ry. Co.*, 123 P.2d 904, 50 Cal.App.2d 796.

Ill.—*Hill v. Richardson*, 251 Ill.App. 75.

Md.—*Baltimore Transit Co. v. State*, to Use of Schriever, 40 A.2d 678, 184 Md. 250.

Mass.—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E.2d 989, 306 Mass. 231.

Mo.—*Harting v. East St. Louis Ry. Co.*, 84 S.W.2d 914—*Roznowski v. East St. Louis Ry. Co.*, App., 51 S.W.2d 969—*Smith v. St. Louis & A. Ry. Co.*, App., 50 S.W.2d 666—*Corbin v. Kansas City, C. C. & St. J. Ry. Co.*, App., 41 S.W.2d 832.

Ohio.—*Langdon v. Cincinnati St. Ry. Co.*, 62 N.E.2d 380, 75 Ohio App. 482.

Or.—*Holzhauser v. Portland Traction Co.*, 169 P.2d 127, 178 Or. 607.

Pa.—*Carden v. Philadelphia Transp. Co.*, 41 A.2d 667, 351 Pa. 407—*Siegfried v. Lehigh Valley Transit Co.*, 6 A.2d 97, 334 Pa. 346—*Sexauer v. Pittsburgh Rys. Co.*, 157 A. 603, 305 Pa. 319—*Ward v. Philadelphia Rapid Transit Co.*, 177 A. 455, 117 Pa.Super. 120.

R.I.—*Arlia v. United Elec. Rys. Co.*, 13 A.2d 242, 64 R.I. 462.

Tex.—*Texas Interurban Ry. v. Hughes*, Civ.App., 34 S.W.2d 1103, affirmed *Texas Interurban Ry. Co. v. Hughes*, Com.App., 53 S.W.2d 445.

Va.—*Virginia Electric & Power Co. v. Holtz*, 174 S.E. 870, 162 Va. 665.

Wash.—*Dye v. City of Seattle*, 24 P. 2d 67, 173 Wash. 515.

60 C.J. p 632 note 72.

Negligence in emergency or sudden peril as jury question in general see *infra* subdivision 1 of this section.

Intoxication of driver

(1) Weight of testimony concerning intoxication of driver of automobile colliding with streetcar with resulting injuries to guest, and findings thereon, were matters that could be

determined only by jury.—*Billingsley v. Kansas City Public Service Co.*, 191 S.W.2d 331, 239 Mo.App. 440.

(2) Knowledge or lack of knowledge on part of guest of intoxication of driver at time of collision was a matter determinable only by a jury.—*Billingsley v. Kansas City Public Service Co.*, *supra*.

53. Cal.—*Borland v. Key System Transit Co.*, 270 P. 194, 205 Cal. 153.

Mo.—*Joyce v. St. Louis Transit Co.*, 86 S.W. 469, 111 Mo.App. 565.

54. Conn.—*New Haven Taxicab Co. v. Connecticut Co.*, 89 A. 92, 87 Conn. 709.

60 C.J. p 633 note 75.

Burden of proof as to contributory negligence in general see *supra* § 307.

55. Mass.—*Raymond v. Worcester Consolidated St. R. Co.*, 110 N.E. 1033, 222 Mass. 396.

56. U.S.—*Kansas City Public Service Co. v. Knight*, C.C.A.Kan., 116 F.2d 233.

Conn.—*Petrillo v. Connecticut Co.*, 102 A. 607, 92 Conn. 235.

Ill.—*Russell v. Richardson*, 31 N.E.2d 427, 308 Ill.App. 11.

Md.—*National Hauling Contractors Co. v. Baltimore Transit Co.*, 44 A.2d 450, 185 Md. 158.

Mo.—*Pettyjohn v. Kansas City Public Service Co.*, 185 S.W.2d 650, 354 Mo. 79.

N.Y.—*Izzo v. Brooklyn & Queens Transit Corp.*, 18 N.Y.S.2d 9, 259 App.Div. 720—*Fried v. Brooklyn & Queens Transit Corp.*, 16 N.Y.S.2d 750, 258 App.Div. 921.

Ohio.—*Schaefer v. Cincinnati St. Ry. Co.*, 62 N.E.2d 102, 75 Ohio App. 258.

Pa.—*Leaman Transp. Corp. v. Philadelphia Transp. Co.*, 57 A.2d 859, 358 Pa. 625—*Elliott v. Philadelphia Transp. Co.*, 53 A.2d 81, 356 Pa. 643—*Weldon v. Pittsburgh Rys.*

Co., 41 A.2d 856, 352 Pa. 103—*Kasnovich v. George*, 34 A.2d 523, 348 Pa. 199—*Philipsburg Beef Co. v. Pennsylvania R. Co.*, 100 Pa.Super. 384—*Chrig v. Lehigh Valley Transit Co.*, Com.Pl., 23 Lehigh Leg.J. 209.

60 C.J. p 633 note 77.

57. Cal.—*Holder v. Key System*, 200 P.2d 98, 55 Cal.App.2d 925—*Wahrenbrock v. Los Angeles Transit Lines*, 190 P.2d 272, 54 Cal.App.2d 236—*Amendt v. Pacific Elec. Ry. Co.*, 115 P.2d 558, 46 Cal.App.2d 248—*Kuhn v. City and County of San Francisco*, 57 P.2d 147, 13 Cal.App. 2d 641.

Conn.—*Clark Dairy v. Feeley*, 181 A. 626, 120 Conn. 557.

D.C.—*Capital Transit Co. v. Gamble*, 172 F.2d 765, 84 U.S.App.D.C. 311.

Ill.—*Cahill v. Cummings*, 54 N.E.2d 634, 322 Ill.App. 662.

Ind.—*Terre Haute, Indianapolis & Eastern Traction Co. v. Wallace*, 150 N.E. 453, 95 Ind.App. 395.

Iowa.—*Gearhart v. Des Moines R. Co.*, 21 N.W.2d 569, 237 Iowa 213—*Deiling v. Des Moines Ry. Co.*, 251 N.W. 622, 217 Iowa 687.

Md.—*Baltimore Transit Co. v. Alexander*, 192 A. 349, 172 Md. 454.

Mass.—*Marturano v. Eastern Massachusetts St. Ry. Co.*, 27 N.E.2d 989, 306 Mass. 231.

N.J.—*Volinsky v. Public Service Co-ordinated Transport*, 68 A.2d 894, 5 N.J.Super. 320—*Devine v. Public Service Co-ordinated Transport*, 155 A. 764, 10 N.J.Misc. 274.

Okl.—*Flanagan v. Oklahoma Ry. Co.*, 206 P.2d 190, 201 Okl. 362.

Pa.—*Carden v. Philadelphia Transp. Co.*, 41 A.2d 667, 351 Pa. 407—*Talley v. Chester Traction Co.*, 76 A. 74, 227 Pa. 393—*Rea v. Pittsburgh Rys. Co.*, 22 A.2d 68, 146 Pa.Super. 251, affirmed 25 A.2d 730, 344 Pa. 421.

R.I.—*Payne v. United Elec. Rys. Co.*, 65 A.2d 713, 75 R.I. 281.

Thus, it is for the jury to determine whether he saw or heard, or by the exercise of reasonable care could have seen or heard, the car in time to avoid being injured by it,⁵⁸ or whether he looked or listened with sufficient and proper care before going upon the tracks,⁵⁹ or whether, after looking once, he was negligent in failing to look again or to continue to look,⁶⁰ or whether it was negligence to approach or travel across or along the tracks without looking or listening,⁶¹ as in walking or driving along the tracks without looking to the rear for a car approaching from that direction.⁶²

Where, however, undisputed evidence clearly shows that the injured person's opportunity for seeing or hearing the approaching car was such that he could not have failed to see or hear it in time to avert an accident if he had used due care in looking or listening, his negligence in that respect should not

be submitted to the jury, but is a question for the court,⁶³ and should be disposed of by the direction of a verdict for defendant⁶⁴ or by a nonsuit,⁶⁵ unless the evidence is such as to justify submission to the jury of the question of last clear chance, as discussed *infra* § 326.

d. Avoidance of Injury from Defect or Obstruction in Street

Contributory negligence of one injured by reason of a defect or obstruction in the street is ordinarily a question for the jury to determine.

It is ordinarily for the jury, in an action against a street railroad company for injuries suffered by reason of a defect or obstruction in the street, to determine whether or not the injured person exercised due care for his own safety to avoid injury from such defect or obstruction.⁶⁶

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 516.
Va.—Cheatwood v. Virginia Elec. & Power Co., 15 S.E.2d 301, 179 Va. 54.

Wash.—Morris v. Seattle, R. & S. Ry. Co., 120 P. 534, 66 Wash. 691.
60 C.J. p 634 note 80.

Obstructed view

(1) Where motorist entered intersection with traffic light in his favor and could not see streetcar approaching from the left because of automobiles in other lanes of traffic until it was too late to avoid collision, whether motorist was contributorily negligent in driving into intersection when his view was obstructed was for the jury.—Rea v. Pittsburgh Rys. Co., 25 A.2d 730, 344 Pa. 421.

(2) A motorist whose automobile was struck by a streetcar traveling at sixty miles an hour at a crossing where the view was obscured could not be held guilty of contributory negligence as a matter of law for failure to hear noise of oncoming car, even though some other person might by a keener sense of hearing have become aware of its approach, in the absence of the blowing of a whistle or the sounding of a gong.—Hisak v. Lehigh Valley Transit Co., 59 A.2d 900, 360 Pa. 1.

58. Cal.—White v. Los Angeles Ry. Corp., 167 P.2d 530, 73 Cal.App.2d 720.

Iowa.—Deiling v. Des Moines Ry. Co., 251 N.W. 622, 217 Iowa 687.

Pa.—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.
60 C.J. p 634 note 81.

Failure to keep window open while driving automobile in heavy fog did not constitute contributory negli-

gence as matter of law.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407.

59. Cal.—Primm v. Market St. Ry. Co., 132 P.2d 842, 56 Cal.App.2d 480.
—Kuhn v. City and County of San Francisco, 57 P.2d 147, 13 Cal.App. 2d 641.

Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205.
Pa.—Di Bona v. Philadelphia Transp. Co., 51 A.2d 765, 356 Pa. 204.
60 C.J. p 634 note 82.

60. U.S.—Morrison v. City of Detroit, C.C.A.Mich., 140 F.2d 625—Sullivan v. Philadelphia Suburban Transp. Co., D.C.Pa., 64 F.Supp. 845, affirmed, C.C.A., 154 F.2d 111.
Cal.—Vincent v. Los Angeles Transit Lines, 153 P.2d 713, 51 Cal.App.2d 195—Amenet v. Pacific Elec. Ry. Co., 115 P.2d 558, 46 Cal.App.2d 245—Aurenz v. Los Angeles Ry. Corp., 96 P.2d 397, 35 Cal.App.2d 615.

Ill.—Grib v. Chicago Transit Authority, 98 N.E.2d 400, 343 Ill.App. 263.
—Kelly v. Friel, 70 N.E.2d 87, 329 Ill.App. 651.

Mass.—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 155, 276 Mass. 29.

Minn.—Moeller v. St. Paul City Ry. Co., 16 N.W.2d 289, 218 Minn. 353, 156 A.L.R. 371—Yien Tsiang v. Minneapolis St. Ry. Co., 4 N.W.2d 630, 213 Minn. 21.

Mo.—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 38 S.W.2d 1042.
—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475.

Pa.—Cinquina v. Philadelphia Transp. Co., 67 A.2d 109, 362 Pa. 546.

R.I.—Payne v. United Elec. Rys. Co., 65 A.2d 713, 75 R.I. 251.

Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.
60 C.J. p 634 note 83.

61. Cal.—Babcock v. Pacific Gas & Electric Co., 7 P.2d 736, 120 Cal. App. 218.

Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205.
Utah.—Barlow v. Utah Light & Traction Co., 295 P. 386, 77 Utah 556.
60 C.J. p 635 note 84.

62. Kan.—Quail v. Kansas Power & Light Co., 64 P.2d 565, 145 Kan. 95.

60 C.J. p 635 note 85.

63. Iowa.—Pender v. Des Moines Ry. Co., 251 N.W. 55, 217 Iowa 1152.

Mo.—Pettyjohn v. Kansas City Public Service Co., 188 S.W.2d 650, 354 Mo. 79.

Pa.—Charles v. Lehigh Valley Transit Co., Com.Pl., 24 Lehigh Leg.J. 462.

60 C.J. p 635 note 86.

64. Mass.—Quinn v. Boston Elevated R. Co., 74 N.E. 657, 153 Mass. 473.

60 C.J. p 636 note 87.

65. Pa.—Kessler v. Philadelphia Rapid Transit Co., 162 A. 393, 107 Pa.Super. 143.

60 C.J. p 636 note 88.

66. Kan.—Durkin v. Kansas City Public Service Co., 27 P.2d 259, 135 Kan. 555.

N.H.—Lovett v. Manchester St. Ry., 159 A. 132, 85 N.H. 345.

e. Children and Persons under Disability

Where the evidence is sufficient to raise the issue, it is ordinarily for the jury to determine whether a child or a person laboring under a physical or mental disability was guilty of contributory negligence when injured by the operation of a streetcar.

It is for the jury, in an action against a street railroad company, to determine whether a child⁶⁷ or a person laboring under a physical or mental disability,⁶⁸ injured by the operation of a streetcar, was exercising due care for his own safety, or was guilty of contributory negligence, under the circumstances existing at the time and place of the accident, and in view of his age, intelligence, and ability, unless the evidence clearly shows that he acted in disregard of the degree of prudence reasonably to be expected of one of his years, experience, and capacity,⁶⁹ or unless there is no evidence of contributory negligence,⁷⁰ in which case the question should not be submitted to the jury.

It is ordinarily a question for the jury whether, in the particular case, such child or other person

was capable of exercising judgment and discretion for his own protection,⁷¹ or was negligent in being on or near the track,⁷² or in crossing or attempting to cross the track or the street in which it was laid,⁷³ or with regard to looking or listening for an approaching car.⁷⁴ In the case of a child, it is also ordinarily for the jury to determine whether or not he was properly allowable on the street unattended,⁷⁵ and whether the parent or custodian of the child was guilty of contributory negligence in allowing him to wander onto or near the track.⁷⁶

f. Acts in Emergencies

In an action for injuries resulting from the operation of a street railroad, whether acts done by the injured person in an emergency constitute contributory negligence and whether the emergency was created through his own fault are ordinarily questions for the jury.

In an action for injuries resulting from the operation of a street railroad, it is ordinarily for the jury to determine whether acts done by the injured person in an emergency or situation of sudden peril

Pa.—Hardiman v. Pittsburgh Rys. Co., 14 A.2d 72, 339 Pa. 79—Illingsworth v. Pittsburgh Rys. Co., 200 A. 89, 331 Pa. 369—Boliver v. City of Philadelphia, 9 A.2d 193, 137 Pa. Super. 437.

Utah.—Christensen v. Utah Rapid Transit Co., 27 P.2d 468, 83 Utah 231.

60 C.J. p 636 note 90.

Contributory negligence of person struck by car while crossing tracks at defective place as jury question see supra subdivision b of this section.

67. Ind.—Indianapolis Rys. v. Williams, 59 N.E.2d 586, 115 Ind.App. 383.

Minn.—Deach v. St. Paul City Ry. Co., 9 N.W.2d 735, 215 Minn. 171.

N.J.—Dunlop v. Public Service Coordinated Transport, 4 A.2d 653, 122 N.J.Law 226.

R.I.—Malfetano v. United Electric Rys. Co., 191 A. 491, 58 R.I. 129.

Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 636 note 91.

Contributory negligence of child as jury question in actions for injuries generally see Parent and Child § 53.

68. Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 636 note 92.

Aged person

Va.—Virginia Elec. & Power Co. v.

Whitehurst, 8 S.E.2d 296, 175 Va. 339.

60 C.J. p 636 note 92 [a].

Intoxication

Mass.—Lydon v. Boston Elevated Ry., 34 N.E.2d 642, 309 Mass. 205.

Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552.

60 C.J. p 636 note 92 [c].

69. Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 637 note 93.

70. Tex.—Galveston Electric Co. v. Hansen, Civ.App., 7 S.W.2d 934, reversed on other grounds, Com. App., 15 S.W.2d 1022.

Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

Evidence of intoxication held insufficient for jury

Mo.—Murray v. Kansas City Public Service Co., 61 S.W.2d 334.

71. Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 637 note 95.

72. N.H.—Katsikas v. Manchester Street Ry., 3 A.2d 821, 90 N.H. 21.

Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 637 note 96.

Contributory negligence in standing on or near track as question for jury in general see supra subdivision b of this section.

73. Ill.—Klooster v. Friel, 75 N.E.2d 773, 332 Ill.App. 652.

Mass.—Barksdale v. Union St. Ry. Co., 193 N.E. 583, 259 Mass. 95.

N.Y.—Shupack v. Brooklyn & Queens Transit Corp., 67 N.Y.S.2d 613, 271 App.Div. 937—Coleman v. Brooklyn & Queens Transit Corp., 298 N.Y. S. 513, 252 App.Div. 215.

Ohio.—Wilson v. Peoples Ry. Co., 21 N.E.2d 860, 135 Ohio St. 547.

Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 637 note 97.

Contributory negligence in crossing track as jury question in general see supra subdivision b of this section.

74. Wash.—Corpus Juris quoted in Burget v. Saginaw Logging Co., 86 P.2d 1117, 1118, 198 Wash. 61.

60 C.J. p 637 note 98.

Contributory negligence as to looking or listening as jury question in general see supra subdivision c of this section.

75. Mo.—Levin v. Metropolitan St. R. Co., 41 S.W. 968, 140 Mo. 624.

N.Y.—Lhowe v. Third Ave. R. Co., 36 N.Y.S. 463, 14 Misc. 612.

76. Mass.—Sullivan v. Boston El. R. Co., 78 N.E. 382, 192 Mass. 37.

60 C.J. p 637 note 1.

Negligence of parent or custodian as jury question in actions for injury to child in general see Parent and Child § 53.

constitute contributory negligence, under the facts of the particular case,⁷⁷ and whether the emergency was created through his own fault.⁷⁸

§ 326. — Last Clear Chance

In an action for injuries resulting from the operation of a street railroad, whether defendant's servants, notwithstanding the contributory negligence of plaintiff, could have avoided the injury by the exercise of reasonable care and were negligent in failing so to do are or-

dinarily questions for the jury, except where the evidence thereof is insufficient.

In an action for injuries resulting from the operation of a street railroad, the questions whether, notwithstanding negligence on the part of the injured person in getting into a position of peril, defendant's servants could have avoided the injury by the exercise of reasonable care and diligence, and hence whether or not they were negligent in failing so to do, are ordinarily for the jury,⁷⁹ except where

77. Ark.—Arkansas Power & Light Co. v. Kennedy, 70 S.W.2d 506, 159 Ark. 95.

Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A.L.R. 1.

Ga.—Brown v. Savannah Electric & Power Co., 167 S.E. 773, 46 Ga.App. 393.

Ill.—Mahan v. Richardson, 1 N.E.2d 100, 284 Ill.App. 493.

Ind.—Elder v. Rutledge, 27 N.E.2d 355, 217 Ind. 459.

Mass.—White v. Eastern Massachusetts St. Ry. Co., 12 N.E.2d 75, 299 Mass. 70—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 276 Mass. 29.

Mich.—Pampu v. City of Detroit, 24 N.W.2d 588, 315 Mich. 615.

Minn.—Nees v. Minneapolis St. Ry. Co., 16 N.W.2d 758, 218 Minn. 532.

Mo.—Wood v. St. Louis Public Service Co., 246 S.W.2d 807, 362 Mo. 1103—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552.

Pa.—Zurcher v. Pittsburgh Rys. Co., 44 A.2d 581, 353 Pa. 212—Sexauer v. Pittsburgh Rys. Co., 157 A. 603, 305 Pa. 319.

60 C.J. p 638 note 2.

Negligence in failing to abandon vehicle when danger is imminent as jury question see supra subdivision b of this section.

78. Mass.—McBride v. Middlesex & B. St. Ry. Co., 176 N.E. 185, 276 Mass. 29.

79. U.S.—Mills v. Denver Tramway Corp., C.C.A.Colo., 155 F.2d 805—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982—Salt Lake & U. R. Co. v. Trumbull, Utah, 246 F. 806, 159 C.C.A. 108.

Ala.—Hayes v. Alabama Power Co., 194 So. 505, 239 Ala. 207.

Cal.—Simon v. City and County of San Francisco, 180 P.2d 393, 79 Cal. App.2d 590—Paris v. Los Angeles Ry. Corp., 179 P.2d 1, 78 Cal.App.2d 950—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal. App.2d 579—Gillette v. City and County of San Francisco, 136 P.2d 611, 58 Cal.App.2d 434—Webb v. Los Angeles Ry. Corporation, 26 P.2d 26, 134 Cal.App. 637.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 230.

Conn.—Simon v. Connecticut Co., 9 A. 2d 719, 128 Conn. 124.

D.C.—Capital Transit Co. v. Garcia, 194 F.2d 162, 90 U.S.App.D.C. 168—Cobb v. Capital Transit Co., 118 F. 2d 217, 79 U.S.App.D.C. 364.

Iowa.—Geers v. Des Moines Ry. Co., 35 N.W.2d 89, 240 Iowa 753—Gearhart v. Des Moines R. Co., 21 N.W. 2d 569, 237 Iowa 213—Lynch v. Des Moines Ry. Co., 245 N.W. 219, 215 Iowa 1119.

Ky.—Brooks v. New Albany & L. Elec. Ry. Corp., 132 S.W.2d 777, 280 Ky. 157—Mullins v. Cincinnati, N. & C. Ry. Co., 68 S.W.2d 790, 253 Ky. 156—Cincinnati, N. & C. Ry. Co. v. England, 68 S.W.2d 783, 253 Ky. 86.

Mich.—Secrist v. City of Detroit, 300 N.W. 137, 299 Mich. 393.

Mo.—Stith v. St. Louis Public Service Co., 251 S.W.2d 693—Johnson v. St. Louis Public Service Co., 251 S.W. 2d 70—Kelley v. St. Louis Public Service Co., 248 S.W.2d 597—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Pearson v. Kansas City Public Service Co., 225 S.W.2d 742, 359 Mo. 1188—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536—Wilson v. Kansas City Public Service Co., 193 S.W.2d 5, 354 Mo. 1032—Bootee v. Kansas City Public Service Co., 183 S.W.2d 892, 353 Mo. 716—Grubbs v. Kansas City Public Service Co., 45 S.W.2d 71, 329 Mo. 390—Smith v. Kansas City Public Service Co., 43 S.W.2d 548, 328 Mo. 979—Bumpus v. St. Louis Public Service Co., App., 251 S.W. 2d 371—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—McClanahan v. St. Louis Public Service Co., App., 242 S.W.2d 265—Martini v. St. Louis Public Service Co., App., 237 S.W.2d 213—Brungs v. St. Louis Public Service Co., App., 235 S.W.2d 81—Davis v. Kansas City Public Service Co., App., 223 S.W.2d 1, affirmed 233 S.W.2d 689, 361 Mo. 168—Pearson v. Kansas City Public Service Co., App., 217 S.W.2d 276, affirmed 225 S.W.2d 742, 359 Mo. 1185—Setser

v. St. Louis Public Service Co., App., 209 S.W.2d 746—Bootee v. Kansas City Public Service Co., 199 S.W.2d 59, 239 Mo.App. 1065—White v. Kansas City Public Service Co., 193 S.W.2d 60, 239 Mo. App. 571—Diel v. St. Louis Public Service Co., 192 S.W.2d 608, 238 Mo. App. 1046—Billingsley v. Kansas City Public Service Co., 191 S.W. 2d 331, 239 Mo.App. 440—Billingsley v. Kansas City Public Service Co., App., 181 S.W.2d 204, record quashed State ex rel. Kansas City Public Service Co. v. Bland, 187 S.W.2d 211, 353 Mo. 1234, conformed to 191 S.W.2d 331, 239 Mo.App. 440—Conroy v. St. Joseph Ry., Light, Heat & Power Co., App., 130 S.W.2d 659—Frye v. St. Joseph Ry., Light, Heat & Power Co., 99 S.W.2d 540, 231 Mo.App. 407—Curtis v. Kansas City Public Service Co., App., 74 S.W.2d 255—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174—Walradt v. St. Joseph Ry., Light, Heat & Power Co., App., 70 S.W.2d 367—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo.App. 24—Lotz v. St. Louis Public Service Co., App., 61 S.W.2d 258—Maher v. St. Louis Public Service Co., App., 53 S.W.2d 1099—Weddle v. St. Joseph Ry., Light, Heat & Power Co., App., 47 S.W.2d 1098, opinion quashed State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1—Flynn v. St. Louis Public Service Co., App., 41 S.W.2d 885.

Ohio.—Schaaf v. Coen, 2 N.E.2d 605, 131 Ohio St. 279.

R.I.—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.

Tex.—Lee v. Houston Elec. Co., Civ. App., 152 S.W.2d 379, affirmed Houston Elec. Co. v. Lee, 162 S.W. 2d 692, 139 Tex. 166—Dallas Railway & Terminal Co. v. Redman, Civ.App., 113 S.W.2d 262.

Va.—Virginia Elec. & Power Co. v. Whitehurst, 8 S.E.2d 296, 175 Va. 339.

W.Va.—Hall v. Monongahela West Penn Public Service Co., 37 S.E.2d 471, 128 W.Va. 547.

60 C.J. p 638 note 3.

there is no sufficient evidence of any such opportunity to avoid the injury or of want of due care in attempting so to do.⁵⁰ To make a submissible case under the doctrine, there must be evidence that the injured person was visible to a person in the motorman's position exercising ordinary care soon enough to allow him, by the means at hand, and with safety to himself and passengers, to stop the car,⁵¹ or evidence disclosing that a reasonably sufficient time was afforded after the peril was discoverable during which interval it was reasonably possible for a warning to have been given, for the injured party to have heeded the warning, and to have escaped to safety.⁵² More is required than the showing of a mere possibility that the accident might have been avoided.⁵³

§ 327. — Willful, Wanton, or Reckless Injury

In an action against a street railroad company for injuries resulting from the operation of the road, questions of willful, wanton, or reckless conduct or gross negligence are ordinarily for the jury on conflicting evidence.

Questions held for jury

(1) Where danger zone commenced for motorist in crossing streetcar track.—*Kloeckner v. St. Louis Public Service Co.*, 53 S.W.2d 1043, 331 Mo. 396.

(2) Whether plaintiff was in position of inescapable peril.—*Ramel v. Kansas City Public Service Co.*, Mo. App., 187 S.W.2d 492.

(3) Whether motorist was oblivious of danger.—*Meeks v. Kansas City Public Service Co.*, Mo.App., 73 S.W.2d 337.

(4) Whether streetcar operator had sufficient time to stop the car after he saw or could have seen plaintiff in a position of peril.—*Ramel v. Kansas City Public Service Co.*, supra.

80. Cal.—*Rasmussen v. Fresno Traction Co.*, 59 P.2d 617, 15 Cal.App.2d 356—*Ellerman v. Pacific Electric Ry. Co.*, 47 P.2d 521, 7 Cal.App.2d 355.

D.C.—*Capital Transit Co. v. Smallwood*, 162 F.2d 14, 82 U.S.App.D.C. 228—*Jackson v. Capital Transit Co.*, 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 53 L.Ed. 1032—*Kelly Furniture Co. v. Washington Ry. & Electric Co.*, 76 F.2d 985, 64 App.D.C. 215—*Washington Ry. & Electric Co. v. Chapman*, 65 F.2d 486, 62 App.D.C. 140, certiorari denied *Chapman v. Washington Ry. & Electric Co.*, 54 S.Ct. 75, 290 U.S. 661, 78 L.Ed. 572.

Iowa.—*Elliott v. Des Moines Ry. Co.*, 271 N.W. 506, 223 Iowa 46.

Ky.—*Bilbrey v. Louisville Ry. Co.*, 192 S.W.2d 177, 301 Ky. 860.

Md.—*Lewis v. Baltimore Transit Co.*, 66 A.2d 556, 193 Md. 366—*United Rys. & Electric Co. of Baltimore v. Sherwood Bros.*, 157 A. 250, 161 Md. 304.

Minn.—*Arnao v. Minneapolis & St. P. S. R. Co.*, 259 N.W. 12, 193 Minn. 498.

Mo.—*McClanahan v. St. Louis Public Service Co.*, 251 S.W.2d 704—*Wilkinson v. St. Louis Public Service Co.*, 243 S.W.2d 953—*Johnson v. Kansas City Public Service Co.*, 214 S.W.2d 5, 358 Mo. 253—*Mahl v. Terrell*, 111 S.W.2d 160, 342 Mo. 15—*Elkin v. St. Louis Public Service Co.*, 74 S.W.2d 600, 335 Mo. 951—*Cavey v. St. Joseph Ry., Light, Heat & Power Co.*, 55 S.W.2d 436, 331 Mo. 882—*Smith v. St. Louis Public Service Co.*, App., 252 S.W.2d 83—*Bean v. St. Louis Public Service Co.*, App., 233 S.W.2d 752—*Setser v. St. Louis Public Service Co.*, App., 209 S.W.2d 746—*Walradt v. St. Joseph Ry., Light, Heat & Power Co.*, App., 48 S.W.2d 93—*Roseman v. United Rys. Co. of St. Louis*, App., 251 S.W. 104.

N.H.—*Katsikas v. Manchester Street Ry.*, 3 A.2d 821, 90 N.H. 21.

Tenn.—*Tennessee Electric Power Co. v. Day*, 10 Tenn.App. 334.

Tex.—*Carrell v. Dallas Railway & Terminal Co.*, Civ.App., 151 S.W.2d 869, error dismissed, judgment correct.

In an action against a street railroad company for injuries resulting from the operation of its cars or road, it is for the jury to determine whether the conduct of defendant or its servants at the time and place of the accident was such as to make it guilty of willfulness, wantonness or recklessness,⁵⁴ or gross negligence,⁵⁵ in causing the injury complained of, unless there is no evidence which would support a finding of willfulness or gross negligence, in which case the question should not be submitted to the jury, but should be disposed of by the court.⁵⁶

§ 328. — Proximate Cause; Unavoidable Accident

In an action for injuries claimed to have resulted from the operation of a street railroad, on conflicting evidence, it is ordinarily for the jury to determine whether negligence or misconduct was the proximate cause of the injuries or whether they resulted from unavoidable accident.

In an action against a street railroad company for injuries claimed to have resulted from the management or operation of its road, where there is evi-

Va.—*Lynchburg Traction & Light Co. v. Wright*, 170 S.E. 569, 161 Va. 251. 60 C.J. p 639 note 4.

81. Mo.—*Walradt v. St. Joseph Ry., Light, Heat & Power Co.*, App., 48 S.W.2d 93.

82. Mo.—*Smith v. St. Louis Public Service Co.*, App., 252 S.W.2d 83.

83. Mo.—*Smith v. St. Louis Public Service Co.*, supra.

84. Ala.—*Birmingham Elec. Co. v. McQueen*, 44 So.2d 598, 253 Ala. 395—*Sims v. Birmingham Elec. Co.*, 189 So. 547, 235 Ala. 83.

Mass.—*Desmond v. Boston Elevated Ry. Co.*, 64 N.E.2d 357, 319 Mass. 13.

Pa.—*Kasanovich v. George*, 34 A.2d 523, 348 Pa. 199.

W.Va.—*Hall v. Monongahela West Penn Public Service Co.*, 37 S.E.2d 471, 128 W.Va. 547.

60 C.J. p 639 note 5.

85. Mich.—*Flintoff v. Muskegon Traction & Lighting Co.*, 175 N.W. 438, 205 Mich. 527.

60 C.J. p 639 note 6.

86. Ala.—*Birmingham Elec. Co. v. Turner*, 1 So.2d 299, 241 Ala. 66—*Birmingham Ry., Light & Power Co. v. Saxon*, 59 So. 584, 179 Ala. 136.

Minn.—*Luck v. Minneapolis St. Ry. Co.*, 254 N.W. 609, 191 Minn. 503.

Pa.—*Esposito v. Philadelphia Transp. Co.*, 70 A.2d 267, 363 Pa. 506.

60 C.J. p 639 note 7.

dence sufficient to raise an issue of fact and it is conflicting or is such that different inferences may reasonably be drawn therefrom, it is for the jury to determine whether the negligence or misconduct of defendant, or of plaintiff, as the case may be, was the proximate cause of such injuries,⁸⁷ or whether they resulted from unavoidable accident.⁸⁸

The question is for the court, and not for the jury, however, where the evidence is insufficient to show that defendant's negligence caused the injuries complained of,⁸⁹ or where evidence of causation is

entirely lacking or purely conjectural,⁹⁰ or is undisputed and such that reasonable minds can draw but one conclusion therefrom.⁹¹

§ 329. — Damages

In an action for injuries resulting from the operation of a street railroad, the question of damages is ordinarily for the jury when raised by sufficient evidence.

In an action to recover for injuries sustained as a result of the management or operation of a street railroad, the amount of damages sustained by the

87. Ala.—Birmingham Elec. Co. v. Turner, 1 So.2d 293, 241 Ala. 66—Hayes v. Alabama Power Co., 194 So. 505, 239 Ala. 207.

Ark.—Arkansas Power & Light Co. v. Connelly, 49 S.W.2d 357, 185 Ark. 693.

Cal.—Kirk v. Los Angeles Ry. Corp., 161 P.2d 673, 26 Cal.2d 833, 164 A. L.R. 1—Blythe v. City and County of San Francisco, 185 P.2d 40, 53 Cal.App.2d 125—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal.App.2d 579—Primm v. Market St. Ry. Co., 132 P.2d 842, 56 Cal.App.2d 480—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—Ring v. Los Angeles Ry. Corporation, 2 P.2d 404, 116 Cal.App. 93.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.

Conn.—Grzybowski v. Connecticut Co., 164 A. 632, 116 Conn. 292.

Ga.—Georgia Power Co. v. Mendelson, 163 S.E. 243, 45 Ga.App. 82.

Ill.—Marron v. Friel, 66 N.E.2d 509, 328 Ill.App. 586—Murphy v. Friel, 66 N.E.2d 450, 328 Ill.App. 586—Valuch v. Rawson, 270 Ill.App. 583.

Iowa.—Geers v. Des Moines Ry. Co., 38 N.W.2d 89, 240 Iowa 783—Dunham v. Des Moines Ry. Co., 35 N.W. 2d 578, 240 Iowa 421.

Kan.—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51.

Md.—Beck v. Baltimore Transit Co., 58 A.2d 909, 190 Md. 506—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740—Armiger v. Baltimore Transit Co., 196 A. 111, 173 Md. 416—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Mich.—Pampu v. City of Detroit, 24 N.W.2d 588, 315 Mich. 618.

Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817—Carlson v. Fredsall, 37 N.W.2d 744, 225 Minn. 461—Nees v. Minneapolis St. Ry. Co., 16 N.W.2d 758, 218 Minn. 532—Arnao v. Minneapolis & St. P. S. R. Co., 259 N.W. 12, 193 Minn. 498.

Mo.—Wood v. St. Louis Public Service Co., 246 S.W.2d 807, 362 Mo. 1103

—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Abernathy v. St. Louis Public Service Co., 240 S.W.2d 914—Neal v. Kansas City Public Service Co., 184 S.W.2d 441, 353 Mo. 779—Robb v. St. Louis Public Service Co., 178 S.W.2d 443, 352 Mo. 566—Ziegelmeier v. East St. Louis & Suburban Ry. Co., 51 S.W.2d 1027, 330 Mo. 1013—Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—McClanahan v. St. Louis Public Service Co., App., 242 S.W.2d 265—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103—Jenkins v. Springfield Traction Co., 96 S.W.2d 620, 230 Mo.App. 1235—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

N.Y.—Mugman v. Brooklyn & Queens Transit Corp., 37 N.Y.S.2d 564, 265 App.Div. 832—Trent v. International Ry. Co., 290 N.Y.S. 915, 249 App. Div. 17, affirmed 7 N.E.2d 725, 273 N.Y. 622.

Ohio.—Readnour v. Cincinnati St. Ry. Co., 93 N.E.2d 587, 154 Ohio St. 69—Childe v. Cincinnati St. Ry. Co., 74 N.E.2d 436, 80 Ohio App. 128—Karle v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327—Ashbrook v. Cleveland Ry. Co., App., 34 N.E.2d 992.

Pa.—Steffenson v. Lehigh Valley Transit Co., 64 A.2d 785, 361 Pa. 317—McCuen v. Philadelphia Rapid Transit Co., 23 A.2d 860, 344 Pa. 112—Illingsworth v. Pittsburgh Rys. Co., 200 A. 89, 331 Pa. 369—Mars v. Philadelphia Rapid Transit Co., 154 A. 290, 303 Pa. 80—Kins v. Pittsburgh Rys. Co., 92 P.L.J. 46, affirmed 34 A.2d 809, 154 Pa.Super. 29.

R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.

Tex.—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816—Boling v. Dallas Railway & Terminal Co., Civ.App., 175 S.W.2d 292, error refused—Dallas Ry. & Ter-

minal Co. v. Starling, Civ.App., 84 S.W.2d 524, affirmed 110 S.W.2d 557, 130 Tex. 379.

Wis.—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625.
60 C.J. p 639 note 9.

88. Tex.—El Paso Electric Co. v. Hedrick, Com.App., 60 S.W.2d 761—Dallas Ry. & Terminal Co. v. Garrison, Com.App., 45 S.W.2d 183.
60 C.J. p 640 note 10.

Evidence held not to present issue of unavoidable accident

Tex.—Dallas Ry. & Terminal Co. v. Darden, Com.App., 38 S.W.2d 777.

89. D.C.—Collins v. District of Columbia, 48 F.2d 1012, 60 App.D.C. 100—Thomas v. Capital Transit Co., Mun.App., 53 A.2d 584.

Ky.—Wigginton's Adm'r v. Louisville Ry. Co., 75 S.W.2d 1046, 256 Ky. 287.

Mo.—Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090—Clark v. Wells, App., 44 S. W.2d 863.

Ohio.—Koch v. Cincinnati St. Ry. Co., 37 N.E.2d 222, 68 Ohio App. 33.

Pa.—Fonzone v. Lehigh Valley Transit Co., 178 A. 671, 318 Pa. 514.

Utah.—Miller v. Utah Light & Traction Co., 86 P.2d 37, 96 Utah 369.
60 C.J. p 640 note 11.

90. Ala.—Davis v. Birmingham Elec. Co., 33 So.2d 355, 250 Ala. 95.
Mich.—Frye v. City of Detroit, 239 N.W. 586, 256 Mich. 466.
60 C.J. p 640 note 12.

91. Tex.—Dallas Railway & Terminal Co. v. Stewart, Civ.App., 123 S. W.2d 443.
60 C.J. p 640 note 13.

Evidence held to require directed verdict as showing as a matter of law either that plaintiff was negligent directly contributing to collision or as furnishing no reasonable basis as to probable cause of collision.—Schaefer v. Cincinnati St. Ry. Co., 62 N.E.2d 102, 75 Ohio App. 288.

injured person is a question for the jury;⁹² but, where plaintiff asks damages for personal injuries and injury to his automobile, the question of property damage should not be submitted to the jury in the absence of sufficient proof of ownership.⁹³

Punitive damages. The question whether there is any evidence to justify the assessment by the jury of punitive damages in a particular case is for the court,⁹⁴ and the issue should not be submitted where there is no evidence of willfulness or gross negligence on the part of defendant;⁹⁵ but, where such evidence is present, the matter becomes one for the jury.⁹⁶

§ 330. Instructions

In actions to recover for injuries resulting from the operation of a street railroad, the instructions should correctly state the law applicable to the case, should not be misleading, and should conform to the pleadings and issues.

The rules governing instructions in civil actions, particularly actions for negligence, ordinarily apply in actions to recover for injuries resulting from the operation of a street railroad.⁹⁷ The instructions should correctly state the law applicable to the case,⁹⁸ should not be misleading⁹⁹ and should conform to the pleadings and issues.¹ Errors of form

or phraseology in instructions are immaterial where they are not calculated to mislead the jury or prejudice the rights of the parties.²

Burden of proof. The rules with respect to instructions in other actions founded on negligence are applicable in an action for injuries resulting from the management or operation of a street railroad, as to the burden of proof and the degree of proof required.³

§ 331. — Negligence of Defendant

General rules as to instructions apply as to the instructions on the issue of negligence in an action to recover for injuries resulting from the operations of a street railroad.

The instructions, in an action against a street railroad company for injuries resulting from the management or operation of its road, relative to the duty and care or negligence of defendant with respect to the condition of its track or equipment are governed by the rules applicable to instructions in other actions founded on negligence and civil actions generally.⁴ These rules also govern the instructions as to the duty and care or negligence of the street railroad company or its servants in the management and operation of its cars,⁵ such as their

92. Wis.—Rissling v. Milwaukee Electric R., etc., Co., 234 N.W. 879, 203 Wis. 554.

93. Ohio.—Clampitt v. City of Cleveland, App., 86 N.E.2d 506.

94. Ky.—Lexington R. Co. v. Fain, 80 S.W. 463, 25 Ky.L. 2243.

95. S.C.—Humphries v. Spartanburg R., etc., Co., 73 S.E. 870, 90 S.C. 442.

96. S.C.—McCormick v. Columbia Electric St. R., etc., Co., 67 S.E. 562, 85 S.C. 455, 21 Ann.Cas. 144.

97. Tenn.—Ijams v. Knoxville Power and Light Co., 1 Tenn.App. 627.

98. N.Y.—Mead v. Lover, 33 N.E.2d 534, 285 N.Y. 230—Kaplan v. Herman, 250 N.Y.S. 532, 232 App.Div. 513, affirmed in part and appeal dismissed 180 N.E. 338, 255 N.Y. 573.

Wis.—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625.

99. Mo.—Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 408.

1. Mich.—De Witt v. Gerard, 275 N.W. 729, 251 Mich. 676.

Mo.—State ex rel. Spears v. McCullen, 210 S.W.2d 68, 357 Mo. 686—

Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 408.

2. Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

3. Md.—United R., etc., Co. v. Cloman, 69 A. 379, 107 Md. 681. 60 C.J. p 650 note 51.

Instructions held sufficient or not erroneous

Tex.—El Paso Elec. Co. v. Beckman, Civ.App., 89 S.W.2d 470, error dismissed.

60 C.J. p 650 note 51 [a].

Instructions held erroneous

Okl.—Pittsburg County Ry. Co. v. Hasty, 233 P. 218, 106 Okl. 65. 60 C.J. p 420 note 50.

Requested instruction held properly refused

D.C.—Howard v. Capital Transit Co., 163 F.2d 910, 82 U.S.App.D.C. 351.

4. Ala.—Alabama Power Co. v. Lewis, 141 So. 229, 224 Ala. 594. 60 C.J. p 641 note 20.

Instructions held sufficient or not erroneous

Ala.—Alabama Power Co. v. Lewis, 141 So. 229, 224 Ala. 594.

Ind.—Vanosdol v. Henderson, 22 N.E.2d 512, 216 Ind. 240.

Minn.—Elkins v. Minneapolis St. Ry. Co., 270 N.W. 914, 199 Minn. 63.

Mo.—Dunlap v. Kansas City Public Service Co., 130 S.W.2d 658, 234 Mo.App. 351.

60 C.J. p 641 note 20 [a].

Instructions held erroneous

Ala.—Alabama Power Co. v. Lewis, 141 So. 229, 224 Ala. 594.

N.Y.—Kaplan v. Herman, 250 N.Y.S. 532, 232 App.Div. 513, affirmed in part and appeal dismissed 180 N.E. 338, 255 N.Y. 573.

60 C.J. p 641 note 20 [b].

Requested instructions held properly refused

Cal.—McAlpine v. Los Angeles Ry. Corp., 154 P.2d 911, 67 Cal.App.2d 486.

60 C.J. p 641 note 20 [e].

5. Mo.—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445. Ohio.—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 189.

60 C.J. p 641 note 23.

Statutory precautions

Use of word "negligence" in charging on defendant's failure to observe statutory precautions was held not

rate of speed.⁶

The same general rules have been held to apply, as to instructions with respect to the maintenance and display of proper lights,⁷ the maintenance of a lookout,⁸ have been held to apply to instructions

improper or confusing.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.

Instructions held sufficient or not erroneous

Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287—Krupp v. Los Angeles Ry. Corp., 135 P.2d 424, 57 Cal.App.2d 695—Cowan v. Market St. Ry. Co., 47 P.2d 752, 8 Cal.App.2d 642.

Ga.—Atlanta Northern Ry. Co. v. Seals, 31 S.E.2d 94, 71 Ga.App. 475.

Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

Mich.—De Witt v. Gerard, 275 N.W.2d 29, 281 Mich. 676.

Minn.—O'Neill v. Minneapolis St. Ry. Co., 7 N.W.2d 665, 213 Minn. 514—Luck v. Minneapolis St. Ry. Co., 254 N.W. 609, 191 Minn. 503.

Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 594, 334 Mo. 275.

Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Rosenthal v. St. Louis Public Service Co., App., 242 S.W.2d 304—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 695, 24 Tenn. App. 42.

Tex.—El Paso Elec. Co. v. Beckman, Civ.App., 89 S.W.2d 470, error dismissed.

60 C.J. p 641 note 23 [a].

Instructions held incorrect

Cal.—Hopkins v. Pacific Electric Ry. Co., App., 118 P.2d 872.

Ga.—Georgia Power Co. v. Burger, 11 S.E.2d 534, 63 Ga.App. 784.

Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049—Thomas v. Des Moines Ry. Co., 2 N.W.2d 655, 231 Iowa 1003.

Minn.—Seward v. Minneapolis St. Ry. Co., 25 N.W.2d 221, 222 Minn. 454.

N.Y.—Taddeo v. Tilton, 289 N.Y.S. 427, 248 App.Div. 290.

Ohio.—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 159—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464.

60 C.J. p 641 note 23 [b].

Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287.

60 C.J. p 641 note 23 [c].

Requested instructions held properly refused

Ala.—Birmingham Elec. Co. v. Echols, 32 So.2d 374, 33 Ala.App. 234, certiorari denied 32 So.2d 379, 249 Ala. 589.

D.C.—Finney v. Capital Transit Co., C.A., 198 F.2d 81.

Ohio.—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 159—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464.

Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.

60 C.J. p 641 note 23 [e].

Requested instructions held erroneously refused

Mo.—Robinson v. Kansas City Public Service Co., 137 S.W.2d 548, 345 Mo. 764.

N.Y.—Lagana v. Westchester Elec. R. R., 97 N.Y.S.2d 263, 277 App.Div. 779, reargument denied 98 N.Y.S.2d 219, 277 App.Div. 878.

Ohio.—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 159.

W.Va.—Tri-City Traction Co. v. Shepherd, 15 S.E.2d 592, 123 W.Va. 227.

60 C.J. p 641 note 23 [f].

Instruction held covered

Ind.—Smith v. Mills, 155 N.E. 327, 98 Ind.App. 543.

60 C.J. p 641 note 23 [g].

Instructions held misleading

Ill.—Anderson v. Cummings, 60 N.E.2d 260, 325 Ill.App. 519.

Ind.—Indiana Service Corp. v. Schaefer, 199 N.E. 155, 101 Ind.App. 294.

60 C.J. p 641 note 23 [h].

Instructions held not misleading

Ark.—Arkansas Power & Light Co. v. Dillinger, 66 S.W.2d 291, 188 Ark. 401.

Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287.

60 C.J. p 641 note 23 [i].

Cal.—Florine v. Market St. Ry. Co., 149 P.2d 41, 64 Cal.App.2d 581.

60 C.J. p 642 note 24.

Definition of negligence

"Negligence," as used in instruction submitting question whether speed of interurban car was negligent, was held not required to be defined.—Corbin v. Kansas City, C. & St. J. Ry. Co., Mo.App., 41 S.W.2d 832.

Instructions held sufficient or not erroneous

Cal.—Powell v. Pacific Elec. Ry. Co., 216 P.2d 448, 35 Cal.2d 40—Wright v. Los Angeles Ry. Corp., 93 P.2d 135, 14 Cal.2d 168—Florine v. Market St. Ry. Co., 149 P.2d 41, 64 Cal.App.2d 585—Schilling v. Central California Traction Co., 1 P.2d 53, 115 Cal.App. 30.

Minn.—Deach v. St. Paul City Ry. Co., 9 N.W.2d 735, 215 Minn. 171.

Mo.—Neal v. Kansas City Public Service Co., 184 S.W.2d 441, 353 Mo. 779—State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475.

W.Va.—Nazionale v. Wheeling Traction Co., 158 S.E. 502, 110 W.Va. 405.

60 C.J. p 642 note 24 [a].

Instructions held erroneous

N.Y.—Mead v. Louer, 33 N.E.2d 534, 285 N.Y. 230.

Ohio.—Prok v. City of Cleveland, App., 102 N.E.2d 253.

60 C.J. p 642 note 24 [b].

Instruction held applicable

Ga.—Georgia Power Co. v. Clark, 25 S.E.2d 91, 69 Ga.App. 273.

Mo.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

60 C.J. p 642 note 24 [c].

Requested instructions held properly refused

Minn.—Peterson v. Minneapolis St. Ry. Co., 53 N.W.2d 817.

Mo.—Dingman v. St. Louis Public Service Co., App., 52 S.W.2d 584.

60 C.J. p 642 note 24 [c].

7. Kan.—Metropolitan St. R. Co. v. Rouch, 71 P. 257, 66 Kan. 195.

60 C.J. p 642 note 25.

Instruction held proper

Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

8. Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

60 C.J. p 643 note 26.

Instructions held sufficient or not erroneous

U.S.—Illinois Terminal R. Co. v. Feltrop, C.C.A.Mo., 130 F.2d 982.

Iowa.—Lynch v. Des Moines Ry. Co., 245 N.W. 219, 215 Iowa 1119.

Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421.

Mo.—Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 408—Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—Billingsley v. Kansas City Public Service Co., App., 181 S.W.2d 204, record quashed State ex rel. Kansas City Public Service Co. v. Bland, 187 S.W.2d 211, 353 Mo. 1234, conformed to 191 S.W.2d 331, 239 Mo. App. 440—McNulty v. St. Louis

as to the giving of signals and warnings,⁹ precautions or negligence on approaching persons, animals, or vehicles on or near the track,¹⁰ or the presence of excited or frightened animals,¹¹ the right of way over the tracks,¹² and acts done in emergencies or situations of sudden peril;¹³ and as to instructions concerning care or negligence of the defendant with respect to children,¹⁴ and li-

Public Service Co., App., 60 S.W.2d 701.

60 C.J. p 643 note 26 [a].

Instructions held erroneous

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

60 C.J. p 643 note 26 [b].

Instructions held applicable

Mo.—Dillard v. East St. Louis Ry. Co., App., 150 S.W.2d 552.

60 C.J. p 643 note 26 [c].

Instructions held not misleading

D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021.

9. Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

60 C.J. p 643 note 27.

Instructions held sufficient or not erroneous

Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

60 C.J. p 643 note 27 [a].

Instructions held erroneous

Iowa.—Elliott v. Des Moines Ry. Co., 271 N.W. 506, 223 Iowa 46.

Mo.—State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

60 C.J. p 643 note 27 [b].

Instructions held inapplicable

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

60 C.J. p 643 note 27 [d].

Requested instructions held properly refused

Ky.—Brooks v. New Albany & L. Elec. Ry. Corp., 132 S.W.2d 777, 280 Ky. 157.

Mo.—Dingman v. St. Louis Public Service Co., App., 52 S.W.2d 584.

60 C.J. p 643 note 27 [e].

Instructions held misleading

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

60 C.J. p 643 note 27 [g].

10. Cal.—Germ v. City and County of San Francisco, 222 P.2d 122, 93 Cal.App.2d 404.

60 C.J. p 643 note 28.

Instructions held sufficient or not erroneous

Cal.—Ring v. Los Angeles Ry. Corporation, 2 P.2d 404, 116 Cal.App. 93.

Ga.—Georgia Power Co. v. Clark, 25 S.E.2d 91, 69 Ga.App. 273.

Mo.—Robb v. St. Louis Public Service Co., 178 S.W.2d 443, 352 Mo. 566—Robinson v. Kansas City Public Service Co., 137 S.W.2d 548, 345 Mo. 764—Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 405—Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.

60 C.J. p 643 note 28 [a].

60 C.J. p 643 note 28 [a].

60 C.J. p 643 note 28 [a].

60 C.J. p 643 note 28 [a].

Instructions held erroneous

Cal.—Germ v. City and County of San Francisco, 222 P.2d 122, 93 Cal.App.2d 404—Criswell v. Pacific Elec. Ry. Co., 120 P.2d 670, 48 Cal. App.2d 819.

60 C.J. p 643 note 28 [b].

60 C.J. p 643 note 28 [b].

Instructions held applicable

Mo.—Williams v. East St. Louis Ry. Co., App., 100 S.W.2d 51.

60 C.J. p 643 note 28 [c].

Requested instructions held properly refused

D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021.

Ohio.—Cincinnati St. Ry. Co. v. Waterman, 198 N.E. 494, 50 Ohio App. 380.

60 C.J. p 643 note 28 [e].

60 C.J. p 643 note 28 [e].

Instructions held misleading or confusing

Cal.—Germ v. City and County of San Francisco, 222 P.2d 122, 93 Cal. App.2d 404.

Mo.—Baldwin v. Kansas City Public Service Co., 210 S.W.2d 115, 240 Mo.App. 527.

60 C.J. p 643 note 28 [g].

11. Tex.—Ross v. Marshall Traction Co., Civ.App., 256 S.W. 638.

60 C.J. p 644 note 29.

12. D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297, certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021.

Ohio.—Plummer v. Peoples Transit Co., App., 104 N.E.2d 75.

60 C.J. p 644 note 30.

60 C.J. p 644 note 30.

60 C.J. p 644 note 30.

Instructions held sufficient or not erroneous

Ark.—Arkansas Power & Light Co. v. Connolly, 49 S.W.2d 357, 185 Ark. 693.

D.C.—Gardner v. Capital Transit Co., 152 F.2d 288, 80 U.S.App.D.C. 297,

certiorari denied 66 S.Ct. 824, 327 U.S. 795, 90 L.Ed. 1021.

Md.—Crawford v. Baltimore Transit Co., 55 A.2d 680, 190 Md. 381.

Mich.—Beauheu v. City of Detroit, 292 N.W. 322, 293 Mich. 364.

Mo.—Rowe v. Kansas City Public Service Co., App., 245 S.W.2d 445.

60 C.J. p 644 note 30 [a].

Instructions held erroneous

Cal.—Stricklin v. Rosemeyer, 126 P.2d 665, 52 Cal.App.2d 558—Abelseth v. City and County of San Francisco, 19 P.2d 53, 129 Cal.App. 552.

Ohio.—Plummer v. Peoples Transit Co., App., 104 N.E.2d 75.

60 C.J. p 644 note 30 [b].

Instructions held inapplicable

Minn.—Wright v. Minneapolis St. Ry. Co., 23 N.W.2d 347, 222 Minn. 105.

60 C.J. p 644 note 30 [c].

Requested instructions held properly refused

R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.

60 C.J. p 644 note 30 [d].

Requested instructions held erroneously refused

Fla.—Miami Beach Ry. Co. v. Dohme, 179 So. 166, 131 Fla. 171.

Ohio.—Clampitt v. City of Cleveland, App., 86 N.E.2d 506—Langdon v. Cincinnati St. Ry. Co., 62 N.E.2d 380, 75 Ohio App. 482.

60 C.J. p 644 note 30 [e].

60 C.J. p 644 note 30 [e].

Instructions held misleading or confusing

Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error dismissed.

60 C.J. p 644 note 30 [f].

60 C.J. p 644 note 30 [f].

13. N.Y.—Hock v. New York, etc., R. Co., 77 N.Y.S. 200, 74 App.Div. 52.

60 C.J. p 645 note 31.

60 C.J. p 645 note 31.

60 C.J. p 645 note 31.

Instruction held inapplicable

Va.—Virginia Electric & Power Co. v. Blunt's Adm'r, 163 S.E. 329, 158 Va. 421.

60 C.J. p 645 note 32.

14. Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 298, 232 Ala. 213.

60 C.J. p 645 note 32.

60 C.J. p 645 note 32.

Instructions held sufficient or not erroneous

Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 130 Cal.App. 316.

Ga.—Georgia Power Co. v. Burger, 11 S.E.2d 534, 63 Ga.App. 784.

60 C.J. p 645 note 32 [a].

censees or trespassers.¹⁵

§ 332. — Contributory Negligence

General rules apply as to instructions on the issue of contributory negligence in actions to recover for injuries resulting from the operations of a street railroad.

The rules governing instructions in other actions

founded on negligence, and in civil actions generally, are applicable in actions for injuries resulting from the management or operation of a street railroad, with respect to the care or contributory negligence of the injured person,¹⁶ as in stopping, looking, or listening for the approach of a car,¹⁷ or attempting to cross the track in front of a standing or approaching car.¹⁸ These rules also

Requested instruction held properly refused

Ala.—Mobile Light & Railroad Co. v. Nicholas, 167 So. 2d 232, 232 Ala. 213. 60 C.J. p 645 note 32 [e].

15. N.Y.—Spitalera v. Second Ave. R. Co., 25 N.Y.S. 919, 73 Hun 37. 60 C.J. p 645 note 33.

16. N.C.—Alexander v. Southern Public Utilities Co., 177 S.E. 427, 207 N.C. 435. 60 C.J. p 645 note 35.

Instructions held sufficient or not erroneous

Ala.—Caudie v. Birmingham Elec. Co., 22 So.2d 417, 247 Ala. 34—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.

Cal.—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 257.

Ind.—Smith v. Mills, 155 N.E. 327, 98 Ind.App. 543.

Iowa.—Mann v. Des Moines Ry. Co., 7 N.W.2d 45, 232 Iowa 1049.

Minn.—Elkins v. Minneapolis St. Ry. Co., 270 N.W. 914, 199 Minn. 63.

Mo.—Wells v. City of Jefferson, 132 S.W.2d 1006, 345 Mo. 239.

N.C.—Alexander v. Southern Public Utilities Co., 177 S.E. 427, 207 N.C. 435.

Pa.—Reithof v. Pittsburgh Rys. Co., 65 A.2d 346, 361 Pa. 459—Longden v. Conestoga Transp. Co., 169 A. 884, 313 Pa. 561.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 695, 24 Tenn.App. 42.

60 C.J. p 646 note 35 [a].

Instructions held erroneous

U.S.—Myles v. Philadelphia Transp. Co., C.A.Pa., 159 F.2d 1014.

Cal.—Abelseth v. City and County of San Francisco, 19 P.2d 53, 129 Cal.App. 552.

Conn.—Hurley v. Connecticut Co., 172 A. 86, 115 Conn. 276.

Mo.—Paisley v. Kansas City Public Service Co., 113 S.W.2d 33, 331 Mo. 468—Smith v. Kansas City Public Service Co., 43 S.W.2d 548, 328 Mo. 979.

N.J.—Reinheimer v. Atlantic City & Shore R. Co., 154 A. 215, 14 N.J. Misc. 253.

N.Y.—Sewell v. Third Ave. Ry. Co., 59 N.Y.S.2d 677.

60 C.J. p 646 note 38 [b].

Instructions held applicable

Pa.—Smith v. Philadelphia Transp. Co., 77 A.2d 653, 168 Pa.Super. 165.

—Ward v. Philadelphia Rapid Transit Co., 177 A. 455, 117 Pa. Super. 120.

60 C.J. p 646 note 35 [c].

Instructions held inapplicable

Mo.—Chervek v. St. Louis Public Service Co., App., 173 S.W.2d 599.

60 C.J. p 646 note 38 [d].

Requested instructions held properly refused

Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393.

Cal.—Paulos v. Market St. Ry. Co., 28 P.2d 94, 136 Cal.App. 163.

Ohio.—Keller v. City Ry. Co., App., 84 N.E.2d 69.

60 C.J. p 646 note 35 [e]

Requested instructions held erroneously refused

Pa.—Kasanovich v. George, 34 A.2d 523, 348 Pa. 199.

60 C.J. p 646 note 35 [f].

17. Cal.—Aurenz v. Los Angeles Ry. Corp., 65 P.2d 910, 19 Cal.App.2d 401.

Ohio.—Keller v. City Ry. Co., App., 84 N.E.2d 69.

60 C.J. p 647 note 39.

Instructions held sufficient or not erroneous

Cal.—De Fries v. Market St. Ry. Co., 55 P.2d 256, 31 Cal.App.2d 463—Meredith v. Key System Transit Co., 267 P. 164, 91 Cal.App. 448.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 695, 24 Tenn. App. 42.

60 C.J. p 647 note 39 [a].

Instructions held erroneous

Cal.—Aurenz v. Los Angeles Ry. Corp., 65 P.2d 910, 19 Cal.App.2d 401.

Cal.—De Fries v. Market St. Ry. Co., 1 P.2d 56, 115 Cal. App. 113.

60 C.J. p 647 note 39 [b].

Instructions held applicable

Cal.—Collier v. Los Angeles Ry. Co., 140 P.2d 206, 60 Cal.App.2d 169—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463.

Md.—Merrick v. United Rys. & Electric Co. of Baltimore City, 163 A. 816, 163 Md. 641.

60 C.J. p 647 note 39 [c].

Requested instructions held properly refused

Cal.—Holder v. Key System, 200 P. 2d 98, 88 Cal.App.2d 925.

Md.—Baltimore Transit Co. v. State for Use of Castranda, 71 A.2d 442, 194 Md. 421.

Ohio.—Keller v. City Ry. Co., App., 84 N.E.2d 69.

60 C.J. p 647 note 39 [e].

Requested instructions held erroneously refused

Ohio.—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 189.

60 C.J. p 647 note 39 [f].

18. Tenn.—Ijams v. Knoxville Power & Light Co., 1 Tenn.App. 627.

60 C.J. p 647 note 40.

Instructions held sufficient or not erroneous

Mo.—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445.

Tenn.—Ijams v. Knoxville Power & Light Co., 1 Tenn.App. 627.

60 C.J. p 647 note 40 [a].

Instructions held erroneous

Ill.—Monahan v. Chicago Transit Authority, 93 N.E.2d 169, 341 Ill.App. 250.

Ohio.—Plummer v. Peoples Transit Co., App., 104 N.E.2d 75—Cincinnati St. Ry. Co. v. Waterman, 195 N.E. 494, 50 Ohio App. 350.

Okl.—Enghlin v. Pittsburg County Ry. Co., 36 P.2d 32, 169 Okl. 36, 94 A.L.R. 1150.

60 C.J. p 647 note 40 [b].

Instructions held applicable

Ala.—McKinney v. Birmingham Elec. Co., 193 So. 139, 238 Ala. 627.

60 C.J. p 647 note 40 [c].

Requested instructions held properly refused

Mich.—Beaulieu v. City of Detroit, 292 N.W. 332, 293 Mich. 364.

60 C.J. p 647 note 40 [e].

Requested instructions held erroneously refused

Ill.—Izenman v. Richardson, 10 N.E. 2d 892, 291 Ill.App. 618.

60 C.J. p 647 note 40 [f].

govern instructions as to the contributory negligence of children,¹⁹ and persons under a physical or mental disability.²⁰

§ 333. — Last Clear Chance; Willful Injury

General rules apply as to instructions on the last clear chance doctrine and the issue of willful injury.

19. N.Y.—Hicks v. Nassau Electric R. Co., 62 N.Y.S. 597, 47 App Div. 479.

60 C.J. p 648 note 41.

Instructions held sufficient or not erroneous

Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 130 Cal.App. 316, 60 C.J. p 648 note 41 [a].

Instructions held erroneous

Tex.—Northern Texas Traction Co. v. Thetford, Com.App., 44 S.W.2d 902, 60 C.J. p 648 note 41 [b].

Requested instructions held properly refused

Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 130 Cal.App. 316, 60 C.J. p 648 note 41 [e].

20. Cal.—Campagna v. Market Street Ry. Co., 149 P.2d 281, 24 Cal.2d 304, 60 C.J. p 648 note 42.

21. D.C.—Stewart v. Capital Transit Co., 108 F.2d 1, 70 App.D.C. 346, certiorari denied 60 S.Ct. 515, 309 U.S. 657, 84 L.Ed. 1006, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036.

Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663—Robards v. Kansas City Public Service Co., 177 S.W.2d 709, 238 Mo.App. 165—Flaspolder v. Kansas City Public Service Co., 170 S.W.2d 141, 237 Mo.App. 1055—Maher v. St. Louis Public Service Co., App., 53 S.W.2d 1099.

60 C.J. p 648 note 45.

Instructions held sufficient or not erroneous

Cal.—Wright v. Los Angeles Ry. Corporation, 93 P.2d 135, 14 Cal.2d 168—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626—Costerisan v. Los Angeles Ry. Corp., 122 P.2d 598, 50 Cal.App.2d 143—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal. App.2d 463—Paulos v. Market St. Ry. Co., 28 P.2d 94, 136 Cal.App. 163.

Mo.—Smith v. St. Louis Public Service Co., 251 S.W.2d 693—Walker v. St. Louis Public Service Co., 243 S.W.2d 92, 362 Mo. 648—Harrow v. Kansas City Public Service Co., 233 S.W.2d 644, 361 Mo. 42—Jants v. St. Louis Public Service Co., 204 S.W.2d 698, 356 Mo. 985—Robinson

v. Kansas City Public Service Co., 137 S.W.2d 548, 345 Mo. 764—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319—Kloekener v. St. Louis Public Service Co., 53 S.W.2d 1043, 331 Mo. 396—Grubbs v. Kansas City Public Service Co., 45 S.W.2d 71, 329 Mo. 390—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Ramel v. Kansas City Public Service Co., App., 157 S.W.2d 492—Farmer v. Kansas City Public Service Co., App., 156 S.W.2d 766—Bresler v. Kansas City Public Service Co., 156 S.W.2d 521, 239 Mo. App. 235, certiorari quashed State ex rel. Kansas City Public Service Co. v. Bland, 191 S.W.2d 660, 354 Mo. 565—King v. Kansas City Public Service Co., 91 S.W.2d 89, 233 Mo.App. 82, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 124 S.W.2d 1097, 343 Mo. 1066—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174—Gay v. Kansas City Public Service Co., App., 77 S.W.2d 133—Curtis v. Kansas City Public Service Co., App., 74 S.W.2d 255—Cain v. St. Louis Public Service Co., App., 59 S.W.2d 734—Maher v. St. Louis Public Service Co., App., 53 S.W.2d 1099. W.Va.—Nazionale v. Wheeling Traction Co., 155 S.E. 502, 110 W.Va. 405, 60 C.J. p 648 note 45 [a].

Instructions held erroneous

D.C.—Stewart v. Capital Transit Co., 108 F.2d 1, 70 App.D.C. 346, certiorari denied 60 S.Ct. 515, 309 U.S. 657, 84 L.Ed. 1006, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036.

Fla.—Miami Beach Ry. Co. v. Dohme, 179 So. 166, 131 Fla. 171.

Mo.—Johnson v. St. Louis Public Service Co., 251 S.W.2d 70—Kelley v. St. Louis Public Service Co., 248 S.W.2d 597—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Harrow v. Kansas City Public Service Co., 233 S.W.2d 644, 361 Mo. 42—Banks v. St. Louis Public Service Co., App., 249 S.W.2d 481—White v. Kansas City Public Service Co., 193 S.W.2d 60, 239 Mo.

The general rules as to instructions in other actions founded on negligence, and civil actions generally, are applicable in actions for injuries resulting from the management or operation of a street railroad, with respect to the doctrine of last clear chance, or the avoidability of the accident notwithstanding contributory negligence on the part of the person injured therein,²¹ and this is true with re-

App. 571—Ramel v. Kansas City Public Service Co., App., 157 S.W.2d 492—Robards v. Kansas City Public Service Co., 177 S.W.2d 709, 238 Mo.App. 165—Flaspolder v. Kansas City Public Service Co., 170 S.W.2d 141, 237 Mo.App. 1055—Flaspolder v. Kansas City Public Service Co., 151 S.W.2d 467, 235 Mo.App. 1102—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174.

Ohio.—Cincinnati St. Ry. Co. v. Keenan, 156 N.E. 812, 45 Ohio App. 75. Okl.—Oklahoma Ry. Co. v. Overton, 12 P.2d 537, 158 Okl. 96.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn. App. 42.

Tex.—Northern Texas Traction Co. v. Thetford, Com.App., 44 S.W.2d 902.

60 C.J. p 648 note 45 [b].

Instructions held applicable

Cal.—Rather v. City and County of San Francisco, 184 P.2d 727, 81 Cal. App.2d 625—Paolini v. City and County of San Francisco, 164 P.2d 916, 72 Cal.App.2d 579—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463.

Colo.—Denver Tramway Corp. v. Perisho, 97 P.2d 422, 105 Colo. 280.

D.C.—Finney v. Capital Transit Co., C.A., 198 F.2d 81.

Ill.—Goldschmidt v. Chicago Transit Authority, 82 N.E.2d 357, 335 Ill. App. 461.

Mo.—Davis v. Kansas City Public Service Co., 233 S.W.2d 669, 361 Mo. 165—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319—Williams v. St. Louis Public Service Co., 73 S.W.2d 199, 335 Mo. 335—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Cacioppo v. Kansas City Public Service Co., App., 234 S.W.2d 789—Steuernagel v. St. Louis Public Service Co., App., 202 S.W.2d 516, affirmed 211 S.W.2d 696, 357 Mo. 904—Farmer v. Kansas City Public Service Co., App., 186 S.W.2d 766—Billingsley v. Kansas City Public Service Co., App., 181 S.W.2d 204, record quashed State ex rel. Kansas City Public Service Co. v. Bland, 187 S.W.2d 211, 353 Mo. 1234, conformed to 191 S.W.2d 331, 239 Mo.

spect to willful injury.²²

§ 334. — Proximate Cause

Instructions with respect to proximate cause are governed by general rules.

Instructions with respect to proximate cause, in an action for injuries claimed to have resulted from the management or operation of a street railroad, are governed by the rules applicable to instructions in other actions based on negligence and civil actions generally.²³

App. 440—Hart v. Kansas City Public Service Co., App., 142 S.W. 2d 345—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256—Williams v. East St. Louis Ry. Co., App., 100 S.W.2d 51—Epstein v. Kansas City Public Service Co., App., 75 S.W.2d 534—Meeks v. Kansas City Public Service Co., App., 73 S.W.2d 337—McNulty v. St. Louis Public Service Co., App., 60 S.W.2d 701.

Ohio—Acker v. Columbus & Southern Ohio Elec. Co., App., 60 N.E.2d 932.

R.I.—Malfetano v. United Elec. Rys. Co., 191 A. 491, 58 R.I. 129.

Va.—Virginia Elec. & Power Co. v. Whitehurst, 8 S.E.2d 296, 175 Va. 339.

W.Va.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504, 60 C.J. p 648 note 45 [c].

Instructions held inapplicable

D.C.—Capital Transit Co. v. Grimes, 164 F.2d 718, 82 U.S.App.D.C. 393, certiorari denied 68 S.Ct. 664, 333 U.S. 545, 92 L.Ed. 1129.

Mo.—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772—Harrow v. Kansas City Public Service Co., 233 S.W.2d 644, 361 Mo. 42—Steuernagel v. St. Louis Public Service Co., 211 S.W.2d 696, 357 Mo. 904—Whitley v. Kansas City Public Service Co., App., 66 S.W.2d 952—Williams v. St. Louis Public Service Co., App., 54 S.W.2d 764, 60 C.J. p 648 note 45 [d].

Requested instructions held properly refused

D.C.—Cobb v. Capital Transit Co., 148 F.2d 217, 79 U.S.App.D.C. 364—Stewart v. Capital Transit Co., 105 F.2d 1, 70 App.D.C. 346, certiorari denied 60 S.Ct. 515, 309 U.S. 657, 84 L.Ed. 1006, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036.

Mich.—Beaulieu v. City of Detroit, 292 N.W. 332, 293 Mich. 364.

Mo.—Kelley v. St. Louis Public Service Co., 248 S.W.2d 597—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

Tenn.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn. App. 42, 60 C.J. p 648 note 45 [e].

Requested instructions held erroneously refused

Cal.—Sills v. Los Angeles Transit Lines, App., 246 P.2d 65—Simon v. City and County of San Francisco, 150 P.2d 393, 79 Cal.App.2d 590.

Mo.—Melton v. St. Louis Public Service Co., 251 S.W.2d 663—Young v. St. Louis Public Service Co., App., 57 S.W.2d 717, 60 C.J. p 648 note 45 [f].

Instructions held consistent with others given

Mo.—Newman v. St. Louis Public Service Co., App., 238 S.W.2d 43, affirmed, Sup., 244 S.W.2d 45, 60 C.J. p 648 note 45 [g].

Instructions held misleading or confusing

Mo.—Murphy v. St. Louis Public Service Co., 244 S.W.2d 31, 362 Mo. 772—State ex rel. Kansas City Public Service Co. v. Bland, 191 S.W.2d 660, 354 Mo. 868—Millhouser v. Kansas City Public Service Co., 55 S.W.2d 673, 331 Mo. 933—Bresler v. Kansas City Public Service Co., 186 S.W.2d 524, 239 Mo.App. 225, certiorari quashed State ex rel. Kansas City Public Service Co. v. Bland, 191 S.W.2d 660, 354 Mo. 865—Flaspolder v. Kansas City Public Service Co., 170 S.W.2d 141, 237 Mo.App. 1055—Cunningham v. Kansas City Public Service Co., 77 S.W.2d 161, 229 Mo.App. 174—Whitley v. Kansas City Public Service Co., App., 66 S.W.2d 952, 60 C.J. p 648 note 45 [i].

Instructions held not misleading or confusing

Mo.—Jants v. St. Louis Public Service Co., 204 S.W.2d 698, 356 Mo. 985—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W. 2d 205, 335 Mo. 319—Sackmann v. Wells, 41 S.W.2d 153—King v. Kansas City Public Service Co., 91 S.W.2d 89, 233 Mo.App. 82, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 124 S.W.2d 1097, 343 Mo. 1066—Gay v. Kansas City Public Service Co., App., 77 S.W.2d 133.

N.H.—Giguere v. Boston & M. R. R., 167 A. 561, 86 N.H. 294.

22. Wash.—Traver v. Spokane St. R. Co., 65 P. 284, 25 Wash. 225, 60 C.J. p 649 note 46.

23. Mo.—Jager v. Metropolitan St. R. Co., 89 S.W. 62, 114 Mo.App. 10, 60 C.J. p 649 note 48

Instructions held sufficient or not erroneous

Ala.—Caudle v. Birmingham Elec. Co., 22 So.2d 417, 247 Ala. 34.

Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.

Mo.—Neal v. Kansas City Public Service Co., 184 S.W.2d 441, 353 Mo. 779—Spencer v. Kansas City Public Service Co., App., 250 S.W. 2d 187—Pearson v. Kansas City Public Service Co., App., 217 S.W.2d 276, affirmed 225 S.W.2d 742, 359 Mo. 1185—Billingsley v. Kansas City Public Service Co., 191 S.W.2d 331, 239 Mo.App. 440—Raymore v. Kansas City Public Service Co., App., 141 S.W.2d 103.

N.C.—Myers v. Southern Public Utilities Co., 180 S.E. 694, 208 N.C. 293.

Or.—Holzhauser v. Portland Traction Co., 169 P.2d 127, 178 Or. 607.

Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.

Tex.—Dallas Railway & Terminal Co. v. Little, Civ.App., 109 S.W.2d 289, error dismissed.

60 C.J. p 649 note 48 [a].

Instructions held erroneous

Minn.—Seward v. Minneapolis St. Ry. Co., 25 N.W.2d 221, 222 Minn. 454.

R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.

60 C.J. p 649 note 48 [b].

Instructions held applicable

Cal.—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal.App.2d 758.

Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Mo.—Bootee v. Kansas City Public Service Co., 183 S.W.2d 892, 353 Mo. 716.

W.Va.—Bowman v. Monongahela West Penn Public Service Co., 21 S.E.2d 148, 124 W.Va. 504, 60 C.J. p 649 note 48 [c].

Instructions held inapplicable

Tex.—Dallas Railway & Terminal Co. v. Little, Civ.App., 109 S.W.2d 289, error dismissed.

60 C.J. p 649 note 48 [d].

Requested instructions held properly refused

Cal.—O'Donnell v. Market Street Ry. Co., 86 P.2d 1077, 30 Cal.App.2d 630.

§ 335. — Damages

Instructions with respect to damages are governed by general rules.

The general rules relating to instructions in other actions founded on negligence and in civil actions generally are applicable, in actions for injuries resulting from the management or operation of a street railroad, as to the elements and measure of damages.²⁴

§ 336. Verdict and Findings

General rules as to verdicts and findings apply in actions for injuries resulting from the operations of street railroads.

The usual rules applicable in other actions founded on negligence, and in civil actions generally, govern, in actions for injuries resulting from the management or operation of a street railroad, as to general verdicts or findings by the jury,²⁵ general verdicts with special findings,²⁶ and verdicts on separate counts.²⁷ General rules also apply with respect to special findings,²⁸ their sufficiency,²⁹ their

consistency with each other³⁰ and with a general verdict,³¹ their construction,³² and their operation and effect,³³ and such rules apply to the findings of the trial court.³⁴

§ 337. Appeal and Error

General rules as to appeal and error apply in actions to recover for injuries resulting from the management or operation of a street railroad.

The rules with respect to appeals and writs of error, and the determination thereon and decision thereof, applicable in other actions founded on negligence, and in civil actions generally, govern actions for injuries resulting from the management or operation of a street railroad.³⁵ Thus, if the verdict, finding, or judgment in the lower court is clearly against the weight of the evidence, or unsupported by any competent evidence, it will be reversed or set aside on appeal;³⁶ but, where there is sufficient evidence to support a verdict or finding, although it is conflicting, such verdict or finding or a judgment rendered thereon will not be disturbed on appeal,³⁷ nor will it be set aside or reversed for an

D.C.—Howard v. Capital Transit Co., 163 F.2d 910, 82 U.S.App.D.C. 351.

Md.—United Rys. & Electric Co. of Baltimore v. State, 163 A. 90, 163 Md. 313.

Minn.—La Combe v. Minneapolis St. Ry. Co., 51 N.W.2d 839.

60 C.J. p 649 note 48 [e].

Requested instructions held erroneously refused

Or.—Hunsaker v. Pacific Northwest Public Service Co., 20 P.2d 433, 143 Or. 583.

R.I.—Ferra v. United Electric Rys. Co., 155 A. 668, 52 R.I. 7.

60 C.J. p 649 note 48 [f].

Instruction held misleading

Cal.—Krupp v. Los Angeles Ry. Corp., 135 P.2d 424, 57 Cal.App.2d 695.

60 C.J. p 648 note 48 [g].

24. Va.—Portsmouth St. R. Co. v.

Peed, 47 S.E. 850, 102 Va. 662.

60 C.J. p 650 note 54.

25. Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.

Mass.—Slowik v. Union St. Ry. Co., 184 N.E. 469, 282 Mass. 249.

Pa.—Valentine v. Philadelphia Transp. Co., 76 A.2d 471, 167 Pa. Super. 592.

60 C.J. p 650 note 57.

26. Ind.—Union Traction Co. v. Howard, App., 87 N.E. 1103, rehearing denied 88 N.E. 987, reversed

on other grounds 90 N.E. 764, 173 Ind. 335.

60 C.J. p 650 note 57 [f].

27. Mo.—Moore v. United R. Co., 170 S.W. 386, 185 Mo.App. 184.

60 C.J. p 652 note 57 [g].

28. Kan.—Slaton v. Union Elec. Ry. Co., 145 P.2d 456, 158 Kan. 132.

Ohio.—Columbus, Delaware & Marion Electric Co. v. O'Day, 176 N.E. 569, 123 Ohio St. 638.

60 C.J. p 652 note 58.

29. Kan.—Wichita R., etc., Co. v. Liebhart, 101 P. 457, 80 Kan. 91.

60 C.J. p 650 note 57 [d].

30. Kan.—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51—Godfrey v. Kansas City Public Service Co., 88 P.2d 1037, 149 Kan. 592—May v. Kansas Power & Light Co., 7 P.2d 108, 134 Kan. 470.

Tex.—Yarbrough v. Dallas Railway & Terminal Co., 97 S.W.2d 169, 128 Tex. 445—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448, motion granted 58 S.W.2d 820—Cannady v. Dallas Ry. & Terminal Co., Civ.App., 219 S.W.2d 816—Gross v. Dallas Railway & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct—Havins v. Dallas Railway & Terminal Co., Civ.App., 130 S.W.2d 878, error refused—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W.2d 884, affirmed 114 S.W.2d

859, 131 Tex. 319—Dallas Railway & Terminal Co. v. Watkins, Civ. App., 59 S.W.2d 420, error refused—Osterloh v. San Antonio Public Service Co., Civ.App., 77 S.W.2d 290, error dismissed.

60 C.J. p 652 note 58 [h].

31. Kan.—Godfrey v. Kansas City Public Service Co., 88 P.2d 1037, 149 Kan. 592—May v. Kansas Power & Light Co., 7 P.2d 108, 134 Kan. 470.

Ohio.—Eversole v. Seelbach, App., 73 N.E.2d 223—Gearhart v. Columbus Ry., Power & Light Co., 29 N.E.2d 621, 65 Ohio App. 225.

32. Kan.—Lee v. Kansas City Public Service Co., 22 P.2d 942, 137 Kan. 759.

60 C.J. p 652 note 58 [i].

33. Kan.—Quail v. Kansas Power & Light Co., 64 P.2d 565, 145 Kan. 95—May v. Kansas Power & Light Co., 7 P.2d 108, 134 Kan. 470.

34. Cal.—Paine v. San Bernardino Valley Traction Co., 77 P. 659, 143 Cal. 654.

60 C.J. p 653 note 59.

35. Ill.—Valuch v. Rawson, 270 Ill. App. 583.

60 C.J. p 653 note 62.

36. Mich.—Gregory v. Detroit United R. Co., 101 N.W. 546, 138 Mich. 368.

60 C.J. p 654 note 63.

37. Mass.—Vincent v. Norton, etc.,

immaterial variance between the pleadings and the proof,³³ or for harmless error with respect to the admission or exclusion of evidence³⁹ or the giving or refusal of instructions.⁴⁰ Where there has been no abuse of discretion by the lower court its rulings will ordinarily not be interfered with on appeal.⁴¹

§ 338. Damages

General rules as to damages, including exemplary or

punitive damages, apply in actions to recover for injuries resulting from the operation of a street railroad.

The general rules as to damages in other civil actions are applicable in an action for injuries or damage sustained through the operation of a street railroad.⁴² Exemplary or punitive damages may be recovered where the injury was due to gross negligence or willful or wanton misconduct,⁴³ but not otherwise.⁴⁴

10. OFFENSES INCIDENT TO OPERATION OF STREET RAILROADS

§ 339. Offenses by Street Railroad Company or Its Servants

General rules of criminal law apply as to offenses in connection with the management and operation of street railroads.

The general rules governing prosecutions for other criminal offenses are applicable to offenses, as created in some jurisdictions by statutes or municipal ordinances, in connection with, or growing out of, the management or operation of a street railroad,⁴⁵ such as causing death through negligence,⁴⁶ or failure to operate cars at proper intervals,⁴⁷ or

to stop them at proper places to take on or let off passengers,⁴⁸ or to run them through to the end of their routes,⁴⁹ or to ventilate them properly,⁵⁰ or to provide cars with protection to motormen from wind and storm,⁵¹ or to keep white and colored passengers separated,⁵² or to place signal lights at crossings over other street railroads,⁵³ or permitting the overcrowding of a car,⁵⁴ or the operation of a car not authorized by the company's franchise,⁵⁵ or the operation of a car without having both a motorman and a conductor thereon,⁵⁶ as well as offenses under general law,⁵⁷ including applicable provisions of a vehicle code or ordinance.⁵⁸

St. R. Co., 61 N.E. 822, 150 Mass. 104.
60 C.J. p 654 note 64.

38. N.Y.—*Liekens v. Staten Island Midland R. Co.*, 72 N.Y.S. 162, 64 App.Div. 327.
60 C.J. p 654 note 65.

39. Wash.—*Christensen v. Union Trunk Line*, 32 P. 1018, 6 Wash. 75.
60 C.J. p 654 note 66.

40. Md.—*Lake Roland El. R. Co. v. McKewen*, 31 A. 797, 80 Md. 593.
60 C.J. p 654 note 67.

41. Cal.—*Ruppel v. United R. Co.*, 82 P. 1073, 1 Cal.App. 666.
Mass.—*Ducharme v. Holyoke, St. R. Co.*, 89 N.E. 561, 203 Mass. 384.

42. D.C.—*McDermott v. Severe*, 25 App.D.C. 276, affirmed 26 S.Ct. 709, 202 U.S. 600, 50 L.Ed. 116.
60 C.J. p 655 note 72.

43. Ky.—*South Covington, etc., R. Co. v. Cleveland*, 100 S.W. 283, 30 Ky.L. 1072, 11 L.R.A., N.S., 853.
60 C.J. p 655 note 73.

44. D.C.—*Darrin v. Capital Transit Co.*, Mun.App., 90 A.2d 823.
60 C.J. p 655 note 74.

45. Ala.—*Dean v. State*, 43 So. 24, 149 Ala. 34.
60 C.J. p 656 note 85.

46. Mass.—*Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.
60 C.J. p 656 note 86.

47. Wash.—*Tacoma v. Boutelle*, 112 P. 661, 61 Wash. 434.
60 C.J. p 656 note 87.

48. N.J.—*Camden v. Public Service R. Co.*, 82 A. 609, 82 N.J.Law 242, affirmed 86 A. 447, 84 N.J.Law 305 and *Camden v. Barrett*, 86 A. 449, 84 N.J.Law 405.
60 C.J. p 656 note 88.

49. Mich.—*People v. Detroit United R. Co.*, 118 N.W. 9, 154 Mich. 514.
60 C.J. p 656 note 89.

50. Ill.—*Chicago v. Chicago City R. Co.*, 192 Ill.App. 1.
60 C.J. p 656 note 90.

51. Ohio.—*State v. Nelson*, 23 N.E. 22, 52 Ohio St. 88, 26 L.R.A. 317.
60 C.J. p 656 note 91.

52. Tenn.—*Nashville R., etc., Co. v. State*, 234 S.W. 327, 144 Tenn. 446.
60 C.J. p 657 note 92.

53. Mich.—*People v. Detroit United R. Co.*, 116 N.W. 186, 152 Mich. 359.
60 C.J. p 657 note 93.

54. Minn.—*State v. Overby*, 133 N. W. 792, 116 Minn. 304.
60 C.J. p 657 note 94.

55. Mo.—*St. Louis, etc., R. Co. v.*

Kirkwood, 60 S.W. 110, 159 Mo. 239, 53 L.R.A. 300.
60 C.J. p 657 note 95.

56. Ohio.—*Thornhill v. Cincinnati*, 4 Ohio Cir.Ct. 354, 2 Ohio Cir.Dec. 592.
60 C.J. p 657 note 96.

57. Ky.—*Commonwealth v. South Covington, etc., St. R. Co.*, 205 S.W. 581, 181 Ky. 459, 6 A.L.R. 118.
60 C.J. p 657 note 97.

Maintaining public nuisance by blocking public street
N.Y.—*People v. Brooklyn & Queens Transit Corporation*, 7 N.E.2d 833, 273 N.Y. 394.

58. Cal.—*People v. Ausen*, 105 P.2d 321, 40 Cal.App.2d Supp. 831.

Justification

Cal.—*People v. Ausen*, supra.

Examination of witnesses

Cal.—*People v. Ausen*, supra.

Evidence

Ohio.—*City of Cincinnati v. Peacock*, 51 N.E.2d 906, 72 Ohio App. 321.
Okl.—*Couch v. City of Tulsa, Cr.*, 249 P.2d 474.

Instructions

Ohio.—*City of Dayton v. Perry, App.*, 44 N.E.2d 381.

Provisions held not applicable

Ohio.—*City of Cincinnati v. Somagyi*, 29 N.E.2d 37, 64 Ohio App. 507.

§ 340. Offenses against Street Railroad Property or Operation

General rules apply in the prosecution of offenses against or affecting street railroads. Statutes relating to offenses against railroads may or may not apply to street railroads.

The general rules applicable to other offenses and prosecutions therefor govern in prosecutions for offenses, as created in some jurisdictions by statute or municipal ordinance, against street railroad companies or affecting the operation of street railroads, such as boarding a moving car for the purpose of obtaining transportation thereon,⁵⁹ or hanging on the outside of a car,⁶⁰ or throwing missiles at a

car,⁶¹ or wrecking or attempting to wreck a car,⁶² or injuring, removing, or destroying the road or any apparatus appertaining thereto,⁶³ or wrongfully obstructing the tracks.⁶⁴

Statutes relating to offenses against railroad property or operation are applicable to street railroads where they are not because of their nature inapplicable thereto and no intention that they shall not be so applied appears;⁶⁵ but otherwise they are inapplicable, and have been so held where the statutes antedated the existence of street railroads within the state, or where considered inapplicable by the legislature itself.⁶⁶

XI. CONSTRUCTION, ACQUISITION, AND OPERATION BY PUBLIC AUTHORITIES

§ 341. By Municipality

Where authorized, a municipality may construct, own, or operate a street railroad.

The state may, in the absence of constitutional restraint, delegate to a municipal corporation the power to construct, maintain, own or operate a street railroad, as discussed in Municipal Corpora-

tions § 1054 c, and, where so authorized, a municipality may construct, own, or operate a street railroad,⁶⁷ and incur indebtedness therefor.⁶⁸ A municipality in such case has been held to have the same rights, powers, and privileges, and to be subject to the same duties, regulations, and obligations, as a street railroad corporation,⁶⁹ except to the ex-

59. N.Y.—*East v. Brooklyn Heights R. Co.*, 88 N.E. 751, 195 N.Y. 409, 23 N.Y.Cr. 470, 23 L.R.A.N.S., 513, 60 C.J. p 658 note 2.

60. Ind.—*Frank Bird Transfer Co. v. Morrow*, 72 N.E. 189, 36 Ind. App. 305, 60 C.J. p 658 note 3.

61. Mass.—*Commonwealth v. Carroll*, 14 N.E. 618, 145 Mass. 403, 60 C.J. p 658 note 4.

62. Ga.—*Gunter v. State*, 92 S.E. 314, 19 Ga.App. 772, 60 C.J. p 658 note 5.

63. Iowa.—*State v. Bosworth*, 152 N.W. 581, 170 Iowa 329, 60 C.J. p 658 note 6.

64. Iowa.—*State v. Foley*, 31 Iowa 527, 7 Am.R. 166, 60 C.J. p 658 note 7.

65. Ga.—*Gunter v. State*, 92 S.E. 314, 19 Ga.App. 772, 60 C.J. p 658 note 9.

66. Kan.—*State v. Cain*, 76 P. 443, 69 Kan. 186, 60 C.J. p 659 note 10.

67. N.Y.—*Smull v. Delaney*, 25 N.Y. S.2d 387, 175 Misc. 795.

Special municipal corporation organized to operate transit system
Under the statutes creating the Chicago transit authority, what was contemplated was a transportation system providing local transporta-

tion for Chicago which would also operate between the city and the suburbs surrounding it.—*Chicago Motor Coach Co. v. Budd*, 105 N.E.2d 140, 346 Ill.App. 385.

Unification of transit system

In order to construe constitutional and statutory enactments relating to unification of the transit system of the city of New York, it is necessary to look at the evil which they were designed to remedy, purpose which motivated their enactment, and process which seemingly was intended to be provided to cure that evil and accomplish that purpose.—*Bronx Chamber of Commerce v. Fullen*, 21 N.Y.S.2d 474, 174 Misc. 524.

Submission to voters

(1) Where an ordinance providing for the construction of a municipal electric railway provided for the submission of the plan proposed to the voters at a special election to be held on the same day as a general city election and that a condensed statement of the plan should be printed on the official ballot, the printing of such condensed statement on a ballot separate from the general election ballot did not affect the validity of the submission, since the election, although held on the same day as the general election and by the same officers, was a special election and the laws relating to the form of the ballot at a general election were not mandatory.—*State v.*

King County Super. Ct., 138 P. 277, 77 Wash. 593.

(2) Alleged misinformation by city officials to the electors, preceding a vote on an ordinance for the construction of a municipal street railroad system, did not invalidate the election, because the voters were misled into believing its purpose was to acquire the existing property at a stated valuation less than its true value, where the submission was made in due form, the ordinance did not provide for the acquisition of the property at the alleged valuation, and no complaint was made of it before the election, especially in view of the provision of the city charter that no purchase could be made, except by contract approved by the electors.—*Detroit United R. Co. v. Detroit, Mich.*, 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570.

(3) Provisions for the purchase of existing street railway lines, or, in case such purchase was not deemed wise, the construction of a parallel line, were not several and distinct purposes, so as to render a joint submission thereof to a vote of the people invalid.—*Tulloch v. Seattle*, 124 P. 451, 69 Wash. 178.

68. N.Y.—*Sun Printing, etc., Assoc. v. New York*, 46 N.E. 499, 152 N.Y. 257, 37 L.R.A. 788, 60 C.J. p 659 notes 14, 15.

69. N.Y.—*In re Board of Rapid*

tent that they are not applicable to a municipality as owner and operator,⁷⁰ and subject to the rule that a municipal corporation has only such powers as are granted by the laws of the state.⁷¹ A duly adopted ordinance, under charter power, for the construction of a municipal street railroad, is not rendered invalid by an offer by the city to buy the property of an existing street railroad company, after the expiration of its franchise, at less than its fair valuation.⁷²

Over bridge. A municipality, through the board or commission having charge of such structures, may, under legislative authority, operate, or cause to be operated, a street railroad on a bridge constructed and owned by the municipality,⁷³ without obtaining a certificate of public convenience⁷⁴ or permission from the public service commission;⁷⁵ and this right carries with it by implication the right to erect a car barn underneath the bridge and by necessary trackage connect the bridge tracks with the barn.⁷⁶ However, municipal power to construct, repair, maintain, and operate bridges does not of itself authorize the officers of the city to operate a railroad on such a bridge.⁷⁷

§ 342. — Extent of System, and Application of Special Fund

Several street railroad lines may constitute a single municipal railway system within charter provisions.

Several radiating street railway lines built and operated by a city, although built at different times

and in each instance submitted to public approval and their cost made possible through separate bond issues, constitute in actual operation a single municipally owned and operated street railway system,⁷⁸ subject in its entirety to all of the provisions of the city charter relating to the operation of a public utility by the city,⁷⁹ such as a provision for maintenance in the city treasury of a special fund to be set aside from the revenues of the railway for operating expenses, repairs, sinking fund, extensions, and reserve.⁸⁰ However, the term "extensions and improvements," as used in such a provision, does not include the purchase of an entirely independent railway system, theretofore privately owned and operated on other streets and thoroughfares and in sections of the municipality other than that occupied by the municipal railway system;⁸¹ nor does such provision authorize the expenditure of such moneys for the purpose of conducting an investigation by the board of public works as to the advisability and availability of the acquisition by purchase of a part or the whole of another street railway.⁸²

§ 343. — Contract for Construction, and Lease

Subject to applicable constitutional and statutory provisions a municipality may be authorized to lease a street railway system which it has constructed to a street railroad company.

Where properly authorized by constitution or statute, a municipality may dispose of a street railway system which it has constructed by leasing it to a

Transit Com'rs, 113 N.Y.S. 619, 128 App.Div. 103, modified on other grounds 90 N.E. 453, 197 N.Y. 81, 36 L.R.A., N.S., 647, 18 Ann.Cas. 366.

60 C.J. p 659 note 17.

70. U.S.—United Railroads of San Francisco v. City and County of San Francisco, Cal., 39 S.Ct. 361, 249 U.S. 517, 63 L.Ed. 739. 60 C.J. p 659 note 18.

71. N.Y.—Smull v. Delaney, 25 N.Y. S.2d 387, 175 Misc. 795.
Ohio.—City of Cleveland v. Division 268 of Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of America, 15 Ohio Supp. 76.

Power to purchase equipment as not including power to lease

The provision of the public service law applicable to the city of New York authorizing the board of transportation thereof to "purchase" all necessary materials and supplies for

operation of transit system, read in connection with the whole law to which it refers, does not authorize the board of transportation of the city of New York to lease omnibus equipment for operation and maintenance of rapid transit facilities since a "purchase" of property involves a transfer of ownership and a passing of title, while a "lease" does not, and title remains in lessor and lessee only has use of property until expiration of the term.—Smull v. Delaney, 25 N.Y.S.2d 387, 175 Misc. 795.

72. U.S.—Detroit United Ry. v. City of Detroit, Mich., 41 S.Ct. 285, 255 U.S. 171, 65 L.Ed. 570. 60 C.J. p 659 note 19.

73. N.Y.—City of New York v. Brooklyn City R. Co., 134 N.E. 533, 232 N.Y. 463. 60 C.J. p 659 note 20.

74. N.Y.—City of New York v.

Brooklyn City R. Co., 134 N.E. 533, 232 N.Y. 463.

75. N.Y.—City of New York v. Brooklyn City R. Co., supra.

76. N.Y.—City of New York v. Brooklyn City R. Co., supra.

77. N.Y.—Dillurio v. City of New York, 132 N.Y.S. 531, 73 Misc. 122.

78. Cal.—Hunt v. Boyle, 267 P. 97, 204 Cal. 151.

79. Cal.—Hunt v. Boyle, supra.

80. Cal.—Hunt v. Boyle, supra. 60 C.J. p 660 note 28.

81. Cal.—Hunt v. Boyle, supra—Mobley v. Board of Public Works of City and County of San Francisco, 186 P. 412, 44 Cal.App. 167.

82. Cal.—Mobley v. Board of Public Works of City and County of San Francisco, supra. 60 C.J. p 660 note 30.

street railway company,⁸³ and may provide for its exclusive use by the lessee,⁸⁴ and the fact that the lessee has contributed to the cost of such system as a consideration for its use does not change the relationship between the city as lessor and lessee to that of partners.⁸⁵ Under some statutes the public authorities cannot proceed to construct a street railway unless an existing street railway company has agreed to lease and operate it.⁸⁶

Where the statute providing for the construction and leasing of a street railroad by a city vests in the board of rapid transit commissioners whatever control the city has over the possession of the railroad by a lessee thereof from the city, such control cannot be exercised by any other officer of the city;⁸⁷ and, where such control is vested in the public service commission, it has the power to determine whether, in contracting with a street railroad company for the construction and leasing of a rapid transit road, allowance should be made for depreciation in the existing plant in determining the net earnings of the company, for determining the rentals to be paid by it,⁸⁸ and to determine whether the street railroad company, with which the commission has contracted for the construction of the road, should be permitted to issue bonds for construction purposes.⁸⁹

A commission authorized to construct a subway or a tunnel must comply with the statute as to the mode of construction;⁹⁰ and, in determining which of certain structures shall be constructed, may act by a majority of its members, if all have had notice and opportunity to act;⁹¹ and the fact that the commission adopts some suggestions after the preparation of a contract with a street railroad company for the construction of an underground railroad, and after a public hearing thereon, does

not require the contract to be submitted for a further public hearing, where the statute authorizes the commission to amend the draft contract in its discretion after a public hearing.⁹²

Where the statute authorizes the city to contract for the construction of an underground street railroad according to plans prepared by the rapid transit commission, provides that the city shall pay for the construction of the road and own the fee, and that the contractor employed to construct and operate the road shall equip it at his own expense, additional excavation and chambers in the walls of the tunnel, rendered necessary by order of the commission because of a determination on electricity as motive power, is a part of the construction and belongs to the city and should be paid for by it.⁹³ The making of such a contract, merely for the construction of a subway, which is to be and remain the property of the city, does not grant to the contractor a "franchise" in the street.⁹⁴

Franchise. A privilege or license, granted for a consideration to operate cars upon tracks belonging to the municipality, is a mere traffic agreement and not a franchise.⁹⁵ The right to operate an underground railroad pursuant to a lease from a city which owns the railroad is not a franchise.⁹⁶

§ 344. — Purchase

Where authorized, a municipality may purchase a street railroad.

Where authorized, a municipality may purchase a street railroad, and, where it does so, it should be held to the performance of the terms of the purchase contract by every moral and equitable rule and by the same rules as control a private corporation under similar circumstances.⁹⁷ A street rail-

83. Ill.—*Barsaloux v. City of Chicago*, 92 N.E. 525, 245 Ill. 598, 19 Ann.Cas. 255.

N.Y.—*Matter of McDonald*, 80 N.Y.S. 536, 80 App.Div. 210, affirmed 67 N.E. 1085, 175 N.Y. 470.

Modification of lease

Ohio.—*Frankenstein v. Goodale*, 26 Ohio N.P., N.S., 584.

84. Ill.—*Barsaloux v. City of Chicago*, 92 N.E. 525, 245 Ill. 598, 19 Ann.Cas. 255.

85. Ill.—*Barsaloux v. City of Chicago*, supra.
60 C.J. p 660 note 35.

86. Mass.—*Horan v. Swain*, 116 N.E. 805, 227 Mass. 142.
60 C.J. p 660 note 36.

87. N.Y.—*Interborough Rapid Transit Co. v. New York*, 95 N.Y.S. 886, 47 Misc. 221.
60 C.J. p 660 note 37.

88. N.Y.—*Hopper v. Willcox*, 140 N.Y.S. 277, 155 App.Div. 213.

89. N.Y.—*Hopper v. Willcox*, supra.
60 C.J. p 660 note 39.

90. Mass.—*Browne v. Turner*, 54 N.E. 510, 174 Mass. 150.
60 C.J. p 660 note 40.

91. Mass.—*Codman v. Crocker*, 89 N.E. 177, 203 Mass. 146, 25 L.R.A., N.S., 980.
60 C.J. p 661 note 41.

92. N.Y.—*Hopper v. Willcox*, 140 N.Y.S. 277, 155 App.Div. 213.

93. N.Y.—*Matter of McDonald*, 80 N.Y.S. 536, 80 App.Div. 210, affirmed 67 N.E. 1085, 175 N.Y. 470.

94. N.Y.—*Admiral Realty Co. v. Gaynor*, 132 N.Y.S. 220, 147 App. Div. 719.
60 C.J. p 661 note 44.

95. N.Y.—*Schinzal v. Best*, 92 N.Y. S. 754, 45 Misc. 455, affirmed 96 N.Y.S. 1145, 109 App.Div. 917.

96. N.Y.—*People v. State Tax Comrs.*, 110 N.Y.S. 577, 126 App. Div. 610, affirmed 89 N.E. 1109, 195 N.Y. 618.
26 C.J. p 1018 note 70.

97. Ohio.—*Sweeny v. Stapleton*, App., 49 N.E.2d 707.

road franchise may provide for the purchase of the property by the municipality,⁹⁸ and such a provision is not destroyed by the fact that the power to purchase extends a reasonable period beyond the company's then chartered life.⁹⁹ General rules have been applied in determining the value of stock held by stockholders of a railroad company opposing a contract for the sale of the railroad to the municipality.¹

Where a city in purchasing an existing street railroad and issuing bonds therefor agrees to make periodic payments out of the gross revenues of the system into a special fund for payment of the bonds and interest, such method of payment is exclusive,² and, where the payments are promptly made, the city cannot be prevented from diverting gross revenues to the payment of subordinate claims, on the theory that the bonds create a lien in gross on all such revenues;³ nor, where the purchase is made by such method, can the amount of a judgment for the seller against the city be charged against the general funds of the city.⁴ So, also, a provision in the contract of purchase, which is also embodied in the deed and bill of sale, accepted by the city and by which it agrees, as part of the consideration, to pay a specified portion of the taxes assessed against the property for the current year, is a valid and enforceable obligation,⁵ and, as between itself and the seller, the city becomes primarily liable for such taxes, and the seller a mere surety, with the right, before payment of the taxes, to main-

tain a suit in equity to compel their payment by the city.⁶

Where the city charter requires that a contract for the sale or leasing of public property shall be taken by ordinance, a city purchasing a streetcar system is not bound by the seller's contract leasing advertising space in the cars, where it has not passed an ordinance accepting an assignment of the lease,⁷ notwithstanding it has accepted payments from the lessee.⁸ A charter provision requiring the municipality to consider offers to sell existing public utilities before constructing new ones is sufficiently complied with where a general solicitation of offers for the sale of any existing street railway is sent to the street railway company and others.⁹

Invalid contract. Where an ordinance authorizing the construction of a street railroad is void in its inception because of want of power in the municipality to grant the particular franchise, a contract given, in consideration of such grant, to transfer the railroad to the city on its request, and on payment of its cost and a certain amount in addition, is also void for want of consideration,¹⁰ and is not saved by a statutory provision authorizing the common council to authorize the construction of a street railroad where the consent of a majority in interest of the abutting owners has been obtained, and permitting the construction, extension, and use of any street railroad already partly constructed under permission of municipal

Wage increase

Where at time city acquired railway company there existed between the company and its employees a contract fixing wages for a prescribed period and providing for arbitration, and board of arbitration had settled controversy over wages by allowing an increase of twelve and one-half cents per hour effective only until date city acquired railway; but subsequently the city by ordinance authorized payment of increase of ten cents an hour, payment of the increased wages was a justifiable payment of a valid moral claim to avoid interruption of service. —Sweeny v. Stapleton, *supra*.

98. N.Y.—Bankers Trust Co. v. City of Yonkers, 6 N.Y.S.2d 883, 255 App.Div. 173, reargument denied 7 N.Y.S.2d 808, 255 App.Div. 851, affirmed 21 N.E.2d 514, 280 N.Y. 738, reargument denied 22 N.E.2d 488, 281 N.Y. 665.

99. U.S.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

1. N.Y.—Application of Shipway, 29 N.Y.S.2d 590.

Going value

N.Y.—Application of Shipway, *supra*.

Book value may be considered.—Application of Shipway, *supra*.

Depreciated reproduction cost may be considered.—Application of Shipway, *supra*.

Market quotations are not controlling.—Application of Shipway, *supra*.

Reserve for damage claims

N.Y.—Application of Shipway, *supra*.

Assessed value of right of way

N.Y.—Application of Shipway, *supra*.

Premium on redemption of preferred stock

N.Y.—Application of Shipway, *supra*.

Costs and counsel fees

N.Y.—Application of Shipway, *supra*.

2. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A.Wash., 29 F.2d 254.

3. U.S.—Puget Sound Power & Light Co. v. City of Seattle, *supra*.

4. U.S.—City of Seattle v. Puget Sound Power & Light Co., C.C.A.Wash., 15 F.2d 794, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874, and 47 S.Ct. 458, 273 U.S. 753, 71 L.Ed. 874.

5. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A.Wash., 5 F.2d 393, certiorari denied 46 S.Ct. 24, 269 U.S. 565, 70 L.Ed. 414.

6. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A.Wash., 5 F.2d 393, certiorari denied 46 S.Ct. 24, 269 U.S. 565, 70 L.Ed. 414.

7. Ariz.—Barron G. Collier, Inc. v. Paddock, 291 P. 1000, 37 Ariz. 194.

8. Ariz.—Barron G. Collier, Inc. v. Paddock, *supra*.

9. U.S.—United Railroads of San Francisco v. City and County of San Francisco, Cal., 39 S.Ct. 361, 249 U.S. 517, 63 L.Ed. 739.

10. N.Y.—Potter v. Collis, 50 N.E. 413, 156 N.Y. 16.

authorities, and to that end confirming the grants, licenses, and resolutions under which the construction was commenced,¹¹ and the company, therefore, is under no legal obligation to surrender or transfer its railroad to the city on request.¹²

Emergency deposit. In the absence of other claims, the grantor of a street railway, purchased by a city, is the beneficial owner of an emergency fund, deposited under its franchise, with the city,¹³ and, where the deed to the city specifically excepts money and choses in action, the city is not entitled to such fund, where, under the sale, the franchise is surrendered, since, the purpose of the fund as security for the performance of franchise duties having ceased, the fund is a chose in action to which the city has no defense,¹⁴ even though a general release has been embodied in the contract of sale which is limited to a date prior to the conveyance of the railway to the city;¹⁵ and, if the city refuses to return such fund, it is liable for interest thereon from the date of the surrender of the franchise.¹⁶

§ 345. By State

A statute providing for the taking over and manage-

ment of a street railroad system by trustees for the commonwealth and for the assessment of a tax to make up a deficiency in revenues has been held valid.

A statute providing for the taking over and operation of a street railroad system by trustees for the commonwealth and for the assessment of a tax to make up a deficiency in revenues has been held valid.¹⁷

Where such a statutory provision is accepted by the street railway company, it constitutes an agreement between it and the commonwealth that the latter shall take over the management and operation of the road and pay therefor the amounts specified as compensation for its use.¹⁸ Title to the property remains in the company with the state taking possession only to the extent and subject to the conditions prescribed by the statute,¹⁹ and the revenue arising from the operation of the railroad is not public money, but belongs to the company.²⁰

Under such a statute, the railroad is managed by the state and not by a subdivision thereof although the railroad operates only in part of the state, and taxes for any deficiency are assessed only in that

11. N.Y.—Potter v. Collis, *supra*.

12. N.Y.—Potter v. Collis, *supra*.
60 C.J. p 662 note 58.

13. Wash.—Puget Sound Power & Light Co. v. City of Seattle, 253 P. 1083, 142 Wash. 580.

14. Wash.—Puget Sound Power & Light Co. v. City of Seattle, 253 P. 1083, 143 Wash. 580.

15. Wash.—Puget Sound Power & Light Co. v. City of Seattle, 253 P. 1083, 143 Wash. 580.

16. Wash.—Puget Sound Power & Light Co. v. City of Seattle, 253 P. 1083, 143 Wash. 580.

17. Mass.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.
60 C.J. p 662 notes 64-66.

18. Mass.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Only power to contract involved

The legislature did not purport by the Public Control Act to take or to authorize taking of possession of properties of Boston Elevated Railway Company or subsequent management thereof by virtue of any sovereign power other than power to enter into contract with company for car-

rying out of a public purpose.—Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

The commonwealth could sue for a breach of the contract and it might maintain an action brought in its own name by the attorney general to recover money due it.—Attorney General v. Trustees of Boston Elevated Ry. Co., *supra*.

Construction as a private contract

Such contract is to be construed as would be a contract between individuals.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, 83 N.E.2d 445, 323 Mass. 562.

19. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Reversion of property

The provision of the Public Control Act stating that at expiration of period of public management and operation of the Boston Elevated Railway Company, control of property should revert to company and that it should then be in good operating condition, imports that control of railway system as a unit should revert to company but does not import that all property of which trustees originally took possession, in the form in which it then existed, should so revert, provision having been made for depreciation, obsolescence, and

rehabilitation.—Boston Elevated Ry. Co. v. Commonwealth, *supra*.

Railroad company retains its corporate existence and continues to be the owner of the properties or rights therein constituting the railway system, notwithstanding the Public Control Act.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.

The arrangement amounts to a lease of the railroad property to the state.—City of Boston v. Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403, affirmed 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274.

20. Mass.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.

Profits from operation

The company continues to derive profits from its railway system by reason of provision in Public Control Act for dividends to its stockholders which, although fixed in amount, are in effect guaranteed by the commonwealth by provision that if company's income is insufficient to meet cost of service, including dividends, and the reserve fund is insufficient, the deficiency shall be paid to the company by the commonwealth out of money raised by taxation.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., *supra*.

area.²¹ The provision of a statute, requiring the state to pay any deficiency of the income over the cost of service, creates an obligation or liability on the part of the state which must be dealt with as such by all the officers of the state.²² The determination of the cost of service for the purpose of ascertaining the deficiency for which the state is liable is to be made in the first instance by the trustees and their determination cannot be set aside unless it is unreasonable;²³ while their determination is not conclusive on the state,²⁴ the state cannot question the wisdom or expedience of expenditures made.²⁵

The statutory requirement that the trustees maintain the property and make provision for depreciation, obsolescence, and rehabilitation, although expressed as an element of compensation for the use of the company's property, implies a purpose that the property shall be maintained for the benefit of the public served by the railway system.²⁶ The trustees who operate and manage the railroad are public officers²⁷ even though they act through the medium of the railroad company and their acts bind the company.²⁸ The trustees have such power as is expressly granted and such implied powers as

21. Mass.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.

22. Mass.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.

Compensation, not gratuity

The payment of fixed dividends to stockholders as provided in contract between commonwealth and the company is not a "gratuity" to stockholders, but in the nature of "compensation" for use of the property in carrying out the public purpose of the Public Control Act.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.

23. Mass.—Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

Discretion

The trustees possess broad discretionary powers in determining the allowances for depreciation and obsolescence that should be included in cost of service and amount that should be expended for rehabilitation of property.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

Depreciation may be included in cost of service and court had no power to decide what was best method of accounting with respect to depreciation; the purpose of a charge for depreciation is to protect integrity of investment, and cost of service rendered should not be burdened with any item which yields the company more than is required to offset loss due to depreciation, and the contractual rights of commonwealth created by Public Control Act must be respected in determining allowances for depreciation and obsolescence that should be included in cost of service.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

Rehabilitation

Where the commonwealth contracted to rehabilitate the property and to maintain and return it to the com-

pany in good operating condition, the trustees were authorized to charge to cost of service amount necessary for that purpose, regardless of whether charges were made ostensibly for depreciation or under some other heading.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

Capital loss which occurred before public management and operation began cannot be charged to cost of service while publicly operated.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

Appraisal

Where commonwealth agreed to rehabilitate property and to maintain and return it to company in good operating condition and to make up any deficiency if revenue and reserve fund proved to be inadequate for that purpose, the fact that trustees did not have an appraisal made of the company's property when they took possession was not just ground of complaint.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

24. Mass.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.

Excess payments by state may be recovered.—Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

25. Mass.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.

26. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Public purpose

Under the Public Control Act, the Boston Elevated Railway Company's railway system continues to be used for the "public purpose" of transporting passengers as a common carrier.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.

27. Mass.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., supra.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Audit

The quoted words of statutory provision that the state auditor shall annually make a careful audit of the "accounts of all departments, offices, commissions, institutions, and activities of the Commonwealth" are comprehensive terms, but their meaning in particular instances cannot be determined solely by dictionary definitions, and whether they include the accounts of the board of trustees of the Boston Elevated Railway Company appointed pursuant to the Public Control Act must be determined in the light of the nature and functions of the board and its relation to the company and the relevant statutes.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.

Determination of cost of service

Although trustees of Boston Elevated Railway Company may for some purposes be considered to be public officers, in determining allowances for depreciation and obsolescence to be included in cost of service under Public Control Act, they were acting as agents of the company concerning a matter covered by contract between company and commonwealth, and interpretation of their contractual authority to make charges against cost of services was an appropriate subject for declaratory decree.—Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

28. Mass.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, 83 N.E.2d 445, 323 Mass. 562.—Auditor of Commonwealth v. Trustees of Boston Elevated Ry. Co., 43 N.E.2d 124, 312 Mass. 74.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

are reasonably necessary for the performance of their duties.²⁹ The statute contemplates that the facilities of the railroad system shall be adapted to meet the changing transportation needs of the public,³⁰ and the trustees in the exercise of their judgment may discontinue certain services.³¹

Where the statute, on acceptance by the company, in substance provides for a contract of sale, it is to be construed as a whole.³² A provision for the assumption by the state of all the company's outstanding debts and liabilities does not include the company's liability for federal income tax on the gain realized from the sale,³³ but does include legal and other incidental expenses incurred by the company in closing the sale.³⁴ Where the statutory

contract gives the state an option to purchase, notice of the exercise of the option as of a stated future date is not a sale as of the date of the notice.³⁵ The extension of a lease of an elevated railway to the commonwealth or of a system of public management thereof does not violate a constitutional provision requiring every charter, franchise, or act of incorporation to remain subject to revocation and amendment, in that such lease would constitute, in substance and effect, a contract as to public business between the commonwealth and a public service corporation.³⁶

Actions for the enforcement of obligations arising during public operation are to be brought by and against the company and not the state.³⁷

STREETWALKING. See the title index to Prostitution.

STRENGTH. The quality or property of being physically strong; power; force.¹

STREPTOCOCCUS. A genus of the tribe *Streptococceæ*, family *Lactobacteriaceæ*, consisting of spherical organisms occurring in pairs or large wavy chains, seldom singly, division of the individuals taking place in one plane only.² "Strep-

tococcie" is defined as "streptococcal," which in turn is defined as meaning relating to, or caused by, some species of streptococcus.³ "Streptococcie" is said to be the scientific term for a form of infection known as blood poisoning.⁴

STREPTOTHRICOSIS. An infectious disease caused by one or more species of *Streptothrix*; it is marked by a chronic suppurative inflammation, the pus containing granules composed chiefly of colonies of the causal microorganism.⁵

Books kept by trustees are books of the company and not of the commonwealth, and, while the books should reflect truthfully transactions of company, the company was not required during the period of public control to keep its books in conformity with those regulations of any governmental agency that are directed to privately owned and operated railway systems.—Attorney General v. Trustees of Boston Elevated Ry. Co., 67 N.E.2d 676, 319 Mass. 642.

29. Mass.—Attorney General v. Trustees of Boston Elevated Ry. Co., supra.

Discretion in management and operation Mass.—In re Opinion of the Justices, 35 N.E.2d 5, 309 Mass. 609.

30. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

31. Mass.—Boston Elevated Ry. Co. v. Commonwealth, supra.

Service in particular locality

Trustees did not exceed their powers in discontinuing passenger service on a particular location, and their

act in doing so bound company.—Boston Elevated Ry. Co. v. Commonwealth, supra.

32. Mass.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, 83 N.E.2d 445, 323 Mass. 562.

"Going concern"

Under contract providing for purchase of company's whole assets, property and franchises as a "going concern," quoted phrase made continued transaction of ordinary business a fundamental prerequisite.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, supra.

33. Mass.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, supra.

Dissolution of company

Under the Public Control Act, pursuant to which the Boston Elevated Railway was operated by public trustees, providing that acceptance constituted agreement by railway to sell assets to the commonwealth, and that sale under the option should work a "dissolution of the company," dissolution was not instantaneous but expressly subject to general statutory provisions relative to dissolu-

tion of corporations, and quoted phrase did not indicate intent that purchaser should be liable for federal capital gain tax arising out of the transfer.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, supra.

34. Mass.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, supra.

35. Mass.—Boston Elevated Ry. Co. v. Metropolitan Transit Authority, supra.

36. Mass.—In re Opinion of the Justices, 159 N.E. 55, 261 Mass. 523.

37. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

1. New Standard D. "Structural strength" see Structural post p 547 note 43.

2. Stedman Med.D.

3. Stedman Med.D.

4. S.D.—Haddorf v. Jerauld County, 260 N.W. 404, 405, 63 S.D. 448.

5. Stedman Med.D.

A rare, branching fungus type of infection.—Stauffer v. Hubley Mfg.

STRESS. Pressure; strain.⁶

STRETCH. To extend or draw out, as to full length or width; hence, to draw tight; tighten.⁷

It has been said that the natural meaning of the word "stretched" as applied to an elastic band is that of intentional extension under tension.⁸

The term "stretching" as employed in the description of boundaries is considered in Boundaries § 4.

STRETCHERS. A technical term of the brick-layer trade which has been applied to three courses of brick laid parallel to the wall.⁹

STRIA. Curved, crooked, and intermittent gouges of irregular depth and width and rough definition,¹⁰ a channel, furrow, or hollow.¹¹

The term has been distinguished from "flat" see 36 C.J.S. p 1023 note 20.

STRICT. Accurate;¹² precise;¹³ exact;¹⁴ rigorous; severe;¹⁵ strenuously enjoined and maintained;¹⁶ not wide or loose;¹⁷ undeviating.¹⁸ Also intimately close, as friendship.¹⁹

STRICTI JURIS. Literally "Of strict right or law; according to strict law."²⁰

The doctrine of stricti juris is treated in Guaranty § 38 d, Liens § 5 b, and Maritime Liens § 7.

STRICTLY. Closely; in a strict manner; positively; precisely; rigorously; stringently.²¹ It is synonymous with "essentially" see 30 C.J.S. p 1228 note 68.

STRIPE. A contention for superiority; a contest.²²

Co., 30 A.2d 370, 373, 151 Pa.Super. 322.

6. W.Va.—Huntington, etc., Transp. Co. v. Western Assur. Co., 57 S.E. 140, 61 W.Va. 324.

Phrases

(1) "Dynamic stress" is the stress set up in a wire rope by reason of change of velocity; such stress may be produced by starting a load from rest at high speed, sharply accelerating a slowly moving load, or by suddenly slowing down or stopping altogether a load being lowered by its own weight.—Shelton v. Seas Shipping Co., D.C.Pa., 75 F.Supp. 195, 202.

(2) "Stress of weather" means constraint imposed by continued bad weather.—Huntington, etc., Transp. Co. v. Western Assur. Co., 57 S.E. 140, 61 W.Va. 324.

7. New Standard D.

8. U.S.—Wolff v. Stewart & Co., D. C.Md., 21 F.Supp. 135, 141.

9. N.Y.—Meehan v. Hogan, 104 N.Y. S. 417, 418, 54 Misc. 241.

"Headers" as bricks with their ends toward the face of the wall see 39 C.J.S. p 807 note 62.

Similarly stated

Stretchers are bricks with their lengths parallel to the face of the wall.—Independent School Dist. No. 35, St. Louis County v. A. Hedenberg & Co., 7 N.W.2d 511, 514, 214 Minn. 82.

10. U.S.—Imperial Machine & Foundry Corp. v. G. S. Blakeslee & Co., C.C.A.N.Y., 262 F. 419, 421.

60 C.J. p 663 note 9.

11. U.S.—Maxim Mfg. Co. v. Imperial Mach. Co., C.C.A.Ill., 256 F. 79, 83.

12. La.—Union Ice & Coal Co. v. Town of Ruston, 66 So. 262, 263, 135 La. 898, L.R.A.1915B 859, Ann. Cas.1916C 1274.

N.Y.—People v. Gardiner, 53 N.Y.S. 451, 453, 33 App.Div. 204.

Phrases

(1) "Strict construction" generally see 16 C.J.S. p 1514 note 67—p 1515 note 69; see also Bonds § 39, Contracts § 294, Deeds § 82, Guaranty § 38, Principal and Surety §§ 132, 133, and Statutes §§ 311, 387.

(2) "Strict foreclosure" see the title index to Mortgages, sub verbo "Foreclosure by action or suit."

(3) "Strict necessity" requirement for implied easement of necessity see Easements § 35 b.

(4) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 663 notes 25—29.

13. La.—Union Ice & Coal Co. v. Town of Ruston, 66 So. 262, 263, 135 La. 898, L.R.A.1915B 859, Ann. Cas. 1916C 1274.

14. La.—Union Ice & Coal Co. v. Town of Ruston, supra.

Similarly defined

(1) Exacting.—Bowman v. Little, 61 A. 223, 657, 1084, 101 Md. 273.

(2) Governed or governing by ex-

act rules.—Union Ice & Coal Co. v. Town of Ruston, 66 So. 262, 263, 135 La. 898, L.R.A.1915B 859, Ann. Cas. 1916C 1274.

(3) Observed, kept, or enforced with rigid exactness.—People v. Gardiner, 53 N.Y.S. 451, 453, 33 App. Div. 204—60 C.J. p 663 note 18.

15. Md.—Bowman v. Little, 61 A. 223, 657, 1084, 101 Md. 273.

16. N.Y.—People v. Gardiner, 53 N.Y.S. 451, 453, 33 App.Div. 204.

17. N.Y.—People v. Gardiner, supra, 60 C.J. p 663 note 17.

18. La.—Union Ice & Coal Co. v. Town of Ruston, 66 So. 262, 263, 135 La. 898, L.R.A.1915B 859, Ann. Cas.1916C 1274.

19. N.Y.—People v. Gardiner, 53 N.Y.S. 451, 453, 33 App.Div. 204, 207.

20. Black L.D.

60 C.J. p 663 note 31.

21. La.—Union Ice & Coal Co. v. Town of Ruston, 66 So. 262, 263, 135 La. 898, L.R.A.1915B 859, Ann. Cas. 1916C 1274.

Phrases

(1) "Strictly choice" equivalent to "choice" see 14 C.J.S. p 1113 note 50.

(2) "Strictly ministerial duty" defined see 28 C.J.S. p 598 note 46.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 663 note 36—p 664 note 43.

22. Mo.—State v. Noell, 295 S.W. 529, 531, 220 Mo.App. 883.

60 C.J. p 664 note 46.

STRIKE. The word "strike," as a noun, is defined generally as meaning an act of striking or hitting; a blow.²³

As a mining term the noun "strike" is defined in Mines and Minerals § 3 b (6).

As a verb, the word "strike" implies force,²⁴ and is defined as meaning to beat;²⁵ to hit with some force;²⁶ to come in collision with;²⁷ to give a blow to.²⁸ When used in connection with the action of the elements, "strike" implies injury or destruction.²⁹

23. New Standard D.

24. N.D.—Issendorf v. State, 283 N. W. 783, 784, 69 N.D. 56.

25. Mo.—State v. Burkhart, App. 34 S.W.2d 563.

26. Mo.—Salmons v. Dun & Bradstreet, 162 S.W.2d 245, 251, 349 Mo. 498, 141 A.L.R. 674.

27. Ala.—French v. State, 20 So.2d 237, 238, 31 Ala.App. 559.

Mo.—Salmons v. Dun & Bradstreet, 162 S.W.2d 245, 251, 349 Mo. 498, 141 A.L.R. 674.

28. Mo.—Salmons v. Dun & Bradstreet, supra.

29. N.D.—Issendorf v. State, 283 N. W. 783, 784, 69 N.D. 56.

30. Webster New Int.D.

Ruling lines

As known in art of ruling lines on paper, term "striking" refers to ruling lines so that lines begin and end at predetermined points on sheet.—Lindblad Corporation v. C. E. Sheppard Co., D.C.N.Y., 7 F.Supp. 446, 447.

31. Mass.—Commonwealth v. Gallagher, 6 Metc. 565, 568. 60 C.J. p 664 note 51.

32. N.D.—Issendorf v. State, 283 N. W. 783, 784, 69 N.D. 56.

33. Phrases

(1) "Special or struck jury" see the index to the title Juries.

(2) "Strike out" means to blot out; to efface; to erase; to force out.—City of St. Louis v. Kellman, 139 S.W. 443, 446, 235 Mo. 687—60 C.J. p 664 note 62.

(3) "Striking off" of property is the overt vocal act whereby the auctioneer or other person conducting the sale signifies his acceptance of a bid made; it is the formal response to a bid announced by another.—Hughes v. Raney, 110 P.2d 544, 545, 45 N.M. 89.

(4) "Struck off" In common par-

lance, and in the language of the auction room, property is understood to be "struck off" or "knocked down" when the auctioneer, by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount bid according to the terms of the sale.—State v. Hoboken Second Nat. Bank, 35 A. 859, 890, 84 Md. 325—60 C.J. p 664 note 59. Manner of accepting bid at auction sale see Auctions and Auctioneers § 7 e (3).

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 664 notes 52-55, 57.

34. Del.—Motion Picture Projectionists Protective Union, Local No. 473 v. Rialto Theatre Co., 17 A.2d 836, 840, 25 Del.Ch. 347.

Insurrections of labor

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Criminal conspiracy under English common law

"It is true that there was a time when the courts of England held that an agreement of workmen to quit work in a body, for the purpose of securing better wages or improved conditions for labor, was a criminal conspiracy at common law; but this attitude may well be considered to have been a survival of the spirit which existed when Gurth, the Saxon swineherd, wore an iron collar riveted about his neck, and more than 40 years ago the English Parliament repudiated this doctrine by an affirmative statute."—Hall v. Johnson, 169 P. 515, 518, 87 Or. 21, Ann.Cas.1918E 49.

35. Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Impossible to devise a legal strike

"It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of in-

"Striking," the present participle of "strike,"³⁰ implies force applied with impetus; a blow.³¹ "Struck" is the past tense of "strike."³²

Phrases employing the various forms of the word are set out in the note.³³

In the Industrial or Labor Sense

In General. The early conception of the strike was as a conspiracy to be dealt with as such, in either a criminal or a civil action,³⁴ and the opinion has sometimes been expressed that there is no such thing as a legal or peaceful strike.³⁵

telligence. From first to last, from the earliest recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connellsville, Pa., occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can come only through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed. I know of no peaceable strike. I think that no strike was ever heard of that was or could be successful unaccompanied by intimidation and violence."—Farmers' Loan & Trust Co. v. Northern Pac. R. Co.,

This early concept has given place to the acceptance of the strike as an indispensable,³⁶ fundamental,³⁷ common-law,³⁸ right of labor in its struggle with capital,³⁹ and the right to strike is now generally recognized,⁴⁰ and it has been said that

the change in the law by which strikes, once illegal and even criminal, are now recognized as lawful was effected in America largely without the intervention of legislation.⁴¹

C.C.Wis., 60 F. 802, 821, 822, 25 L.R.A. 414.

36. Del.—Motion Picture Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 840, 25 Del.Ch. 347.

37. N.J.—Bayonne Textile Corp. v. American Fed. of Silk Workers, 172 A. 551, 554, 116 N.J.Eq. 146.

Effect of denial of right

To deny the right to strike would, in effect, compel the acceptance of the scale of wages fixed by the employer.—Bayonne Textile Corp. v. American Fed. of Silk Workers, 172 A. 551, 554, 116 N.J.Eq. 146.

38. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 3, 301 Mass. 573.

Common-law right to pursue calling

"The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit."—Pickett v. Walsh, 78 N.E. 753, 757, 192 Mass. 572, 6 L.R.A.N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

Origin of common-law right

"Undisputed also is the proposition, based upon sound public policy, that workmen have a common law right to strike, that is, to combine to cease work, for the purpose of coercing their employer into providing higher wages, shorter hours and better conditions of employment. As early as 1542, in the leading case of *Commonwealth v. Hunt*, 4 Metc. 111, 38 Am.Dec. 346, this court held that an indictment for conspiracy, alleging in substance 'that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman' (page 128), did not charge either an illegal object or illegal means. In that case, it is believed for the first time, the general right of workmen, when free from valid contractual obligation, to strike against their employer, was established. It has never been challenged since."—Simon v. Schwachman, 18 N.E.2d 1, 3, 301 Mass. 573.

39. Del.—Motion Picture Projectionists Protective Union, Local No.

473 v. Rialto Theatre Co., 17 A.2d 836, 840, 25 Del.Ch. 347.

40. Ga.—McMichael v. Atlanta Envelope Co., 103 S.E. 226, 230, 151 Ga. 776, 26 A.L.R. 149.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1913D 347.

Minn.—Gray v. Building Trades Council, 97 N.W. 662, 667, 91 Minn. 171, 63 L.R.A. 753, 103 Am.S.R. 477, 1 Ann.Cas. 172.

Mo.—Rogers v. Poteet, 199 S.W.2d 378, 388, 355 Mo. 986—Lohse Patent Door Co. v. Fuelle, 114 S.W. 1002, 1004, 215 Mo. 421.

N.J.—Four Plating Co. v. Mako, 194 A. 53, 55, 122 N.J.Eq. 298.

N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 84, 268 App.Div. 516—Rentner v. Sigman, 216 N.Y.S. 79, 126 Misc. 781.

Long-established right

N.J.—Bayonne Textile Corp. v. American Fed. of Silk Workers, 172 A. 551, 554, 116 N.J.Eq. 146.

General recognition of right

"We think that to-day no court would question the right of an organized union of employes, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a 'strike.'"—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

Right of a labor union

There is no question of the general right of a labor union to strike.—Pickett v. Walsh, 78 N.E. 753, 756, 192 Mass. 572, 6 L.R.A.N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

Recognition of right in England

In England since the legislation of 1871–1875, the legality of trade disputes, or strikes as such, has been fully recognized. That is, the cessation or abstention from work by laborers in order to influence and better employment conditions has been recognized, but the mode and manner of carrying out the strike are subject to certain prescribed conditions.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S. 257, 276.

Development of right to strike

"Sometimes under stress of gen-

uine emotion, sometimes in rant, and sometimes in misguided ignorance, labor speaks of its 'right' to strike as God-given. Right to strike is God-given in the same sense that right indicated by the word 'property' is God-given. They both developed naturally out of the relation of man to his environment, including other men. The primitive man claimed the game he killed, because it was necessary to his survival. This ownership extended to the flints he chipped, the arrows he barbed, and other things on which he depended for existence. Consciousness that a fight and probable injury would result induced other men to refrain from interfering with his possession. The practice grew into an overtly admitted claim. The practice became habitual, then customary and general, and finally crystallized into a rule, simply through a feeling that the rule possessed obligatory force. When legal institutions were set up, the sphere of self-help in enforcing the rule was very greatly narrowed. The right to strike grew up in precisely the same way. Quitting work, first permanently, and then with the expectation of resuming was found by experience to produce a result which served an end. The practice of quitting work grew as the satisfaction was more often desired. The practice so fitted into the scheme of relations that it became recognized as rightful, and was protected by law. It has served as a rude but valuable weapon in the attainment of justice, and has been a positive factor contributing to social progress. As in the case of property, abuse and misuse are not to be tolerated."—State ex rel. Hopkins v. Howat, 198 P. 686, 699, 109 Kan. 376.

Labor union membership not essential

"Employees, whether members of a labor union or not have a right to strike."—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J. Eq. 222.

41. U.S.—Duplex Printing Press Co. v. Deering, N.Y., 41 S.Ct. 172, 181, 254 U.S. 443, 65 L.Ed. 349, 16 A.L.R. 196.

Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 304, 186 Wis. 24.

"This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but

The right to strike is now regarded as one manifestation of the competition or struggle for survival or place which is inevitable in individualistic society,⁴² and the strike is considered to be an economic⁴³ weapon⁴⁴ with which the employee may legally arm himself to defend or assert his rights, or maintain his status, in industrial disputes,⁴⁵ and is a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital,⁴⁶ and the rules governing strikes have grown from the economic relations and the disparity of bargaining power between employer and employee.⁴⁷ However, the courts have expressed regret that society has not been able to evolve a more efficient or logical mode of settling labor disputes than the strike,⁴⁸ which has been characterized as an archaic clumsy expedient, and a disruptive force.⁴⁹

The right to strike is a relative right⁵⁰ which must be exercised with due regard for the rights of others,⁵¹ and neither the common law nor the Fourteenth Amendment to the federal Constitution confers the absolute right to strike.⁵²

Since the act of workmen quitting employment in a body cannot, in itself, involve any question of public peace, health, or safety, unless it be complicated with some other problem, as stated *infra* p 529 note 93, strikes may not be prohibited by municipal regulation,⁵³ and such regulations have been held to be void as unreasonable and contrary to public policy.⁵⁴

Definitions.

—As a Noun. As used with reference to the employer-employee relation, the term "strike" has a universally understood signification,⁵⁵ and the commonly accepted meaning⁵⁶ is the act of quitting

to a better realization of the facts of industrial life."

U.S.—Duplex Printing Press Co. v. Deering, N.Y., 41 S.Ct. 172, 181, 254 U.S. 443, 65 L.Ed. 349, 16 A.L.R. 196.

Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 308, 186 Wis. 24.

42. U.S.—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 50, 91 C.C.A. 631, 20 L.R.A., N.S., 315.

43. Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.

Not a substitute for legal procedure

"A strike, though a lawful and valuable economic weapon, is not a substitute for orderly procedure in court."—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 746.

44. Strikes are effective weapons in the hands of organized labor.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo.App. 27.

45. N.J.—Restful Slipper Co. v. United Shoe & Leather Union, Ch., 174 A. 543, 546, 116 N.J.Eq. 521.

46. U.S.—American Steel Foundries v. Tri-City Central Trade Council, Ill., 42 S.Ct. 72, 78, 257 U.S. 184.

N.J.—Bayonne Textile Corp. v. American Federation of Silk Workers, 172 A. 551, 556, 116 N.J.Eq. 146, 92 A.L.R. 1459.

47. N.J.—Suchodolski v. American Federation of Labor, 14 A.2d 51, 52, 127 N.J.Eq. 511.

48. Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S. 257, 269.

49. Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, *supra*.

50. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J. Eq. 222.

No higher than other rights

"The right of a labor association to strike is no higher than the right of a nonunion workman to take employment in place of the strikers."—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 328, 156 Cal. 70.

Limited right

"We have now arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best. In addition to the limitation thus put on labor unions there is a fact which puts a further limitation on what acts a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take for example the power of a labor union to compel by a strike compliance with its demands. Speaking generally a strike to be successful means not only coercion and compulsion but coercion and compulsion which, for practical purposes, are irresistible. A success-

ful strike by laborers means, in many if not most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have."—Pickett v. Walsh, 78 N.E. 753, 757, 192 Mass. 572, 6 L.R.A., N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

51. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J. Eq. 222.

52. U.S.—Dorchy v. State of Kansas, Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 337, 140 Or. 35.

Wis.—International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 881, 250 Wis. 550.

53. Or.—Hall v. Johnson, 169 P. 515, 518, 87 Or. 21, Ann.Cas.1918E 49.

54. Or.—Hall v. Johnson, *supra*.

55. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

56. Fla.—State ex rel. Frazier v.

work;⁵⁷ and, specifically, such an act done by mutual understanding of a body of workmen as a means of enforcing compliance with demands made on their employer;⁵⁸ the act of a body of workmen employed by the same master in stopping work all together at a prearranged time and refusing to continue until higher wages or shorter hours, or some other concession, is granted to them by the employer;⁵⁹ the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made on him, and which he has refused.⁶⁰

The word "strike" is applied commonly to a

combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted;⁶¹ and the term is defined as meaning a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand;⁶² a combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time;⁶³ a com-

Coleman, 23 So.2d 477, 478, 156 Fla. 413.

57. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.

Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Wis.—International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550—Walter W. Oefflein, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.

Similarly defined

A combination to quit work.—Albro J. Newton Co. v. Erickson, 126 N.Y.S. 949, 951, 70 Misc. 291.

58. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.

Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Wis.—International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550—Walter W. Oefflein, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.

59. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1913D 347—Phillip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Or.—Hall v. Johnson, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49.

Similarly defined

The act of workmen in any trade or branch of industry when they leave their work with the object of compelling the master to concede certain demands made by them, as an advance of wages, the withdrawal of a notice of reduction of wages, a shortening of the hours of work, the withdrawal of any obnoxious rule or regulation, or the like.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

60. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

61. U.S.—N. L. R. B. v. Illinois Bell Tel. Co., C.A.7, 189 F.2d 124, 127—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397.

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

Similarly expressed

As is indicated by the definitions, the word "strike" ordinarily connotes a movement growing out of problems arising between the employee and the employer class, relating to hours, wages, or employment conditions, in the course of which there is a concerted suspension of employment by the employees for the purpose of enforcing certain demands against the employer, or employers.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.

62. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 327—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 821, 25 L.R.A. 414.

Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

63. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1913D 347—Phillip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ohio.—United States Coal Co. v. Unemployment Compensation Board of Review, 32 N.E.2d 763, 764, 66 Ohio App. 329.

Excellent definition

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ohio.—United States Coal Co. v. Unemployment Compensation Board of Review, 32 N.E.2d 763, 764, 66 Ohio App. 329.

bination among laborers, or those employed by others, to compel an increase of wages, change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character or number of men employed, or the like;⁶⁴ a concerted or general quitting of work by a body of employees in order to coerce their employer or employers in some way, as when higher wages or shorter hours are demanded, or a reduction of wages is resisted;⁶⁵ a concerted refusal to serve in an industry, either to assert a supposed right or to obtain an economic

advantage;⁶⁶ a concerted refusal by employees to do any work for their employer,⁶⁷ or to work at their customary rate of speed,⁶⁸ until the object of the strike is attained,⁶⁹ that is, until the employer grants the concessions demanded;⁷⁰ any general refusal to work as a coercive measure.⁷¹

"Strike" is further defined as meaning a cessation of work by employees in an effort to secure for the employees more desirable⁷² or favorable⁷³ terms; a stopping of work by workmen in order to obtain or resist a change in conditions of employment;⁷⁴ a stoppage of work by common agreement

Similarly defined

A combination to obtain higher wages, shorter hours of employment, better working conditions, or some other concession from their employer by the employees stopping work at a preconceived time.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 338, 140 Or. 35.

64. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

N.Y.—Delaware, L. & W. R. Co. v. Bounds, 58 N.Y. 573, 582.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

65. Ill.—Philip Henri Co. v. Alexander, 198 Ill.App. 568, 578.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

Similarly defined

A concerted abandonment or desertion of their employment by groups of employees with the object of improving their working conditions, hours of labor, and wages.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 634, 172 Misc. 95.

66. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.

67. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Mich.—Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W.2d 900, 903, 317 Mich. 311.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.

68. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

69. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.

70. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Mich.—Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W.2d 900, 903, 317 Mich. 311.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.

71. Ill.—Philip Henri Co. v. Alexander, 198 Ill.App. 568, 578.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

72. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137.—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 186 F. 45, 52, 91 C.C.A. 631, 20 L.R.A.N.S. 315.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Ind.—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 801, 128 N.J.Eq. 450—Restful

Slipper Co. v. United Shoe & Leather Union, Ch., 174 A. 543, 545, 116 N.J.Eq. 521.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600. Wash.—In re North River Logging Co., 130 P.2d 64, 66, 15 Wash.2d 204.

Authorities in substantial accord as to this definition

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

Similarly defined

(1) A cessation of work on the part of employees until more desirable terms of employment can be obtained.—Dignan v. Metropolitan Life Ins. Co., 34 N.Y.S.2d 238, 239, 178 Misc. 312.

(2) The cessation of work by employees in an effort to secure better terms of employment.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S. 257, 274.

(3) A cessation of work as a means of enforcing compliance with some demand on the employer.—People, on Complaint of Mandel v. Tepel, 3 N.Y.S.2d 779, 780.

(4) A cessation of work by employees for the purpose of coercing compliance with their demands.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Ohio Com.Pl., 93 N.E.2d 301, 302.

73. Ill.—Bankston Creek Collieries v. Gordon, 77 N.E.2d 670, 674, 399 Ill. 291.

74. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.

Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16.—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

of a body of workmen⁷⁵ for the purpose of obtaining or resisting a change in the conditions of employment;⁷⁶ a concerted cessation of work, intended to disrupt the business of the employer, and thereby induce him to act in a manner desired by the strikers;⁷⁷ a simultaneous cessation of work by workmen acting in combination to compel their common employer to accede to demands made on him by such combination.⁷⁸

Since it is uniformly recognized that a legal strike may be for the purpose of improving the conditions of the employees, or to maintain or secure higher wages as stated *infra* p 530 note 16—p 531 note 18, a strike exists where men quit their work because their employer refuses the conditions demanded of him,⁷⁹ and where there is a disagreement between employer and employee as to wages, and a demand is made by the employees for new and different terms, and there is a refusal by the employer to comply, and as a consequence there is a refusal of the employees to work, there is a strike in the ordinary meaning of the word.⁸⁰ Furthermore, the courts have said

that they are not prepared, in the absence of evidence, to hold as a matter of law that a combination among employees, having for its object their orderly withdrawal in a large number or in a body from the service of their employer simply because of a reduction of wages is not a "strike," within the meaning of the word as commonly used.⁸¹

—As a Verb. The word "strike," when used as a verb and with reference to the employer-employee relationship, in common usage means to quit work along with others in order to compel an employer to accede to some demand,⁸² as for increase of pay, or to protest against something, as a reduction of wages;⁸³ as to strike for higher pay or shorter hours of work;⁸⁴ to quit work in order to obtain, or resist, a change in conditions of employment;⁸⁵ to quit work in order to compel an increase or prevent a reduction of wages;⁸⁶ to quit work in a body, or by combination, in order to compel their employers to raise their wages;⁸⁷ to cease from work in order to extort higher wages as workmen;⁸⁸ to cease work in a body by prearrangement until a

N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.

75. Ill.—Walgreen Co. v. Murphy, 53 N.E.2d 390, 393, 386 Ill. 32.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S. 257, 274.

Similarly defined

(1) A stoppage of work by common agreement of workmen.

Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.

Mich.—Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, 13 N.W.2d 260, 264, 308 Mich. 198, 154 A.L.R. 660.

Okl.—Board of Review v. Mid-Continent Petroleum Corp., 141 P.2d 69, 72, 193 Okl. 36.

(2) A stoppage of work by common agreement for the purpose of obtaining or resisting a change in the conditions of employment.—Fash v. Gordon, 75 N.E.2d 294, 297, 298, 398 Ill. 210—Local Union No. 11 v. Gordon, 71 N.E.2d 637, 641, 396 Ill. 293.

76. Ill.—Local Union No. 11 v. Gordon, *supra*—Walgreen Co. v. Murphy, 53 N.E.2d 390, 393, 386 Ill. 32.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.

Best definition

Ohio.—Park v. Locals Nos. 106, 107,

108, & 167 of Hotel & Restaurant Employees Int. Alliance, *supra*.

Similarly defined

The quitting of work by a body of workmen done by mutual understanding, in order to obtain or resist a change in conditions of employment.

—American Ry. Express Co. v. Johnson, 100 So. 743, 745, 87 Fla. 451.

77. N.J.—State v. Traffic Tel. Workers Federation of N. J., 61 A.2d 570, 575, 142 N.J.Eq. 785.

78. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.

Similarly expressed

The simultaneous cessation of work on the part of workmen.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, *supra*.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

79. U.S.—Dall-Overland Co. v. Willys-Overland Inc., D.C.Ohio, 263 F. 171, 187.

80. Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

81. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 327.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

82. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414. Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 273.

83. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.

84. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., *supra*.

85. Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

86. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

87. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., *supra*.

88. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., *supra*. Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.

grievance is redressed;⁸⁹ to press a claim or demand by coercive or threatening action of some kind.⁹⁰

Legality of Strike. It has been stated that a strike can never be, in and of itself, illegal,⁹¹ and is not, in and of itself, an unlawful act,⁹² since the act of workmen quitting employment in a body cannot, alone, involve any question of public peace, health, or safety, unless it be complicated with some other problem.⁹³ It does not follow, however, that all strikes are lawful or legal,⁹⁴ but neither is it true that all strikes are necessarily illegal⁹⁵ or unlaw-

ful.⁹⁶ A strike may be legal⁹⁷ or lawful,⁹⁸ or it may be illegal⁹⁹ or unlawful,¹ or it may even be criminal.²

While a strike may not be in violation of an express contract or statute,³ it is generally recognized that the legality or illegality of a strike depends on two factors, first, the purpose for which it is maintained, and second, the means employed in carrying it on,⁴ and these two factors are treated in the two following subdivisions.

89. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 395, 255 Ill. 213, Ann. Cas.1913D 347.

N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas.1918D 661—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P.,N.S., 257, 274.

90. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Ohio.—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P.,N.S., 257, 273.

91. N.Y.—Albro J. Newton Co. v. Erickson, 126 N.Y.S. 949, 951, 70 Misc. 291.

92. Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

93. Or.—Hall v. Johnson, 169 P. 515, 518, 87 Or. 21, Ann.Cas.1918E 49.

Not necessarily breaches of the peace
Strikes do not necessarily engender breaches of the peace.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

94. Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 394, 255 Ill. 213, Ann. Cas.1913D 347.

Mass.—Burnham v. Dowd, 104 N.E. 841, 843, 217 Mass. 351, 51 L.R.A., N.S., 778.

N.J.—Four Plating Co. v. Mako, 194 A. 53, 55, 122 N.J.Eq. 298.

95. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

96. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 395, 255 Ill. 213, Ann. Cas.1913D 347.

Minn.—Gray v. Building Trades Council, 97 N.W. 663, 667, 91 Minn. 171, 63 L.R.A. 753, 103 Am.S.R. 477, 1 Ann.Cas. 172.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

97. Mass.—Fashioncraft v. Halpern, 48 N.E.2d 1, 4, 313 Mass. 385—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125.

N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

98. U.S.—Duplex Printing Press Co. v. Deering, N.Y., 41 S.Ct. 172, 181, 254 U.S. 443, 65 L.Ed. 349, 16 A. L.R. 196.

Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

N.Y.—Herzog v. Cline, 227 N.Y.S. 462, 464, 465, 131 Misc. 816—Michaels v. Hillman, 183 N.Y.S. 195, 203, 112 Misc. 395—Albro J. Newton Co. v. Erickson, 126 N.Y.S. 949, 951, 70 Misc. 291.

Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 432, 287 Pa. 171, 47 A.L.R. 745.

Lawful inducement

N.J.—Four Plating Co. v. Mako, 194 A. 53, 55, 122 N.J.Eq. 298.

Perfectly innocent

U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

99. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Mass.—Fashioncraft v. Halpern, 48 N.E.2d 1, 4, 313 Mass. 385.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Some strikes by labor unions are illegal

Mass.—Pickett v. Walsh, 78 N.E. 753, 756, 192 Mass. 572, 6 L.R.A.,N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

1. Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

N.Y.—Michaels v. Hillman, 183 N.Y.S. 195, 203, 112 Misc. 395.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

2. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

3. N.Y.—Maisel v. Sigman, 205 N.Y. S. 807, 813, 814, 123 Misc. 714.

4. Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Similarly expressed

(1) A strike may be legal or illegal according to the acts involved therein.—Kingston Trap Rock Co. v. International Union of Operating Engineers, 19 A.2d 661, 668, 129 N.J.Eq. 570.

(2) A strike becomes unlawful only when conducted in an unlawful manner, or for an unlawful object, or for an object not substantially connected with the economic well-being of the members of the union.—Four Plating

—As Dependent on Purpose. One of the factors which determines the legality or illegality of a strike is the purpose for which the strike is maintained, as stated *supra* p 529 note 4, and thus a strike may be illegal because of its purpose,⁵ however orderly the manner in which it is conducted,⁶ and if a strike is for an unlawful object all acts done in support of the strike are unlawful.⁷

A lawful strike may be maintained only for the purpose of obtaining that which is lawful,⁸ since a strike for an unlawful purpose is beyond any lawful sanction⁹ and may not be maintained,¹⁰ and a

combination to strike for the purpose of accomplishing an object which is not regarded as lawful is a wrong for which the law affords a remedy.¹¹

A strike for both a legal and an illegal purpose is an illegal strike,¹² but the mere violation of a contract not to strike does not render the strike illegal.¹³

Strikes to accomplish certain ends are lawful,¹⁴ such as strikes to assert a supposed right or to obtain an economic advantage,¹⁵ and it is uniformly recognized that strikes to improve the conditions of the employees are legal,¹⁶ as are strikes to main-

Co. v. Mako, 194 A. 53, 55, 56, 122 N. J.Eq. 298.

(3) The cases in which concerted action on the part of a body of workers has been held unlawful have invariably been such in which either the object sought to be attained had little or no bearing on the interest of the workers, or in which the methods employed by them were in themselves unlawful.—New Jersey Painting Co. v. Local No. 26, 126 A. 399, 403, 96 N.J.Eq. 632, 47 A.L.R. 384.

(4) "Without discussing the conflicting authorities in other jurisdictions, in this commonwealth, in the present stage of the industrial controversy, the principle is defined that the legality of a strike depends first upon the purpose for which it is maintained, and secondly on the means employed in carrying it on."—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A.1916C 218.

5. U.S.—Dorchy v. State of Kansas, Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 337, 140 Or. 35.

Similarly expressed

(1) If the object of a strike is unlawful the means and end are alike condemned.

U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 867, 301 U.S. 468, 81 L.Ed. 1229.
N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 810, 122 N. J.Eq. 222.

(2) "It is settled in this commonwealth that the legality of a combination not to work for an employer, that is to say, of a strike, depends (in case the strikers are not under contract to work for him) upon the purpose for which the combination is formed—the purpose for which the employees strike. We have

excluded all cases where the employees are under contract to work for their employer, because it is now settled in this commonwealth at least that competition and similar defenses are not a justification for inducing an employee or other person to commit a breach of contract and thereby interfering with the business of the employer. . . . From that it would seem to follow necessarily that, in case of persons under contract to work a strike or combination not to work, in violation of that contract, to secure something not due to them under that contract, would be a combination interfering without justification with the employer's business."—Reynolds v. Davis, 84 N.E. 457, 458, 198 Mass. 294, 17 L.R.A., N.S., 162.

6. U.S.—Dorchy v. State of Kansas, Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 337, 140 Or. 35.

7. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 867, 301 U.S. 468, 81 L.Ed. 1229.

Ill.—Fenske Bros. v. Upholsterers' Union, 193 N.E. 112, 117, 358 Ill. 239, 97 A.L.R. 1318.

N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 810, 122 N. J.Eq. 222—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 496, 114 N.J.Eq. 586.

Including picketing

N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 810, 122 N. J.Eq. 222—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 496, 114 N.J.Eq. 586.

8. Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

9. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 867, 301 U.S. 468, 81 L.Ed. 1229.

N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 810, 122 N. J.Eq. 222.

10. N.Y.—Rentner v. Sigman, 216 N. Y.S. 79, 80, 126 Misc. 781.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

11. Idaho.—Robison v. Hotel & Restaurant Employees, Local No. 782, 207 P. 132, 135, 35 Idaho 418.

12. Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

Mass.—Folsom Engraving Co. v. McNeill, 126 N.E. 479, 235 Mass. 269 —Baush Machine Tool Co. v. Hill, 120 N.E. 188, 231 Mass. 30.

13. Ohio.—Lundoff-Bicknell Co. v. Smith, 156 N.E. 243, 245, 24 Ohio App. 294.

14. Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

15. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.

16. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 867, 301 U.S. 468, 81 L.Ed. 1229.

Cal.—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 255 Ill. 213, Ann.Cas. 1913D 347.

Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A.1916C 218.

Minn.—Gray v. Building Trades Council, 97 N.W. 663, 666, 91 Minn. 171,

tain wages,¹⁷ or to secure higher wages¹⁸ or shorter hours,¹⁹ or to compel an employer to fulfill his engagement with the employees,²⁰ but such an enumeration does not purport to cover all the grounds which will lawfully justify a strike, and the enumeration is illustrative rather than comprehensive;²¹

and, in general, the right to strike may be to secure any lawful benefit.²² Thus it may be lawful to strike because an employee has been given employment,²³ or because an employee has been discharged,²⁴ or to secure the reemployment of an em-

63 L.R.A. 753, 103 Am.S.R. 477, 1 Ann.Cas. 172.

N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas.1918D 661—Wilson & Adams v. Pearce, 237 N.Y.S. 601, 608, 135 Misc. 426—Herzog v. Cline, 227 N.Y.S. 462, 464, 465, 131 Misc. 816—Albro J. Newton Co. v. Erickson, 126 N.Y.S. 949, 951, 70 Misc. 291.

Right firmly established

U.S.—Tri-City Central Trades Council v. American Steel Foundries, C.C.A. Ill., 238 F. 728, 732.

Improved relations with employers

N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

Object just and praiseworthy

A perfectly legal strike may be inaugurated and maintained if the object is to better the condition of the workmen, and such an object is not only legitimate and lawful, but just and praiseworthy.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

As justification for concerted action

Where a bona fide labor dispute exists as to the conditions of employment a strike is lawful, and justification exists for the concerted action.—Motion Picture Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 838, 842, 25 Del.Ch. 347.

17. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 394, 255 Ill. 213, Ann.Cas.1913D 347.

N.J.—New Jersey Painting Co. v. Local No. 26, 126 A. 399, 402, 96 N.J. Eq. 632, 47 A.L.R. 384.

18. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Cal.—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 394, 255 Ill. 213, Ann.Cas. 1913D 347.

Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125—Baush Machine Tool Co. v. Hill, 120 N.E. 188, 231

Mass. 30—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A.1916C 218—M. Steinert & Sons Co. v. Tegen, 93 N.E. 584, 585, 207 Mass. 394, 32 L.R.A.N.S., 879, Ann.Cas.1915B 659—L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3, 85 N.E. 897, 899, 200 Mass. 110, 23 L.R.A.N.S., 1236. Minn.—Gray v. Building Trades Council, 97 N.W. 663, 666, 91 Minn. 171, 63 L.R.A. 753, 103 Am.S.R. 477, 1 Ann.Cas. 172.

N.J.—New Jersey Painting Co. v. Local No. 26, 126 A. 399, 402, 96 N.J. Eq. 632, 47 A.L.R. 384.

N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Right firmly established

U.S.—Tri-City Central Trades Council v. American Steel Foundries, C.C.A.Ill., 238 F. 728, 732.

19. Cal.—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 394, 255 Ill. 213, Ann.Cas. 1913D 347.

Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A. 1916C 218—M. Steinert & Sons Co. v. Tegen, 93 N.E. 584, 585, 207 Mass. 394, 32 L.R.A.N.S., 879, Ann.Cas. 1915B 659—L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3, 85 N.E. 897, 899, 200 Mass. 110, 23 L.R.A.N.S., 1236.

N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

20. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Mass.—Walton Lunch Co. v. Kearney, 128 N.E. 429, 430, 236 Mass. 310.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Engagement to discuss closed-shop agreement

A strike because of an employer's failing to keep an engagement to discuss a closed-shop agreement has been held to be legal.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125.

21. N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

22. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 255 Ill. 213, Ann.Cas. 1913D 347.

N.Y.—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Similarly expressed

(1) A strike may be for any one or more specific conditions which workers may deem for the improvement of their terms of employment.—People on Complaint of Mandel v. Tepel, 3 N.Y.S.2d 779, 781.

(2) Employees may strike for the purpose of protecting and promoting their common welfare.—McMichael v. Atlanta Envelope Co., 108 S.E. 226, 230, 151 Ga. 776, 26 A.L.R. 149.

(3) Any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees.—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

(4) Those who labor for wages have a right to strike in concert when the object of the strike is for their collective benefit.—Robison v. Hotel & Restaurant Employees, Local No. 782, 207 P. 132, 134, 135, 35 Idaho 418.

23. Cal.—Pierce v. Stablemen's Union, Local No. 8,760, 103 P. 324, 327, 156 Cal. 70.

24. Cal.—Pierce v. Stablemen's Union, Local No. 8,760, supra.

ployee felt to have been wrongfully discharged,²⁵ and strikes for other purposes have been held to be legal.²⁶

It is equally well recognized that a strike is illegal if its purpose is to gratify malice,²⁷ or to harm or inflict injury on others,²⁸ or to injure a person in his business²⁹ where the strike results in no pecuniary benefit to the strikers,³⁰ and thus a strike, if not in self-interest, but for the sole purpose of injuring the employer, may be a malicious tort.³¹ Strikes for other purposes have been held to be illegal,³² such as strikes to enforce the payment of a claim,³³ and strikes to destroy interstate commerce and create public opinion hostile to a governmental board;³⁴ and a strike is illegal if it is the result of an agreement depriving those engaged in it of their liberty of action.³⁵

A strike to compel the employment of a larger number of workers than the employer desires has been held to be illegal,³⁶ and it has been said that it is not a lawful labor objective for a union to insist that machinery be discarded in order that manual labor may take its place, and thus secure additional opportunity of employment,³⁷ but it has also been said that, individually and collectively, the members of any union may at any time refuse to work because machinery is employed, or for any other reason, and may strike in so doing.³⁸

A strike is both unlawful and criminal if its purpose is to destroy the property of another, or to deprive another of his liberty or property without just cause,³⁹ and a strike is criminal if it be part of a combination for the purpose of injuring or molesting either masters or men.⁴⁰

25. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 395, 255 Ill. 213, Ann. Cas.1913D 347.
N.Y.—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.

26. Strikes held to be legal

(1) A strike to force the discharge of an employee's helper, on the ground that there was not enough work to go around.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125—Mina-sian v. Osborne, 96 N.E. 1036, 1037, 210 Mass. 250, 37 L.R.A.,N.S., 179, Ann.Cas.1913C 1299.

(2) A strike by bricklayers and masons to get the work of pointing.—Pickett v. Walsh, 78 N.E. 753, 758, 192 Mass. 572, 6 L.R.A.,N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

(3) Where the employer, although willing to grant the requested increase in wages, was unwilling to make the arrangement as to wages through the union or its representatives, and the employees were unwilling to make such agreement except through the union or its representatives, a strike called by the employees to enforce their demands was legal.—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 646, 221 Mass. 554, L.R.A.1916C 218.

27. N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas. 1918D 661—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 170 N.Y. 315—Wilson & Adams v. Pearce, 237 N.Y.S. 601, 608, 135 Misc. 426—Maisel v. Sigman, 205 N.Y.S. 807, 813, 814, 123 Misc. 714.

28. N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas. 1918D 661—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 170 N.Y. 315—Wilson & Adams v. Pearce, 237 N.Y.S. 601, 608, 135 Misc. 426.

29. Del.—Sarres v. Nouris, 138 A. 607, 610, 15 Del.Ch. 391.
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 335, 337, 140 Or. 35.

30. Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 335, 337, 140 Or. 35.

31. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.

32. Strikes held to be for an illegal purpose

(1) A strike to secure the discharge of foremen because some workmen had personal objections to, and a dislike for, them.—De Minico v. Craig, 94 N.E. 317, 319, 207 Mass. 593, 42 L.R.A.,N.S., 1048.

(2) A strike to compel the employment of union foremen.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 91, 260 Mass. 45, 52 A.L.R. 1125.

(3) A strike because the employer refused to buy only union-made materials, where there was no voluntary agreement between the employer and the union to do so.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 89, 260 Mass. 45, 52 A.L.R. 1125.

33. U.S.—Dorchy v. State of Kansas,

Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

Wis.—International Union, U. A. W. A. A. F. of L. of Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 881, 250 Wis. 550.

To enforce payment of a stale demand

A strike to collect a stale demand due to a fellow member of the union who was formerly employed in the business is not a permissible purpose for a strike.—Dorchy v. State of Kansas, Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

34. U.S.—U. S. Railway Employees' Dept. of A. F. of L., D.C. Ill., 230 F. 978, 982.

35. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

36. Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125.

37. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 353, 235 N.Y. 348, 136 A.L.R. 267.

38. N.Y.—Opera on Tour v. Weber, supra.

39. Conn.—State v. Stockford, 58 A. 769, 772, 77 Conn. 227, 107 Am.S.R. 28.

40. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 11 C.C.A. 209, 25 L.R.A. 414.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

It has been said that the courts are hopelessly divided as to whether a strike to unionize a shop or, in pursuance thereof, to compel the discharge of a nonunion employee is legal or illegal,⁴¹ and that there is a decided conflict between courts in different jurisdictions as well as between courts in the same jurisdiction.⁴² There are statements to the effect that strikes for the purpose of unionization⁴³ or to force the discharge of nonunion men⁴⁴ are illegal; and that a strike for a closed shop is a strike for an unlawful purpose,⁴⁵ and lacks a legitimate aim.⁴⁶ On the other hand, there are statements to the effect that a strike for a union or closed shop,⁴⁷ or to unionize an entire trade, business, or industry,⁴⁸ or to increase the number of members of a union,⁴⁹ or to force the discharge of nonunion men⁵⁰ is legal, and it has been said that the weight of authority in this country is that a primary strike for a closed shop is not per se unlawful.⁵¹

A position somewhat between the two extremes is that a strike for a closed shop is prima facie unlawful, but it may be justified by showing that it was inaugurated to advance the material interests of the union.⁵² The apparent conflict as to the legality or illegality of the strike to secure a closed or union shop results to some extent from the fact that certain contracts for the closed or union shop are illegal, either because of being contrary to public policy, or because of being monopolistic, or because of being contrary to statute, while such contracts as do not violate public policy, or are not monopolistic, or are not contrary to statute, are legal. Such contracts are treated, from the standpoint of public policy, in *Contracts* § 267, from the monopoly standpoint in *Monopolies* § 80, and, from the statutory standpoint, in *Master and Servant* § 28 (40).

Whether the purpose for which a strike is instituted is or is not a legal justification for the

41. Me.—Keith Theatre v. Vachon, 187 A. 692, 696, 134 Me. 392.

42. Del.—Sarros v. Nouris, 138 A. 607, 610, 15 Del.Ch. 391.

43. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 75, 245 U.S. 229, 62 L.Ed. 260, L.R.A. 1918C 487, Ann.Cas.1918B 461.

Mass.—Baush Machine Tool Co. v. Hill, 120 N.E. 188, 231 Mass. 30.

To secure recognition of union

Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125.

44. Mass.—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125.

N.J.—Lehigh Structural S. Co. v. Atlantic Smelting & R. Works, 111 A. 376, 378, 92 N.J.Eq. 131.

45. Mass.—Fashioncraft v. Halpern, 48 N.E.2d 1, 3, 313 Mass. 385—Stearns Lumber Co. v. Howlett, 157 N.E. 82, 87, 260 Mass. 45, 52 A.L.R. 1125—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A.1916C 218.

N.J.—Four Plating Co. v. Mako, 194 A. 53, 56, 122 N.J.Eq. 298—J. Lichtman & Sons v. Leather Workers' Industrial Union, 169 A. 498, 500, 114 N.J.Eq. 596—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 496, 114 N.J.Eq. 586—Lehigh Structural S. Co. v. Atlantic Smelting & R. Works, 111 A. 376, 378, 92 N.J.Eq. 131.

Similarly expressed

"And it seems strange that at this late day it should be necessary to

repeat that a strike that has for its object the 'closed shop' is unlawful."

—Four Plating Co. v. Mako, 194 A. 53, 57, 122 N.J.Eq. 298—International Ticket Co. v. Wendrich, 193 A. 808, 810, 122 N.J.Eq. 222.

Rationale of decision

Whatever advantage might in general accrue to trade unionism by the acquisition of a closed shop arrangement with an employer, there is not sufficient relationship between the aim sought and the self interest of the strikers to justify the intentional infliction of harm on another.—Fashioncraft v. Halpern, 48 N.E.2d 1, 3, 313 Mass. 385.

46. Del.—Sarros v. Nouris, 138 A. 607, 610, 15 Del.Ch. 391.

47. N.Y.—People, on Complaint of Mandel v. Tepel, 3 N.Y.S.2d 779, 780—Rosenwasser Bros. v. Pepper, 172 N.Y.S. 310, 312, 104 Misc. 457.

Similarly expressed

"If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination, injury may result incidentally to nonunion men through the loss of their positions, that object does not become unlawful."—Kemp v. Division No. 241, Amalgamated

Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 394, 255 Ill. 213, Ann.Cas.1913D 347.

48. N.Y.—Mays Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 283, 282 N.Y. 331—Herzog v. Cline, 227 N.Y.S. 462, 464, 465, 131 Misc. 816.

49. N.Y.—Herzog v. Cline, *supra*.

50. N.Y.—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315—Maisel v. Sigman, 205 N.Y. S. 807, 817, 123 Misc. 714.

Dictating terms of employment

"Union workmen who inform their employer that they will strike if he refuses to discharge all non-union workmen in his employ are acting within their absolute right, and in fact are merely dictating the terms on which they will be employed."

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employés of America, 99 N.E. 389, 395, 255 Ill. 213, Ann.Cas. 1913D 347.

N.J.—Four Plating Co. v. Mako, 194 A. 53, 56, 122 N.J.Eq. 298—Jersey City Printing Co. v. Cassidy, 53 A. 230, 231, 232, 63 N.J.Eq. 759.

51. N.J.—Kingston Trap Rock Co. v. International Union of Operating Engineers, 19 A.2d 661, 664, 129 N. J.Eq. 570.

52. N.H.—White Mt. Freezer Co. v. Murphy, 101 A. 357, 361, 78 N.H. 398.

N.J.—Four Plating Co. v. Mako, 194 A. 53, 56, 57, 122 N.J.Eq. 298.

strike is a question of law to be decided by the court.⁵³ In order to be a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the courts hold to have been a legal purpose for a strike,⁵⁴ but it is not necessary that they should have been in the right in instituting a strike for such a purpose.⁵⁵ On the other hand, a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient justification for the strike.⁵⁶

It has been said that a strike does not need to be justified,⁵⁷ and whenever a strike is declared the employees are not required to justify it on the ground that the object of the strike falls within any particular category of the permissible causes.⁵⁸ Rather, it devolves on those who attack the validity of a strike to prove that it comes within an express exception to the general right of workers to strike.⁵⁹

—As Dependent on Means and Methods Employed. One of the factors which determines the legality or illegality of a strike is the means employed in

carrying it on, as stated supra p 529 note 4, and if a strike is for a lawful purpose, as discussed in the previous subdivision, it will be lawful if conducted without violence or intimidation.⁶⁰ The right to strike includes the right to use all lawful and peaceable means in support of the strike⁶¹ and for the attainment of the lawful objects thereof,⁶² and to induce, by such means, present and expectant employees to join the ranks of the strikers,⁶³ and the means employed are lawful if peaceable and devoid of the elements of intimidation and obstruction,⁶⁴ and thus a peaceable and orderly strike is not in violation of law.⁶⁵

On the other hand, labor may not, in conducting a strike, resort to violence and other unlawful conduct,⁶⁶ since the right to strike does not mean the right to strike with clubs, stones, or other weapons,⁶⁷ and the use of illegal means in aid of a lawful strike is a wrong for which the law affords a remedy.⁶⁸ Thus a strike remains lawful only as long as the means employed are lawful,⁶⁹ and a strike is unlawful when unlawful means are used to uphold or maintain it.⁷⁰ In general, the means

53. Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

Mass.—Minasian v. Osborne, 96 N.E. 1036, 1037, 210 Mass. 250, 37 L.R. A.N.S., 179, Ann.Cas.1912C 1299—De Minico v. Craig, 94 N.E. 317, 319, 207 Mass. 593, 42 L.R.A., N.S., 1048.

Question of law

The question whether any particular strike is lawful is a question of law.—Cornellier v. Haverhill Shoe Mfg. Ass'n, 109 N.E. 643, 645, 221 Mass. 554, L.R.A.1916C 218—Burnham v. Dowd, 104 N.E. 841, 843, 217 Mass. 351, 51 L.R.A., N.S., 778.

54. Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

Mass.—De Minico v. Craig, 94 N.E. 317, 319, 207 Mass. 593, 42 L.R.A., N.S., 1048.

55. Mass.—De Minico v. Craig, supra.

56. Mass.—De Minico v. Craig, supra.

57. N.Y.—Albro J. Newton Co. v. Erickson, 126 N.Y.S. 949, 951, 70 Misc. 291.

58. N.Y.—Maisel v. Sigman, 205 N.Y. S. 807, 814, 123 Misc. 714.

59. N.Y.—Maisel v. Sigman, supra.

60. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.
N.J.—Restful Slipper Co. v. United

Shoe & Leather Union, 174 A. 543, 546, 116 N.J.Eq. 521.

61. Ga.—McMicheal v. Atlanta Envelope Co., 108 S.E. 226, 230, 151 Ga. 776, 26 A.L.R. 149.

N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J.Eq. 222.

Right to publicize strike

(1) When employees have lawfully gone on strike they have the right to give notice of the strike, as a matter of news, or to anyone interested therein.—Greenfield v. Central Labor Council, 192 P. 783, 789, 104 Or. 236.

(2) The striking employees have a right to acquaint the public with the fact of the existence of the strike and the causes thereof, and to appeal for sympathetic aid by a request to withhold patronage.—Robison v. Hotel & Restaurant Employees, Local No. 782, 207 P. 132, 135, 35 Idaho 418.

62. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J.Eq. 222.

63. Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 796, 114 Conn. 319.
N.J.—Restful Slipper Co. v. United Shoe & Leather Union, 174 A. 543, 546, 116 N.J.Eq. 521.

Rule long recognized in New Jersey
N.J.—Bayonne Textile Corp. v. American Federation of Silk Workers, 172 A. 551, 559, 116 N.J.Eq. 146.

64. N.J.—Bayonne Textile Corp. v. American Federation of Silk Workers, supra.

65. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 395, 255 Ill. 213, Ann. Cas.1913D 347.

N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas.1918D 661—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 63 N.E. 369, 170 N.Y. 315—Wilson & Adams v. Pearce, 237 N.Y.S. 601, 608.

66. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann. Cas.1913D 347.

67. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J.Eq. 222.

68. Idaho.—Robison v. Hotel & Restaurant Employees, Local No. 782, 207 P. 132, 135, 35 Idaho 418.

69. Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 432, 287 Pa. 171, 47 A.L.R. 745.

70. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 813, 122 N.J.Eq. 222.

N.Y.—Michaels v. Hillman, 183 N.Y. S. 195, 203, 112 Misc. 395.
Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

employed must be free from falsehood, libel, or defamation, and from physical violence, coercion, or moral intimidation,⁷¹ and if such means are employed to carry on a strike, the strike is illegal,⁷² at least until those illegal acts are discontinued.⁷³ However, if the purpose of a strike is lawful, but unlawful means are used to effectuate it, such means cannot be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all acts done in its furtherance.⁷⁴

At one time picketing was deemed to be an illegal means of conducting a strike,⁷⁵ and strikes have been held to be illegal when accompanied by unlawful picketing,⁷⁶ but picketing, when properly conducted, is no longer regarded as unlawful per se, and is considered to be a legitimate method strikers have a right to employ to notify the public of the

existence of a strike as stated in the definition Picket; Picketing 70 C.J.S. pages 1049-1057.

Although it has been said that, after striking, employees may engage in a boycott,⁷⁷ the sympathetic strike, which is otherwise known as a boycott, as stated *infra* p 545 note 6, is generally held to be illegal.⁷⁸

—Incidental Results as Affecting Legality. While it is well recognized that a strike is illegal if its purpose is to gratify malice, or harm or inflict injury on others, or injure a person in his business, as stated *supra* p 532 notes 27-29, a strike is not rendered unlawful because it incidentally results in injury to others,⁷⁹ or hampers the employer⁸⁰ and seriously interferes with the free and unrestrained control and operation of his business,⁸¹ or

Similarly expressed

"The usefulness and value of labor organizations is fully recognized. Their efforts to better the condition of labor have been remarkably effective, beneficial to labor, and of great value to society and the state. They may use any lawful means to accomplish these ends. Capital and labor unite in production, and between them must be divided the fruits of their joint efforts. Each is desirous of increasing its own share, and this is necessarily at the expense of the other. From this results an economic warfare. The forces are marshaled against each other—capital in corporations managed by directors and labor in Unions managed by councils. This struggle often creates waste and imposes hardships on the rest of the people; but such things society endures as the price of individualism. Fortunately the warfare is subject to municipal law, and society is strong enough to impose its terms on the combatants. Certain methods and weapons the law permits. Others it prohibits. It permits the strike on the one side and the lockout on the other. But each combatant must respect the rights of the other guaranteed by our Constitution. Among these are life, liberty, and property. Violence against persons and tangible property will not be permitted. Neither will attacks on intangible property rights, like business, good will, or trade, be permitted. One cardinal principle must be borne in mind, that any element of illegality essential to a scheme or combination makes the whole illegal. This principle the defendants have overlooked. They have found a lawful means, viz., strikes, and an ultimate lawful end, viz., the

improvement of labor; but they have forgotten that the very turning point in their scheme, and which alone makes it effective, is the coercion of plaintiff by injuring property rights. This is exactly what the defendants intended, it is what they have done, and it is unlawful."—*Albro J. Newton Co. v. Erickson*, 126 N.Y.S. 949, 953, 954, 70 Misc. 291.

71. Idaho.—*Robison v. Hotel & Restaurant Employees*, Local No. 782, 207 P. 132, 135, 35 Idaho 418.

Threats, intimidation, and violence
N.J.—*International Ticket Co. v. Wendrich*, 193 A. 808, 813, 122 N.J.Eq. 222.

Threats, intimidation, and annoyance
Mass.—*Rice, Barton & Fales Machine & Iron Co. v. Willard*, 136 N.E. 629, 632, 242 Mass. 566.

Intimidation without force or physical violence

(1) "The well-considered authorities all hold that the conduct of a strike may be such as to constitute intimidation, though there is no use of force or physical violence."—*Levy & Devaney v. International Pocketbook Workers' Union*, 158 A. 795, 796, 114 Conn. 319.

(2) "When the acts of strikers, although unaccompanied by violence or threats, are such an annoyance to others as to amount to coercion or intimidation, they are unlawful."—*Fenske Bros. v. Upholsterers' Union*, 193 N.E. 112, 117, 358 Ill. 239, 97 A.L.R. 1318.

72. N.J.—*International Ticket Co. v. Wendrich*, 193 A. 808, 813, 122 N.J.Eq. 222.

73. N.J.—*International Ticket Co. v. Wendrich*, *supra*.

74. U.S.—*Tri-City Central Trades Council v. American Steel Foundries*, C.C.A.III., 238 F. 728, 732.

75. Mass.—*Simon v. Schwachman*, 18 N.E.2d 1, 4, 301 Mass. 573.

76. Mass.—*Rice, Barton & Fales Machine & Iron Co. v. Willard*, 136 N.E. 629, 632, 242 Mass. 566.

77. Cal.—*Pierce v. Stablemen's Union*, Local No. 3,760, 103 P. 324, 327, 156 Cal. 70.

78. Mass.—*Stearns Lumber Co. v. Howlett*, 157 N.E. 82, 91, 260 Mass. 45, 52 A.L.R. 1125.

Similarly expressed

"In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike on A., with whom the striker has no trade dispute, to compel A. to force B. to yield to the striker's demands, is an unjustifiable interference with the right of A. to pursue his calling as he thinks best."—*Pickett v. Walsh*, 78 N.E. 753, 760, 192 Mass. 572, 6 L.R.A., N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.

79. Ill.—*Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 99 N.E. 389, 397, 255 Ill. 213, Ann.Cas.1913D 347.

Minn.—*Gray v. Building Trades Council*, 97 N.W. 663, 666, 91 Minn. 171, 63 L.R.A. 753, 103 Am.S.R. 477, 1 Ann.Cas. 172.

80. Me.—*Keith Theatre v. Vachon*, 187 A. 692, 695, 134 Me. 392.

81. U.S.—*Tri-City Central Trades Council v. American Steel Foundries*, C.C.A.III., 238 F. 728, 732.

results in some injury to the employer's business,⁸² and a strike is not unlawful even though its effect is to cause financial loss to the employer,⁸³ and it has been said that the right of employees to strike does not infringe any right of the employer.⁸⁴

The right to strike carries with it by implication the right to interfere with the employer's business to a certain extent,⁸⁵ since the right to persuade prospective employees by legitimate argument must of necessity interfere with the employer's business, and, where labor is essential to the successful operation of a business, any interference with that labor is an interference with the employer's business.⁸⁶ Whether the interference with the employer's business is lawful or unlawful depends on the facts in each case,⁸⁷ and if the concerted action which is one of the characteristics of a strike is justified there is no liability for the resulting intentional

harm,⁸⁸ and it has been said that this is a change of philosophy, and for this change courts, not legislatures, are the more responsible.⁸⁹

Characteristics, Elements, or Ingredients of Strike. There are a number of outstanding characteristics of a strike, as that term is employed in modern times,⁹⁰ and these characteristics are considered in the following subdivisions.

—Employer-Employee Relationship.

Existence of relationship. One of the outstanding characteristics,⁹¹ or essential ingredients⁹² of a strike as that term is employed in modern times⁹³ is that there exist an established employer-employee relationship between the strikers and the person or persons against whom the strike is directed,⁹⁴ and that in the absence of such a relationship there can be no strike,⁹⁵ and it is not a strike for workmen

Or.—Greenfield v. Central Labor Council, 192 P. 783, 788, 104 Or. 236.

Justification for injury

"The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification." U.S.—Dorcy v. State of Kansas, Kan., 47 S.Ct. 86, 87, 272 U.S. 306, 71 L.Ed. 248.

Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 337, 140 Or. 35.

82. N.Y.—Herzog v. Cline, 227 N.Y. S. 462, 464, 465, 131 Misc. 816.

83. Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Mo. 392.

84. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 867, 801 U.S. 468, 81 L.Ed. 1229.

85. U.S.—Tri-City Central Trades Council v. American Steel Foundries, C.C.A.III., 238 F. 728, 733.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 788, 104 Or. 236.

86. U.S.—Tri-City Central Trades Council v. American Steel Foundries, C.C.A.III., 238 F. 728, 733.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 788, 104 Or. 236.

87. U.S.—Tri-City Central Trades Council v. American Steel Foundries, C.C.A.III., 238 F. 728, 733.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 788, 104 Or. 236.

Similarly expressed

"To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference." Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

Mass.—De Minico v. Craig, 94 N.E. 317, 319, 207 Mass. 593, 42 L.R.A., N.S., 1048.

88. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 840, 25 Del.Ch. 347.

89. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., supra.

90. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

Similarly expressed

(1) Running through many of the definitions of the word "strike" are two controlling ideas.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

(2) Every definition of the word "strike" contains two essential ingredients.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

(3) "A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned."—

Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

91. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

92. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

93. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

94. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Comp.Pl., 93 N.E.2d 301, 303.

Relationship essential

"It will be noticed in all these definitions, and in every definition of a strike that can be obtained, that a strike only results where there is the relation of employer and employé; that is, a strike can only be said to exist where there is a trade dispute between the employer and his workmen. This relation is the essential basis of the legal right to maintain and enforce a strike. A strike can not be said to exist where the relation of employer and employé did not exist."—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.

95. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

to refuse to enter into the employment of a particular employer.⁹⁶

While it has been said that all the recognized definitions of an industrial strike confine it to the concerted action by the employees of the particular employer against whom it is aimed, that is, between the individuals who are under present contract of employment with a particular employer and such employer, and to no one outside of such class,⁹⁷ there is, however, some difference of opinion as to whether the right to strike against an employer is a right which is restricted to the employees of such employer.⁹⁸ In some jurisdictions, under the common law,⁹⁹ the right to strike is deemed to be the right of the employees only,¹ and labor unions and other persons assisting striking employees do so only in the right, and for the benefit, of those employees,² and it is only where a trade union itself has contractual relations with an employer, as by an agreement for a closed shop, that the union may take coercive action in its own right.³ In other jurisdictions a strike may be maintained against an employer by persons who, although not employed by such employer, are employed in the same trade or business.⁴

Continuance of relationship. It is an ingredient of a strike that there exist an intention on the part of the employees to return to work when their aims are accomplished,⁵ and it is also an ingredient of a strike that there exist an intention on the part of the employer to reemploy the same men or men of a similar class when the demands are acceded to, or withdrawn, or otherwise adjusted.⁶ The employees who remain to take part in the strike do so that they may be ready to go to work again on terms to which they shall agree, and the employer remains ready to take them back on terms to which he shall agree.⁷ Thus a strike does not completely terminate the employer-employee relationship,⁸ and is not a bona fide dissolution of contractual relations,⁹ and ordinarily is not intended by those engaged in it to be a complete severance of the relationship.¹⁰

During a strike the employer-employee relationship is temporarily suspended,¹¹ and it has been said that one of the outstanding characteristics of the strike, as that term is employed in modern times, is the contention on the part of the employees that, although work has ceased, the employer-employee relationship continues, albeit in a state of belligerent suspension,¹² and one of the controlling ideas run-

96. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

97. Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 304, 186 Wis. 24.

98. Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 549, 303 Mass. 315.

99. Mass.—Quinton's Market v. Patterson, supra—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573.

1. Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 549, 303 Mass. 315—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573.

2. Mass.—Simon v. Schwachman, supra.

3. Mass.—Simon v. Schwachman, supra.

4. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 133, 245 N.Y. 260.

5. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 936, 110 Colo. 108.

6. Colo.—Sandoval v. Industrial Commission, supra.

7. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations

Board, C.C.A.4, 91 F.2d 134, 137—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 52, 91 C.C.A. 631, 20 L.R.A., N.S., 315.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

N.J.—Restful Slipper Co. v. United Shoe & Leather Union, 174 A. 543, 545, 116 N.J.Eq. 521.

8. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Michaelson v. U. S., C.C.A.Wis., 291 F. 940, 942—Tri-City Central Trades Council v. American Steel Foundries, C.C.A.Ill., 238 F. 728, 733—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 52, 91 C.C.A. 631, 20 L.R.A., N.S., 315. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

N.J.—Restful Slipper Co. v. United Shoe & Leather Union, Ch., 174 A. 543, 545, 116 N.J.Eq. 521.

N.Y.—Degnan v. Metropolitan Life Ins. Co., 38 N.Y.S.2d 238, 239, 178 Misc. 312.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 787, 104 Or. 236.

In the absence of statute, the relationship of employer and employee is not completely terminated by a strike.—National Labor Relations Board v. Carlisle Lumber Co., C.C. A.9, 94 F.2d 138, 144.

9. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

10. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 842, 25 Del.Ch. 347.

11. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Tri-City Central Trades Council v. American Steel Foundries, C.C.A. Ill., 238 F. 728, 733.

Essential ingredient of strike

A suspended employer-employee relationship is an essential ingredient of a strike.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

12. Fla.—State ex rel. Frazier v.

ning through all of the definitions¹³ is that a strike is a cessation of labor, but not an abandonment of the employment.¹⁴ It follows, therefore, that a strike has, and is intended to have, an entirely different effect from that produced by individuals acting independently, who resign their employment,¹⁵ and, in the common acceptance of the term,¹⁶ it is not a strike for the workmen of an employer to quit his employment and go elsewhere,¹⁷ either singly or in a body,¹⁸ without any intention of returning,¹⁹ whatever may be the reason which moves them to do so.²⁰

Status of strikers. Since the employer-employee relationship is temporarily suspended during a strike, as stated supra p 537 note 11, it follows that

a person on strike technically is not an employee,²¹ although it has been said that one of the chief characteristics of a strike²² is that the strikers retain the status of employees during the work stoppage.²³ While a strike does not completely terminate the employer-employee relationship, as stated supra p 537 note 8, a new status does arise,²⁴ and, pending a strike, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee which is neither that of the general relationship of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment,²⁵ and the courts have coined a term to describe the situation,²⁶ and

Coleman, 23 So.2d 477, 479, 156 Fla. 413.

13. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

14. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., supra.
Me.—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

Similarly expressed

(1) "It may be noted that a strike is not a quitting of employment. The man who goes out on a strike does not profess to quit his employment. He still lays claim to his position and asserts a right to go back and take it at more advantageous terms."

U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Kan.—State v. Personett, 220 P. 520, 524, 114 Kan. 680.

(2) "A controversy arises, and the employees, then at work, say to their employer: 'We shall stop work until you are in what we may consider a more reasonable state of mind. We shall deprive you of our labor as a legitimate means of exerting economic pressure to induce you to yield. If we do go out, we shall remain at hand, ready to negotiate with you concerning fair wages and working rules, and ready to return to work the moment we can agree.'"—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Michaelson v. U. S., C.C.A.Wis., 291 F. 940, 942, 943.

As an abandonment of employment

"A lawful strike, whether the employment consists in a definite contract or is merely an existing relation, involves generally an abandonment of the employment and a termination by the strikers of the employ-

ment so far as they are concerned."—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.

15. N.J.—State v. Traffic Tel. Workers Federation of N. J., 61 A.2d 570, 575, 142 N.J.Eq. 785.

16. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.
Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

17. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.
Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

18. Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

19. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

Similarly expressed

If the refusal to work by the men is with the intention never to be re-employed by the employer, it is not a strike.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

20. Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

21. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Tri-City Central Trades Council v. American Steel Foundries, C.C.A. Ill., 238 F. 728, 733.

22. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

23. U.S.—National Labor Relations Board v. Columbian E. & S. Co., C. C.A.7, 96 F.2d 943, 952.

Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302, 303.

24. U.S.—National Labor Relations Board v. Carlisle Lumber Co., C.C. A.9, 94 F.2d 138, 144.

25. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Tri-City Central Trades Council v. American Steel Foundries, C.C.A. Ill., 238 F. 728, 733—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 52, 53, 91 C.C.A. 631, 20 L.R.A., N.S., 315.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Ga.—McMichael v. Atlanta Envelope Co., 108 S.E. 226, 229, 151 Ga. 776, 26 A.L.R. 149.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

N.J.—Restful Slipper Co. v. United Shoe & Leather Union, Ch., 174 A. 543, 545, 116 N.J.Eq. 521.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 787, 104 Or. 236.

26. U.S.—National Labor Relations Board v. Carlisle Lumber Co., C.C. A.9, 94 F.2d 138, 144.

refer to the employee on strike as a "striking employee."²⁷

—Cessation from, or Interruption of, Work. One of the essential²⁸ ingredients²⁹ of a strike is that there be a quitting of,³⁰ or refusal to,³¹ work, and

the essence,³² and basic element,³³ of a strike is the stoppage of work,³⁴ the concerted cessation of work by employees for their employer.³⁵

The courts define a "strike" in terms of a quitting,³⁶ stopping,³⁷ or cessation³⁸ of work, or a

27. U.S.—National Labor Relations Board v. Carlisle Lumber Co., supra.

Similarly expressed

"They are entitled to rank as 'employees,' with the adjective 'striking' defining their immediate status."—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A. 4, 91 F.2d 134, 137—Michaelson v. U. S., C.C.A.Wis., 291 F. 940, 942, 943.

28. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609, 610.

29. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

30. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609, 610.

31. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

32. Ohio.—Sammons v. Hotel & Restaurant Emp. Local No. 363, Com. Pl., 93 N.E.2d 301, 302.

Concomitants of a strike

Walking out and refraining from work, and not appearing for work for the purpose of exerting economic pressure are plainly concomitants of a strike.—International Union, U.A. W.A.A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 878, 250 Wis. 550.

33. Mass.—Boylston Housing Corporation v. O'Toole, 74 N.E.2d 288, 298, 321 Mass. 538, 172 A.L.R. 1251.

34. Ohio.—Sammons v. Hotel & Restaurant Emp. Local No. 363, Com. Pl., 93 N.E.2d 301, 302.

35. Mass.—Boylston Housing Corporation v. O'Toole, 74 N.E.2d 288, 298, 321 Mass. 538, 172 A.L.R. 1251.

36. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413—American Ry. Express Co. v. Johnson, 100 So. 743, 745, 87 Fla. 451.

Ill.—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122—Deshler Broom Factory v. Kinney, 2 N.W. 2d 332, 334, 140 Neb. 889.

N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

Wis.—International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550—Walter W. Oeffeln, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.

37. U.S.—N.L.R.B. v. Illinois Bell Tel. Co., C.A.7, 189 F.2d 124, 127—The Point Reyes, C.C.A.La., 110 F. 2d 608, 609—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.

Ill.—Fash v. Gordon, 75 N.E.2d 294, 297, 298, 386 Ill. 210—Local Union No. 11 v. Gordon, 71 N.E.2d 637, 641, 396 Ill. 293—Walgreen Co. v. Murphy, 53 N.E.2d 390, 393, 386 Ill. 32—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America, 99 N.E. 389, 393, 255 Ill. 213, Ann. Cas.1913D 347—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.

Mich.—Lawrence Baking Co. v. Michigan Unemployment Compensation

Commission, 13 N.W.2d 260, 264, 308 Mich. 198, 154 A.L.R. 660.

Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Ohio.—United States Coal Co. v. Unemployment Compensation Board of Review, 32 N.W.2d 763, 764, 66 Ohio App. 329—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P.N.S., 257, 274.

Okl.—Board of Review v. Mid-Continent Petroleum Co., 141 P.2d 69, 72, 193 Okl. 36.

Or.—Hall v. Johnson, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

38. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 52, 91 C.C.A. 631, 20 L.R.A., N.S., 315.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 110 Colo. 108.

Ill.—Bankston Creek Collieries v. Gordon, 77 N.E.2d 670, 674, 399 Ill. 291.

Ind.—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.J.—State v. Traffic Tel. Workers Federation of N. J., 61 A.2d 570, 575, 142 N.J.Eq. 785—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 801, 128 N.J. Eq. 450—Restful Slipper Co. v. United Shoe & Leather Union, Ch., 174 A. 543, 545, 116 N.J.Eq. 521.

N.Y.—Degnan v. Metropolitan Life Ins. Co., 34 N.Y.S.2d 238, 239, 178 Misc. 312—People, on Complaint of Mandel v. Tepel, 3 N.Y.S.2d 779, 780.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600—Sammons v. Hotel & Restaurant

refusal to work,³⁹ or to do any work,⁴⁰ or to resume⁴¹ or continue⁴² work, and it has been said that it is impossible for an employee to be on strike and at work simultaneously.⁴³

Thus, when there is a dispute between the employer and the employee there are two courses open; first, the employees can continue work and negotiate further with the employer, or, second, they can strike in protest; but they may not do both.⁴⁴ However, a strike may be a refusal to work at the customary rate of speed,⁴⁵ and it may include any concerted slow-down or other concerted interruption of operations by employees.⁴⁶

While the essence and basic element of a strike is the stoppage of work, as stated supra p 539 notes 32-34, every stoppage of work is not a strike,⁴⁷ and for a stoppage of work to constitute a strike it must be for the purpose of coercing an employer to grant concessions as to working conditions,⁴⁸ and the stoppage is intended to be temporary, continuing

only until the purpose is accomplished,⁴⁹ and until there is compliance with the demand.⁵⁰

Refusal to work without a contract. Where an employee-employer relationship is based on a contract and that contract by its terms expires, so that there is no contractual obligation on the part of the employees to work, and no contractual obligation on the part of the employers to employ the workmen for specified wages and hours and under specified conditions, it has been held that there can be no strike,⁵¹ but it has been said that this decision is based on the fallacious assumption that in the absence of a contractual obligation to work, and to employ for contractually specified wages and hours, and under contractually specified conditions, there can be no strike,⁵² and it has been held that a work stoppage which is the result of a disagreement after negotiations about wages and working conditions is a strike, and it is of no importance that a contract under which the employees had been working had expired.⁵³ Thus a refusal to work

Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302—Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P.N.S., 257, 274. Wash.—In re North River Logging Co., 130 P.2d 64, 66, 15 Wash.2d 204.

39. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

Ill.—Phillip Henrici Co. v. Alexander, 198 Ill.App. 568, 578. Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600 —Sammons v. Hotel & Restaurant Emp. Local No. 363, Com.Pl., 93 N.E.2d 301, 302.

Abandonment or desertion of employment
N.Y.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 634, 172 Misc. 95.

40. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Mich.—Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W.2d 900, 903, 317 Mich. 311.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600. Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.

41. U.S.—N.L.R.B. v. Illinois Bell Tel. Co., C.A.7, 189 F.2d 124, 127—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397. Mo.—Smith v. Eagle Coal & Mercan-

tile Co., 155 S.W. 886, 889, 170 Mo. App. 27.

Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

42. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1918D 347—Phillip Henrici Co. v. Alexander, 198 Ill.App. 568, 578. Or.—Hall v. Johnson, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49.

43. U.S.—Home Beneficial Life Ins. Co. v. N.L.R.B., C.C.A.4, 159 F.2d 280, 286—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397.

N.Y.—New York State Labor Relations Board v. Union Club of City of New York, 52 N.Y.S.2d 74, 81, 268 App.Div. 516.

Similarly expressed

An employee must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.

U.S.—Home Beneficial Life Ins. Co. v. N.L.R.B., C.C.A.4, 159 F.2d 280, 286—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397.

N.Y.—New York State Labor Relations Board v. Union Club of City of New York, 52 N.Y.S.2d 74, 81, 268 App.Div. 516.

44. U.S.—C. G. Conn. Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397.

N.Y.—New York State Labor Relations Board v. Union Club of City of New York, 52 N.Y.S.2d 74, 81, 268 App.Div. 516.

45. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600.

46. U.S.—N.L.R.B. v. Illinois Bell Tel. Co., C.A.7, 189 F.2d 124, 127.

47. Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 584, 188 Md. 677.

48. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

49. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

50. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 936, 110 Colo. 108.

51. Ohio.—United States Coal Co. v. Unemployment Compensation Board of Review, 32 N.E.2d 763, 764, 66 Ohio App. 329.

52. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

53. Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, Ind., 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana

without a contract is regarded as a strike.⁵⁴

—**Existence of Dispute and Necessity of Demand.**

A strike involves a labor dispute,⁵⁵ and necessarily assumes the existence of a grievance,⁵⁶ and one of the characteristics of a strike is that a dispute must exist between the employer and the employees,⁵⁷ since the purpose of a strike is to right an asserted wrong,⁵⁸ and a strike is a means of effecting a reconciliation between an employer and an employee when a controversy has arisen.⁵⁹ The necessity for a lawful trade dispute is illustrated in cases where a dispute once existed but has ceased to exist,⁶⁰ for, when a trade dispute ceases to exist, continued acts of interference with the business of the employee can no longer be justified as lawful incidents of an existing strike, as stated *infra* p 545 note 15.

A demand for some concession is one of the ingredients of a strike,⁶¹ and it is sometimes regarded as a condition precedent to a strike that a demand be made, directed to the employer by, or on behalf of, the employees.⁶² There is, however, an alternative;⁶³ there must either be such a demand or the stoppage of work, after it occurs, must be used to gain concessions from the employer.⁶⁴ Thus it has been said that it is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting concessions from him even though the stoppage is against his will.⁶⁵

—**Coercion, Compulsion, or Persuasion.** A strike is generally regarded as coercive;⁶⁶ a coercive measure;⁶⁷ a means of coercion,⁶⁸ extortion,⁶⁹ or compulsion.⁷⁰ It is a means of enforcing compliance with some demand made on the employer,⁷¹ and

Employment Sec. Division, Ind. App., 70 N.E.2d 31, 34, 117 Ind.App. 132.

54. Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 391, 169 Pa.Super. 554.

55. Ill.—Bankston Creek Collieries v. Gordon, 77 N.E.2d 670, 674, 399 Ill. 291.

56. Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 695, 134 Me. 392.

Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 304, 186 Wis. 24.

"No one is known ever to have struck because his wage is too high or his work day too short"—Keith Theatre v. Vachon, 187 A. 692, 695, 134 Me. 392.

57. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.

Dispute within employer-employee unit

"Each employer and his employees constitute a unit within which a trade dispute must be found in order that picketing and other normally lawful methods of conducting a strike may be employed."—Simon v. Schwachman, 18 N.E.2d 1, 5, 301 Mass. 573.

58. Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 695, 134 Me. 392.

59. Me.—Keith Theatre v. Vachon, *supra*.

60. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573.

61. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 936, 110 Colo. 108.

Generally for a modification of conditions of labor or rates of pay.—Sandoval v. Industrial Commission, 130 P.2d 930, 935, 936, 110 Colo. 108.

62. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 303.

Similarly expressed

It first becomes incumbent upon the employees or their representatives to make a demand upon the employer, in order to lay the basis for a refusal, and such view is in harmony with the fundamental thought underlying the definition of a strike under the common acceptance of the term, and it logically follows that it is contemplated that a strike exists after the demands of the employees are made and refused, as the result of which the employees are withdrawn from the employment. —International Union, U.A.W.A.A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 880, 250 Wis. 550—Walter W. Oeflein, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.

63. Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 303.

64. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, *supra*.

65. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, *supra*.

Wis.—International Union, U.A.W.A.A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550.

66. Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Se-

curity Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

67. Ill.—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600—Sammons v. Hotel & Restaurant Emp. Local No. 363, Com.Pl., 93 N.E.2d 301, 302.

68. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 138.

Neb.—Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 334, 140 Neb. 889.

Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

Wash.—Uden v. Schaefer, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

69. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.

Ohio.—Park v. Locals Nos. 106, 107, 108 & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.

70. U.S.—Arthur v. Oakes, C.C.A. Wis., 63 F. 310, 326, 327—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.

Me.—Keith Theatre v. Vachon, 187 A. 692, 694, 134 Me. 392.

N.Y.—Delaware, L. & W. R. Co. v. Bounds, 58 N.Y. 573, 582.

71. U.S.—The Point Reyes, C.C.A. La., 110 F.2d 608, 609.

Del.—Motion Picture Machine Projectionists Protective Union, Local

is a resort by labor to the weapon of concerted refusal to work as a means or method of persuasion or coercion to accomplish the employees' demands,⁷² and one of the controlling ideas running through many of the definitions is by compulsion to extort from the employer the concessions demanded.⁷³

—Concerted Action. Concerted action is one of the characteristics of a strike,⁷⁴ and the courts generally refer to the work stoppage as being concerted⁷⁵ or general,⁷⁶ or as being done simultaneously,⁷⁷ or by mutual understanding,⁷⁸ or by common agreement,⁷⁹ or at a prearranged⁸⁰ or preconceived⁸¹

- No. 473, v. Rialto Theatre Co., 17 A.2d 836, 842, 25 Del.Ch. 347.
- Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.
- Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.
- Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.
- Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.
- N.Y.—People, on Complaint of Mandel v. Tepel, 3 N.Y.S.2d 779, 780—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.
- Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.
- Wis.—International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550—Walter W. Oeflein, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.
72. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413.
73. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.
74. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 840, 25 Del.Ch. 347.
75. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.
- Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.
- Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 478, 156 Fla. 413.
- Ill.—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.
- Mich.—Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W.2d 900, 903, 317 Mich. 311.
- N.J.—State v. Traffic Tel. Workers Federation of N. J., 61 A.2d 570, 575, 142 N.J.Eq. 785.
- N.Y.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 634, 172 Misc. 95.
- Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600—Sammons v. Hotel & Restaurant

- Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.
- Pa.—Hogan v. Unemployment Compensation Board of Review, 83 A.2d 386, 390, 169 Pa.Super. 554.
76. Ill.—Philip Henrici Co. v. Alexander, 198 Ill.App. 569, 573.
- Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 717, 146 Ohio St. 600—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.
77. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 271 F. 743, 745.
- Ohio.—Park v. Locals Nos. 106, 107, 108 & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.
- Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.
- All together
- U.S.—The Point Reyes, C.C.A.La., 110 F.2d 608, 609—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.
- Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas.1913D 347—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.
- Or.—Hall v. Johnson, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49.
78. U.S.—The Point Reyes, C.C.A.La., 110 F.2d 608, 609.
- Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 479, 156 Fla. 413—American Ry. Express Co. v. Johnson, 100 So. 743, 745, 87 Fla. 451.
- Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury, 46 N.E.2d 477, 479, 221 Ind. 16—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.
- Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.
- Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.
- N.Y.—Panzieri-Hogan Co. v. Bender, 199 N.Y.S. 887, 889, 205 App.Div. 398.
- Or.—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

- Wis.—International Union, U.A.W.A. A.F. of L. Local No. 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 879, 250 Wis. 550—Walter W. Oeflein, Inc. v. State, 188 N.W. 633, 635, 177 Wis. 394.
79. Ill.—Fash v. Gordon, 75 N.E.2d 294, 297, 298, 386 Ill. 210—Local Union No. 11 v. Gordon, 71 N.E.2d 637, 641, 396 Ill. 293—Walgren Co. v. Murphy, 53 N.E.2d 390, 393, 386 Ill. 32.
- Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.
- Mich.—Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, 13 N.W.2d 260, 264, 308 Mich. 193, 154 A.L.R. 660.
- Ohio.—Park v. Locals Nos. 106, 107, 108 & 167 of Hotel & Restaurant Employees Int. Alliance, 22 Ohio N.P., N.S., 257, 274.
- Okl.—Board of Review v. Mid-Continent Petroleum Co., 141 P.2d 69, 72, 193 Okl. 36.
80. U.S.—N.L.R.B. v. Illinois Bell Tel. Co., C.A.7, 189 F.2d 124, 127—The Point Reyes, C.C.A.La., 110 F.2d 608, 609—C. G. Conn, Limited, v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.
- Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1913D 347—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.
- Mo.—Smith v. Eagle Coal & Mercantile Co., 155 S.W. 886, 889, 170 Mo. App. 27.
- N.Y.—Bossert v. Dhuy, 117 N.E. 582, 583, 221 N.Y. 342, Ann.Cas.1918D 661—National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 63 N.E. 369, 370, 170 N.Y. 315.
- Or.—Hall v. Johnson, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49—Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.
81. U.S.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.
- Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

time. While it is the concerted withdrawal of the employees which makes the strike,⁸² it is the concerted refusal of employees to work for their employer, rather than the concerted cessation of work, which is sometimes emphasized as the essential of a strike.⁸³

—**Picketing.** It is stated in 70 C.J.S. p 1056 note 88 that picketing is an activity which is not necessarily restricted to labor situations, and it is not considered an essential element of a strike,⁸⁴ and neither is it the strike itself,⁸⁵ since it is common knowledge that a strike may or may not be accompanied by the establishment of a picket line.⁸⁶ Picketing and persuading others to keep away from an employer are but incidentals of a strike.⁸⁷

Number of Persons Involved. There is a difference of opinion as to whether a work stoppage by one person can properly be regarded as a strike.⁸⁸ On the one hand, it has been said that a strike may be carried on by one man,⁸⁹ and that, while a cessation of work by the concerted action of a large number of employees may more easily accomplish

the object of the work stoppage than if it is by one person, there is, in fact, no fundamental difference in the principle involved as far as the number of persons involved is concerned, and thus, if the act is the same, and the purpose to be accomplished is the same, there is a strike, whether one or more than one have ceased to work.⁹⁰ Furthermore, since one of the chief characteristics of a strike is that the strikers retain the status of employees during the work stoppage, as stated supra p 538 notes 22, 23, a single individual who stops work temporarily for the sole purpose of coercing a change in his working conditions should not, merely because he is not acting in concert with others, lose his status as an employee, but such would be the result if one worker could not strike.⁹¹

On the other hand, it has been held that the refusal of one person to work is not a strike,⁹² the rationale being that a strike involves a combination of persons and not a single individual.⁹³ While the courts define the word "strike" in terms which indicate that it is the action of employees,⁹⁴ work-

III.—Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas. 1913D 347—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ohio.—United States Coal Co. v. Unemployment Compensation Board of Review, 32 N.E.2d 763, 764, 66 Ohio App. 329.

Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 338, 140 Or. 35.

82. Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 306, 186 Wis. 24.

Least effective means

"The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed."—Farmers' Loan & Trust Co. v. Northern Pac. R. Co., C.C.Wis., 60 F. 803, 821, 25 L.R.A. 414.

83. Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

84. Ill.—Local Union No. 11 v. Gordon, 71 N.E.2d 637, 641, 396 Ill. 293.

85. Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 306, 186 Wis. 24.

86. Ill.—Local Union No. 11 v. Gordon, 71 N.E.2d 637, 641, 396 Ill. 293.

87. Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 306, 186 Wis. 24.

88. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

89. N.Y.—People, on Complaint of Mandel, v. Tepel, 3 N.Y.S.2d 779, 781.

Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, Com.Pl., 93 N.E.2d 301, 302.

90. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, supra.

91. Ohio.—Sammons v. Hotel & Restaurant Emp. Local Union No. 363, supra.

92. Ohio.—Salzman v. United Retail Employees' Local No. 112, 2 Ohio Supp. 188, 193.

More than one employee

"An examination of authorities discloses that the term 'strike' in a legal sense connotes the stoppage of work by more than one employee."—Salzman v. United Retail Employees' Local No. 112, supra.

93. Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union,

Local No. 159, 12 P.2d 333, 338, 140 Or. 35.

94. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C.C.A.4, 91 F.2d 134, 137—Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co., C.C.A.Wis., 166 F. 45, 52, 91 C.C.A. 631, 20 L.R.A., N.S., 315.

Colo.—Sandoval v. Industrial Commission, 130 P.2d 930, 933, 110 Colo. 108.

Ill.—Bankston Creek Collieries v. Gordon, 77 N.E.2d 670, 674, 399 Ill. 291—Philip Henrici Co. v. Alexander, 198 Ill.App. 568, 578.

Ind.—Adkins v. Indiana Employment Sec. Division, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Ky.—Barnes v. Hall, 146 S.W.2d 929, 936, 285 Ky. 160.

Md.—Saunders v. Maryland Unemployment Compensation Board, 53 A.2d 579, 582, 188 Md. 677.

Mich.—Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W. 2d 900, 903, 317 Mich. 311.

Neb.—Magner v. Kinney, 2 N.W.2d 689, 692, 141 Neb. 122.

N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 801, 128 N.J.Eq. 450—Restful Slipper Co. v. United Shoe & Leather Union, 174 A. 543, 545, 116 N.J.Eq. 521.

N.Y.—Degnan v. Metropolitan Life Ins. Co., 34 N.Y.S.2d 238, 239, 178 Misc. 312—Bartfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 634, 172 Misc. 95—People, on Com-

men,⁹⁵ or laborers,⁹⁶ in a party,⁹⁷ combination,⁹⁸ body,⁹⁹ or group,¹ it has been held that it is not necessary that any fixed number of employees should quit their work in order to constitute the stoppage a strike,² and the number of persons necessary de-

pends in each case on the peculiar facts in the case, and no definite rule can be laid down.³

Classifications. There are numerous variations of the recognized legitimate strike, such as the "sit-

plaint of *Mandel v. Tepel*, 3 N.Y.S. 2d 779, 780.

Ohio.—*Baker v. Powhatan Min. Co.*, 67 N.E.2d 714, 717, 146 Ohio St. 600.—*Sammons v. Hotel & Restaurant Emp. Local Union No. 363*, Com.Pl., 93 N.E.2d 301, 302.—*Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance*, 22 Ohio N.P., N.S., 257, 274.

Or.—*Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union*, Local No. 159, 12 P.2d 333, 338, 140 Or. 35.

Pa.—*Hogan v. Unemployment Compensation Board of Review*, 83 A. 2d 386, 390, 169 Pa.Super. 554.

Wash.—*In re North River Logging Co.*, 130 P.2d 64, 66, 15 Wash.2d 204.

95. U.S.—*N.L.R.B. v. Illinois Bell Tel. Co.*, C.A.7, 189 F.2d 124, 127.—*The Point Reyes, C.C.A.La.*, 110 F. 2d 608, 609.—*C. G. Conn. Limited, v. National Labor Relations Board*, C.C.A.7, 108 F.2d 390, 397.—*Jeffery-De Witt Insulator Co. v. National Labor Relations Board*, C.C.A.4, 91 F.2d 134, 138.—*Arthur v. Oakes, C.C.A.Wis.*, 63 F. 310, 326, 327.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Colo.—*Sandoval v. Industrial Commission*, 130 P.2d 930, 933, 110 Colo. 108.

Fla.—*State ex rel. Frazier v. Coleman*, 23 So.2d 477, 478, 156 Fla. 413.—*American Ry. Express Co. v. Johnson*, 100 So. 743, 745, 87 Fla. 451.

Ill.—*Walgren Co. v. Murphy*, 53 N.E. 2d 390, 393, 386 Ill. 32.—*Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas.1913D 347.—*Philip Henri Co. v. Alexander*, 198 Ill.App. 568, 578.

Ind.—*Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury*, 46 N.E.2d 477, 479, 221 Ind. 16.—*Adkins v. Indiana Employment Sec. Division*, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Me.—*Keith Theatre v. Vachon*, 187 A. 692, 694, 134 Me. 392.

Md.—*Saunders v. Maryland Unemployment Compensation Board*, 53 A.2d 579, 582, 183 Md. 677.

Mich.—*Lawrence Baking Co. v. Michigan Unemployment Compens-*

sation Commission, 13 N.W.2d 260, 264, 306 Mich. 198, 154 A.L.R. 660.

Mo.—*Smith v. Eagle Coal & Mercantile Co.*, 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—*Magner v. Kinney*, 2 N.W.2d 689, 692, 141 Neb. 122.—*Deshler Broom Factory v. Kinney*, 2 N.W. 2d 332, 334, 140 Neb. 889.

N.Y.—*Panzieri-Hogan Co. v. Bender*, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Ohio.—*United States Coal Co. v. Unemployment Compensation Board of Review*, 32 N.E.2d 763, 764, 66 Ohio App. 329.—*Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance*, 22 Ohio N.P., N.S., 257, 274.

Okl.—*Board of Review v. Mid-Continent Petroleum Co.*, 141 P.2d 69, 72, 193 Okl. 36.

Or.—*Hall v. Johnson*, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49.—*Longshore Printing & Pub. Co. v. Howell*, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 A.L.R. 464.

Wash.—*Uden v. Schaefer*, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

Wis.—*International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board*, 27 N.W.2d 875, 879, 250 Wis. 550.—*Walter W. Oefflein, Inc. v. State*, 188 N.W. 633, 635, 177 Wis. 394.

96. U.S.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.

N.Y.—*Delaware, L. & W. R. Co. v. Bounds*, 58 N.Y. 573, 582.

Or.—*Longshore Printing & Pub. Co. v. Howell*, 38 P. 547, 551, 552, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

97. U.S.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, C.C. Wis., 60 F. 803, 819, 25 L.R.A. 414.

98. N.Y.—*Albro J. Newton Co. v. Erickson*, 126 N.Y.S. 949, 951, 70 Misc. 291.

Ohio.—*Park v. Locals Nos. 106, 107, 108, & 167 of Hotel & Restaurant Employees Int. Alliance*, 22 Ohio N.P., N.S., 257, 274.

Or.—*Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union*, Local No. 159, 12 P.2d 333, 338, 140 Or. 35.

99. U.S.—*N.L.R.B. v. Illinois Bell Tel. Co.*, C.A.7, 189 F.2d 124, 127.—*The Point Reyes, C.C.A.La.*, 110 F.2d 608, 609.—*C. G. Conn. Limited,*

v. National Labor Relations Board, C.C.A.7, 108 F.2d 390, 397.—*Jeffery-De Witt Insulator Co. v. National Labor Relations Board*, C.C.A.4, 91 F.2d 134, 138.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, C.C.Wis., 60 F. 803, 819, 25 L.R.A. 414.

Fla.—*State ex rel. Frazier v. Coleman*, 23 So.2d 477, 478, 156 Fla. 413.—*American Ry. Express Co. v. Johnson*, 100 So. 743, 745, 87 Fla. 451.

Ill.—*Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 99 N.E. 389, 393, 255 Ill. 213, Ann.Cas.1913D 347.—*Philip Henri Co. v. Alexander*, 198 Ill.App. 568, 578.

Ind.—*Walter Bledsoe Coal Co. v. Review Board of Employment Security Division of Department of Treasury*, 46 N.E.2d 477, 479, 221 Ind. 16.—*Adkins v. Indiana Employment Sec. Division*, 70 N.E.2d 31, 34, 117 Ind.App. 132.

Mo.—*Smith v. Eagle Coal & Mercantile Co.*, 155 S.W. 886, 889, 170 Mo. App. 27.

Neb.—*Magner v. Kinney*, 2 N.W.2d 689, 692, 141 Neb. 122.—*Deshler Broom Factory v. Kinney*, 2 N.W. 2d 332, 334, 140 Neb. 889.

N.Y.—*Panzieri-Hogan Co. v. Bender*, 199 N.Y.S. 887, 889, 205 App.Div. 398.

Ohio.—*Baker v. Powhatan Min. Co.*, 67 N.E.2d 714, 717, 146 Ohio St. 600.—*Sammons v. Hotel & Restaurant Emp. Local Union No. 363*, Com.Pl., 93 N.E.2d 301, 302.

Or.—*Hall v. Johnson*, 169 P. 515, 517, 87 Or. 21, Ann.Cas.1918E 49.—*Longshore Printing & Pub. Co. v. Howell*, 38 P. 547, 551, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

Wash.—*Uden v. Schaefer*, 188 P. 395, 396, 110 Wash. 391, 11 A.L.R. 1001.

Wis.—*International Union, U.A.W.A. A.F. of L. Local 232 v. Wisconsin Employment Relations Board*, 27 N.W.2d 875, 879, 250 Wis. 550.—*Walter W. Oefflein, Inc. v. State*, 188 N.W. 633, 635, 177 Wis. 394.

1. N.Y.—*Barfield v. Standard Oil Co. of New Jersey*, 14 N.Y.S.2d 627, 634, 172 Misc. 95.

2. N.Y.—*People, on Complaint of Mandel v. Tepel*, 3 N.Y.S.2d 779, 781.

3. Wis.—*Walter W. Oefflein, Inc. v. State*, 188 N.W. 633, 635, 177 Wis. 394.

down strike" and the "slow-down strike,"⁴ and the "mass strike;"⁵ and there is also the "sympathetic strike" which is otherwise known in this country as the "boycott;"⁶ and some strikes have been referred to as "strikes on the installment plan."⁷

Termination of Strike. When a strike is at an end as a matter of law is a question, it has been said, on which conflicting views have been expressed.⁸ Technically, and as a practical matter, as soon as the striker's places are filled with permanent competent workers, the strikers are no longer employees of the employer and there is no longer in existence a strike by employees,⁹ but all courts do not hold this view.¹⁰ Some courts have likened a strike to the principle governing a blockade in time of war; in order to be lawful it must be effective,¹¹ and it has been said that any remedy by way of maintaining a strike is limited to the period of effective maintenance of the strike.¹² Thus, when a strike

becomes merely nominal, without substantial effect on the business of the employer, or genuine hope of success,¹³ a trade dispute ceases to exist,¹⁴ and continued acts of interference with the business of the employer can no longer be justified as lawful incidents of an existing strike.¹⁵ Various statements have been made to the effect that a strike is terminated when the strikers' places have been filled with competent men, and the employer's business is operating in a normal manner and to a normal extent;¹⁶ and that a strike is deemed to be at an end when conditions are such that the business of the employer is not materially affected by it, and there are no reasonable grounds for believing that a continuance thereof will materially affect his business.¹⁷ However, it has also been stated that a strike continues as long as the workers have not abandoned it by taking permanent employment elsewhere or otherwise, even though the employer has

4. U.S.—C. G. Conn. Limited, v. National Labor Relations Board, C.C. A.7, 108 F.2d 390, 397.

N.Y.—New York State Labor Relations Board v. Union Club of City of New York, 52 N.Y.S.2d 74, 81, 82, 268 App.Div. 516.

5. N.Y.—People v. Gitlow, 136 N.E. 317, 321, 234 N.Y. 132.

See Insurrection and Sedition § 1 a.

Mass strike means the striking or ceasing to work by concerted action of, and among, all working classes.—People v. Gitlow, *supra*.

6. U.S.—Booth v. Brown, C.C.Wash., 62 F. 794, 795.

"Boycott" defined see 11 C.J.S. p 763 note 61.

In a **sympathetic strike**, there is no dispute between the employer and his employees, but action is taken as a result of a dispute elsewhere.—Aitken v. Board of Review of Unemployment Compensation Commission, Sup., 56 A.2d 587, 588, 136 N.J.Law 372.

7. U.S.—C. G. Conn. Limited, v. National Labor Relations Board, C.C. A.7, 108 F.2d 390, 397.

N.Y.—New York State Labor Relations Board v. Union Club of City of New York, 52 N.Y.S.2d 74, 82, 268 App.Div. 516.

8. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 842, 25 Del.Ch. 347.

9. N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 799, 128 N.J.Eq. 450—McPherson Hotel Co. v. Smith, 12 A.2d 136, 141, 127 N.J.Eq. 167.

10. N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 799, 128 N.J.Eq. 450—McPherson Hotel Co. v. Smith, 12 A.2d 136, 141, 127 N.J.Eq. 167.

11. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 842, 25 Del.Ch. 347.

Similarly expressed

A strike bears some resemblance to a blockade in international law.—Samuel Hertzig Corporation v. Gibbs, 3 N.E.2d 831, 832, 295 Mass. 229.

"It is reasoned that if the employer is unable to obtain the services of a sufficient number of competent workmen to operate his business, or can obtain them only at an unusual or exorbitant wage, or employs them only temporarily and for the purpose of disrupting the strike, or if he is not able by reason of the pressure to carry on his business in a normal manner, the effectiveness of the strike has been demonstrated. It exists as a fact. But the strike may not prove effective. The demands of the strikers may not appeal to the reason either of the workmen in the trade or the patronizing public. The employer may be able to employ at a usual wage a sufficient number of qualified workmen. The public may continue, as theretofore, to bestow its patronage. The strike and the picketing may fail to exert economic pressure; and the facts and circumstances may show that there is no reasonable ground for belief that the purpose for which the strike was called will be accomplished. Consequently, the strike, in contemplation of law, is at an end."—Motion Pic-

ture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 842, 843, 25 Del.Ch. 347.

12. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573—Samuel Hertzig Corporation v. Gibbs, 3 N.E.2d 831, 832, 295 Mass. 229.

13. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 6 A.2d 321, 324, 125 Conn. 391, 122 A.L.R. 1287.

Mass.—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573—Samuel Hertzig Corporation v. Gibbs, 3 N.E.2d 831, 832, 295 Mass. 229.

14. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573.

15. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 6 A.2d 321, 324, 125 Conn. 391, 122 A.L.R. 1287.

Mass.—Simon v. Schwachman, 18 N.E.2d 1, 4, 301 Mass. 573—Samuel Hertzig Corporation v. Gibbs, 3 N.E.2d 831, 832, 295 Mass. 229.

16. N.J.—Newark International Baseball Club v. Theatrical Managers, Agents & Treasurers' Union, 10 A.2d 274, 126 N.J.Eq. 520—Mode Novelty Co. v. Taylor, 195 A. 819, 820, 122 N.J.Eq. 593.

17. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836, 843, 25 Del.Ch. 347.

Wis.—West Allis Foundry Co. v. State, 202 N.W. 302, 306, 186 Wis. 24.

filled their places and is operating at normal capacity,¹⁸ and that where employees have gone out on strike, that strike is deemed to continue to exist, and the strikers are deemed to continue to be employees or quasi employees, as long as the strike has not been abandoned, or terminated by mutual consent, and there exists some reasonable possibility that the purposes of the strike, or some of them, may still be attained.¹⁹

Cross References. Strikes are treated in various connections throughout the title Master and Servant since an established employer-employee relationship is an outstanding characteristic or essential ingredient of a strike, as stated *supra* p 536 note 91 et seq.

The failure of an employer to state in an advertisement, proposal, or contract for employment that a strike exists, where such is the case, is a statutory offense in some jurisdictions, as stated in Master and Servant § 14. For other specific references see the index to the title Master and Servant.

However, strikes are not treated exclusively in the title Master and Servant, but are treated in other places throughout this work, and thus, since the early conception of a strike was as a conspiracy to be dealt with as such, in either a criminal or a civil action, as stated *supra* p 543 note 34, the treatment of strikes as civil conspiracies is set out in Conspiracy § 11, and as criminal conspiracies in Conspiracy § 70.

It is sometimes contended that a strike is in violation of anti-trust legislation, or is contrary to common law provisions relating to monopolies, and the law in this connection is discussed in Monopolies § 79.

Unemployment compensation laws frequently contain provisions disqualifying persons who are unemployed by reason of strikes or other labor disputes from the benefits of such compensation laws, and such provisions are treated in Social Security

and Public Welfare §§ 173-196. Under some unemployment compensation statutes a claimant will not be denied benefits for refusing to accept a position offered where it is vacant due directly to a strike or other labor dispute as stated in Social Security and Public Welfare § 199. Injunctive relief against strikes is discussed in Injunctions § 147. For other specific references to the treatment of strikes throughout this work see the indexes to the various titles and consult the Descriptive-Word Index.

STRIKEBREAKER. One who takes the place of a workman on strike;²⁰ a worker who takes the place of one who has left work in an effort to force the employer to agree to demands made.²¹

STRIKE INSURANCE. See the index to the title Insurance.

STRIKER. A person who strikes; specifically an employee who leaves his work in consequence of some act of his employer or in the endeavor to force his employer to accede to some demand.²²

Also, in another sense, a private soldier detailed as an officer's servant.²³

STRING. A term said to mean, broadly, a ribbon.²⁴

In architecture, one of the inclined sides of a stair supporting the treads and risers.²⁵

STRINGER or STRINGERS. The word "stringer" is defined generally as meaning one who, or that which, strings.²⁶

As an architectural term it refers to one of the inclined sides of a stair supporting the treads and risers,²⁷ and in mining it is commonly understood to be a crack or crevice filled by mineral deposit and occurring in the country rock, as stated in Mines and Minerals § 3 h.

18. Conn.—*E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees*, 6 A.2d 321, 323, 125 Conn. 391, 122 A.L.R. 1287.
Del.—*Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co.*, 17 A.2d 836, 842, 25 Del.Ch. 347.
19. N.J.—*McPherson Hotel Co. v. Smith*, 12 A.2d 136, 141, 127 N.J.Eq. 167.
20. N.Y.—*People, on Complaint of*

Siegel, v. Kaye, 1 N.Y.S.2d 354, 355, 165 Misc. 663.
21. N.Y.—*People, on Complaint of Siegel, v. Kaye, supra*.
22. *New Standard D.*
23. *New Standard D.*
"Striker fee" see 36 C.J.S. p 630 note 43.
24. U.S.—*William Mann Co. v. Kalamazoo Loose Leaf Binder Co., C.C.* N.Y., 168 F. 284, 289.

Phrases
(1) "String bean" see 10 C.J.S. p 218 note 35.1.
(2) "String fuse" see *Mines and Minerals* § 3 h.
25. N.Y.—*Erlicht v. Boser*, 18 N.Y.S. 2d 797, 798, 259 App.Div. 269.
26. *Webster New Int.D.*
27. N.Y.—*Erlicht v. Boser*, 18 N.Y. S.2d 797, 798, 259 App.Div. 269.

In the language of bridge men and civil engineers the term "stringers" has an accepted meaning,²⁸ being used interchangeably with "joists."²⁹

STRIP. In popular usage as well as in the metallurgical sense,³⁰ the noun "strip" denotes a long, flat, and narrow piece, as contradistinguished from a long thin cylinder, like a wire;³¹ a narrow piece, comparatively long.³²

In the metallurgical sense the noun "strip" is further defined as meaning an ingot prepared for rolling into plates; a narrow flat bar of iron or steel; hence iron or steel in strips (more fully, strip iron or steel).³³

As a verb, "strip" is defined as meaning to deprive of utterly; rob; despoil; plunder; as, to strip a man of his wealth.³⁴ It has been held synonymous with "deprive" see 26 C.J.S. p 977 note 67.2.

Phrases employing the term in its various forms are set out in the note.³⁵

STRIPPER. One who strips, in any sense; any implement or device for stripping something.³⁶

STRONG. A relative term³⁷ having reference to the medium of the class to which it is applied,³⁸ and susceptible to degrees of comparison.³⁹ The word denotes strength,⁴⁰ and is defined as meaning, cogent; powerful; forcible; calculated to make a deep or effectual impression on the mind.⁴¹

As used in a representation for the purpose of securing credit it has been construed to mean financially strong or able.⁴²

STRUCTURAL. Of, or pertaining to, structure or a structure.⁴³

STRUCTURE. It has been said that the word "structure" is very comprehensive,⁴⁴ and one of the broadest terms in the English language,⁴⁵ and that it may be used in a broad sense or in a more restricted sense.⁴⁶

Primarily,⁴⁷ "structure" means a thing built,

28. N.Y.—Town of Queensbury v. Hudson Valley Ry. Co., 135 N.Y.S. 200, 204, 45 Misc. 197.

29. N.Y.—Town of Queensbury v. Hudson Valley Ry. Co., supra. 60 C.J. p 665 note 68.

30. U.S.—Magnavox Co. v. Hart & Reno, C.C.A.Cal., 73 F.2d 433, 437.

31. U.S.—Magnavox Co. v. Hart & Reno, supra.

32. U.S.—U. S. v. Ashcroft Mfg. Co., Conn., 176 F. 736, 100 C.C.A. 281—Magone v. Vom Cleff, N.Y., 70 F. 980, 981, 17 C.C.A. 549.

33. U.S.—Magnavox Co. v. Hart & Reno, C.C.A.Cal., 73 F.2d 433, 437.

34. New Standard D.

35. *Phrases*

(1) "Coal stripping" see Mines and Minerals § 3 h.

(2) "Strip mining" see Mines and Minerals § 3 c (1).

(3) "Stripped weight."—Swift & Co. v. Wallace, C.C.A.7, 105 F.2d 848, 860.

(4) "Stripping mine" see Mines and Minerals § 3 h.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 665 notes 70-72.

36. Webster New Int.D.

"Stripper wells" see Mines and Minerals § 3 h.

37. N.Y.—People v. Crilley, 20 Barb. 246, 248.

38. N.Y.—People v. Crilley, supra.

39. Tex.—Wright v. Austin, Civ. App., 175 S.W.2d 281, 283.

Language may be strong, yet other expressions may be stronger, and other language may be the strongest of all.—Wright v. Austin, supra.

40. Tex.—Wright v. Austin, supra.

41. Tex.—Wright v. Austin, supra—Harrison v. Sharpe, Civ.App., 210 S.W. 731, 733—Hernandez v. State, 18 Tex.App. 134, 150, 51 Am.R. 295.

Phrases

(1) "Strong-arm clause" of Bankruptcy Act see Bankruptcy § 169 a.

(2) "Strong beer" see 10 C.J.S. p 226 note 46.

(3) "Strong corroborating circumstances" see Evidence § 1016.

(4) "Strongly corroborated" generally see 20 C.J.S. p 238 note 66; see also Perjury § 70 b.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 665 notes 81, 82.

42. N.Y.—People v. Jefferey, 31 N.Y.S. 267, 271, 9 N.Y.Cr. 419, 82 Hun 409.

43. Webster New Int.D.

Ky.—Corpus Juris quoted in Sellig-

man v. Von Allmen Bros., 179 S.W. 2d 207, 209, 297 Ky. 121.

Phrases

(1) "Structural alteration" see 3 C.J.S. p 900 note 82.1.

(2) "Structural change" see 14 C.J.S. p 396 note 91.1.

(3) "Structural fabrication" of steel see 35 C.J.S. p 380 note 59.

(4) "Structural shape" or "structural shapes" generally see 80 C.J.S. p 141 notes 90, 91; as subject to tariff see Customs Duties § 34.

(5) "Structural steel" see 82 C.J.S. p 1051 note 5.

(6) "Structural strength" of a building refers to the strength of the building considered as a structure.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 916, 60 S.D. 630.

(7) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 665 notes 90-96.

44. U.S.—United States ex rel. Murphy v. Warden of Clinton Prison, D.C.N.Y., 29 F.Supp. 486, 492.

45. U.S.—U. S. ex rel. Murphy v. Warden of Clinton Prison, supra.

46. Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

47. S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 916, 60 S.D. 630.

erected, or fabricated;⁴⁸ that which is built or constructed;⁴⁹ something constructed or built,⁵⁰ as a building, a dam, or a bridge.⁵¹ In its broadest⁵² and widest⁵³ sense "structure" means any construction;⁵⁴ any production or piece of work artificially built up, or composed of parts joined together in some definite manner;⁵⁵ and when the term is applied to a material thing made by human labor, it means something composed of parts or portions which have been put together by human exertion.⁵⁶

In a more restricted sense,⁵⁷ the word "structure" is ordinarily understood⁵⁸ to mean a building⁵⁹ of any kind,⁶⁰ especially a building of some

size⁶¹ or magnificence;⁶² an edifice.⁶³

While a structure is defined to be a production composed of parts artificially joined together according to plan, and designed to accomplish a definite purpose,⁶⁴ it has been said that it may well be doubted whether such a definition now precisely and truly describes a structure as that word is generally and customarily used,⁶⁵ since the term ordinarily carries with it the idea of size, weight, and strength, as stated *infra* p 549 note 69, and has come to mean anything composed of parts capable of resisting heavy weights or strains, and artificially joined together for some special use.⁶⁶

48. S.D.—Western Bldg. Co. v. J. C. Penney Co., *supra*.

49. N.C.—Watson Industries v. Shaw, 69 S.E.2d 505, 509, 235 N.C. 203.
60 C.J. p 666 note 8.

50. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

Miss.—Jefferson Davis County v. Riley, 130 So. 283, 285, 157 Miss. 473.

N.C.—Watson Industries v. Shaw, 69 S.E.2d 505, 509, 235 N.C. 203.

51. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

52. Cal.—Mendoza v. Central Forest Co., 174 P. 359, 361, 37 Cal.App. 289.

Mich.—Detroit Trust Co. v. Austin, 289 N.W. 239, 240, 291 Mich. 523—Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254—C. K. Eddy & Sons v. Tierney, 267 N.W. 852, 855, 276 Mich. 333.

Wash.—Karasek v. Peier, 61 P. 33, 35, 22 Wash. 419, 50 L.R.A. 345.

53. Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

N.C.—Watson Industries v. Shaw, 69 S.E.2d 505, 509, 235 N.C. 203.

Ohio.—Lewis v. State, 69 N.E. 980, 983, 69 Ohio St. 473.

W.Va.—State v. Royal Indemnity Co., 128 S.E. 439, 443, 99 W.Va. 277, 43 A.L.R. 552.

54. Cal.—Mendoza v. Central Forest Co., 174 P. 359, 361, 37 Cal. App. 289.

Mich.—Detroit Trust Co. v. Austin, 289 N.W. 239, 240, 291 Mich. 523—

Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254—C. K. Eddy & Sons v. Tierney, 267 N.W. 852, 855, 276 Mich. 333.

Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

60 C.J. p 666 note 1.

Connected construction

Ohio.—Phoenix Ins. Co. v. Luce, 11 Ohio Cir.Ct. 476, 483, 5 Ohio Cir. Dec. 210.

55. Cal.—Mendoza v. Central Forest Co., 174 P. 359, 361, 37 Cal.App. 289.

Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

Mich.—Detroit Trust Co. v. Austin, 289 N.W. 239, 240, 291 Mich. 523—

Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254—C. K. Eddy & Sons v. Tierney, 267 N.W. 852, 855, 276 Mich. 333.

N.C.—Watson Industries v. Shaw, 69 S.E.2d 505, 509, 235 N.C. 203.

Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

W.Va.—State v. Royal Indemnity Co., 128 S.E. 439, 443, 99 W.Va. 277, 43 A.L.R. 552.

60 C.J. p 666 note 4.

56. W.Va.—State v. Royal Indemnity Co., 128 S.E. 439, 443, 99 W.Va. 277, 43 A.L.R. 552.

60 C.J. p 666 note 7.

57. Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

58. Mont.—Cascade Elec. Co. v. Associated Creditors, *supra*.

Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

59. Mont.—Cascade Elec. Co. v. Associated Creditors, *supra*.

Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

60 C.J. p 666 note 10 [a].

61. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

Vt.—Dickerman v. Town of Pittsford, 80 A.2d 529, 532.

60 C.J. p 666 note 10.

62. Tex.—Corpus Juris quoted in Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

63. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Tex.—Corpus Juris quoted in Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

Vt.—Dickerman v. Town of Pittsford, 80 A.2d 529, 532.

60 C.J. p 666 note 10.

61. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Tex.—Corpus Juris quoted in Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

Vt.—Dickerman v. Town of Pittsford, 80 A.2d 529, 532.

60 C.J. p 666 note 11.

62. Tex.—Corpus Juris quoted in Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

Vt.—Dickerman v. Town of Pittsford, 80 A.2d 529, 532.

60 C.J. p 666 note 12.

63. U.S.—U. S. v. Frank, 15 Ct.Cust. App. 97, 103.

Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

Tex.—Corpus Juris quoted in Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

Vt.—Dickerman v. Town of Pittsford, 80 A.2d 529, 532.

60 C.J. p 666 note 13.

64. U.S.—Jackson Freight Forwarding Co. v. U. S., 20 C.C.P.A., Customs, 229, 234—U. S. v. Henry L. Exstein, 16 Ct.Cust.App. 328, 331—Simon, Buhler & Baumann, Inc. v. U. S., 8 Cust.App. 273, 274.

65. U.S.—Jackson Freight Forwarding Co. v. U. S., 20 C.C.P.A., Customs, 229, 234—U. S. v. Henry L. Exstein, 16 Ct.Cust.App. 328, 331—Simon, Buhler & Baumann, Inc. v. U. S., 8 Cust.App. 273, 274.

66. U.S.—Jackson Freight Forwarding Co. v. U. S., 20 C.C.P.A., Customs, 229, 234—European Trading Co. v. U. S., 19 C.C.P.A., Customs, 82, 84—U. S. v. Henry L. Exstein, 16 Ct.Cust.App. 328, 331—Simon,

From an engineering point of view "structure" is technically defined as any artificial construction in which all the component parts are intended to be and remain in equilibrium, and at rest relatively to each other.⁶⁷

The word "structure" usually refers to a permanent stationary erection,⁶⁸ and ordinarily carries with it the idea of size, weight, and strength,⁶⁹ and it has been said that the strength of any structure consists in its ability under any given circumstances to remain in a condition of stability and equilibrium; that is, its ability to resist the breaking or displacement of any of its parts, its ability to sustain without failure its own weight, together with all loads and stresses imposed on it.⁷⁰

A structure may be below the surface of the ground as well as above it,⁷¹ and it may be a part of another larger structure, and in reference to it constitute but a part of a structure.⁷²

Although a building is always a structure,⁷³ all structures are not necessarily buildings,⁷⁴ and many things may be termed structures which are not buildings.⁷⁵ It has been said that a structure is a building even though the sides are not inclosed or walled in.⁷⁶

The word "structure" has been held to include a hotel, apartment house, office building, railroad station, theatre, and any other building,⁷⁷ and it also includes various other objects,⁷⁸ such as a bill-

Buhler & Baumann, Inc. v. U. S., 8 Cust.App. 273, 274.

67. S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 916, 60 S.D. 630.

68. Ohio.—Phoenix Ins. Co. v. Luce, 11 Ohio Cir.Ct. 476, 484, 5 Ohio Cir. Dec. 210.
60 C.J. p 666 note 3.

Similarly expressed

Every product of construction designed for permanent use where it stands.—A. Dicillo & Sons v. Chester Zoning Board of Appeal, Com.Pl., 103 N.E.2d 44, 47.

69. U.S.—Jackson Freight Forwarding Co. v. U. S., 20 C.C.P.A., Customs, 229, 234—European Trading Co. v. U. S., 19 C.C.P.A., Customs, 82, 84—U. S. v. Henry L. Exstein, 16 Ct.Cust.App. 328, 331—Simon, Buhler & Baumann, Inc. v. U. S., 8 Cust.App., 273, 274.

70. S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 916, 60 S.D. 630.

71. Wis.—Kosidowski v. City of Milwaukee, 139 N.W. 187, 188, 152 Wis. 223.
60 C.J. p 666 note 9 [b].

We are accustomed to think of a structure as something above ground in the nature of a building, but this is not necessarily the only meaning of the word.—Dysart v. Youngblood, 102 P.2d 664, 665, 44 N.M. 351—Albuquerque Foundry & Machine Works v. Stone, 286 P. 157, 158, 34 N.M. 540.

72. Cal.—Williams v. Mountaineer G. M. Co., 34 P. 702, 704, 102 Cal. 134—Hammond Lumber Co. v. Goldberg, 13 P.2d 814, 817, 125 Cal. App. 120.

"One who has built a chimney in a house, or a porch, or a doorstep, has helped to build a structure, to wit, a chimney, a porch, or doorstep."—Williams v. Mountaineer G. M. Co., 34 P. 702, 704, 102 Cal. 134—Hammond Lumber Co. v. Goldberg, 13 P.2d 814, 817, 125 Cal.App. 120.

73. Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

Mich.—Detroit Trust Co. v. Austin, 289 N.W. 239, 240, 291 Mich. 523.
N.Y.—City of New York v. M. Wineburgh Adv. Co., 107 N.Y.S. 478, 483, 122 App.Div. 748.

All buildings of every name and nature are structures.—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N.Y., 29 F.Supp. 486, 492.

74. Conn.—Andrew B. Hendryx Co. v. City of New Haven, 134 A. 77, 79, 104 Conn. 632.

75. Mich.—Detroit Trust Co. v. Austin, 289 N.W. 239, 240, 291 Mich. 523.

N.Y.—City of New York v. M. Wineburgh Adv. Co., 107 N.Y.S. 478, 483, 122 App.Div. 748.

76. Ill.—Sixty-Third & Halsted Realty Co. v. Goldblatt Bros., 96 N.E. 2d 838, 842, 342 Ill.App. 389.

Similarly expressed

The word "structure" encompasses walls.—A. Dicillo & Sons v. Chester Zoning Board of Appeals, Ohio Com. Pl., 103 N.E.2d 44, 47.

77. U.S.—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N.Y., 29 F.Supp. 486, 492.

78. Held to include

(1) Belt conveyor.—Ohio Power

Co. v. Delst, 96 N.E.2d 771, 775, 154 Ohio St. 473.

(2) Dog house consisting of concrete blocks, and approximately seven feet long, five feet wide, and five feet high, and having a roof.—University Gardens Property Owners Ass'n v. Solomon, 88 N.Y.S.2d 789, 790.

(3) Fire escape.
Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254.
N.Y.—Pross v. Excelsior Cleaning & Dyeing Co., 179 N.Y.S. 176, 179, 110 Misc. 195.

(4) Flagstaff.—Lawver v. Joint Dist. No. 1, Mount Horeb v. Blue Mounds, 288 N.W. 192, 193, 232 Wis. 608.

(5) Lunchwagon placed on a brick foundation.—People ex rel. Herzog v. Miller, 11 N.Y.S.2d 572, 573, 170 Misc. 1063.

(6) Pier and platform.—Feirn v. Village of Shorewood Hills, 34 N.W. 2d 107, 109, 253 Wis. 418.

(7) Post.
Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254.
N.Y.—Pross v. Excelsior Cleaning & Dyeing Co., 179 N.Y.S. 176, 179, 110 Misc. 195.

(8) Stairway.
Mich.—Paye v. City of Grosse Pointe, supra.

N.Y.—Pross v. Excelsior Cleaning & Dyeing Co., supra.

(9) Stepladder.
Mich.—Paye v. City of Grosse Pointe, supra.

N.Y.—Pross v. Excelsior Cleaning & Dyeing Co., supra.

(10) Other objects held to be included see 60 C.J. p 667 notes 14 [a], 16 [a].

board,⁷⁹ a fence,⁸⁰ a railroad track⁸¹ or tunnel,⁸² towers,⁸³ and a well.⁸⁴

The term has been held not to include various objects,⁸⁵ such as a dirt road⁸⁶ and a sidewalk.⁸⁷

The term may⁸⁸ or may not⁸⁹ include a gasoline pump, and may or may not include various kinds of tanks.⁹⁰

It has been said that the inclusion of a particular object, or its exclusion, usually depends on the context and the purpose sought to be accomplished by the provision of which the term is a part.⁹¹

The word "structure" is sometimes defined as meaning a fitting together, adjustment, building;⁹² a joining together;⁹³ the act of building or constructing; a building up;⁹⁴ but, according to modern dictionaries, such meanings are now character-

ized as archaic⁹⁵ or obsolete.⁹⁶

"Structure" has been held synonymous with "building" see 12 C.J.S. p 382 note 35, and it has been distinguished from "building" see 12 C.J.S. p 382 note 54, and "edifice" see 28 C.J.S. p 831 note 33.1.

Phrases employing the word "structure" are set out in the note.⁹⁷

STRUMPET. See Prostitution § 1.

STUB. The short blunt part of anything after the larger part has been broken off or used up; hence, any short, thick, projecting part; a stump.⁹⁸

The term has been employed to designate a small post.⁹⁹

79. N.Y.—Buskirk v. O. J. Gude Co., 100 N.Y.S. 777, 115 App.Div. 330—Gunning System v. City of Buffalo, 77 N.Y.S. 987, 75 App.Div. 31—City of Rochester v. West, 51 N.Y.S. 482, 29 App.Div. 125.

Outdoor advertising sign or billboard
Ohio.—A. Dicillo & Sons v. Chester Zoning Board of Appeals, Ohio Com. Pl., 103 N.E.2d 44, 47.

Signboard

Ark.—Seiz v. City of Hot Springs, 108 S.W.2d 897, 899, 194 Ark. 544.

80. Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254.

N.Y.—Pross v. Excelsior Cleaning & Dyeing Co., 179 N.Y.S. 176, 179, 110 Misc. 195.

Wash.—Karasek v. Peier, 61 P. 33, 35, 22 Wash. 419, 50 L.R.A. 345.

An ordinary fence is a structure within the broad definition, but is not a structure within the narrow definition.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

81. Tex.—Fort Worth & D. C. R. Co. v. Ammons, Civ.App., 215 S.W.2d 407, 411.
60 C.J. p 667 note 14 [a] (21).

82. W.Va.—Atlas Powder Co. v. Nelson and Chase & Gilbert Co., 20 S.E.2d 890, 893, 124 W.Va. 298—Bluefield Supply Co. v. M. P. Smith Const. Co., 177 S.E. 296, 298, 115 W.Va. 537.

83. Ohio.—A. Dicillo & Sons v. Chester Zoning Board of Appeals, Com. Pl., 103 N.E.2d 44, 47.

Radio tower

N.C.—Watson Industries v. Shaw, 69 S.E.2d 505, 509, 235 N.C. 203.

84. Ohio.—A. Dicillo & Sons v. Chester Zoning Board of Appeals, Com. Pl., 103 N.E.2d 44, 47.

Oil well

N.M.—Dysart v. Youngblood, 102 P. 2d 664, 665, 44 N.M. 351.
60 C.J. p 667 note 16 [a] (9), (10).

Water well

N.M.—Dysart v. Youngblood, supra.

85. Held not to include

(1) A canal.—Paye v. City of Grosse Pointe, 271 N.W. 826, 827, 279 Mich. 254—Healy v. Toles, 254 N.W. 213, 266 Mich. 584, 92 A.L.R. 749.

(2) Other objects held not to be included see 60 C.J. p 667 notes 15 [a], 16 [b].

86. Ill.—Village of Niles Center v. Industrial Commission, 21 N.E.2d 745, 747, 371 Ill. 622—McLaughlin v. Industrial Board of Illinois, 117 N.E. 819, 820, 281 Ill. 100.

87. Wis.—Bauhs v. St. James Congregation, Madison, 37 N.W.2d 842, 843, 255 Wis. 108.

88. Ala.—Chaney v. State, 142 So. 104, 105, 225 Ala. 5.

89. N.M.—Dunn v. Town of Gallup, 29 P.2d 1053, 1055, 38 N.M. 197.

90. Septic tank and water tank held included

Ohio.—A. Dicillo & Sons v. Chester Board of Zoning Appeal, Com.Pl., 103 N.E.2d 44, 47.

Tank for storage of petroleum products not included

Pa.—Humphreys v. Stuart Realty Corp., 73 A.2d 407, 410, 364 Pa. 616.

91. Tex.—Stewart v. Welsh, 178 S.W.2d 506, 508, 142 Tex. 314.

92. Ohio.—Lewis v. State, 69 N.E. 980, 983, 69 Ohio St. 473.

93. Ohio.—Phoenix Ins. Co. v. Luce, 11 Ohio Cir.Ct. 470, 483, 5 Ohio Cir. Dec. 210.

94. Ohio.—Lewis v. State, 69 N.E. 980, 983, 69 Ohio St. 473.

95. New Standard D.

96. Webster New Int.D.

97. Phrases

(1) "Circulation structure" as a publishing term see 14 C.J.S. page 1122 note 50.

(2) "Drainage structure" defined see Drains § 1.

(3) "Permanent structure" see 70 C.J.S. p 563 notes 61–63.

(4) "Temporary structure" is one which can easily be changed or repaired at reasonable expense.—Louisville & N. R. Co. v. Laswell, 137 S.W. 2d 732, 735, 299 Ky. 799—Kidd v. Jody, 161 S.W.2d 606, 608, 290 Ky. 379.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 667 notes 21–30.

98. Webster New Int.D.

Phrases

(1) "Stub book" see 11 C.J.S. p 521 note 97.7.

(2) "Stub run" see Motor Vehicles § 8.

(3) "Stub switch" distinguished from "split switch" see Railroads § 1 n.

(4) "Stub train" see Railroads § 1 q (2).

99. Tex.—Galveston, H. & S. A. Ry. Co. v. Miller, Civ.App., 193 S.W. 593, 595.

STUBBLE. The stumps of wheat, rye, or other grain left in the ground, as after reaping.¹ The term is also applied to the roots from which sugar cane has been cut.²

STUBBORN. The adjective³ "stubborn" is defined as meaning inflexible in opinion or intention; unreasonably obstinate;⁴ unreasonably unyielding;⁵ not easily bent, set aside, or overcome;⁶ characterized by perseverance or persistence.⁷

STUDENT. A person who is engaged in a course of study, either general or special.⁸ It has been stated that a student does not lose his status as such merely because he earns money to help pay for his tuition or living expenses.⁹

The relationship between student and college or university is discussed in Colleges and Universities §§ 24-29. A student's domicile is treated in Domicile § 12 g (3), and his residence for voting purposes in Elections § 22.

Immigration laws applicable to alien students are considered in Aliens §§ 89, 94 d (2), 102 a (3); statutes prohibiting the sale or gift of intoxicating liquor to students, see Intoxicating Liquors § 261.

STUD POKER. See Gaming § 1 b (2), (3), d.

STUFF. While the word "stuff" ordinarily is used in connection with inanimate personal property,¹⁰

it is also employed to signify trash; nonsense; foolish or irrational language.¹¹

Phrases employing various forms of the word are set out in the note.¹²

STUMP. The part of the tree or plant remaining in the earth after the stem or trunk is cut off; the stub.¹³

STUMPAGE. As a term which generally refers to the sum agreed on to be paid to an owner for trees standing or lying on his land, see Logs and Logging § 1 i. "Stumpage value" is also defined in that section, and "stumpage liens" are treated in §§ 59 b, 65, 70 b, 74.

STUPOR. A state in which the faculties are deadened or dazed; a suspension or great diminution of sensibility.¹⁴ The term may mean either physical or mental insensibility.¹⁵

ST. VITUS' DANCE. See Insane Persons § 2 d.

STYLE. Mode or manner;¹⁶ also design or pattern.¹⁷

SUA CUIQUE DOMUS ARX ESTO. See 60 C.J. p 669 note 78.

SUA SPONTE. Literally, Of his or its own will

1. Webster New Int.D.

Not stubble

A cornfield from which the corn had not been gathered, and a meadow which had been mowed once, but could be mowed again, were not stubble.—*Corpus Juris* cited in Colby v. Hill, 61 P.2d 207, 209, 177 Okl. 511.

The term may be shown to include and designate whatever is left on the ground after the harvest time.—Callahan v. Stanley, 57 Cal. 476, 478.

2. U.S.—Viterbo v. Freidlander, La., 7 S.Ct. 962, 976, 120 U.S. 707, 30 L. Ed. 776.

3. Miss.—Taylor v. State, 11 So.2d 663, 674, 194 Miss. 1.

4. Miss.—Taylor v. State, supra. "Stupidly stubborn" synonymous with "bull-headed" see 12 C.J.S. p 558 note 42.

5. Or.—State v. Butler, 186 P. 55, 61, 96 Or. 219.

6. Miss.—Taylor v. State, 11 So.2d 663, 675, 194 Miss. 1.

7. New Standard D.

Similarly defined

Perseverance; persistence.—Taylor v. State, 11 So.2d 663, 675, 194 Miss. 1.

8. U.S.—U. S. ex rel. Simonian v. Tod, C.C.A.N.Y., 297 F. 172, 173. 60 C.J. p 668 note 41.

9. Mass.—Rummel v. Peters, 51 N.E. 2d 57, 64, 314 Mass. 504.

10. Mont.—Sharp v. Sharp, 139 P.2d 235, 237, 115 Mont. 35.

11. Iowa.—State v. Weems, 65 N.W. 387, 393, 96 Iowa 426.

12. Phrases.

(1) "Household stuff" see 41 C.J.S. p 368 note 96.

(2) "Stuffing the ballot box" as an offense see Elections § 327.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 668 notes 47, 49.

13. Wis.—Cremer v. Portland, 36 Wis. 92, 96.

60 C.J. p 668 note 52.

As a mining term see Mines and Minerals § 3 h.

Phrases

(1) "Stump tail" is a term applied to depreciated currency.—Webster v. Pierce, 35 Ill. 158, 163.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 668 notes 54, 55.

14. Tex.—Baldridge v. State, 74 S.W. 916, 919, 45 Tex.Cr. 193.

60 C.J. p 669 note 67.

15. Iowa.—In re Richardson's Will, 202 N.W. 114, 117, 199 Iowa 1320.

16. Neb.—Gorey v. Kelly, 90 N.W. 554, 555, 64 Neb. 605.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 669 notes 74-77.

17. Vt.—Herrick v. Noble, 27 Vt. 1, 6.

or motion; voluntarily; without prompting or suggestion.¹⁸

SUB (Latin). Under;¹⁹ below;²⁰ upon.²¹

As the first word of a maxim as to which there have been no recent applications see 60 C.J. p 669 note 82.

Sub conditione. The phrase "sub conditione" is defined as meaning on condition,²² and is used to express a condition²³ or a contingent obligation.²⁴

Other phrases commencing with the Latin "sub" are set out in the note.²⁵

SUB (Prefix). Under; from under.²⁶ In chemistry,²⁷ it signifies nothing more than that the term to which it is prefixed is present in only relatively small proportion, or in less than the normal amount.²⁸

SUBAGENT. The term is defined generally in Agency § 7 and other references to it are made in the title index. Consult also the title index to Banks and Banking.

SUBCONTRACT. Defined, see Contracts § 11, and other references in title index.

SUBCONTRACTOR. The term is defined in connection with contracts generally in Contracts § 1

f, and with reference to building contracts in Contracts § 11. See also the C.J.S. title Workmen's Compensation Acts §§ 107-111, also 71 C.J. p 483 note 21-p 495 note 17, and the indexes to the titles Master and Servant, Mechanics' Liens, Municipal Corporations, and Negligence. Consult also the Descriptive-Word Index.

SUBDITIS ET OBEDIENTIBUS NISI, LEGES FRUSTRA FERUNTUR. See 60 C.J. p 670 note 99.

SUBDIVIDE. In general, to divide the parts of into more parts; to divide again, as what has already been divided;²⁹ to divide into smaller parts the same thing or subject matter.³⁰

In real estate, to divide a tract of land into lots to sell before developing or improving them.³¹

SUBDIVISION. In general, the act or process of subdividing; also, an instance or example of subdividing; a part of a thing made by subdividing.³²

"Subdivision" may be used as synonymous with "paragraph" see 67 C.J.S. p 557 note 22.

The word "subdivision" is frequently used with reference to real estate to denote an unimproved tract of land which has been surveyed and divided into lots for the purpose of resale,³³ and as used in this sense a subdivision may be the same as an addition.³⁴ In some localities a subdivision is dis-

18. Black L.D.

19. Miss.—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.

N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

Va.—French v. Beville, 62 S.E.2d 883, 886, 191 Va. 842.

20. N.Y.—In re Arcowsky's Will, 11 N.Y.S.2d 853, 854, 171 Misc. 41.

21. Black L.D.

22. Black L.D.

23. N.Y.—Graves v. Deterling, 24 N.E. 655, 657, 120 N.Y. 447. 60 C.J. p 669 note 84.

24. Ill.—Aldrich v. Aldrich, 260 Ill. App. 333, 361.

25. Sub iudice

Literally, "Under or before a judge or court; under judicial consideration; undetermined."—Black L.D.; 60 C.J. p 674 note 69-p 675 note 71.

Sub modo

Under a qualification; subject to a

restriction or condition.—Black L.D. —60 C.J. p 688 note 11. Corporations sub modo see Corporations § 21.

Sub nomine

Under the name; in the name of; under the title of.—Black L.D.

26. New Standard D.

27. New Standard D.

28. U.S.—Durand v. Bethlehem Steel Co., C.C.A.Del., 122 F.2d 321, 322.

29. Mo.—State ex rel. Frank v. Tegethoff, 89 S.W.2d 666, 669, 338 Mo. 328.

30. Cal.—Corpus Juris cited in People v. Embassy Realty Associates, 167 P.2d 797, 799, 73 Cal.App. 2d 901—Corpus Juris cited in Cowell v. Clark, 99 P.2d 594, 596, 37 Cal.App.2d 255. 60 C.J. p 670 note 2.

31. Cal.—People v. Embassy Realty Associates, Inc., 167 P.2d 797, 799, 73 Cal.App.2d 901—Cowell v. Clark, 99 P.2d 594, 596, 37 Cal.App.2d 255.

32. Webster New Int.D.

"Subdivision" defined by application of meanings of verb "subdivide" "Subdivision" means to divide into smaller parts the same thing or subject matter.

Cal.—People v. Embassy Realty Associates, 167 P.2d 797, 799, 73 Cal. App.2d 901—Cowell v. Clark, 99 P.2d 594, 596, 37 Cal.App.2d 255. Mo.—Kansas City v. Neal, 26 S.W. 695, 696, 122 Mo. 232.

Construed as meaning "part"

Ark.—Gill v. Saunders, 31 S.W.2d 748, 749, 182 Ark. 453.

33. Cal.—People v. Embassy Realty Associates, 167 P.2d 797, 800, 73 Cal.App.2d 901.

34. Utah.—Ferguson v. Mathis, 85 P.2d 827, 829, 96 Utah 442.

Used interchangeably

"An addition and a subdivision may be the same thing or they may be different things. Each usually, but not necessarily, implies a tract of

tinguished from a development on which improvements are made before sale, while elsewhere the terms have the same signification.³⁵

Phrases employing the term are set out in the note.³⁶

SUBDURAL. Beneath the dura mater, between it and the arachnoid.³⁷

SUBFLOW. As applied to a surface stream the term may be defined as those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream.³⁸

SUBFREIGHTS. An expression in common use and easily understood, embracing all freights which a charterer stipulates to receive for the carriage of goods, whether he takes the ship by demise or otherwise.³⁹

SUBINFEUDATION. The system which the feudal tenants introduced of granting smaller estates out of those which they held of their lord, to be held of

themselves as inferior lords. As this system was proceeding downward ad infinitum, and depriving the lords of their feudal profits, it was suppressed by the statute *Quia Emptores*, 18 Edward I. ch. 1, and instead of it alienation in the modern sense was introduced, so that thenceforth the alienee held of the same chief lord and by the same services that his alienor before him held.⁴⁰ However, even after the statute of *Quia Emptores* was enacted it was recognized that the chief lord might forego the benefit of the statute by authorizing his tenant to make a subinfeudation, that is, grant lands to be holden of himself; but this could not be done by a mesne lord on account of the interest of his superiors.⁴¹

SUBIRRIGATE. To irrigate below the surface, as by a system of underground porous pipes.⁴²

SUBIRRIGATION. A natural process by percolation through the soil.⁴³

SUBJACENT. Lying under or below; also, being lower, although not directly below; as, hills and subjacent valleys; occurring below the surface; as, a subjacent fire.⁴⁴

land platted and subdivided into smaller tracts, named and designated as lots or blocks, the official plat of which is duly authenticated and recorded in the recorder's office. Each may cover new lands thereby added to or included within the corporate limits of the city or either cover lands already within the city but now platted and subdivided from acreage into lots and blocks as a new plat or subdivision of the platted portion of the city or be an addition to the subdivided and platted portion of the city. So lands may be subdivided and platted, named, and the plat authenticated and filed for record in the recorder's office, even though outside the corporate limits of any city or town. We refer to these matters to point out that the words are not inherently different or suggestive of different things. In common parlance, they are frequently used interchangeably."—*Ferguson v. Mathis*, supra.

35. Cal.—*People v. Embassy Realty Associates*, 167 P.2d 797, 800, 73 Cal.App.2d 901.

36. Phrases

(1) "Political subdivision" see 72 C.J.S. p 223 notes 97-1.

(2) "Subdivision of the electric light" see *Electricity* § 1 b.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 670 notes 6-12.

37. *Stedman Med.D.*

Phrases

(1) "Subdural hematoma" see 39 C.J.S. p 888 note 95.

(2) "Subdural hemorrhage" see 39 C.J.S. p 888 note 99.

38. Ariz.—*Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 380, 39 Ariz. 65.
60 C.J. p 670 note 13.

39. U.S.—*American Steel Barge Co. v. Chesapeake & D. Coal Agency Co.*, Mass., 115 F. 669, 672, 53 C.C. A. 301.

40. Black L.D.
18 C.J. p 151 note 61.

Abolished by statute *Quia Emptores*

(1) The statute *Quia Emptores* in the year 1290 was designed to prevent the disadvantageous effects of subinfeudation to the overlord. The statute provided that when the feudal holder of the land aliened it his grantee should nevertheless hold directly from the overlord, so that the rights of the latter with respect to escheat and other incidents of the

feudal tenure should not be defeated—*Jones v. Magruder*, D.C.Md., 42 F. Supp. 193, 196.

(2) In the year 1290 the custom of subinfeudation had become intolerable, whereupon the statute of *Quia Emptores* was enacted. Thereafter no new tenure could be created on feoffment in fee simple, unless by the king or a tenant in capite, because by the force of the statute all lands and tenements so granted were held of the chief lord of the same fee by such services and customs as the feoffer held before. The effect of this statute was to prevent subinfeudation, and to permit alienation of lands in fee, free and clear of any new tenure.—*Kavanaugh v. Cohoes Power & Light Corporation*, 187 N.Y. S. 216, 231, 114 Misc. 590.

41. N.Y.—*People v. Van Rensselaer*, 9 N.Y. 291, 333.

42. Neb.—*Morrow v. Farmers' Irr. Dist.*, 220 N.W. 680, 682, 117 Neb. 424.

43. Neb.—*Morrow v. Farmers' Irr. Dist.*, supra.
60 C.J. p 671 note 18.

44. Webster New Int.D.
"Subjacent support" see *Adjoining Landowners* § 26, and *Mines and Minerals* §§ 240, 278.

SUBJECT. The term "subject" is derived from the Latin "subjectus,"⁴⁵ and, like many other words in the English language, has various meanings,⁴⁶ and a large signification, often embracing different kinds, different classes, and various modes, all belonging to the general subject.⁴⁷ Thus, in determining the intent with which the word is used, the meaning most suited to the context should be chosen.⁴⁸

As a Noun

The word "subject" is defined generally as meaning that concerning which something is asserted⁴⁹ or done;⁵⁰ that concerning which anything is said or done;⁵¹ that which is spoken of;⁵² that which is taken up for discussion;⁵³ that on which any operation, either mental or material, is performed;⁵⁴ that which is brought under thought or examination;⁵⁵ the theme of a proposition or discourse;⁵⁶ the thing or person treated of;⁵⁷ the thing forming the groundwork.⁵⁸ It is also defined as meaning that of which anything is affirmed or predicated;⁵⁹ or more specifically, a word or word group denoting that of which anything is predicated.⁶⁰

As used with respect to a person, the word "subject" is frequently applied to one who is under the governing power of another,⁶¹ specifically a person owing allegiance to a monarch;⁶² and it refers also to one who owes obedience to the laws, and is entitled to partake of the elections into the public office.⁶³

The noun "subject" has been held equivalent to, or synonymous with, "item" see 48 C.J.S. p 788 note 10, "purpose" see 73 C.J.S. p 1261 note 96, and "substance,"⁶⁴ and it has been compared with, or distinguished from, "provision" see 73 C.J.S. p 269 note 35, "substance,"⁶⁵ and "transient."⁶⁶ "Subject" and "object" have been held to be equivalent, and the terms have also been distinguished, see 67 C.J.S. p 11, notes 24-28.

While the words "subject" and "citizen" have been regarded as words of different import, the term "citizen," in the United States, is analogous to the term "subject" in the common law, see Citizens § 1 a.

With reference to nations the terms "inhabitants," "people," and "subjects" are sometimes used indiscriminately as synonyms, see 43 C.J.S. p 392 note 89.

The meaning of constitutional provisions prohibiting a statute from embracing more than one subject is treated in Statutes §§ 217, 218. Reference to the word "subjects" as used in various alien enemy statutes is made in the C.J.S. title War § 12, also 67 C.J. p 349 note 89.

As a Verb

The term "subject," which is frequently employed with the preposition "to,"⁶⁷ is variously defined as meaning to bring under control, power, or domin-

45. Ill.—O'Leary v. Cook County, 28 Ill. 534, 537.
60 C.J. p 671 note 20.

46. U.S.—United States v. Northern Pac. Ry. Co., D.C.Minn., 54 F.Supp. 843, 844.

Given many shades of meaning by the dictionaries.—White v. Hopkins, C.C.A.Tex., 51 F.2d 159, 163.

47. Okl.—Ex parte Owen, 286 P. 883, 885, 143 Okl. 8.

48. U.S.—U. S. v. Northern Pac. Ry. Co., D.C.Minn., 54 F.Supp. 843, 844.

49. Cal.—Bourland v. Hildreth, 26 Cal. 161, 232.

50. Iowa.—Miller v. Miller, 73 N.W. 484, 485, 104 Iowa 186.

51. Tenn.—Warren v. Walker, 71 S. W.2d 1057, 1058, 1059, 167 Tenn. 505.

52. N.M.—State v. Armstrong, 243 P. 333, 337, 31 N.M. 220.

Wash.—State v. King County Super.

Ct., 68 P. 957, 960, 28 Wash. 317, 92 Am.S.R. 831.

53. Cal.—People v. Parvin, 14 P. 783, 784, 2 Cal.Unrep.Cas. 788.

54. N.Y.—Glen, etc., Mfg. Co. v. Hall, 61 N.Y. 226, 236, 19 Am.R. 278.

55. Cal.—People v. Parvin, 14 P. 783, 784, 2 Cal.Unrep.Cas. 788.

56. N.M.—State v. Armstrong, 243 P. 333, 337, 31 N.M. 220.

Wash.—State v. King County Super. Ct., 68 P. 957, 960, 28 Wash. 317, 92 Am.S.R. 831.

57. Tenn.—Warren v. Walker, 71 S. W.2d 1057, 1059, 167 Tenn. 505.

58. Ill.—O'Leary v. Cook County, 28 Ill. 534, 537.

60 C.J. p 671 note 31.

59. N.M.—State v. Armstrong, 243 P. 333, 337, 31 N.M. 220.

60 C.J. p 671 note 26.

60. S.D.—State ex rel. Johnson v. Youngquist, 13 N.W.2d 296, 297, 298, 69 S.D. 574.

61. Alta.—Rex v. Felton, 9 Alta.L. 238, 243.

60 C.J. p 671 note 51.

"British subject" see 11 C.J.S. p 1143 note 53.

62. Alta.—Rex v. Felton, supra.

60 C.J. p 671 note 52.

63. U.S.—Respublica v. Chapman, 1 Dall., Pa., 53, 60, 1 L.Ed. 33.

64. Tenn.—McMahan v. Felts, 19 S. W.2d 249, 250, 159 Tenn. 435.

65. Ala.—Ex parte Black, 40 So. 133, 134, 144 Ala. 1.

60 C.J. p 976 note 76 [b].

66. U.S.—Stadtmuller v. Miller, C.C. A.N.Y., 11 F.2d 732, 739, 45 A.L.R. 895.

67. Cal.—Coffey v. Sacramento County Superior Court, 82 P. 75, 79, 147 Cal. 525.

Pa.—Ozehoski v. Scranton Spring Brook Water Service Co., 43 A.2d 601, 603, 157 Pa.Super. 437.

ion;⁶⁸ to make subservient;⁶⁹ to make liable;⁷⁰ to make subject;⁷¹ to subordinate;⁷² to cause to become subject or subordinate;⁷³ to subdue;⁷⁴ also to become servient,⁷⁵ subservient,⁷⁶ or subordinate⁷⁷ to.

As an Adjective

Actually placed or brought under;⁷⁸ liable;⁷⁹ obedient; submissive; subordinate.⁸⁰

Subject matter. A term of different meanings as used by the courts in treating with different problems.⁸¹ It is defined generally⁸² as meaning the cause;⁸³ the object;⁸⁴ the thing in controversy;⁸⁵ the thing in dispute;⁸⁶ the subject or matter presented for consideration;⁸⁷ the matter or thought presented for consideration in some statement or discussion;⁸⁸ the right which one party claims as against the other, as the right to divorce, of ejectment, to recover money, to have

foreclosure.⁸⁹

The term "subject matter" in connection with actions generally is treated in Actions § 1 i, and with respect to questions of jurisdiction generally in Courts § 23, Federal Courts § 4 b, Equity §§ 79-83, and Admiralty §§ 23-65.

Subject to. The expression "subject to" has no well-defined meaning.⁹⁰ It is a term of qualification,⁹¹ being employed usually to qualify something substantially already created,⁹² and embodying the command that the act shall not be effective until the condition is complied with.⁹³ It normally connotes, in legal usage, an absence of personal obligation,⁹⁴ and as ordinarily used does not create affirmative rights.⁹⁵

As defined by lexicographers,⁹⁶ and in its ordinary sense,⁹⁷ the term "subject to" means subordinate,⁹⁸

68. N.C.—Avery County Bank v. Smith, 120 S.E. 215, 218, 186 N.C. 635.

60 C.J. p 672 note 62.

69. N.Y.—Shepard & Morse Lumber Co. v. Hurd, 112 N.Y.S. 401, 403, 128 App.Div. 28—Thorp v. Munro, 47 Hun 246, 249.

70. N.Y.—Shepard & Morse Lumber Co. v. Hurd, 112 N.Y.S. 401, 403, 128 App.Div. 28.

60 C.J. p 672 note 66.

71. N.C.—Avery County Bank v. Smith, 120 S.E. 215, 218, 186 N.C. 635.

72. N.Y.—Duryea v. Lohrke, 121 N.Y.S. 138, 141, 136 App.Div. 555.

N.C.—Avery County Bank v. Smith, 120 S.E. 215, 218, 186 N.C. 635.

73. Cal.—Byrne v. Drain, 60 P. 433, 127 Cal. 663.

74. N.C.—Avery County Bank v. Smith, 120 S.E. 215, 218, 186 N.C. 635.

75. Pa.—Ozehoski v. Scranton Spring Brook Water Service Co., 43 A.2d 601, 603, 157 Pa.Super. 437.

76. Cal.—Coffey v. Sacramento County Super. Ct., 82 P. 75, 79, 147 Cal. 525—Byrne v. Drain, 60 P. 433, 127 Cal. 663.

77. Cal.—Coffey v. Sacramento County Super. Ct., 82 P. 75, 79, 147 Cal. 525.

78. U.S.—White v. Hopkins, C.C.A. Tex., 51 F.2d 159, 163.

Ohio.—Dumhoff-Joyce Co. v. Hamilton Furnace Co., 24 Ohio N.P., N.S., 145, 147.

79. Ala.—People's Bank, etc., Co. v.

Tissier Hardware Co., 45 So. 624, 626, 154 Ala. 103.

Ga.—Blackshear Mfg. Co. v. Talmadge, 161 S.E. 256, 259, 173 Ga. 703.

80. Ala.—People's Bank, etc., Co. v. Tissier Hardware Co., 45 So. 624, 626, 154 Ala. 103.

81. Mo.—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 475, 359 Mo. 282.

82. N.Y.—Hunt v. Hunt, 72 N.Y. 217, 228, 28 Am.R. 129.

83. N.Y.—Hunt v. Hunt, 72 N.Y. 217, 228, 28 Am.R. 129.

60 C.J. p 672 note 76.

84. Okl.—Parker v. Lynch, 56 P. 1082, 1088, 7 Okl. 631.

60 C.J. p 673 note 77.

85. Neb.—Holmes v. Mason, 115 N.W. 770, 80 Neb. 454.

86. Okl.—Flower Hospital v. Hart, 62 P.2d 1248, 1252, 178 Okl. 447.

60 C.J. p 673 note 79.

87. Okl.—Flower Hospital v. Hart, supra.

88. N.Y.—Hunt v. Hunt, 72 N.Y. 217, 228, 28 Am.R. 129.

Puerto Rico.—Martinez v. Padilla, 19 Puerto Rico 555, 557.

89. Okl.—Flower Hospital v. Hart, 62 P.2d 1248, 1252, 178 Okl. 447.

90. Wash.—Laucks v. Princehouse, 124 P.2d 226, 230, 232, 13 Wash.2d 140.

91. Ill.—Harley v. Magnolia Petroleum Co., 37 N.E.2d 760, 766, 378 Ill. 19, 137 A.L.R. 900.

60 C.J. p 673 note 1 [a].

92. Pa.—In re Brown's Estate, 137 A. 132, 138, 289 Pa. 101.

Tex.—Corpus Juris quoted in Sanitary Appliance Co. v. French, Civ. App., 58 S.W.2d 159, 163.

93. Mont.—Atlantic Pacific Oil Co. of Montana v. Gas Development Co., 69 P.2d 750, 762, 105 Mont. 1—State v. Stafford, 34 P.2d 372, 379, 97 Mont. 275.

94. U.S.—Helvering v. Southwest Consol. Corporation, La., 62 S.Ct. 546, 551, 315 U.S. 194, 86 L.Ed. 789.

95. U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.III., 124 F.2d 714, 716.

Ill.—Englestein v. Mintz, 177 N.E. 746, 752, 345 Ill. 48.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 302, 345 Mo. 650, 127 A.L.R. 163.

Tex.—Kokernot v. Caldwell, Civ.App., 231 S.W.2d 528, 531.

96. Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 298, 345 Mo. 650, 127 A.L.R. 163.

97. U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.III., 124 F.2d 714, 716.

Ill.—Englestein v. Mintz, 177 N.E. 746, 752, 345 Ill. 48.

Mass.—Flower v. Town of Billerica, 87 N.E.2d 189, 191, 324 Mass. 519.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 302, 345 Mo. 650, 127 A.L.R. 163.

Tex.—Kokernot v. Caldwell, Civ.App., 231 S.W.2d 528, 531.

98. U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.III., 124 F.2d 714, 716.

subservient⁹⁹ or obedient¹ to; charged with;² liable;³ subjected to the evils of.⁴

It is also defined as meaning limited,⁵ controlled,⁶ regulated,⁷ or affected⁸ by; under the control, power, or dominion of;⁹ conditional upon;¹⁰ dependent upon¹¹ or exposed to¹² (some contingent action);¹³ being under the contingency of.¹⁴

The term has also been construed by the courts as the equivalent of "reserving,"¹⁵ and under its broader import and when employed in connection with an existing agreement it has been construed to mean subject not only to the disadvantages, but also to the advantages, given by the agreement.¹⁶

"Subject to" has been held identical in meaning

Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

Mass.—Flower v. Town of Billerica, 87 N.E.2d 189, 191, 324 Mass. 519.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 302, 345 Mo. 650, 127 A.L.R. 163.

Mont.—Atlantic Pacific Oil Co. of Montana v. Gas Development Co., 69 P.2d 750, 762, 105 Mont. 1—State ex rel. Nagle v. Stafford, 34 P.2d 372, 379, 97 Mont. 275.

Tex.—Kokernot v. Caldwell, Civ.App., 231 S.W.2d 528, 531—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, 163.

Wyo.—Kelly v. Smythe, 157 P.2d 289, 296, 61 Wyo. 209, 60 C.J. p 673 note 97.

Inferior to

N.Y.—P. T. McDermott, Inc. v. Lawyers' Mortgage Co., 133 N.E. 909, 914, 232 N.Y. 336.

99. U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.Ill., 124 F.2d 714, 716.

Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

Mass.—Flower v. Town of Billerica, 87 N.E.2d 189, 191, 324 Mass. 519.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 302, 345 Mo. 650, 127 A.L.R. 163.

Mont.—Atlantic Pacific Oil Co. of Montana v. Gas Development Co., 69 P.2d 750, 762, 105 Mont. 1—State ex rel. Nagle v. Stafford, 34 P.2d 372, 379, 97 Mont. 275.

Tex.—Kokernot v. Caldwell, Civ.App., 231 S.W.2d 528, 531—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, 163.

Wyo.—Kelly v. Smythe, 157 P.2d 289, 296, 61 Wyo. 209, 60 C.J. p 673 note 98.

1. Cal.—Shay v. Roth, 221 P. 967, 969, 64 Cal.App. 314.

Tex.—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ. App., 58 S.W.2d 159, 163.

2. Tex.—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, supra.

60 C.J. p 673 note 87.

3. Mo.—**Corpus Juris** cited in Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 298, 345 Mo. 650, 127 A.L.R. 163.

Mo.—Hannibal Trust Co. v. Elzea, 286 S.W. 371, 377, 315 Mo. 485.

Similarly defined

(1) Made liable.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

(2) Liable to be affected.—Dumhoff-Joyce Co. v. Hamilton Furnace Co., 24 Ohio N.P., N.S., 145, 147.

4. Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

5. U.S.—Shell Oil Co. v. Manley Oil Corporation, C.C.A.Ill., 124 F.2d 714, 716.

Ga.—**Corpus Juris** cited in State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

Ill.—Englestein v. Mintz, 177 N.E. 746, 752, 345 Ill. 48.

Mass.—Flower v. Town of Billerica, 87 N.E.2d 189, 191, 324 Mass. 519.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 302, 345 Mo. 650, 127 A.L.R. 163.

Neb.—**Corpus Juris** quoted in State ex rel. Johnson v. Tilley, 288 N.W. 521, 523, 137 Neb. 173.

Tex.—Kokernot v. Caldwell, Civ.App., 231 S.W.2d 528, 531—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, 163.

6. Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 298, 345 Mo. 650, 127 A.L.R. 163.

7. Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

8. Ga.—**Corpus Juris** cited in State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

Ohio.—Cassidy v. Ellerhorst, 153 N.E. 118, 20 Ohio App. 8.

Tex.—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ. App., 58 S.W.2d 159, 163.

9. Iowa.—Van Duyn v. H. S. Chase & Co., 128 N.W. 300, 301, 149 Iowa 222.

Neb.—**Corpus Juris** quoted in State ex rel. Johnson v. Tilley, 288 N.W. 521, 523, 137 Neb. 173.

Brought under the control or action of

Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

10. N.Y.—F. W. Berk & Co. v. Derecktor, 92 N.E.2d 914, 915, 301 N.Y. 110—F. W. Berk & Co. v. Derecktor, 92 N.Y.S.2d 510, 511, 276 App.Div. 754.

11. Ga.—Blue Ridge Apartment Co. v. Telfair Stockton & Co., 54 S.E.2d 608, 612, 205 Ga. 552.

Neb.—**Corpus Juris** quoted in State ex rel. Johnson v. Tilley, 288 N.W. 521, 523, 137 Neb. 173.

Ohio.—Dumhoff-Joyce Co. v. Hamilton Furnace Co., 24 Ohio N.P., N.S., 145, 147.

Tex.—**Corpus Juris** quoted in Sanitary Appliance Co. v. French, Civ. App., 58 S.W.2d 159, 163.

Depending on

N.Y.—F. W. Berk & Co. v. Derecktor, 92 N.E.2d 914, 915, 301 N.Y. 110—F. W. Berk & Co. v. Derecktor, 92 N.Y.S.2d 510, 511, 276 App.Div. 754.

12. Ga.—Blue Ridge Apartment Co. v. Telfair Stockton & Co., 54 S.E.2d 608, 612, 205 Ga. 552, 60 C.J. p 673 note 89.

Exposed to some agency or tendency
Ohio.—Dumhoff-Joyce Co. v. Hamilton Furnace Co., 24 Ohio N.P., N.S., 145, 147.

13. Ga.—Blue Ridge Apartment Co. v. Telfair Stockton & Co., 54 S.E.2d 608, 612, 205 Ga. 552.

14. Ga.—Blue Ridge Apartment Co. v. Telfair Stockton & Co., supra.

In the contingency of

Ohio.—Dumhoff-Joyce Co. v. Hamilton Furnace Co., 24 Ohio N.P., N.S., 145, 147, 60 C.J. p 673 note 92.

15. N.Y.—Dagrosa v. Calabro, 105 N.Y.S.2d 178, 181.

16. Ga.—State Revenue Commission v. Columbus Bank & Trust Co., 178 S.E. 463, 464, 50 Ga.App. 486.

N.Y.—Bacon v. Grossmann, 76 N.Y. S. 188, 189, 71 App.Div. 574.

with "consistent with" see 15 C.J.S. p 990 note 68, and "restrained by" see 77 C.J.S. p 324 note 36, and equivalent to "thereafter."¹⁷

It is stated in the C.J.S. title Wills § 1304, also 69 C.J. p 1183 note 85 that, in the absence of anything indicating an intention to the contrary, land specifically devised will be charged with the payment of legacies where the land is specifically devised "subject to," "charged with," or "on condition that" the devisee pay the legacies.

Other phrases employing the term are set out in the note.¹⁸

SUBJECTIVE. Of the nature of, or pertaining to, a subject; having the character or quality of a subject.¹⁹

Subjective representations are statements not susceptible of present actual knowledge, but which amount only to statements of intention, opinion, or belief.²⁰ They are distinguishable from "objective representations" see 67 C.J.S. p 11 note 41.

Subjective symptoms. In medicine, those symptoms which a physician or surgeon learns from what his patient tells him;²¹ those which a physician learns from the expressions of the patient;²² those which a physician concludes exist because his patient says so;²³ those which are related by the patient, that cannot be observed by the physician, but are learned by questioning the patient.²⁴ They have been distinguished from "objective symptoms" see 67 C.J.S. p 12 note 47.

The admissibility of testimony by a medical expert as to statement made by his patient is treated in Evidence § 536.

SUBLATA; SUBLATO. As the first words of maxims as to which there have been no recent applications see 60 C.J. p 675 notes 72-75.

SUBLEASES. See the title indexes to Landlord and Tenant; and Mines and Minerals.

SUBLET. To underlet; to lease; as when a lessee leases to another person.²⁵ It has been compared with "transfer."²⁶

SUBMERGED LANDS. The term "submerged lands" is treated in various connections throughout the title Navigable Waters; and for specific references see the index to that title.

Federal and state rights to minerals in submerged lands are treated in Mines and Minerals § 4, and statutory provisions for leasing oil and gas rights to submerged lands are discussed in Mines and Minerals § 129.

SUBMISSION. The term "submission," which does not necessarily involve consent,²⁷ is defined generally as meaning a yielding to authority.²⁸ When applied to a controversy or action in court, the term means to refer or to place it before the court for determination.²⁹

17. R.I.—McCrillis v. McCrillis, 142 A. 153, 49 R.I. 240.

18. Other phrases

(1) "Subject to all the terms, etc.," are ordinarily words of restriction rather than of expansion.—Bee Line Transp. Co. v. Connecticut Fire Ins. Co. of Hartford, D.C.N.Y., 6 F.Supp. 816, 818.

(2) "Subject of action" see Actions § 1 i.

(3) "Subject of bankruptcy" see Bankruptcy § 1.

(4) "Subject to indebtedness" construed as meaning "subject to the payment of indebtedness."—Kelly v. Smythe, 157 P.2d 289, 296, 61 Wyo. 209.

(5) "Subject to a penalty" held synonymous with "liable to a penalty."—The Motorboat, D.C.N.J., 53 F. 2d 239, 241.

(6) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 671 notes 38-49, 55, 56, p 672 notes 57-60, 71, p 673 notes 81-85, 2-15, p 674 notes 16-65.

19. Webster New Int.D.

20. Okl.—United Ben. Life Ins. Co. v. Knapp, 51 P.2d 963, 965, 175 Okl. 25.
See Fraud §§ 10-12.

21. Mo.—Dean v. Wabash R. Co., 129 S.W. 953, 957, 229 Mo. 425—Schroeder v. Western Union Telegraph Co., App., 129 S.W.2d 917, 922.

22. Kan.—Reeder v. Thompson, 245 P. 127, 120 Kan. 722.
La.—Frantz v. Schroeder, App., 164 So. 147, 148.

23. Mo.—LaForge v. Cogilizer Tent & Awning Co., App., 205 S.W.2d 957, 962.

24. Wis.—Abbot v. Heath, 54 N.W. 574, 84 Wis. 314.

25. Webster New Int.D.

26. U.S.—U. S. v. A. Bentley & Sons Co., D.C.Ohio, 293 F. 229, 238.

27. Iowa.—State v. Cross, 12 Iowa . 66, 70, 79 Am.D. 519.

Pa.—Commonwealth v. Tuck, 82 A.2d 288, 290, 169 Pa.Super. 35.
"Submission" distinguished from "consent" see 15 C.J.S. p 981 note 27.

28. Black L.D.
60 C.J. p 675 note 82.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 675 notes 84, 85.

29. Ind.—Thompson v. A. J. Thompson Stone Co., 144 N.E. 150, 153, 81 Ind.App. 442.

Submission of controversies to courts for determination on a statement of facts agreed to by the parties, without action, is discussed in Submission of Controversy § 1 et seq; submission of controversies,	by agreement of the parties thereto, to persons chosen by themselves for determination, see Arbitration and Award § 1 et seq.
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SUBMISSION OF CONTROVERSY

This Title includes submission of controversies to courts for determination upon a statement of fact agreed to by the parties, without action; jurisdiction and proceedings of courts on such submission and statement, and requisites, validity, operation, and effect of such submission and statement and of the decision thereon.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition and nature—p 559
- 2. Statutory provisions—p 560
- 3. Courts having jurisdiction—p 560
- 4. Controversies which may be submitted—p 561
- 5. Persons who may submit controversy and parties—p 562
- 6. Requisites of submission—p 563
- 7. ——— Affidavit of reality of controversy—p 564
- 8. ——— Pleadings—p 565
- 9. ——— Filing and entry of agreement on record—p 565
- 10. Operation and effect of submission—p 565
- 11. Dismissal and cancellation of agreement for submission—p 566
- 12. Trial or hearing—p 566
- 13. ——— Scope of inquiry and powers of court in general—p 567
- 14. ——— Amendment—p 569
- 15. Judgment or decision—p 569
- 16. Appeal and error—p 570
- 17. Costs—p 571

See also descriptive word index in the back of this Volume

§ 1. Definition and Nature

Submission of controversy without action is a consent proceeding, a substitute for an action, and the agreed statement stands on the same footing as a special verdict, but is entirely different from an agreed statement of facts used merely as evidence on the trial.

Submission of controversy is a procedure whereby the parties, without instituting an action,¹ submit to any court that would otherwise have jurisdiction, as discussed *infra* § 3, any matter of real controversy between them for final determination, as considered *infra* § 4, on any agreed statement of

facts, signed by the parties, as discussed *infra* § 6, and supported by an affidavit that the controversy is real and the proceeding in good faith to determine the rights of the parties, as discussed *infra* § 7. Although the practice has been said to be unknown at common law,² and to be of statutory origin there is authority to the effect that in some jurisdictions of the United States at least it has become by usage a part of the common law.⁴

A submission of controversy is a consent proceeding;⁵ a substitute for an action,⁶ the purpose of

1. N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295.

S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.

Action for declaratory judgment see Actions § 18.

Confession of judgment without action see Judgments § 151.

Submission of cause on case stated see the C.J.S. title Trial § 578, also 64 C.J. p 1191 notes 97-7.

2. N.C.—Grandy v. Gulley, 26 S.E. 779, 120 N.C. 176.

3. S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.
60 C.J. p 677 note 7.

4. U.S.—Derby v. Jacques, C. Mass., 7 F.Cas.No.3,817, 1 Cliff. 42 60 C.J. p 677 note 8.

5. N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295.

6. N.Y.—Berlin Iron Bridge Co. v. Wagner, 10 N.Y.S. 215, 56 Hun 64 60 C.J. p 677 note 9.

the proceeding being to dispose of the formalities of a summons, complaint, and answer,⁷ and on an agreed statement of the facts to submit the case to the court for decision.⁸ The agreed statement stands on the same footing as a special verdict,⁹ and is entirely different from an agreed statement of facts used merely as evidence on the trial,¹⁰ which is simply the result of an agreement of the parties as to what the evidence in the case will prove.¹¹ The practice is encouraged whenever the facts can be agreed on.¹²

Distinguished from trying a case before court without jury. Submission of controversy without action is quite distinct from the trial of a case by consent before the court without a jury. In the former case the court is in the exercise of its inherent functions to decide questions of law submitted to it, while in a trial before the court, sitting, by consent, without a jury, it deals with the facts in all respects as a jury would do.¹³

§ 2. Statutory Provisions

Where the practice is of statutory origin, whether or not submission of a controversy without action is authorized must be determined from the provisions of the statute granting the right, and such statute must be strictly construed and its requirements strictly observed.

Where the practice is of statutory origin, whether or not submission of a controversy without action is authorized must be determined from the provi-

sions of the statute granting the right.¹⁴ Such statutes must be strictly construed,¹⁵ and their requirements must be observed¹⁶ strictly.¹⁷

§ 3. Courts Having Jurisdiction

What courts have jurisdiction of a controversy submitted without action depends on the statutes regulating the proceeding, and, under some statutes, but not others, the court must be one which would have had jurisdiction if an action had been brought.

What courts have jurisdiction of a controversy submitted without action depends on the statutes regulating the proceeding.¹⁸ Under some statutes the court must be one which would have had jurisdiction if an action had been brought;¹⁹ and, where a court has only appellate jurisdiction, the agreed case and the decision of the court below should be regularly certified into the appellate court, which otherwise has no jurisdiction of the case.²⁰ However, under other statutes, the submission must be tried and judgment rendered by an appellate court.²¹ The submission of facts must represent a statement of a controversy existing between the parties, on the determination of which a judgment which the court would have jurisdiction to enter in an action brought to determine the controversy could be granted.²² In accordance with the general rule, as discussed in Courts § 85, jurisdiction of the subject matter cannot be conferred by the consent of the parties,²³ and a court cannot take

In nature of action

Submission of controversy between bank and indorser respecting indorser's right to offset deposit, with agreement for judgment, is in nature of action on note with counterclaim for amount of deposit.—*Bank of U. S. v. Braveman*, 181 N.E. 50, 259 N.Y. 65, 82 A.L.R. 658.

7. N.C.—*Consolidated Realty Corp. v. Koon*, 4 S.E.2d 850, 216 N.C. 295, 60 C.J. p 683 note 94.

The fact that no summons is served or issued does not deprive the court of jurisdiction as it may in an ordinary action.—*In re Davis Bros. Stone Co.*, 13 N.W.2d 512, 245 Wis. 130, rehearing denied 14 N.W.2d 870, 245 Wis. 130.

8. N.C.—*Consolidated Realty Corp. v. Koon*, 4 S.E.2d 850, 216 N.C. 295, 60 C.J. p 683 note 95.

9. N.C.—*State ex rel. Atkins v. Fortner*, 72 S.E.2d 594, 236 N.C. 264, 60 C.J. p 677 note 10.

10. Ariz.—*Clason v. Matko*, 100 P. 773, 12 Ariz. 213, affirmed 32 S.Ct. 392, 223 U.S. 646, 56 L.Ed. 588.

Okl.—*Whitten v. Kroeger*, 82 P.2d 668, 183 Okl. 327.

60 C.J. p 677 note 11.

Agreed statement of facts used merely as evidence on trial see *Stipulations* § 10.

11. Ind.—*Witz v. Dale*, 27 N.E. 498, 129 Ind. 120.

60 C.J. p 677 note 12.

12. Pa.—*Smith v. Eline*, 4 Pa.Dist. 490.

13. Md.—*Tyson v. Western Nat. Bank*, 26 A. 520, 77 Md. 412, 23 L.R.A. 161.

14. S.D.—*Beresford Independent School Dist. v. Fletcher*, 287 N.W. 497, 66 S.D. 500.

15. N.C.—*Consolidated Realty Corp. v. Koon*, 4 S.E.2d 850, 216 N.C. 295, 60 C.J. p 678 note 17.

16. N.C.—*Consolidated Realty Corp. v. Koon*, supra.

Case held not within statute

Iowa.—*Rogers v. Davis*, 272 N.W. 539, 223 Iowa 373.

60 C.J. p 678 note 18 [a].

17. N.C.—*Finney v. Corbett*, 136 S. E. 878, 193 N.C. 315.
60 C.J. p 678 note 18.

18. N.Y.—*Skinner v. Paramount Pictures*, 63 N.E.2d 64, 294 N.Y. 474.

N.C.—*Board of Health of Nash County v. Board of Com'rs of Nash County*, 16 S.E.2d 677, 220 N.C. 140.
60 C.J. p 678 note 19.

19. Cal.—*White v. Clark*, 44 P. 164, 111 Cal. 425.
60 C.J. p 678 note 20.

20. Ill.—*Plumleigh v. White*, 9 Ill. 387.

21. N.Y.—*Skinner v. Paramount Pictures*, 63 N.E.2d 64, 294 N.Y. 474.

22. N.Y.—*Kelley v. Hogan*, 74 N.Y. S. 682, 69 App.Div. 251.

23. Conn.—*West Hartford v. Hartford Water Com'rs*, 36 A. 786, 68 Conn. 323.
60 C.J. p 678 note 24.

cognizance of a submission of controversy where the effect of the decision would be to modify or change a decree of another court of equal jurisdiction in the state.²⁴

§ 4. Controversies Which May Be Submitted

The controversies which may be submitted depend on the statutes granting the right, and under some statutes any question may be submitted which might be the subject of a civil action or special proceeding between the parties.

The controversies which may be submitted depend on the statutes granting the right.²⁵ Under some statutes any question may be submitted which might be the subject of a civil action between the parties,²⁶ and under these provisions questions which could not be the subject of an action between the parties cannot be entertained.²⁷ While it has been held that a special proceeding is not an action within

the meaning of such provisions,²⁸ controversies which might be the subject of a special proceeding may be submitted where the statute expressly includes such controversies.²⁹ Submission on an agreed statement of facts is not available where the relief sought cannot be given,³⁰ or the controversy involves a matter of public policy and the power of the parties to create, limit, or define their legal rights is restricted by law in the public interest;³¹ but, where the controversy affects only the individual or private rights of the parties thereto, there may be submission on an agreed statement of facts.³²

The controversy must present a question of law,³³ must be real,³⁴ and must be one which can be followed by an effective judgment,³⁵ and not a merely colorable dispute suggested in order to have the law in the case ascertained,³⁶ or a mere abstract or moot question presented to get the advice of the

24. Ind.—Gregory v. Perdue, 29 Ind. 66.

25. S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.
60 C.J. p 678 note 27.

Public officers may have their legal duties judicially determined in a controversy without action pursuant to statute.—Board of Health of Nash County v. Board of Com'rs of Nash County, 16 S.E.2d 677, 220 N.C. 140.

26. N.Y.—Rivet v. Burdick, 6 N.Y.S. 2d 79, 255 App.Div. 131.
S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.
60 C.J. p 678 note 27.

Removal of cloud on title

Submission of controversy on an agreed statement of facts was proper as an action in the nature of a proceeding for equitable relief to remove a cloud on title and to remove the onus of an illegal levy which illegality was not manifest on the record and could be established only by extrinsic evidence.—Cooper Union for Advancement of Science and Art v. City of New York, 71 N.Y.S.2d 204, 272 App.Div. 438, appeal and reargument denied 74 N.Y.S.2d 404, 272 App. Div. 1004, affirmed 81 N.E.2d 108, 298 N.Y. 578.

Construction of trust indenture

Court was required to accept submission of controversy on agreed statement of facts concerning the construction of an indenture of trust.—Empire Properties Corp. v. Manufacturers Trust Co., 28 N.Y.S.2d 376,

262 App.Div. 166, reversed on other grounds 43 N.E.2d 25, 288 N.Y. 242.

Declaratory judgment action

(1) The court may render judgment on an agreed statement of facts in a case where the parties could have maintained an action for a declaratory judgment.—Goldstein v. Trustees of Sailor's Snug Harbor in City of New York, 98 N.Y.S.2d 544, 277 App.Div. 269—Taylor-Fichter Const. Co. v. Tri-Borough Bridge Authority, 271 N.Y.S. 399, 241 App.Div. 75.

(2) So, submission of the controversy on an agreed statement of facts is an appropriate remedy where only the meaning of a statute was in question.—Smith v. New York State Emp. Retirement System, 61 N.Y.S.2d 590, 270 App.Div. 462.

27. S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.
60 C.J. p 678 note 28.

28. N.Y.—Woodruff v. People, 86 N.E. 562, 193 N.Y. 560.
60 C.J. p 679 note 30.

29. N.Y.—Taylor-Fichter Const. Co. v. Tri-Borough Bridge Authority, 271 N.Y.S. 399, 241 App.Div. 75—Hammond v. Rice, 267 N.Y.S. 534, 237 App.Div. 539.

30. N.Y.—Cunard Steam-Ship Co. v. Voorhis, 11 N.E. 49, 104 N.Y. 525.
60 C.J. p 679 note 29.

Dismissal and cancellation of agreement for submission see *infra* § 11.

31. N.Y.—Manhattan Storage & Warehouse Co. v. Movers & Ware-

housemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82.

32. N.Y.—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, *supra*—Levy v. Delaware, L. & W. R. Co., 207 N.Y.S. 592, 211 App.Div. 503.

33. N.Y.—Cerf v. Diener, 104 N.E. 126, 210 N.Y. 156.
60 C.J. p 679 note 31.
Inferences of fact see *infra* § 13.

34. Cal.—Collier v. Lindley, 266 P. 526, 203 Cal. 641.
Mo.—Joplin Waterworks Co. v. Jasper County, 38 S.W.2d 1068, 327 Mo. 964.
N.Y.—Rivet v. Burdick, 6 N.Y.S.2d 79, 255 App.Div. 131—Johnson v. Flynn, 287 N.Y.S. 949, 248 App. Div. 649.
60 C.J. p 679 note 32.

Fact that submission is amicable does not negate an actual controversy.—Joplin Waterworks Co. v. Jasper County, 38 S.W.2d 1068, 327 Mo. 964.

Where both parties seek the same judgment, there is no real controversy.—Johnson v. Flynn, 287 N.Y.S. 949, 248 App.Div. 649.

35. N.Y.—Goldstein v. Trustees of Sailor's Snug Harbor in City of New York, 98 N.Y.S.2d 544, 277 App.Div. 269.
60 C.J. p 679 note 33.

36. Mo.—Joplin Waterworks Co. v. Jasper County, 38 S.W.2d 1068, 327 Mo. 964.
60 C.J. p 679 note 34.

court,³⁷ the decision of which will not terminate the controversy between the parties,³⁸ and by which only a preliminary question will be settled, leaving the merits undecided;³⁹ and the court will not entertain a question of law presented by agreement of the parties, which does not arise out of the facts in the case.⁴⁰

§ 5. Persons Who May Submit Controversy and Parties

With the exception of persons not sui juris, all persons and corporations, including municipal corporations, having any matter in controversy, may agree to its submission, but the submission can be made only by interested parties or persons to be affected by the judgment, or by their attorneys, and a submission will not be entertained when a necessary party to the complete determination of the controversy is lacking.

With the exception of persons not sui juris,⁴¹ all persons and corporations, including municipal corporations, having any matter in controversy, may agree to its submission.⁴² However, the submission can be made only by interested parties, or by persons to be affected by the judgment,⁴³ or by their attorneys.⁴⁴ A submission will not be entertained when it appears that an infant is legally

interested,⁴⁵ or when a necessary party to the complete determination of the controversy is lacking.⁴⁶ On the other hand, a person who has no interest in the subject matter is not a necessary party and need not be joined.⁴⁷

Where necessary parties are lacking, the court cannot direct additional parties to be made in invitum to cure the defect,⁴⁸ and it has been held that an order by which a third person is made a party to an agreed case without his consent is without authority of law, and that all the proceedings thereunder are coram non judge.⁴⁹ Although it has been held that, where the decision of a controversy submitted will indirectly affect persons other than the parties and property other than that involved in the submission, the court will be very careful to insist on the observance of all the forms of law intended to prevent the submission of any but real controversies;⁵⁰ it has also been held that, if the demand is genuine, an agreed case will not be considered fictitious merely because it is so worded as to ignore the rights of third persons.⁵¹

Designation of parties. On a submission of controversy the parties should be designated as plaintiffs and defendants.⁵²

37. Cal.—Collier v. Lindley, 266 P. 526, 203 Cal. 641.
N.Y.—L. L. F. Realty Co. v. Fell, 105 N.Y.S.2d 144, 278 App.Div. 831—Gish v. Village of Peekskill, 5 N.Y. S.2d 614, 255 App.Div. 706.
60 C.J. p 679 note 35.

Future rights

(1) It has been held that questions in anticipation of future events will not be determined and, hence, the court will not undertake to construe a city charter before it becomes effective.—Gish v. Village of Peekskill, *supra*.

(2) However, it has also been held, notwithstanding controversy submitted might never arise since action taken by third person might prevent its arising, where both sides chose to treat matter as genuine existing controversy, it was proper to settle matter by answering questions submitted.—Whaley v. Monroe County, 257 N.Y.S. 296, 235 App.Div. 334.

Case is not moot, where proceeding presents actual controversy involving adverse interests between parties.—Joplin Waterworks Co. v. Jasper County, 38 S.W.2d 1068, 327 Mo. 964.

38. N.Y.—Woodruff v. People, 86 N.E. 562, 193 N.Y. 560.
60 C.J. p 679 note 36.

39. Mass.—Austin v. Willson, 7 Mass. 205.

40. Mass.—Smith v. Cudworth, 24 Pick. 196.
Mo.—Blair v. Illinois State Bank, 8 Mo. 313.

41. Hawaii.—McCoy v. Corbett, 35 Hawaii 743.
60 C.J. p 680 note 40.

42. Ill.—West Chicago Park Com'rs v. Riddle, 91 N.E. 1060, 245 Ill. 168.

43. S.D.—Beresford Independent School Dist. v. Fletcher, 287 N.W. 497, 66 S.D. 500.
60 C.J. p 680 note 42.

44. Ill.—Farwell v. Sturges, 46 N.E. 189, 165 Ill. 252.
60 C.J. p 680 note 43.

45. R.I.—Petition of Rossi, 146 A. 406, 50 R.I. 147.
60 C.J. p 680 note 44.

46. N.Y.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App.Div. 443.
N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295.
60 C.J. p 680 notes 45, 46.

Controversy affecting all of a class
Submission of case between justice and state official requiring justice to file certificate stating age and time when term would expire was dismissed for want of proper parties,

where sixty or more justices were not parties, since they would be interested in, and status of each would be drawn into question by, any judgment entered.—Johnson v. Flynn, 287 N.Y.S. 949, 248 App.Div. 649.

47. Mo.—Joplin Waterworks Co. v. Jasper County, 38 S.W.2d 1068, 327 Mo. 964.

48. N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295.—Wagoner v. Saintsing, 114 S.E. 313, 184 N.C. 362—Waters v. Boyd, 102 S.E. 196, 179 N.C. 180.

49. Idaho.—Potter v. Talkington, 59 P. 362, 6 Idaho 649.

50. N.Y.—Bloomfield v. Ketcham, 95 N.Y. 657, 5 N.Y.Civ.Proc. 407.

51. Tenn.—State v. Willson, 2 Lea 204.

Mortgage guarantor and other certificate holders

Submission of controversy between mortgage certificate holder and state mortgage commission was held improperly dismissed, although guarantor and other certificate holders were not notified of intended submission.—Title Guarantee & Trust Co. v. Mortgage Commission of New York, 3 N.E.2d 433, 271 N.Y. 302.

52. N.Y.—Matter of Yerks, 89 N.Y.S. 869, 97 App.Div. 632.

§ 6. Requisites of Submission

Except as controlled by statute, submission of a controversy without action need not follow any particular form, but must contain an agreement as to the facts which are admitted, and must be absolute and unequivocal, stipulating all facts necessary to a complete determination of the controversy, and showing the kind of action, the relief sought, authority to enter judgment, and the general nature of the judgment to be entered.

Except as controlled by statute,⁵³ submission of a controversy without action need not follow any particular form.⁵⁴ The submission must contain an agreement as to the facts which are admitted,⁵⁵ for the court cannot be required to take the evidence in a case and ascertain the facts from the testimony which is thus admitted.⁵⁶ The agreement must be absolute, without reservations, and unequivocal,⁵⁷ and must stipulate all of the facts necessary to a complete determination of the controversy.⁵⁸ All the facts agreed on must be distinctly stated, and not left to inference,⁵⁹ so that

the court may have nothing to do but pronounce the law arising out of them.⁶⁰ A controversy submitted for the opinion of the court containing mere evidence of facts is insufficient.⁶¹

The agreement of facts must show the kind of action,⁶² and a cause of action,⁶³ jurisdiction of the court over the parties,⁶⁴ the relief sought,⁶⁵ authority to enter judgment,⁶⁶ and the general nature of the judgment to be entered,⁶⁷ although a prayer for judgment has been held unnecessary.⁶⁸ If the case agreed is such that the court cannot render judgment either for plaintiff or for defendant, as the court might conclude the law to be for the one or the other, the case agreed is defective, and the court will refuse to render any judgment and will proceed with the case as if no such agreement had been entered into.⁶⁹

The submission must present a bona fide justiciable controversy complete in itself.⁷⁰ The court

53. "Question in difference" must be set forth under a statute so providing and this requirement is not satisfied by merely setting forth the "contentions" of the parties.—*Bishop v. Mahiko*, 35 Hawaii 608.

54. Stipulation held to constitute agreed case

Stipulations signed by corporation's attorneys, the attorneys of village having judgment for taxes against corporation, the attorneys of county, holder of tax deed covering corporation's property, and attorney of assignee of purchaser at sale by trustee under trust deed, constituted an "agreed case" for determination of validity of sale by trustee.—*In re Davis Bros. Stone Co.*, 13 N.W.2d 512, 245 Wis. 130, rehearing denied 14 N.W.2d 870, 245 Wis. 130.

55. N.Y.—*Begen v. Curtis*, 80 N.Y.S. 929, 81 App.Div. 91.
60 C.J. p 680 note 54.

56. N.H.—*Woodman v. Eastman*, 10 N.H. 359.

57. N.Y.—*Satterfield v. Manufacturers & Traders Trust Co.*, 69 N.Y.S.2d 786, 272 App.Div. 127.
60 C.J. p 677 note 14.

Stipulation for purpose of submission

Admissions made only for the purpose of a submission are insufficient and the facts stipulated would be regarded as stipulated absolutely, notwithstanding recital that admitted facts were submitted to court for decision for the purposes of such action and submission only.—*Satterfield v. Manufacturers & Traders*

Trust Co., 69 N.Y.S.2d 786, 272 App.Div. 127.

58. U.S.—*Kapiolani Maternity and Gynecological Hospital v. Wodehouse*, C.C.A.Hawaii, 70 F.2d 793.
N.Y.—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141 A.L.R. 1157—*Haase v. Title Guarantee & Trust Co.*, 55 N.Y.S.2d 428, 269 App.Div. 319, affirmed 66 N.E.2d 126, 295 N.Y. 761—*Trimble v. New York Life Ins. Co.*, 255 N.Y.S.2d 234, 234 App.Div. 427.
60 C.J. p 680 note 56, p 682 note 67.

Law of another state is to be stipulated as any other fact.—*Haase v. Title Guarantee & Trust Co.*, 55 N.Y.S.2d 428, 269 App.Div. 319, affirmed 66 N.E.2d 126, 295 N.Y. 761.

59. N.Y.—*Skinner v. Paramount Pictures*, 63 N.E.2d 64, 294 N.Y. 474—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141 A.L.R. 1157—*Title Guarantee & Trust Co. v. Mortgage Commission of New York*, 3 N.E.2d 433, 271 N.Y. 302—*Alexander T. Stephan, Inc. v. Bank of U. S.*, 258 N.Y.S.2d 289, 236 App.Div. 280—*Trimble v. New York Life Ins. Co.*, 255 N.Y.S.2d 234, 234 App.Div. 427.
60 C.J. p 680 note 56.

60. N.Y.—*Skinner v. Paramount Pictures*, 63 N.E.2d 64, 294 N.Y. 474—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141 A.L.R. 1157.
60 C.J. p 681 note 57.

Submission is adequate if it enables court to draw conclusions of law determinative of matter with-

out necessity of drawing inferences of fact.—*Title Guarantee & Trust Co. v. Mortgage Commission of New York*, 3 N.E.2d 433, 271 N.Y. 302.

61. N.Y.—*Feist v. Fifth Ave. Bank of New York*, 20 N.E.2d 388, 280 N.Y. 189.
N.C.—*Consolidated Realty Corp. v. Koon*, 4 S.E.2d 550, 216 N.C. 295.
60 C.J. p 681 note 55.

62. Pa.—*Berks County v. Jones*, 21 Pa. 413.

63. S.D.—*Beresford Independent School Dist. v. Toomey*, 273 N.W. 724, 65 S.D. 328.
60 C.J. p 681 note 60.

64. Pa.—*Forney v. Huntingdon*, 6 Pa.Super. 397.

65. N.H.—*Rockingham County v. Brown*, 79 A. 690, 76 N.H. 571.
60 C.J. p 681 note 62.
Amendment so as to include relief demanded see *infra* § 14.

66. N.Y.—*Woodruff v. People*, 86 N.E. 562, 193 N.Y. 560.
60 C.J. p 681 note 65.

67. N.Y.—*L. F. Realty Co. v. Fell*, 105 N.Y.S.2d 144, 278 App.Div. 531.
60 C.J. p 681 note 63.

68. N.C.—*Williams v. Iredell County Com'rs*, 43 S.E. 896, 132 N.C. 300.
60 C.J. p 681 note 64.

69. W.Va.—*Stockton v. Copeland*, 23 W.Va. 696.
60 C.J. p 682 note 66.

70. N.Y.—*Title Guarantee & Trust Co. v. Mortgage Commission of*

will dismiss a case agreed to by the parties when the agreed statement of facts is incomplete,⁷¹ or where an essential fact is in dispute,⁷² or a decision cannot be made without drawing inferences of fact,⁷³ or considering facts not submitted,⁷⁴ or when, through some fraud, accident, mistake, or misapprehension, the statement embraces matters which did not exist.⁷⁵ However, where the facts submitted present a justiciable controversy and are sufficient to enable judgment to be given with no question that the issue is not bona fide or collusive, the court cannot decline to hear and decide the controversy submitted on the ground that there may be other and additional facts which, if included, might change the decision on the issue as presented,⁷⁶ or on the ground that a claim for punitive damages raises issues of fact not proper for determination on submission of a controversy.⁷⁷

Documents annexed to the agreed statement and referred to therein may be treated as part of the agreed statement.⁷⁸

Signature. Under some statutes it has been held that in the case of natural parties the agreement for

submission must be signed by the parties, and not by the attorneys, to give the court jurisdiction,⁷⁹ or, if signed by the attorneys, there should be such evidence of authority so to represent the party as to prevent any question arising in the future as to the authorized representation of the parties before the court.⁸⁰

§ 7. — Affidavit of Reality of Controversy

Statutes requiring that the agreed case must be supported by a proper affidavit must be strictly followed in order to confer jurisdiction on the court, and cannot be waived by the parties.

Statutes relating to the submission of a controversy without action and providing that the agreed case must be supported by an affidavit that the controversy is real and the proceeding in good faith to determine the rights of the parties must be strictly followed,⁸¹ and cannot be waived by the parties.⁸² Such affidavit is necessary to confer jurisdiction on the court,⁸³ and, if not made, the decision of the court is not a judgment which may be enforced or appealed,⁸⁴ but is, at most, a mere award as in

New York, 3 N.E.2d 433, 271 N.Y. 302.

71. U.S.—Kapiolani Maternity and Gynecological Hospital v. Wodehouse, C.C.A.Hawaii, 70 F.2d 793.

N.Y.—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141 A.L.R. 1157—Title Guarantee & Trust Co. v. Mortgage Commission of New York, 3 N.E.2d 433, 271 N.Y. 302—Thomas v. Loomis, 74 N.Y.S.2d 603, 272 App.Div. 1036—Haase v. Title Guarantee & Trust Co., 55 N.Y.S.2d 428, 269 App.Div. 319, affirmed 66 N.E.2d 126, 295 N.Y. 761—Alexander T. Stephan, Inc. v. Bank of U. S., 258 N.Y.S. 289, 236 App.Div. 280—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App. Div. 427.

D.—Beresford Independent School Dist. v. Toomey, 273 N.W. 724, 65 S.D. 328.

60 C.J. p 682 notes 67, 70, 71.

72. U.S.—Kapiolani Maternity and Gynecological Hospital v. Wodehouse, C.C.A.Hawaii, 70 F.2d 793.

Pa.—Ford v. Buchanan, 2 A. 339, 111 Pa. 31.

73. N.Y.—Skinner v. Paramount Pictures, 63 N.E.2d 64, 294 N.Y. 474—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141

A.L.R. 1157—Title Guarantee & Trust Co. v. Mortgage Commission of New York, 3 N.E.2d 433, 271 N.Y. 302—McCloy v. Pennsylvania R. Co., 45 N.Y.S.2d 323, 267 App. Div. 179, appeal denied 47 N.Y.S. 2d 303, 267 App.Div. 868—Town of Putnam Valley v. Slutzky, 9 N.Y.S.2d 781, 256 App.Div. 929.

74. N.Y.—1165 Fifth Avenue Corp. v. Alger, 41 N.E.2d 461, 288 N.Y. 67, 141 A.L.R. 1157—Town of Putnam Valley v. Slutzky, 9 N.Y.S.2d 781, 256 App.Div. 929.

75. N.H.—Heywood v. Wingate, 14 N.H. 73.

76. N.Y.—Title Guarantee & Trust Co. v. Mortgage Commission of New York, 3 N.E.2d 433, 271 N.Y. 302.

77. **Malice as basis for punitive damages**

While punitive damages are predicated on malice, which is a matter of fact or inference to be drawn from the facts, and is for the jury, the fact that a submission contains a claim for punitive damages does not require a dismissal, if, apart from such claim, sufficient facts have been submitted to permit the court to direct a proper judgment.—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App.Div. 427.

78. N.Y.—Monroe v. Winslow, 5 N.Y.S.2d 640, 254 App.Div. 811.

79. N.Y.—Gabel v. Jeacock, 12 N.Y. S.2d 171.

60 C.J. p 682 note 74.

80. R.I.—Angell v. Angell, 67 A. 325, 28 R.I. 330.

Failure to disclose any authority on part of attorney to sign stipulation, and absence of signature and acknowledgment of party precluded stipulation being regarded as submission of controversy.—Gabel v. Jeacock, 12 N.Y.S.2d 171.

81. N.C.—Waters v. Boyd, 102 S.E. 196, 179 N.C. 180.

60 C.J. p 682 note 77.

The purpose of the requirement is to avoid collusive and fictitious submissions.—Nott v. Klein, 285 N.Y.S. 1025, 159 Misc. 35.

82. N.Y.—Weinstein v. Douglas, 101 N.Y.S. 251, 51 Misc. 559.

Estoppel or waiver by submission see *infra* § 10.

83. N.Y.—Friedman v. Collins, 126 N.Y.S. 623.

Okl.—Wiles v. Board of Com'rs of Alfalfa County, 62 P.2d 1182, 178 Okl. 341.

Wyo.—Hudson Oil Co. v. Board of Com'rs of Fremont County, 52 P.2d 683, 49 Wyo. 1.

60 C.J. p 682 note 79.

84. Wis.—Plainfield v. Plainfield, 30 N.W. 673, 67 Wis. 525, 527.

a common-law arbitration.⁸⁵ Ordinarily, when the affidavit is not filed, the proceeding will be dismissed,⁸⁶ or a judgment entered thereon will be set aside⁸⁷ or vacated.⁸⁸ It has also been held that the affidavit should state that the court would have jurisdiction if the proceeding was by summons.⁸⁹

By whom made. The affidavit must be made by a party, and not by his attorney,⁹⁰ when there is a natural person, a party, who may make it;⁹¹ and it has been held that it is not necessary that such affidavit be made by more than one of the parties.⁹²

§ 8. — Pleadings

An agreed case does not require any pleadings, and should they be filed they may be disregarded.

An agreed case does not require any pleadings,⁹³ and should they be filed they must be disregarded,⁹⁴ for an agreed case takes the place of pleading.⁹⁵

§ 9. — Filing and Entry of Agreement on Record

Under some statutes the agreement to submit the controversy must be entered on the record of the case, but it has been held that noncompliance does not deprive the court of jurisdiction, and it is sufficient compliance if the agreement is entered on the record as part of the decree.

Under some statutes the agreement to submit the controversy must be entered on the record of the case.⁹⁶ Such provisions have been held to give the clerk of the court authority or direction to enter the

agreement of record,⁹⁷ and it has been held that noncompliance does not deprive the court of jurisdiction.⁹⁸ It is a sufficient compliance with the statute if the agreement is entered on the record as part of the decree.⁹⁹ Apart from such statutes, it has been held that, where an agreement is not entered on the record, an appeal will be dismissed.¹

§ 10. Operation and Effect of Submission

A party by submitting a controversy is estopped to object to review on the ground that the controversy was not one which could lawfully be submitted, but is not precluded from objecting to want of jurisdiction, and, if after an action is commenced, the parties agree on a submission, the other case should be dismissed or discontinued.

A party by submitting a controversy is estopped to object to the defeated party's right to review on the ground that the controversy was not one which could lawfully be submitted,² but he is not precluded from objecting to the want of jurisdiction,³ and the admitted facts on a submission of controversy without action are not binding on one not a party to the submission.⁴ If, after an action is commenced, the parties agree on a submission of controversy, the other case should be dismissed or discontinued;⁵ and, where an action is commenced, and thereafter a case containing the facts on which the controversy depends is agreed on and submitted, if the action is not thereby discontinued, it is so discontinued when judgment is entered on the submission,⁶ and until that time it is suspended;⁷ and by such submission the parties are to be considered

85. Wis.—*Plainfield v. Plainfield*, supra.

86. N.C.—*Garris v. Hardy*, 156 S.E. 245, 200 N.C. 91. 60 C.J. p 683 note 82.

87. N.C.—*Finney v. Corbett*, 136 S.E. 878, 193 N.C. 315.

88. Idaho.—*Stoddard v. William A. Davis Co.*, 220 P. 115, 38 Idaho 249.

89. N.C.—*Grandy v. Gulley*, 26 S.E. 779, 120 N.C. 176—*Arnold v. Porter*, 25 S.E. 785, 119 N.C. 123.

90. N.Y.—*Neustaedter v. Wiener*, 108 N.Y.S. 650, 57 Misc. 643. 60 C.J. p 683 note 87.

Persons who may sign agreement for submission see supra § 6.

91. N.Y.—*Bloomfield v. Ketcham*, 95 N.Y. 657, 5 N.Y.Civ.Proc. 407.

92. Ind.—*Booth v. Cottingham*, 26 N.E. 84, 126 Ind. 431.

93. N.C.—*Consolidated Realty Corp. v. Koon*, 4 S.E.2d 850, 216 N.C. 295. 60 C.J. p 683 note 91.

Waiver of defects in pleading by submission see infra § 10.

94. Ind.—*Warrick Bldg., etc., Assoc. v. Hougland*, 90 Ind. 115—*Sharpe v. Sharpe*, 27 Ind. 507.

95. Mo.—*Folk v. City of St. Louis*, 157 S.W. 71, 250 Mo. 116. 60 C.J. p 683 note 93.

Agreed facts with required affidavits constitute pleadings in submission of a controversy without action. —*Consolidated Realty Corp. v. Koon*, 2 S.E.2d 360, 215 N.C. 459.

96. Ill.—*West Chicago Park Com'rs v. Riddle*, 91 N.E. 1060, 245 Ill. 168.

97. Ill.—*Farwell v. Sturges*, 58 Ill. App. 462, affirmed 46 N.E. 197, 165 Ill. 275.

98. Ill.—*West Chicago Park Com'rs v. Riddle*, 91 N.E. 1060, 245 Ill. 168.

60 C.J. p 683 note 98.

99. Ill.—*West Chicago Park Com'rs*

v. Riddle, supra—*Farwell v. Sturges*, 58 Ill.App. 462, affirmed 46 N.E. 197, 165 Ill. 275.

1. U.S.—*Burr v. Des Moines R., etc., Co.*, Iowa, 1 Wall. 99, 17 L.Ed. 561. Necessity of agreement being part of transcript on appeal see infra § 16.

2. U.S.—*Northern Commercial Co. v. U. S.*, Alaska, 217 F. 33, 133 C.C. A. 143.

3. Del.—*Beeson v. Elliott*, 1 Del.Ch. 368.

4. N.C.—*Clark v. Carolina Homes*, 128 S.E. 20, 189 N.C. 703.

5. Ohio.—*Elder v. Taylor*, 5 Ohio Dec., Reprint, 461, 6 Am.L.Rec. 73, reversed on other grounds 39 Ohio St. 535.

6. N.Y.—*Van Sickle v. Van Sickle*, 8 How.Pr. 265.

7. N.Y.—*Van Sickle v. Van Sickle*, supra.

as having waived all previous irregularities⁸ and defects of pleading.⁹

§ 11. Dismissal and Cancellation of Agreement for Submission

Although it has been held that the court cannot vacate the submission, it has also been held that the court will dismiss the submission where it may properly decline deciding the questions submitted, where it appears that a decision would work injustice, where there has been a failure to observe the statutory provisions relating to the submission, where collusion is found, or the controversy has become moot, or no enforceable judgment can be entered.

Although it has been held that the court cannot vacate the submission,¹⁰ it has also been held that the court will dismiss the submission where it may properly decline deciding the questions submitted,¹¹ where it appears that a decision would work injustice,¹² where the effect of the decision would be to modify or change a decree of another court in the state of equal jurisdiction,¹³ where there has been a failure to observe the statutory provisions relating to the submission,¹⁴ where collusion is found,¹⁵ or where the controversy, while sub judice, has become moot,¹⁶ or where no enforceable judgment can be entered.¹⁷ Where neither the relief

sought nor any other appropriate relief may be given, the court will dismiss the proceeding.¹⁸

The court will not dismiss the submission because defendant has since become a voluntary bankrupt,¹⁹ or because the submission is faulty in some respects,²⁰ especially on motion of the party responsible for the defect;²¹ but, where a case agreed is too imperfectly stated for the court to proceed to judgment, it will be set aside and new proceedings ordered.²² The submission of a controversy will not be dismissed on the motion of one who is not a party to it.²³

Cancellation of agreement. A contract submitting an agreed case may be canceled by a suit in equity for fraud, duress, or mutual mistake;²⁴ but such relief will not be granted where there is an adequate remedy at law.²⁵

§ 12. Trial or Hearing

Where a controversy is submitted on agreed facts without action, there must be a trial or hearing at a proper term.

Where a controversy is submitted on agreed facts without action, there must be a trial or hearing.²⁶

8. U.S.—In re Blake, Mo., 150 F. 279, 80 C.C.A. 167.
Tex.—Chappell v. McIntyre, 9 Tex. 161.

9. U.S.—In re Blake, Mo., 150 F. 279, 80 C.C.A. 167.
60 C.J. p 683 note 10.

10. N.Y.—Neilson v. Commercial Mut. Ins. Co., 10 N.Y.Super. 455.

11. N.H.—Heywood v. Wingate, 14 N.H. 73.

Defect of parties as grounds for dismissal see supra § 5.

Dismissal:

Of proceeding where no affidavit filed see supra § 7.

Where no agreed statement of facts or statement is incomplete or incorrect see supra § 6.

12. N.H.—Bell v. Twilight, 17 N.H. 528.
60 C.J. p 683 note 14.

13. Ind.—Gregory v. Perdue, 29 Ind. 66.

14. N.Y.—Odell v. Cromwell, 21 Hun 279, 10 N.Y.Wkly.Dig. 273.

Written stipulation of facts not filed
N.C.—Consolidated Realty Corp. v. Koon, 2 S.E.2d 360, 215 N.C. 459.

15. Notwithstanding a proper affidavit, a submitted controversy may be dismissed if collusion is found.—

Title Guarantee & Trust Co. v. Mortgage Commission of New York, 3 N.E.2d 433, 271 N.Y. 302.

16. N.Y.—New York City Omnibus Corp. v. City of New York, 97 N.Y. S.2d 590, 277 App.Div. 760.
Submission of moot controversies see supra § 4.

17. Hawaii.—Honolulu Rapid Transit Co. v. Territory, 21 Hawaii 171.

Opinion as to rights and relations

(1) In the absence of statutory authorization, the court will not enter a judgment simply answering questions.—Honolulu Rapid Transit Co. v. Territory, supra.

(2) However, where a declaratory judgment is authorized by statute, court was not required to dismiss submission of controversy on agreed statement of facts which merely asked for opinion as to rights and legal relations but could accept it as a request by all parties for declaratory judgment.—Goldstein v. Trustees of Sailor's Snug Harbor in City of New York, 98 N.Y.S.2d 544, 277 App.Div. 269.

18. N.Y.—L. L. F. Realty Co. v. Fell, 105 N.Y.S.2d 144, 278 App.Div. 831.

Where relief by injunction is expressly prohibited by statute, and

this is the only effective relief that can be given, the court will dismiss the proceeding.—Cunard Steam-Ship Co. v. Voorhis, 11 N.E. 49, 104 N.Y. 525—60 C.J. p 684 note 20.

19. N.H.—Heywood v. Wingate, 14 N.H. 73.

20. N.Y.—Town of Putnam Valley v. Slutzky, 8 N.Y.S.2d 82, 255 App. Div. 975.

21. N.Y.—Town of Putnam Valley v. Slutzky, supra.

22. Pa.—Thompson v. Miller, 14 Leg.Int. 132.

Va.—Brewer v. Opie, 1 Call 212, 5 Va. 212.

23. N.Y.—Berlin Iron Bridge Co. v. Wagner, 10 N.Y.S. 215, 56 Hun 648.

24. Mo.—Peake v. Webb, 112 S.W. 13, 132 Mo.App. 601—State v. McCune, 107 S.W. 1030, 129 Mo.App. 511.

25. N.H.—Brewster v. Page, 58 N. H. 4.

Power of court to which controversy is submitted to permit party to withdraw from agreement see infra § 13.

26. Wash.—Leonardo v. Bunnell, 137 P. 1033, 77 Wash. 495.

Party held entitled to be heard on question whether particular legisla-

It has been held that the hearing must be at the general term,²⁷ as it is irregular to have it heard in the first instance at special term.²⁸ It has also been held that a special judge is unauthorized to determine a controversy without action at chambers when not holding a term of court.²⁹

§ 13. — Scope of Inquiry and Powers of Court in General

- a. In general
- b. Inferences from agreement

a. In General

In a submission of controversy the court cannot for itself determine issues of fact, but only questions of law, and in determining the legal question presented is limited to a consideration of the facts appearing in the agreed statement, which will be construed without favor to either party with a view to determining and giving effect to the intention of the parties.

In a submission of controversy the court cannot for itself determine issues of fact.³⁰ Only the determination of questions of law³¹ between the parties affecting their interests may be made, and the court cannot go beyond a decision affecting such inter-

ests;³² and the inquiry is confined to the question put in issue,³³ although under an agreement that the court may make any order or judgment in the case, it has been held that the whole controversy is submitted without limitation.³⁴ Where a controversy is submitted without action, a presumption exists that the agreed statement of facts contains all the facts on which the parties intend to rely to sustain their contentions,³⁵ and the agreed case is to be considered as showing the facts of the controversy, even though they should constitute a different cause of action in favor of plaintiff from that shown by an accompanying complaint.³⁶

The court in determining the legal question presented is limited to a consideration of the facts appearing in the agreed statement.³⁷ The court has no power to permit either party against the objection of the other to adduce other facts or introduce evidence of any character;³⁸ and, where all the facts necessary for a proper determination of the question are not before the court, it will decline to answer the question,³⁹ and it cannot direct an additional statement of facts to be made in invitum to cure the defect;⁴⁰ nor can it appoint a master to

tion applied to the case.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266.

27. N.Y.—Waring v. O'Neill, 15 Hun 105.

28. N.Y.—Waring v. O'Neill, supra.

29. N.C.—Greene v. Stadlem, 149 S. E. 685, 197 N.C. 472.

30. N.H.—Pray v. Burbank, 11 N.H. 290.

31. N.Y.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82—Goldstein v. Trustees of Sailor's Snug Harbor in City of New York, 98 N.Y.S.2d 544, 277 App.Div. 269.

32. N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295.

Whether the facts stated are true is not the concern of the court.—Levy v. Delaware, L. & W. R. Co., 207 N.Y.S. 592, 211 App.Div. 503.

33. N.Y.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82—McCloy v. Pennsylvania R. Co., 45 N.Y.S.2d 323, 267 App.Div. 179, appeal denied 47 N.Y.S.2d 303, 267 App.Div. 868.

60 C.J. p 684 note 32.

32. N.Y.—Abate v. Bianco, 128 N.Y. S. 271, 143 App.Div. 511. 60 C.J. p 684 note 33.

33. N.Y.—Goldstein v. Trustees of Sailor's Snug Harbor in City of New York, 98 N.Y.S.2d 544, 277 App.Div. 269—Pink v. Isle Theatrical Corp., 284 N.Y.S. 447, 24 App. Div. 24, modified on other grounds 3 N.E.2d 521, 271 N.Y. 390, motion denied 4 N.E.2d 251, 272 N.Y. 500. 60 C.J. p 684 note 34.

34. U.S.—Derby v. Jacques, C.C. Mass., 7 F.Cas.No.3,817, 1 Cliff. 425.

35. Mo.—Folk v. City of St. Louis, 157 S.W. 71, 250 Mo. 116.

36. Ind.—Warrick Bldg., etc., Assoc. v. Hougland, 90 Ind. 115—Manchester v. Dodge, 57 Ind. 584.

37. N.Y.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82—Penthouse Properties v. 1158 Fifth Avenue, 11 N.Y.S.2d 417, 256 App.Div. 685—Haddad v. Southern Pac. Co., 173 N.Y.S. 256, 185 App. Div. 500—McGoldrick v. Bodkin, 125 N.Y.S. 101, 140 App.Div. 196.

N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295—Consolidated Realty Corp. v. Koon, 2 S.E.2d 360, 215 N.C. 459.

60 C.J. p 685 notes 60, 61.

Statements or claims in briefs

(1) Statements of fact in briefs of counsel cannot be considered.—Town of Putnam Valley v. Slutzky, 9 N.Y.S. 2d 781, 256 App.Div. 929—McGoldrick v. Bodkin, 125 N.Y.S. 101, 140 App.Div. 196.

(2) However, it has been held that the statute of limitations may be invoked where the claims of parties were properly set forth in briefs with respect to agreed facts.—Town of Pelham v. City of Mount Vernon, 103 N.Y.S.2d 494, 278 App.Div. 79, reversed on other grounds 105 N.E.2d 604, 304 N.Y. 15.

38. N.Y.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266.

N.C.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295—Consolidated Realty Corp. v. Koon, 2 S.E.2d 360, 215 N.C. 459.

60 C.J. p 684 note 36.

39. N.Y.—Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater New York, 43 N.E.2d 820, 289 N.Y. 82. 60 C.J. p 684 note 37.

Dismissal where statement incomplete see supra § 6.

40. N.C.—Waters v. Boyd, 102 S.E. 196, 179 N.C. 180.

60 C.J. p 684 note 38.

report the facts in the case.⁴¹ Where, without proof of further facts, plaintiff's case is not made out, the court ought simply to render judgment against plaintiff without further suggestions,⁴² and it is error to make an order based on the supposition that plaintiff might establish other facts.⁴³

Legal conclusions or matters of law included in the statement of facts are not binding on the court,⁴⁴ and will be disregarded.⁴⁵ Neither party can be allowed to withdraw from the agreement without the consent of the other;⁴⁶ and an application to the court of a party to an agreed case to be relieved from his agreement and for a trial of the questions of fact is to be considered under the rules of law applicable to petitions for a new trial.⁴⁷

Construction of statement or agreement. The statement of facts must be construed without favor to either party,⁴⁸ with the view to determining and giving effect to the intention of the parties.⁴⁹ The language of the agreement will be given its common, ordinary meaning,⁵⁰ and the agreed statement of facts will be construed as a whole,⁵¹ but the contentions of the parties embodied in the statement of facts cannot be considered as facts.⁵² Where the agreed statement of facts undertakes to exhibit the effect of a probate record in the language of the

parties and is ambiguous, the ambiguity will be imputed to the agreement rather than to the probate record.⁵³ Where the agreement sets forth that plaintiffs are entitled to certain real estate except the improvements unless prevented by the facts hereinafter set forth, it was held to be a submission of the title to the real estate, aside from the improvements.⁵⁴

b. Inferences from Agreement

Unless as a matter of law they are necessary inferences, the court cannot draw inferences of fact from controverted or equivocal facts.

Unless as a matter of law they are necessary inferences,⁵⁵ the court cannot draw inferences of fact⁵⁶ from controverted or equivocal facts,⁵⁷ for balancing evidence, or drawing conclusions from circumstances proved, and thereby determining controverted questions of fact are not among the ordinary duties of the court on a submission of controversy;⁵⁸ nor does the assent, or even the request, of the parties, in a case agreed, impose any such duty on the court.⁵⁹ Whenever it appears that a submitted controversy necessarily involves the duty of drawing inferences from inconclusive, equivocal, or evidentiary facts before a legal con-

41. Pa.—Frailley v. Supreme Council A. L. H., 20 A. 684, 132 Pa. 578.

42. Cal.—Crandall v. Amador County, 20 Cal. 72.
Mo.—Folk v. City of St. Louis, 157 S.W. 71, 250 Mo. 116.

43. Cal.—Crandall v. Amador County, 20 Cal. 72.
Mo.—Folk v. City of St. Louis, 157 S.W. 71, 250 Mo. 116.

44. Ky.—City of Louisville v. Vreeland, 131 S.W. 195, 140 Ky. 400.
60 C.J. p 685 note 42.

45. Hawaii.—Bishop v. Mahiko, 35 Hawaii 608.
S.C.—Southern R. Co. v. Greenville City Council, 27 S.E. 652, 49 S.C. 449.

46. Mo.—Folk v. City of St. Louis, 157 S.W. 71, 250 Mo. 116—State v. McCune, 107 S.W. 1030, 129 Mo.App. 511.
Suit in equity to cancel agreement see supra § 11.

47. N.H.—Dame v. Woods, 62 A. 379, 73 N.H. 391.

48. Ala.—Gamble v. Andrews, 65 So. 525, 187 Ala. 302.
60 C.J. p 685 note 47.

49. Immaterial matter ignored
N.Y.—Boret v. L. Vogelstein & Co., 177 N.Y.S. 402, 188 App.Div. 605.

Construed as mutual expression of an agreement into which parties have voluntarily entered for the purpose of laying before the court the facts and points of difference.—Gamble v. Andrews, 65 So. 525, 187 Ala. 302.

50. Ind.—Jennings v. Hembree, 124 N.E. 876, 71 Ind.App. 370.

51. Ga.—Wright v. Union Tank Line Co., 85 S.E. 994, 143 Ga. 765.
60 C.J. p 685 note 50.

52. Wyo.—Hudson Oil Co. v. Board of Com'rs of Fremont County, 52 P.2d 683, 49 Wyo. 1.
60 C.J. p 685 note 51.

53. Ala.—Gamble v. Andrews, 65 So. 525, 187 Ala. 302.

54. Iowa.—Burns v. Keas, 21 Iowa 257.

55. N.Y.—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App.Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.
60 C.J. p 686 note 62.

56. U.S.—Kapiolani Maternity and Gynecological Hospital v. Wodehouse, C.C.A.Hawaii, 70 F.2d 793.
N.Y.—Cohen v. Manufacturers Safe Deposit Co., 78 N.E.2d 604, 297 N.Y. 266—Skinner v. Paramount Pictures, 63 N.E.2d 64, 294 N.Y. 474—Feist v. Fifth Ave. Bank of New York, 20 N.E.2d 388, 280 N.Y. 189—Gorman's Restaurant v. O'Connell, 88 N.Y.S.2d 230, 275 App.Div. 166—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App. Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Town of Putnam Valley v. Slutzky, 9 N.Y.S.2d 781, 256 App.Div. 929—Ormond Realty Co. v. Consolidated Trimming Corporation, 263 N.Y.S. 344, 238 App.Div. 118—Haddad v. Southern Pac. Co., 173 N.Y.S. 256, 185 App.Div. 500.
60 C.J. p 686 note 63.

57. N.Y.—Lafrinz v. Whitney, 134 N. E. 852, 233 N.Y. 107—People v. Hewson, 120 N.E. 115, 224 N.Y. 136.

58. N.H.—Pray v. Burbank, 11 N.H. 290.

59. U.S.—Shankland v. Washington, Dist.Col., 5 Pet. 390, 8 L.Ed. 166.
N.H.—Pray v. Burbank, 11 N.H. 290.

clusion can be formed, the issue will not be decided.⁶⁰

§ 14. — Amendment

Generally, an amendment may be allowed when the agreed facts improvidently admit the existence, as a fact, of something which is not a fact, or where sufficient facts are not stated, or no relief was demanded, but under some statutes it has been held that the court has no power to amend an agreed case.

Where there is a clear and palpable mistake in figures or amounts in an agreed case and in the record thereof, it has been held that the court may correct it on the motion or petition of either party,⁶¹ and may allow amendment when the agreed facts improvidently admit the existence, as a fact, of something which is not a fact,⁶² or where sufficient facts are not stated,⁶³ or where no relief was demanded.⁶⁴ However, it has been held that, after a case has been heard and decided and judgment entered, an amendment of the prayer so as to include other relief will not be allowed,⁶⁵ and, after a case has been submitted on agreed facts, the court cannot, without setting aside the submission, allow one party, over the other's objection, to introduce additional facts, the existence of which was known to the former before the submission.⁶⁶ Under some statutes, it has been held that the court has no power to amend an agreed case.⁶⁷

§ 15. Judgment or Decision

The court is bound to render such judgment as the facts call for, whether legal or equitable, but the statutory provisions have been held not to contemplate the entry of judgment by default, or the direction of judgment against an undisclosed defendant, and no further adjudication will be made than affects the interests of the parties.

On submission of controversy the court is bound to render such judgment as the facts call for, whether legal or equitable;⁶⁸ but statutory provisions allowing submission of controversy have been held not to contemplate the entry of a judgment by default,⁶⁹ or the direction of a judgment against an undisclosed defendant.⁷⁰ As there is no trial of facts, as discussed supra § 13, no findings of fact are necessary,⁷¹ although it has been held that a judgment must be considered a determination of both facts and law in favor of the party for whom judgment is given.⁷² The judgment must be on the agreed facts, as discussed in Judgments § 186, and, in accordance with the rule that the court is confined to a determination of questions between the parties affecting their interests, as discussed supra § 13, no further adjudication will be made than affects such interests,⁷³ and no judgment will be pronounced where there are other persons not parties whose rights would be necessarily affected.⁷⁴ Provisions in the submission as to the form of judgment to be entered will be construed and applied so as to give effect to the intention of the parties.⁷⁵

60. N.Y.—Town of Putnam Valley v. Slutzky, 9 N.Y.S.2d 781, 256 App.Div. 929.

60 C.J. p 686 note 67.

61. Ind.—State v. Porter, 86 Ind. 404.

62. N.Y.—Fearing v. Irwin, 4 Daly 385, affirmed 55 N.Y. 486.

63. N.Y.—Matter of Yerks, 89 N.Y. S. 869, 97 App.Div. 632.

Concurrence of parties

(1) Court has discretionary power to permit amendments which are concurred in by parties, where facts agreed are insufficient to support judgment.—Consolidated Realty Corp. v. Koon, 4 S.E.2d 850, 216 N.C. 295—Consolidated Realty Corp. v. Koon, 2 S.E.2d 360, 215 N.C. 459. Necessity of agreement as to facts generally see supra § 6.

64. N.Y.—Cogan v. Taylor, 208 N.Y. S. 121, 212 App.Div. 8.

Necessity of prayer for judgment see supra § 6.

65. N.Y.—Kingsland v. New York, 42 Hun 599.

66. Ala.—Wilcox v. San José Fruit-

Packing Co., 21 So. 376, 113 Ala. 519, 59 Am.S.R. 135.

67. Mo.—Peake v. Webb, 112 S.W. 13, 132 Mo.App. 601.

68. N.Y.—Graves v. Brinkerhoff, 4 Hun 305, 6 Thomps. & C. 630.

Power of court to enter judgment on case submitted generally see Judgments § 186.

Courts are not obliged to answer specific questions propounded in a submission as long as they decide the case presented.—Pink v. Isle Theatrical Corp., 3 N.E.2d 521, 271 N.Y. 390, motion denied 4 N.E.2d 251, 272 N.Y. 500.

Judgment that defendant is owner of real property in dispute directed.—Town of Huntington v. Duck Island Corp., 297 N.Y.S. 292, 251 App.Div. 901.

69. N.Y.—Heasty v. Lambert, 90 N.Y.S. 595, 98 App.Div. 177.

70. N.Y.—Davin v. Davin, 94 N.Y.S. 281, 105 App.Div. 580.

71. Cal.—McMenomy v. White, 47 P. 109, 115 Cal. 339. 60 C.J. p 687 note 81.

72. Wis.—Hoff v. Hackett, 134 N.W. 132, 148 Wis. 32.

73. N.Y.—Abate v. Bianco, 128 N.Y. S. 271, 143 App.Div. 511. 60 C.J. p 687 note 85.

Consents necessary for revocation of irrevocable trust

In submission of a controversy as to whether necessary consents had been given for revocation of trust, decision in the negative was sufficient without determining consents necessary to revocation, the trust in no event being revocable.—Schoellkopf v. Marine Trust Co. of Buffalo, 272 N.Y.S. 613, 242 App.Div. 11, affirmed 196 N.E. 288, 267 N.Y. 358.

74. N.Y.—Des Caso v. Stiles, 147 N.Y.S. 9, 161 App.Div. 871. Dismissal where defect of parties see supra § 5.

75. Where submission involving several questions as to violations of the law was equivocal in respect of the form of judgment to be entered and provided that, if the "questions" were decided for plaintiff, plaintiff should have judgment for a stipulated penalty, and if for defendant the pro-

The findings and judgment in a stipulated case, where they conflict with an order of a court providing for the issuance of receiver's certificates, as to their priority, will control as against the order.⁷⁶

Interest will not be included in the amount awarded unless authorized by the submission.⁷⁷

§ 16. Appeal and Error

Where the case submitted fails to show what the controversy was, the decision of the court on the question submitted is not appealable. General rules governing the presentation and reservation in the lower court of the grounds of review, matters to be shown by record, and other matters of appeal and error have been applied.

Where the case submitted fails to show what the controversy was, or that there was a controversy between the parties, the decision of the court on the question submitted is not appealable,⁷⁸ although it has been held that, where a controversy involving a question of importance to the public is submitted, the appellate court may properly determine the question of law raised, although the statement of facts is not full enough to enable it to render judgment between the parties.⁷⁹ An appeal does not ordinarily lie from a judgment on submission of a controversy or agreed case except where the state of facts presents questions of law or where the parties do not agree as to the judgment to be entered, as discussed in Appeal and Error § 160. An exception to the decision on the trial of an agreed case is neces-

sary to a review thereof,⁸⁰ and an appeal cannot be taken before judgment below;⁸¹ but, where the parties proposed to file a record of the judgment as an amendment, it was held that on so doing the order remanding the case would be withdrawn and the cause would be allowed to remain on the docket for future hearing as amended;⁸² and, where an order of the inferior court directs that an agreed statement of facts be discharged because of a mistake or misunderstanding, and that a trial be had, the discharge and trial cannot be carried to the appellate court by bill of exceptions before the trial so directed.⁸³

The transcript on appeal must include the agreed statement of facts⁸⁴ and a copy of the affidavit required by statute, showing the reality of the controversy and the good faith of the proceeding.⁸⁵ Review is limited to the stipulated facts and to no others,⁸⁶ and on an appeal from a finding and judgment the court will consider whether there is in the stipulated facts sufficient to support the judgment;⁸⁷ and a determination of the lower court, based on a consideration of the uncontroverted facts, from which contradictory inferences might be drawn, is conclusive on the appellate court.⁸⁸

On appeal the court cannot draw inferences of facts from the stipulated facts,⁸⁹ and, where there is not a concurrence of facts material to the determination of the case, a judgment thereon will be

ceeding should be dismissed, but made no provision in terms, at least, for a judgment if some questions were decided for plaintiff and some for defendant, the court assumed, since it had no power to pass on moot questions or to act in an advisory capacity merely, that it was the intention of the parties that defendant should be cast for the stipulated penalty in the event that it was found to have violated the law in any particular, and in such case would render judgment for the stipulated penalty.—*People, by Mitchell, v. Interborough Rapid Transit Co.*, 154 N.Y.S. 627, 169 App.Div. 32.

76. *Idaho*.—*Cox v. Snow*, 273 P. 933, 47 *Idaho* 229.

77. *N.Y.*—*Pinsky v. Minneapolis Fire & Marine Ins. Co.*, 233 N.Y.S. 160, 225 App.Div. 326. 60 C.J. p 687 note 87.

78. *Mont.*—*Jefferson County v. Gilliam*, 42 P. 852, 17 *Mont.* 333. Estoppel to object to right of review see *supra* § 10.

79. *N.C.*—*Farthing v. Carrington*, 22 S.E. 9, 116 N.C. 315.

80. *Ind.*—*Geisen v. Reder*, 51 N.E. 353, 1060, 151 *Ind.* 529.—*Thatcher v. Ireland*, 77 *Ind.* 486.

81. *N.C.*—*Moore v. Hinnant*, 87 N.C. 505.

Tenn.—*Aldrich v. Pickard*, 12 *Lea* 657.

82. *N.C.*—*Moore v. Hinnant*, 87 N.C. 505.

83. *Mass.*—*West v. Platt*, 124 *Mass.* 353.

84. *N.C.*—*Consolidated Realty Corp. v. Koon*, 2 S.E.2d 360, 215 N.C. 459. Dismissal of appeal on failure to enter agreement on record of court below see *supra* § 9.

85. *Cal.*—*Mellois v. Chaine*, 20 *Cal.* 679.

60 C.J. p 687 note 97. Affidavit of reality of controversy and good faith of proceeding see *supra* § 7.

86. *N.Y.*—*Town of Pelham v. City of Mount Vernon*, 105 N.E.2d 604,

304 N.Y. 15, reargument denied 107 N.E.2d 85, 304 N.Y. 594.

87. *Wis.*—*Hoff v. Hackett*, 134 N.W. 132, 148 *Wis.* 32.

88. *Wis.*—*Hoff v. Hackett*, *supra*.

89. *N.Y.*—*Town of Pelham v. City of Mount Vernon*, 105 N.E.2d 604, 304 N.Y. 15, reargument denied 107 N.E.2d 85, 304 N.Y. 594.—*Cohen v. Manufacturers Safe Deposit Co.*, 78 N.E.2d 604, 297 N.Y. 266.—*Bradley v. Crane*, 94 N.E. 359, 201 N.Y. 14. Inferences of fact generally see *supra* § 13.

Inferences which trier of fact might make

Reviewing court may determine legal consequences flowing from the agreed facts, but in so doing may not find additional facts even though the submitted facts logically and reasonably admit of further important inferences which a trier of fact might very well draw.—*Town of Pelham v. City of Mount Vernon*, 105 N.E.2d 604, 304 N.Y. 15, reargument denied 107 N.E.2d 85, 304 N.Y. 594.

reversed.⁹⁰ The appellate court will not indulge in any presumption in favor of the judgment of the court below on a case submitted there without action, inasmuch as the upper court has the same means of reaching a correct conclusion of law on the agreed facts of the case as the lower court had.⁹¹ It has been held that the reviewing court has no alternative but to dismiss a submission where it fails to pose any determinative issue of law.⁹²

§ 17. Costs

Where the agreement does not provide for costs, the awarding of costs is discretionary with the court.

Where a cause is submitted by agreement and the submission does not provide for costs, the awarding of costs is discretionary with the court;⁹³ and, although it has been held that the costs should be

divided on the dismissal of an agreed case because the facts stated will not warrant a judgment for either party,⁹⁴ or because the case is submitted without plaintiff or defendant,⁹⁵ it has also been held that, where the case is dismissed because there is no agreed statement of facts on which a judgment can be rendered,⁹⁶ or where the submission is dismissed without prejudice to relief by an action,⁹⁷ costs will not be awarded to either party. Where defendants offered to allow judgment for the sum recovered by plaintiff, it has been held that they are entitled to their costs.⁹⁸ The parties may, however, stipulate regarding costs, and, where the submission of the controversy provides that no costs shall be awarded to plaintiff against defendant, the judgment will provide that no costs be recovered,⁹⁹ and, where a submission of controversy provides that judgment shall be given with costs and disbursements, no additional allowance can be made.¹

SUBMIT. The verb² "submit" is defined generally as meaning to present for determination;³ to commit to the discretion or judgment of another.⁴

The legal definition of the word is to propound, as an advocate, a proposition for the approval of the court,⁵ and, as applied to a cause, the word "submit" is in common use,⁶ and means to refer a cause to a court or referee for disposition.⁷ The term is sometimes used as applied to evidence, though not with the same accuracy.⁸

With respect to elections, the word "submit" means to present and leave to the judgment of the

qualified voters.⁹

SUB MODO. See the definition *Sub ante* p 552 note 25.

SUB NOMINE. See the definition *Sub ante* p 552 note 25.

SUBORDINATE. As a noun, the word "subordinate" is defined generally as meaning one who stands in order or rank below another;¹⁰ and, with respect to a class of servants, an employee who has

90. Pa.—*Staten Island Rapid Transit Ry. Co. v. Hite*, 41 Pa.Super. 527.

91. Ind.—*General Asbestos & Supply Co. v. Aetna Casualty & Surety Co.*, 198 N.E. 813, 101 Ind.App. 207, 60 C.J. p 688 note 4.

92. N.Y.—*Cohen v. Manufacturers Safe Deposit Co.*, 78 N.E.2d 604, 297 N.Y. 266.

93. N.Y.—*Herkimer County Light, etc., Co. v. Johnson*, 55 N.Y.S. 924, 37 App.Div. 257—*Gray v. Daniels*, 45 N.Y.S. 1106, 18 App.Div. 465.

94. Kan.—*Frazer v. Miller*, 12 Kan. 459.

95. Kan.—*Frazer v. Miller*, *supra*.

96. Ohio.—*Newark, etc., R. Co. v. Perry County Com'rs*, 30 Ohio 120.

97. N.Y.—*Cerf v. Deiner*, 104 N.E.

126, 210 N.Y. 156—*Leopold v. Heymann*, 148 N.Y.S. 50, 163 App.Div. 16.

98. N.Y.—*Neilson v. Commercial Mut. Ins. Co.*, 10 N.Y.Super. 455.

99. N.Y.—*McDonald v. Ross-Lewin*, 29 Hun 87.

1. N.Y.—*Fish v. Coster*, 28 Hun 64, affirmed 92 N.Y. 627.

2. Ill.—*People ex rel. Kerner v. Huls*, 189 N.E. 346, 348, 355 Ill. 412.

3. Ill.—*People ex rel. Kerner v. Huls*, *supra*.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 688 notes 6-10.

4. N.C.—*Cherokee County Board of Education v. Cherokee County*, 63 S.E. 724, 729, 150 N.C. 116

Similarly defined

To leave or commit to the discretion or judgment of another or others.—*McNulta v. Corn Belt Bank*, 63 Ill.App. 593, 608.

5. Nev.—*State v. Davis*, 19 P. 894, 897, 20 Nev. 220.

6. Iowa.—*Miller v. Wolf*, 18 N.W. 889, 890, 63 Iowa 233, 60 C.J. p 688 note 5.

7. Iowa.—*Miller v. Wolf*, *supra*.

8. Iowa.—*Miller v. Wolf*, *supra*, 60 C.J. p 688 note 5.

9. Colo.—*Noland v. Hayward*, 192 P. 657, 658, 69 Colo. 181, N.Y.—*In re Norton*, 134 N.Y.S. 1030, 1032, 75 Misc. 180.

10. Webster New Int.D.

no power to direct or control in the branch or department in which he is employed.¹¹

As a verb, to place in a lower order or class; to make or consider as of less value or importance; to make subject or subservient; to subject or subdue.¹²

As an adjective, belonging to an inferior order in a classification; having a lower position in a recognized scale; secondary; minor.¹³

It has been said that the term has much the same meaning as "incidental,"¹⁴ and that a thing is subordinate when it is ancillary or auxiliary to a principal thing.¹⁵ When used in connection with buildings, the word "subordinate" denotes the relationship of one building to another.¹⁶

"Subordinate" has been compared with, or distinguished from, "co-ordinate" see 18 C.J.S. p 128 note 67, and "first" see 36 C.J.S. p 822 note 26.

Phrases employing the term are set out in the note.¹⁷

SUBORDINATION. Act of subordinating or subjecting.¹⁸

Subornation of perjury and attempts to suborn perjury see Perjury §§ 79-91; conspiracy to commit the crime of subornation of perjury under federal statute see Conspiracy § 62 b.

SUBORN. To prepare, provide, or procure, especially in a secret or underhand manner.¹⁹

SUBORNARE. As the first word of a maxim to

which there have been no recent applications see 60 C.J. p 689 note 21.

SUBPARTNERSHIP. Defined see Partnership § 1 (a) (3) (a).

SUBPŒNA. The term "subpœna," or, more precisely, "subpœna ad testificandum," is defined and discussed in the C.J.S. title Witnesses §§ 19-24, also 79 C.J. p 43 note 89-p 47 note 80.

The subpœna duces tecum, which is a process or writ whereby a court, at the instance of a suitor, commands a person who has in his possession or control some book or paper which is pertinent to the issues of the pending controversy to attend and produce it for use at the trial, is treated in Witnesses § 25, also 70 C.J. p 48 note 15-p 55 note 71. Compelling the production of books and papers under such process as an unreasonable search or seizure see Searches and Seizures §§ 36, 37.

The subpœna ad respondendum, as the fundamental writ in English chancery and in some American jurisdictions, is treated in Equity § 174.

The phrase "subpœna docket" is defined in Courts § 226.

For other particular applications and specific uses of the word "subpœna" consult the Descriptive-Word Index.

SUBRENT. Rent from a subtenant.²⁰

SUBROGATIO. As the first word of a maxim as to which there have been no recent applications see 60 C.J. p 689 note 33.

11. U.S.—Kane v. Erie R. Co., Ohio, 142 F. 682, 685, 73 C.C.A. 672.
60 C.J. p 688 note 13.

12. Webster New Int.D.

13. N.J.—In re Fidelity Union Title & Mortgage Guaranty Co., 177 A. 449, 452, 118 N.J.Eq. 155.

14. Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 558.

15. Minn.—Lowry v. City of Mankato, supra.

16. Minn.—Lowry v. City of Mankato, supra.

17. *Phrases*

(1) "Subordinate body" of beneficial associations see Beneficial Associations §§ 60, 62, 68.

(2) "Subordinate officer" defined see Officers § 1 b.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 689 notes 15-18.

18. Webster New Int.D.

19. U.S.—U. S. v. Silverman, C.C.A. Pa., 106 F.2d 750, 751.

20. Webster New Int.D.
Assignment of subrents to lessor see Landlord and Tenant § 521 b.

SUBROGATION

This Title includes substitution in place of creditors, and succession to creditors' rights and remedies, of persons paying debts for which they were not primarily liable, whether payment be in pursuance of an agreement for such substitution, or for the protection of the interest of the person making it; and rights, liabilities, and remedies of parties in respect of such subrogation.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. DEFINITION AND ORIGIN, BASIS, NATURE, AND PURPOSE OF DOCTRINE IN GENERAL, §§ 1-4

II. GENERAL PRINCIPLES APPLICABLE TO RIGHT OF SUBROGATION, §§ 5-14

III. PARTICULAR APPLICATIONS OF DOCTRINE, §§ 15-62

A. IN GENERAL, §§ 15-45

B. SURETIES OR GUARANTORS, §§ 46-62

IV. ESTABLISHMENT AND ENFORCEMENT OF RIGHT, §§ 63-72

Sub-Analysis

I. DEFINITION AND ORIGIN, BASIS, NATURE, AND PURPOSE OF DOCTRINE IN GENERAL— p 575

- § 1. Definition—p 575
- 2. Origin, nature, and purpose of doctrine—p 578
- 3. — Legal subrogation—p 583
- 4. — Conventional subrogation—p 586

II. GENERAL PRINCIPLES APPLICABLE TO RIGHT OF SUBROGATION—p 588

- § 5. Scope and extent of remedy—p 588
- 6. Application of maxims of equity—p 594
- 7. Necessity for obligation and right or privilege aiding in enforcement thereof—p 599
- 8. Relationship of subrogee to debt discharged—p 600
- 9. — Volunteers—p 601
- 10. Payment of debt; partial subrogation—p 607
- 11. When right to subrogation accrues—p 610
- 12. Assignability of right—p 610
- 13. Waiver or loss of, and estoppel to assert, right—p 610
- 14. Operation and effect—p 611

III. PARTICULAR APPLICATIONS OF DOCTRINE—p 614

A. IN GENERAL—p 614

- § 15. Persons interested in administration of estates—p 614
- 16. Persons liable for loss or injury caused by fault of another—p 616
- 17. Persons jointly or jointly and severally liable for same debt—p 618
- 18. — Joint mortgagors and vendees—p 619
- 19. — Joint judgment debtors—p 620

See also descriptive word index in the back of this Volume

III. PARTICULAR APPLICATIONS OF DOCTRINE—Continued

A. IN GENERAL—Cont'd.

- § 20. — Partners—p 620
- 21. — Cotenants—p 621
- 22. Parties to bills or notes—p 621
- 23. — Subrogation of parties liable on instrument—p 621
- 24. — Subrogation of holder—p 623
- 25. Persons acting in representative, fiduciary, or official capacity—p 624
- 26. — Agent—p 625
- 27. — Executor or administrator—p 625
- 28. — Guardian—p 627
- 29. — Sheriff or other public officer—p 628
- 30. — Trustee—p 629
- 31. Persons discharging encumbrances—p 630
- 32. — Persons in status of purchaser of encumbered property in general—p 633
- 33. — Application to discharge of particular encumbrances—p 634
- 34. — Purchasers of equity of redemption—p 641
- 35. — Purchasers at execution, foreclosure, judicial, and similar sales—p 641
- 36. — Subsequent encumbrancers—p 644
- 37. — Grantors or mortgagors paying after transfer of mortgaged property—
p 647
- 38. Third persons advancing means to discharge debt or encumbrance securing
it—p 649
- 39. — Mortgage or deed of trust—p 654
- 40. — Maritime lien—p 659
- 41. — Mechanic's or wage lien—p 660
- 42. — Vendor's lien—p 661
- 43. Third person making advancements for necessities, or to discharge encum-
brance on property of person incompetent to contract—p 663
- 44. Persons owning funds or property applied by others to debts or encumbranc-
es—p 663
- 45. Persons making improvements on land of another—p 666

B. SURETIES OR GUARANTORS—p 666

- § 46. In general—p 666
- 47. Subrogation to rights of creditor—p 667
- 48. — Matters essential to creation or existence of right—p 670
- 49. — Right of subrogation as dependent on, or affected by, acts of creditor in
general—p 676
- 50. — Assignment by creditor—p 677
- 51. — Waiver by surety—p 679
- 52. — Extent and limitations of subrogation generally—p 680
- 53. — Assignment and transfer of surety's rights—p 682
- 54. — Rights and remedies to which subrogated—p 682
- 55. — Against whom surety may enforce liens and securities of creditor—p 690
- 56. — Subrogation as between successive and independent sureties—p 691
- 57. Subrogation to rights of principal—p 693
- 58. Subrogation to rights of cosurety—p 695
- 59. Sureties for particular purposes or types of persons—p 695
- 60. — Sureties for fiduciaries and officials—p 709
- 61. — Sureties on bonds in judicial proceedings—p 712
- 62. Indemnitors of sureties—p 714

See also descriptive word index in the back of this Volume

IV. ESTABLISHMENT AND ENFORCEMENT OF RIGHT—p 714

- § 63. In general—p 714
- 64. Nature and form of remedy—p 715
- 65. Conditions precedent—p 717
- 66. Time to sue, limitations, and laches—p 717
- 67. Parties—p 719
- 68. Pleading—p 720
- 69. Evidence—p 723
- 70. Trial—p 725
- 71. Judgment or decree—p 725
- 72. Review—p 726

See also descriptive word index in the back of this Volume

I. DEFINITION AND ORIGIN, BASIS, NATURE, AND PURPOSE OF DOCTRINE IN GENERAL

§ 1. Definition

Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt; it is of two kinds, legal and conventional, the former being subrogation which arises by operation of law, and the latter that which arises by contract.

Subrogation may be defined as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.¹ The term has been defined in more or less similar language in other cases,² and has been used

1. U.S.—Maryland Casualty Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375, 377.

Ariz.—Mosher v. Conway, 46 P.2d 110, 112, 45 Ariz. 463.

Ga.—Corpus Juris quoted in Harrison v. Citizens & Southern Nat. Bank, 195 S.E. 750, 752, 185 Ga. 556—Callan Court Co. v. Citizens & Southern Nat. Bank, 190 S.E. 831, 856, 184 Ga. 87—First Nat. Bank of Atlanta v. American Surety Co., 30 S.E.2d 402, 406, 71 Ga.App. 112.

Ind.—Wilson v. Todd, 26 N.E.2d 1003, 1005, 217 Ind. 183, 129 A.L.R. 192—First & Tri State Nat. Bank & Trust Co. of Fort Wayne v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 452, 102 Ind.App. 361.

Kan.—Corpus Juris cited in City of New York Ins. Co. v. Tice, 152 P. 2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Me.—Home Ins. Co. v. Bishop, 34 A. 2d 22, 140 Me. 72.

N.Y.—Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 36, 169 Misc. 961—Ash v. Rhodes, 5 N.Y.S.2d 939, 940.

Or.—Schiska v. Schramm, 51 P.2d 668, 669, 151 Or. 647.

Tenn.—Lewis v. Koehn, 5 Tenn.App. 530, 535—Turley-Bullington Mortgage Co. v. Brown, 4 Tenn.App. 500, 507.

Tex.—Platte v. Securities Inv. Co., Com.App., 55 S.W.2d 551.
60 C.J. p 694 note 2.

Literal and equitable significance

"Subrogation" in its literal and equitable significance is the demanding of something under the right of another, to which right the claimant is entitled, for the purpose of justice, to be substituted in place of the original holder.—Cooper v. Home Owners' Loan Corp., 126 S.W.2d 112, 197 Ark. 839.

Sale

Subrogation is in effect a sale, and only the sale of a litigious right is prohibited under the law.—Motors Ins. Corp. v. Employers' Liability Assur. Corp., La.App., 52 So.2d 311.

"Doctrine of subrogation" is doctrine by which the equities of one are worked out through the legal rights of another.—Subscribers at Casualty Reciprocal Exchange, by Dodson v. Kansas City Public Service Co., 91 S.W.2d 227, 230 Mo.App. 468.

"Subrogated"

(1) When, under rules of equity, one person is substituted for another as creditor, he is "subrogated" to all of such other's rights as creditor.—Verdier v. Marshallville Equity Co., 46 N.E.2d 636, 70 Ohio App. 434.

(2) One who is compelled to pay claim which another should in fairness pay is "subrogated" to creditor's rights against him.—Amalgamated Casualty Ins. Co. v. Winslow, 135 F. 2d 663, 665, 77 U.S.App.D.C. 382.

To "subrogate" is to put into place of another; to substitute.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 679, 64 Cal.App.2d 229.

Referred to as doctrine of "square deal"

U.S.—Amick v. Columbia Casualty Co., C.C.A.Mo., 101 F.2d 984, 986.

2. U.S.—American Surety of New York v. Robinson, C.C.A.Ga., 53 F. 2d 22, 23—Federal Deposit Ins. Corp. v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551, 556—In re United Cigar Stores Co. of America, D.C.N.Y., 9 F.Supp. 149.
Ala.—Schuessler v. Shelnutt, 171 So. 259, 261, 233 Ala. 188.

Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 1058, 11 Cal.2d 113—Eckman v. Arnold Taxi Co., 148 P.2d 677, 679, 64 Cal.App.2d 229.

Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 772, 123 Conn. 232.

Ga.—Jasper School Dist. v. Gormley, 193 S.E. 248, 251, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga.App. 537—Callan Court Co. v. Citizens & Southern Nat. Bank, 190 S.E. 831, 856, 184 Ga. 87—Lee v. Holman, 186 S.E. 189, 190, 182 Ga. 559—Adel Banking Co. v. Parrish, 66 S.E.2d 150, 152, 84 Ga.App. 329—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 406, 71 Ga.App. 112.

Idaho.—Gerken v. Davidson Grocery Co., 69 P.2d 122, 126, 57 Idaho 670.

synonymously with the word "substitution."³ In this respect, the doctrine of subrogation has been referred to as the doctrine of substitution.⁴ Subrogation is of two kinds,⁵ according to the

Ill.—London & Lancashire Indemnity Co. of America v. Tindall, 36 N.E.2d 334, 337, 377 Ill. 308—People v. Metropolitan Cas. Ins. Co. of N. Y., 90 N.E.2d 565, 567, 339 Ill.App. 514—Cherry, for Use of Simon v. Aetna Casualty & Surety Co., 3 N.E.2d 105, 285 Ill.App. 601.

Ind.—First & Tri State Nat. Bank & Trust Co. of Fort Wayne v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 102 Ind.App. 361.

Iowa.—American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 339, 218 Iowa 1.

Kan.—City of New York Ins. Co. v. Tice, 152 P.2d 836, 159 Kan. 176, 157 A.L.R. 1233.

Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 76, 297 Ky. 339.

Md.—Harford Bank of Bel Air v. Hopper's Estate, 181 A. 751, 755, 169 Md. 314.

Mo.—Krebs v. Bezler, 89 S.W.2d 935, 938, 338 Mo. 365, 103 A.L.R. 1177.

N.Y.—Ash v. Rhodes, City Ct., 5 N.Y.S.2d 939, 940.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 853, 864, 146 Ohio St. 305—Zimpher v. Schwartz, 27 N.E.2d 499, 502, 64 Ohio App. 7.

Pa.—Reimel v. Northwestern Trust Co., 155 A. 106, 108, 304 Pa. 121—Lit Bros., to Use of Kaplan, v. Goodman, 18 A.2d 519, 521, 144 Pa. Super. 43—Corn Exchange Nat. Bank v. Tinicum School Dist., Com. Pl., 32 Del.Co. 600.

S.C.—Brown Const. Co. v. Massachusetts Bonding & Insurance Co., 179 S.E. 697, 702, 176 S.C. 76.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 920, 179 Va. 394.

60 C.J. p 694 note 2 [a].

Particular definitions

(1) The substitution of one person in the place of another with respect to a lawful claim or right.

Fla.—Goodwin v. Schmidt, 5 So.2d 64, 66, 149 Fla. 85—Cuesta, Rey & Co. v. Newson, 136 So. 551, 555, 102 Fla. 853—Whysel v. Smith, 134 So. 552, 554, 101 Fla. 971.

Ohio.—Federal Union Life Ins. Co. v. Deitsch, 189 N.E. 440, 442, 127 Ohio St. 505.

Wis.—U. S. Guarantee Co. v. Liberty Mut. Ins. Co., 12 N.W.2d 59, 61, 244 Wis. 317, 150 A.L.R. 632—Leonard v. Bottomley, 245 N.W. 849, 851, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis. 420, and 254 N.W. 853, 210 Wis. 421.

60 C.J. p 694 note 2 [a] (13).

(2) The substitution of one person

in the place of another, whether as a creditor, or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.—Home Owners' Loan Corporation v. Baker, 12 N.E.2d 199, 201, 299 Mass. 158—60 C.J. p 694 note 2 [a] (15).

(3) The machinery by which the equity of one man is worked out through the legal rights of another.—American Surety Co. v. Hamrick Mills, 9 S.E.2d 433, 435, 194 S.C. 221.

(4) The substitution of one person for another by reason of payment by that person of a claim owing by the original debtor.—Adel Banking Co. v. Parrish, 66 S.E.2d 150, 152, 84 Ga. App. 329.

(5) The equitable substitution of another person in place of lienholder or preferred claimant, to whose original rights he succeeds in relation to the claim paid.—Olivere v. Taylor, 65 A.2d 723, 726, 31 Del.Ch. 53.

(6) The putting of one to whom a particular right does not legally belong in the position of legal owner of the right.—Adelman v. Biber, 17 A.2d 819, 19 N.J.Misc. 63.

(7) A remedy for benefit of one secondarily liable, who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of original creditor.—Fidelity & Deposit Co. of Maryland v. Atherton, 144 P.2d 157, 47 N.M. 443.

(8) An equity called into existence to enable party secondarily liable, but who has paid debt, to reap benefit of securities or remedies which creditors may hold as against principal debtor, and by use of which party paying may thus be made whole.

Iowa.—American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 339, 218 Iowa 1.

Pa.—Reimel v. Northwestern Trust Co., 155 A. 106, 108, 304 Pa. 121.

S.C.—American Sur. Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

60 C.J. p 694 note 2 [a] (3).

(9) A legal action by force of which an obligation, extinguished by payment made by a third person, is treated as still subsisting for his benefit.—Texas Co. v. Miller, C.C.A. Tex., 165 F.2d 111, 115, certiorari denied 68 S.Ct. 911, 333 U.S. 880, 92 L. Ed. 1155.

(10) An equitable doctrine under which, as result of payment of debt

by one other than principal debtor, there is a substitution of former in place of creditor to whose rights he succeeds in relation to obligation of debtor.—Maryland Casualty Co. v. Gough, 65 N.E.2d 853, 864, 146 Ohio St. 305.

3. Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 1058, 11 Cal.2d 113—Lossman v. City of Stockton, 44 P.2d 397, 6 Cal.App.2d 324.

Del.—Leiter v. Carpenter, 22 A.2d 393, 26 Del.Ch. 85.

Ind.—First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 102 Ind.App. 361.

Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.

60 C.J. p 694 note 2 [c].

"Subrogation" in theory substitutes one person to the claim of another.—American Sur. Co. v. Bank of California, C.C.A.Or., 133 F.2d 160.

Not assignment or transfer

"Subrogation" means substitution, not assignment or transfer.

U.S.—Reconstruction Finance Corporation v. Teter, C.C.A.Ill., 117 F.2d 716.

La.—Motors Ins. Corp. v. Employers' Liability Assur. Corp., App., 52 So. 2d 311.

4. U.S.—American Surety Co. v. National Bank of Barnesville, D.C. Ohio, 17 F.2d 942.

Ky.—Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1, 136 S.W.2d 1094, 281 Ky. 771.

5. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—Gautney v. Gautney, 46 So.2d 198, 253 Ala. 584.

Ga.—McCormick v. Lark, 200 S.E. 276, 187 Ga. 292—Lee v. Holman, 186 S. E. 189, 182 Ga. 559—Federal Land Bank of Columbia v. Barron, 160 S.E. 228, 173 Ga. 242—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 71 Ga.App. 112.

Kan.—Corpus Juris cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705—Hay v. Crawford, 158 P.2d 463, 159 Kan. 723, 159 A.L.R. 388—Corpus Juris cited in City of New York Ins. Co. v. Tice, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Ohio.—Federal Union Life Ins. Co. v. Deitsch, 189 N.E. 440, 127 Ohio St. 505.

Tex.—Rotge v. Dunlap, Civ.App., 91 S.W.2d 905, error dismissed by agreement—Corpus Juris cited in

authorities on the question, namely, legal⁶ and conventional,⁷ legal subrogation being for the purpose of this distinction regarded as subrogation which arises by operation of law,⁸ and conventional subrogation that which arises by contract.⁹ So subro-

gation may or may not arise from contract.¹⁰ If the term "subrogation" is used without qualification, it is ordinarily legal subrogation which is meant, as distinguished from conventional subrogation.¹¹ It

Ramey v. Cage, Civ.App., 90 S.W. 2d 626, 627.

Wash.—*Corpus Juris* cited in Ross v. Jones, 24 P.2d 623, 626, 174 Wash. 205.

60 C.J. p 695 note 3.

Agreement or implication

Subrogation may arise from agreement between parties or by implication in equity to prevent fraud or injustice.—*Platte v. Securities Inv. Co.*, Tex.Com.App., 55 S.W.2d 551.

6. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 Ga. 242—*First Nat. Bank of Atlanta v. American Surety Co.*, 30 S.E.2d 402, 71 Ga.App. 112—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543.

Kan.—*Corpus Juris* cited in *Fenly v. Revell*, 228 P.2d 905, 908, 170 Kan. 705—*Corpus Juris* cited in *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Neb.—*Luikart v. Buck*, 270 N.W. 495, 131 Neb. 866.

Ohio.—*Federal Union Life Ins. Co. v. Deitsch*, 189 N.E. 440, 127 Ohio St. 505.

Tex.—*Rotge v. Dunlap*, Civ.App., 91 S.W.2d 905, error dismissed by agreement—*Corpus Juris* cited in *Ramey v. Cage*, Civ.App., 90 S.W. 2d 626, 627.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

Wash.—*Corpus Juris* cited in *Ross v. Jones*, 24 P.2d 622, 626, 174 Wash. 205.

60 C.J. p 695 note 4.

Referred to as "equitable" subrogation.

Ohio.—*Ætna Ins. Co. v. Williamson Heater Co.*, 3 Ohio Supp. 61.

7. U.S.—In re Lauer, D.C.N.J., 38 F. Supp. 691.

Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*Federal Land*

Bank of Columbia v. Barron, 160 S.E. 228, 173 Ga. 242—*First Nat. Bank of Atlanta v. American Surety Co.*, 30 S.E.2d 402, 71 Ga.App. 112—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543.

Kan.—*Corpus Juris* cited in *Fenly v. Revell*, 228 P.2d 905, 908, 170 Kan. 705—*Corpus Juris* cited in *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Neb.—*Luikart v. Buck*, 270 N.W. 495, 131 Neb. 866.

Ohio.—*Federal Union Life Ins. Co. v. Deitsch*, 189 N.E. 440, 127 Ohio St. 505.

Tex.—*Rotge v. Dunlap*, Civ.App., 91 S.W.2d 905, error dismissed by agreement—*Corpus Juris* cited in *Ramey v. Cage*, Civ.App., 90 S.W. 2d 626, 627.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

Wash.—*Corpus Juris* cited in *Ross v. Jones*, 24 P.2d 622, 626, 174 Wash. 205.

60 C.J. p 695 note 5.

8. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 Ga. 242—*First Nat. Bank of Atlanta v. American Sur. Co.*, 30 S.E.2d 402, 71 Ga.App. 112—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543.

Ill.—In re *Dickson's Estate*, 45 N.E. 2d 558, 316 Ill.App. 559.

Iowa.—*Home Owners' Loan Corp. v. Rupe*, 283 N.W. 108, 225 Iowa 1044.

Kan.—*Corpus Juris* cited in *Fenly v. Revell*, 228 P.2d 905, 908, 170 Kan. 705—*Corpus Juris* cited in *Hay v. Crawford*, 158 P.2d 463, 468, 159 Kan. 723, 159 A.L.R. 388—*Corpus Juris* cited in *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Me.—*Home Ins. Co. v. Bishop*, 34 A. 2d 22, 140 Me. 72.

N.Y.—*City of New York v. Barbato*, 5 N.Y.S.2d 125.

Ohio.—*Ætna Ins. Co. v. Williamson Heater Co.*, 3 Ohio Supp. 61.

Tex.—*Rotge v. Dunlap*, Civ.App., 91 S.W.2d 905, error dismissed by agreement—*Corpus Juris* cited in

Ramey v. Cage, Civ.App., 90 S.W. 2d 626, 627.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

Wash.—*Corpus Juris* cited in *Ross v. Jones*, 24 P.2d 622, 626, 174 Wash. 205.

60 C.J. p 695 note 6.

9. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85—*Federal Bank of Columbia v. Godwin*, 136 So. 513, 107 Fla. 537, modified on other grounds and rehearing denied 145 So. 883, 107 Fla. 537.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*First Nat. Bank of Atlanta v. American Sur. Co.*, 30 S.E.2d 402, 71 Ga.App. 112—*Western Union Telegraph Co. v. Smith*, 178 S.E. 472, 50 Ga.App. 585.

Ill.—In re *Dickson's Estate*, 45 N.E.2d 558, 316 Ill.App. 559—*Cherry*, for Use of *Simon v. Ætna Casualty & Surety Co.*, 3 N.E.2d 105, 235 Ill. App. 601.

Iowa.—*Home Owners' Loan Corp. v. Rupe*, 283 N.W. 108, 225 Iowa 1044.

Kan.—*Corpus Juris* cited in *Hay v. Crawford*, 158 P.2d 463, 468, 159 Kan. 723, 159 A.L.R. 388—*Corpus Juris* cited in *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Me.—*Home Ins. Co. v. Bishop*, 34 A.2d 22, 140 Me. 72.

Neb.—*Luikart v. Buck*, 270 N.W. 495, 131 Neb. 866.

N.Y.—*City of New York v. Barbato*, 5 N.Y.S.2d 125.

Ohio.—*Federal Union Life Ins. Co. v. Deitsch*, 189 N.E. 440, 127 Ohio St. 505—*Ætna Ins. Co. v. Williamson Heater Co.*, 3 Ohio Supp. 61.

Tex.—*Rotge v. Dunlap*, Civ.App., 91 S.W.2d 905, error dismissed by agreement—*Ramey v. Cage*, Civ. App., 90 S.W.2d 626.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

Wash.—*Corpus Juris* cited in *Ross v. Jones*, 24 P.2d 622, 626, 174 Wash. 205.

60 C.J. p 695 note 7.

10. Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28.

11. Kan.—*Corpus Juris* cited in

has been said that the progressive extension of both types of subrogation has somewhat obliterated this line of division.¹²

§ 2. Origin, Nature, and Purpose of Doctrine

- a. Origin and basis
- b. Nature
- c. Purpose

a. Origin and Basis

Subrogation does not owe its origin to statute, custom, or the common law, but it is a creature of equity, adopted by equity from the Roman or the civil law. It is founded on principles of justice and equity, and its operation is governed by principles of equity.

Subrogation does not owe its origin to statute or custom,¹³ nor is it a doctrine of the common law.¹⁴ It originated in equity¹⁵ and is a creature of equity,¹⁶ a doctrine of equity jurisprudence¹⁷

City of New York Ins. Co. v. Tice, 152 P.2d 836, 839, 159 Kan. 176, 157 A.L.R. 1233.

Mo.—McKenzie v. Missouri Stables, 34 S.W.2d 136, 225 Mo.App. 64.

12. Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

13. Ill.—Corpus Juris quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.

Md.—Schaeffer v. Sterling, 6 A.2d 254, 176 Md. 553.

Neb.—Burks v. Packer, 9 N.W.2d 471, 143 Neb. 373.

60 C.J. p 696 note 12.

State laws

The principle of subrogation is a principle of equity not dependent on state laws.—Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

14. Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

Ill.—Corpus Juris quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.

Md.—Schaeffer v. Sterling, 6 A.2d 254, 176 Md. 553.

60 C.J. p 696 note 13.

15. Ala.—Duke v. Kilpatrick, 163 So. 640, 231 Ala. 51—Strickland v. Carroll, 154 So. 109, 228 Ala. 498.

Ga.—Jasper School Dist. v. Gormley, 193 S.E. 248, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga.App. 537—First Nat. Bank of Atlanta v. American Surety Co., 30 S.E.2d 402, 71 Ga.App. 112.

Ill.—Corpus Juris quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.

Iowa.—Home Owners' Loan Corp. v. Rupe, 283 N.W. 108, 225 Iowa 1044.

Ky.—Commonwealth, for Use of Coleman v. Farmers Deposit Bank of Frankfort, 95 S.W.2d 793, 264 Ky. 839—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

Neb.—Burks v. Packer, 9 N.W.2d 471, 143 Neb. 373.

N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq.

261—Lubowicki v. Travelers Ins. Co., 8 A.2d 842, 18 N.J.Misc. 19.

N.Y.—Junkersfeld v. Bank of Manhattan Co., 295 N.Y.S. 62, 250 App. Div. 646.

N.C.—Corpus Juris cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.

Okl.—Smith v. Minter, 191 P.2d 929, 200 Okl. 208—Mitchell v. Jackson, 60 P.2d 390, 177 Okl. 441.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa.Super. 259—Commonwealth for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co., 186 A. 242, 122 Pa.Super. 403—Auto Building & Loan Ass'n v. Hall, 177 A. 581, 117 Pa.Super. 104.

Tex.—Hays v. Spangenberg, Civ. App., 94 S.W.2d 899.

W.Va.—Bank of Marlinton v. McLaughlin, 17 S.E.2d 213, 123 W.Va. 608.

60 C.J. p 696 note 14.

16. U.S.—American Surety Co. v. Bank of California, C.C.A.Or., 133 F.2d 160—Wojciuk v. U. S., D.C. Wis., 74 F.Supp. 914—National Surety Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 159—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F. Supp. 551.

Ala.—Carter v. Carter, 38 So.2d 557, 251 Ala. 598.

Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

Ark.—Brookfield v. Rock Island Improvement Co., 169 S.W.2d 682, 205 Ark. 573, 147 A.L.R. 451.

Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113—Lossman v. City of Stockton, 44 P.2d 397, 6 Cal.App.2d 324.

Colo.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254.

Fla.—Federal Land Bank of Columbia v. Godwin, 145 So. 883, 107 Fla. 537.

Ill.—Corpus Juris quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.

Kan.—Corpus Juris cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705.

Me.—Lee Tire & Rubber Co. v. Snow Hudson Co., 157 A. 710, 130 Me. 475, 80 A.L.R. 709.

Md.—Schaeffer v. Sterling, 6 A.2d 254, 176 Md. 553.

Miss.—Corpus Juris cited in Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 388, 196 Miss. 50.

Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177—Neer v. Neer, App., 80 S.W.2d 240.

Ohio.—Canton Morris Plan Bank v. Most, 184 N.E. 765, 44 Ohio App. 180.

Okl.—Home Owners' Loan Corp. v. Parker, 73 P.2d 170, 181 Okl. 234—City of Barnsdall v. Barnsdall Nat. Bank, 23 P.2d 373, 164 Okl. 167.

S.D.—American Surety Co. v. Western Surety Co., 23 N.W.2d 429, 71 S.D. 126.

Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed.

Utah.—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A. L.R. 809.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

Wis.—Strelitz v. First Wisconsin Nat. Bank of Milwaukee, 264 N.W. 649, 220 Wis. 443.

60 C.J. p 696 note 15.

Arm of equity

Subrogation is an arm of equity that may guide or even force one to pay a debt for which an obligation was incurred but which was in whole or in part paid by another.—Fireman's Fund Indem. Co. v. State Compensation Ins. Fund, 209 P.2d 55, 93 Cal.App.2d 408.

Dependent on equity

Right to subrogation arises by operation of, and depends on, equity alone.—National Surety Co. v. Franklin Trust Co., 170 A. 683, 313 Pa. 501, 95 A.L.R. 300.

17. Ill.—Corpus Juris quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.

60 C.J. p 696 note 16.

to a volunteer.⁹⁵ Thus, where money due on the mortgage is paid by such purchaser, it is in the nature of an equitable assignment, substituting him who pays in the place of the mortgagee,⁹⁶ and it makes no difference whether he took an assignment of the mortgage as a release, or whether a discharge was made and evidence of the debt canceled;⁹⁷ and no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it.⁹⁸ The purchaser's right of subrogation to the mortgage he discharged includes its priority over junior liens⁹⁹ of which he did not have actual knowledge,¹ where he was not culpably negligent in failing to learn of the junior lien,² even though he had constructive notice thereof.³ Even where the mortgage is discharged of record, the purchaser may be subrogated thereto as against junior lienors who did not change their position in reliance on the recorded discharge.⁴ Whether one who purchases subject to a mortgage which he discharges is subrogated to the mortgagee's rights

in other security he holds for the payment of the mortgage debt has been held to depend on the equities of the case and whether the price paid by the purchaser, including the discharge of the mortgage, is in excess of the value of the land.⁵ Where the purchaser is compelled to pay a mortgage which was released by a guardian without authority, he is subrogated to the guardian's rights as to the substituted security taken by the guardian,⁶ although he cannot compel the guardian first to resort to such security.⁷ Where a mortgagor conveys the property expressly subject to the mortgage and the purchaser reconveys, with a covenant against encumbrances not excepting the mortgage, and such purchaser satisfies the mortgage, he obtains no right of subrogation to the rights of the mortgagee.⁸

As a general rule, a purchaser who discharges a mortgage or deed of trust which he has assumed is not entitled to subrogation⁹ to the prejudice of a junior lien claimant of whose lien he had actual¹⁰ or constructive¹¹ notice at the time of payment, in

95. Cal.—Macfarlane v. Faulkner, 37 P.2d 161, 1 Cal.App.2d 722.

Abstractor liable to purchaser

Where abstractor who issued certificate of title in which it was erroneously shown that certain property was free from mortgages subsequently paid mortgage on property, abstractor was volunteer and not entitled to recover payments made from original mortgagors, in absence of assignment of rights of purchasers for whom abstract was made, since no privity of contract existed between abstractor and original mortgagors, particularly where original mortgagors had notified abstractor they were not liable on mortgage.—Macfarlane v. Faulkner, supra.

96. D.C.—Burgoon v. Lavezzo, 92 F. 2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

60 C.J. p 792 notes 67, 68.

97. Tex.—Houston First Nat. Bank v. Ackerman, 8 S.W. 45, 70 Tex. 315.

60 C.J. p 792 note 69.

98. Ark.—Jefferson v. Edrington, 14 S.W. 99, 53 Ark. 545.

99. Ohio.—Ehrman v. Bayer, App., 41 N.E.2d 900—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

1. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Ohio.—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

2. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Ohio.—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

3. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

4. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., supra.

5. Miss.—Haraway v. Sledge & Norfleet Co., 11 So.2d 903, 194 Miss. 133, 145 A.L.R. 735, suggestion of error overruled 12 So.2d 436, 194 Miss. 133, 145 A.L.R. 735.

6. Tex.—Freiberg v. De Lamar, 27 S.W. 151, 7 Tex.Civ.App. 263.

7. Tex.—Freiberg v. De Lamar, supra.

8. N.Y.—Weeks v. Garvey, 4 N.Y.S. 890, 56 N.Y.Super. 557.

9. Ala.—Duke v. Kilpatrick, 163 So. 640, 231 Ala. 51.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Fla.—Whyel v. Smith, 134 So. 552, 101 Fla. 971.

Ind.—Storer v. Warren, 192 N.E. 325, 99 Ind.App. 616.

Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

Mo.—Tucker v. Holder, 225 S.W.2d 123, 359 Mo. 1039—State ex rel. State Highway Commission v. Houchens, App., 235 S.W.2d 97.

Pa.—Klopfenstein v. Chadbourne, 161 A. 642, 105 Pa.Super. 530.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128. 60 C.J. p 793 notes 92, 2, p 794 note 10.

Reasons for rule

(1) A purchaser who discharges an encumbrance which he has assumed is the person primarily liable and has paid his own debt.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Ind.—Storer v. Warren, 192 N.E. 325, 99 Ind.App. 616.

Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

Mo.—State ex rel. State Highway Commission v. Houchens, App., 235 S.W.2d 97.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334.

(2) A purchaser assuming a mortgage is a volunteer.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833—60 C.J. p 793 note 91.

10. Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

Tenn.—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

60 C.J. p 793 note 93.

11. Ark.—Lindley v. Marriott, 114 S.W.2d 453, 196 Ark. 1178.

Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

60 C.J. p 793 notes 94, 98, 99.

its operation is governed by principles of equity.²⁰ It rests on the principle that substantial justice should be attained regardless of form,²¹ that is, its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form.²²

b. Nature

Subrogation is an equitable doctrine, and the right thereto is an equitable right and not a legal right.

Although it has been held that subrogation is an equitable remedy,²³ it has also been said that subrogation is not strictly a remedy,²⁴ but rather that it is an equitable principle through which the benefit of remedies is obtained.²⁵ It is an equitable doctrine,²⁶ under the authorities on the question, and

(8) Subrogation is predicated on equitable doctrine that one who has indemnified another in pursuance of his obligation to do so is entitled to means of redress held by person indemnified against individual causing loss.—*Economy Auto Ins. Co. v. Brown*, 79 N.E.2d 854, 334 Ill.App. 579.

20. D.C.—*A. Gusmer, Inc. v. McGrath, C.A.*, 196 F.2d 860, certiorari denied *A. Gusmer Inc. v. McGranery*, 73 S.Ct. 38, 344 U.S. 831, 97 L.Ed. 39.

Ky.—*Smith v. Feltner*, 83 S.W.2d 506, 259 Ky. 833.

Miss.—*Sadler v. Glenn*, 199 So. 305, 190 Miss. 112.

Pa.—*Gildner v. First Nat. Bank & Trust Co. of Bethlehem*, 19 A.2d 910, 915, 342 Pa. 145—*Fell v. Johnston*, 36 A.2d 227, 154 Pa.Super. 470.

Tex.—*Sherman v. El Paso Nat. Bank, Civ.App.*, 100 S.W.2d 402, error dismissed.

21. Ariz.—*Mosher v. Conway*, 46 P. 2d 110, 45 Ariz. 463.

Ark.—*Webster v. Horton*, 67 S.W.2d 200, 188 Ark. 610.

Fla.—*Federal Land Bank of Columbia v. Godwin*, 145 So. 883, 107 Fla. 537.

Ill.—*Corpus Juris* quoted in *People ex rel. Nelson v. Phillip State Bank & Trust Co.*, 30 N.E.2d 771, 773, 307 Ill.App. 464.

Miss.—*Corpus Juris* cited in *Oxford Production Credit Ass'n v. Bank of Oxford*, 16 So.2d 384, 388, 196 Miss. 50.

Okl.—*Corpus Juris* quoted in *Ward v. Continental Ins. Corp.*, 24 P.2d 654, 658, 165 Okl. 20.

60 C.J. p 699 note 30.

Form ignored

The doctrine of subrogation ignores the form and looks to the substance, construes payment to be purchase, and purchase to be payment, as justice may demand, and substitutes one person for another, or property for property.—*Home Ins. Co. v. Bishop*, 34 A.2d 22, 140 Me. 72.

22. Cal.—*Raynor v. City of Arcata*, 77 P.2d 1054, 11 Cal.2d 113—*Lossman v. City of Stockton*, 44 P.2d 397, 6 Cal.App.2d 324.

Ga.—*Jasper School Dist. v. Gormley*, 193 S.E. 248, 184 Ga. 756, trans-

ferred, see 196 S.E. 232, 57 Ga.App. 537—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*First Nat. Bank of Atlanta v. American Surety Co.*, 30 S. E.2d 402, 71 Ga.App. 112.

Iowa.—*American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant*, 254 N.W. 338, 218 Iowa 1.

Me.—*Lee Tire & Rubber Co. v. Snow Hudson Co.*, 157 A. 710, 130 Me. 475, 80 A.L.R. 709.

Miss.—*Home Owners' Loan Corp. v. Moore*, 185 So. 253, 184 Miss. 283—*Box v. Early*, 178 So. 793, 181 Miss. 19.

Neb.—*Burks v. Packer*, 9 N.W.2d 471, 143 Neb. 373.

Ohio.—*Harshman v. Harshman, App.*, 42 N.E.2d 447.

Okl.—*Corpus Juris* quoted in *Ward v. Continental Ins. Corp.*, 24 P.2d 654, 658, 165 Okl. 20.

60 C.J. p 699 note 31.

23. U.S.—*U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex.*, 172 F.2d 258—*Martin v. Federal Surety Co.*, C.C.A.Minn., 58 F.2d 79.

Conn.—*Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 123 Conn. 232.

Ill.—*London & Lancashire Indemnity Co. of America v. Tindall*, 36 N.E. 2d 334, 377 Ill. 308.

N.M.—*Fidelity & Deposit Co. of Maryland v. Atherton*, 144 P.2d 157, 47 N.M. 443.

24. Ga.—*Jasper School Dist. v. Gormley*, 193 S.E. 248, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga.App. 537.

Or.—*Corpus Juris* quoted in *In re Dedman's Estate*, 121 P.2d 466, 468, 170 Or. 692.

W.Va.—*Central Banking, etc., Co. v. U. S. Fidelity, etc., Co.*, 80 S.E. 121, 73 W.Va. 197, 51 L.R.A., N.S., 797.

25. Ga.—*Jasper School Dist. v. Gormley*, 193 S.E. 248, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga. App. 537.

Or.—*Corpus Juris* quoted in *In re Dedman's Estate*, 121 P.2d 466, 468, 170 Or. 692.

W.Va.—*Central Banking, etc., Co. v. U. S. Fidelity, etc., Co.*, 80 S.E. 121, 73 W.Va. 197, 51 L.R.A., N.S., 797.

Remedial device

Ark.—*Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662, 205 Ark. 573, 147 A.L.R. 451.

Equitable considerations

Subrogation is not dependent on contract, strict suretyship, or priority, but arises out of equitable considerations.—*Fowler v. Lee*, 143 So. 613, 106 Fla. 712.

26. U.S.—*In re Dorr Pump & Mfg. Co.*, D.C.Wis., 39 F.Supp. 295, affirmed, C.C.A., 125 F.2d 610—*Ewen v. Peoria & E. Ry. Co.*, D.C.N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454—*Gilbert v. Peoria & E. R. Co.*, D.C.N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454.

Ark.—*Acker v. Watkins*, 134 S.W.2d 523, 199 Ark. 573—*Webster v. Horton*, 67 S.W.2d 200, 188 Ark. 610.

Ill.—*People ex rel. Nelson v. Chicago Lawn State Bank*, 28 N.E.2d 294, 306 Ill.App. 107.

Ind.—*Kamarata v. Hayes Freight Lines, Inc., App.*, 108 N.E.2d 723—*First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co.*, 200 N.E. 449, 102 Ind. App. 361.

Kan.—*State ex rel. Lester v. Baker*, 160 P.2d 264, 160 Kan. 180.

Ky.—*Evans' Adm'r v. Evans*, 199 S. W.2d 734, 304 Ky. 28—*Corpus Juris* cited in *Western Casualty & Surety Co. v. Meyer*, 192 S.W.2d 388, 390, 301 Ky. 487, 164 A.L.R. 769.

Me.—*Home Ins. Co. v. Bishop*, 84 A.2d 22, 140 Me. 72.

Miss.—*Sadler v. Glenn*, 199 So. 305, 190 Miss. 112—*Box v. Early*, 178 So. 793, 181 Miss. 19.

N.J.—*Ganger v. Moffett*, 83 A.2d 769, 8 N.J. 73—*Camden Trust Co. v. Cramer*, 40 A.2d 601, 136 N.J.Eq. 261—*Lubowicki v. Travelers Ins. Co.*, 8 A.2d 842, 18 N.J.Misc. 19.

N.Y.—*In re McClancy's Estate*, 45 N. Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, affirmed 61 N.E.2d 752, 294 N.Y. 760.

Ohio.—*Maryland Cas. Co. v. Gough*, 65 N.E.2d 858, 146 Ohio St. 305.

Okl.—*Smith v. Minter*, 191 P.2d 929, 200 Okl. 208—*Fourth Nat. Bank v.*

the right thereto is an equitable right,²⁷ not a legal right.²⁸ Subrogation is closely akin to, if not a part of, the equitable principle of "restitution" and "unjust enrichment."²⁹ It is in the nature of a constructive trust, of equitable origin, to serve best the justice of the situation and accord with the intention of the parties.³⁰

c. Purpose

The object of subrogation is to promote and accomplish justice and to prevent injustice. It is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it.

The object of subrogation is the prevention of injustice.³¹ It is designed to promote and to ac-

Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102—*Mitchell v. Jackson*, 60 P.2d 390, 177 Okl. 441.

Or.—*Corpus Juris* quoted in *In re Dedman's Estate*, 121 P.2d 466, 468, 170 Or. 692.

Pa.—*In re McCahan's Estate*, 168 A. 685, 312 Pa. 515—*Rohm & Haas Co. v. Lessner*, 77 A.2d 675, 168 Pa.Super. 242—*Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 151 Pa.Super. 259.

Utah.—*Martin v. Hickenlooper*, 59 P. 2d 1139, 90 Utah 150, 107 A.L.R. 762, rehearing denied 61 P.2d 307, 90 Utah 185—*Germo v. Zion's Ben. Bldg. Soc.*, 39 P.2d 312, 85 Utah 227.

Wash.—*Omicron Co. v. U. S. Fidelity & Guaranty Co.*, 152 P.2d 716, 718, 21 Wash.2d 703.

60 C.J. p 697 note 20.

Similar statements of rule

(1) In general.—*National Surety Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273—60 C.J. p 697 note 20 [a].

(2) Subrogation is an equitable doctrine springing out of the right of contribution.—*St. Paul Fire & Marine Ins. Co. v. Petroleum Nav. Co.*, D.C. Wash., 35 F.Supp. 350.

(3) Subrogation is a fiction invented for the purpose of arriving at an obviously equitable result.—*Omicron Co. v. U. S. Fidelity & Guaranty Co.*, 152 P.2d 716, 21 Wash.2d 703.

(4) Subrogation is a device of equity to prevent unjust enrichment and to compel the ultimate discharge of an obligation by him who in good conscience should pay it.

Mo.—*Tucker v. Holder*, 225 S.W.2d 123, 359 Mo. 1039.

N.J.—*Sullivan v. Naiman*, 32 A.2d 589, 130 N.J.Law 282.

N.Y.—*\$105 Grand Corp. v. City of New York*, 42 N.E.2d 475, 288 N.Y. 178, 141 A.L.R. 1211.

N.C.—*Beam v. Wright*, 32 S.E.2d 213, 224 N.C. 677.

Wash.—*In re Farmers' & Merchants' State Bank of Nooksack*, 26 P.2d 631, 175 Wash. 78.

(5) Subrogation is an invention of equity.—*Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1*, 136 S.W.2d 1094, 281 Ky. 771.

(6) Doctrine of subrogation is a

pure unmixed equity, having its foundation in principles of natural justice.—*Movl Const. Co. v. Covington Trust & Banking Co.*, 80 S.W.2d 560, 258 Ky. 485—60 C.J. p 697 note 20 [a] (2).

27. U.S.—*Hurwitz v. Pink*, C.C.A.N.Y., 96 F.2d 605—*Ward v. First Nat. Bank*, C.C.A.Mo., 76 F.2d 256—*New York Title & Mortgage Co. v. First Nat. Bank*, C.C.A.Mo., 51 F.2d 485, 77 A.L.R. 1052, certiorari denied 52 S.Ct. 131, 284 U.S. 676, 76 L.Ed. 572.

Ark.—*Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662, 205 Ark. 573, 147 A.L.R. 451.

Cal.—*J. G. Boswell Co. v. W. D. Felder & Co.*, 230 P.2d 386, 103 Cal.App. 2d 767.

Del.—*Kimberley & Carpenter v. National Liberty Ins. Co. of America*, 157 A. 730, 5 W.W.Harr. 63—*Leiter v. Carpenter*, 22 A.2d 393, 26 Del.Ch. 85.

D.C.—*Washington Mechanics' Sav. Bank v. District Title Ins. Co.*, 65 F.2d 827, 62 App.D.C. 194.

Ill.—*Cherry v. Aetna Casualty & Surety Co.*, 25 N.E.2d 11, 372 Ill. 534—*National Casualty Co. v. Caswell & Co.*, 45 N.E.2d 698, 317 Ill. App. 66.

Ind.—*American Automobile Fire Ins. Co. v. Speker*, 187 N.E. 355, 97 Ind. App. 533.

Ky.—*Smith v. Feltner*, 83 S.W.2d 506, 259 Ky. 833.

Ohio.—*Zimpher v. Schwartz*, 27 N.E. 2d 499, 64 Ohio App. 7.

Or.—*Corpus Juris* quoted in *In re Dedman's Estate*, 121 P.2d 466, 468, 170 Or. 692.

S.C.—*Powers v. Calvert Fire Ins. Co.*, 57 S.E.2d 638, 216 S.C. 309.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 697 note 21.

Equitable cause of action

Right of equitable subrogation is mere equitable cause of action.—*Whitson v. Metropolitan Life Ins. Co.*, 142 So. 564, 225 Ala. 262.

Mere equity

The right of subrogation is a mere equity, as distinguished from an equitable estate.—*Downing v. Jeffrey*, Tex.Civ.App., 173 S.W.2d 241, error refused.

28. Neb.—*Gilbert v. First Nat. Bank*,

Minatare, Neb., 48 N.W.2d 401, 154 Neb. 404—*Webber v. Spencer*, 27 N.W.2d 824, 148 Neb. 481—*Fender v. Reed*, 12 N.W.2d 98, 143 Neb. 911—*Equitable Life Assur. Soc. of U. S. v. Person*, 284 N.W. 260, 135 Neb. 800.

Ohio.—*Zimpher v. Schwartz*, 27 N.E. 2d 499, 64 Ohio App. 7.

Okl.—*Mitchell v. Jackson*, 60 P.2d 390, 177 Okl. 441.

Or.—*Corpus Juris* quoted in *In re Dedman's Estate*, 121 P.2d 466, 468, 170 Or. 692.

60 C.J. p 697 note 22.

29. Ky.—*Western Casualty & Surety Co. v. Meyer*, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

Same equity

The remedy of subrogation is based on theory that somewhat same equity operates which seeks to prevent unjust enrichment of one person at another's expense by permitting actions for reimbursement, contribution, and exoneration, and creates, in appropriate cases, a relationship somewhat analogous to constructive trust.—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 28 Del.Ch. 365.

30. Ala.—*Sutley v. Dothan Oil Mill Co.*, 179 So. 819, 235 Ala. 475.

Ark.—*Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662, 205 Ark. 573, 147 A.L.R. 451.

Analogous doctrines

The doctrines of subrogation and constructive trust are analogous, and the creditor is regarded as holding his claim against the principal debtor and his securities therefor in trust for the subrogee.—*New York Cas. Co. v. Sinclair Refining Co.*, C.C.A.Okl., 108 F.2d 65.

31. U.S.—*St. Paul Fire & Marine Ins. Co. v. Petroleum Nav. Co.*, D.C. Wash., 35 F.Supp. 350.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Ark.—*Webster v. Horton*, 67 S.W.2d 200, 188 Ark. 610.

Ga.—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559—*First Nat. Bank of Atlanta v. American Surety Co.*, 30 S.E.2d 402, 71 Ga.App. 112.

Ill.—*Corpus Juris* quoted in *People ex rel. Nelson v. Phillip State Bank & Trust Co.*, 30 N.E.2d 771, 773, 307 Ill.App. 464.

compish justice,³² and is the mode which equity | by one who, in justice, equity, and good conscience, adopts to compel the ultimate payment of a debt | should pay it.³³ It is an appropriate means of pre-

- Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.
 Miss.—Box v. Early, 178 So. 793, 181 Miss. 19.
 Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.
 Neb.—**Corpus Juris** quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.
 Tex.—Hays v. Spangenberg, Civ.App., 94 S.W.2d 899.
 Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1. 60 C.J. p 697 note 23.
- Cure of technical defects**
 The underlying purpose of subrogation is to compel one on whom debt should equitably rest to discharge the debt by lending the benevolent aid of equity in curing technical defects caused by mistake or inadvertence.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.
32. U.S.—Old Colony Ins. Co. v. U. S., C.C.A.Ohio, 168 F.2d 931—In re Dorr Pump & Mfg. Co., D.C.Wis., 39 F.Supp. 295, affirmed, C.C.A., 125 F.2d 610—St. Paul Fire & Marine Ins. Co. v. Petroleum Nav. Co., D.C. Wash., 35 F.Supp. 350.
 Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Carter v. Carter, 38 So.2d 557, 251 Ala. 598—Strickland v. Carroll, 154 So. 109, 228 Ala. 498.
 Ark.—Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York, 121 S.W.2d 890, 197 Ark. 187—Commonwealth Building & Loan Ass'n v. Martin, 49 S.W.2d 1046, 185 Ark. 858.
 Colo.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254, 96 Colo. 127.
 Ga.—Lee v. Holman, 186 S.E. 189, 182 Ga. 559—First Nat. Bank of Atlanta v. American Surety Co., 30 S.E. 2d 402, 71 Ga.App. 112.
 Ill.—**Corpus Juris** quoted in People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 773, 307 Ill.App. 464.
 Ky.—Evans' Adm'r v. Evans, 199 S. W.2d 734, 304 Ky. 28—Federal Deposit Ins. Corp. v. Wilhoit, 180 S. W.2d 72, 297 Ky. 339.
 Miss.—Box v. Early, 178 So. 793, 181 Miss. 19.
 Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.
 Mont.—State ex rel. Blenkner v. Stillwater County, 66 P.2d 788, 104 Mont. 387.
 Neb.—**Corpus Juris** quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.
 N.J.—Sullivan v. Naiman, 32 A.2d 589, 130 N.J.Law 282.
 N.C.—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
 Okl.—Smith v. Minter, 191 P.2d 929, 200 Okl. 208.
 Pa.—Potoczny to Use of City of Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377—Commonwealth for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co., 186 A. 242, 122 Pa.Super. 403.
 Tex.—American Nat. Bank v. Reed, Civ.App., 134 S.W.2d 782.
 Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.
 Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.
 W.Va.—Bank of Marlinton v. McLaughlin, 17 S.E.2d 213, 123 W.Va. 608.
 60 C.J. p 698 note 24.
33. U.S.—Bennett v. The Preferred Accident Ins. Co. of N. Y., 192 F.2d 748—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A. Tex., 172 F.2d 258—Martin v. Federal Surety Co., C.C.A.Minn., 58 F. 2d 79—New York Title & Mortgage Co. v. First Nat. Bank, C.C.A.Mo., 51 F.2d 485, 77 A.L.R. 1052, certiorari denied 52 S.Ct. 131, 284 U. S. 676, 76 L.Ed. 572—National Sur. Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 189—American Surety Co. of New York v. Bank of California, D.C.Or., 44 F.Supp. 81—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds, C.C.A., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.
 Ala.—Schuessler v. Shelnutt, 171 So. 259, 233 Ala. 188—U. S. Fidelity & Guaranty Co. v. First Nat. Bank, 140 So. 755, 224 Ala. 375.
 Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.
 Cal.—In re Whitney's Estate, 11 P.2d 1107, 124 Cal.App. 109.
 Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.
 D.C.—Washington Mechanics' Sav. Bank v. District Title Ins. Co., 65 F.2d 827, 62 App.D.C. 194.
 Ga.—**Corpus Juris** cited in Jasper School Dist. v. Gormley, 193 S.E. 248, 251, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga.App. 537.
 Ill.—People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 307 Ill.App. 464.
 Ind.—Kamarata v. Hayes Freight Lines, Inc., App., 108 N.E.2d 723.
 Miss.—**Corpus Juris** cited in Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 388, 196 Miss. 50.
 Neb.—**Corpus Juris** quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.
 N.J.—Bater v. Cleaver, 176 A. 889, 114 N.J.Law 346—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J. Eq. 261.
 N.M.—Fidelity & Deposit Co. of Maryland v. Atherton, 144 P.2d 157, 47 N.M. 443.
 N.Y.—3105 Grand Corporation v. City of New York, 42 N.E.2d 475, 478, 288 N.Y. 178—In re McClancy's Estate, 45 N.Y.S.2d 917, 920, 182 Misc. 866—In re Kelley's Estate, 289 N. Y.S. 1079, 160 Misc. 421, affirmed 296 N.Y.S. 923, 251 App.Div. 847.
 N.C.—Beam v. Wright, 32 S.E.2d 213, 224 N.C. 677—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
 Ohio.—Maryland Casualty Co. v. Gough, 51 N.E.2d 216, 72 Ohio App. 260.
 Okl.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102.
 Pa.—Gildner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A.2d 910, 342 Pa. 145—Potoczny to Use of City of Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377.
 S.D.—Application of Mach, 25 N.W.2d 881, 71 S.D. 460—American Surety Co. v. Western Sur. Co., 22 N.W.2d 429, 71 S.D. 126—In re Petersen's Estate, 295 N.W. 494, 67 S.D. 540.
 Tex.—Downing v. Jeffrey, Civ.App., 173 S.W.2d 241, error refused.
 Utah.—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L. R. 809—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.
 Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.
 Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.
 Wis.—U. S. Guarantee Co. v. Liberty Mut. Ins. Co., 12 N.W.2d 59, 244 Wis. 317, 150 A.L.R. 632.
 60 C.J. p 698 note 25.
- Similar statements of rule**
 (1) Subrogation was adopted by equity to put burden of loss on one primarily responsible for it.—National Garment Co. v. New York, C. & St. L. R. Co., C.A.Mo., 173 F.2d 32.
 (2) Purpose of subrogation is to enable a person secondarily liable, who has paid the debt, to benefit by the securities or remedies which the creditors hold against the principal

venting unjust enrichment.³⁴ The doctrine of subrogation is applied to subserve the ends of justice,³⁵ to do equity in the particular case under consideration,³⁶ and to prevent fraud³⁷ or relieve from mistake.³⁸

§ 3. — Legal Subrogation

a. In general

b. Not dependent on contract or privity

debtor.—*Ganger v. Moffett*, 83 A.2d 769, 8 N.J. 73.

(3) Subrogation rests generally on the principle that one who, for purpose of protecting his own interest, pays debt or liability of another may enforce all the liens and securities of the person to whom he pays.—*Terry v. Claypool*, 65 N.E.2d 889, 77 Ohio App. 87.

(4) Subrogation is based on the theory that one who has the right to pay, and does pay, a debt which should have been paid by another is entitled to exercise all the remedies which creditor possessed against that other.—*Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213, 123 W.Va. 608.

(5) The right of subrogation is enforced on the theory that the subrogee succeeds to the rights of the creditor.—*Cole v. Patty*, 134 S.W.2d 160, 175 Tenn. 334.

Essence of doctrine of subrogation is right of person paying to be put in place of person receiving payment while primary obligation still exists.—*Cobbe v. Peterson*, 3 P.2d 298, 89 Colo. 350.

34. U.S.—*American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa.*, D.C.Pa., 33 F. Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

Similar statements of rule

U.S.—*Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co.*, C.C.A. W.Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

Del.—*Oliver v. Taylor*, 65 A.2d 723, 31 Del.Ch. 53—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 49 A.2d 612, 29 Del.Ch. 305. Wis.—*Home Owners' Loan Corp. v. Papara*, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289.

The rationale of legal subrogation is bottomed on a sensitivity to the comparative equities involved, so that where one is more fundamentally liable for a debt which another is obligated to pay, such person shall

not enrich himself by escaping his obligation.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

35. Ala.—*Schuessler v. Shelnutt*, 171 So. 259, 233 Ala. 188.

Cal.—*J. G. Boswell Co. v. W. D. Felder & Co.*, 230 P.2d 386, 103 Cal.App.2d 767.

Colo.—*Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver*, 40 P.2d 254, 96 Colo. 127.

Del.—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 28 Del.Ch. 365.

Ill.—*People ex rel. Nelson v. Phillip State Bank & Trust Co.*, 30 N.E.2d 771, 307 Ill.App. 464.

Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28—*Movl Const. Co. v. Covington Trust & Banking Co.*, 80 S.W.2d 560, 258 Ky. 485.

Neb.—*Gilbert v. First Nat. Bank, Minature*, 48 N.W.2d 401, 154 Neb. 404—*Webber v. Spencer*, 27 N.W.2d 824, 148 Neb. 481—*Fender v. Reed*, 12 N.W.2d 98, 143 Neb. 911—*Equitable Life Assur. Soc. of U. S. v. Person*, 284 N.W. 260, 135 Neb. 800.

N.J.—*Sullivan v. Naiman*, 32 A.2d 589, 130 N.J.Law 282.

N.Y.—*In re Leonhauser's Will*, 51 N.Y.S.2d 335, 183 Misc. 863—*In re Lawyers Title & Guaranty Co.*, 50 N.Y.S.2d 257, 183 Misc. 294.

Okla.—*Mitchell v. Jackson*, 60 P.2d 390, 177 Okl. 441.

Pa.—*Commonwealth for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co.*, 186 A. 242, 122 Pa.Super. 403—*Kooser v. West Penn Rys.*, 42 Pa. Dist. & Co. 701, 4 Fay.L.J. 258, 3 Monroe L.R. 134, 10 Som.Leg.J. 350.

60 C.J. p 698 note 26.

36. Del.—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 28 Del.Ch. 365.

Kan.—*State ex rel. Lester v. Baker*, 160 P.2d 264, 160 Kan. 180—*Levant State Bank v. Shults*, 47 P.2d 80, 142 Kan. 318.

Miss.—*Box v. Early*, 178 So. 793, 181 Miss. 19.

Neb.—*Gilbert v. First Nat. Bank, Minature*, 48 N.W.2d 401, 154 Neb. 404—*Webber v. Spencer*, 27 N.W.2d 824, 148 Neb. 481—*Fender v. Reed*, 12 N.W.2d 98, 143 Neb. 911—

a. In General

Legal subrogation arises out of a condition or relationship by operation of law where a person having a liability or a right or a fiduciary relationship in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditors whom he has paid.

Legal subrogation has its rise in equity,³⁹ and

Equitable Life Assur. Soc. of U. S. v. Person, 284 N.W. 260, 135 Neb. 800.

N.Y.—*Junkersfeld v. Bank of Manhattan Co.*, 295 N.Y.S. 62, 250 App. Div. 646.

Okla.—*Home Owners' Loan Corp. v. Parker*, 73 P.2d 170, 181 Okl. 234.

S.D.—*American Surety Co. v. Western Surety Co.*, 22 N.W.2d 429, 71 S.D. 126.

S.C.—*Powers v. Calvert Fire Ins. Co.*, 57 S.E.2d 638, 216 S.C. 309.

Wis.—*Farmers & Merchants State Bank v. Hildebrandt*, 267 N.W. 42, 268 N.W. 212, 221 Wis. 394.

60 C.J. p 698 note 27.

Subrogation always will be granted when an equitable result will be obtained.—*Ragan v. Kelly*, 24 A.2d 289, 180 Md. 324.

37. Del.—*Eastern State Petroleum Co. v. Universal Oil Products Co.*, 46 A.2d 553, 29 Del.Ch. 112, opinion set aside on other grounds 49 A.2d 612, 29 Del.Ch. 305.

Fla.—*Brannon v. Hills*, 149 So. 556, 111 Fla. 491—*Federal Land Bank of Columbia v. Godwin*, 145 So. 883, 107 Fla. 537.

Ohio.—*Canton Morris Plan Bank v. Most*, 184 N.E. 765, 44 Ohio App. 180.

Tenn.—*Peoples v. Smith*, 159 S.W.2d 832, 178 Tenn. 491—*McCoy v. Hight*, 39 S.W.2d 271, 162 Tenn. 507—*Hudson v. Chandler & Co.*, 14 Tenn.App. 496.

Tex.—*Hays v. Spangenberg*, Civ.App., 94 S.W.2d 899.

60 C.J. p 698 note 28.

38. Fla.—*Brannon v. Hills*, 149 So. 556, 111 Fla. 491—*Federal Land Bank of Columbia v. Godwin*, 145 So. 883, 107 Fla. 537.

Ohio.—*Canton Morris Plan Bank v. Most*, 184 N.E. 765, 44 Ohio App. 180.

Tenn.—*Peoples v. Smith*, 159 S.W.2d 832, 178 Tenn. 491—*McCoy v. Hight*, 39 S.W.2d 271, 162 Tenn. 507—*Hudson v. Chandler & Co.*, 14 Tenn.App. 496.

39. Kan.—*Hay v. Crawford*, 158 P.2d 463, 159 Kan. 723, 159 A.L.R. 388—*City of New York Ins. Co. v. Tice*, 152 P.2d 836, 159 Kan. 176, 157 A.L.R. 1233.

arises out of a condition or relationship⁴⁰ by operation of law.⁴¹ So it has been held that legal subrogation arises by operation of law where a person having a liability or a right or a fiduciary relationship in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditors whom he has paid.⁴²

b. Not Dependent on Contract or Privity

The right of legal subrogation does not arise from

any contractual relationship between the parties, but takes place as a matter of equity, with or without an agreement to that effect; but a right of true legal subrogation may be provided for in a contract, or a contract may modify or extinguish the right of subrogation.

The right of legal subrogation is not a matter of contract;⁴³ it does not arise from any contractual relationship between the parties,⁴⁴ but takes place as a matter of equity,⁴⁵ with or without an agreement to that effect.⁴⁶ The right of legal subrogation is not dependent on privity⁴⁷ nor is it founded

Miss.—*Corpus Juris* cited in *Oxford Production Credit Ass'n v. Bank of Oxford*, 16 So.2d 384, 388, 196 Miss. 50.

N.C.—*Wallace v. Benner*, 156 S.E. 795, 200 N.C. 124.

40. Del.—*Kimberley & Carpenter v. National Liberty Ins. Co. of America*, 157 A. 730, 5 W.W.Harr. 63—*Leiter v. Carpenter*, 22 A.2d 393, 26 Del.Ch. 85.

Kan.—*Fenly v. Revell*, 228 P.2d 905, 170 Kan. 705.
60 C.J. p 695 note 10.

41. U.S.—*In re Braker*, C.C.A.Ohio, 127 F.2d 652—*In re Lauer*, D.C. N.J., 38 F.Supp. 691.

Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.

Fla.—*North v. Albee*, 20 So.2d 682, 155 Fla. 515, 157 A.L.R. 490—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85—*Cuesta, Rey & Co. v. Newson*, 136 So. 551, 102 Fla. 853.

Kan.—*Corpus Juris* cited in *Fenly v. Revell*, 228 P.2d 905, 908, 170 Kan. 705—*Hay v. Crawford*, 158 P.2d 463, 159 Kan. 723, 159 A.L.R. 388—*City of New York Ins. Co. v. Tice*, 152 P.2d 836, 159 Kan. 176, 157 A.L.R. 1233.

Ky.—*Travelers Indemnity Co. v. Moore*, 201 S.W.2d 7, 304 Ky. 456—*Federal Deposit Ins. Corporation v. Wilhoit*, 180 S.W.2d 72, 297 Ky. 339.

La.—*Motors Ins. Corp. v. Employers' Liability Assur. Corp.*, App., 52 So.2d 311.

Mo.—*In re Jamison's Estate*, 202 S.W.2d 879.

Ohio.—*Reed v. Ramey*, 80 N.E.2d 250, 82 Ohio App. 171.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 923, 179 Va. 394.

60 C.J. p 695 note 11.

Assignment is unnecessary where right of subrogation exists.—*American Surety Co. of New York v. Multnomah County*, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

42. Ala.—*Ragland v. Board of Missions for Freedmen of Presby-*

rian Church, 140 So. 435, 224 Ala. 325.

Fla.—*North v. Albee*, 20 So.2d 682, 155 Fla. 515, 157 A.L.R. 490—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85—*Dodge v. Kistler*, 191 So. 301, 139 Fla. 209—*Clermont-Minnesota Country Club v. Loblaw*, 143 So. 129, 106 Fla. 122—*Whyel v. Smith*, 134 So. 552, 101 Fla. 971.

Ga.—*Western Union Telegraph Co. v. Smith*, 178 S.E. 472, 50 Ga.App. 585.

Ohio.—*Federal Union Life Ins. Co. v. Deitch*, 189 N.E. 440, 127 Ohio St. 505.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

Similar statements of rule

U.S.—*Texas Co. v. Miller*, C.C.A.Tex., 165 F.2d 111, certiorari denied 68 S.Ct. 911, 333 U.S. 880, 92 L.Ed. 1155.

Del.—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A. 2d 11, 28 Del.Ch. 365.

R.I.—*Industrial Trust Co. v. Hanley*, 165 A. 223, 53 R.I. 180.

Right of surety

(1) Legal subrogation is allowed where one who pays debt of another stands in situation of surety and is compelled to pay debt to protect his own right.—*Luikart v. Buck*, 270 N. W. 495, 131 Neb. 866.

(2) Except as provided by statute, legal subrogation is in general the right of a surety, even though such relation is by construction, to pay debt on which he is bound, and thereby become the equitable assignee from creditor of the debt, and all remedies for its enforcement against principal which creditor had before it was thus paid.—*Hall v. Hall*, 2 So.2d 908, 241 Ala. 397.

43. U.S.—*Wojcik v. U. S.*, D.C.Wis., 74 F.Supp. 914.

Ill.—*Cherry v. Aetna Casualty & Surety Co.*, 25 N.E.2d 11, 372 Ill. 534.

Ky.—*Evans' Adm'r v. Evans*, 199 S. W.2d 734, 304 Ky. 28.

Pa.—*Potoczny to Use of City of*

Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377—*Corpus Juris* quoted in *First Nat. Bank of Ashley v. Reilly*, 67 A.2d 679, 681, 165 Pa.Super. 168.
60 C.J. p 700 note 33.

44. U.S.—*In re Dorr Pump & Mfg. Co.*, D.C.Wis., 39 F.Supp. 295, affirmed, C.C.A., 125 F.2d 610.

Ala.—*Schuessler v. Shelnutt*, 171 So. 259, 233 Ala. 188.

Pa.—*Corpus Juris* quoted in *First Nat. Bank of Ashley v. Reilly*, 67 A. 2d 679, 681, 165 Pa.Super. 168.
60 C.J. p 700 note 34.

45. Ga.—*Telfair Stockton & Co. v. Trust Co. of Georgia*, 48 S.E.2d 532, 203 Ga. 802—*Cornelia Bank v. First Nat. Bank*, 154 S.E. 234, 170 Ga. 747.

Pa.—*Corpus Juris* quoted in *First Nat. Bank of Ashley v. Reilly*, 67 A.2d 679, 681, 165 Pa.Super. 168.

46. Conn.—*Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 123 Conn. 232.

Ga.—*Telfair Stockton & Co. v. Trust Co. of Georgia*, 48 S.E.2d 532, 203 Ga. 802.

Mo.—*Lewis v. Paul Brown Realty & Inv. Co.*, 193 S.W.2d 13, 354 Mo. 1025—*In re Jamison's Estate*, 202 S.W.2d 879.

Pa.—*Corpus Juris* quoted in *First Nat. Bank of Ashley v. Reilly*, 67 A. 2d 679, 681, 165 Pa.Super. 168.
S.D.—*In re Petersen's Estate*, 295 N. W. 494, 67 S.D. 540.

W.Va.—*Central Trust Co. v. Bank of Mullens*, 150 S.E. 221, 107 W.Va. 679.

60 C.J. p 700 note 36.

47. U.S.—*Rud. Degermark A.-B. v. Monarch Silk Co.*, D.C.Pa., 85 F. Supp. 535.

Minn.—*Hayward v. State Farm Mut. Auto. Ins. Co.*, 4 N.W.2d 316, 212 Minn. 500, 140 A.L.R. 1286.

N.H.—*Mitchell v. Smith's Estate*, 4 A. 2d 355, 90 N.H. 36.

N.J.—*Gordon v. Arata*, 163 A. 729, 114 N.J.Eq. 294.

N.Y.—*In re Lawyers Title & Guaranty Co.*, 50 N.Y.S.2d 257, 183 Misc. 294.

on, or dependent on, contract⁴⁸ or on the absence of contract,⁴⁹ but is independent of any contractual relations between the parties.⁵⁰ Likewise, the right does not depend on the act of the creditor, but may be independent of him and also of the debtor.⁵¹ However, although the right of subrogation does not flow from a contract expressed or legally implied, it may be dependent on a contract in the sense that it may grow out of conditions resulting from the due observance of a contract.⁵²

Effect of agreement for legal subrogation. A right of true legal subrogation may be provided for

in a contract,⁵³ but the exercise of the right will, nevertheless, have its basis in general principles of equity rather than in the contract,⁵⁴ which will be treated as being merely a declaration of principles of law already existing.⁵⁵

Contract as controlling exercise of right. The right of legal subrogation may be modified or extinguished by contract.⁵⁶ The doctrine of subrogation cannot be invoked to override and displace the real contract of the parties,⁵⁷ or where to do so would be inconsistent with the terms thereof,⁵⁸ or where the contract either expressly or by implica-

Pa.—Potoczny, to Use of City of Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377—*Corpus Juris* quoted in First Nat. Bank of Ashley v. Reilly, 67 A.2d 679, 681, 165 Pa.Super. 168.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 700 note 37.

48. Ala.—Carter v. Carter, 38 So.2d 557, 251 Ala. 598—Montgomery v. Wadsworth, 148 So. 419, 226 Ala. 667.

Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

Fla.—Fowler v. Lee, 143 So. 613, 106 Fla. 712.

Ind.—Home Owners' Loan Corp. v. Henson, 29 N.E.2d 873, 217 Ind. 554—Mishawaka-St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85, 209 Ind. 433, 105 A.L.R. 881—Kamarata v. Hayes Freight Lines, Inc., App., 108 N.E.2d 723.

Kan.—*Corpus Juris* cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705—Tillotson v. Goodman, 114 P.2d 845, 154 Kan. 31—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569—Levant State Bank v. Shults, 47 P.2d 80, 142 Kan. 318.

Ky.—Travelers Indemnity Co. v. Moore, 201 S.W.2d 7, 304 Ky. 456—National Surety Corp. v. First Nat. Bank, 128 S.W.2d 766, 278 Ky. 273.

Minn.—Hayward v. State Farm Mut. Auto. Ins. Co., 4 N.W.2d 316, 212 Minn. 500, 140 A.L.R. 1236—Bacich v. Homeland Ins. Co., of America, 3 N.W.2d 665, 212 Minn. 375.

Miss.—*Corpus Juris* cited in Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 388, 196 Miss. 50.

Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177—Neer v. Neer, App., 80 S.W.2d 240.

Neb.—Gilbert v. First Nat. Bank, Minatare, 48 N.W.2d 401, 154 Neb. 404—Webber v. Spencer, 27 N.W.2d 824, 148 Neb. 481—Fender v. Reed, 12 N.W.2d 98, 143 Neb. 911—Equita-

ble Life Assur. Soc. of U. S. v. Person, 284 N.W. 260, 135 Neb. 800.

N.H.—Mitchell v. Smith's Estate, 4 A.2d 355, 90 N.H. 36.

N.J.—Employers' Fire Ins. Co. v. Ritter, 164 A. 426, 112 N.J.Eq. 418.

N.M.—Fidelity & Deposit Co. of Maryland v. Atherton, 144 P.2d 157, 47 N.M. 443.

N.Y.—In re Leonhauser's Will, 51 N.Y.S.2d 335, 183 Misc. 863—In re Lawyers Title & Guaranty Co., 50 N.Y.S.2d 257, 183 Misc. 294—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, affirmed 61 N.E.2d 752, 294 N.Y. 760.

Pa.—*Corpus Juris* quoted in First Nat. Bank of Ashley v. Reilly, 67 A.2d 679, 681, 165 Pa.Super. 168. S.C.—Powers v. Calvert Fire Ins. Co., 57 S.E.2d 638, 216 S.C. 309.

S.D.—Application of Mach, 25 N.W.2d 881, 71 S.D. 460.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 700 note 38.

Express or implied

In order to decree subrogation, equity needs no contract express or implied.—Morrison v. Mansion Realty Co., 38 N.Y.S.2d 41.

49. Kan.—Tillotson v. Goodman, 114 P.2d 845, 154 Kan. 31—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

N.Y.—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, affirmed 61 N.E.2d 752, 294 N.Y. 760.

Pa.—*Corpus Juris* quoted in First Nat. Bank of Ashley v. Reilly, 67 A.2d 679, 681, 165 Pa.Super. 168. 60 C.J. p 701 note 39.

50. Iowa.—American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 218 Iowa 1.

Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.

Pa.—*Corpus Juris* quoted in First Nat. Bank of Ashley v. Reilly, 67 A.2d 679, 681, 165 Pa.Super. 168. 60 C.J. p 701 note 40.

51. Ga.—Telfair Stockton & Co. v. Trust Co. of Ga., 48 S.E.2d 532, 203 Ga. 802. 60 C.J. p 701 note 40½.

52. Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833. 60 C.J. p 701 note 41.

53. Mo.—McKenzie v. Missouri Stables, 34 S.W.2d 136, 225 Mo.App. 64.

54. Mo.—Loewenstein v. Queen Ins. Co., 127 S.W. 72, 227 Mo. 100. 60 C.J. p 701 note 43.

55. Mo.—McKenzie v. Missouri Stables, 34 S.W.2d 136, 225 Mo.App. 64. 60 C.J. p 701 note 44.

56. U.S.—Hardware Mut. Ins. Co. v. Dunwoody, C.A.9, 194 F.2d 666. Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

N.J.—*Corpus Juris* cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346.

W.Va.—*Corpus Juris* cited in Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 739, 113 W.Va. 764. 60 C.J. p 701 note 45.

57. N.J.—*Corpus Juris* cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346. 60 C.J. p 701 note 46.

Due observance

Subrogation can grow only out of conditions resulting from due observance of the contract between the parties and must not be inconsistent with the legal relationship of the parties.—Strelitz v. First Wisconsin Nat. Bank of Milwaukee, 264 N.W. 649, 220 Wis. 443.

58. N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73—*Corpus Juris* cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346.

tion forbids its application;⁵⁹ and, if the liability of a party is fixed by contract, the doctrine cannot be used either to enlarge or defeat it.⁶⁰

§ 4. — Conventional Subrogation

- a. In general
- b. Necessity for, and requisites of, contract

a. In General

Conventional subrogation arises by act of the parties, wholly independent of any interest in the property which the lender may have to protect, and exists where

one person pays the debt of another as the result of an agreement that the liens existing as security for the debt shall be kept alive for his benefit.

Conventional subrogation arises by act of the parties.⁶¹ It rests on a contract therefor,⁶² and is wholly independent of any interest in the property which the lender may have to protect.⁶³ It exists where one person pays the debt of another as the result of an agreement that the liens existing as security for the debt shall be kept alive for his benefit.⁶⁴ A stranger who by the authority and consent of the debtor and on his agreement that he shall be subrogated to the rights of the creditor makes payment for the debtor will be subrogated if

W.Va.—*Corpus Juris* cited in *Buskirk v. State-Planters' Bank & Trust Co.*, 169 S.E. 738, 739, 113 W.Va. 764.

60 C.J. p 701 note 47.

59. Mo.—*Capen v. Garrison*, 92 S.W. 368, 369, 193 Mo. 335, 5 L.R.A., N.S., 838.

N.J.—*Ganger v. Moffett*, 83 A.2d 769, 8 N.J. 73—*Corpus Juris* cited in *Bater v. Cleaver*, 176 A. 889, 892, 114 N.J.Law 346.

W.Va.—*Corpus Juris* cited in *Buskirk v. State-Planters' Bank & Trust Co.*, 169 S.E. 738, 739, 113 W.Va. 764.

60. Wash.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788, 92 Wash. 654.

61. Mo.—*McKenzie v. Missouri Stables*, 34 S.W.2d 136, 225 Mo.App. 64.

62. Ala.—*Whitson v. Metropolitan Life Ins. Co.*, 142 So. 564, 225 Ala. 262—*Ragland v. Board of Missions for Freedmen of Presbyterian Church*, 140 So. 435, 224 Ala. 325.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85—*Federal Land Bank of Columbia v. Godwin*, 136 So. 513, 107 Fla. 537, modified on other grounds 145 So. 883, 107 Fla. 537—*Whyel v. Smith*, 134 So. 552, 101 Fla. 971—*Boley v. Daniel*, 72 So. 644, 72 Fla. 121, L.R.A.1917A 734.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Lee v. Holman*, 186 S. E. 189, 182 Ga. 559—*Erwin v. Brooke*, 126 S.E. 777, 778, 159 Ga. 683—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543—*Western Union Telegraph Co. v. Smith*, 178 S.E. 472, 50 Ga.App. 585.

Ill.—*Cherry, for Use of Simon v. Aetna Casualty & Surety Co.*, 3 N. E.2d 105, 285 Ill.App. 601.

Kan.—*Hay v. Crawford*, 158 P.2d 463, 159 Kan. 723, 159 A.L.R. 388—*City of New York Ins. Co. v. Tice*, 152 P. 2d 836, 159 Kan. 176, 157 A.L.R. 1233—*Lervold v. Republic Mut.*

Fire Ins. Co., 45 P.2d 839, 142 Kan. 43, 106 A.L.R. 673—*Kansas City Title & Trust Co. v. Fourth Nat. Bank in Wichita*, 10 P.2d 896, 135 Kan. 414.

Ky.—*Western Casualty & Surety Co. v. Meyer*, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

N.J.—*Home Owners' Loan Corporation v. Collins*, 184 A. 621, 120 N.J. Eq. 266.

N.Y.—*City of New York v. Barbato*, 5 N.Y.S.2d 125.

Ohio.—*Aetna Ins. Co. v. Williamson Heater Co.*, 3 Ohio Supp. 61.

Tex.—*Corpus Juris* cited in *Rotge v. Dunlap*, Civ.App., 91 S.W.2d 905, 908—*B. F. Brooks Const. Co. v. First State Bank of Marquez*, Civ. App., 39 S.W.2d 83.

Wash.—*Ross v. Jones*, 24 P.2d 622, 174 Wash. 205.

60 C.J. p 702 note 71.

Express or implied agreement

The doctrine of subrogation applies where money is advanced to pay debt under express or implied agreement with debtor or creditor that person making advancement shall be subrogated to creditor's rights.

Ky.—*Southern Exchange Bank v. American Surety Co. of New York*, 144 S.W.2d 203, 284 Ky. 251.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

63. Ga.—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543.

60 C.J. p 703 note 72.

64. Ala.—*Ragland v. Board of Missions for Freedmen of Presbyterian Church*, 140 So. 435, 224 Ala. 325.

Fla.—*Goodwin v. Schmidt*, 5 So.2d 64, 149 Fla. 85—*Dodge v. Kistler*, 191 So. 301, 139 Fla. 209—*Federal Land Bank of Columbia v. Godwin*, 136 So. 513, 107 Fla. 537, modified on other grounds 145 So. 883, 107 Fla. 537—*Whyel v. Smith*, 134 So. 552, 101 Fla. 971.

Ga.—*McCollum v. Lark*, 200 S.E. 276, 187 Ga. 292—*Callan Court Co. v. Citizens & Southern Nat. Bank*, 190 S.E. 831, 184 Ga. 87—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 Ga. 242—*First Nat. Bank of Atlanta v. American Surety Co.*, 30 S.E.2d 402, 71 Ga.App. 112—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543.

Ill.—*Kaminskas v. Cepauskis*, 17 N.E. 2d 558, 369 Ill. 566—*Hurwith v. Carson*, 8 N.E.2d 737, 290 Ill.App. 475—*Central Trust Co. v. Calumet Co.*, 260 Ill.App. 410.

Iowa.—*Home Owners' Loan Corp. v. Rupe*, 283 N.W. 108, 225 Iowa 1044.

Kan.—*Kansas City Title & Trust Co. v. Fourth Nat. Bank in Wichita*, 10 P.2d 896, 135 Kan. 414, 87 A.L.R. 334.

La.—*A. Baldwin & Co. v. Le Long*, App., 143 So. 723.

Neb.—*Chrisman v. Daniel*, 278 N.W. 565, 134 Neb. 326—*Luikart v. Buck*, 270 N.W. 495, 131 Neb. 866.

Ohio.—*Federal Union Life Ins. Co. v. Deitsch*, 189 N.E. 440, 127 Ohio St. 505.

R.I.—*Industrial Trust Co. v. Hanley*, 165 A. 223, 53 R.I. 180.

Tex.—*Bradshaw v. Wolfe City*, Civ. App., 3 S.W.2d 527.

Utah.—*Bingham v. Walker Bros., Bankers*, 283 P. 1055, 75 Utah 149.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 703 note 73.

Equitable right

Conventional subrogation results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have a lien equal to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien.—*In re McGuire*, D.C. Ohio, 137 F. 967—60 C.J. p 697 note 21 [a].

the payment is made with the express declaration of the subrogation in the release made by the creditor.⁶⁵ As discussed *infra* § 6 d, conventional subrogation by agreement with the debtor alone will not be allowed to impair the security of the creditor for the remainder of his debt or prejudice innocent third persons having equities of equal rank.

Extent of right. In conventional subrogation the extent of the right is measured by the agreement for subrogation,⁶⁶ and by the rights of the person granting the right.⁶⁷

b. Necessity for, and Requisites of, Contract

Conventional subrogation can take effect only by agreement with the creditor and debtor or either, and there must be a lawful contract therefor, existing at, or prior to, the time of payment, which agreement must be to the effect that the payor shall have the same priority as the holder of the security and be substituted for him. The agreement must be supported by a consideration but need not be in writing and may be express or implied.

Conventional subrogation can take effect only by agreement.⁶⁸ There must be a lawful contract

therefor⁶⁹ existing at, or prior to, the time of payment,⁷⁰ which agreement must be to the effect that the payor shall have the same priority as the holder of the security and be substituted for him.⁷¹

Requisites of contract. The agreement for conventional subrogation, like other agreements, must be supported by a consideration.⁷² It need not be in writing⁷³ and, although in a few jurisdictions it is held that the agreement must be express,⁷⁴ as a general rule it may be either express or implied.⁷⁵ It must concern the debtor or creditor in a particular indebtedness.⁷⁶

Parties to contract. The contract may be between the person to be subrogated and the creditor and debtor or either⁷⁷ but there must, in order to create a conventional subrogation, be an agreement with one or the other,⁷⁸ and the agreement must be with the subrogee.⁷⁹ It is not essential to subrogation by convention that the creditor should be a party to the agreement between the debtor and a third person, provided no intervening rights to the security have occurred.⁸⁰

65. N.J.—Shreve v. Hankinson, 34 N. J.Eq. 76.

66. Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.

60 C.J. p 703 note 77.

Marriage of mortgagor

Knowledge of the marriage of a mortgagor is immaterial where the principle of conventional subrogation is applied.—Kaminskas v. Cepauskis, 17 N.E.2d 558, 369 Ill. 566.

67. La.—Surghnor v. Beauchamp, 24 La. Ann. 471.

68. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262—Ragland v. Board of Missions for Freedmen of Presbyterian Church, 140 So. 435, 224 Ala. 325.

Ga.—Western Union Telegraph Co. v. Smith, 178 S.E. 472, 50 Ga.App. 585. Ill.—In re Dickson's Estate, 45 N.E. 2d 558, 316 Ill.App. 599.

Iowa.—Home Owners' Loan Corporation v. Rupe, 283 N.W. 108, 225 Iowa 1044.

N.Y.—City of New York v. Barbato, 5 N.Y.S.2d 125.

Utah.—Martin v. Hickenlooper, 59 P. 2d 1139, 90 Utah 150, 107 A.L.R. 762, rehearing denied 61 P.2d 307, 90 Utah 185.

60 C.J. p 704 note 81.

Conventional subrogation as synonymous with assignment, see Assignments § 2.

69. Fla.—Goodwin v. Schmidt, 5 So. 2d 64, 149 Fla. 85—Dodge v. Kistler, 191 So. 301, 139 Fla. 209.

Ga.—Federal Land Bank of Columbia v. Barron, 160 S.E. 228, 173 Ga. 242—Lee v. Holman, 183 S.E. 837, 52 Ga.App. 543.

Ohio.—Federal Union Life Ins. Co. v. Deitsch, 189 N.E. 440, 127 Ohio St. 505.

60 C.J. p 704 note 83.

70. La.—Bank of Bienville v. Fidelity & Deposit Co. of Maryland, 135 So. 26, 172 La. 687.

60 C.J. p 704 note 84.

71. U.S.—In re Rogers Palace Laundry Co., C.C.A.Ill., 275 F. 829.

72. U.S.—Underwood v. Metropolitan Nat. Bank, Mo., 12 S.Ct. 784, 144 U.S. 669, 36 L.Ed. 586.

60 C.J. p 704 note 86.

73. Ga.—Bleckley v. Bleckley, 5 S. E.2d 206, 189 Ga. 47—*Corpus Juris* cited in Lee v. Holman, 186 S.E. 189, 191, 182 Ga. 559.

60 C.J. p 704 note 87.

74. U.S.—J. P. Browder & Co. v. Hill, Tenn., 136 F. 821, 69 C.C.A. 499.

60 C.J. p 704 note 88.

The word "rights," in civil code article stating that when creditor receiving his payment from third per-

son subrogates him in his "rights," actions, privileges, and mortgages against the debtor, the subrogation must be expressed and made at same time as the payment, embraces everything included in actions, privileges, and mortgages.—Moters Ins. Corp. v. Employers' Liability Assur. Corp., La.App., 52 So.2d 311.

75. U.S.—Federal Deposit Ins. Corp. v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551.

Ga.—Glens Falls Indemnity Co. v. Liberty Mut. Ins. Co., 44 S.E.2d 543, 202 Ga. 752.

Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 704 note 89.

76. Ga.—Hiers v. Exum, 123 S.E. 784, 158 Ga. 19.

77. Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326.

60 C.J. p 704 note 91.

78. N.J.—Gore v. Brian, Ch., 35 A. 897.

60 C.J. p 704 note 92.

79. Ohio.—Gasche v. Ohio Lumber Co., 5 Ohio S. & C.P. 130, 31 Cinc.L. Bul. 189.

80. Iowa.—Watson v. Bowman, 119 N.W. 623, 142 Iowa 528.

60 C.J. p 705 note 94.

II. GENERAL PRINCIPLES APPLICABLE TO RIGHT OF SUBROGATION

§ 5. Scope and Extent of Remedy

- a. In general
- b. Tendency to extend scope
- c. Matter of right or discretion
- d. Necessity of equitable right and lawful or meritorious transaction
- e. Limitation of right by legislature

a. In General

No general rule can be laid down which will afford a test in all cases for application of the doctrine of subrogation, and whether or not it is applicable depends on the facts and circumstances of each case as it arises; but ordinarily the remedy is broad enough to include every instance in which one person, not a mere volun-

teer, pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter.

It has been said that the nature and grounds of subrogation are very clear but that the difficulties arise in their application to the innumerable complications of business.⁸¹ The doctrine of subrogation applies to a great variety of cases,⁸² but no general rule can be laid down which will afford a test in all cases for its application,⁸³ and whether or not it is applicable depends on the facts and circumstances of each case as it arises.⁸⁴ In general it is applied where demanded by the dictates of equity, justice, and good conscience,⁸⁵ as well as by

81. *Ariz.*—*Mosher v. Conway*, 46 P.2d 110, 45 *Ariz.* 463.

Ind.—*First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co.*, 200 N.E. 449, 102 *Ind.App.* 361.
60 C.J. p 705 note 95.

82. *N.Y.*—*In re Leonhauser's Will*, 51 N.Y.S.2d 335, 183 *Misc.* 863.
60 C.J. p 705 note 96.

Contract rights and tort actions

Subrogation is equitable principle and applies to contract rights as fully as it does to tort actions.—*Consolidated Freightways v. Moore*, 229 P.2d 882, 38 *Wash.2d* 427.

Payment by person secondarily liable

The doctrine is most frequently applied to situations where a person only secondarily liable is compelled to pay a debt for which another is directly and primarily liable.—*Omicron Co. v. U. S. Fidelity & Guaranty Co.*, 152 P.2d 716, 21 *Wash.2d* 703.

83. *Ariz.*—*Mosher v. Conway*, 46 P.2d 110, 45 *Ariz.* 463.

Kan.—*Corpus Juris cited in Hay v. Crawford*, 158 P.2d 463, 468, 159 *Kan.* 723, 159 A.L.R. 388.

Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 *Ky.* 28—*Federal Deposit Ins. Corp. v. Wilhoit*, 180 S.W.2d 72, 237 *Ky.* 339.

Neb.—*Fender v. Reed*, 12 N.W.2d 98, 143 *Neb.* 911—*Burks v. Packer*, 9 N.W.2d 471, 143 *Neb.* 373.

N.J.—*Ganger v. Moffett*, 83 A.2d 769, 8 *N.J.* 73.

Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 *Va.* 394.

60 C.J. p 705 note 97.

84. *U.S.*—*American Sur. Co. of New York v. First Nat. Bank, D.C.Pa.*, 15 F.Supp. 974, affirmed, C.C.A., 96 F.2d 813.

Ala.—*Carter v. Carter*, 38 So.2d 557, 251 *Ala.* 598—*Duke v. Kilpatrick*, 163 So. 640, 231 *Ala.* 51—*Strickland v. Carroll*, 154 So. 109, 228 *Ala.* 498—*Jefferson Standard Life Ins. Co. v. Brunson*, 145 So. 156, 226 *Ala.* 16.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 *Ariz.* 463.

D.C.—*A. Gusmer, Inc. v. McGrath*, 196 F.2d 860, 90 U.S.App.D.C. 372, certiorari denied *A. Gusmer, Inc. v. McGrath*, 73 S.Ct. 38, 344 U.S. 831, 97 L.Ed. —.

Idaho.—*Gerken v. Davidson Grocery Co.*, 69 P.2d 122, 57 *Idaho* 670.

Kan.—*Corpus Juris cited in Hay v. Crawford*, 158 P.2d 463, 468, 159 *Kan.* 723, 159 A.L.R. 388—*Old Colony Ins. Co. v. Kansas Public Service Co.*, 121 P.2d 193, 154 *Kan.* 643, 138 A.L.R. 1166—*Tillotson v. Goodman*, 114 P.2d 845, 154 *Kan.* 31—*Katschor v. Ley*, 113 P.2d 127, 153 *Kan.* 569—*Levant State Bank v. Shults*, 47 P.2d 80, 142 *Kan.* 318.

Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 *Ky.* 28—*National Sur. Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 *Ky.* 273—*Smith v. Feltner*, 83 S.W.2d 506, 259 *Ky.* 833.

Mont.—*State ex rel. Blenkner v. Stillwater County*, 66 P.2d 788, 104 *Mont.* 387.

Neb.—*Gilbert v. First Nat. Bank*, *Minatare, Neb.*, 48 N.W.2d 401, 154 *Neb.* 404—*Webber v. Spencer*, 27 N.W.2d 824, 148 *Neb.* 481—*Fender v. Reed*, 12 N.W.2d 98, 143 *Neb.* 911—*Equitable Life Assur. Soc. of U. S. v. Person*, 284 N.W. 260, 135 *Neb.* 800.

N.J.—*Employers' Fire Ins. Co. v. Ritter*, 164 A. 426, 112 *N.J.Eq.* 418.

N.M.—*Fidelity & Deposit Co. of Maryland v. Atherton*, 144 P.2d 157, 47 *N.M.* 443.

N.Y.—*In re McClancy's Estate*, 45 N.Y.S.2d 917, 182 *Misc.* 866, affirmed

51 N.Y.S.2d 90, 268 *App.Div.* 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.

Okl.—*Smith v. Minter*, 191 P.2d 929, 200 *Okl.* 208—*Mitchell v. Jackson*, 60 P.2d 390, 177 *Okl.* 441.

Va.—*State-Planters Bank & Trust Co. v. Pollard & Bagby Inv. Corp.*, 42 S.E.2d 287, 186 *Va.* 217—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 *Va.* 394.

Wash.—*In re Farmers' & Merchants' State Bank of Nooksack*, 26 P.2d 631, 175 *Wash.* 78.

W.Va.—*Buskirk v. State-Planters' Bank & Trust Co.*, 169 S.E. 738, 739, 113 *W.Va.* 764.

60 C.J. p 705 note 98.

85. *Ala.*—*Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co.*, 42 So.2d 829, 253 *Ala.* 54.

Conn.—*Home Owners' Loan Corporation v. Sears, Roebuck & Co.*, 193 A. 769, 123 *Conn.* 232.

Ind.—*Home Owners' Loan Corporation v. Henson*, 29 N.E.2d 873, 876, 217 *Ind.* 554—*Mishawaka-St. Joseph Loan & Trust Co. v. Neu*, 196 N.E. 85, 209 *Ind.* 433, 105 A.L.R. 881.

Kan.—*Tillotson v. Goodman*, 114 P.2d 845, 154 *Kan.* 31—*Katschor v. Ley*, 113 P.2d 127, 153 *Kan.* 569.

Ky.—*Chalk v. Chalk*, 165 S.W.2d 534, 291 *Ky.* 702.

Mo.—*In re Jamison's Estate*, 202 S.W.2d 879—*Subscribers at Casualty Reciprocal Exchange, by Dodson v. Kansas City Public Service Co.*, 91 S.W.2d 227, 230 *Mo.App.* 468.

Neb.—*Burks v. Packer*, 9 N.W.2d 471, 143 *Neb.* 373.

N.Y.—*In re McClancy's Estate*, 45 N.Y.S.2d 917, 182 *Misc.* 866, affirmed 51 N.Y.S.2d 90, 268 *App.Div.* 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.

public policy,⁸⁶ and the remedy is broad enough to include every instance in which one person, not a mere volunteer, pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter.⁸⁷ Since the remedy of subrogation is founded in equity, as discussed supra § 2, in its application no attention should be paid to technicalities which are not of an insuperable character,⁸⁸ but the broad equities should always be sought out as far as possible.⁸⁹

On the other hand subrogation is not a universal

remedy for persons who have lost their money,⁹⁰ and the doctrine cannot be extended beyond the settled principles on which it rests.⁹¹ It has its sphere of relief plainly limited by its nature⁹² and it is not intended to be applied in all cases where there is security for a debt, but only in those in which justice demands its application.⁹³ While subrogation is a consequence which equity attaches to certain conditions, those elements or conditions must be present in every instance where subrogation is sought.⁹⁴ Particular elements or conditions include the existence of a superior equity on the part of the person seeking subrogation, discussed

N.C.—*Corpus Juris* cited in *Beam v. Wright*, 32 S.E.2d 213, 218, 224 N.C. 677.

Pa.—*Auto Building & Loan Ass'n v. Hall*, 177 A. 581, 117 Pa.Super. 104.

Tenn.—*Turley-Bullington Mortgage Co. v. Brown*, 4 Tenn.App. 500.

Tex.—*Corpus Juris* cited in *Kaminski v. Kaminczak*, Civ.App., 86 S.W.2d 833, 834.

Wash.—*Wallace v. Henderson*, 101 P.2d 1078, 3 Wash.2d 697—In re *Farmers' & Merchants' State Bank of Nooksack*, 26 P.2d 631, 175 Wash. 78.

60 C.J. p 765 note 99.

36. Neb.—*Burks v. Packer*, 9 N.W.2d 471, 143 Neb. 373.

60 C.J. p 706 note 1.

37. U.S.—*New York Cas. Co. v. Sinclair Refining Co.*, C.C.A.Okl., 108 F.2d 65.

Conn.—*Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 123 Conn. 232.

Ill.—*People ex rel. Nelson v. Phillip State Bank & Trust Co.*, 30 N.E.2d 771, 307 Ill.App. 464.

Ind.—*Home Owners' Loan Corp. v. Henson*, 29 N.E.2d 873, 217 Ind. 554—*Kamarata v. Hayes Freight Lines, Inc.*, App., 108 N.E.2d 723.

Kan.—*Fenly v. Revell*, 228 P.2d 905, 170 Kan. 705.

Ky.—*McCracken County v. Lakeview Country Club*, 70 S.W.2d 938, 254 Ky. 515.

N.Y.—*Gerstet Corporation v. Equitable Trust Co. of New York*, 150 N.E. 501, 241 N.Y. 418, 43 A.L.R. 1320—In re *Van Hoesen's Will*, 81 N.Y.S.2d 392, 192 Misc. 689—In re *McClancy's Estate*, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760—In re *Stafford's Will*, 98 N.Y.S.2d 714, affirmed In re *Stafford's Estate*, 101 N.Y.S.2d 904, 278 App. Div. 612—*Colonial Fire Underwriters Branch of Nat. Fire Ins. Co. of Hartford v. Utica Mut. Ins. Co.*, 69 N.Y.S.2d 623.

Pa.—*Green v. Second Allegheny Bldg. Ass'n*, 166 A. 865, 311 Pa. 305.

S.D.—*Application of Mach*, 25 N.W.2d 881, 71 S.D. 460.

Similar statements of rule

U.S.—*The Etna, C.C.A.Pa.*, 138 F.2d 37—*New York Title & Mortgage Co. v. First Nat. Bank, C.C.A.Mo.*, 51 F.2d 485.

Ala.—*Strickland v. Carroll*, 154 So. 109, 228 Ala. 498.

Ky.—*National Sur. Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273.

Mo.—*Neitherton v. Farmers' Exchange Bank of Gallatin*, 63 S.W.2d 156, 228 Mo.App. 296.

Ohio.—*Central Nat. Bank of Cleveland v. International Sales Co.*, 91 N.E.2d 532, 87 Ohio App. 207.

Pa.—In re *McCahan's Estate*, 168 A. 685, 312 Pa. 515—*Sarapin v. City of Philadelphia*, 159 A. 866, 306 Pa. 388.

Utah.—*Beaver County v. Home Indem. Co.*, 52 P.2d 435, 88 Utah 1.

Subrogation cannot be defeated because another person fails or refuses to act.—*Anstine v. Pennsylvania R. Co.*, Com.Pl., 56 Dauph.Co. 221, affirmed 43 A.2d 109, 352 Pa. 547, 160 A.L.R. 981.

38. U.S.—*Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transp. R. I. Co.*, 191 F. 769, 113 C.C.A. 427, rehearing denied 194 F. 361, 114 C.C.A. 321, certiorari denied 32 S.Ct. 837, 225 U.S. 704, 56 L.Ed. 1265.

39. U.S.—*Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transp. Co.*, supra.

90. Ala.—*Corpus Juris* cited in *Duke v. Kilpatrick*, 163 So. 640, 641, 231 Ala. 51—*N. O. Nelson Mfg. Co. v. County Board of Education*, 152 So. 221, 228 Ala. 45.

Miss.—*Berry v. Bullock*, 33 So. 410, 81 Miss. 463.

91. Tenn.—*Cole v. Patty*, 134 S.W.2d 160, 175 Tenn. 334.

92. Ala.—*Corpus Juris* cited in *N. O. Nelson Mfg. Co. v. County Board of Education*, 152 So. 221, 228 Ala. 45.

Miss.—*Berry v. Bullock*, 33 So. 410, 81 Miss. 463.

Doctrine of subrogation held inapplicable

(1) In general.

Ark.—*Wyatt Lumber & Supply Co. v. Hansen*, 147 S.W.2d 366, 201 Ark. 534.

La.—*Sutton v. Moreland*, App., 177 So. 396.

Mo.—*O'Neill v. Viviano*, App., 105 S.W.2d 985.

Pa.—*Commonwealth to Use of Willow Highlands Co. v. Maryland Cas. Co.*, 85 A.2d 83, 369 Pa. 300.

S.C.—*Silverman v. Dew*, 189 S.E. 756, 182 S.C. 457.

Va.—*Clark v. George*, 170 S.E. 713, 161 Va. 104.

(2) Where mortgagee, releasing lien to enable mortgagor to sell unincumbered timber, took assignment from mortgagor of purchaser's notes and mortgage as collateral for mortgagor's indebtedness.—*Travers v. Stevens*, 145 So. 851, 108 Fla. 11.

(3) Where grantees, in consideration for conveyance of land, agreed in memorandum to pay grantor money and to raise sheep in which grantor had interest, grantee to whom grantor subsequently conveyed the same realty in return for support was not a subrogee of any cause of action grantor might have had for breach of first grantees' breach of promise to pay, or of any right to rescind which grantor might have had for failure of first grantees to provide support.—*Lowe Foundation v. Mosley*, C.A.S.D., 199 F.2d 227.

93. Ky.—*Louisville Trust Co. v. Royal Indemnity Co.*, 20 S.W.2d 71, 230 Ky. 482.

60 C.J. p 706 note 6.

94. U.S.—*Lowe Foundation v. Mosley*, C.A.S.D., 199 F.2d 227.

infra § 6, a claim or obligation on the part of the debtor and an original right to that claim on the part of him in whose place substitution is sought, infra § 7, payment of the debt, infra § 10, and the payor's relationship to the debt entitling him to a right of reimbursement, such as a relationship of principal and surety, or of primary and secondary liability, or a situation in which the payor is compelled, even though only for his own protection and without obligation to another, to pay some other person's debt, discussed infra §§ 8, 9.

Subrogation ordinarily arises only from the payment by the subrogee of a debt due a third person,⁹⁵ but in some cases the term subrogation has been used to signify the right of a creditor to enforce a claim or lien of his debtor against another notwithstanding the creditor has not paid anything with respect to such claim or lien.⁹⁶ The question whether the remedy of subrogation can be applied primarily concerns only the creditor, the debtor, and the person claiming to be subrogated.⁹⁷

Subrogation to rights of state. Although in a few jurisdictions it has been held otherwise,⁹⁸ as

a general rule, the common-law right of a state to preference as a creditor is not so inherent or exclusive in the state as a sovereignty that it cannot be a matter of subrogation.⁹⁹ Thus, a subrogee of a state is entitled to assert the state's preference in the payment of a debt due it from a debtor over other creditors without prior specific liens.¹ A statute for the relief of persons paying certain claims to the state, under color of judicial proceedings, and subrogating such persons to the rights of the state, does not apply where the state was fully paid, and the claim assigned before the passage of the act.²

b. Tendency to Extend Scope

The remedy of subrogation is highly favored and the courts are inclined to extend rather than to restrict the principle, and to give it a liberal application.

The doctrine of subrogation, under the initial guidance of Chancellor Kent,³ has been applied much more extensively in American than in English jurisprudence.⁴ The doctrine is much encouraged and protected.⁵ It is a remedy which is highly favored⁶ and is not so restricted in its application as formerly.⁷ The courts are inclined to extend rather than to restrict the principle⁸ so that, al-

95. U.S.—In re Fowble, D.C.Md., 213 F. 676.
60 C.J. p 712 note 81.

96. Cal.—Penn Mut. Life Ins. Co. v. Bank of America Nat. Trust & Savings Ass'n, 54 P.2d 453, 5 Cal.2d 288.

D.C.—Philadelphia Nat. Bank v. McKinlay, 72 F.2d 89, 63 App.D.C. 296, certiorari denied McKinlay v. Philadelphia Nat. Bank, 55 S.Ct. 96, 293 U.S. 583, 79 L.Ed. 679.

97. Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

98. Conn.—Sperry v. Butler, 53 A. 899, 901, 75 Conn. 369.
60 C.J. p 702 note 67.

99. N.Y.—United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn, 146 N.Y.S. 870, 161 App. Div. 479, affirmed 107 N.E. 1086, 213 N.Y. 628.

1. Ark.—Lester v. Richardson, 62 S. W. 62, 69 Ark. 198.
60 C.J. p 702 note 69.

Right of city

The Corpus Juris text has been cited in support of rule that a subrogee of a city was entitled to the preferential rights of the city conferred by statute.—Willits v. Jencks Mfg. Co., 171 A. 234, 54 R.I. 164.

2. Ind.—Johnson v. Johnson, 26 Ind. 441.

3. Mo.—Furnold v. State Bank, 44 Mo. 336.

4. Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.
60 C.J. p 706 note 8.

5. Ill.—Corpus Juris cited in Smith v. Clavey Ravinia Nurseries, 69 N.E.2d 921, 923, 329 Ill.App. 648.
W.Va.—Hawker v. Moore, 20 S.E. 848, 40 W.Va. 49.

6. Ill.—Corpus Juris cited in Smith v. Clavey Ravinia Nurseries, 69 N.E.2d 921, 923, 329 Ill.App. 648.

Kan.—Corpus Juris cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705.

N.J.—Corpus Juris cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346—Corpus Juris cited in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 253, 130 N.J.Eq. 254.

N.Y.—3105 Grand Corp. v. City of New York, 42 N.E.2d 475, 288 N. Y. 178, 141 A.L.R. 1211—In re Leonhauser's Will, 51 N.Y.S.2d 335, 183 Misc. 863—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N. E.2d 752, 294 N.Y. 760.

N.C.—Corpus Juris cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.

Pa.—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa.Super. 259.

Utah.—Martin v. Hickenlooper, 59 P. 2d 1139, 90 Utah 150, 107 A.L.R. 762, rehearing denied 61 P.2d 307, 90 Utah 185—Bingham v. Walker Bros., Bankers, 283 P. 1055, 75 Utah 149.

Vt.—Iby v. Wrisley, 158 A. 67, 104 Vt. 148.

7. Kan.—Corpus Juris cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705.

N.C.—Corpus Juris cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

Wash.—University State Bank v. Steeves, 147 P. 645, 85 Wash. 55, 2 A.L.R. 237.

8. Ariz.—Mosher v. Conway, 46 P. 2d 110, 45 Ariz. 463.

Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

Ill.—Corpus Juris cited in Smith v. Clavey Ravinia Nurseries, 69 N.E. 2d 921, 329 Ill.App. 648.

Ind.—First & Tri-State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 102 Ind.App. 361.

N.J.—Corpus Juris cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J.

though formerly the right was limited to transactions between principals and sureties,⁹ now it is broad and expansive¹⁰ and has a very liberal application.¹¹ It is no longer confined to cases of suretyship,¹² but the doctrine has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of cases as they have arisen.¹³ So the mere fact that the doctrine of subrogation had not been previously invoked in a

similar situation is not a prima facie bar to its applicability.¹⁴

c. Matter of Right or Discretion

The doctrine of subrogation is not a fixed and inflexible rule of law or equity and is not a matter of right, but the granting of the remedy is a matter for judicial discretion to be administered according to the established rules of equity jurisprudence.

The doctrine of subrogation is not a fixed and inflexible rule of law or equity¹⁵ and does not flow from any fixed rule of law;¹⁶ it is not a matter of strict right,¹⁷ but is, according to the authorities

- Law 346—**Corpus Juris** cited in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 253, 130 N.J.Eq. 254.
- N.Y.—3105 Grand Corp. v. City of New York, 42 N.E.2d 475, 288 N.Y. 178, 141 A.L.R. 1211—In re Leonhauser's Will, 51 N.Y.S.2d 335, 183 Misc. 863—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.
- N.C.—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
- Tenn.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198—Hunt v. Hoppe, 124 S.W.2d 306, 22 Tenn.App. 540.
- Vt.—Iby v. Wrisley, 158 A. 67, 104 Vt. 148.
- 60 C.J. p 706 note 12.
9. Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.
- Kan.—**Corpus Juris** cited in Fenly v. Revell, 228 P.2d 905, 908, 170 Kan. 705.
- N.J.—**Corpus Juris** cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346—**Corpus Juris** cited in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 253, 130 N.J.Eq. 254.
- N.C.—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
- Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.
- 60 C.J. p 706 note 13.
10. U.S.—New York Cas. Co. v. Sinclair Refining Co., C.C.A.Okl., 108 F.2d 65.
- Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.
- Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.
- Ga.—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 71 Ga.App. 112.
- N.J.—**Corpus Juris** cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346—**Corpus Juris** cited in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 253, 130 N.J.Eq. 254.
- N.Y.—In re Lawyers Title & Guaranty Co., 50 N.Y.S.2d 257, 183 Misc. 294.
- N.C.—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
- Wash.—Wallace v. Henderson, 101 P.2d 1078, 3 Wash.2d 697.
- 60 C.J. p 706 note 16.
13. Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.
- Ill.—**Corpus Juris** quoted in Smith v. Clavey Ravinia Nurseries, 69 N.E.2d 921, 923, 329 Ill.App. 648.
- N.J.—**Corpus Juris** cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346—**Corpus Juris** cited in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 253, 130 N.J.Eq. 254.
- N.C.—**Corpus Juris** cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.
- 60 C.J. p 707 note 17.
14. Ill.—Smith v. Clavey Ravinia Nurseries, 69 N.E.2d 921, 329 Ill. App. 648.
- Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.
15. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., C.C.A.Pa., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.
- 60 C.J. p 707 note 18.
16. Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.
- Va.—Obici v. Furcron, 168 S.E. 340, 160 Va. 351, 91 A.L.R. 848.
- 60 C.J. p 707 note 19.
17. U.S.—New York Title & Mortgage Co. v. First Nat. Bank, C.C. A.Mo., 51 F.2d 485, 77 A.L.R. 1052, certiorari denied 52 S.Ct. 131, 284 U.S. 676, 76 L.Ed. 572—National Sur. Corp. v. Allen-Codell Co., D.C. Ky., 70 F.Supp. 189—Reconstruction Finance Corp. v. Maryland Cas. Co., D.C.Md., 23 F.Supp. 1008.
- Ala.—Duke v. Kilpatrick, 163 So. 640,

on the question, a matter of grace,¹⁸ the operation of which is governed and controlled by the principles of equity.¹⁹ It makes its appeal solely to the conscience of the court.²⁰ However, its application is not controlled alone by the judge's conception of right.²¹ It is to be administered according to the established rules of equity jurisprudence²² and its exercise must be governed by judicial discretion.²³ While subrogation should not be arbitrarily granted,²⁴ the right should not be denied except in the sound judicial discretion of the court based on some definite and adequate reason therefor.²⁵ All who happen at any time to occupy a particular situation are entitled to like rights of subrogation.²⁶

d. Necessity of Equitable Right and Lawful or Meritorious Transaction

In every case where the doctrine of subrogation is invoked, there must be a concurrence of inherent justice of the case and some principle of equity jurisprudence as recognized and enforced by courts of equity; and the remedy will not be allowed where it would be contrary to public policy, or where it would be of no real benefit to the moving party. The doctrine of subrogation applies only to lawful and meritorious transactions.

As a general rule, there must, in every case where the doctrine of subrogation is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by courts of equity.²⁷ In other words, subrogation will not be enforced unless there is some equitable doctrine on which it can be predicated,²⁸ and only when the applicant

231 Ala. 51—Strickland v. Carroll, 154 So. 109, 228 Ala. 498—Jefferson Standard Life Ins. Co. v. Brunson, 145 So. 156, 226 Ala. 16.

Cal.—In re Whitney's Estate, 11 P. 2d 1107, 124 Cal.App. 109.

Miss.—Corpus Juris cited in National Surety Corporation v. Edwards House Co., 4 So.2d 340, 341, 191 Miss. 884, 137 A.L.R. 697.

N.Y.—3105 Grand Corp. v. City of New York, 42 N.E.2d 475, 288 N.Y. 178, 141 A.L.R. 1211—In re Leonhauser's Will, 51 N.Y.S.2d 335, 183 Misc. 863—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E. 2d 752, 294 N.Y. 760.

Okl.—Mitchell v. Jackson, 60 P.2d 390, 177 Okl. 441.

Pa.—In re Gordon, 5 A.2d 554, 334 Pa. 317.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

W.Va.—Corpus Juris cited in Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 739, 113 W.Va. 764.

60 C.J. p 707 note 20.

Doctrine of conventional subrogation will not be enforced as matter of legal right.—George A. Hoagland & Co. v. Decker, 224 N.W. 14, 118 Neb. 194.

18. Pa.—Budd v. Olver, 23 A. 1105, 148 Pa. 194, 197.

60 C.J. p 707 note 21.

19. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., C.C.A.Pa., 116 F. 2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L. Ed. 241, 138 A.L.R. 509.

Ala.—Jefferson Standard Life Ins. Co.

v. Brunson, 145 So. 156, 226 Ala. 16.

Ill.—People ex rel. Nelson v. Chicago Lawn State Bank, 28 N.E.2d 294, 306 Ill.App. 107.

Ky.—Movl Const. Co. v. Covington Trust & Banking Co., 80 S.W.2d 560, 258 Ky. 485.

N.J.—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261.

Okl.—Home Owners' Loan Corp. v. Parker, 73 P.2d 170, 181 Okl. 234.

Pa.—In re Gordon, 5 A.2d 554, 334 Pa. 317.

Tenn.—Turley-Bullington Mortgage Co. v. Brown, 4 Tenn.App. 500.

60 C.J. p 707 note 22.

20. N.Y.—Huff v. Rosen, 201 N.Y.S. 639, 121 Misc. 674.

21. Tenn.—Lewis v. Koehn, 5 Tenn. App. 530.

60 C.J. p 707 note 24.

22. Iowa.—Kent v. Bailey, 164 N.W. 852, 181 Iowa 489.

23. U.S.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, C.C.A.Pa., 116 F.2d 75—Corpus Juris cited in Reconstruction Finance Corp. v. Maryland Cas. Co., D.C.Md., 23 F.Supp. 1008, 1011.

Tenn.—Lewis v. Koehn, 5 Tenn.App. 530—Turley-Bullington Mortgage Co. v. Brown, 4 Tenn.App. 500.

60 C.J. p 707 note 26.

24. U.S.—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F.Supp. 551.

25. U.S.—Reconstruction Finance Corp. v. Maryland Cas. Co., D.C. Md., 23 F.Supp. 1008.

26. Pa.—In re South Philadelphia

State Bank's Insolvency, 145 A. 520, 295 Pa. 433.

27. Ala.—Corpus Juris cited in Jefferson Standard Life Ins. Co. v. Brunson, 145 So. 156, 226 Ala. 16.

Neb.—Federal Land Bank of Omaha v. Worley, 282 N.W. 476, 135 Neb. 493.

N.Y.—Charles H. Dauchy Co. v. Wilkinson, 295 N.Y.S. 666, 251 App.Div. 53.

Tenn.—Lewis v. Koehn, 5 Tenn.App. 530.

60 C.J. p 701 note 51.

Assignment immaterial

A person who asserts a right of subrogation, whether by virtue of assignment or otherwise, must first show right in equity to be entitled to such subrogation, and, where such right is clearly shown by application of equitable principles, assignment adds nothing to the right.—Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 11 Cal.2d 92.

28. Cal.—J. G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 103 Cal. App.2d 767.

Pa.—Corpus Juris quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78.

Tenn.—Lewis v. Koehn, 5 Tenn.App. 530.

Tex.—Huey v. Brand, Civ.App., 92 S. W.2d 505, affirmed Borger v. Brand, 118 S.W.2d 303, 131 Tex. 614.

60 C.J. p 701 note 52.

Mere payment insufficient

The doctrine of subrogation requires something more than the mere payment of a debt in order to entitle the person paying the debt to be substituted in place of the original creditor.—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa. Super. 259.

therefor has an equity to invoke²⁹ and his cause is just³⁰ and its enforcement is consonant with right and justice,³¹ and then only in a clear case.³² It will not be allowed where it would be contrary to public policy,³³ or where it would accomplish by indirection that which a statute forbids to be done by direction;³⁴ nor will it be ordered where it can be of no real benefit to the person seeking to be subrogated,³⁵ where he has not actually suffered a loss,³⁶ or where it appears that plaintiff owes defendant an amount equal to, or greater than, the

amount claimed against defendant.³⁷ Subrogation cannot be predicated on the failure to do an illegal act.³⁸

Existence of lawful or meritorious transaction. The doctrine of subrogation applies only to lawful and meritorious transactions.³⁹ It will not be enforced where resort to a usurious agreement or security would be necessary for its establishment;⁴⁰ nor will it be applied to a tortious transaction at the instance of one liable as a tortfeasor.⁴¹

29. Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73.

Ohio.—Zimpher v. Schwartz, 27 N.E. 2d 499, 64 Ohio App. 7.

Pa.—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa.Super. 259.

Minn.—Heisler v. Aultman, 57 N.W. 1053, 56 Minn. 454, 45 Am.S.R. 486.

Wash.—Carter v. Helphrey, 168 P.2d 508, 25 Wash.2d 103.

Who to bear loss

Claimant must establish that as between himself and defendant the latter and not the former should in equity bear the loss.—United States Fidelity & Guaranty Co. v. Title Guaranty & Surety Co. of Scranton, Pa., D.C.Md., 200 F. 443.

30. Miss.—Lyon v. Colonial U. S. Mortgage Co., 91 So. 708, 129 Miss. 54.

N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73.

Pa.—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78.

31. U.S.—New York Title & Mortgage Co. v. First Nat. Bank, C.C. A.Mo., 51 F.2d 485, 77 A.L.R. 1052, certiorari denied 52 S.Ct. 131, 284 U.S. 676, 76 L.Ed. 572.

Del.—Leiter v. Carpenter, 22 A.2d 393, 26 Del.Ch. 85.

D.C.—Washington Mechanics' Sav. Bank v. District Title Ins. Co., 65 F.2d 827, 62 App.D.C. 194.

Ill.—National Cas. Co. v. Caswell & Co., 45 N.E.2d 698, 317 Ill.App. 66.

Mo.—In re Jamison's Estate, 202 S.W.2d 879.

N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261.

N.Y.—In re Kelley's Estate, 289 N.Y. S. 1079, 160 Misc. 421.

Ohio.—Zimpher v. Schwartz, 27 N.E. 2d 499, 64 Ohio App. 7.

Pa.—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78—Auto Building & Loan Ass'n v. Hall, 177 A. 581, 117 Pa.Super. 104.

S.C.—American Sur. Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147—Watson v. Fowler, 163 S.E. 640, 165 S.C. 288.

Va.—State-Planters Bank & Trust Co. v. Pollard & Bagby Inv. Corp., 42 S.E.2d 287, 186 Va. 217.

Wash.—Carter v. Helphrey, 168 P.2d 508, 25 Wash.2d 103.

W.Va.—Bank of Marlinton v. McLaughlin, 17 S.E.2d 213, 123 W.Va. 608—Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 739, 113 W.Va. 764.

60 C.J. p 702 note 55.

Justice and intention

In order to justify application of remedy of subrogation, it must appear that enforcement of doctrine will not only best serve substantial purposes of justice but also true intention of parties.—Duke v. Kilpatrick, 163 So. 640, 231 Ala. 51—Strickland v. Carroll, 154 So. 109, 228 Ala. 498—Jefferson Standard Life Ins. Co. v. Brunson, 145 So. 156, 226 Ala. 16.

32. N.J.—Ganger v. Moffett, 83 A.2d 769, 8 N.J. 73.

N.C.—**Corpus Juris** cited in Beam v. Wright, 32 S.E.2d 213, 224 N.C. 677.

Pa.—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 177 A. 5, 317 Pa. 518—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78.

S.D.—Am. Sur. Co. v. Western Sur. Co., 22 N.W.2d 429, 71 S.D. 126.

Va.—State-Planters Bank & Trust Co. v. Pollard & Bagby Inv. Corp., 42 S.E.2d 287, 186 Va. 217.

W.Va.—Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 113 W.Va. 764.

60 C.J. p 702 note 56.

33. Pa.—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78.

60 C.J. p 702 note 57.

34. Pa.—**Corpus Juris** quoted in In re McGrath's Estate, 46 A.2d 735, 737, 159 Pa.Super. 78.

60 C.J. p 702 note 58.

35. N.Y.—Roma Holding Corp. v. Stemmler, 31 N.Y.S.2d 509.

Va.—Aetna Cas. & Sur. Co. v. Whaley, 3 S.E.2d 395, 173 Va. 11.

60 C.J. p 702 note 59.

36. Neb.—Eaton v. Hasty, 6 Neb. 419, 29 Am.R. 365.

60 C.J. p 702 note 60.

37. Okl.—City of Barnsdall v. Barnsdall Nat. Bank of Barnsdall, 90 P.2d 1057, 185 Okl. 228.

38. Tenn.—Fidelity & Deposit Co. of Maryland v. Long, 195 S.W. 766, 138 Tenn. 43.

39. Ala.—Galliland v. Williams, 61 So. 291, 181 Ala. 173.

60 C.J. p 702 note 62.

Transaction merged in note

Where loan made by licensed small loan company and evidenced by note was void for violation of statute, but proceeds of loan had been used to satisfy a conditional bill of sale on automobile, the doctrine of subrogation could not be applied to give small loan company a lien on the automobile, since the transaction was merged in the note.—Pollack v. Madison Long Island Personal Loan Co., 24 N.Y.S.2d 950, 176 Misc. 78.

40. U.S.—German Savings & Loan Soc. v. Tull, Wash., 136 F. 1, 69 C. C.A. 1, certiorari denied 26 S.Ct. 757, 200 U.S. 621, 50 L.Ed. 624.

Ark.—Trible v. Nichols, 13 S.W. 796, 53 Ark. 271, 22 Am.S.R. 190.

Usurious loan

Where debt and lien were discharged with funds provided by a usurious loan, and lender took no assignment of the lien but took his own deed of trust from the borrower, lender could not be subrogated to the original debt.—Jones v. Tindall, 226 S.W.2d 44, 216 Ark. 431.

41. Ky.—Fidelity & Casualty Co. of New York v. Farmers' & Mer-

e. Limitation of Right by Legislature

The legislature may limit the right of subrogation.

The legislature may limit the right of subrogation,⁴² and where it declares that such right may be made the subject of contract in one particular instance, and in no other, and makes it criminal to contract for the right of subrogation in other respects, it manifests an intention to limit the right of subrogation to the specified instance.⁴³

§ 6. Application of Maxims of Equity

- a. In general
- b. Superior equity necessary
- c. Freedom from fault
- d. Necessity of fair result

a. In General

The ordinary equity maxims are applicable to the equitable remedy of subrogation, such as the rules that equity will not grant relief where there is an adequate remedy of law, that the plaintiff must come into court with clean hands, and that he who seeks equity must do equity.

The ordinary equity maxims are applicable to the equitable remedy of subrogation.⁴⁴ Thus, subrogation is not allowed where there is an adequate remedy at law,⁴⁵ and, as in other cases of equitable

relief, the party seeking subrogation must not be guilty of laches, as discussed *infra* § 66; and the familiar rule in equity, that where one of two innocent persons must suffer by the fraudulent conduct of a third, the one who has, by his negligence or failure to do something that a prudent man under the circumstances should have done, enabled the fraud to be committed must suffer the loss occasioned thereby, applies.⁴⁶ The doctrine of subrogation cannot be extended so as to authorize the application of the principle for the relief and benefit of a person who voluntarily surrenders a right or suffers an injury, the consequence of his own willful neglect or wrong, or who has connived at, and assisted in, the wrong,⁴⁷ since one seeking subrogation must come into court with clean hands.⁴⁸ The rule that he who seeks equity must do equity applies,⁴⁹ and the pleading seeking equity must offer to do it where others have rights and must not seek to set them off.⁵⁰

b. Superior Equity Necessary

In order to entitle one to subrogation his equity should be strong and his case clear, and the remedy is not available if there are subsisting and countervailing equities.

In order to entitle one to subrogation his equity should be strong and his case clear.⁵¹ It is not

chants' Bank of Tolu, 2 S.W.2d 1048, 223 Ky. 32.

N.C.—**Corpus Juris** cited in Beam v. Wright, 32 S.E.2d 213, 218, 224 N.C. 677.

42. Minn.—In re Farmers' State Bank of North Branch, 219 N.W. 916, 174 Minn. 583, certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 559.

60 C.J. p 702 note 65.

43. N.Y.—Fort v. Globe & Rutgers Fire Ins. Co., 173 N.Y.S. 595, 186 App.Div. 185, affirmed 169 N.Y.S. 229, 102 Misc. 584, and appeal dismissed 125 N.E. 918, 227 N.Y. 581.

44. Ark.—Acker v. Watkins, 134 S.W.2d 523, 199 Ark. 573.

Ind.—First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 102 Ind.App. 361.

Okl.—City of Barnsdall v. Barnsdall Nat. Bank, 23 P.2d 373, 164 Okl. 167.

45. N.J.—Volker v. Fisk, 72 A. 1011, 75 N.J.Eq. 497.

60 C.J. p 707 note 29.

46. U.S.—Coonrod v. Kelly, N.J., 119 F. 841, 56 C.C.A. 353.

Neb.—Porter v. Ourada, 71 N.W. 52, 51 Neb. 510.

47. Ala.—Starke v. Bernhelm, 14 So. 770, 102 Ala. 464.

60 C.J. p 707 note 32.

48. Ala.—**Corpus Juris** cited in Schuessler v. Shelnutt, 171 So. 259, 263, 233 Ala. 188—Montgomery v. Ward, 151 So. 583, 227 Ala. 641—U. S. Fidelity & Guaranty Co. v. First Nat. Bank, 140 So. 755, 224 Ala. 375.

Ark.—Jones v. Tindall, 226 S.W.2d 44, 216 Ark. 431—City Nat. Bank v. Riggs, 70 S.W.2d 574, 189 Ark. 123—Trible v. Nichols, 13 S.W. 796, 53 Ark. 271, 22 Am.S.R. 190.

Ky.—Fidelity & Casualty Co. of New York v. Farmers' & Merchants' Bank of Tolu, 2 S.W.2d 1048, 223 Ky. 32.

Md.—**Corpus Juris** cited in Schaeffer v. Sterling, 6 A.2d 254, 255, 176 Md. 553.

Tex.—Rotge v. Dunlap, Civ.App., 91 S.W.2d 905, error dismissed by agreement—Christian v. Manning, Civ.App., 59 S.W.2d 234, modified on other grounds Manning v. Christian, 81 S.W.2d 54, 124 Tex. 517.

60 C.J. p 707 note 33.

Unclean hands held not shown

Cal.—Fritz v. Mills, 192 P. 92, 48 Cal.App. 328.

49. Ariz.—Mosher v. Conway, 46 P. 2d 110, 45 Ariz. 463.

Pa.—Smith v. Yellow Cab Co., 135 A. 858, 288 Pa. 85.

60 C.J. p 708 note 34.

50. Ala.—New England Mortg. Security Co. v. Fry, 42 So. 57, 143 Ala. 637, 111 Am.S.R. 62.

51. U.S.—National Sur. Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 189.

Cal.—In re Whitney's Estate, 11 P. 2d 1107, 124 Cal.App. 109.

Neb.—**Corpus Juris** quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.

N.Y.—**Corpus Juris** cited in City of New York v. Barbato, 5 N.Y.S.2d 125, 128.

N.C.—Beam v. Wright, 32 S.E.2d 213, 224 N.C. 677.

Ohio.—Harshman v. Harshman, App., 42 N.E.2d 447.

Pa.—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 171 A. 283, 112 Pa.Super. 343.

S.D.—American Sur. Co. v. Western Sur. Co., 22 N.W.2d 429, 71 S.D. 126.

Utah.—Ashton Jenkins Ins. Co. v. Layton Sugar Co., 39 P.2d 701, 85 Utah 333.

60 C.J. p 708 note 36.

available if there are subsisting and countervailing equities.⁵² He must have a greater equity than those who oppose him.⁵³ Thus, he will be denied subrogation if there are equal⁵⁴ or superior⁵⁵ equities existing in other persons opposed to him.

c. Freedom from Fault

In order to warrant equitable relief of subrogation,

the person seeking subrogation must act fairly and equitably and be free from fault, and the remedy will not be allowed where he has intermeddled with the rights of others or is guilty of fraud or culpable negligence.

In order to warrant equitable relief of subrogation, the person seeking subrogation must act fairly and equitably⁵⁶ and be free from fault.⁵⁷ It will not be allowed where he has intermeddled with the

52. U.S.—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F. Supp. 551.

N.Y.—*Corpus Juris* cited in City of New York v. Barbato, 5 N.Y.S.2d 125, 128.

60 C.J. p 708 note 37.

53. U.S.—American Sur. Co. v. Bank of California, C.C.A.Or., 133 F.2d 160—Amick v. Columbia Cas. Co., C.C.A.Mo., 101 F.2d 984—Martin v. Federal Surety Co., C.C.A.Minn., 58 F.2d 79—New York Title & Mortgage Co. v. First Nat. Bank, C.C.A.Mo., 51 F.2d 485, 77 A.L.R. 1052, certiorari denied 52 S.Ct. 131, 284 U.S. 676, 76 L.Ed. 572—National Sur. Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 189.

Cal.—J. G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 103 Cal.App. 2d 767—In re Whitney's Estate, 11 P.2d 1107, 124 Cal.App. 109.

D.C.—Washington Mechanics' Sav. Bank v. District Title Ins. Co., 65 F.2d 827, 62 App.D.C. 194.

Mo.—In re Jamison's Estate, 202 S.W.2d 879.

N.Y.—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 266 N.Y.S. 753, 239 App.Div. 100, reversed on other grounds 190 N.E. 330, 264 N.Y. 159.

Ohio—Maryland Cas. Co. v. Gough, 51 N.E.2d 216, 72 Ohio App. 260.

Okl.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102—*Corpus Juris* cited in City of Barnsdall v. Barnsdall Nat. Bank, 23 P.2d 373, 374, 164 Okl. 167.

Pa.—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa.Super. 259—Miller Lumber & Coal Co. v. Berkhimer, Com.Pl., 54 York Leg. Rec. 141, affirmed 20 A.2d 772, 342 Pa. 329, 135 A.L.R. 736.

S.D.—American Sur. Co. v. Western Sur. Co., 22 N.W.2d 429, 71 S.D. 126.

Wash.—Wallace v. Henderson, 101 P.2d 1078, 3 Wash.2d 697.

60 C.J. p 708 note 38.

Balance of equities

Court will weigh and balance the equities of the parties in the light of the circumstances.—National Sur.

Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 189.

54. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258—American Sur. Co. v. Bank of California, C.C.A.Or., 133 F.2d 160—Commercial Cas. Ins. Co. v. Petroleum Pipe Line Co., C.C.A.Okl., 83 F.2d 412—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256—Hartford Accident & Indemnity Co. v. Petroleum Royalties Co. of Oklahoma, D.C. Okl., 24 F.Supp. 759, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied Hartford Accident & Indemnity Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522.

Cal.—In re Whitney's Estate, 11 P.2d 1107, 124 Cal.App. 109.

Ill.—National Cas. Co. v. Caswell & Co., 45 N.E.2d 698, 317 Ill.App. 66.

Miss.—Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 196 Miss. 50—National Surety Corporation v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

N.J.—*Corpus Juris* cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346.

N.Y.—Butts v. Randall, 260 N.Y.S. 713, 145 Misc. 708.

Pa.—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 177 A. 5, 317 Pa. 518—Auto Building & Loan Ass'n v. Hall, 177 A. 581, 117 Pa. Super. 104—Commonwealth for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co., 186 A. 242, 122 Pa.Super. 403—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 171 A. 283, 112 Pa.Super. 343.

S.D.—American Sur. Co. v. Western Sur. Co., 22 N.W.2d 429, 71 S.D. 126.

Utah.—Beaver County v. Home Indem. Co., 62 P.2d 435, 88 Utah 1—Germo v. Zion's Ben. Bldg. Soc., 39 P.2d 312, 85 Utah 227.

Wash.—Wallace v. Henderson, 101 P.2d 1078, 3 Wash.2d 697.

60 C.J. p 708 note 39.

55. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dal-

las, Tex., C.A.Tex., 172 F.2d 258—American Sur. Co. v. Bank of California, C.C.A.Or., 133 F.2d 160—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F.Supp. 551—Hartford Accident & Indemnity Co. v. Petroleum Royalties Co. of Oklahoma, D.C. Okl., 24 F.Supp. 759, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied Hartford Acc. & Indem. Co. v. Petroleum Royalties Co., 60 S. Ct. 384, 308 U.S. 626, 84 L.Ed. 522.

Ky.—Gilliam v. Cassidy, 161 S.W.2d 915, 290 Ky. 477—National Sur. Corp. v. First Nat. Bank, 128 S.W.2d 766, 278 Ky. 273—Commonwealth for Use of Coleman, v. Farmers Deposit Bank of Frankfort, 95 S.W.2d 793, 264 Ky. 839—Maryland Casualty Co. v. Walker, 78 S.W.2d 34, 257 Ky. 397.

Miss.—National Surety Corporation v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

N.J.—*Corpus Juris* cited in Bater v. Cleaver, 176 A. 889, 892, 114 N.J. Law 346.

N.Y.—New Jersey Equities Co. v. Mandel, 36 N.Y.S.2d 601, 178 Misc. 783—Butts v. Randall, 260 N.Y.S. 713, 145 Misc. 708.

Okl.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102.

Pa.—Commonwealth for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co., 186 A. 242, 122 Pa.Super. 403—Auto Building & Loan Ass'n v. Hall, 177 A. 581, 117 Pa.Super. 104.

Utah.—Germo v. Zion's Ben. Bldg. Soc., 39 P.2d 312, 85 Utah 227.

60 C.J. p 708 note 40.

56. Ind.—Dixon v. Thompson, 98 N. E. 738, 52 Ind.App. 560.

Neb.—*Corpus Juris* quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.

Tex.—Huey v. Brand, Civ.App., 92 S. W.2d 505, affirmed Borger v. Brand, 118 S.W.2d 303, 131 Tex. 614.

57. Neb.—*Corpus Juris* quoted in Luikart v. Buck, 270 N.W. 495, 496, 131 Neb. 866.

N.J.—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261.

rights of others⁵⁸ or is guilty of fraud⁵⁹ or culpable negligence,⁶⁰ or where he would derive an advantage from, or establish his claim through, his own negligence⁶¹ or, in any way, would thereby reap advantage from his own wrongdoing,⁶² or from the wrongful act of one under whom he claims.⁶³ Also, subrogation will not be allowed where to do so would relieve a person from the consequences of his own wrongful or unlawful act.⁶⁴

Negligence of the subrogee must be more than ordinary negligence, however, in order to bar application of the principle of subrogation,⁶⁵ and relief may be allowed notwithstanding the suitor's mistakes and ignorance.⁶⁶ The negligence of a person seeking subrogation is chiefly of significance where there are subsequently intervening rights involved which would be prejudiced if subrogation were allowed,⁶⁷ and the mere fact that a person seeking subrogation was negligent does not bar him

from relief where such negligence is as to his own interests and does not affect prejudicially the interest of the person to whose rights he seeks to be subrogated,⁶⁸ or where the negligence does not increase the burdens of any lienholder.⁶⁹ If the party invoking the rule of subrogation is not a volunteer, and both parties are negligent in the matter, there being no violation of law, contract, or superior equity, and no injury done to defendant, the application of justice and good conscience to the particular circumstances justifies the burden falling on him whose negligence or default primarily caused or induced the situation.⁷⁰ Mere constructive fraud will not prevent one from being protected by subrogation, if he has not himself actively participated in the fraud.⁷¹

d. Necessity of Fair Result

Subrogation will be granted only where an equitable result will be reached, and it will not be allowed when to

N.Y.—*Corpus Juris* cited in *Ollendorf v. Lissberger*, 28 N.Y.S.2d 455, 458, 176 Misc. 661.

Tex.—*Huey v. Brand*, Civ.App., 92 S.W.2d 505, affirmed *Borger v. Brand*, 118 S.W.2d 303, 131 Tex. 614—*Bell v. Franklin*, Civ.App., 230 S.W. 181.

Vt.—*Iby v. Wrisley*, 158 A. 67, 104 Vt. 148.

60 C.J. p 708 note 42.

58. N.Y.—*Title Guarantee & Trust Co. v. Haven*, 89 N.E. 1082, 196 N. Y. 487, 25 L.R.A.N.S., 1308, 17 Ann.Cas. 1131.

59. U.S.—*Hurwitz v. Pink*, C.C.A.N. Y., 96 F.2d 605.

Ark.—*City Nat. Bank v. Riggs*, 70 S.W.2d 574, 189 Ark. 123.

N.C.—*Corpus Juris* cited in *Beam v. Wright*, 32 S.E.2d 213, 218, 224 N. C. 677.

60 C.J. p 709 note 44.

A fraudulent grantee cannot equitably apply profits derived from the use of property obtained by fraud and have subrogation for the payment thereof on indebtedness assumed as consideration for the fraudulent transfer.—*Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213, 123 W.Va. 608.

60. Tenn.—*Peoples v. Smith*, 159 S. W.2d 832, 178 Tenn. 491—*Old Nat. Bank v. Swearingen*, 72 S.W.2d 545, 167 Tenn. 529—*Hunt v. Hoppe*, 124 S.W.2d 306, 22 Tenn.App. 540—*Morrah v. First Nat. Bank*, 65 S.W.2d 830, 16 Tenn.App. 104.

60 C.J. p 709 note 45.

Held not negligent

Tenn.—*Peoples v. Smith*, 159 S.W.2d 832, 178 Tenn. 491.

61. Cal.—*Corpus Juris* cited in *Jack v. Wong Shee*, 92 P.2d 449, 453, 33 Cal.App.2d 402.

Neb.—*Corpus Juris* quoted in *Luikart v. Buck*, 270 N.W. 495, 496, 131 Neb. 866.

60 C.J. p 709 note 46.

Disregard of stop payment order

The doctrine of subrogation was inapplicable to action by drawee bank to recover from drawer-depositor amount of check paid by bank after receipt of stop payment order.—*Chase Nat. Bank of City of New York v. Battat*, 78 N.E.2d 465, 297 N.Y. 185.

62. Ala.—*Corpus Juris* cited in *Schuessler v. Shelnutt*, 171 So. 259, 262, 233 Ala. 188—*Corpus Juris* cited in *Montgomery v. Wadsworth*, 148 So. 419, 422, 226 Ala. 667.

Ill.—*People v. Metropolitan Cas. Ins. Co. of N. Y.*, 90 N.E.2d 565, 339 Ill. App. 514.

Neb.—*Corpus Juris* quoted in *Luikart v. Buck*, 270 N.W. 495, 496, 131 Neb. 866.

N.J.—*Camden Trust Co. v. Cramer*, 40 A.2d 601, 136 N.J.Eq. 261.

N.C.—*Beam v. Wright*, 32 S.E.2d 213, 224 N.C. 677.

Tex.—*Huey v. Brand*, Civ.App., 92 S. W.2d 505, affirmed *Borger v. Brand*, 118 S.W.2d 303, 131 Tex. 614.

60 C.J. p 709 note 47.

Constructive trust

There can be no subrogation in a constructive trust in favor of one who by his own acts caused trust to arise.—*U. S. Fidelity & Guaranty Co. v. Salmon*, C.C.A.Del., 81 F.2d 420.

63. Neb.—*Corpus Juris* quoted in *Luikart v. Buck*, 270 N.W. 495, 496, 131 Neb. 866.

60 C.J. p 709 note 48.

64. Ala.—*Montgomery v. Ward*, 151 So. 583, 227 Ala. 641.

Ark.—*Jones v. Tindall*, 226 S.W.2d 44, 216 Ark. 431—*Acker v. Watkins*, 134 S.W.2d 523, 199 Ark. 573—*Corpus Juris* quoted in *City Nat. Bank v. Riggs*, 70 S.W.2d 574, 575, 189 Ark. 123—*Tribble v. Nichols*, 13 S. W. 796, 53 Ark. 271, 22 Am.S.R. 190.

60 C.J. p 709 note 49.

65. Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

66. Tex.—*Kone v. Harper*, Civ.App., 297 S.W. 294, affirmed *Ward-Harrison Co. v. Kone*, Com.App., 1 S. W.2d 857.

60 C.J. p 709 note 52.

67. Va.—*Federal Land Bank of Baltimore v. Joynes*, 18 S.E.2d 917, 179 Va. 394.

68. Mass.—*Home for Aged Women v. Wiley*, 3 N.E.2d 1022, 295 Mass. 407—*Hill v. Wiley*, 3 N.E.2d 1015, 295 Mass. 396.

69. Ohio.—*Miller v. Stark*, 56 N.E. 11, 61 Ohio St. 413.

70. Ala.—*Schuessler v. Shelnutt*, 171 So. 259, 233 Ala. 188.

71. Ala.—*Corpus Juris* cited in *Schuessler v. Shelnutt*, 171 So. 259, 262, 233 Ala. 188.

Mass.—*Adams v. Young*, 86 N.E. 942, 200 Mass. 588.

60 C.J. p 709 note 53.

do so would be inequitable or where it would accomplish injustice; the remedy can be applied only with a due regard to the legal and equitable rights of others.

Subrogation will be granted only where an equitable result will be reached.⁷² It will not be allowed when to do so would be inequitable⁷³ or where it would accomplish injustice.⁷⁴ Ordinarily the right

of subrogation may be enforced as against liens and claims which are subordinate to the security discharged,⁷⁵ but where it exists it is subject to prior equities and all the rules of equity.⁷⁶ Thus, it can be applied only with a due regard to the legal and equitable rights of others.⁷⁷ It will not be en-

72. U.S.—Hartford Acc. & Indem. Co. v. Petroleum Royalties Co. of Oklahoma, D.C.Okl., 24 F.Supp. 759, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Acc. & Indem. Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied Hartford Acc. & Indem. Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522.

Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

Kan.—Levant State Bank v. Shults, 47 P.2d 80, 142 Kan. 318.

Md.—Corpus Juris cited in Ragan v. Kelly, 24 A.2d 289, 295, 180 Md. 324.

N.Y.—Mahnk v. Blanchard, 253 N.Y.S. 307, 233 App.Div. 555—Corpus Juris quoted in Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 37, 169 Misc. 961.

Tenn.—Elledge v. Sumpter, 203 S.W. 346, 140 Tenn. 11.

Adjustment of claims

Subrogation is applied only when necessary to bring about equitable adjustment of claims founded on right and natural justice.—Maryland Casualty Co. v. Walker, 78 S.W.2d 34, 257 Ky. 397—Vance v. Atherton, 67 S.W.2d 968, 252 Ky. 591.

73. U.S.—Amick v. Columbia Cas. Co., C.C.A.Mo., 101 F.2d 984—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256.

D.C.—A. Gusmer, Inc. v. McGrath, 196 F.2d 860, 90 U.S.App.D.C. 372, certiorari denied A. Gusmer, Inc. v. McGrath, 73 S.Ct. 38, 344 U.S. 831, 97 L.Ed. —.

Ill.—People v. Metropolitan Cas. Ins. Co. of N. Y., 90 N.E.2d 565, 339 Ill. App. 514.

Iowa.—American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 218 Iowa 1.

N.J.—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261.

N.Y.—Corpus Juris quoted in Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 37, 169 Misc. 961.

Ohio.—Zimpher v. Schwartz, 27 N.E. 2d 499, 64 Ohio App. 7.

Pa.—In re Gordon, 5 A.2d 554, 334 Pa. 317.

Wis.—Farmers & Merchants State

Bank v. Hildebrandt, 267 N.W. 42, 212, 221 Wis. 394.
60 C.J. p 709 note 55.

74. U.S.—Amick v. Columbia Cas. Co., C.C.A.Mo., 101 F.2d 984—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F.Supp. 551—Hartford Acc. & Indem. Co. v. Petroleum Royalties Co. of Oklahoma, D.C.Okl., 24 F.Supp. 759, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Acc. & Indem. Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied Hartford Acc. & Indem. Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522.

Ark.—Brookfield v. Rock Island Improvement Co., 169 S.W.2d 662, 205 Ark. 573, 147 A.L.R. 451.

Fla.—Federal Land Bank of Columbia v. Godwin, 145 So. 883, 107 Fla. 537.

Iowa.—American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 218 Iowa 1.

Ky.—Evans' Adm'r v. Evans, 199 S.W.2d 734, 304 Ky. 28—Gilliam v. Cassidy, 161 S.W.2d 915, 290 Ky. 477—Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1, 136 S.W.2d 1094, 281 Ky. 771—National Sur. Corp. v. First Nat. Bank, 128 S.W.2d 766, 278 Ky. 273—Maryland Casualty Co. v. Walker, 78 S.W.2d 34, 257 Ky. 397.

N.J.—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261.

N.Y.—Application of Brooklyn Trust Co., 12 N.Y.S.2d 718, 257 App.Div. 188, reargument denied 14 N.Y.S.2d 158, 257 App.Div. 977, appeal denied—In re Kelley's Estate, 289 N.Y.S. 1079, 160 Misc. 421, affirmed 296 N.Y.S. 923, 251 App.Div. 847.
N.C.—Frederick v. Southern Fidelity Mut. Ins. Co., 20 S.E.2d 372, 221 N.C. 409.

Ohio.—Zimpher v. Schwartz, 27 N.E. 2d 499, 64 Ohio App. 7.

S.C.—Watson v. Fowler, 163 S.E. 640, 165 S.C. 288.

Tenn.—Morrah v. First Nat. Bank, 65 S.W.2d 830, 16 Tenn.App. 104.

Utah.—Ashton Jenkins Ins. Co. v. Layton Sugar Co., 39 P.2d 701, 85 Utah 333—Germo v. Zion's Ben. Bldg. Soc., 39 P.2d 312, 85 Utah 227.

Va.—State-Planters Bank & Trust Co. v. Pollard & Bagby Inv. Corp., 42 S.E.2d 287, 186 Va. 217.

W.Va.—Bank of Marlinton v. McLaughlin, 17 S.E.2d 213, 123 W.Va. 608—Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 113 W.Va. 764.

60 C.J. p 709 note 56.

75. Ala.—Alison v. Patrick, 116 So. 918, 217 Ala. 520.

76. N.Y.—Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 169 Misc. 961.

60 C.J. p 710 note 58.

77. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, C.C.A.Pa., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F.Supp. 551.
Ky.—Gilliam v. Cassidy, 161 S.W.2d 915, 290 Ky. 477—Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1, 136 S.W.2d 1094, 281 Ky. 771—National Sur. Corp. v. First Nat. Bank, 128 S.W.2d 766, 278 Ky. 273.

Mo.—In re Jamison's Estate, 202 S.W.2d 879—Subscribers at Casualty Reciprocal Exchange, by Dodson v. Kansas City Public Service Co., 91 S.W.2d 227, 230 Mo.App. 468.

Okl.—Home Owners' Loan Corp. v. Parker, 73 P.2d 170, 181 Okl. 234.

Pa.—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 177 A. 5, 317 Pa. 518—Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 171 A. 283, 112 Pa.Super. 343.

Utah.—Germo v. Zion's Ben. Bldg. Soc., 39 P.2d 312, 85 Utah 227.

Va.—Waddell v. Roanoke Mut. Building & Loan Ass'n, 181 S.E. 288, 165 Va. 229, 100 A.L.R. 906.

60 C.J. p 710 note 59.

Balance of interests

Subrogation is, in its essence, pure equity, and in every case the interests of all persons who might be affected by applying the doctrine must be taken into consideration, balanced against one another, and the solution arrived at which, as far as possible, is fair and just to all concerned.—In re Commercial Nat. Bank of Philadelphia, D.C.Pa., 54 F.Supp. 570.

forced to the prejudice or injury of the creditor⁷⁸ or the rights of others⁷⁹ of equal or higher rank than those of the person claiming subrogation,⁸⁰ or to displace an intervening right or title.⁸¹ So conventional subrogation by agreement with the debtor alone will not be allowed to impair the security of the creditor for the remainder of his debt⁸² or prejudice innocent third persons having equities of equal rank.⁸³

Subrogation will not be allowed where it would defeat legal rights⁸⁴ or overthrow a legal title,⁸⁵ or where it would disturb the priorities of liens,⁸⁶ or where a junior lienholder would be prejudiced.⁸⁷ Also, subrogation will not be allowed to enable one to recover money legally paid to persons, without notice, to satisfy just claims prior to the maturing of the right of subrogation;⁸⁸ and the principle of subrogation will not be applied where its effect

Preferences

(1) Equitable subrogation does not raise ordinary claim to preferential one or deny to persons, holding claims on parity with one under which subrogation attaches, right to participate equally in debtor's assets with one claiming subrogation.—*Sundheim v. School Dist. of Philadelphia*, 166 A. 365, 311 Pa. 90.

(2) Doctrine of subrogation is not to be used to create favorites among class of creditors who at law are equal.—*Sundheim v. School Dist. of Philadelphia*, supra.

78. Mass.—*Hill v. Wiley*, 3 N.E.2d 1015, 295 Mass. 396.
N.Y.—*In re Kelley's Estate*, 289 N.Y. S. 1079, 160 Misc. 421, affirmed 296 N.Y.S. 923, 251 App.Div. 847.
Wis.—*Strelitz v. First Wisconsin Nat. Bank of Milwaukee*, 264 N.W. 649, 220 Wis. 443.
60 C.J. p 710 note 60.

79. Ala.—*Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co.*, 42 So.2d 829, 253 Ala. 54—*Strickland v. Carroll*, 154 So. 109, 228 Ala. 498—*Corpus Juris cited in Jefferson Standard Life Ins. Co. v. Brunson*, 145 So. 156, 157, 226 Ala. 16.

Fla.—*Brannon v. Hills*, 149 So. 556, 111 Fla. 491.

Ky.—*Chalk v. Chalk*, 165 S.W.2d 534, 291 Ky. 702—*Title Ins. & Trust Co. v. McCracken County*, 92 S.W. 2d 89, 263 Ky. 302—*Smith v. Feltner*, 83 S.W.2d 506, 259 Ky. 833.

N.Y.—*Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville*, 9 N.Y.S.2d 34, 169 Misc. 961—*Roma Holding Corp. v. Stemmler*, 31 N.Y.S.2d 509.

Pa.—*In re Gordon*, 5 A.2d 554, 334 Pa. 317—*Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 151 Pa.Super. 259.

Tenn.—*Hunt v. Hoppe*, 124 S.W.2d 306, 22 Tenn.App. 540.

W.Va.—*Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213, 123 W.Va. 608.

Wis.—*Farmers & Merchants State Bank v. Hildebrandt*, 267 N.W. 42, 212, 221 Wis. 394.

60 C.J. p 710 note 61.

Person wronged by fraud

A surety's right of recovery from a third person through subrogation does not follow as of course, on proof that the losing but recompensed person could have recovered from the third person, since subrogation will not operate against an innocent person wronged by a principal's fraud.—*American Sur. Co. v. Bank of California, C.C.A.Or.*, 133 F.2d 160.

Commingle of funds

Correspondent bank claiming from bank in receivership proceeds of trust receipts by subrogation could not recover portion thereof which had been mingled indiscriminately with general funds of bank, preventing identification.—*Greenough v. Munroe, D. C.N.Y.*, 2 F.Supp. 104.

80. U.S.—*Amick v. Columbia Cas. Co.*, C.C.A.Mo., 101 F.2d 984.

N.J.—*Camden Trust Co. v. Cramer*, 40 A.2d 601, 136 N.J.Eq. 261.

Pa.—*Miller Lumber & Coal Co. v. Berkhelmer, Com.Pl.*, 54 York Leg. Rec. 141, affirmed 20 A.2d 772, 342 Pa. 329, 135 A.L.R. 736.

Vt.—*Iby v. Wrisley*, 158 A. 67, 104 Vt. 148.

Va.—*Obici v. Furcron*, 168 S.E. 340, 160 Va. 351, 91 A.L.R. 848.

81. Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28—*Gilliam v. Cassidy*, 161 S.W.2d 915, 290 Ky. 477—*National Sur. Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273—*Maryland Casualty Co. v. Walker*, 78 S.W.2d 34, 257 Ky. 397.

Utah.—*Germo v. Zion's Ben. Bldg. Soc.*, 39 P.2d 312, 85 Utah 227.
60 C.J. p 710 note 62.

82. U.S.—*J. P. Browder & Co. v. Hill, Tenn.*, 136 F. 821, 69 C.C.A. 499.

Ky.—*Wilson v. Smith*, 281 S.W. 1008, 213 Ky. 836.

83. R.I.—*Industrial Trust Co. v. Hanley*, 165 A. 223, 53 R.I. 180.
60 C.J. p 703 note 76.

84. Fla.—*Clermont-Minneola Country Club v. Loblaw*, 143 So. 129, 106 Fla. 122—*Whyel v. Smith*, 134 So. 552, 101 Fla. 971.

Ky.—*Gilliam v. Cassidy*, 161 S.W.2d 915, 290 Ky. 477—*National Sur. Corp. v. First Nat. Bank*, 128 S.

W.2d 766, 278 Ky. 273—*Maryland Casualty Co. v. Walker*, 78 S.W.2d 34, 257 Ky. 397.

N.Y.—*Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville*, 9 N.Y.S.2d 34, 169 Misc. 961.

Utah.—*Germo v. Zion's Ben. Bldg. Soc.*, 39 P.2d 312, 85 Utah 227.

Va.—*Obici v. Furcron*, 168 S.E. 340, 160 Va. 351, 91 A.L.R. 848.
60 C.J. p 710 note 63.

Special statutes

Subrogation is creature of equity, and cannot be decreed where others' legal rights are fixed by positive special statutes.—*Canton Morris Plan Bank v. Most*, 184 N.E. 765, 44 Ohio App. 180.

85. Tex.—*O'Brien v. Perkins, Civ. App.*, 276 S.W. 308, affirmed Com. App., 285 S.W. 260.

86. Idaho.—*Houghtellin v. Diehl*, 277 P. 699, 47 Idaho 636.

Extension of time for payment

Doctrine of subrogation could not be invoked to make lien of first mortgage inferior to lien of second mortgage after extension of time of payment of first mortgage debt, where second mortgagee was not prejudiced by such extension, and had not tendered amount of first mortgage to first mortgagee—*Farmers & Merchants State Bank v. Hildebrandt*, 267 N.W. 42, 212, 221 Wis. 394.

87. N.C.—*Wallace v. Benner*, 156 S. E. 795, 200 N.C. 124.

One of first tests determining right to subrogation is whether subrogation to prior lien puts holder of second lien in any worse position than if prior lien had not been discharged.—*Federal Land Bank of Columbia v. Godwin*, 145 So. 883, 107 Fla. 537.

Position unchanged

The theory of subrogation is that junior lienor's position is left unchanged by conduct of person seeking subrogation and that junior lienor is not wronged in any respect by permitting subrogation.—*Lentz v. Stoflet*, 273 N.W. 763, 280 Mich. 446.

88. U.S.—*Fidelity & Deposit Co. of Maryland v. Union State Bank of*

would be to compel the acceptance of a doubtful or inadequate remedy for one which might be more certain and definite.⁸⁹

§ 7. Necessity for Obligation and Right or Privilege Aiding in Enforcement Thereof

Subrogation involves a valuable right, a person who owns the right, and a person who is seeking to be substituted in that ownership; and there must exist a claim or obligation against the debtor and some original privilege on the part of the person in whose place substitution is claimed.

Subrogation has been said to involve three elements, that is, a valuable right, a person who owns the right, and a person who is seeking to be substituted in that ownership.⁹⁰ There must exist a claim or obligation against the debtor⁹¹ and some original privilege on the part of the person in whose place substitution is claimed;⁹² if no such privilege exists, or if it has been waived by the creditor, there is nothing on which the right can be based.⁹³ The right of subrogation exists only against the principal debtor,⁹⁴ and such right does not extend against a person who is merely secondar-

Minneapolis, D.C.Minn., 21 F.2d 102.

⁸⁹. Mont.—McCarthy v. State Bank of Townsend, 170 P. 15, 54 Mont. 319.

⁹⁰. U.S.—Belknap Hardware & Mfg. Co. v. Ohio River Contract Co., C.C.A.Ky., 271 F. 144.

Ala.—*Corpus Juris* cited in Montgomery v. Wadsworth, 148 So. 419, 421, 226 Ala. 667.

Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

N.Y.—Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 169 Misc. 961.

Pa.—Kooser v. West Penn Rys., 42 Pa.Dist. & Co. 701, 4 Fay.L.J. 258, 3 Monroe L.R. 134, 10 Som.Leg.J. 350.

⁹¹. U.S.—Rud. Degermark A-B. v. Monarch Silk Co., D.C.Pa., 85 F. Supp. 535.

Ala.—Shaddix v. National Surety Co., 128 So. 220, 221 Ala. 268.

Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

Mass.—James Stewart & Co. v. National Shawmut Bank of Boston, 196 N.E. 169, 291 Mass. 534.

S.C.—*Corpus Juris* cited in Greene v. Brown, 19 S.E.2d 114, 119, 199 S.C. 218—Silverman v. Dew, 189 S.E. 756, 182 S.C. 457.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334.

60 C.J. p 711 note 70.

Right of recovery

(1) Subrogation cannot exist independent of a right of recovery against person causing the loss.—Fidelity & Cas. Co. of N. Y. v. Niles Bank Co., 71 N.E.2d 742, 79 Ohio App. 15.

(2) Claimant must establish that the person against whom he claims the right could have been compelled by the principal creditor to pay the debt paid by claimant.—U. S. Fidelity & Guaranty Co. v. Title Guaranty & Surety Co. of Scranton, Pa., D.C. Md., 200 F. 443.

(3) Subrogation cannot be invoked against person who was not liable for indebtedness discharged.—Lawyers' Title & Guaranty Co. v. Claren, 260 N.Y.S. 847, 237 App.Div. 188.

Debt

In every case of subrogation there must be a debt for which a person or persons other than the subrogee are primarily liable and which in some capacity as an interested person the subrogee discharged for the protection of his own rights.—Kenney v. Kenney, 217 P.2d 151, 97 Cal. App.2d 60.

Improvements

One who made improvements on realty under good-faith belief that he was owner of the property and holder of the record title could not recover amount of such expenditures from life tenant under doctrine of subrogation, since expenditure for improvements discharged no obligation owing by life tenant.—Chapman v. Blackburn, 175 S.W.2d 26, 295 Ky. 606.

Termination of liability

Bank purchasing deficiency certificate from sheriff was not subrogated to rights of state against sheriff's surety for sheriff's collection of unlawful fees, when state refused to pay sum stipulated in deficiency certificate because of such unlawful fees, since surety's liability ceased when state recovered unlawful fees from sheriff by deducting them from payment of certificate.—Citizens' State Bank of Wheeler v. American Surety Co., Tex.Civ.App., 65 S.W.2d 778, error refused.

Widow as creditor

Where an annuity to testator's widow had not been paid, widow could be considered a creditor of testator's estate for purposes of son's suit to be subrogated to widow's rights under agreement to be compensated for caring for widow by having annuity paid to him.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

⁹². Ariz.—Mosher v. Conway, 46 P. 2d 110, 45 Ariz. 463.

Ill.—People v. Metropolitan Cas. Ins. Co. of N. Y., 90 N.E.2d 565, 339 Ill. App. 514.

60 C.J. p 711 note 71.

Right

A right, in order to be subrogated to another, must exist in the person from whom it is taken.—Travelers Ins. Co. v. E. I. Du Pont De Nemours & Co., 9 A.2d 88, 1 Terry, Del., 285.

Enforcement of original claim

Equitable subrogation is the enforcement of injured person's original claim and not of a separate claim, even though enforced by another person.—Insurance Co. of North America v. U. S., D.C.Pa., 76 F.Supp. 951.

⁹³. Ala.—*Corpus Juris* cited in Montgomery v. Wadsworth, 148 So. 419, 421, 226 Ala. 667.

Ind.—First & Tri State Nat. Bank & Trust Co. of Fort Wayne v. Massachusetts Bonding & Ins. Co., 200 N.E. 449, 102 Ind.App. 361.

60 C.J. p 711 note 72.

Surrender of contract

Where contractor surrendered his contract to construct house after the house was partially completed, and voluntarily agreed that nothing more was due to him, an unpaid materialman who furnished material to the contractor for use in constructing the house was not entitled to an equitable lien on theory that he was subrogated to the rights of the contractor, since there was no debt to which he could be subrogated.—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

No default

Where obligee, payee, or vendee is not in default or has not refused to comply with his obligation, subrogation may not be resorted to by a person paying debt of another.—Vance v. Atherton, 67 S.W.2d 968, 252 Ky. 591.

⁹⁴. Pa.—Commonwealth v. American Surety Co. of New York, 172 A. 844, 315 Pa. 428.

ily liable.⁹⁵ The true owner of property has no right of subrogation to the rights of tenants against one who collected rents as the agent of another whom the agent represented to be the true owner, since the tenants still owe the true owner the rent.⁹⁶

§ 8. Relationship of Subrogee to Debt Discharged

While it has been held that, in order to be entitled to subrogation, the payor must have some relationship to the debt, it is generally held that subrogation is available in favor of one, not a mere volunteer, who pays the debt of another, which in equity and good conscience should be paid by the latter. Subrogation is not available in favor of one primarily liable or one claiming under him.

Subrogation has been held to depend on the payor's relationship to the debt.⁹⁷ Accordingly, it has been held that such relationship must exist that the payment is to be regarded as by or on behalf of a person who had some interest in the premises or some claim against other persons which he is entitled in equity to have protected,⁹⁸ and that there must be a relationship of principal

and surety, or of primary and secondary liability, or a situation in which one person is compelled, even though only for his own protection and without obligation to another, to pay some other person's debt.⁹⁹ Although it has been stated that the doctrine of subrogation is confined to the relation of principal and surety and guarantors, and to cases where a person, in order to protect his own junior lien, is compelled to remove one which is superior, and to cases of insurers paying losses,¹ subrogation is not confined to those personally bound on the obligation,² and it is generally held that subrogation will be applied wherever a person not acting voluntarily, but under some compulsion, pays a debt or discharges an obligation for which another is primarily liable and which in equity and good conscience ought to be discharged by the latter;³ and generally where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, paying a debt should be substituted for or in the place of the creditor, such person will be so substituted.⁴

Primary or secondary liability; subrogation to own rights. It is not possible for a person to be

95. Pa.—In re Patterson Building & Loan Ass'n, 34 Pa. Dist. & Co. 114.

Person claiming through another whose duty it is to pay cannot claim right of subrogation against one who is secondarily liable.—Commonwealth, for Use, etc., of Emblem Oil Co. v. Baldwin Bros. Co., 186 A. 242, 122 Pa. Super. 403.

96. Tex.—De La Moriniere v. Sam, Civ. App., 8 S.W.2d 312.

97. Ala.—**Corpus Juris** cited in Strickland v. Carroll, 154 So. 109, 110, 228 Ala. 498.

Mich.—**Corpus Juris** cited in Wagner v. La Croix' Estate, 286 N.W. 182, 184, 289 Mich. 126.

Va.—Hinman v. Mason, 136 S.E. 573, 149 Va. 267, reheard 141 S.E. 144, 149 Va. 267.

98. Ala.—**Corpus Juris** quoted in Carter v. Carter, 38 So.2d 557, 559, 251 Ala. 598.

Ill.—Thompson v. Davis, 130 N.E. 455, 297 Ill. 11.

Ky.—Western Casualty & Surety Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487.

99. U.S.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C.C.A. Mo., 127 F.2d 799.

Tex.—**Corpus Juris** quoted in Ramey v. Cage, Civ. App., 90 S.W.2d 626, 628.

60 C.J. p 712 note 74.

Statutory enumeration

In order to be entitled to subrogation, person must be within statute enumerating cases in which subrogation is allowed.—Succession of Holstun, La. App., 141 So. 793.

1. Ill.—Dunlap v. Peirce, 168 N.E. 277, 336 Ill. 178, 66 L.R.A. 181—Harris Trust & Savings Bank v. Lennox, 263 Ill. App. 629.
60 C.J. p 714 note 90.

2. Md.—**Corpus Juris** cited in Ragan v. Kelly, 24 A.2d 289, 295, 180 Md. 324.

Ohio.—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

Tenn.—Harrison v. Harrison, 259 S.W. 906, 149 Tenn. 601, 32 A.L.R. 563.

3. U.S.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C.C.A. Mo., 127 F.2d 799—Stowers v. Wheat, C.C.A. Fla., 78 F.2d 25—American Surety Co. of New York v. Lewis State Bank, C.C.A. Fla., 58 F.2d 559.

Cal.—Stein v. Simpson, 230 P.2d 816, 37 Cal.2d 79.

D.C.—Amalgamated Casualty Ins. Co. v. Winslow, 135 F.2d 663, 77 U.S. App. D.C. 382.

Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

Md.—**Corpus Juris** cited in Ragan v. Kelly, 24 A.2d 289, 295, 180 Md. 324.

N.J.—Bater v. Cleaver, 176 A. 889, 114 N.J. Law 346.

N.C.—Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 213 N.C. 563.

Pa.—Trilling v. Cramer, 49 Dauph. Co. 276.

Tex.—**Corpus Juris** cited in Fidelity & Deposit Co. v. Farmers & Merchants Nat. Bank, Civ. App., 121 S.W.2d 503, 506.

60 C.J. p 714 note 91.

Subrogee need not be lienor

In order to invoke principle of subrogation a party need not necessarily be a junior mortgagee, judgment creditor, or other encumbrancer in order to protect his own interest out of an estate by subrogation to rights of a senior encumbrancer.—Lietka v. Hambersky, 74 A.2d 698, 167 Pa. Super. 304.

Debt paid from funds of another

(1) Subrogation is applicable whenever a debt or obligation is paid from the funds of one person, although properly payable from the funds of another.—In re McCahan's Estate, 168 A. 685, 312 Pa. 515—Rohm & Haas Co. v. Lessner, 77 A.2d 675, 168 Pa. Super. 242.

(2) Persons owning funds or property applied by others to payment of debts or encumbrancers as entitled to subrogation generally see *infra* § 44.

4. Kan.—Yaple v. Stephens, 14 P. 222, 36 Kan. 680.

60 C.J. p 715 note 8.

subrogated to his own rights.⁵ Subrogation is allowed only in favor of one who pays the debt of another,⁶ which debt was a valid enforceable obligation against that person,⁷ and subrogation is not allowed in favor of him who pays a debt in performance of his own obligation,⁸ since the right of subrogation never follows an actual primary liability,⁹ and there can be no right of subrogation in one whose duty it is to pay,¹⁰ or in one claiming under him¹¹ against one who is secondarily liable, or not liable at all. A person who cannot legally claim the attitude of a creditor holding the debt for the payment of which security is pledged is not entitled to subrogation to the security.¹² Where a decree of court orders that recourse for payment of the decree shall first be had against one of two de-

fendants, but does not make the liability of the parties in the nature of that of principal and surety, the party against whom recourse was to be had last cannot, on payment of the decree, be subrogated to all the rights of the creditor against the other party.¹³

§ 9. — Volunteers

A mere volunteer paying another's debt is not entitled to subrogation; but one is not a volunteer where he pays in the performance of a legal duty, or to protect his own rights and interests, or pursuant to a contract for subrogation.

It always requires something more than the mere payment of a debt in order to entitle the person paying it to be substituted in the place of the orig-

5. Fla.—Oakland Properties Corp. v. Hogan, 117 So. 850, 96 Fla. 52.

6. Ala.—Corpus Juris cited in Duke v. Kilpatrick, 163 So. 640, 641, 231 Ala. 51.

Mich.—Machined Parts Corp. v. Schneider, 286 N.W. 831, 289 Mich. 567.

N.H.—Corpus Juris cited in McCulloch v. John B. Varick Co., 10 A. 2d 245, 247, 90 N.H. 409.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

60 C.J. p 712 note 82.

7. U.S.—Corpus Juris cited in Eagle Star Ins. Co. v. Bean, D.C.Wash., 34 F.Supp. 300, 301, affirmed, C.C.A., 184 F.2d 755.

60 C.J. p 712 note 83.

8. U.S.—Amick v. Columbia Casualty Co., C.C.A.Mo., 101 F.2d 984—Commercial Casualty Ins. Co. v. Petroleum Pipe Line Co., C.C.A. Okl., 83 F.2d 412—American Surety Co. of New York v. Bank of California, D.C.Or., 44 F.Supp. 81, affirmed, C.C.A., 133 F.2d 160.

Ala.—Corpus Juris cited in Duke v. Kilpatrick, 163 So. 640, 641, 231 Ala. 51.

Ark.—Corpus Juris cited in Lindley v. Marriott, 114 S.W.2d 453, 454, 196 Ark. 1178.

D.C.—Woodside Manor, Inc. v. Rose Bros. Co., Mun.App., 83 A.2d 325.

Mass.—Jenks v. Lang, 19 N.E.2d 705, 302 Mass. 409.

Mich.—Machined Parts Corp. v. Schneider, 286 N.W. 831, 289 Mich. 567.

Neb.—Luikart v. Buck, 270 N.W. 495, 131 Neb. 866.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334.

60 C.J. p 712 note 84.

Debt assumed by another see infra

§ 9.

Subrogation where payor is one of several jointly liable see infra § 17.

Incidental benefits

Subrogation does not apply when one claiming it merely pays his own debt, not another's debt, even though incidental benefits may accrue to such other.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

9. U.S.—Corpus Juris cited in National Ben-Franklin Fire Ins. Co. of Pittsburgh, Pa., v. Geary, D.C.Mo., 29 F.Supp. 135, 137.

Ala.—Corpus Juris cited in Duke v. Kilpatrick, 163 So. 640, 641, 231 Ala. 51.

Ark.—Corpus Juris cited in Lindley v. Marriott, 114 S.W.2d 453, 454, 196 Ark. 1178.

Colo.—Liddle v. Lechman, 163 P.2d 802, 114 Colo. 189.

Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

D.C.—Woodside Manor, Inc. v. Rose Bros. Co., Mun.App., 83 A.2d 325.

Iowa.—In re Lunt's Trust, 24 N.W.2d 467, 237 Iowa 1097.

Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

Mass.—Jenks v. Lang, 19 N.E.2d 705, 302 Mass. 409.

Mich.—Corpus Juris cited in Wagner v. La Croix' Estate, 286 N.W. 182, 184, 289 Mich. 126.

Miss.—Home Ins. Co. of N. Y. v. Northington, 23 So.2d 537, 198 Miss. 650.

Neb.—Corpus Juris cited in Luikart v. Buck, 270 N.W. 495, 497, 131 Neb. 866.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

Pa.—Commonwealth v. American Surety Co. of New York, 172 A. 844, 315 Pa. 428.

Tenn.—Cole v. Patty, 134 S.W.2d

160, 175 Tenn. 334—Lovelace-Farm-er Co. v. Shaw, 4 Tenn.App. 458. Tex.—Kerens Nat. Bank v. Stockton, 94 S.W.2d 161, 127 Tex. 326—Rick-etts v. Alliance Life Ins. Co., Civ. App., 135 S.W.2d 725, error dis-mitted, judgment correct.

Wash.—Omicon Co. v. U. S. Fidelity & Guaranty Co., 152 P.2d 716, 21 Wash.2d 703.

60 C.J. p 713 note 85.

10. U.S.—Corpus Juris cited in Un-ion Joint Stock Land Bank v. By-ers, D.C.Pa., 33 F.Supp. 491, 493.

Ala.—Corpus Juris cited in Duke v. Kilpatrick, 163 So. 640, 641, 231 Ala. 51.

Colo.—Liddle v. Lechman, 163 P.2d 802, 114 Colo. 189.

Fla.—Williams v. City of Miami, 42 So.2d 582.

60 C.J. p 713 note 86.

11. U.S.—Corpus Juris cited in Un-ion Joint Stock Land Bank v. By-ers, D.C.Pa., 33 F.Supp. 491, 493. 60 C.J. p 713 note 87.

Where secured debt is satisfied out of security, general creditors of the debtor are not subrogated to the rights of the secured creditor against one secondarily liable for the secured debt.—Baskett v. Rudy, 239 S.W. 797, 194 Ky. 411.

Where award for injury to mort-gaged property is by court decree paid to the mortgagee, the mortga-gor's assignees or creditors are not entitled to be subrogated to the mort-gage as against subsequent mortga-gees.—Sarapin v. City of Philadel-phia, 159 A. 866, 306 Pa. 388.

12. Tex.—Hall v. First Nat. Bank, Civ.App., 252 S.W. 828, modified on other grounds 254 S.W. 522. 60 C.J. p 712 note 79.

13. U.S.—The Sagamore, D.C.N.Y., 3 F.2d 689.

inal creditor.¹⁴ Subrogation goes on the theory that the one invoking the remedy rightfully discharged the debt.¹⁵ A mere volunteer, inter-

meddler, or stranger, or one acting officiously in paying the debt of another, is not entitled to subrogation to the creditor's rights,¹⁶ where he pays

14. Pa.—*Corpus Juris* quoted in *Tesauro v. Calitri*, 33 A.2d 36, 37, 153 Pa.Super. 156—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 Pa.Super. 259.

Tex.—*Mikulenka v. Mikulenka*, Civ. App., 168 S.W.2d 517.
60 C.J. p 716 note 11, p 807 note 80.

15. N.D.—*Heegaard v. Kopka*, 212 N.W. 440, 55 N.D. 77.

16. U.S.—*In re Inland Gas Corp.*, C.C.A.Ky., 91 F.2d 113—Federal Deposit Ins. Corp. v. American Surety Co. of New York, D.C.Ky., 39 F. Supp. 551.

Ala.—*Barnes v. Powell*, 3 So.2d 80, 241 Ala. 409—*Corpus Juris* cited in *Duke v. Kilpatrick*, 163 So. 640, 641, 231 Ala. 51.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Ark.—*Corpus Juris* quoted in *Gosnell v. Garner*, 132 S.W.2d 187, 189, 198 Ark. 983.

Cal.—*Stein v. Simpson*, 230 P.2d 816, 37 Cal.2d 79—*McMillan v. O'Brien*, 29 P.2d 183, 219 Cal. 775, 91 A.L.R. 383.

Ga.—*Graves v. Carter*, 64 S.E.2d 450, 208 Ga. 5—*Telfair Stockton & Co. v. Trust Co. of Georgia*, 48 S.E.2d 532, 203 Ga. 802—*Callan Court Co. v. Citizens & Southern Nat. Bank*, 190 S.E. 831, 184 Ga. 87—*Lee v. Arlington Peanut Co.*, 169 S.E. 1, 176 Ga. 816—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 Ga. 242—*Hill, for Use of Etheridge v. Shaw*, 9 S.E.2d 850, 62 Ga.App. 757.

Ill.—*Thorp v. Board of Education of City of Chicago*, 90 N.E.2d 71, 404 Ill. 588—*Ohio Nat. Life Ins. Co. v. Board of Education of Grant Community High School Dist. No. 124*, 55 N.E.2d 163, 387 Ill. 159, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635—*Lake View Trust & Savings Bank v. Rice*, 279 Ill. App. 538—*Harris Trust & Savings Bank v. Lennox*, 263 Ill.App. 629.

Ind.—*Indiana Trust Co. v. Beagley*, 15 N.E.2d 758, 105 Ind.App. 502.

Kan.—*Old Colony Ins. Co. v. Kansas Public Service Co.*, 121 P.2d 193, 154 Kan. 643, 138 A.L.R. 1166.

Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1—*Vance v. Atherton*, 67 S.W.2d 968, 252 Ky. 591.

Mass.—*Blair v. Claffin*, 37 N.E.2d 501, 310 Mass. 186—*MacAleese's Case*, 33 N.E.2d 280, 308 Mass. 513.

Mo.—*Corpus Juris* cited in *Neer v. Neer*, App., 80 S.W.2d 240, 242—*Netherton v. Farmers' Exchange Bank of Gallatin*, 63 S.W.2d 156, 228 Mo.App. 296.

N.H.—*Mitchell v. Smith's Estate*, 4 A.2d 355, 90 N.H. 36.

N.J.—*Camden County Welfare Board v. Federal Deposit Ins. Corp.*, 62 A.2d 416, 1 N.J.Super. 532—*Schmid v. First Camden Nat. Bank & Trust Co.*, 22 A.2d 246, 130 N.J.Eq. 254.

N.Y.—*Charles H. Dauchy Co. v. Wilkinson*, 295 N.Y.S. 666, 251 App.Div. 53—*Auto Dealers' Discount Corporation v. Budd*, 272 N.Y.S. 893, 242 App.Div. 37—*In re Leonhauser's Will*, 51 N.Y.S.2d 335, 183 Misc. 863—*Ely v. Stone*, 17 N.Y.S.2d 266, 173 Misc. 117—*City of New York v. Barbato*, 5 N.Y.S.2d 125.

N.C.—*Beam v. Wright*, 32 S.E.2d 213, 224 N.C. 677—*Frederick v. Southern Fidelity Mut. Ins. Co.*, 20 S.E. 2d 372, 221 N.C. 409—*Boney v. Central Mut. Ins. Co. of Chicago*, 197 S. E. 122, 213 N.C. 563.

Ohio.—*Zimpher v. Schwartz*, 27 N.E. 2d 499, 64 Ohio App. 7—*Hill v. Hurlless*, 4 Ohio Supp. 1—*In re Outhwaite's Estate*, Prob., 94 N.E. 2d 122, affirmed, App., 94 N.E.2d 59.

Or.—*McBride v. McBride*, 36 P.2d 175, 148 Or. 478.

Pa.—*Corpus Juris* quoted in *Tesauro v. Calitri*, 33 A.2d 36, 37, 153 Pa. Super. 156—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 Pa. Super. 259—*Beck v. Beiter*, 22 A.2d 90, 146 Pa.Super. 114—*National Bank of Arendtsville v. Hartman*, 70 Pa.Dist. & Co. 588—*Johnson v. Donat, Com.Pl.*, 65 Montg.Co. 8, 11 Monroe L.R. 32.

S.C.—*American Surety Co. v. Hamrick Mills*, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147—*Watson v. Fowler*, 163 S.E. 640, 165 S.C. 288.

Tex.—*Verschoye v. Hollifield*, 123 S.W.2d 878, 132 Tex. 516—*Federal Reserve Bank of Dallas v. Smylie*, Civ.App., 134 S.W.2d 838—*Kostas v. C. D. Shamburger Lumber Co.*, Civ. App., 87 S.W.2d 511, error dismissed.

Wis.—*Home Owners' Loan Corp. of Washington, D. C., v. Dougherty*, 275 N.W. 363, 226 Wis. 8—*Marshall & Ilsley Bank v. Hackett, Hoff & Thiermann*, 250 N.W. 866, 213 Wis. 426.

60 C.J. p 716 note 12, p 807 note 88, p 808 notes 91, 92, p 818 note 20.

Right of:

One lending money for discharge of debt to subrogation see *infra* § 38.

Person to whom debtor conveyed property in fraud of creditors to subrogation with respect to debts and encumbrances discharged by him see *Fraudulent Conveyances* § 280.

Purchaser at invalid bulk sale to subrogation see *Fraudulent Conveyances* § 484 c.

Reason for rule

Payment by a mere volunteer extinguishes the debt.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Pa.—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 Pa.Super. 259.
60 C.J. p 716 note 12, p 718 note 13.

The mere occurrence of insolvency is not sufficient ground to extend legal subrogation to one who has voluntarily paid another's debt.—*Bankers Trust Co. v. Florida East Coast Car Ferry Co.*, C.C.A.Fla., 92 F.2d 450.

State having as volunteer paid indebtedness incurred by certain dissolved highway districts was not entitled to subrogation.—*Tri-County Highway Improvement Dist. v. Taylor*, 43 S.W.2d 231, 184 Ark. 675.

Close relative

(1) The fact that the one paying is a blood relation of the debtor does not remove him from the status of a volunteer.

Kan.—*Gantz v. Bondurant*, 155 P.2d 450, 159 Kan. 389.

Ky.—*Kevil Bank v. Page*, 126 S.W.2d 1082, 277 Ky. 657.

(2) One who without legal or moral obligation or request, consent, or ratification of debtor pays his debt cannot recover therefor from debtor, particularly where he is near relation of debtor, in which case there is rebuttable presumption that payment was gift.—*Hartley v. Hartley*, 179 S. E. 245, 50 Ga.App. 848.

Invalid gift

If deceased's alleged gift of money to sister was invalid, sister, in paying bills of deceased with such money, was mere volunteer.—*Union Trust Co. v. Davies*, 163 A. 744, 53 R.I. 63.

Claim for damages

Advancement by American bankers to purchasers of German government bonds of interest deposited in German bank to credit of bankers, but not permitted to be withdrawn, was

without an assignment of the debt or an agreement for subrogation.¹⁷ A "volunteer" or "stranger" within this rule is one who has no obligation or liability to pay the debt and has no interest in the property affected by the debt.¹⁸ Some compulsion to pay,¹⁹ such as legal process,²⁰ is ordinarily essen-

tial and sufficient to support subrogation. One induced by fraud to pay another's debt is not a mere volunteer and may obtain subrogation.²¹ Subrogation arises where, under circumstances equitably entitling him to the security or obligation held by the creditor, one having a liability, or a right, or oc-

a mere gratuitous service, and did not subrogate bankers to purchasers' rights, including right to damages for withholding fund.—*Doerschuck v. Mellon*, 55 F.2d 741, 60 App.D.C. 383, followed in *Mellon v. U. S. ex rel. Z. & F. Assets Realization Corporation*, 55 F.2d 745, 60 App.D.C. 387.

Release of debt

A married woman who discharges a debt in return for payment by her debtor of a debt owed by her and a debt of her husband, on which her debtor was an indorser, is not entitled to be subrogated to security held by her debtor as indorser, in the absence of an agreement therefor.—*Troxall v. Silverthorne*, N.J.Ch., 11 A. 684.

17. *Ariz.*—*Mosher v. Conway*, 46 P. 2d 110, 45 *Ariz.* 463.

Ga.—*Callan Court Co. v. Citizens & Southern Nat. Bank*, 190 S.E. 831, 184 *Ga.* 87—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 *Ga.* 242—*Hill*, for Use of *Etheridge v. Shaw*, 9 S.E.2d 850, 62 *Ga.* App. 757.

Ill.—*Lake View Trust & Savings Bank v. Rice*, 279 Ill.App. 538.

Md.—*Corpus Juris* quoted in *Harford Bank of Bel Air v. Hopper's Estate*, 181 A. 751, 755, 169 *Md.* 314.

N.H.—*Mitchell v. Smith's Estate*, 4 A. 2d 355, 90 *N.H.* 36.

Tex.—*Hays v. Spangenberg*, Civ.App., 94 S.W.2d 899.

60 C.J. p 716 note 12, p 810 note 27.

18. *Ariz.*—*Mosher v. Conway*, 46 P. 2d 110, 45 *Ariz.* 463.

Ark.—*Corpus Juris* quoted in *Gosnell v. Garner*, 132 S.W.2d 187, 189, 198 *Ark.* 989.

Ga.—*Telfair Stockton & Co. v. Trust Co. of Ga.*, 48 S.E.2d 532, 203 *Ga.* 802—*Callan Court Co. v. Citizens & Southern Nat. Bank*, 190 S.E. 831, 184 *Ga.* 87—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 *Ga.* 242—*Hill*, for Use of *Etheridge v. Shaw*, 9 S.E.2d 850, 62 *Ga.* App. 757.

Ill.—*In re Dickson's Estate*, 45 N.E. 2d 558, 316 Ill.App. 599—*Lake View Trust & Savings Bank v. Rice*, 279 Ill.App. 538.

Kan.—*Corpus Juris* cited in *Fenly v. Revell*, 228 P.2d 905, 910, 170 *Kan.* 705.

Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 *Ky.* 1.

N.J.—*Schmid v. First Camden Nat. Bank & Trust Co.*, 22 A.2d 246, 130 N.J.Eq. 254—*Camden County Welfare Board v. Federal Deposit Ins. Corp.*, 62 A.2d 416, 1 N.J.Super. 532.

N.C.—*Frederick v. Southern Fidelity Mut. Ins. Co.*, 20 S.E.2d 372, 221 N.C. 409.

Ohio.—*Reed v. Ramey*, 80 N.E.2d 250, 82 *Ohio* App. 171.

Or.—*McBride v. McBride*, 36 P.2d 175, 177, 148 *Or.* 478.

Pa.—*In re Bell*, 25 A.2d 344, 344 *Pa.* 223—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 *Pa.Super.* 259—*Beck v. Beiter*, 22 A.2d 90, 146 *Pa.* Super. 114.

S.C.—*American Surety Co. v. Hamrick Mills*, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

Tex.—*Verschoye v. Holifield*, 123 S.W.2d 878, 132 *Tex.* 516.

60 C.J. p 716 note 12.

Strict and narrow construction

The term "volunteer" as a limitation on the doctrine of subrogation precluding subrogation of one who has voluntarily paid the debt of another should be narrowly and strictly interpreted to the end that the doctrine may be liberally applied.—*Boney v. Central Mut. Ins. Co. of Chicago*, 197 S.E. 122, 213 N.C. 563.

Payment on own initiative

One paying, on his own initiative, another's debt, without invitation, compulsion, or necessity for self-protection, is usually regarded as a mere volunteer without any standing in equity, and he cannot rely on subrogation.—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 28 *Del.Ch.* 365.

No legal or moral obligation

One who pays debt of another without legal or moral obligation to do so is volunteer not entitled to subrogation.

Ga.—*Western Union Telegraph Co. v. Smith*, 178 S.E. 472, 50 *Ga.* App. 585.

Pa.—*Grambo v. South Side Bank & Trust Co.*, 14 A.2d 925, 141 *Pa.Super.* 176.

S.C.—*Silverman v. Dew*, 189 S.E. 756, 182 S.C. 457.

Tex.—*Hays v. Spangenberg*, Civ. App., 94 S.W.2d 899.

Where president of insolvent trust company deposited moneys and se-

curities with secretary of banking to indemnify against loss by reason of overdrafts on trust estates or funds, he was a volunteer who could not invoke the principle of exoneration or subrogation to rights and securities of creditor, and beneficiaries of trust estates were entitled to be paid in full before anything could be returned to creator of indemnity fund.—*In re Bell*, 25 A.2d 344, 344 *Pa.* 223.

19. *Ala.*—*Corpus Juris* cited in *Duke v. Kilpatrick*, 163 So. 640, 641, 231 *Ala.* 51.

Ark.—*Corpus Juris* quoted in *Gosnell v. Garner*, 132 S.W.2d 187, 189, 198 *Ark.* 989.

Ga.—*Lee v. Arlington Peanut Co.*, 169 S.E. 1, 176 *Ga.* 816.

Kan.—*Old Colony Ins. Co. v. Kansas Public Service Co.*, 121 P.2d 193, 154 *Kan.* 643, 138 A.L.R. 1166.

Md.—*Corpus Juris* quoted in *Harford Bank of Bel Air v. Hopper's Estate*, 181 A. 751, 755, 169 *Md.* 314.

N.C.—*Corpus Juris* cited in *Boney v. Central Mut. Ins. Co. of Chicago*, 197 S.E. 122, 126, 213 N.C. 563.

Pa.—*Corpus Juris* quoted in *Tesauro v. Calitri*, 33 A.2d 36, 37, 153 *Pa.* Super. 156—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 *Pa.Super.* 259—*Grambo v. South Side Bank & Trust Co.*, 14 A.2d 925, 141 *Pa.Super.* 176.

60 C.J. p 718 note 13.

Compulsion, duress, or apprehension of loss

Where plaintiff pays debt of defendants, under duress, compulsion, or justifiable apprehension, plaintiff may recover from defendants under doctrine of subrogation.—*Reed v. Ramey*, 80 N.E.2d 250, 82 *Ohio* App. 171.

20. *Ark.*—*Corpus Juris* quoted in *Gosnell v. Garner*, 132 S.W.2d 187, 189, 198 *Ark.* 989.

Md.—*Corpus Juris* quoted in *Harford Bank of Bel Air v. Hopper's Estate*, 181 A. 751, 755, 169 *Md.* 314.

Pa.—*Corpus Juris* quoted in *Tesauro v. Calitri*, 33 A.2d 36, 37, 153 *Pa.* Super. 156—*Corpus Juris* quoted in *Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 331, 151 *Pa.Super.* 259.

60 C.J. p 718 note 13.

21. *Del.*—*Eastern States Petroleum Co. v. Universal Oil Products Co.*, 44 A.2d 11, 28 *Del.Ch.* 365.

cupying a fiduciary relation in the premises, pays the debt of another,²² or where the payment is favored by public policy.²³

Payment under liability. As a general rule, one is not a volunteer and is entitled to subrogation where he pays another's debt in the performance of a legal duty imposed by contract or rules of law,²⁴ as where he will be liable in the event of a default,²⁵ or is secondarily liable,²⁶ or where one pays his own debt, the burden of which has, for a valuable consideration, been assumed by another,²⁷ or where one of two or more persons equally liable

to the creditor, on whom as between themselves the inferior obligation to pay the debt rests, pays the debt.²⁸ Payment under a moral obligation has been held not voluntary.²⁹ A bank paying a check after authority to do so has been withdrawn is subrogated to the payee's rights against the drawer.³⁰

Payment to protect own rights and interests. Subrogation will arise in favor of those who act under the necessity of self-protection.³¹ One who pays another's debt to protect his own rights and interests,³² or who pays another's debt in order

22. Fla.—Marianna Nat. Farm Loan Ass'n v. Braswell, 116 So. 639, 95 Fla. 510.
60 C.J. p 714 note 92.

23. Ga.—Western Union Telegraph Co. v. Smith, 178 S.E. 472, 50 Ga. App. 585.
Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.
60 C.J. p 715 note 1.

24. U.S.—Petition of M. P. Howlett, Inc., D.C.N.Y., 75 F.Supp. 438.
Fla.—Cuesta, Rey & Co. v. Newson, 136 So. 551, 102 Fla. 853.
Ga.—Western Union Telegraph Co. v. Smith, 178 S.E. 472, 50 Ga.App. 485.
Kan.—Old Colony Ins. Co. v. Kansas Public Service Co., 121 P.2d 193, 154 Kan. 643, 138 A.L.R. 1166.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

Ohio.—Hill v. Hurless, 4 Ohio Supp. 1.

Pa.—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa.Super. 259.

S.C.—Watson v. Fowler, 163 S.E. 640, 165 S.C. 288.

Wash.—J. D. O'Malley & Co. v. Lewis, 28 P.2d 283, 176 Wash. 194—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

60 C.J. p 714 note 95, p 787 note 94 [b].

Performance of building contract

Person who agreed to procure money for contractor, and who was bound to complete building on contractor's default, was not a volunteer in completing building; hence he could maintain suit on building construction bond in which he was obligee.—Employers' Liability Assur. Corporation v. Neely, Tex.Civ.App., 60 S.W.2d 836, error dismissed.

25. Ark.—Corpus Juris quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989.

Md.—Corpus Juris quoted in Harford Bank of Bel Air v. Hopper's Estate, 181 A. 751, 755, 169 Md. 314.

Pa.—Corpus Juris quoted in Tesaro v. Calitri, 33 A.2d 36, 37, 153 Pa. Super. 156—Corpus Juris quoted in Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 331, 151 Pa.Super. 259.

60 C.J. p 718 note 13.

26. U.S.—New York Cas. Co. v. Sinclair Refining Co., C.C.A.Okla., 108 F.2d 65—Federal Deposit Ins. Corp. v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551.

Ala.—Duke v. Kilpatrick, 163 So. 640, 231 Ala. 51.

Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.

N.C.—Frederick v. Southern Fidelity Mut. Ins. Co., 20 S.E.2d 372, 221 N.C. 409.

Pa.—In re Boles' Estate, 173 A. 664, 316 Pa. 179—Commonwealth v. American Surety Co. of New York, 172 A. 844, 315 Pa. 428.

S.C.—American Sur. Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147—Watson v. Fowler, 163 S.E. 640, 165 S.C. 288.

60 C.J. p 714 note 93.

Surety's right to subrogation see infra § 46 et seq.

Subordination of lien

Landlord who merely subordinated his privilege to lien of chattel mortgagee and crop pledge to secure tenant's notes was not entitled to subrogation, on appropriation of landlord's share of crop to discharge notes, on theory that landlord was bound with or for another for payment of debt.—Comeaux v. Savoy, La.App., 146 So. 725.

27. Okl.—American Liberty Life Ins. Co. v. Baird, 57 P.2d 829, 176 Okl. 132.

Wash.—First Nat. Bank & Trust Co. of Minneapolis v. U. S. Trust Co., 50 P.2d 904, 184 Wash. 212.

60 C.J. p 715 note 96.

Mortgagor paying after transfer of mortgaged property see infra § 37.

28. U.S.—New York Cas. Co. v. Sinclair Refining Co., C.C.A.Okla., 108 F.2d 65.

Ark.—Broyles v. Edmonson, 104 S.W.2d 813, 193 Ark. 1125.

Pa.—Bender v. George, 92 Pa. 36.

Subrogation of persons jointly or jointly and severally liable for same debt generally see infra § 17.

29. N.C.—Corpus Juris cited in Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 126, 213 N.C. 563.

60 C.J. p 719 note 21.

Government undertaking liability for theft by soldier

Where United States paid claim of Englishman for money stolen by American soldier under statute authorizing payment of claims on account of loss caused by military forces, United States was not acting as a mere volunteer in paying debt and in action by soldier against United States to recover money taken from him at time of arrest, United States would be subrogated to rights of Englishman and could set off amount so paid.—Ford v. U. S., 88 F.Supp. 263, 115 Ct.Cl. 793.

30. Tex.—American Nat. Bank v. Reed, Civ.App., 134 S.W.2d 782, error dismissed—Texas State Bank & Trust Co. v. St. John, Civ.App., 103 S.W.2d 1104, error dismissed.

31. Ohio.—Reed v. Ramey, 80 N.E.2d 250, 82 Ohio App. 171—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.
60 C.J. p 715 note 2.

Threat of civil and criminal liability

Supervisor's payment to town of tax collector's shortage after indictment and under threat of civil action was not voluntary so as to preclude right of subrogation against collector's surety.—Avey v. American Surety Co. of New York, 260 N.Y.S. 833, 146 Misc. 228—Avey v. American Surety Co. of New York, 260 N.Y.S. 828, 146 Misc. 224.

32. U.S.—Federal Deposit Ins. Corp.

to protect some interest which he represents,³³ is not ordinarily considered a volunteer and may be subrogated to the creditor's rights. Likewise, one who has an interest which is jeopardized by the continued existence of the debt of another is not a volunteer in paying that debt, and he may obtain subrogation.³⁴ Also, one who, being himself a creditor, pays another creditor, whose claim is preferable to his, by reason of his privileges or

mortgages, is not a volunteer and may obtain subrogation.³⁵

Contract or assignment. Although there is some authority to the contrary,³⁶ it is generally held that one paying the debt of another pursuant to an agreement, express or implied, for subrogation is not a volunteer,³⁷ and is entitled to subrogation to the creditor's rights.³⁸ While it has been held that

v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551.

Ala.—**Corpus Juris** cited in Strickland v. Carroll, 154 So. 109, 110, 228 Ala. 498.

Ark.—**Corpus Juris** quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989.

Cal.—Kenney v. Kenney, 217 P.2d 151, 97 Cal.App.2d 60—Diehl v. Hanrahan, 155 P.2d 853, 68 Cal.App.2d 32.

Ga.—Western Union Telegraph Co. v. Smith, 178 S.E. 472, 50 Ga.App. 485.

Ill.—Thorp v. Board of Education of City of Chicago, 90 N.E.2d 71, 404 Ill. 588—Ohio Nat. Life Ins. Co. v. Board of Education of Grant Community High School Dist. No. 124, 55 N.E.2d 163, 387 Ill. 159, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635.

Ky.—Evans' Adm'r v. Evans, 199 S.W.2d 734, 304 Ky. 28.

Md.—**Corpus Juris** quoted in Harford Bank of Bel Air v. Hopper's Estate, 181 A. 751, 755, 169 Md. 314.

Neb.—Luikart v. Buck, 270 N.W. 495, 131 Neb. 866.

N.J.—Coughlin v. Kennedy, 28 A.2d 417, 132 N.J.Eq. 383—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.Y.—In re Neptune Ave. in the City of Brooklyn, 300 N.Y.S. 545, 165 Misc. 577.

Ohio.—Hill v. Hurless, 4 Ohio Supp. 1.

Pa.—**Corpus Juris** quoted in Tesaro v. Calitri, 33 A.2d 36, 37, 153 Pa. Super. 156—Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 151 Pa. Super. 259.

Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

W.Va.—Frederick v. Read, 169 S.E. 387, 113 W.Va. 722.

60 C.J. p 715 notes 3, 4, p 718 note 13.

Payment necessary for enforcement of right

An attorney, paying costs adjudged against surety on supersedeas bond, given by corporation appealing from judgment against it after corporate appellee's assignment to such attorney of portion of judgment awarding it attorneys' fees, was not a mere volunteer, since appellate court clerk

could not send down mandate, as required before attorney could get out execution on judgment until collection of such costs, so that attorney was subrogated to right to collect costs from surety.—Casray Oil Corp. v. Royal Indemnity Co., Civ.App., 165 S.W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.

Condition to bid

Where bondholders of bankrupt hotel corporation paid liens of subcontractors arising out of hotel construction, as condition to bid at sale of hotel property, they were subrogated to rights of action of subcontractors against surety on bond of principal contractor.—Cherry v. Aetna Casualty & Surety Co., 25 N.E.2d 11, 372 Ill. 534—Cherry, for Use of Simon v. Aetna Casualty & Surety Co., 3 N.E.2d 105, 285 Ill.App. 601.

Protection of other security

Where bank by extension agreement agreed to pay mortgage to protect other security, bank on paying mortgage note was entitled to assignment of note and mortgage to enforce it against land.—Nippolt v. Farmers' & Merchants' State Bank of Springfield, 243 N.W. 136, 186 Minn. 325.

33. N.Y.—Sexton v. Fensterer, 139 N.Y.S. 811, 154 App.Div. 542, affirmed 107 N.E. 1085, 213 N.Y. 641.

34. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J. Super. 532—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J. Eq. 254.

Extent or quantity of interest

The extent or quantity of the interest which is in jeopardy is not material.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J. Eq. 254.

Ohio.—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

Stockholder paying obligation of corporation is not a volunteer, but acts in protection of interest and is

entitled to subrogation.—Gross v. Tierney, C.C.A.W.Va., 55 F.2d 578.

35. La.—Spiller & Allen v. Their Creditors, 16 La. Ann. 292—Comeaux v. Savoy, App., 146 So. 725.

Other inferior creditors

Inferior creditor's right to pay superior claim and be subrogated is not affected by existence of other inferior creditors.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Common or preferred creditors

The benefits afforded by the statutory provision with respect to a legal subrogation, such as takes place of right, for benefit of one who, being himself a creditor, pays another creditor whose claim is preferable to his by reason of his privileges or mortgages, flow to all inferior creditors, irrespective of whether they are common or preferred.—White System of Alexandria v. Fitzhugh, La. App., 5 So.2d 555.

36. Pa.—Lackawanna Trust & Safe Deposit Co. v. Gomeringer, 84 A. 757, 236 Pa. 179.

60 C.J. p 811 note 35.

Reason for rule

One paying his own debt has no right to require the creditor to transfer the claim instead of discharging it, and the debtor cannot confer such a right on a stranger to the transaction.—Lackawanna Trust & Safe Deposit Co. v. Gomeringer, 84 A. 757, 236 Pa. 179.

37. Ala.—**Corpus Juris** cited in Burch v. Burch, 165 So. 387, 231 Ala. 464.

Ky.—Movl Const. Co. v. Covington Trust & Banking Co., 80 S.W.2d 560, 258 Ky. 485.

Wis.—Home Owners' Loan Corp. of Washington, D. C. v. Dougherty, 275 N.W. 363, 226 Wis. 8.

60 C.J. p 811 notes 38, 40, 41, p 813 note 56.

38. U.S.—Federal Deposit Ins. Corp. v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551.

Ala.—Des Portes v. Hall, 192 So. 899, 238 Ala. 641.

Ark.—**Corpus Juris** quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989.

the mere fact that, at the instance of the debtor, a third person pays off a debt of another, does not entitle him to subrogation,³⁹ as a general rule, subrogation will be allowed where the payment is made pursuant to a request by the debtor,⁴⁰ or where there is a ratification of the payment,⁴¹ or an assignment of the debt.⁴²

A mere understanding, existing in the mind of the payor, that he will be entitled to subrogation will not so entitle him;⁴³ but, if persons not legally bound to pay do so, not as volunteers, but with a

well founded expectation, justified by the conduct or contract of the debtor, that they will be entitled to hold all the securities for their indemnity which the creditor had against the debtor, they will be subrogated.⁴⁴ It has been held that a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative, that if the debtor does not ratify such payment, the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.⁴⁵

Ky.—Mowl Const. Co. v. Covington Trust & Banking Co., 80 S.W.2d 560, 253 Ky. 485.

La.—Home Ins. Co. of New York v. Alsop-Baker Motor Co., App., 155 So. 33.

N.H.—Horton v. Eagle Indemnity Ins. Co., 171 A. 322, 86 N.H. 472.

N.C.—Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 213 N.C. 563.

Tex.—Platte v. Securities Inv. Co., Com.App., 55 S.W.2d 551—Mikulenska v. Mikulenska, Civ.App., 168 S.W.2d 517—Texas Bank & Trust Co. v. Bankers' Life Co., Civ.App., 43 S.W.2d 631.

Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

Wis.—Home Owners' Loan Corp. of Washington, D. C., v. Dougherty, 275 N.W. 363, 226 Wis. 8.

60 C.J. p 715 note 98, p 718 note 14, p 808 notes 94-96, 98, p 809 notes 99, 1, 2, p 811 note 38-p 813 note 52, p 819 note 40-p 820 note 42.

Right of one lending money for discharge of debt to subrogation see *infra* § 38.

Agreement by either debtor or creditor

Ky.—Western Casualty & Surety Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

Where a stranger pays a judgment, he will become subrogated to the judgment creditor's rights when, and only when, there is an intention and agreement or understanding to this effect.—Phillips v. Behn, 19 Ga. 298—34 C.J. p 691 notes 79, 80.

39. U.S.—Browder v. Hill, Tenn., 136 F. 821, 69 C.C.A. 499.

60 C.J. p 807 note 86.

40. U.S.—Gross v. Tierney, C.C.A. W.Va., 55 F.2d 578.

Ala.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

Ark.—Hawkins v. Scanlon, 206 S.W.2d 179, 212 Ark. 180—**Corpus Juris** quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989—

Cooper v. Home Owners' Loan Corp., 126 S.W.2d 112, 197 Ark. 839.

Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

Ind.—Kozanjieff v. Petroff, 19 N.E.2d 563, 215 Ind. 286, 122 A.L.R. 479.

Kan.—Finnegan v. Ihinger, 92 P.2d 538, 150 Kan. 357.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.C.—Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 213 N.C. 563.

Tex.—De Busk v. Jacksonville Bldg. & Loan Ass'n, Civ.App., 147 S.W.2d 537, error dismissed, judgment correct—Citizens Sav. Bank & Trust Co. v. Spencer, 105 S.W.2d 671, error dismissed Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt. v. Spencer, 110 S.W.2d 1151, 130 Tex. 384—Hays v. Spangenberg, Civ.App., 94 S.W.2d 899.

W.Va.—McClaren v. Anderson, 153 S.E. 379, 110 W.Va. 380.

60 C.J. p 715 note 99, p 719 note 15, p 819 note 34.

Fraud on payor

Person paying debt at request of debtor under circumstances which would operate as a fraud on him if security for debt were discharged by his payment may be subrogated to security as against debtor.—Ramey v. Cage, Tex.Civ.App., 90 S.W.2d 626.

One paying debt at request of creditor is a volunteer.—In re Dickson's Estate, 45 N.E.2d 558, 316 Ill.App. 599.

Tenancy by entirety; request by husband

The Home Owners' Loan Corporation which, in good faith, liquidated an existing valid vendor's lien on realty held by husband and wife by entirety, at instance of husband and at a time when wife was insane, was not a mere volunteer and was subrogated to the rights of vendor, and, subject to wife's right to redeem, could foreclose the lien against the wife who subsequently was declared

to be sane.—Cooper v. Home Owners' Loan Corp., 126 S.W.2d 112, 197 Ark. 839.

Request by beneficiary of policy

A wife, paying premiums which became due on life policy after disappearance of insured husband until discovery of his body at request of insured's mother who was named beneficiary and on mother's representation that proceeds of policy would be the wife's, was thereby not subrogated to mother's right to proceeds of policy.—Cook v. Cook, 174 P.2d 434, 110 Utah 406.

Manifestation of intent to keep lien alive

A person who pays a debt at the instance of the debtor is not a volunteer and, if such person at time of payment manifests an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the encumbrance.—Cooper v. Home Owners' Loan Corp., 126 S.W.2d 112, 197 Ark. 839.

41. Ark.—**Corpus Juris** quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989.

N.C.—Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 213 N.C. 563.

60 C.J. p 719 note 16.

42. Ark.—**Corpus Juris** quoted in Gosnell v. Garner, 132 S.W.2d 187, 189, 198 Ark. 989.

N.C.—Boney v. Central Mut. Ins. Co. of Chicago, 197 S.E. 122, 213 N.C. 563.

60 C.J. p 719 note 17, p 807 note 81.

43. Iowa.—Wragg v. Wragg, 226 N.W. 99, 208 Iowa 939, 64 A.L.R. 1292. N.J.—New Jersey Midland R. Co. v. Wortendyke, 27 N.J.Eq. 658.

44. Iowa.—Wragg v. Wragg, 226 N.W. 99, 208 Iowa 939, 64 A.L.R. 1292. 60 C.J. p 719 note 19.

45. W.Va.—Crumlish v. Central Imp. Co., 18 S.E. 456, 38 W.Va. 390, 45 Am.S.R. 872, 23 L.R.A. 120.

Mistake as to necessity of payment. Payments made in ignorance of the real state of facts cannot be said to be voluntary.⁴⁶ So, a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, or under an honest belief that he is bound,⁴⁷ or who mistakenly but in good faith believes that he has an interest in property, to protect which he discharges a lien⁴⁸ will be subrogated to the claim he has paid. However, it has been held that a mere mistake as to the

identity of the property with which he is dealing is not sufficient to prevent one discharging a lien from being considered a mere volunteer.⁴⁹

§ 10. Payment of Debt; Partial Subrogation

Ordinarily the debt must be paid in full before subrogation will be allowed; partial or pro tanto subrogation is allowed where the debt is paid in full, but not until full payment unless the creditor consents thereto.

Ordinarily before subrogation can be enforced the debt must be paid.⁵⁰ According to the decisions

46. Md.—*Corpus Juris* cited in *Ragan v. Kelly*, 24 A.2d 289, 295, 180 Md. 324.

N.C.—*Corpus Juris* cited in *Boney v. Central Mut. Ins. Co. of Chicago*, 197 S.E. 122, 126, 213 N.C. 563.

Tex.—*Corpus Juris* quoted in *Lusk v. Palmer*, Civ.App., 114 S.W.2d 677, 680.
60 C.J. p 719 note 22.

47. Ala.—*Carter v. Carter*, 38 So.2d 557, 251 Ala. 598.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Md.—*Corpus Juris* cited in *Ragan v. Kelly*, 24 A.2d 289, 295, 180 Md. 324.

Tex.—*Corpus Juris* quoted in *Lusk v. Palmer*, Civ.App., 114 S.W.2d 677, 680.

Wis.—*Schuetz v. Schuetz*, 296 N.W. 70, 237 Wis. 1.
60 C.J. p 719 note 23.

Public officer in armed forces

Commonwealth's attorney, paying a lawyer out of such attorney's private funds to perform his duties during his absence in army, under mistaken belief that he had legal authority to do so and would continue to receive emoluments of office, was entitled by subrogation to recover from Commonwealth all sums to which such lawyer was entitled as pro tempore Commonwealth's attorney under appointment by circuit judge.—*Whitworth v. Miller*, 193 S.W.2d 470, 302 Ky. 24.

48. Ala.—*Carter v. Carter*, 38 So.2d 557, 251 Ala. 598.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Cal.—*Stein v. Simpson*, 230 P.2d 816, 37 Cal.2d 79.

N.C.—*Boney v. Central Mut. Ins. Co. of Chicago*, 197 S.E. 122, 213 N.C. 563.

Ohio.—*In re Outhwaite's Estate*, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

Pa.—*In re Becker's Estate*, 43 Pa. Dist. & Co. 132, 58 Montg.Co. 95.

Tex.—*Coke v. Bargainies*, Civ.App., 116 S.W.2d 904, error dismissed.—*Corpus Juris* quoted in *Lusk v.*

Palmer, Civ.App., 114 S.W.2d 677, 680.

60 C.J. p 719 note 24.

Good faith; not good title

Subrogation does not depend on the validity of the title of the person claiming to be reimbursed, but on his good faith and discharge of an obligation on the land to protect an interest which he believed himself to have in the property.—*Tucker v. Holder*, 225 S.W.2d 123, 359 Mo. 1039.

Mistake of law

Where a person, as a result of a mistake of law, supposes himself to have an interest in land, he is treated as having such an interest for purposes of subrogation and as being within the rule entitling a person to subrogation where he of necessity acts to protect his own interest.—*Schuetz v. Schuetz*, 296 N.W. 70, 237 Wis. 1.

49. Mo.—*Jacobs v. Webster*, 205 S. W. 530, 199 Mo.App. 604.

50. U.S.—*Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, C.A.S.C., 199 F.2d 60—*American Surety Co. v. Bank of California*, C.C.A.Or., 133 F.2d 160—*Federal Ins. Co. v. Tamiami Trail Tours*, C.C.A.Fla., 117 F.2d 794.

Ala.—*Corpus Juris* cited in *Strickland v. Carroll*, 154 So. 109, 110, 228 Ala. 498—*Pickens County v. Johnson*, 149 So. 252, 227 Ala. 190, followed in *Montgomery v. Johnson*, 149 So. 257, 227 Ala. 196.

Ark.—*Fidelity & Deposit Co. of Maryland v. Cowan*, 41 S.W.2d 748, 184 Ark. 75.

Ind.—*Fast v. State*, 107 N.E. 465, 182 Ind. 606.

Kan.—*In re Concordia Mercantile Co.*, 244 P.2d 1175, 173 Kan. 155.

Mich.—*Associated Truck Lines v. Employers' Fire Ins. Co. of Boston*, Mass., 265 N.W. 780, 275 Mich. 74.

Minn.—*Corpus Juris* cited in *Anderson v. State Bank*, 254 N.W. 459, 461, 191 Minn. 404.

Mo.—*State ex rel. and to Use of Missouri Pac. R. Co. v. Haid*, 59 S.W.2d 690, 332 Mo. 616.

Neb.—*Wightman v. City of Wayne*, 28 N.W.2d 575, 148 Neb. 700.

N.Y.—*Globe Indemnity Co. v. Atlantic Lighterage Corporation*, 278 N. Y.S. 212, 244 App.Div. 97, affirmed 2 N.E.2d 640, 271 N.Y. 234.

N.C.—*Miller v. Potter*, 186 S.E. 350, 210 N.C. 268.

Ohio.—*Harshman v. Harshman*, App., 42 N.E.2d 447.

Okl.—*Berger v. City of Vinita*, 40 P. 2d 1, 170 Okl. 214.

S.C.—*Watson v. Fowler*, 163 S.E. 640, 165 S.C. 288.

Tenn.—*Third Nat. Bank in Nashville v. Carver*, 218 S.W.2d 66, 31 Tenn. App. 520.

Tex.—*American Employers' Ins. Co. v. Dallas Joint Stock Land Bank*, Civ.App., 170 S.W.2d 546, error refused—*Corpus Juris* cited in *Calderson v. Gonzales*, Civ.App., 158 S. W.2d 349, 350.

Vt.—*Iby v. Wrisley*, 158 A. 67, 104 Vt. 148.

Wash.—*Goodwin v. American Surety Co. of New York*, 68 P.2d 619, 190 Wash. 457.

Wis.—*Riley v. State Bank of De Pere*, 269 N.W. 722, 223 Wis. 16.

60 C.J. p 720 note 27.

Necessity for payment in order to entitle a surety to subrogation see *infra* § 48.

Surrender of property

Remote assignee of conditional sale contract covering furniture, who had notice of provision of lease to conditional seller awarding lessor lien on furniture, and who relinquished furniture to lessor foreclosing lessor's lien, could not recover from conditional seller who was secondarily liable for rent under equitable subrogation theory amount for which lessor took furniture as settlement for rent.—*Spokane Sec. Finance Corporation v. Titus*, 16 P.2d 1053, 170 Wash. 508.

Lien

In action on building contract wherein defendants filed a cross petition alleging that lumber company had filed lien against property for materials furnished to plaintiff, defendants were not entitled to judgment on the cross petition where they had not paid the lien.—*Dusi v.*

on the question, the debt must be paid in full,⁵¹ at least in so far as the rights of the principal creditor are concerned.⁵² Liability to pay⁵³ or a conditional tender of payment⁵⁴ is not sufficient. It is not necessary that payment be in money; anything accepted by the creditor is sufficient, provided it is actually accepted.⁵⁵ However, where the special circumstances of the case demand it, equity has allowed subrogation in cases where a liability only, and not payment, was shown.⁵⁶

Partial subrogation. Although subrogation may

be granted pro tanto under some circumstances,⁵⁷ the doctrine contemplates full substitution.⁵⁸ Ordinarily partial subrogation will not be allowed where the debt has not been paid in full,⁵⁹ and, until the whole debt is paid, there can be no interference with the creditor's rights or securities which might, even by bare possibility, prejudice him in the collection of the residue of his claim,⁶⁰ since a right of subrogation is against the debtor rather than against the creditor.⁶¹ Accordingly, a person who pays only one of two or more debts,⁶² or who pays

Albanese, 57 N.E.2d 803, 74 Ohio App. 136.

51. U.S.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, C.C. A.Mo., 137 F.2d 799—*Corpus Juris* cited in Standard Surety & Casualty Co. v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, 497, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530—National Surety Corp. v. Cherokee County Bank, Centre, D.C. Ala., 57 F.Supp. 370.

Ind.—Springer v. Foster, 60 N.E. 720, 27 Ind.App. 15.

Kan.—In re Concordia Mercantile Co., 244 P.2d 1175, 173 Kan. 155.

Mich.—Oakland County v. Central West Casualty Co., 254 N.W. 158, 266 Mich. 438, reheard 255 N.W. 733, 268 Mich. 117.

Mont.—Hardware Mut. Casualty Co. v. Butler, 148 P.2d 563, 116 Mont. 73.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.M.—George R. Sasser & Co. v. Chuck Wagon System, 172 P.2d 818, 50 N.M. 136.

N.Y.—American Surety Co. of New York v. Gerold, 7 N.Y.S.2d 447, 255 App.Div. 285, reargument denied 8 N.Y.S.2d 682, 255 App.Div. 950.

Ohio.—Harshman v. Harshman, App., 42 N.E.2d 447.

Pa.—Northampton Nat. Bank of Easton v. Holland, 190 A. 483, 126 Pa.Super. 597—First Nat. Bank v. Newark Fire Ins. Co., 180 A. 163, 118 Pa.Super. 582—Thomas v. Monroe County, 52 Pa.Dist. & Co. 21, 5 Monroe L.R. 121.

Tex.—Small v. Brooks, Civ.App., 163 S.W.2d 236, error refused—New York Casualty Co. v. State, Civ. App., 161 S.W.2d 150, affirmed 169 S.W.2d 158, 140 Tex. 549—Ricketts v. Alliance Life Ins. Co., Civ.App., 135 S.W.2d 725, error dismissed, judgment correct—Fidelity & Deposit Co. of Maryland v. Farmers & Merchants Nat. Bank of Nocona, Civ.App., 121 S.W.2d 503, error dis-

missed—Ramey v. Cage, Civ.App., 90 S.W.2d 626.

Va.—Obici v. Furcron, 168 S.E. 340, 160 Va. 351, 91 A.L.R. 848.

W.Va.—Price v. Lovins, 187 S.E. 318, 117 W.Va. 624.

60 C.J. p 720 note 28.

52. Ark.—Jones v. Harris, 117 S.W. 1077, 90 Ark. 51.

Fla.—Fowler v. Lee, 143 So. 613, 106 Fla. 712—Whyel v. Smith, 134 So. 552, 101 Fla. 971.

Pa.—Stofflett v. Kress, 21 A.2d 31, 342 Pa. 332—Guldner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A.2d 910, 342 Pa. 145.

53. La.—Motors Securities Co. v. Aetna Ins. Co. of Hartford, Conn., App., 17 So.2d 316.

Pa.—Bryan v. Home Ins. Co. of New York, 187 A. 924, 124 Pa.Super. 85.

Tenn.—Third Nat. Bank in Nashville v. Carver, 218 S.W.2d 66, 31 Tenn. App. 520.

Wis.—In re Liquidation of Anchor State Bank of West Milwaukee, 291 N.W. 329, 234 Wis. 261.

60 C.J. p 720 note 30.

Judgment

Where defendant, who was allegedly only accommodation maker on note, admitted execution of the note but made no offer to pay it during pendency of suit on it or at any time, he had no right to have judgment on note include adjudication of rights of subrogation against comaker which could be accorded him only after note in question had been paid.—Haley v. Brewer, Ark., 248 S.W.2d 890.

54. Pa.—Forest Oil Co.'s Appeals, 12 A. 442, 118 Pa. 138, 4 Am.S.R. 584. 60 C.J. p 720 note 31.

55. Kan.—*Corpus Juris* quoted in Jones v. Jones, 146 P.2d 405, 407, 158 Kan. 196.

60 C.J. p 720 note 32.

56. Kan.—*Corpus Juris* quoted in Jones v. Jones, 146 P.2d 405, 407, 158 Kan. 196.

60 C.J. p 721 note 33.

57. Iowa.—Black v. Chicago Great Western R. Co., 174 N.W. 774, 187 Iowa 904.

58. N.Y.—U. S. Fidelity & Guaranty Co. v. Borough Bank of Brooklyn, 146 N.Y.S. 870, 161 App.Div. 479, affirmed 107 N.E. 1086, 213 N.Y. 628.

59. Mont.—American Surety Co. of New York v. Clarke, 20 P.2d 831, 94 Mont. 1.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.Y.—Rogers v. Tolkov, 256 N.Y.S. 415, 235 App.Div. 798.

Ohio.—Harshman v. Harshman, App., 42 N.E.2d 447.

Pa.—Sheaffer v. Baeringer, 29 A.2d 697, 346 Pa. 32.

Tex.—Small v. Brooks, Civ.App., 163 S.W.2d 236, error refused.

Vt.—Iby v. Wrisley, 158 A. 67, 104 Vt. 148.

Wis.—Strelitz v. First Wisconsin Nat. Bank of Milwaukee, 264 N.W. 649, 220 Wis. 443. 60 C.J. p 721 note 36.

60. U.S.—Southern Surety Co. v. Braley, C.C.A.Mo., 64 F.2d 893—National Surety Corp. v. Cherokee County Bank, Centre, D.C. Ala., 57 F.Supp. 370.

Fla.—Whyel v. Smith, 134 So. 552, 101 Fla. 971.

Miss.—U. S. Fidelity & Guaranty Co. v. Sunflower County, 12 So.2d 142, 194 Miss. 680.

Vt.—Iby v. Wrisley, 158 A. 67, 104 Vt. 148.

Va.—Obici v. Furcron, 168 S.E. 340, 160 Va. 351, 91 A.L.R. 848. 60 C.J. p 721 note 34.

61. Wash.—Jensen v. American Bank of Spokane, 288 P. 660, 157 Wash. 240.

60 C.J. p 721 note 35.

62. Ohio.—Andwur Mortg. Loan Co. v. Murbach, 59 N.E.2d 235, 74 Ohio App. 387.

Pa.—Hunsberger v. Perkiomen Nat. Bank, 164 A. 839, 108 Pa.Super. 443. 60 C.J. p 721 note 37.

only some of a series of notes,⁶³ is not subrogated to any collateral securing all of the indebtedness until the entire indebtedness has been satisfied. The reason for the rule against subrogation on part payment is that the creditor cannot equitably be compelled to split his securities and give up control of any part until he is fully satisfied.⁶⁴ It is for the benefit of the creditor,⁶⁵ and he alone can object to subrogation under a partial payment and only to the extent that it would impair his preferred rights.⁶⁶ The rule extends only as far as its reason goes,⁶⁷ and is never invoked to defeat contract obligations in the interest of the debtor alone.⁶⁸

Partial or pro tanto subrogation will be allowed where the debt has been paid in full,⁶⁹ as where the balance of the debt has been satisfied by the principal,⁷⁰ or its full satisfaction has been brought about by two persons,⁷¹ or where the person claiming subrogation offers to pay any remaining unpaid portion of the debt.⁷² Also, if by some error or mistake of calculation as to interest or costs not quite

enough is paid to meet the whole debt, when the intention was to pay the whole debt, equity under its general power to relieve from mistake will grant subrogation pro tanto;⁷³ and one who endeavored but failed to ascertain the exact amount due, and then paid into court a sum in excess of the debt, interest, and costs is entitled to subrogation.⁷⁴

A judgment creditor is not bound to accept his debt from a stranger to the judgment, and a refusal of such tender is not equivalent to payment, for the purpose of subrogation, nor will it work an equitable assignment.⁷⁵ Partial subrogation will also be allowed where the creditor consents thereto or acquiesces therein.⁷⁶

The rule against partial subrogation has been held to apply to conventional, as well as to legal, subrogation,⁷⁷ unless the contract otherwise provides;⁷⁸ but it has been held that, when the right of subrogation is the result of an express agreement with the creditor, a partial payment may effect a pro tanto

63. Fla.—Whyel v. Smith, 134 So. 552, 101 Fla. 971.

Ohio.—Harshman v. Harshman, App., 42 N.E.2d 447.

64. U.S.—Standard Surety & Casualty Co. of New York v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.
60 C.J. p 721 note 38.

65. U.S.—Borserine v. Maryland Casualty Co., C.C.A.Mo., 112 F.2d 409—Corpus Juris quoted in Standard Surety & Casualty Co. of New York v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, 497, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.

Fla.—Fowler v. Lee, 143 So. 613, 106 Fla. 712.

Tex.—Corpus Juris cited in Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, 409, error dismissed.
60 C.J. p 721 note 39.

66. U.S.—Corpus Juris cited in Hurt v. Read, C.C.A.Tex., 108 F.2d 282, 283—Corpus Juris quoted in Standard Surety & Casualty Co. of New York v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, 497, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.C.—Journal Pub. Co. v. Barber, 81 S.E. 694, 165 N.C. 478.

67. U.S.—Corpus Juris quoted in Standard Surety & Casualty Co. v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, 497, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.
Ark.—Schoonover v. Allen, 40 Ark. 132.

68. U.S.—Corpus Juris quoted in Standard Surety & Casualty Co. v. Standard Accident Ins. Co., C.C.A.Mo., 104 F.2d 492, 497, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.

N.C.—Grantham v. Nunn, 121 S.E. 662, 187 N.C. 394.

Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed.

69. U.S.—Borserine v. Maryland Casualty Co., C.C.A.Mo., 112 F.2d 409—National Surety Corp. v. Cherokee County Bank, Centre, D.C.Ala., 57 F.Supp. 370.

Fla.—Fowler v. Lee, 143 So. 613, 106 Fla. 712.

La.—Comeaux v. Savoy, App., 146 So. 725.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.C.—Journal Pub. Co. v. Barber, 81 S.E. 694, 165 N.C. 478.

70. U.S.—National Surety Corp. v. Cherokee County Bank, Centre, D.C. Ala., 57 F.Supp. 370.

Fla.—Fowler v. Lee, 143 So. 613, 106 Fla. 712.
60 C.J. p 722 note 43.

71. Ga.—Wilkins v. Gibson, 38 S.E. 374, 113 Ga. 31, 84 Am.S.R. 204.

72. Ala.—Corinth State Bank v. First Nat. Bank, 117 So. 216, 217 Ala. 632.
Necessity and sufficiency of tender see § 64.

73. Pa.—Appeal of Sowers, 15 A. 898, 1 Mon. 49.

74. Md.—Snook v. Munday, 54 A. 77, 96 Md. 514.

75. Pa.—Nesbit v. Martin, 4 Pa.Co. 95.

76. N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.C.—Grantham v. Nunn, 121 S.E. 662, 187 N.C. 394.

77. Ind.—Maryland Casualty Company of Baltimore, Md. v. Cleveland, C. C. & St. L. Ry. Co., 144 N.E. 774, 74 Ind.App. 272.

N.Y.—New Jersey Equities Co. v. Mandel, 36 N.Y.S.2d 601, 178 Misc. 783.

Conventional subrogation generally see supra § 4.

78. Ind.—Maryland Casualty Co. of Baltimore, Md. v. Cleveland, C. C. & St. L. Ry. Co., 144 N.E. 774, 74 Ind.App. 272.

N.Y.—New Jersey Equities Co. v. Mandel, 36 N.Y.S.2d 601, 178 Misc. 783.

subrogation of the creditor's securities,⁷⁹ provided the contract is clear.⁸⁰

Effect of payment with intent to extinguish debt. If the facts and circumstances show definitely that at the time of payment the right of subrogation was not intended to be exercised, but, on the contrary, that the purpose was not to keep the debt alive but to extinguish it, the right of subrogation cannot be held to exist.⁸¹

§ 11. When Right to Subrogation Accrues

The right to subrogation accrues on payment of the debt.

The rights of a subrogee attach at the time the equities arise in his favor,⁸² which ordinarily is at the time he pays the debt,⁸³ but the right to subrogation does not mature until the debt is paid in full.⁸⁴

§ 12. Assignability of Right

The right of subrogation may be assigned.

The right of subrogation may be assigned and enforced by the assignee.⁸⁵

§ 13. Waiver or Loss of, and Estoppel to Assert, Right

The right to subrogation may be waived or the subrogee may be estopped to assert his right thereto.

Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be modified or extinguished by contract,⁸⁶ or may be waived,⁸⁷ either expressly⁸⁸ or by implication.⁸⁹ No one may complain if the person entitled to subrogation waives his right thereto,⁹⁰ except, possibly, the subrogee's creditors.⁹¹ In accordance with the rule as to waiver generally, waiver of the right of subrogation is a question of intention.⁹² It must be by the conduct of the subrogee,⁹³ and his right to subrogation will be unaffected by the conduct of another.⁹⁴

In order to establish a waiver it is necessary to show by clear evidence an intentional relinquishment of a known right.⁹⁵ It is not necessary, however, that the subrogee use the word "waive" in releasing his rights,⁹⁶ but it is sufficient if the understanding and arrangement are plainly expressed by the words

79. Ind.—Washington Tp. Board of Finance v. American Surety Co. of New York, 183 N.E. 492, 97 Ind.App. 45.

60 C.J. p 703 note 79.

80. Ind.—Washington Tp. Board of Finance v. American Surety Co. of New York, supra.

60 C.J. p 703 note 79 [c].

81. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Okl.—*Corpus Juris* quoted in Christ-burgh v. Anderson, 66 P.2d 902, 906, 179 Okl. 552.

N.Y.—Loomer v. Wheelwright, 3 Sandf.Ch. 135.

60 C.J. p 722 note 50.

82. N.J.—*Corpus Juris* quoted in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 255, 130 N.J.Eq. 254.

N.Y.—Pacific Fire Ins. Co. v. L. A. D. Motors Corporation, 240 N.Y.S. 372, 136 Misc. 594.

83. N.J.—*Corpus Juris* quoted in Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 255, 130 N.J.Eq. 254.

N.Y.—Pacific Fire Ins. Co. v. L. A. D. Motors Corporation, 240 N.Y.S. 372, 136 Misc. 594.

Wis.—Heller v. Shapiro, 242 N.W. 174, 208 Wis. 310, 87 A.L.R. 1201.

84. N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

85. Ariz.—Mosher v. Conway, 46 P. 2d 110, 45 Ariz. 463.

W.Va.—McClaren v. Anderson, 158 S. E. 379, 110 W.Va. 380.

60 C.J. p 722 note 53.

Assignee of second mortgage, claiming subrogation to satisfied first mortgage, stood in assignor's shoes and took equitable right burdened with its infirmities.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

The purchaser and assignee of a note secured by trust deed was entitled to assert whatever right of subrogation the assignor was entitled to assert.—Jack v. Wong Shee, 92 P.2d 449, 33 Cal.App.2d 402.

86. U.S.—Hardware Mut. Ins. Co. v. Dunwoody, C.A.9, 194 F.2d 666.

Minn.—Northern Trust Co. v. Consolidated Elevator Co., 171 N.W. 265, 142 Minn. 132, 4 A.L.R. 510.

87. Cal.—*Corpus Juris* cited in Jack v. Wong Shee, 92 P.2d 449, 453, 33 Cal.App.2d 402.

W.Va.—*Corpus Juris* cited in Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 739, 113 W. Va. 764.

60 C.J. p 722 note 55.

88. Ala.—Tyus v. De Jarnette, 26 Ala. 280.

N.Y.—Hope v. Seaman, 119 N.Y.S. 713, modified on other grounds 122 N.Y.S. 127, 137 App.Div. 86, affirmed 97 N.E. 1106, 204 N.Y. 563.

89. N.Y.—Hope v. Seaman, supra.

90. Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113—Lossman v. City of Stockton, 44 P.2d 397, 6 Cal.App.2d 324.

91. Pa.—Appeal of Huston, 69 Pa. 485, overruling Harrisburg Bank v. German, 3 Pa. 300.

92. N.Y.—U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 146 N.Y. S. 804, 161 App.Div. 429, affirmed 107 N.E. 1087, 213 N.Y. 629.

93. N.C.—Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380.

Vt.—Hall v. Windsor Sav. Bank, 121 A. 582, 124 A. 593, 97 Vt. 125.

94. Vt.—Hall v. Windsor Sav. Bank, supra.

95. Ala.—Corinth State Bank v. First Nat. Bank, 117 So. 216, 217 Ala. 632.

60 C.J. p 722 note 63.

96. Or.—First Nat. Bank v. U. S. Fidelity & Guaranty Co., 271 P. 57, 127 Or. 147.

used, and the rights and equities of the parties are clearly delineated.⁹⁷ Any positive act done by the subrogee, at the time of, or subsequent to, payment, inconsistent with the enforcement of the right, will be considered as a waiver.⁹⁸ Thus a conventional subrogee, who accepts other and different security than his agreement for subrogation calls for, thereby loses his right to subrogation.⁹⁹ Where one of two joint purchasers discharged the entire vendor's lien on the property, but failed to claim subrogation to the vendor's lien to support his right to contribution until after the giving of a mortgage on the property, he has been denied subrogation as against the mortgagee.¹ The right is also lost by inexcusable negligence on the part of the person asserting it;² but the equitable lien of a subrogee to the rights of a pledgee is not affected by attachment proceedings which are dissolved without any sale;³ nor it has been held, is it divested by the removal of the goods pledged or its proceeds from the jurisdiction by the pledgor's trustee in bankruptcy.⁴

Estoppel to assert right. The ordinary doctrine of estoppel applies to the subrogee's right to subrogation.⁵ Thus, the subrogee is estopped to claim subrogation where he urges another person to buy land without disclosing to him an intention to assert, in any event, some claim to it, resulting from facts or rights then existing, and without notifying him of the existence of such facts or contingent claim.⁶ However, negligence in asserting his claim does not estop one to seek subrogation unless such negligence causes injury to another or increases the burden of other lienholders.⁷

§ 14. Operation and Effect

The subrogee is ordinarily entitled to all of the creditor's rights, privileges, priorities, remedies, liens, judgments, and mortgages, subject to such limitations and conditions as were binding on the creditor; but he is not entitled to any greater rights than the creditor.

Ordinarily, subrogation, legal or conventional, passes all the creditor's rights privileges, remedies, liens, judgments, and mortgages.⁸ The subrogee is

97. Or.—First Nat. Bank v. U. S. Fidelity & Guaranty Co., *supra*.

98. U.S.—Union Joint Stock Land Bank of Detroit, Mich., v. Byers, D.C.Pa., 33 F.Supp. 491.

Cal.—Jack v. Wong Shee, 92 P.2d 449, 33 Cal.App.2d 402.

Ind.—Kozanjieff v. Petroff, 19 N.E.2d 563, 215 Ind. 286, 122 A.L.R. 479.

Kan.—Davidson v. McKown, 139 P.2d 421, 157 Kan. 217.

60 C.J. p 723 note 66.

99. U.S.—In re Rogers Palace Laundry Co., C.C.A.Ill., 275 F. 829.

1. Ky.—Gilliam v. Cassady, 161 S.W. 2d 915, 290 Ky. 477.

2. Iowa.—Webber v. Frye, 202 N.W. 1, 199 Iowa 448.

3. U.S.—In re Plantations Co., D.C. Pa., 270 F. 273.

4. U.S.—In re Plantations Co., *supra*.

5. Vt.—Hall v. Windsor Sav. Bank, 121 A. 582, 124 A. 593, 97 Vt. 125.

60 C.J. p 723 note 70.

6. Ky.—Kleiser v. Scott, 6 Dana 137.

7. N.D.—Farmers' State Bank of Richardton v. Stieg, 219 N.W. 776, 56 N.D. 851.

8. Ala.—Crutchfield v. Johnson & Latimer, 8 So.2d 412, 243 Ala. 73.

Ariz.—Mosher v. Conway, 46 P.2d 110, 45 Ariz. 463.

Del.—Olivere v. Taylor, 65 A.2d 723, 31 Del.Ch. 53.

Fla.—Cuesta, Rey & Co. v. Newson, 136 So 551, 102 Fla. 853.

Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.

La.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Miss.—U. S. Fidelity & Guaranty Co. v. State, for Use of Merchants Bank & Trust Co., 188 So. 911, 186 Miss. 1.

Mo.—In re Jamison's Estate, 202 S.W. 2d 879.

N.H.—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Ohio.—Inter Ins. Exchange of the Chicago Motor Club v. Wagstaff, 59 N.E.2d 373, 144 Ohio St. 457.

Or.—National Fire Ins. Co. v. Mogan, 206 P.2d 963, 186 Or. 286.

Pa.—Commonwealth v. American Surety Co. of New York, 172 A. 844, 315 Pa. 428—Trilling v. Cramer, Com.Pl., 49 Dauph.Co. 276.

Philippine.—Azarraga v. Rodriguez, 9 Philippine 637—Palma v. Cafilzars, 1 Philippine 602.

Va.—Loughran v. Kincheloe, 168 S.E. 362, 160 Va. 292.

W.Va.—Central Trust Co. v. Bank of Mullens, 150 S.E.2d 221, 107 W.Va. 679.

60 C.J. p 723 note 76.

Subrogation to collateral securing other debts see *supra* § 10.

Nonassignable Lien

A third person who discharges a carrier's lien is not entitled to subrogation thereto, since a carrier's lien is not assignable.—Whaley Lumber

Co. v. Reliance Brick Co., Tex.Civ. App., 2 S.W.2d 911.

Creditor cannot dictate terms of resulting legal subrogation to favor other inferior creditors or himself.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Sovereign rights

Subrogated rights may rise as high as, except where sovereign rights of state are involved, but no higher than, their source.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

Statutory lien of United States

(1) The statutory lien of the United States against the assets of a bank which fails to pay a check certified by it has been held not to pass by subrogation to the one for whose debt the check was tendered on his paying the debt.—Harry Bierschenk Co. v. Goess, D.C.N.Y., 12 F.Supp. 295.

(2) However, where taxpayer paid internal revenue taxes by certified check, but before check was presented for payment bank became insolvent and taxpayer was again compelled to pay taxes, taxpayer was held subrogated to statutory right and lien of United States and, therefore, was entitled to preferred claim against assets of insolvent bank for amount of check.—Cuesta, Rey & Co. v. Newson, 136 So. 551, 102 Fla. 853.

"Subrogation" is not restricted to rights against principal debtor, but extends to all the remedies which creditor had against the principal and others liable for the debt.—Home Ins.

entitled to the same priority in the payment of the claim as the creditor would have.⁹ While assignment and subrogation have been distinguished, as discussed in Assignments § 2 b (12), it is generally held that subrogation operates as an equitable assignment,¹⁰ and an actual assignment is not necessary.¹¹ Equity treats the debt,¹² lien,¹³ or mortgage¹⁴ which has been paid and extinguished as

still subsisting for the benefit of the person entitled to subrogation.

A person entitled to subrogation must work through the creditor whose rights he claims.¹⁵ He stands in the shoes of the creditor,¹⁶ and is entitled to the benefit of all the remedies of the creditor and may use all the means which the creditor could employ to enforce payment.¹⁷ However, he can en-

Co. v. Bishop, 34 A.2d 22, 140 Me. 72.

Partnership

Individual paying general creditors of partnership was subrogated to rights of general creditors whose claims he paid, and he had right to protect his interest in partnership property against any attempt of government to sequester partnership property for payment of income tax due from partners individually.—Adler v. Nicholas, C.C.A.Colo., 166 F.2d 674.

9. La.—Shaw v. Wells, App., 17 So. 2d 387—A. Baldwin & Co. v. Le Long, App., 143 So. 723.

Or.—National Fire Ins. Co. v. Mogan, 206 P.2d 963, 186 Or. 285.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

Tex.—Calderon v. Gonzales, Civ.App., 158 S.W.2d 349.

W.Va.—Central Trust Co. v. Bank of Mullens, 150 S.E.2d 221, 107 W.Va. 679.

Personal right to priority

Where one person discharges an obligation owed by another to a third person under such circumstances that he is entitled to subrogation, and third person has a claim entitling him to preference over claims of other creditors, one discharging the obligation is entitled to a similar preference, except where right of creditor to priority was merely personal to him.—Western Casualty & Surety Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

Subrogation to secure contribution

In judgment creditor's action to subject to satisfaction of judgment land owned jointly by judgment debtor and his elder brother, who had paid taxes and interest on mortgage thereon, trial court properly decreed older brother's lien for taxes and interest superior to lien of plaintiff's judgment.—Fender v. Reed, 12 N.W.2d 98, 143 Neb. 911.

10. U.S.—Stowers v. Wheat, C.C.A. Fla., 78 F.2d 25.

Ky.—Hill v. Hoover, 166 S.W.2d 450, 292 Ky. 548.

60 C.J. p 789 notes 99, 1-3.

When right to subrogation arises, equity makes assignment and right

does not then depend on, and is not affected by, willingness or unwillingness of creditor to transfer security.—Crawford State Bank v. McEwen, 272 N.W. 226, 132 Neb. 399.

An assignment is a form of subrogation, and, hence, when by virtue of subrogation one is entitled to substitution in the place of one entitled to sue, neither a written nor an oral contract is necessary to effect transfer of such right, and formal written assignment of claims adds nothing to enforceability of cause of action by assignee.—Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 11 Cal.2d 92.

11. La.—Comeaux v. Savoy, App., 146 So. 725.

Neb.—Crawford State Bank v. McEwen, 272 N.W. 226, 132 Neb. 399. 60 C.J. p 723 note 77.

Implied assignment

Right of subrogation does not necessarily depend on express assignment of cause of action, but facts must support implied assignment in toto of a legally assignable cause of action.—Subscribers at Casualty Reciprocal Exchange, by Dodson v. Kansas City Public Service Co., 91 S.W. 2d 227, 230 Mo.App. 468.

12. Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 44 A.2d 11, 28 Del.Ch. 365.

13. Tex.—Harrison v. First Nat. Bank, Com.App., 238 S.W. 209. 60 C.J. p 789 note 5.

14. Ohio.—Joyce v. Dauntz, 45 N.E. 900, 55 Ohio St. 538. 60 C.J. p 789 note 6.

15. Ala.—Corpus Juris cited in Crutchfield v. Johnson & Latimer, 8 So.2d 412, 414, 243 Ala. 73.

Tex.—San Antonio Cattle Loan Co. v. Blalack & Son, Civ.App., 256 S.W. 974, affirmed, Com.App., 267 S.W. 474.

16. U.S.—Stowers v. Wheat, C.C.A. Fla., 78 F.2d 25—Maryland Cas. Co. v. Independent Metal Products Co., D.C.Neb., 99 F.Supp. 862—Corpus Juris cited in Eagle Star Ins. Co. v. Bean, D.C.Wash., 34 F.Supp. 300, 301, affirmed, C.C.A., 134 F.2d 755. Ala.—Corpus Juris cited in Crutch-

field v. Johnson & Latimer, 8 So.2d 412, 414, 243 Ala. 73.

Ga.—Bickerstaff v. Ellis, 51 S.E.2d 821, 204 Ga. 734.

Ill.—Freeman v. Equitable Life Assur. Soc. of U. S., 26 N.E.2d 714, 304 Ill.App. 517.

Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.

La.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Ohio.—Inter Ins. Exchange of the Chicago Motor Club v. Wagstaff, 59 N.E.2d 373.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

Tex.—Navarro Oil Co. v. Cross, Civ. App., 190 S.W.2d 413, reversed on other grounds 200 S.W.2d 616, 145 Tex. 562.

60 C.J. p 723 note 79.

As if payment not made

One who rests on subrogation stands in the place of one whose claim he has paid, as if the payment giving rise to the subrogation had not been made, and he cannot jump back and forth in time and present himself at once as the unpaid claimant and again, under the conditions as they have changed because payment was made.—U. S. v. Munsey Trust Co. of Washington, D. C., Ct.Cl., 67 S. Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022.

Laws applicable to creditor

La.—International Paper Co. v. Arkansas & L. M. Ry. Co., App., 35 So. 2d 769.

17. Ala.—Corpus Juris cited in Crutchfield v. Johnson & Latimer, 8 So.2d 412, 414, 243 Ala. 73.

Ill.—Freeman v. Equitable Life Assur. Soc. of U. S., 26 N.E.2d 714, 304 Ill.App. 517.

Ky.—Federal Deposit Ins. Corp. v. Wilhoit, 180 S.W.2d 72, 297 Ky. 339.

Miss.—Robert G. Bruce Co. v. Spears, 187 So. 756, 187 Miss. 405.

N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Okl.—Smith v. Southwestern Engraving Co. of Oklahoma, 11 P.2d 921, 157 Okl. 211.

60 C.J. p 723 note 80.

Exemption from statute of limitations

Where street improvement district brought foreclosure proceedings for

force only such rights as the creditor could enforce,¹⁸ and must exercise such rights under the same conditions and limitations as were binding on the creditor;¹⁹ and, hence, can be subrogated to no greater rights than the one in whose place he is substituted.²⁰ If the latter had no rights, the subrogee can have none.²¹ Where a creditor is seeking to obtain satisfaction of his claim through subrogation to the rights of his debtor against a third person, the utmost good faith on his own part will not entitle him to prevail, if it appears that his debtor has been guilty of such fraud as to defeat his rights against such third person.²²

Subrogation will not be allowed as against intervening equities acquired in reliance on a recorded release of the lien with respect to which subrogation is sought.²³ The doctrine of relation back cannot be used by the subrogee for the purpose of recovering money paid to persons having no notice, in satisfaction of just claims, prior to the maturing of the right to subrogation.²⁴ A statute protecting the title of creditors without notice against trusts implied by law or created or declared by the parties has been held to bar subrogation, as against a judgment creditor, to a lien superior to the creditor's where the creditor had no notice of the claim to subrogation at the time he acquired his lien.²⁵ On the

delinquent district taxes and obtained title and agreed to surrender of such title and its lien, on execution by owners of land of notes secured by trust deed which were then sold and assigned by the district to plaintiff who furnished the money, plaintiff became subrogated to the rights and remedies of the district, including the right of the district to the exemption from statutes of limitation.—*Lueken v. Burch*, 219 S.W.2d 235, 214 Ark. 921.

Attorney's fees

Where accommodation indorsers of notes paid them, they became owners of the notes, with subrogation to holder's rights, including the right to recover attorney's fees stipulated in the notes and in mortgage securing such notes.—*Cook v. Crow*, La.App., 194 So. 455.

18. Ala.—*Corpus Juris* cited in *Crutchfield v. Johnson & Latimer*, 8 So.2d 412, 414, 243 Ala. 73.—*Turner v. Lumbermen's Mut. Ins. Co.*, 180 So. 300, 235 Ala. 632.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Ill.—*Corpus Juris* cited in *Franceschi v. Franceschi*, 62 N.E.2d 1, 7, 326 Ill.App. 494.

Pa.—*In re Sivak's Estate*, 58 A.2d 456, 359 Pa. 194.
60 C.J. p 724 note 81.

19. Ala.—*Corpus Juris* cited in *Crutchfield v. Johnson & Latimer*, 8 So.2d 412, 414, 243 Ala. 73.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Ga.—*Bickerstaff v. Ellis*, 51 S.E.2d 821, 204 Ga. 734.

Md.—*Poe v. Philadelphia Casualty Co.*, 84 A. 476, 118 Md. 347.

Disabilities qualifying right of original creditor remain as limitations on right of subrogee.—*Fell v. Johnston*, 36 A.2d 227, 154 Pa.Super. 470.

Infirmities and set-offs

Right asserted by subrogee is sub-

ject to the same infirmities and set-offs as though its original owner were asserting it, and the extent to which subrogee's recovery will be diminished thereby must be determined just as though original owner were asserting it.—*Coal Operators Cas. Co. v. U. S.*, D.C.Pa., 76 F.Supp. 681.

20. U.S.—*Beecher v. Leavenworth State Bank*, C.A.Wash., 192 F.2d 10, certiorari denied 72 S.Ct. 1048, two cases, 343 U.S. 953, 954, 96 L.Ed. 1354, and 73 S.Ct. 187, 344 U.S. 886, 97 L.Ed. — *Fidelity & Casualty Co. of New York v. Hoyle*, C.C.A. N.C., 64 F.2d 413.—*Maryland Casualty Co. v. Lincoln Bank & Trust Co.*, D.C.Ky., 18 F.Supp. 375.—*Globe Indemnity Co. v. U. S.*, 84 Ct.Cl. 587, certiorari denied 58 S.Ct. 26, 302 U.S. 707, 82 L.Ed. 546.

Ala.—*Corpus Juris* cited in *Crutchfield v. Johnson & Latimer*, 8 So.2d 412, 414, 243 Ala. 73.

Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Cal.—*Jack v. Wong Shee*, 92 P.2d 449, 33 Cal.App.2d 402.

Conn.—*Connecticut Sav. Bank of New Haven v. First Nat. Bank & Trust Co. of New Haven*, 84 A.2d 267, 138 Conn. 298.—*Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 123 Conn. 232.

La.—*Pearl v. Rykoski, Inc.*, App., 195 So. 30, affirmed 197 So. 605, 195 La. 931.

Neb.—*Gilbert v. First Nat. Bank, Minatare, Neb.*, 48 N.W.2d 401, 154 Neb. 404.

N.C.—*Parsons v. Leak*, 167 S.E. 567, 204 N.C. 92.

Tex.—*Platte v. Securities Inv. Co.*, Com.App., 55 S.W.2d 551.—*Pugh v. Clark*, Civ.App., 238 S.W.2d 980, error refused no reversible error.

60 C.J. p 724 note 83.

Subrogee of unsecured debt is not entitled to claim a lien.—*MacBryde v. Burnett*, D.C.Md., 44 F.Supp. 833, affirmed, C.C.A., 132 F.2d 898.

Subrogor not party

A subrogee cannot improve his position or augment his right beyond that of the subrogor merely because he sues in his own name without bringing in the subrogor as a party.—*Coal Operators Casualty Co. v. U. S.*, D.C.Pa., 76 F.Supp. 681.

21. U.S.—*Maryland Casualty Co. v. Independent Metal Products Co.*, D.C.Neb., 99 F.Supp. 862.—*Rud. Degermark A.-B. v. Monarch Silk Co.*, D.C.Pa., 85 F.Supp. 535.

Conn.—*Connecticut Sav. Bank of New Haven v. First Nat. Bank & Trust Co. of New Haven*, 84 A.2d 267, 138 Conn. 298.

N.Y.—*Chapin Owen Co. v. Newman*, 107 N.Y.S.2d 941, 201 Misc. 1072.—*In re Wolf's Estate*, 87 N.Y.S.2d 327.

Pa.—*Commonwealth to Use of Willow Highlands Co. v. Maryland Casualty Co.*, 85 A.2d 83, 369 Pa. 300.—*Vogue Co. v. John C. Winston Co.*, 76 Pa.Super. 158.

60 C.J. p 724 note 84, p 787 note 94 [a].

Where carrier's lien was lost by abandonment of the goods, payment of the freight by one secondarily liable therefor did not entitle him to enforce the carrier's lien.—*Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co.*, D.C.Or., 145 F. 687.

22. U.S.—*Green v. Turner*, C.C.Wis., 80 F. 41, affirmed 86 F. 837, 30 C.C. A. 427.

60 C.J. p 724 note 85.

23. D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

24. U.S.—*California Bank v. U. S. Fidelity & Guaranty Co.*, C.C.A.Cal., 129 F.2d 751.—*Fidelity & Deposit Co. v. Union State Bank*, D.C.Minn., 21 F.2d 102.

25. Ala.—*Sutley v. Dothan Oil Mill Co.*, 179 So. 819, 235 Ala. 475.

other hand, it has been held that subrogation to a lien may be had as against a judgment creditor, even though the lien had been discharged at the time he filed his judgment and he had no notice of the right to subrogation, since there is no provision for recording a right to subrogation and a judgment lien is subject to outstanding equitable interests.²⁶

Subrogation gives indemnity only.²⁷ It cannot take place beyond the amount actually disbursed,²⁸ under legal necessity.²⁹ Where one who, believing himself the owner of land, satisfied a mortgage thereon and transferred the land, it has been held that his grantee's right of subrogation to the mort-

gage is limited to the amount he paid for the land, and that he cannot recover the full amount of the mortgage or the amount paid in discharge thereof.³⁰ Subrogation has been limited to the right of redress existing when the right to subrogation accrued, that is, when payment was made, and the subrogee is not entitled to rights subsequently accruing.³¹

Champerous deed. Where the grantor does not object, the grantee of a champerous deed may be subrogated to the grantor's interest in the property or its proceeds.³²

III. PARTICULAR APPLICATIONS OF DOCTRINE

A. IN GENERAL

§ 15. Persons Interested in Administration of Estates

As a general rule, where a person interested in an estate pays, or has his interest in the estate subjected to the payment of, a debt of the estate, he is subrogated

to the claim of the creditor against the estate to the extent to which he or his interest is not primarily liable for the debt.

As a general rule, where a person interested in the administration of an estate³³ as heir,³⁴ dev-

26. Tex.—Lusk v. Parmer, Civ.App., 114 S.W.2d 677, error dismissed.

27. Ind.—Smith v. Wells, 122 N.E. 334, 123 N.E. 644, 72 Ind.App. 29. 60 C.J. p 724 note 86.

28. U.S.—Milan v. Kausch, C.A. Mich., 194 F.2d 263.

La.—Cook v. Crow, App., 194 So. 455. Tex.—Citizens Sav. Bank & Trust Co. v. Spencer, Civ.App., 105 S.W.2d 671, error dismissed Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt. v. Spencer, 110 S.W.2d 1151, 130 Tex. 384. 60 C.J. p 724 note 87.

Satisfaction at discount

(1) Where holder surrendered note on payment of less than face amount, payor may not hold maker for more than the amount he paid.

La.—Cook v. Crow, App., 194 So. 455. Wis.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.

(2) A lessor, who paid chattel mortgage on furniture which primed lessor's lien, receiving a discount, and had the chattel mortgage canceled rather than obtaining indorsement of note to himself, could not hold lessee liable for more than amount actually paid.—Harris v. Crisler, La.App., 187 So. 91.

Accounting for profits during occupancy

Where sale to purchaser was set aside and purchaser was awarded

subrogation, he should be charged with excess of rents over expense of maintaining property.—Lewis v. Creech, 176 S.W.2d 898, 296 Ky. 302.

Payment with stock

Where purchaser paid off mortgage with stock of a corporation, purchaser, on being subrogated to lien of first mortgage, was entitled to full value of stock which went to pay off mortgage, and was not relegated to market value of such stock.—Hill v. Hurless, 4 Ohio Supp. 1.

Commission

Insurance agent paying premiums less commissions on policy may recover full premiums, including amount advanced as commission.

N.D.—Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 64 N.D. 317.

Tex.—Ward v. Hanchett, Civ.App., 47 S.W.2d 360, error dismissed Hanchett v. Ward, Com.App., 65 S.W.2d 268.

29. Conn.—Smith v. Foran, 43 Conn. 244, 21 Am.R. 647. 60 C.J. p 724 note 88.

30. Mo.—Tucker v. Holder, 225 S.W.2d 123, 359 Mo. 1039.

31. Ind.—Commercial Casualty Ins. Co. v. Board of Com'rs of Fountain County, 19 N.E.2d 476, 215 Ind. 440.

State submitting to liability

Where, after one secondarily liable

paid creditor, the state accepted liability for claims such as the creditor's, payor could not enforce subrogation against the state.—Commercial Casualty Ins. Co. v. Board of Com'rs of Fountain County, supra.

32. Tenn.—Young v. Unknown Heirs, etc., App., 249 S.W.2d 580.

33. Ala.—Corpus Juris cited in Carter v. Carter, 38 So.2d 557, 560, 251 Ala. 598.

La.—Succession of Holstun, App., 141 So. 793.

Md.—Corpus Juris cited in Ragan v. Kelly, 24 A.2d 289, 295, 180 Md. 324.

N.C.—Corpus Juris cited in Jackson v. Thomas, 191 S.E. 327, 211 N.C. 634.

Ohio.—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, Com. Pl., 94 N.E.2d 59.

60 C.J. p 725 notes 89-92.

Right to reimbursement for payments or advances on behalf of estate see Executors and Administrators §§ 383-389, 463.

Subrogation of executor or administrator see *infra* § 27.

34. Ky.—Owensboro Banking Co. v. Lewis, 106 S.W.2d 1000, 269 Ky. 277.

La.—Succession of Holstun, App., 141 So. 793.

Pa.—In re Zoller's Estate, 52 Pa.Dist. & Co. 328.

60 C.J. p 725 note 89, p 787 note 96 [1].

isee,³⁵ legatee,³⁶ or surviving spouse³⁷ pays, in order to protect his interest or benefit the estate,³⁸ or has his interest taken for, or applied to the satisfaction of,³⁹ a debt or claim against the estate for which the general estate,⁴⁰ or the interests of others,⁴¹ are primarily liable either in whole⁴² or in part,⁴³ he will be subrogated to the rights of the creditor whose debt is thus paid, to the extent that may be necessary to reimburse him for the amount for which he or his interest in the estate is not primarily responsible;⁴⁴ but to no greater extent.⁴⁵ In no case can a person, claiming by way of subrogation against an estate, stand in a better position than the person to whose rights he claims to be subrogated.⁴⁶

Ordinarily a volunteer or stranger cannot claim subrogation against an estate, and it has been held that the payment must be made by one who is personally liable for, or whose interest in the estate is chargeable with, the debt.⁴⁷ Subrogation against the estate has been allowed to a widow who contracted and paid for the erection of a monument over the grave of her deceased husband before the appointment of an administrator,⁴⁸ and to an heir who, before the estate was placed in the hands of an administrator, had incurred expenses in caring for live stock of decedent which had been given to the heir pursuant to a voluntary agreement of distribution with the other heirs.⁴⁹ Where a debt of insured

35. Ohio.—In re Outhwaite's Estate, App., 94 N.E.2d 59.
Tenn.—Gamble v. Fulton, 59 S.W.2d 504, 166 Tenn. 66.
60 C.J. p 725 note 90.

36. Ala.—Murphy v. May, 5 So.2d 769, 242 Ala. 247.
Pa.—In re Bodenstein's Estate, Orph., 58 Montg.Co. 181.
60 C.J. p 725 note 91.

37. Ala.—Corpus Juris cited in Bain v. Howell, 25 So.2d 167, 169, 247 Ala. 514.
Kan.—Spradling v. Hawk, 1 P.2d 268, 133 Kan. 545.

Ky.—Owensboro Banking Co. v. Lewis, 106 S.W.2d 1000, 269 Ky. 277.
Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.

N.Y.—Corpus Juris cited in In re Van Hoesen's Will, 81 N.Y.S.2d 392, 395, 192 Misc. 689.
60 C.J. p 725 note 92.

Election to take against will

(1) Where decedent's husband elected to take against decedent's will, fact that husband out of his own funds voluntarily paid a portion of two legacies did not entitle his estate to be subrogated to the rights of the legatees so as to entitle estate to have amount paid by husband charged against interest of decedent's heirs in her realty.—Beck v. Beiter, 22 A.2d 90, 146 Pa.Super. 114.

(2) Where decedent's husband elected to take against decedent's will and thereafter voluntarily paid from his own funds direct and collateral inheritance taxes, husband's estate was not entitled to have realty descending to decedent's heirs charged with amount of payment made by husband.—Beck v. Beiter, supra.

Payment held voluntary

Where realty devised by husband to widow was encumbered by a mortgage which secured a note and widow had not signed either note or mortgage, act of widow in paying

note and mortgage out of her own personal fund was a voluntary one, and neither she nor her estate could be subrogated to the rights of the mortgagee, and the estate of the widow could not assert a claim for amount of the indebtedness against the estate of deceased husband or any of his children who eventually inherited the real estate on the widow's death.—Ratchford v. Fravel, 4 Ohio Supp. 284.

Right of recoupment

Where property set apart to surviving wife was not subject to such allotment, her right to recoup from the estate passed to her personal representatives and not to those to whom she devised the property.—Spitzer v. Branning, 190 So. 516, 139 Fla. 259.

38. Ala.—Murphy v. May, 5 So.2d 769, 242 Ala. 247.
Kan.—Spradling v. Hawk, 1 P.2d 268, 133 Kan. 545.
Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.
Tenn.—Gamble v. Fulton, 59 S.W.2d 504, 166 Tenn. 66.
60 C.J. p 725 note 94.

39. Ala.—Corpus Juris cited in Bain v. Howell, 25 So.2d 167, 169, 247 Ala. 514.
Tenn.—Flynn v. Flynn, 1 Tenn.App. 188.
60 C.J. p 726 note 95.

Right to subrogation of persons whose property or funds is applied by others to debt or encumbrance generally see infra § 44.

40. Ala.—Bain v. Howell, 25 So.2d 167, 169, 247 Ala. 514—Murphy v. May, 5 So.2d 769, 242 Ala. 247.
Kan.—Spradling v. Hawk, 1 P.2d 268, 133 Kan. 545.
Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.
Ohio.—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

Tenn.—Flynn v. Flynn, 1 Tenn.App. 188.
60 C.J. p 726 note 96.

41. Tex.—Kerens Nat. Bank v. Stockton, 94 S.W.2d 161, 127 Tex. 326.
60 C.J. p 726 note 97.

42. La.—Succession of Holstun, App., 141 So. 793.
60 C.J. p 726 note 98.

43. Tenn.—Gamble v. Fulton, 59 S.W.2d 504, 166 Tenn. 66.
60 C.J. p 726 note 99.

44. Ala.—Corpus Juris cited in Carter v. Carter, 38 So.2d 557, 560, 251 Ala. 598—Bain v. Howell, 25 So.2d 167, 247 Ala. 514.
Kan.—Spradling v. Hawk, 1 P.2d 268, 133 Kan. 545.

Tenn.—Flynn v. Flynn, 1 Tenn.App. 188.
60 C.J. p 727 note 1.

Where payor or his interest is primarily liable for the debt paid, subrogation will be denied.—Belvin's Ex'r v. Belvin, 189 S.E. 315, 167 Va. 355—60 C.J. p 727 note 2 [a].

45. Ala.—Carter v. Carter, 38 So.2d 557, 560, 251 Ala. 598.
Tex.—Kerens Nat. Bank v. Stockton, 94 S.W.2d 161, 127 Tex. 326.
60 C.J. p 727 note 2.
Extent of right to subrogation generally see supra § 14.

46. Mass.—Hayes v. Gill, 115 N.E. 492, 226 Mass. 388.
60 C.J. p 727 note 3.

47. Fla.—Wilson v. Fridenberg, 21 Fla. 386.
60 C.J. p 727 note 4.
Payment by volunteer generally see supra § 9.

48. Ind.—Pease v. Christman, 64 N.E. 90, 158 Ind. 642.

49. Ind.—Chamness v. Chamness' Estate, 101 N.E. 323, 53 Ind.App. 225.

is paid from the proceeds of a life policy pledged as collateral security for the payment of the debt, it has been held that the beneficiary of the policy is subrogated to the creditor's claim against the estate of insured,⁵⁰ but it has also been held that, where the deceased borrowed from his insurer on the security of the insurance policy, the proceeds of the policy are the primary source for the payment of the debt and the beneficiary of the policy has no claim against the estate if insurer satisfies the debt out of the proceeds of the policy.⁵¹ Persons who have given to an executor or administrator services or property which are of direct benefit to the estate are often subrogated to the right of the executor or administrator to reimbursement from the estate.⁵²

In order that the person paying the claim may be entitled to subrogation it is not necessary to show affirmatively that there was an intention to be subrogated or have the money repaid by the es-

tate;⁵³ but, if the facts and circumstances show definitely that at the time of payment the right of subrogation was not intended to be exercised, and could not be exercised without injustice to others, no such right will be held to exist.⁵⁴

§ 16. Persons Liable for Loss or Injury Caused by Fault of Another

As a general rule, a person who, pursuant to a legal liability, has paid for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter.

As a general rule, any person who, pursuant to a legal obligation to do so, has paid, even indirectly,⁵⁵ for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter,⁵⁶ persons who stand in the shoes of the wrongdoer,⁵⁷ or others who, as to the payor, are primarily responsible for the wrong or default.⁵⁸

50. N.Y.—In re Stafford's Will, 98 N.Y.S.2d 714, affirmed In re Stafford's Estate, 101 N.Y.S.2d 904, 278 App.Div. 612.

51. Tenn.—Allen v. Southard, 151 S.W.2d 1072, 177 Tenn. 541.

52. N.Y.—In re Crowley's Will, 4 N.Y.S.2d 885, 167 Misc. 840.—In re Wolf's Estate, 87 N.Y.S.2d 327. Wash.—Jones v. Peabody, 45 P.2d 915, 182 Wash. 148, 100 A.L.R. 64. Right of executor or administrator to credit for expenditures see Executors and Administrators § 217 et seq.

Equitable lien

The right of a person doing work on estate realty at request of executor successfully defending action against him personally on ground that executor had not made himself personally liable and that the work was done solely on the credit of the estate, to be subrogated to right of executor, had he paid the charges to be indemnified out of the estate assets, was an equitable lien.—In re Crowley's Will, 4 N.Y.S.2d 885, 167 Misc. 840.

Where the executor would not have a right of recoupment from the estate if he paid the claim, there is no right of subrogation.—Wagner v. La Croix' Estate, 286 N.W. 182, 289 Mich. 126.

53. Ind.—Neptune v. Eyler, 41 N.E. 965, 15 Ind.App. 132.

54. Tenn.—Belcher v. Wickersham, 9 Baxt. 111. 60 C.J. p 728 note 9.

55. Ark.—Hunter v. Jennings, 227 S.W.2d 946, 216 Ark. 886—Corpus Juris cited in Home Ins. Co. v. Lack, 120 S.W.2d 355, 357, 196 Ark. 888.

60 C.J. p 728 note 11.

56. Ark.—Hunter v. Jennings, 227 S.W.2d 946, 216 Ark. 886—Corpus Juris cited in Home Ins. Co. v. Lack, 120 S.W.2d 355, 357, 196 Ark. 888. Kan.—Corpus Juris cited in Fenly v. Revell, 228 P.2d 905, 909, 910, 170 Kan. 705.

Miss.—Davis Co. v. D'Lo Guaranty Bank, 138 So. 802, 162 Miss. 829. N.Y.—Avey v. American Surety Co. of New York, 260 N.Y.S. 333, 146 Misc. 228.

Ohio.—Myles v. Meineke, 78 N.E.2d 917, 82 Ohio App. 126.

Pa.—Potoczny, to Use of City of Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377.

Tex.—Corpus Juris cited in Johnson v. Henderson, Civ.App., 132 S.W.2d 458, 462—Corpus Juris cited in Fidelity & Deposit Co. v. Farmers & Merchants Nat. Bank, Civ.App., 121 S.W.2d 503, 506.

60 C.J. p 728 note 12.

Subrogation of insurers to insured's rights against wrongdoer causing loss or injury see Insurance § 1209. Subrogation under workmen's compensation laws see Workmen's Compensation Acts § 992, also 71 C.J. p 1547 note 7 et seq.

Statutory sanction

General assembly can give either expressly or by implication, to persons interested, right of acquiring

by subrogation interest in claim for unliquidated damages arising out of tort before verdict.—Neal v. Buffalo, R. & P. Ry. Co., 158 A. 305, 103 Pa. Super. 218.

Aggravation of injury

(1) Wrongdoer who has been held liable for injuries is subrogated to any right of action which injured person may have had against physicians for malpractice.—Clark v. Halstead, 93 N.Y.S.2d 49, 276 App.Div. 17—60 C.J. p 730 note 21 [h].

(2) Where tort-feasor settled with injured person, whose injury had been aggravated by malpractice, tort-feasor's settlement covered claim for entire injury and tort-feasor was subrogated to injured person's claim for malpractice.—Noll v. Nugent, 252 N.W. 574, 214 Wis. 204—60 C.J. p 730 note 21 [h] (2).

(3) Primary tort-feasor who settled claim would have no claim for contribution against the physician who treated claimant, but he would have a claim by way of subrogation to the injured person's rights for that part of damages which was primarily due to the negligence of the physician.—Greene v. Waters, 49 N.W.2d 919, 260 Wis. 40.

57. Wash.—Fournier v. Cornish, 133 P. 9, 74 Wash. 175. 60 C.J. p 728 note 13.

58. Ga.—Hinson v. Farmers' Bank of Alamo, 154 S.E. 468, 41 Ga.App. 715.

60 C.J. p 729 note 14.

Apparently this rule will not be applied to permit one who suffers loss under his contract with a third person,⁵⁹ or has his contract with a third person remain unperformed⁶⁰ because of defendant's breach of an independent contract with such third person, to be subrogated to the latter's rights against defendant. Where recovery is obtained against a master under the theory of respondeat superior for the tort or negligence of his servant, the master is subrogated to the rights of the injured person against the servant;⁶¹ and, where recovery is obtained against the owner of a motor vehicle for injury caused by its negligent operation, the owner is subrogated to the rights of the injured person against the operator of the vehicle.⁶² Similarly, where a municipality is compelled to pay

compensation for an injury caused by the negligence of the owner of property abutting on a public street, it will be subrogated to the rights of the injured person against the property owner.⁶³ It has been held that one who pays pursuant to an indemnity agreement is subrogated to the creditor's rights,⁶⁴ at least where the agreement provides for subrogation,⁶⁵ but it has also been held that an indemnitor discharges his own and not another's obligation so that unless he has stipulated for it, he is not subrogated to the indemnitee's rights against the person who defaulted or caused the loss.⁶⁶

A person voluntarily satisfying the debt or default of another can claim no right of subrogation;⁶⁷ but it is apparently sufficient if there is

59. U.S.—Barber Asphalt Paving Co. v. Northern Ohio Traction & Light Co., Ohio, 202 F. 817, 121 C.C.A. 125.

60 C.J. p 729 note 15.

60. Iowa.—Howell v. Jackson, 181 N.W. 788, 192 Iowa 70.
60 C.J. p 729 note 16.

61. Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.

Ohio.—Losito v. Kruse, 24 N.E.2d 705, 136 Ohio St. 183, 126 A.L.R. 1194—Myles v. Meineke, 78 N.E.2d 917, 82 Ohio App. 126.

Va.—Maryland Cas. Co. v. Aetna Cas. & Sur. Co., 60 S.E.2d 876, 191 Va. 225.

62. Cal.—Holland v. Kodimer, 77 P. 2d 843, 11 Cal.2d 40—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256.

Judgment against operator

An automobile owner's right to be subrogated to rights of a person injured through negligence of operator of automobile is not limited to cases in which operator is not made a party defendant, but applies to any recovery under the statute, since owner's right of contribution does not rest on existence of judgment against operator in same action.—Holland v. Kodimer, 77 P.2d 843, 11 Cal.2d 40—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256.

Owner and bailee of motor vehicle

Subsection of statute making both bailee and driver of motor vehicle operators within subdivisions providing for service of process on operator in action against owner and giving owner right of subrogation to recover from operator, amount of judgment rendered against him on owner's liability, provides a right of subrogation on part of owner against his bailee, who has in turn let an-

other person operate the automobile, and does not make the bailee liable to the injured person.—Overgard v. Beaverson, 201 P.2d 67, 89 Cal.App.2d 449.

63. Ohio.—Hillyer v. City of East Cleveland, 99 N.E.2d 772, 155 Ohio St. 552—Herron v. City of Youngstown, 24 N.E.2d 708, 136 Ohio St. 190.

64. Ill.—Solliday v. John B. Colegrove & Co. State Bank, 274 Ill.App. 493.

Reimbursement of indemnitor see Indemnity § 38.
Subrogation of insurer see Insurance § 1209 et seq.

65. Mich.—Metropolitan Casualty Ins. Co. v. First Nat. Bank, 246 N. W. 178, 261 Mich. 450.

66. U.S.—Howell v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 447, certiorari denied Howell v. Helvering, 54 S.Ct. 864, 292 U.S. 654, 78 L.Ed. 1503.

67. Ill.—Bennett v. Chandler, 64 N. E. 1052, 199 Ill. 97.
60 C.J. p 729 note 17.

Wages and medical expenses

(1) The person paying wages and medical expenses of an injured person is not entitled to subrogation or indemnification, in absence of contractual or statutory right.

U.S.—Standard Oil Co. of Cal. v. U. S., C.C.A.Cal., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L. Ed. 2067.

Tex.—Morgan v. Woodruff, Civ.App., 208 S.W.2d 628.

(2) Various statutes were held to indicate that congress did not intend that, for tortious injuries to soldier in time of war, the government should be subrogated to the soldier's claim for damages.—Standard Oil Co. of Cal. v. U. S., supra.

(3) Hospital voluntarily treating injured person cannot by reason of subrogation claim any rights to proceeds of settlement or judgment paid by tort-feasor.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324.

(4) A city could not under doctrine of subrogation recover from motorist for hospital expenses paid by city in care and treatment of motorcycle police patrolman injured in collision with motorist.—City of New York v. Barbato, 5 N.Y.S.2d 125.

(5) Statute providing that, where a patient in any state-supported hospital has been injured by the negligence of another person and has a right of action for recovery of compensatory damages, the hospital shall be subrogated to the right of action to the extent of reasonable charges for services rendered to patient goes no further than to make any state-supported hospital the legal subrogee to the right of action of a patient treated by it against the tort-feasor to the extent of reasonable charges for services to the patient.—Peart v. Rykoski, Inc., 197 So. 605, 195 La. 931.

(6) Where statute required city to pay fireman, injured in course of his employment, his regular wages during period of his incapacity, and fireman brought action against person whose negligence had allegedly resulted in injury for recovery of damages for personal injuries, and city intervened to recover for wages paid, city was entitled to subrogation to recovery by fireman for loss of wages which city had had to pay under statute.—Potoczny, to Use of City of Philadelphia v. Vallejo, 85 A.2d 675, 170 Pa.Super. 377.

Compensation paid by government

(1) Claims of government owning vessel sunk in collision for amounts

practical compulsion to pay, although there may be no strict legal obligation to do so,⁶⁸ or if, because of mistake, the payor believes that it is his legal duty to pay.⁶⁹ Where the injured person does not have a cause of action against the wrongdoer, the person making compensation for the injury has nothing to which to be subrogated.⁷⁰

Subrogation will not be accorded to a person whose own negligence or wrong has contributed to the loss or injury, where there is no primary liability or right of contribution as between him and the one against whom he seeks subrogation.⁷¹ The mere fact, however, that the person seeking subrogation has incurred liability for the loss or injury because of the violation of some duty owing to the creditor or injured person will not of itself defeat subrogation.⁷²

paid to replace personal effects of officers and seamen and that paid to beneficiaries of deceased seamen were properly disallowed where statute permitted government to require assignment of claim as condition to compensation and assignment had not been taken.—*The Steel Inventor*, D.C. N.Y., 36 F.2d 399.

(2) The mere fact that volunteer firemen injured by negligence of third persons received a settlement from third persons did not establish that money so paid included any part of the payments made to them by town for injury, so as to entitle town and its indemnity insurer to recover, out of settlement, amount paid by town to firemen, on theory of equitable settlement.—*Employers' Liability Assur. Corp., Limited*, of London, England, v. Daley, 67 N.Y.S.2d 233, 271 App. Div. 662, affirmed 77 N.E.2d 515, 297 N.Y. 745—*Employers' Liability Assur. Corp., Limited* of London, England v. Daley, 68 N.Y.S.2d 743, 271 App. Div. 662.

(3) Neither town which paid benefits under general municipal law to volunteer firemen injured while performing their duties nor its indemnity insurer was entitled on theory of equitable subrogation to recover indemnity from third persons who negligently caused injury, since benefit payments constituted compensation for work firemen did voluntarily for town.—*Employers' Liability Assur. Corp., Limited*, of London, England, v. Daley, 67 N.Y.S.2d 233, 271 App. Div. 662, affirmed 77 N.E.2d 515, 297 N.Y. 745—*Employers' Liability Assur. Corp., Limited*, of London, England v. Daley, 68 N.Y.S.2d 743, 271 App. Div. 662.

68. N.Y.—*Avey v. American Surety Co. of New York*, 260 N.Y.S. 833,

146 Misc. 228—*Avey v. American Surety Co. of New York*, 260 N.Y.S. 828, 146 Misc. 224.

60 C.J. p 728 note 18.

69. N.Y.—*Title Guarantee & Trust Co. v. Haven*, 139 N.Y.S. 207, 154 App. Div. 652, reversed 108 N.E. 819, 214 N.Y. 468.

60 C.J. p 729 note 19.

70. D.C.—*Woodside Manor, Inc. v. Rose Bros. Co.*, Mun. App., 83 A.2d 325.

71. Colo.—*W. A. Ellis, Inc., v. Ellis*, 168 P.2d 549, 115 Colo. 12.

60 C.J. p 729 note 20.

Joint tort-feasor

(1) Equity will not grant trespasser relief against joint tort-feasor by way of subrogation, the rule of subrogation having no application to joint tort-feasors.—*W. A. Ellis, Inc., v. Ellis*, supra.

(2) Where bus company, as one of alleged joint tort-feasors, paid the amount of a compromise settlement for injuries sustained by its bus passenger in collision with truck, bus company's indemnitors became subrogated to its rights and could maintain action for contribution against lessee and operator of truck.—*McKay v. Citizens Rapid Transit Co.*, 59 S. E.2d 121, 190 Va. 851, 20 A.L.R.2d 918.

(3) Contribution between joint tort-feasors see Contribution § 11.

72. Ark.—*Wilson v. White*, 102 S.W. 201, 82 Ark. 407.

60 C.J. p 729 note 21.

73. Ga.—*Hall v. Harris*, 65 S.E. 1086, 6 Ga. App. 822.

60 C.J. p 730 note 23.

Contribution among joint debtors see Contribution § 9.

§ 17. Persons Jointly or Jointly and Severally Liable for Same Debt

It is generally held that a joint debtor who discharges more than his share of the common debt has a right to compel contribution by way of subrogation.

While there appears to be some authority to the effect that a person who pays more than his equitable share of a debt for which he and one or more others are jointly liable as principals is not entitled to be subrogated to the creditor's rights in order to compel contribution by the nonpaying debtors,⁷³ it is generally held that a joint debtor who discharges more than his share of the common debt has a right to compel contribution by way of subrogation,⁷⁴ since in equity a joint debtor is regarded as being only a surety for that portion of the debt

74. U.S.—*Corpus Juris* cited in *Hurt v. Read*, C.C.A. Tex., 108 F. 2d 282, 283—*New York Cas. Co. v. Sinclair Refining Co.*, C.C.A. Okl., 108 F.2d 65.

Ky.—*Hill v. Hoover*, 166 S.W.2d 450, 292 Ky. 548.

Md.—*Blair v. Baker*, 76 A.2d 129.

Mo.—*Corpus Juris* cited in *O'Neill v. Viviano*, App., 105 S.W.2d 985, 990.

Ohio.—*Minks v. Byerly*, 20 N.E.2d 536, 60 Ohio App. 240.

Pa.—*City Nat. Bank of Wichita Falls, Tex.*, now for Use of *Newhams, v. Atkinson*, 175 A. 507, 316 Pa. 526—*Lit Bros., to Use of Kaplan, v. Goodman*, 18 A.2d 519, 144 Pa. Super. 43.

Tex.—*Shell Petroleum Corp. v. Tipsett*, Civ. App., 103 S.W.2d 448, error refused.

60 C.J. p 730 note 24.

Right not dependent on statute or will of creditor

The right of subrogation, based on the payment by one joint debtor of the obligation of two or more of such debtors, arises independently of statute, and is not affected by the willingness or unwillingness of the original creditor to transfer the security to the debtor paying the obligation.—*Hill v. Hoover*, 166 S.W.2d 450, 292 Ky. 548.

A creditor cannot prevent subrogation to his rights of the joint debtor who pays the debt.—*Lit Bros., to Use of Kaplan, v. Goodman*, 18 A.2d 519, 144 Pa. Super. 43.

Stockholder

Statute providing that a stockholder who pays on account of his liability as such is subrogated to claim of the creditor against the corporation is not unconstitutional as impairment of obligation of contract,

which should be discharged by his codebtors, and like a surety he is entitled to be subrogated,⁷⁵ although this can be only to the extent that he has paid more than his proportionate share of the debt.⁷⁶ If one joint debtor has assumed the obligation of paying the entire debt, so that inter se the assuming debtor occupies the position of principal and the other debtor or debtors the position of sureties, a nonassuming debtor will be subrogated to the extent of the amount which he actually pays;⁷⁷ but, should payment be made by the one who is ultimately obliged to discharge the debt, no right of subrogation can arise in his favor, since such payment operates as an extinguishment of the debt and a discharge of all liens held by the creditor for his security.⁷⁸

§ 18. — Joint Mortgagors and Vendees

It is generally held that, where two or more persons have mortgaged their property to secure the payment of a debt for which they are jointly liable, the person who pays more than his proportionate share of the debt will be subrogated to the rights of the mortgagee to the extent necessary to reimburse him for the amount for which he was not primarily responsible.

Although there is some authority to the contrary,⁷⁹ it is generally held that, where two or

more persons have mortgaged their property to secure the payment of a debt for which they are jointly liable and one mortgagor is compelled to pay more than his proportionate share of the debt, he will be subrogated to the rights of the mortgagee, or be given a lien on the interest of the other or others, to the extent necessary to reimburse him for the amount for which he was not primarily responsible,⁸⁰ even as against one to whom a comortgagor has transferred his interest before the mortgage has been satisfied where such a person has taken subject to the rights of the mortgagee and has in no way been prejudiced or misled by an apparent satisfaction of the mortgage.⁸¹ Where the land has been sold on foreclosure, and the personal liability of the mortgagors extinguished and satisfied, a mortgagor who redeems from the sale can claim by way of subrogation only a lien on the interest of his comortgagor, and no personal liability on the part of the latter can be asserted, since no such right remains in the mortgagee to which subrogation can be had.⁸² Where land is sold or conveyed to two or more persons jointly subject to a lien of the grantor or vendor to secure payment of the unpaid purchase price, or other consideration to be paid or furnished, a grantee or

taking property without due process or as an *ex post facto* law. Under the statute the stockholder succeeds to the rights of the creditor against the corporation to the extent of the amount paid by the stockholder and the stockholder to the extent of such amount is substituted for the creditor. A stockholder who pays creditor's claim does not stand in the position of a surety, since the liability of stockholders is entirely independent of that of the corporation and they are in no sense sureties for the corporation.—*McCune v. First Nat. Trust & Savings Bank of Santa Barbara*, C.C.A.Cal., 109 F.2d 887.

Prejudice to third persons

Where father and son execute their joint note to a creditor of the son, and without knowledge of the creditor it is agreed between the makers that the father shall pay the note to satisfy a debt he owes the son, the son whose property is taken in payment by an execution issued under a judgment on the note is not entitled to be subrogated to the payee's rights as against subsequent lien creditors of the father.—*Foy v. Pulling*, 63 Pa.Super. 552.

Husband and wife; statutory subrogation

Primary purpose of statute requiring that property of husband be ap-

plied first to satisfy joint liability of husband and wife, and that wife paying debt for her husband is subrogated to rights of creditors whose claims she has satisfied, as against her husband, is to aid creditors who furnish goods and services to a family.—*Larzo v. Swift & Co.*, 40 S.E.2d 811, 129 W.Va. 436.

75. Pa.—*Lit Bros., to Use of Kaplan, v. Goodman*, 18 A.2d 519, 144 Pa. Super. 43.
60 C.J. p 731 note 25.

76. U.S.—*Corpus Juris* cited in *Hurt v. Read*, C.C.A.Tex., 108 F.2d 282, 283.
60 C.J. p 731 note 26.

Property primarily liable

Where husband and wife as joint obligors executed note to pay for realty purchased as home, although title to it was placed in wife and trust deed on realty was executed by both to secure note, executor of estate of deceased husband would not be entitled to be subrogated to rights of holder of note if he should pay one half of note, where it was not established that husband and wife intended that realty lien should be primary source from which note should be paid.—*Commerce Union Bank v. Weis*, 181 S.W.2d 764, 27 Tenn.App. 433.

77. U.S.—*Bennett v. The Preferred Acc. Ins. Co. of N. Y.*, C.A.Okla., 192 F.2d 748.
60 C.J. p 731 note 27.

78. Tenn.—*Greenlaw v. Pettit*, 11 S.W. 357, 87 Tenn. 467.
60 C.J. p 731 note 28.

79. Ga.—*Clark v. Warren*, 55 Ga. 575.
60 C.J. p 731 note 30.

80. Ala.—*Batson v. Graham*, 181 So. 260, 236 Ala. 72.
Md.—*Heighe v. Sale of Real Estate*, 164 A. 671, 164 Md. 259, 93 A.L.R. 81.
Wis.—*Hare v. Reddy*, 269 N.W. 294, 222 Wis. 508.
60 C.J. p 731 note 31.

Liability on note barred by limitations

The fact that liability on note is barred by limitations does not make joint mortgagor a volunteer in discharging mortgage where enforcement of mortgage was not barred.—*Hare v. Reddy*, supra.

81. Cal.—*Shaffer v. McCloskey*, 36 P. 196, 101 Cal. 576.
60 C.J. p 731 note 32.

82. Wis.—*McLaughlin v. Curtis*, 27 Wis. 644.

vendee who pays more than his share of the purchase price will be subrogated to the vendor's or grantor's lien as against the other grantee or vendee,⁸³ or persons who purchase from the latter with notice;⁸⁴ but it has been held that the paying purchaser will not be subrogated to an express vendor's lien as against one who purchases the interest of the nonpaying purchaser, in reliance on information from the vendor that the debt has been paid and the lien discharged, and without notice of the latent equity in favor of the payor, even though the lien has not been released of record.⁸⁵

§ 19. — Joint Judgment Debtors

The majority view is that a joint judgment debtor who pays the judgment is entitled to subrogation to the extent that he has exonerated his codebtor.

It has been held that a joint judgment debtor who has paid the entire judgment cannot, in order to compel contribution, enforce the creditor's rights against the codebtor either by way of subrogation or assignment;⁸⁶ but the majority rule appears to be that, if there is an apparent intention on the part of the paying debtor not to discharge the judgment completely, he will be subrogated to the creditor's rights to the extent of the amount paid in exoneration of the codebtor,⁸⁷ and a right of subrogation is sometimes provided by statute.⁸⁸ It has also been held that, where one joint judgment debtor gives a recognizance to obtain a stay as against him, the codebtors, on paying the debt after a breach of the recognizance, will not be subrogated to the creditor's rights against the surety on the recognizance, since there is no privity of con-

tract between the parties and the surety's liability, which is not primary with respect to the codebtors.⁸⁹

§ 20. — Partners

As a general rule, a partner who pays a firm debt is not entitled to subrogation if there has not been a settlement of partnership accounts or a promise establishing his right to have the copartner contribute toward or pay the debt.

As a general rule, a partner who has paid a firm debt with his individual means cannot compel contribution from his copartner by way of subrogation to the rights of the creditor whose debt has been paid.⁹⁰ Accordingly, a partner who pays a firm debt is not entitled to subrogation if there has not been a settlement of partnership accounts or a promise establishing his right to have the copartner contribute toward or pay the debt;⁹¹ but, where the right to contribution has accrued as by a dissolution and settlement of accounts,⁹² or the nonpaying partner is primarily liable, *inter se*, because he has expressly assumed the obligation of paying a firm debt or debts,⁹³ or because the debt is in reality his own rather than that of the firm,⁹⁴ subrogation is generally allowed. If, in a suit for settlement of partnership accounts, one partner pays to another the amount which it is the obligation of a third partner to contribute, the paying partner will be subrogated to such rights as the payee partner has acquired against the third.⁹⁵ If partners borrow money on their personal responsibility, in order to discharge a debt which is a lien on their property, one partner, on being compelled to repay the loan, cannot be subrogated to the lien which was extinguished with the borrowed money.⁹⁶

83. Va.—Smith v. Alderson, 83 S.E. 373, 116 Va. 986.
60 C.J. p 732 notes 34, 35.

84. Ark.—Dowdy v. Blake, 6 S.W. 897, 50 Ark. 205.
60 C.J. p 732 notes 34, 36.

85. W.Va.—Wolford v. Bias, 90 S.E. 875, 79 W.Va. 349.
60 C.J. p 732 note 37.

86. Mass.—Adams v. Drake, 11 Cush. 504.
60 C.J. p 732 note 39.

87. Fla.—Corpus Juris cited in North v. Albee, 20 So.2d 682, 684, 155 Fla. 403.

La.—Steele v. Hough, 141 So. 22, 174 La. 441—Nelson v. Kinnebrew, App., 140 So. 139.

N.Y.—Tron v. Thime, 105 N.Y.S.2d 546, 201 Misc. 85.
60 C.J. p 732 note 40.

Joint judgment against persons primarily and secondarily liable, paid by judgment debtor secondarily liable, will be kept alive under doctrine of subrogation for benefit of debtor secondarily liable.—Greenbrier Valley Bank v. Holt, 171 S.E. 906, 114 W.Va. 363.

Creditor defunct

Codebtor in solido paying bank's judgment became subrogated to bank's rights and could maintain action against other debtors in solido, even though bank later became defunct.—Steele v. Hough, 141 So. 22, 174 La. 441.

88. Minn.—Ankeny v. Moffett, 33 N.W. 320, 37 Minn. 109.
60 C.J. p 733 note 41.

89. Mass.—Holmes v. Day, 108 Mass. 563.

90. N.C.—Hinton v. Odenheimer, 57 N.C. 406.
60 C.J. p 733 note 45.

91. Pa.—Bryn Mawr Trust Co. v. Cole, 159 A. 445, 306 Pa. 274.
60 C.J. p 733 note 46.

92. Tex.—Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
60 C.J. p 733 note 47.

93. Pa.—Gillfillan v. Dewoody, 27 A. 782, 157 Pa. 601.
60 C.J. p 734 note 48.

94. La.—Hall v. Galennie, 18 La. 442.

95. Ky.—Davis v. Abell, 216 S.W. 104, 185 Ky. 843.
60 C.J. p 734 note 50.

96. Tex.—Sherk v. First Nat. Bank, Civ.App., 152 S.W. 832, modified on other grounds, Com.App., 206 S.W. 507.

§ 21. — Cotenants

A cotenant who pays off an encumbrance or lien which is a charge on the common estate will ordinarily be subrogated to the creditor's rights to the extent necessary to compel contribution.

As a general rule, unless there are intervening equities,⁹⁷ a cotenant who pays off or discharges an encumbrance or lien which is a charge on the common estate will be subrogated to the creditor's rights against the interests of his cotenants to the extent necessary to compel contribution.⁹⁸ No subrogation will be allowed where the circumstances show that a tenant in common in paying off a mortgage on the common estate intended a benefaction to the other tenants, and not to be subrogated to any claims against them or their estate.⁹⁹ Subrogation apparently cannot be claimed to a nonassignable right of reentry for condition broken.¹

§ 22. Parties to Bills or Notes

The right to subrogation of parties liable on a

bill or note is discussed *infra* § 23. The right of the holder of a note to subrogation is considered *infra* § 24.

Examine Pocket Parts for later cases.

§ 23. — Subrogation of Parties Liable on Instrument

As a general rule, where a bill or note is paid by a party who is only secondarily liable, he will be subrogated to all the rights and remedies available to the owner or holder of the instrument in order to obtain payment from the parties primarily liable on the instrument.

As a general rule, where a bill or note has been paid by a party who is only secondarily liable, such as, an indorser in the course of negotiation or transfer,² an accommodation indorser,³ an accommodation acceptor,⁴ or a drawer,⁵ the paying party will be subrogated to all rights and remedies which were available to the holder or owner of the instrument in order to obtain payment thereof from prior parties,⁶ or other parties who, with respect to the

97. Mo.—Foster v. Williams, 128 S. W. 797, 144 Mo.App. 219.

98. U.S.—Epp v. Bicknell, C.C.A.Neb., 138 F.2d 735, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

Ky.—Back v. Back, 211 S.W.2d 667, 307 Ky. 571.

Neb.—Fender v. Reed, 12 N.W.2d 98, 143 Neb. 911.

Wis.—Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289—Hermance v. Weisner, 279 N.W. 608, 228 Wis. 501, 117 A.L.R. 1437.

60 C.J. p 734 note 54, p 792 note 79.

Relinquishment of rights

Where an heir discharges a valid encumbrance against property jointly owned, he is subrogated to the rights of the creditor and would normally be entitled to interest paid, but, where such heir has by contract or by his actions relinquished certain of his rights, he is not entitled to full subrogation and contribution from other heirs.—Back v. Back, 211 S.W.2d 667, 307 Ky. 571.

Judgment creditor of cotenant

In judgment creditor's action to subject to satisfaction of judgment land owned jointly by judgment debtor and his elder brother, who had paid taxes and interest on mortgage thereon, trial court properly decreed elder brother's lien for taxes and interest superior to lien of plaintiff's judgment, in view of evidence, other than elder brother's own testimony, that he made payments from his own

and not from judgment debtor's funds.—Fender v. Reed, 12 N.W.2d 98, 143 Neb. 911.

99. N.J.—Kinkead v. Ryan, 55 A. 730, 65 N.J.Eq. 726.

1. Minn.—Ohio Iron Co. v. Auburn Iron Co., 67 N.W. 221, 64 Minn. 404.

2. U.S.—Alexander v. Young, C.C.A. Kan., 65 F.2d 752.

Fla.—Maryland Casualty Co. v. Orr, 147 So. 271, 109 Fla. 184.

Ga.—Brain v. Hill, 7 S.E.2d 407, 61 Ga.App. 756.

Ind.—Shortal v. Standerford, 157 N.E. 109, 87 Ind.App. 167.

Neb.—Weiner v. Aetna Ins. Co. of Hartford, Conn., 259 N.W. 507, 128 Neb. 575.

N.Y.—Kohl v. First Trust Co. of Tonawanda, 6 N.Y.S.2d 84, 255 App. Div. 123.

Pa.—Franklin Savings & Trust Co. of Pittsburgh v. Clark, 129 A. 56, 283 Pa. 212.

60 C.J. p 735 note 58.

3. U.S.—Alexander v. Young, C.C.A. Kan., 65 F.2d 752.

La.—Cook v. Crow, App., 194 So. 455.

Pa.—Northampton Nat. Bank of Easton v. Holland, 190 A. 483, 126 Pa. Super. 597—Hunsberger v. Perkiomen Nat. Bank, 164 A. 839, 108 Pa. Super. 443.

Tenn.—First Nat. Bank of Coeburn v. Hartsell, 14 Tenn.App. 578.

60 C.J. p 735 note 59.

Notice

In absence of averment by accommodation indorser that he had given

bank notice of claim to subrogation before bank paid surplus of proceeds of collateral security to maker's bankruptcy trustee, bank's equities were superior to those of accommodation indorser.—Hunsberger v. Perkiomen Nat. Bank, 164 A. 839, 108 Pa. Super. 443.

Assumption of liability

Where liability of one of three accommodation indorsers secured by chattel mortgage was assumed by others, they were subrogated to his security under mortgage without assignment.—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 10 N.J. Misc. 397.

4. U.S.—Greenough v. Munroe, D.C. N.Y., 2 F.Supp. 104.

60 C.J. p 735 note 60—8 C.J. p 271 note 55 [e].

5. U.S.—Standard Inv. Co. v. Town of Snow Hill, C.C.A.N.C., 78 F.2d 33.

Tex.—Hoffman v. Bignall, 1 Tex.A. Civ.Cas. § 704.

60 C.J. p 735 note 61.

6. Fla.—Maryland Casualty Co. v. Orr, 147 So. 271, 109 Fla. 184.

La.—Cook v. Crow, App., 194 So. 455—Sarraille v. Beyer, App., 172 So. 822.

N.Y.—Kohl v. First Trust Co. of Tonawanda, 6 N.Y.S.2d 84, 255 App. Div. 123.

Pa.—Hunsberger v. Perkiomen Nat. Bank, 164 A. 839, 108 Pa. Super. 443—Franklin Savings & Trust Co. of Pittsburgh v. Clark, 129 A. 56, 283 Pa. 212.

paying party, are primarily liable on the instrument.⁷ A party primarily liable on a note is not entitled to subrogation.⁸ A party secondarily liable with respect to the maker, but primarily liable with respect to another party to the instrument, will not be subrogated with respect to collateral which has been given the creditor by the latter party.⁹ One not liable on the note, as one who assigned it without recourse, is not entitled to subrogation where he pays it without a demand on him by the holder.¹⁰

Necessity and sufficiency of payment. Generally a party secondarily liable on a bill or note must actually pay the instrument before he can avail himself of, and be subrogated to, the rights and securities of the creditor or holder.¹¹ It is not necessary that the payment should be made in money since the giving of anything which the creditor is willing to accept in satisfaction of the debt is sufficient.¹² Although by statute the indorser of a note is not liable thereon until the holder has exhausted his remedies against the maker, if the indorser waives that privilege and pays the amount due, he becomes subrogated to the rights of the holder, since such a payment cannot be considered as a voluntary one.¹³

Where the rule exists that the holder of a mortgage given to secure a debt falling due in installments may maintain successive actions of foreclosure as the installments fall due, it has been held

that an indorser who pays an installment of interest may by way of subrogation maintain an immediate action to foreclose a mortgage given to secure payment of principal and interest subject, however, to the holder's rights in the security for the principal debt and remaining installments of interest.¹⁴

Makers and accommodation makers. Since an accommodating party is usually regarded as being only a surety for the party accommodated, it is the generally accepted rule that an accommodation maker, who has been compelled to pay a holder or transferee of the instrument, will be subrogated to all rights and securities possessed by the latter in order to obtain payment from the party accommodated.¹⁵ Until the note is paid, the accommodation maker is not entitled to subrogation.¹⁶ One of two accommodation makers who pays the entire note will be subrogated to the rights of his comaker under a trust agreement that certain collateral given the creditor should be applied in satisfaction of the note.¹⁷

Ordinarily a maker for value will not be subrogated to the holder's rights against a party only secondarily liable.¹⁸ A maker for value, who has paid the amount of a note to the payee but is compelled to pay the note again because it was in the hands of a transferee, will not be subrogated to the latter's rights against the payee and indorser;¹⁹ and, since an exchange of notes is a sufficient con-

Tenn.—First Nat. Bank of Coeburn v. Hartsell, 14 Tenn.App. 578.

Va.—Loughran v. Kincheloe, 168 S.E. 362, 160 Va. 292.

60 C.J. p 736 note 64.

7. N.Y.—Riverside Bank v. Totten, 11 N.Y.S. 519, 58 Hun 603.

8. Wis.—Strelitz v. First Wisconsin Nat. Bank of Milwaukee, 264 N.W. 649, 220 Wis. 443.

9. Cal.—Gardiner v. Holcomb, 255 P. 523, 82 Cal.App. 342.

10. Tex.—Wood's Garage & Implement Co. v. McAllen State Bank, Civ.App., 231 S.W.2d 492.

11. Pa.—Hunsberger v. Perkiomen Nat. Bank, 164 A. 839, 108 Pa.Super. 443.

60 C.J. p 736 note 67.

Payment and partial subrogation generally see supra § 10.

12. Miss.—Humphreys v. Vertner, Freem. p. 251.

60 C.J. p 737 note 69.

13. Ill.—Telford v. Garrels, 24 N.E. 573, 132 Ill. 550.

14. Fla.—Miami Mortgage & Guaranty Co. v. Drawdy, 127 So. 323, 99 Fla. 1092.

15. Fla.—Scott v. National City Bank of Tampa, 139 So. 367, 107 Fla. 810.

Neb.—Meade Co. v. Doerfler, 26 N.W. 2d 393, 148 Neb. 75.

R.I.—Corpus Juris cited in Michael v. McGovern, 184 A. 571, 572, 56 R.I. 133.

Wis.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.

60 C.J. p 737 note 74—8 C.J. p 270 note 43 [e].

Right to avoid bulk sale

Accommodation maker of note was subrogated to rights of holder against principal maker on his payment of note, so as to be entitled to treat as void attempted transfer by principal maker which was fraudulent and void as against holder of note for noncompliance with Sales in Bulk Act, and to attach property so transferred.—Michael v. McGovern, 184 A. 571, 56 R.I. 133.

In Tennessee

(1) An accommodation maker being primarily liable on the note is not entitled to subrogation to the note where he pays it.—Merchants' Bank & Trust Co. v. Bushnell, 218 S.W. 709, 142 Tenn. 275—Lovelace-Farmer Co. v. Shaw, 4 Tenn.App. 458.

(2) However, there is also authority holding that an accommodation maker whose name appeared on note as comaker was a surety and, on payment of note by accommodation maker because of principal maker's default, accommodation maker, to whom note was indorsed, could maintain action thereon against principal maker.—Hunt v. Hoppe, 124 S.W.2d 306, 22 Tenn.App. 540.

16. N.C.—Mayers v. Bank of Bladen, 152 S.E. 628, 198 N.C. 542.

17. Idaho.—Kite v. Eckley, 282 P. 868, 48 Idaho 454.

18. U.S.—In re Jules Bouy & Co., D.C.N.Y., 244 F. 896.

Cal.—Gardiner v. Holcomb, 255 P. 523, 82 Cal.App. 342.

19. Iowa.—Newhall Sav. Bank v. Buck, 197 N.W. 986, 197 Iowa 732.

sideration so that neither instrument is accommodation paper, one maker, in such a case, on being compelled to pay the note which he has executed, will not be subrogated to the holder's rights in securities which have been given by the maker of the other note on his indorsement of the note involved,²⁰ or to rights of the other maker, or payee, against other persons who have undertaken with him to pay the debt which was paid by means of the note involved.²¹ Where, however, a note obtained by fraud has been transferred to a holder for value so that the maker can no longer avail himself of his defense against the payee, the maker may be subrogated to, and acquire the rights of, the payee with respect to the transaction;²² and, where there has been a failure of consideration, so that the maker would not be liable to the payee, but the payee has transferred the notes to a third person in payment of land, and the maker is compelled to pay the assignee, the maker in such a case occupies a position similar to that of a surety for the purchase price, and will be subrogated to a lien reserved by the vendor.²³ It has been held that the fact that the maker has a defense to liability on a note does not make his payment thereof voluntary so as to deprive him of the right of subrogation.²⁴

To what party is subrogated, and limitations on right. After a party secondarily liable has paid the debt, he has, by way of subrogation, the same rights on the instrument itself as the holder would have had against the parties primarily liable,²⁵ including the holder's rights in any collateral security which has been given him for the debt by a party who is primarily liable.²⁶ Also, either with,²⁷ or without,²⁸ statutory authority therefor, he is entitled to

the protection of judgments which the holder has obtained against parties who are primarily liable,²⁹ or security which has been given to assure payment of the instrument.³⁰

A party secondarily liable will not be subrogated to the rights of the holder of an instrument other than the particular instrument on which the party is bound, although the instrument on which the party is bound, and compelled to pay, has been used to pay and satisfy the other instrument under which the rights, to which he claims to be subrogated, existed.³¹

An indorser, who has been compelled to pay a note, will be subrogated to the maker's rights against the payee where the maker has subsequently paid the note again in ignorance of the prior payment by the indorser.³² If the indorser of a bill is compelled to pay it because of the drawee's refusal to accept and pay it at maturity, the indorser will be subrogated to the drawee's rights in goods given him by the drawer to secure the latter's obligation to furnish the drawee funds with which to take up the bill.³³ Where the maker has deposited sufficient funds with the holder to take the note up at maturity, an indorser by paying the note before maturity, and accepting the holder's direct obligation to hold the funds for the indorser's benefit, thereby waives his right to be subrogated to any rights the maker might have against the holder.³⁴

§ 24. — Subrogation of Holder

Where both the indorser and the maker of a note are insolvent, the holder will be subrogated to the in-

20. Md.—Stickney v. Mohler, 19 Md. 490.

Pa.—Appeal of Smith, 17 A. 344, 125 Pa. 404.

21. N.Y.—Coburn v. Baker, 13 N.Y. Super. 532.

22. Ky.—Southern Ins. Co. v. Milligan, 157 S.W. 37, 154 Ky. 216. 60 C.J. p 737 note 82.

23. Tenn.—Gallihier v. Gallihier, 10 Lea 23. 60 C.J. p 738 note 83.

24. Mo.—Netherton v. Farmers' Exchange Bank of Gallatin, 63 S.W.2d 156, 228 Mo.App. 296.

25. R.I.—Michael v. McGovern, 184 A. 571, 56 R.I. 133. Tenn.—Hunt v. Hoppe, 124 S.W.2d 306, 22 Tenn.App. 540. 60 C.J. p 738 note 84.

26. La.—Cook v. Crow, App., 194 So. 455.

Pa.—Northampton Nat. Bank of Easton v. Holland, 190 A. 483, 126 Pa. Super. 597. 60 C.J. p 738 note 85.

Collateral securing other debts

(1) Party, secondarily liable, paying note is not entitled to be subrogated to any securities of the creditor or holder until all indebtedness, to secure which, the securities are held, has been satisfied.—Marianna Nat. Farm Loan Ass'n v. Braswell, 116 So. 639, 95 Fla. 510—60 C.J. p 736 note 68.

(2) Subrogation as to collateral securing other debts as well as that paid generally see supra § 10.

27. Md.—Wallace v. Jones, 72 A. 769, 110 Md. 143. 60 C.J. p 738 note 86.

28. Wyo.—Corpus Juris cited in Casper Nat. Bank v. Woodin, 232 P.2d 706, 712, 68 Wyo. 232. 60 C.J. p 738 note 87.

29. Pa.—Appeal of Cottrell, 23 Pa. 294.

30. La.—Toler v. Cushman, 12 La. Ann. 733. 60 C.J. p 739 note 90.

31. Ky.—Flannery v. Utley, 5 S.W. 878, 9 Ky.L. 581, 584; 3 S.W. 412, 8 Ky.L. 776. 60 C.J. p 739 note 91.

32. Mo.—Havlin v. Continental Nat. Bank of St. Louis, 161 S.W. 741, 253 Mo. 292.

33. Mass.—Stevenson v. Austin, 3 Metc. 474.

34. U.S.—Pitts v. Pease, C.C.A.Ga., 39 F.2d 14.

dorser's rights in security given him by the maker to indemnify him against his liability as indorser.

Where both the indorser and maker of a note are insolvent, the holder will be subrogated to the indorser's rights in security given by the maker to indemnify him against his liability as indorser;³⁵ and the holder of a bill of exchange, on the failure of an accommodation acceptor to pay it, may resort to securities which the drawer has given to the acceptor to secure the latter for the amount of the accepted bill.³⁶ A holder will not, however, be subrogated to security which joint indorsers have given to each other simply to secure performance of their obligation to contribute as to each other, rather than to secure payment of the principal debt itself.³⁷

Where two persons have exchanged notes, the holder of one note is not entitled to be subrogated to its maker's rights in securities which he has been given by the maker of the other note to secure payment of such note, since the transactions are independent;³⁸ but, where a forged note is given in partial payment of a genuine note, which is secured, a bank rediscounting the forged note, whose payments are applied toward satisfaction of the debt represented by the genuine note, is by way of subrogation entitled to an equitable trust in the proceeds of the security given for the genuine note.³⁹ Where the drawee of a draft or check applies the fund on which it is drawn in satisfaction of another debt of the drawer secured by collateral, it has been held that the payee will not be subrogated to the collateral, since he bears no relation to the debt which the collateral secures;⁴⁰ but other cases by an application of the two funds

doctrine have permitted the payee to be subrogated to the collateral of the drawee.⁴¹

§ 25. Persons Acting in Representative, Fiduciary, or Official Capacity

One who, acting in a representative or fiduciary capacity, satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable, and to the rights of the creditor against the principal.

One who, acting in a representative or fiduciary capacity, incurs and satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable,⁴² and to the rights of the creditor against the principal.⁴³ One who has an active interest or concern in the nature of a definite managerial responsibility with respect to the payment of enforceable demands against an estate, and who, although under no legal or moral obligation personally to pay, nevertheless does so, is entitled to subrogation, provided no option or privilege of the person primarily liable is thereby intercepted, abridged, or altered.⁴⁴ A fiduciary who satisfied a judgment against him for breach of his duty with respect to the obligation of a third person has been subrogated to his beneficiary's rights with respect to such obligation.⁴⁵

Where assignees of an insolvent debtor give their joint note to a creditor of the insolvent in payment of the creditor's debt, relying for the means of paying the note on the funds in their hands by virtue of the assignment, specially appropriated for that purpose, the assignees will be considered, both in law and equity, as substituted for the creditor with respect to such fund.⁴⁶ An attorney, compelled by his neglect to pay his client the amount of a judg-

35. U.S.—National Shoe, etc., Bank v. Small, D.C.Me., 7 F. 837. 60 C.J. p 739 note 96.

36. Ala.—Toulmin v. Hamilton, 7 Ala. 362.

Pa.—Appeal of Kramer, 37 Pa. 71.

37. N.Y.—Seward v. Huntington, 94 N.Y. 104.

60 C.J. p 740 note 98.

38. Pa.—Battin v. Meyer, 5 Phila. 73, modified on other grounds Appeal of Taylor, 45 Pa. 71.

39. Kan.—Federal Intermediate Credit Bank of Wichita v. Howard, 284 P. 380, 129 Kan. 640. 60 C.J. p 740 note 1.

40. Tex.—Hall v. First Nat. Bank, Civ.App., 252 S.W. 823, reheard 254 S.W. 522.

41. S.C.—Hampton Loan & Exchange Bank v. Lightsey, 152 S.E. 425, 155 S.C. 222.

42. Mont.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.

Utah.—Corpus Juris quoted in Peay v. Gasov of Provo, 39 P.2d 1041, 1050, 88 Utah 85.

43. Ala.—Corpus Juris quoted in Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 542, 246 Ala. 178.

Pa.—In re Sivak's Estate, 58 A.2d 456, 359 Pa. 194.

Utah.—Corpus Juris quoted in Peay v. Gasov of Provo, 39 P.2d 1041, 1050, 88 Utah 85. 60 C.J. p 782 note 99.

44. Miss.—Hayes v. First Joint Stock Land Bank, 165 So. 605, 174

Miss. 880—Love v. Robinson, 137 So. 499, 161 Miss. 585, 78 A.L.R. 608.

45. N.Y.—Hendry v. Title Guarantee & Trust Co., 300 N.Y.S. 741, 165 Misc. 349, modified 8 N.Y.S.2d 164, 255 App.Div. 497, affirmed 21 N.E. 2d 515, 280 N.Y. 740.

Improper investment

Fiduciary, who has paid surcharge for making improper investments, becomes owner of legal title to property in which trust funds were invested and to all rights against third persons with respect to such property to extent of surcharge paid.—Junkersfeld v. Bank of Manhattan Co., 295 N.Y.S.2d 62, 250 App.Div. 646.

46. Me.—Rollins v. Taber, 25 Me. 144.

ment collected by a sheriff, is subrogated to the rights of the client against the sheriff.⁴⁷ Where a receiver of a corporation borrowed money, without authority, and used it for expenses of the receivership, and his estate has been held liable therefor, the estate is entitled to be subrogated to the rights of the lender.⁴⁸ A receiver, acting on behalf of a first mortgagee in paying taxes, has been subrogated to the rights of the owner to have the taxes paid by the second mortgagee, as provided for in an agreement between the owner and the second mortgagee.⁴⁹ In the absence of a statute to the contrary, a director of a corporation against whom a judgment has been rendered for assenting to a declaration of a dividend when there were no profits to divide has no right of subrogation as against the company.⁵⁰

§ 26. — Agent

Where an agent pays on behalf of his principal, the agent is subrogated to any rights his principal may have to reimbursement from third persons.

Where an agent pays on behalf of his principal, the agent is subrogated to any rights his principal may have to reimbursement from third persons.⁵¹ Accordingly, an agent who in good faith pays a mortgage of his principal is subrogated to the mortgagee's rights.⁵² An agent who is compelled by his mistake or mismanagement of his principal's affairs to pay his principal for a debt or default

primarily due by a third person is subrogated to the rights of the principal against that person,⁵³ unless the agent was not merely negligent but his conduct was such that he is not entitled to the consideration of a court of equity,⁵⁴ or the agent's use of his own funds for the protection of his principal was voluntary.⁵⁵ A general agent, on being compelled to pay a debt which should be satisfied by a subagent, is subrogated to the creditor's right against the latter.⁵⁶ An insurance agent who in the ordinary course of business pays premiums to the insurer on behalf of the insured is subrogated to the insurer's rights against the insured with respect to the premium.⁵⁷

§ 27. — Executor or Administrator

As a general rule, an executor or administrator who with his own funds pays debts or charges on the estate is entitled to be subrogated to the rights of those paid.

While there is some authority that an executor or administrator who uses his own funds to pay the debt of the estate is a mere volunteer and not entitled to subrogation,⁵⁸ as a general rule, unless there is fraud or want of good faith on the part of the executor or administrator,⁵⁹ an executor or administrator who with his own funds pays debts or charges on the estate is entitled to be subrogated to the rights of those paid for the collection of the amounts so paid,⁶⁰ and he may apply assets in his possession to his reimbursement,⁶¹ or may be en-

47. Ga.—Governor v. Raley, 34 Ga. 173.

48. Pa.—Estate of Wilson, 24 Pa. Dist. 314.

49. N.Y.—Redmond v. Broderick, 276 N.Y.S. 244, 243 App.Div. 579, affirmed 193 N.E. 391, 268 N.Y. 535.

50. Pa.—Hill v. Frazier, 22 Pa. 320.

51. Wash.—J. D. O'Malley & Co. v. Lewis, 28 P.2d 283, 176 Wash. 194.

Fact that attorney's agreement to indemnify surety on client's bail bond loss is attorney's direct obligation does not preclude subrogation of surety's agent, paying judgment on forfeited bond, to surety's rights against attorney.—J. D. O'Malley & Co. v. Lewis, supra.

52. N.Y.—Fawcett v. Fisher, 265 N.Y.S. 661, 148 Misc. 852.

53. Ark.—Murrell v. Henry, 66 S.W. 647, 70 Ark. 161.
60 C.J. p 782 note 2.

54. U.S.—Brinckerhoff v. Holland Trust Co., C.C.N.Y., 159 F. 191.

55. Ill.—Bennett v. Chandler, 64 N.E. 1052, 199 Ill. 97.

Volunteer's right to subrogation generally see supra § 9.

Payment of claim due principal

Where agent of mortgagee paid interest coupons on failure of mortgagor to do so, action was that of a volunteer and he was not subrogated to the mortgagee's rights.—Bennett v. Chandler, supra.

56. Ill.—Hough v. Aetna Life Ins. Co., 57 Ill. 318, 11 Am.R. 18.

57. Ga.—Stevens v. Hunt, 6 S.E.2d 591, 61 Ga.App. 265.

Kan.—Boston Safe Deposit & Trust Co. v. Thomas, 53 P. 472, 59 Kan. 470—Stoddart v. Black, 8 P.2d 305, 134 Kan. 838, 83 A.L.R. 100.

La.—Calhoun & Barnes v. Epstein Land & Improvement Co., App., 165 So. 539—McElroy v. Parry, App., 152 So. 793.

N.D.—Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 64 N.D. 317.

Tex.—Ward v. Hanchett, Civ.App., 47 S.W.2d 360, error dismissed Han-

chett v. Ward, Com.App., 65 S.W. 2d 268.

60 C.J. p 782 note 2 [b].

58. N.J.—Shinn v. Budd, 14 N.J.Eq. 234.

60 C.J. p 782 note 8.

59. N.C.—Denton v. Tyson, 24 S.E. 116, 118 N.C. 542.
60 C.J. p 782 note 9.

60. Md.—Corpus Juris cited in Blum v. Fox, 197 A. 117, 121, 173 Md. 527.

N.Y.—In re Power's Estate, 199 N.Y. S. 96, 205 App.Div. 49—In re Ryshpan's Estate, 7 N.Y.S.2d 711, 169 Misc. 368.

Ohio.—In re Outhwaite's Estate, App., 94 N.E.2d 59.

W.Va.—Harrison v. Miller, 21 S.E. 2d 674, 124 W.Va. 550.

60 C.J. p 782 note 10.

Right of executor or administrator to reimbursement for expenditures on behalf of estate see Executors and Administrators § 217 et seq.

61. Ala.—Milam v. Ragland, 19 Ala. 85.

60 C.J. p 783 note 11.

titled to have decedent's land sold, and to be repaid out of the proceeds of the sale.⁶² Moreover, in so far as an administrator has paid a debt of the estate with assets he must refund, he may be subrogated to the rights of the person whose funds were used against the creditor paid,⁶³ or to the rights of the creditor paid,⁶⁴ and may resort to any remedy such creditor would have against the assets of the estate.⁶⁵

Where an administrator pays debts in full, with entire confidence that the assets are sufficient for all purposes, and the estate subsequently is found to be insolvent, he will be entitled to subrogation as to other claims against the estate in favor of the same creditors, to the extent of overpayment on the first claim,⁶⁶ even after audit,⁶⁷ and an administrator who pays debts not of the preferred class before he has had time to ascertain the condition of the estate may be subrogated to the shares of the creditors whose claims he has paid, where the estate is in fact insolvent.⁶⁸ Likewise, where the administrator pays a debt due the estate, he is entitled to be subrogated to the rights of the estate against the debtor.⁶⁹ Where a distributee is entitled to recover his share either from the personal representative or from a third person who has received it and recovers it by action against the per-

sonal representative, the latter is subrogated to the distributee's rights against such third person.⁷⁰ Where an executor makes disbursements from his own funds for the benefit of legatees or distributees, it has been held that he becomes subrogated to their rights against the estate.⁷¹

Where an executor is secondarily liable for losses by a life tenant he has a right of subrogation against such life tenant,⁷² and this right is not affected by the fact that the deceased life tenant devised real estate to the remaindermen constituting the creditors,⁷³ or by the rule that the legatee or distributee may not be compelled to refund a payment made under a mistake of law.⁷⁴ An executor or administrator who pays a claim against the estate which is disallowed on his accounting is subrogated to the claim,⁷⁵ but it has been held that an executor or administrator who pays claims not sworn to as required by statute is not subrogated to the claimant's rights.⁷⁶ An administrator surcharged with a deposit made in an insolvent bank has been subrogated to the rights of the estate against the bank,⁷⁷ and an executor who pays a surcharge equal to the value of the securities for his negligence in failing to sell them has been subrogated to the rights of the estate with respect to the securities.⁷⁸ One who pays legacies with the reasonable expectation of

62. N.C.—Denton v. Tyson, 24 S.E. 116, 118 N.C. 542.
60 C.J. p 783 note 12.

63. N.C.—Frederick v. Southern Fidelity Mut. Ins. Co., 20 S.E.2d 372, 221 N.C. 409.

Law applicable

Where facts allegedly constituting cause of action in favor of executrix individually, as subrogee, for recovery of payment made to creditor of decedent's insolvent estate, from a fund which did not belong to the decedent and which the executrix as an individual subsequently repaid to the rightful owner, transpired in another state, laws of that state were applicable to the action, except the procedural law involved.—Frederick v. Southern Fidelity Mut. Ins. Co., supra.

64. Ky.—Franzell's Ex'r v. Franzell, 154 S.W. 912, 153 Ky. 171.
60 C.J. p 783 note 14.

65. Ark.—Flowers v. Reece, 123 S.W. 773, 92 Ark. 611.—Crowley v. Mellon, 11 S.W. 876, 52 Ark. 1.

66. Pa.—Estate of Weil, 1 Kulp 339.

67. Pa.—Estate of Weil, supra.

68. Ala.—Hullett v. Hood, 19 So. 419, 109 Ala. 345.
60 C.J. p 783 note 18.

69. Tex.—Parker v. Smith, 11 S.W. 909.
60 C.J. p 783 note 19.

70. Ohio.—Stayner v. Bower, 42 Ohio St. 314.
24 C.J. p 496 note 35.

71. U.S.—Corpus Juris quoted in Davis v. Dixon, D.C.S.C., 31 F.Supp. 912, 918.

W.Va.—Earle v. Coberly, 64 S.E. 628, 65 W.Va. 163, 17 Ann.Cas. 479.
24 C.J. p 483 note 86.

Judgment over against life tenant

Where executor conducted farming operations in violation of statute and used the money of the estate therein by express or implied agreement with the life tenant, or where the life tenant ratified such expenditures by receiving the fruits, and judgment was rendered against the executor and his surety in favor of the remaindermen, defendants were entitled to judgment over against the life tenant.—Lane v. Tarver, 113 S.E. 452, 153 Ga. 570.

Where executor paid claim for public relief furnished decedent's adult son and son's minor children before

decedent's death, executor's right to reimbursement out of son's legacy was superior to rights of son's assignee claiming under assignments executed before claim for relief was filed or paid but after father's death, since son's interest in father's estate was subject to father's equitable right of reimbursement which arose before assignments were executed.—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.

72. Md.—Carroll v. Bowling, 133 A. 851, 151 Md. 59.

73. Md.—Carroll v. Bowling, supra.

74. Md.—Carroll v. Bowling, supra.

75. Md.—Blum v. Fox, 197 A. 117, 173 Md. 527.
S.C.—Carolina Life Ins. Co. v. Arrow-smith, 176 S.E. 728, 174 S.C. 161.

76. Ark.—Acker v. Watkins, 134 S.W.2d 523, 199 Ark. 573.

77. N.Y.—In re Poulson's Estate, 280 N.Y.S. 350, 155 Misc. 625.

78. N.Y.—Junkersfeld v. Bank of Manhattan Co., 295 N.Y.S. 62, 250 App.Div. 646.

becoming the executor of an estate has been subrogated to the rights of the legatees against the estate⁷⁹ where he dies before becoming executor.⁸⁰

Discharge of encumbrance. An administrator or executor who discharges an encumbrance on estate property with his personal funds is subrogated thereto.⁸¹ So, where administrators discharge a deed of trust on land belonging to the estate, they are entitled to subrogation.⁸² The rule which prevents subrogation where one of several principals pays a joint judgment, or more than his share, does not apply where executors of two deceased tenants in common, having sold the property, discharge joint encumbrances thereon.⁸³ Where an encumbrance on estate property is discharged with the funds or property of the estate subrogation does not take place.⁸⁴ Where the decedent had given a mortgage and then transferred the property to one who assumed the mortgage, on payment of the mortgage by the executor, the estate becomes subrogated to the mortgage and to the rights against the one who assumed it.⁸⁵

Subrogation against coexecutor. Where one representative is compelled to make good a loss resulting from the default of his corepresentative, he is entitled to be subrogated to all rights which the estate⁸⁶ and the persons beneficially interested therein⁸⁷ have against the corepresentative because of his misconduct; but subrogation to the rights of an executor as legatee has been refused where the interest of the legatee has passed to an innocent third person by foreclosure of a mortgage executed

by the legatee.⁸⁸ A coexecutor, sued on his bond for the default of his coexecutor, is entitled to subrogation,⁸⁹ and an executor, liable on joint bond for the default of his coexecutor, is entitled to be subrogated to whatever compensation the coexecutor is entitled to.⁹⁰

§ 28. — Guardian

A guardian who incurs and satisfies obligations for the benefit of his ward is subrogated to the rights of the ward against others primarily liable.

The general rule that one who, acting in a representative or fiduciary capacity, incurs and satisfies obligations to the benefit of his principal is subrogated to the rights of the principal against others primarily liable applies to a guardian.⁹¹ Thus, where he pays a creditor of his ward, he will be subrogated to the rights of the creditor as against the estate.⁹² A guardian who extends time to his ward's debtor until he becomes insolvent, relying on his promise to pay, and settles the debt in his accounts, can recover it as a debt due to himself;⁹³ and, similarly, a guardian compelled by suit to pay his ward a sum of money because of his neglect to sue a former guardian, by whom the sum was due the ward and unaccounted for, is subrogated to the rights of the ward, and may recover the amount from the former guardian⁹⁴ or from the sureties on his bond.⁹⁵ Where a guardian pays to his ward the amount secured to the ward by a recognizance given by another, he is entitled to be subrogated on the security.⁹⁶ So a guardian, having lent money belonging to the ward on a note and mort-

Unclean hands

Executrix who, with coexecutor, had paid surcharge for negligently failing to sell securities belonging to estate was entitled to recover from bank for conversion of securities which coexecutor, without executrix' knowledge, had pledged to itself as security for loan and assigned to bank, since executrix was subrogated to rights of estate against bank to extent of surcharge paid by her.—*Junkersfeld v. Bank of Manhattan Co.*, *supra*.

79. N.Y.—*In re Leonhauser's Will*, 51 N.Y.S.2d 335, 183 Misc. 863.

80. N.Y.—*In re Leonhauser's Will*, *supra*.

81. Ark.—*Jefferson v. Edrington*, 14 S.W. 99, 903, 53 Ark. 545. 60 C.J. p 784 note 28.

82. Tex.—*Galbraith v. Howard*, 32 S.W. 803, 11 Tex.Civ.App. 230.

83. Pa.—*Estate of Strough*, 2 Chest. Co. 291.

84. Tex.—*Kerens Nat. Bank v. Stockton*, 94 S.W.2d 161, 127 Tex. 326.

85. Pa.—*In re Skolnek's Estate*, 19 A.2d 266, 342 Pa. 49.

86. N.Y.—*Drake v. Paige*, 28 N.E. 407, 127 N.Y. 562—*In re Prime's Estate*, 71 N.Y.S.2d 389.

87. U.S.—*Reber v. Gundy*, D.C.Pa., 13 F. 53.

N.Y.—*In re Prime's Estate*, 71 N.Y.S. 2d 389.

88. N.Y.—*Drake v. Paige*, 28 N.E. 407, 127 N.Y. 562. 24 C.J. p 1195 note 20.

89. S.C.—*Smith v. Smith*, 11 S.C.Eq. 112.

90. Ky.—*Albro v. Robinson*, 19 S.W. 587, 93 Ky. 195, 14 Ky.L. 124. 60 C.J. p 783 note 25.

91. Mont.—*In re Stinger's Estate*, 201 P. 693, 61 Mont. 173.

92. La.—*Ballio v. Wilson*, 8 Mart., N.S., 344.

W.Va.—*Buskirk v. Sanders*, 73 S.E. 937, 70 W.Va. 363.

93. Pa.—*Appeal of Breneman*, 15 A. 650, 121 Pa. 641. 60 C.J. p 784 note 36.

94. Tenn.—*Smith v. Alexander*, 4 Sneed 482.

95. Tenn.—*Smith v. Alexander*, *supra*.

96. Pa.—*Kelchner v. Forney*, 29 Pa. 47.

Where ward is not entitled to recover on claim, the guardian, on paying the ward the claim and being subrogated thereto, cannot recover.—*First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co.*, 35 S.E.2d 47, 207 S.C. 15, 162 A.L.R. 1003.

gage running to the guardian as such and having paid the loan in accounting for his guardianship is entitled to the note and mortgage,⁹⁷ and, where he has lent the ward's money without an order of the court and has paid it back from his own funds, he is subrogated to the rights of the ward.⁹⁸

Where a guardian has been compelled to account to his ward for a deposit in an insolvent bank, the guardian is subrogated to the ward's rights in the account;⁹⁹ but, where the guardian has wrongfully invested funds belonging to his ward and has been compelled to account for such funds, subrogation has been denied.¹ A guardian who advances the balance found on settlement of his account is entitled to subrogation to the remedies of his late ward as against his agent who had wrongfully retained possession of the assets represented by the decree.² An unauthorized purchase of land for wards, made by a guardian out of his own funds, entitles him to subrogation to the rights of the wards.³ A guardian who has for a valuable consideration promised to pay to the ward the amount of the ward's interest in land is not, on payment thereof, subrogated to the interest of the ward in the land.⁴

Discharge of encumbrance. Where a guardian pays a purchase-money lien, for which the land of the ward is liable, out of his own money⁵ or from money borrowed for such purpose, for which he is liable,⁶ he is entitled to subrogation to the rights of the creditor paid. Further, a guardian who, out of his own funds, pays a note of the ward which is secured by a chattel mortgage in order to prevent a loss of the property is subrogated to the rights of the chattel mortgagee.⁷

§ 29. — Sheriff or Other Public Officer

General rules as to subrogation have been applied where a sheriff or other public officer satisfies another's debt.

Where a sheriff, without liability to do so and without the consent of the debtor, satisfies an execution on which a return "no property found" has been returned, he has no right of subrogation;⁸ but, where he has satisfied the execution because of a liability to do so, he will be subrogated to the creditor's rights.⁹ So a sheriff¹⁰ or constable¹¹ who has been made liable for the failure of the obligors in a forthcoming bond to produce the property is subrogated to the creditor's rights on such bond, and, where the sheriff, by reason of the insolvency of the receptors of attached property, has been compelled to discharge an attachment debt, he is entitled to be subrogated to the rights of the creditor against the debtor.¹² Under some statutes, where a sheriff fails to retain any execution directed to him and where, after judgment is had against him, he pays the amount of the execution, with interest and costs, such judgment and execution vest in him.¹³

A sheriff who has satisfied a judgment rendered against him because of his deputy's failure to pay money collected on an execution is entitled to be subrogated to the deputy's rights.¹⁴ On satisfying a judgment based on his own delinquency, a deputy sheriff cannot thereupon recover the amount from the person for whose benefit the judgment was recovered.¹⁵ Where by reason of his neglect to collect and return an execution in due time, a constable is subject to a statutory liability, and voluntarily pays the judgment without taking a transfer thereof, he is not entitled to subrogation.¹⁶ A constable holding an attachment against the purchaser may

97. Ala.—Wright v. Robinson, 10 So. 319, 94 Ala. 479.

98. Mont.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173. 60 C.J. p 784 note 41.

99. Ky.—Bryant Bros. v. Wilson, 69 S.W.2d 1020, 253 Ky. 578.

1. Mich.—Rowley v. Towsley, 19 N. W. 20, 53 Mich. 329.

2. Pa.—In re Calhoun, 27 Pittsb. Leg.J., N.S., 414.

3. S.C.—Smith v. Moore, 95 S.E. 351, 109 S.C. 196.

4. Ky.—Steinreide v. Tegge, 29 S.W. 626, 16 Ky.L. 687. 60 C.J. p 784 note 45.

5. W.Va.—Buskirk v. Sanders, 73 S. E. 937, 70 W.Va. 363.

6. W.Va.—Buskirk v. Sanders, supra.

7. Kan.—Lessert v. Krebs, 196 P. 1070, 108 Kan. 752.

8. Ky.—Stewart v. Commonwealth, 272 S.W. 906, 209 Ky. 372. 60 C.J. p 785 note 51.

9. Ky.—Stewart v. Commonwealth, supra. 60 C.J. p 785 note 52.

10. W.Va.—Sayre v. Kunst, 93 S.E. 559, 83 W.Va. 456.

11. Tex.—Denson v. Ham, 16 S.W.

182, 4 Willson Civ.Cas.Ct.App., § 226.

12. Vt.—Hammond v. Chamberlin, 26 Vt. 406. 60 C.J. p 785 note 55.

13. Miss.—Staples v. Fox, 45 Miss. 667. 60 C.J. p 785 note 56.

14. Vt.—Downer v. South Royalton Bank, 39 Vt. 25.

15. Me.—Whittier v. Heminway, 22 Me. 238, 38 Am.D. 309. Va.—Lee County Justices v. Fulker-son, 21 Gratt. 182, 62 Va. 182.

16. Tenn.—Lintz v. Thompson, 1 Head 456, 73 Am.D. 182.

advance the amount of the charges claimed by the carrier, take the property, and become substituted to all the carrier's rights of possession.¹⁷

Where a public officer, having deposited public funds in a depository, is compelled to refund such funds on refusal of the depository to do so, such officer is entitled to be subrogated to the rights of the body to which the refund was made.¹⁸ However, where a deputy collector of internal revenue deposits money belonging to his department in a bank which becomes bankrupt, and the collector of internal revenue pays the money to the government, in view of the fact that the collector is the only person known to the law as the custodian of the revenue collected until it is paid into the proper depository, subrogation has been refused.¹⁹ A claim of subrogation has also been denied where a deposit by a public officer in a bank was unlawful²⁰ under the rule that subrogation will not be allowed to relieve a person from the consequences of his own unlawful act.²¹ A public officer who, at the request of the debtor, discharges a lien securing an obligation due the officer is not a mere volunteer in doing so,²² and is entitled to be subrogated to the lien.²³ Where a school treasurer paid legitimate orders drawn on him as treasurer, he was entitled, on the principle of subrogation, to reimburse himself from school funds coming into his hands.²⁴ A public official, on taking over an insolvent bank and paying the depositors, is subrogated to their rights against the stockholders.²⁵ A school trustee who incurs

unauthorized debts for the completion of a school building and who pays such debts out of school funds will be subrogated to the rights of the creditor paid where the debts have been ratified by the school corporation; but, where the creditors have no right of action because of failure to comply with statutory requirements in making the contract, there can be no subrogation.²⁶

§ 30. — Trustee

General rules as to subrogation have been applied with respect to the right of a trustee to subrogation.

General rules with respect to subrogation have been applied as to the right of a trustee to subrogation.²⁷ Where a trustee is compelled to pay an obligation due the estate, by reason of his neglect timely to collect such assets, title thereto vests in the trustee.²⁸ Moreover, trustees who discharge debts of the estate in reliance on void security are entitled to subrogation.²⁹ Where there is a mixed sale of property under a decree for the payment of debts, and where the trustees making the sale have exceeded in their payments their cash receipts, they may be subrogated, as to the excess, to the rights of the creditors paid off.³⁰ The right of subrogation does not exist in behalf of a trust fund wrongfully lent by the trustee;³¹ nor will such trustee be entitled to subrogation, where he has paid the cestui que trust, because of any application of the borrowed funds by the borrower.³² A trustee ex maleficio is not entitled to be subrogated to se-

17. Kan.—Rucker v. Donovan, 13 Kan. 251, 19 Am.R. 84.

18. Miss.—U. S. Fidelity & Guaranty Co. v. State, for Use of Merchants Bank & Trust Co., 188 So. 911, 186 Miss. 1.
60 C.J. p 785 note 61.

19. U.S.—Wilkinson v. Babbitt, C.C. Mo., 29 F.Cas.No.17,668, 4 Dill. 207.

20. U.S.—Wilkinson v. Babbitt, supra.
Ala.—Montgomery v. Ward, 151 So. 583, 227 Ala. 641—*Corpus Juris* cited in Montgomery v. Wadsworth, 148 So. 419, 421, 226 Ala. 667.

21. U.S.—Wilkinson v. Babbitt, C.C. Mo., 29 F.Cas.No.17,668, 4 Dill. 207.
Ala.—Montgomery v. Ward, 151 So. 583, 227 Ala. 641—*Corpus Juris* cited in Montgomery v. Wadsworth, 148 So. 419, 421, 226 Ala. 667.

22. Miss.—Grenada Bank v. Young, 104 So. 166, 139 Miss. 448.

23. Miss.—Grenada Bank v. Young, supra.
60 C.J. p 785 note 69.

24. Ill.—Trustees of Schools of Tp. No. 20, Range No. 5, Whiteside County v. Central Nat. Bank of Sterling, 39 N.E.2d 64, 312 Ill.App. 659.

25. Miss.—Love v. Robinson, 137 So. 499, 161 Miss. 585, 78 A.L.R. 608.

Payment violation of law

Fact that superintendent of banks may have violated law in paying depositors of insolvent bank from guaranty fund should not prevent reimbursement.—Love v. Robinson, supra.

26. Pa.—In re Sykesville Borough, 91 Pa.Super. 335.

27. Mass.—Hill v. Wiley, 3 N.E.2d 1015, 295 Mass. 396.

Discharge of encumbrance

Where defendant agreed to take deed to property from plaintiff, obtain mortgage and pay off encumbrances thereon and resell realty to

plaintiff within eight years if he could raise sufficient funds to pay off defendant's indebtedness on the realty, defendant was dealing with realty in a trust capacity and, if mortgage was paid off by defendant with his own money, he merely became subrogated to rights of mortgagee, and, if he paid it off with credits belonging to plaintiff, plaintiff would become reinstated with legal title.—Hanson v. Lancaster, 226 P.2d 105, 124 Mont. 441.

28. S.C.—Neely v. People's Bank of Anderson, 130 S.E. 550, 133 S.C. 43.

29. N.Y.—New York Public Library v. Tilden, 79 N.Y.S. 161, 39 Misc. 169.

30. Md.—Ellicott v. Ellicott, 6 Gill & J. 35.
60 C.J. p 786 note 76.

31. N.C.—Costner v. Piedmont Cotton Mills Co., 71 S.E. 85, 155 N.C. 128.

32. N.C.—Costner v. Piedmont Cotton Mills Co., supra.

curities held by his principals for their own security.³³ Where a testamentary trustee is removed for misconduct, and the court has control of a fund bequeathed to him as compensation for his services, the court may charge the fund with the compensation of his successor trustee.³⁴

§ 31. Persons Discharging Encumbrances

Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid.

The general rules as to the right to subrogation

apply with respect to the right of a person discharging an encumbrance on property to be subrogated thereto.³⁵ Thus, where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid,³⁶ provided the debt secured by the encumbrance is not one for which the payor is primarily liable,³⁷ and the grant of such relief is equitable.³⁸ The discharge of an encumbrance by a mere volunteer will not entitle him to subrogation,³⁹ but subrogation will be allowed where the encumbrance is discharged pursuant to an express or implied agreement for subrogation.⁴⁰ The fact

33. U.S.—*Alexander v. Security Bank & Trust Co.*, D.C.Tex., 273 F. 258, affirmed, C.C.A., 288 F. 317. 60 C.J. p 786 note 80.

34. Cal.—*In re Whitney's Estate*, 11 P.2d 1107, 124 Cal.App. 109.

35. Ark.—*Blackburn v. White*, 147 S.W.2d 7, 201 Ark. 663.

Ky.—*W. T. Congleton Co. v. Craft*, 103 S.W.2d 287, 267 Ky. 750.

N.Y.—*In re Colligan's Estate*, 110 N.Y.S.2d 638, 202 Misc. 728. 60 C.J. p 787 notes 91-94.

Creditor, who procured annulment of fraudulent mortgage, is not entitled to be subrogated to position of mortgagee.—*Campbell v. Calcasieu Nat. Bank of Southwest Louisiana*, C.C.A.La., 12 F.2d 981, certiorari denied *Calcasieu Nat. Bank of Southwest Louisiana v. Campbell*, 47 S.Ct. 111, 273 U.S. 720, 71 L.Ed. 458.

Where intention was to clear title of liens, subrogation will not be decreed.—*Blake v. Pine Mountain Iron, etc., Co.*, Ky., 76 F. 624, 22 C.C.A. 430.

36. Ariz.—*Mosher v. Conway*, 46 P.2d 110, 45 Ariz. 463.

Ark.—*Webster v. Horton*, 67 S.W.2d 200, 188 Ark. 610.

Minn.—*First Nat. Bank v. Schunk*, 276 N.W. 290, 201 Minn. 359.

N.J.—*Sever v. Yeher*, 16 A.2d 461, 128 N.J.Eq. 367.

N.Y.—*Application of Lafayette Nat. Bank of Brooklyn*, 4 N.Y.S.2d 356, 254 App.Div. 207.

Ohio.—*Jones v. Remley, App.*, 74 N.E.2d 109, modified on other grounds 75 N.E.2d 179.

N.C.—*Corpus Juris cited in Leno v. Prudential Ins. Co. of America*, 46 S.E.2d 471, 474, 228 N.C. 501, 1 A.L.R.2d 281.

Ohio.—*Joyce v. Dauntz*, 45 N.E. 900, 55 Ohio St. 538—*State Savings & Loan Ass'n v. Engel*, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779—*Hill v. Hurless*, 4 Ohio Supp. 1.

Pa.—*Corpus Juris quoted in Weir v.*

Potter Title & Mortgage Guarantee Co., 185 A. 630, 634, 323 Pa. 212. Tex.—*Coffman v. Brannen*, Civ.App., 50 S.W.2d 913.

Utah.—*Corpus Juris quoted in Peay v. Gasav of Provo*, 39 P.2d 1041, 1050, 88 Utah 85.

Wash.—*Wallace v. Henderson*, 101 P.2d 1078, 3 Wash.2d 697.

60 C.J. p 786 note 89.

One paying another's debt to protect own rights or interests as entitled to subrogation generally see supra § 9.

Fact that creditor executed release does not bar application of the text rule.—*Lusk v. Farmer*, Tex.Civ.App., 114 S.W.2d 677, error dismissed.

37. Colo.—*Liddle v. Lechman*, 163 P.2d 802, 114 Colo. 189.

Ohio.—*Jones v. Remley, App.*, 74 N.E.2d 109, modified 75 N.E.2d 179—*Hill v. Hurless*, 4 Ohio Supp. 1.

Person paying own debt as not entitled to subrogation generally see supra § 8.

38. Wash.—*Wallace v. Henderson*, 101 P.2d 1078, 3 Wash.2d 697.

Application of maxims of equity generally see supra § 6.

Fraud

Mortgagee who discharged certain paving and tax liens against mortgagors' homestead, but who fraudulently induced mortgagors to include such homestead in trust deed, was not entitled to foreclosure against homestead under subrogation provision in trust deed, since it was avoided by his fraud.—*Rotge v. Dunlap*, Tex.Civ.App., 91 S.W.2d 905, error dismissed by agreement.

39. Conn.—*Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 123 Conn. 232.

Kan.—*Katschor v. Ley*, 113 P.2d 127, 153 Kan. 569.

Mo.—*Roberts v. Best*, 72 S.W. 657, 172 Mo. 67.

Pa.—*Grace v. Kemp*, 82 Pa.Co. 597.

Utah.—*Corpus Juris quoted in Peay*

v. Gasav of Provo, 39 P.2d 1041, 1050, 88 Utah 85.

60 C.J. p 789 notes 9-11, p 790 note 25, p 810 notes 27, 29, p 818 note 20.

Volunteer as not entitled to subrogation generally see supra § 9.

Lienor whose claim has been satisfied

Where debt secured by deed had been paid, security deed grantee paying off executions against land was not entitled to conventional or equitable subrogation to rights of plaintiffs in execution, since grantee had no interest in land and was mere volunteer.—*Lee v. Arlington Peanut Co.*, 169 S.E. 1, 176 Ga. 816.

40. U.S.—*Gross v. Tierney*, C.C.A.W. Va., 55 F.2d 578.

Ga.—*Lee v. Holman*, 186 S.E. 189, 182 Ga. 559.

Kan.—*Williamstown Baptist Church v. Henley*, 148 P.2d 269, 158 Kan. 324—*Finnegan v. Ihinger*, 92 P.2d 538, 150 Kan. 357.

Miss.—*Box v. Early*, 178 So. 793, 181 Miss. 19.

Ohio.—*Knox v. Carr*, 26 Ohio Cir.Ct. 345, affirmed 70 N.E. 1125, 69 Ohio St. 575.

Or.—*Metropolitan Life Ins. Co. v. Craven*, 101 P.2d 237, 164 Or. 274.

Tex.—*Citizens Sav. Bank & Trust Co. v. Spencer*, Civ.App., 105 S.W.2d 671, error dismissed *Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt., v. Spencer*, 110 S.W.2d 1161, 130 Tex. 384—*Texas Bank & Trust Co. v. Bankers' Life Co.*, Civ. App., 43 S.W.2d 631, error refused. 60 C.J. p 811 note 38, p 813 note 52, p 814 note 68, p 819 notes 34, 40, p 820 note 43.

Debt canceled

The fact that the notes evidencing the debt discharged are "canceled" does not prevent the operation of the text rule.—*White System of Alexandria v. Fitzhugh*, La.App., 5 So.2d 555.

that the payor knows or has notice of an intervening lien at the time he pays the senior encumbrance will not bar subrogation to the senior encumbrance, provided he had an agreement for subrogation,⁴¹ although it has been held that subrogation will be denied one who negligently failed to learn of an intervening lien.⁴² Subrogation is not allowed as against intervening rights and equities acquired in reliance on the recorded release of the lien or encumbrance in respect of which subrogation is sought.⁴³ Subrogation will not be refused because of injury to the general creditors of the common debtor.⁴⁴

Persons who have been regarded as having suffi-

cient interest in the property so that they are not volunteers in discharging an encumbrance thereon and may be entitled to subrogation include the owner of the property,⁴⁵ a lessee,⁴⁶ a junior encumbrancer, as discussed *infra* § 36, one having a contract to purchase the property,⁴⁷ and one having a reasonable expectancy of inheriting the property.⁴⁸ A life tenant discharging an encumbrance on the estate is entitled to subrogation,⁴⁹ but this rule does not apply where the life tenant uses the funds of the estate to discharge the encumbrance.⁵⁰ A husband or wife discharging an encumbrance on the spouse's property is not ordinarily regarded as a volunteer,⁵¹ but a husband is not entitled to sub-

Payment at niece's request

One who paid notes given for materials used in building house in order to protect interest of purchaser's wife, who was payor's niece, at her request, was not a mere volunteer, and had lien superior to rights of purchaser's grantee for amounts paid to satisfy lumber company's lien for materials, and also for taxes paid in order to protect such lien.—*Robertson v. Lewis*, 115 S.W.2d 264, 195 Ark. 989.

Invalid assignment

One who at mortgagor's request paid full value for school fund mortgage and secured invalid assignment thereof was subrogated to mortgage lien superior to second mortgagee's foreclosure title, and entitled to foreclose mortgage lien.—*Wells v. Walworth County*, 249 N.W. 730, 61 S.D. 413.

41. Miss.—*Home Owners' Loan Corp. v. Moore*, 185 So. 253, 184 Miss. 283.

42. Cal.—*Jack v. Wong Shee*, 92 P.2d 449, 33 Cal.App.2d 402.

43. D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Neb.—*Hayden v. Huff*, 83 N.W. 920, 60 Neb. 625, affirmed on rehearing *Peters v. Huff*, 88 N.W. 179, 63 Neb. 99.

44. Mass.—*James Stewart & Co. v. National Shawmut Bank of Boston*, 196 N.E. 169, 291 Mass. 534.

45. N.Y.—*Lichtig v. Bates Chevrolet Co.*, 299 N.Y.S. 904, 252 App.Div. 502.

Tex.—*Meador v. Wagner*, Civ.App., 70 S.W.2d 794, error dismissed. 60 C.J. p 788 note 96 [h]. Discharge of encumbrance by purchaser see *infra* § 32.

Tenant's water charges

A building owner, paying city charges for water consumed by ten-

ant in order to discharge liens on property, was subrogated to rights of city against tenant and entitled to recover amount paid from latter.—*Lichtig v. Bates Chevrolet Co.*, 299 N.Y.S. 904, 252 App.Div. 502.

Mechanics' liens

(1) Building owner who paid lienors' claims could be subrogated to their rights against contractors' surety.—*Hansen v. Covell*, 24 P.2d 772, 218 Cal. 622, 89 A.L.R. 670.

(2) Where owners of land were compelled to pay lessee's indebtedness to contractor's assignee in order to obtain release of mechanic's lien, owners were entitled to be subrogated to contractor's right against lessee and lessee's guarantor without any formal assignment.—*Morris v. Hussman*, C.C.A.Cal., 66 F.2d 879, certiorari denied 54 S.Ct. 228, 290 U.S. 700, 78 L.Ed. 602.

46. N.J.—*Sever v. Yetter*, 16 A.2d 461, 128 N.J.Eq. 367.

N.C.—*Leno v. Prudential Ins. Co. of America*, 46 S.E.2d 471, 228 N.C. 501, 1 A.L.R.2d 281.

Lessee under unenforceable parol lease

Pa.—*Williams v. Benzing*, 53 Pa.Dist. & Co. 559.

Compulsion to pay

The lessee of encumbered property was not entitled to be subrogated for payments which he made on account of second mortgage, where it was not shown whether lessee was compelled, by reason of a threatened foreclosure, to make payments in order to protect his leasehold interest, in which event alone he would be entitled to subrogation.—*Sheaffer v. Baeringer*, 29 A.2d 697, 346 Pa. 32.

Lessee of only some of cotenants

Corporation holding oil lease executed by two of five cotenants of mortgaged property was entitled to subrogation and assignment from holder of mortgage, in process of

foreclosure, on tender of full amount due.—*Mahnk v. Blanchard*, 253 N.Y.S. 307, 233 App.Div. 555.

47. Ill.—*Landis v. Wolf*, 119 Ill.App. 11.

Not in position of owner

A person who has contracted to purchase land which is encumbered by a mortgage is not in the position of owner so as to bar his right of subrogation to the mortgage he has discharged, where the contract of sale is not fully carried out, nor is he barred by reason of a tender of a deed to him which he has refused as being improper.—*Landis v. Wolf*, *supra*.

48. Ohio.—*Jones v. Remley*, App., 74 N.E.2d 109, modified on other grounds 75 N.E.2d 179.

Son-in-law of owner in possession of the property was subrogated to trust deed which he discharged.—*Pugh v. Clark*, Tex.Civ.App., 238 S.W.2d 980, error refused no reversible error.

49. Mo.—*Krebs v. Bezler*, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177. Ohio.—*Eddy v. Leath*, 26 Ohio Cir. Ct. 645.

60 C.J. p 787 notes 94 [e], 96 [f], p 788 note 97 [b].

Belief of ownership

One who at the time of paying the mortgage debt erroneously believes himself the owner of the property, while in fact the record shows him entitled to but a life estate, is nevertheless entitled to subrogation against the remainderman to the extent to which such remainderman was bound to pay the mortgage to protect his estate.—*Stroh v. O'Hearn*, 142 N.W. 865, 176 Mich. 164—60 C.J. p 794 note 14.

50. Mo.—*Krebs v. Bezler*, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.

51. Ark.—*Ogden v. Watts*, 54 S.W.2d 292, 186 Ark. 500.

rogation to an encumbrance on his wife's property which he discharged where the circumstances show that the discharge was intended as a gift to her.⁵² Where a widower has no interest in the property of his deceased wife, he is a volunteer in discharging an encumbrance thereon and is not entitled to subrogation.⁵³ A widow having a dower or homestead interest in property is not regarded as a volunteer in discharging an encumbrance thereon and

may be entitled to subrogation.⁵⁴ The discharge of an encumbrance on community property by one of the spouses out of his or her separate property may entitle the payor to subrogation,⁵⁵ and a wife using her personal funds to discharge an encumbrance on property held as tenants by the entirety has been granted subrogation.⁵⁶

The foregoing rules have been applied where the encumbrance discharged is a mortgage⁵⁷ or deed of

Minn.—Kopp v. Thele, 116 N.W. 472, 104 Minn. 267, 17 L.R.A., N.S., 981, 15 Ann.Cas. 313.

60 C.J. p 788 note 97 [e].

Contract to purchase

Where a wife made all the payments due on a contract to purchase land entered into by husband, not as a volunteer but in protection of her dower interests and the homestead interest of herself and minor son, her equity in the property was superior to that of a simple contract creditor of husband.—Des Portes v. Hall, 192 So. 899, 238 Ala. 641.

Where husband abandoned wife, who continued to live on his land, she was not a mere volunteer in discharging encumbrance thereon and was entitled to subrogation.—Isselstein v. Steinberger, 179 P. 855, 106 Wash. 294.

52. Ark.—Stewart v. Tucker, 188 S.W.2d 125, 208 Ark. 612.

53. Ark.—Stewart v. Tucker, *supra*.

54. Ala.—Des Portes v. Hall, 192 So. 899, 238 Ala. 641.

Ark.—Broyles v. Edmonson, 104 S.W.2d 813, 193 Ark. 1125.

N.J.—Elmore & West End Bldg. & Loan Ass'n v. Dancy, 155 A. 796, 108 N.J.Eq. 542.

60 C.J. p 787 note 96 [m], p 788 notes 97 [d], 98 [a].

55. Cal.—Kenney v. Kenney, 217 P.2d 151, 97 Cal.App.2d 60.

Tex.—Lusk v. Parmer, Civ.App., 114 S.W.2d 677, error dismissed—Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, affirmed 134 S.W.2d 1042, 134 Tex. 201.

56. Mich.—McCaslin v. Schouten, 292 N.W. 696, 294 Mich. 180.

57. Ark.—Broyles v. Edmonson, 104 S.W.2d 813, 193 Ark. 1125—Webster v. Horton, 67 S.W.2d 200, 188 Ark. 610—Ogden v. Watts, 54 S.W.2d 292, 186 Ark. 500.

Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

La.—White System of Alexandria v. Fitzhugh, App., 5 So.2d 555.

Md.—Heighe v. Sale of Real Estate, 164 A. 671, 164 Md. 259, 93 A.L.R. 81.

N.Y.—Mahnk v. Blanchard, 253 N.Y.S. 307, 233 App.Div. 555.

Ohio.—Joyce v. Dauntz, 45 N.E. 900, 55 Ohio St. 538—Jones v. Remley, App., 74 N.E.2d 109, modified on other grounds 75 N.E.2d 179—In re Outhwaite's Estate, Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

Pa.—Sylvester v. Gosztonyi, Com.Pl., 30 North.Co. 228.

60 C.J. p 787 note 96.

Volunteer

Iowa.—Ackley Bank v. Porter, 89 N.W. 1094, 116 Iowa 377.

Neb.—Mavity v. Stover, 94 N.W. 834, 68 Neb. 602.

One having absolute or contingent interest in mortgaged property may pay mortgage debt, with right of subrogation, if payment is necessary for protection of interest.—Mahnk v. Blanchard, 253 N.Y.S. 307, 233 App.Div. 555—60 C.J. p 787 note 96 [b].

Discharge by person entitled to redeem

Subrogation arises by operation of law whenever a mortgage debt is extinguished by one entitled to redeem, other than the mortgagor or person ultimately liable for mortgage debt. Ohio.—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779—Hill v. Hurlless, 4 Ohio Supp. 1.

Tex.—McDermott v. Steck Co., Civ. App., 138 S.W.2d 1106, error refused.

Subrogation necessary for protection of rights

An equitable assignment of lien and debt to person paying mortgage arises when person making payment stands in such relationship to the premises or to the other parties that his interests, recognized either by law or equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit.—Lusk v. Parmer, Tex.Civ.App., 114 S.W.2d 677, error dismissed.

Where one was induced by fraud to convey property and the fraudulent grantee mortgaged the property and then reconveyed it to the original owner, who, without knowledge of such mortgage, discharged an earlier mortgage on the property, the owner was entitled to subrogation to the mortgage he discharged as against the mortgage given by his grantee.—Simpson v. Del Hoyo, 94 N.Y. 189.

Condemnation

(1) In proceeding for condemnation of fee title, wherein owners were entitled to only nominal award because their title was subject to street easements, but mortgagees were entitled to unincumbered fee value, city would be subrogated to mortgagees' rights in portion of mortgaged premises which was not taken, to extent of award paid to mortgagees, although subordinated to mortgagees' rights in such portion for the balances due on mortgages.—In re Braddock Avenue, City of New York, 15 N.E.2d 563, 278 N.Y. 163, reargument denied In re Braddock Avenue, City of New York, 16 N.E.2d 850, 278 N.Y. 703—In re Sixty-Eighth (Tenth and Eleventh) Street, 13 N.Y.S.2d 714, 257 App.Div. 289, supplemented 41 N.Y.S.2d 211, 266 App.Div. 677.

(2) Where assignee of mortgage, for nominal consideration, released certain lots from mortgage after title to part of mortgaged land had vested in city by virtue of condemnation proceedings, the city could not successfully claim that its right of subrogation by way of an equitable lien on mortgaged property not taken, on payment of award to assignee, was impaired by assignee's acts, since subrogation should not have been applied.—In re 43d Avenue, Borough of Queens, City of New York, 34 N.E.2d 841, 282 N.Y. 42, reargument denied 12 N.Y.S.2d 356, 256 App.Div. 1100.

(3) In proceeding to condemn land for grade crossing elimination, where owner agreed to convey property to state for a payment of a cash consideration and relocation and grading of entranceway, but state was required to pay mortgagee an award of fee value of land taken to be applied on mortgage, state was entitled to be subrogated to mortgagee's rights in

trust,⁵⁸ a vendor's lien,⁵⁹ a judgment lien,⁶⁰ an execution lien,⁶¹ a materialman's or mechanic's lien,⁶² or an assessment.⁶³

Maritime lien. One who pays the wages of seamen may be subrogated to the rank of the seamen as against other lienholders,⁶⁴ and this rule extends to an owner⁶⁵ or coowner⁶⁶ when the equities are with him, and a bottomry creditor may, by payment of the wages, entitle himself to a novation in their place for recovery of their demands against the vessel.⁶⁷ However, a mere volunteer who discharges the lien for wages cannot legally claim to be subrogated thereto;⁶⁸ nor is a general agent entitled to subrogation by reason of paying seamen in the usual course of his agency.⁶⁹ A third person who, at the request of the master, discharges maritime liens is not a volunteer.⁷⁰ The charterer of a vessel or his agent, who has authority to, and does, order services and supplies for the vessel is subrogated to a maritime lien where he pays for such supplies and services.⁷¹ Where a

vessel is forfeited for false registry, a person who has paid on behalf of the vessel the statutory head tax due on alien passengers, which is a lien on the vessel, is entitled to be subrogated thereto.⁷²

§ 32. — Persons in Status of Purchaser of Encumbered Property in General

A purchaser of property on which there is an encumbrance is not a volunteer in discharging the encumbrance, and, where he is not primarily obligated to pay the encumbrance, and justice and equity require it, he may be subrogated to the rights of the holder of the encumbrance.

A purchaser of property on which there is an encumbrance is not a volunteer in paying and discharging the encumbrance where the payment is made to protect his own interest or to perfect his own title,⁷³ and, where he is not primarily obligated to pay the encumbrance, and justice and equity require it, he may be subrogated to the rights of the holder of the encumbrance,⁷⁴ at least as against a

portion of mortgaged premises which was not taken to extent award paid exceeded amount for which owner had contracted to convey the premises.—Application of East River Sav. Bank, 51 N.Y.S.2d 796, 268 App.Div. 367.

58. N.C.—Leno v. Prudential Ins. Co. of America, 46 S.E.2d 471, 228 N.C. 501, 1 A.L.R.2d 281.
60 C.J. p 788 note 97.

Volunteer

Tex.—Schneider v. Sellers, Civ.App., 81 S.W. 126, modified on other grounds 84 S.W. 417, 98 Tex. 380.

59. Ala.—Des Portes v. Hall, 192 So. 899, 238 Ala. 641.

Ark.—Stewart v. Tucker, 188 S.W.2d 125, 208 Ark. 612.

Tex.—Lusk v. Parmer, Civ.App., 114 S.W.2d 677, error dismissed—Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, affirmed 134 S.W.2d 1042, 134 Tex. 201—Texas Bank & Trust Co. v. Bankers Life Co., Civ.App., 43 S.W.2d 631.

60 C.J. p 788 note 98, p 818 note 20, p 819 note 34, p 819 note 40—p 820 note 43.

A stranger to a title acquires no lien by way of subrogation in making purchase-money payments.—Stewart v. Tucker, 188 S.W.2d 125, 208 Ark. 612.

Officers and stockholders of a corporation are subrogated to the vendor's lien retained by the grantor of land to the corporation paid off by them.—Canadian Country Club v. Johnson, Tex.Civ.App., 176 S.W. 835.

60. N.Y.—Cole v. Malcolm, 66 N.Y. 363.

60 C.J. p 787 note 95.

61. Ga.—Lee v. Arlington Peanut Co., 169 S.E. 1, 176 Ga. 816.

62. Ill.—Hibernian Banking Ass'n v. Chicago Title & Trust Co., 217 Ill. App. 36, affirmed 129 N.E. 540, 295 Ill. 537.

60 C.J. p 787 note 94 [c].

63. Ohio.—Eddy v. Leath, 26 Ohio Cir.Ct. 645.

60 C.J. p 787 note 91 [a].

64. U.S.—The J. A. Brown, D.C. Mass., 13 F.Cas.No.7,118, 2 Lowell 464.

65. U.S.—The J. A. Brown, supra.

66. U.S.—The J. A. Brown, supra.

67. U.S.—The Cabot, D.C.N.Y., 4 F. Cas.No.2,277, Abb.Adm. 150.

68. Ark.—The P. H. White v. Levy, 10 Ark. 411.

69. U.S.—The Sarah J. Weed, D.C. Mass., 21 F.Cas.No.12,350, 2 Lowell 555.

Reliance on handling of funds for reimbursement

Where one who was appointed "irrevocable agent" of company owning vessel to handle all matters in connection with two projected voyages of the vessels agreed to pay certain of company's bills, including unpaid wages due to crew and wages during contemplated voyages, relying on his own handling of company's funds for his reimbursement, he was not entitled to be subrogated to the wage

liens against the ship.—U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185.

70. U.S.—Fielder v. Bay Const. Co., C.C.A.Fla., 5 F.2d 227—The Richmond, D.C.Del., 2 F.2d 903.

71. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218—Rodriguez v. The G. K. Dauntless, D.C.Fla., 70 F.Supp. 958.

72. U.S.—The Fredericka Schepp, D. C.R.I., 195 F. 623.

73. Tex.—Ricketts v. Alliance Life Ins. Co., Civ.App., 135 S.W.2d 725, error dismissed, judgment correct. 60 C.J. p 789 note 18.

74. Mo.—Corpus Juris cited in Tucker v. Holder, 225 S.W.2d 123, 126, 359 Mo. 1039.

Tex.—Corpus Juris cited in McDermott v. Steck Co., Civ.App., 138 S. W.2d 1106, 1109, error refused—Ricketts v. Alliance Life Ins. Co., Civ.App., 135 S.W.2d 725.

Utah.—Corpus Juris quoted in Peay v. Gasav of Provo, 39 P.2d 1041, 1050, 88 Utah 85.

60 C.J. p 789 notes 18, 20, p 795 note 41, p 796 note 47.

Subrogation of:

Fraudulent grantee to rights of creditor whom he has paid see Fraudulent Conveyances § 280 d. Purchaser of goods in violation of bulk sales statutes see Fraudulent Conveyances § 484 c.

Right extends to those claiming under purchaser

Md.—Gibson v. McCormick, 10 Gill & J. 65.

junior encumbrance.⁷⁵ In order that the purchaser may be entitled to subrogation, it is essential that he has, by his payments, extinguished the encumbrance or charge on the property purchased,⁷⁶ and that his payments, made in good faith,⁷⁷ were made either as the result of compulsion,⁷⁸ or for the protection of some interest in the property that was threatened or imperiled by the encumbrance or charge paid.⁷⁹ It has been stated that a purchaser of property who discharges an encumbrance thereon at the request of the debtor will be subrogated to such encumbrance as against other encumbrances of which he had no notice, but not as against encumbrances of which he had notice either actual or constructive.⁸⁰

A purchaser of realty who discharges an encumbrance for which he is primarily liable is not entitled to claim subrogation.⁸¹ Thus, as a general rule, a purchaser of encumbered property cannot be subrogated to the benefit of an encumbrance which he has assumed and agreed to pay,⁸² as against junior encumbrances.⁸³

Failure of title. A purchaser who, in good faith, in order to protect his title or interest, discharges an encumbrance on the property but has no title or interest, is not a mere volunteer,⁸⁴ and is entitled to subrogation,⁸⁵ and to have the lien of the encumbrance kept alive until he is paid.⁸⁶ This rule has been held to apply in favor of a purchaser who assumed an encumbrance as against third persons who have a hostile and superior interest in the property.⁸⁷ It has been held that a purchaser, who

with notice of a prior accepted option to purchase the property, applies the purchase money to discharge encumbrances thereon, is not entitled to be subrogated to the rights of the encumbrancers paid on being compelled to perform the option.⁸⁸ Where one, knowing that the mortgage was not executed by the owner of the property, nevertheless releases a chattel mortgage of it, he has been denied subrogation to a valid mortgage which was released as part of the transaction involved in the giving of the chattel mortgage.⁸⁹

§ 33. — Application to Discharge of Particular Encumbrances

- a. Mortgage or deed of trust
- b. Vendor's lien
- c. Judgment lien
- d. Chattel mortgage; deed of trust; conditional sale

a. Mortgage or Deed of Trust

As a general rule, a purchaser who discharges a mortgage or deed of trust on the property may be subrogated to the rights of the holder thereof, but subrogation will ordinarily be denied a purchaser who assumed the mortgage or deed of trust; subrogation will ordinarily be allowed to a purchaser whose title has wholly failed.

As a general rule, a purchaser of property encumbered by a mortgage or deed of trust who, in order to protect his title or interest, believing in good faith he has title or interest, although his title or interest has wholly failed, discharges the

Mo.—*Corpus Juris* cited in *Tucker v. Holder*, 225 S.W.2d 123, 126, 359 Mo. 1039.

75. Tex.—*McDermott v. Steck Co.*, Civ.App., 138 S.W.2d 1106.

76. Mo.—*Roberts v. Best*, 72 S.W. 657, 172 Mo. 67.

Utah.—*Corpus Juris* quoted in *Peay v. Gasav of Provo*, 39 P.2d 1041, 1050, 88 Utah 85.

Payment as essential to subrogation generally see *supra* § 10.

77. Mo.—*Roberts v. Best*, 72 S.W. 657, 172 Mo. 67.

Utah.—*Corpus Juris* quoted in *Peay v. Gasav of Provo*, 39 P.2d 1041, 1050, 88 Utah 85.

78. Mo.—*Roberts v. Best*, 72 S.W. 657.

Utah.—*Corpus Juris* quoted in *Peay v. Gasav of Provo*, 39 P.2d 1041, 1050, 88 Utah 85.

79. Utah.—*Corpus Juris* quoted in *Peay v. Gasav of Provo*, *supra*. 60 C.J. p 790 note 24.

80. Ga.—*Benenson v. Evans*, 134 S.E. 441, 162 Ga. 578.

81. Ind.—*Caley v. Morgan*, 16 N.E. 790, 114 Ind. 350—*La Grange v. Greer-Wilkinson Lumber Co.*, 108 N.E. 373, 59 Ind.App. 488.

Primary liability as affecting subrogation generally see *supra* § 8.

82. Ark.—*Corpus Juris* cited in *Lindley v. Marriott*, 114 S.W.2d 453, 454, 196 Ark. 1178.

Mo.—*Tucker v. Holder*, 225 S.W.2d 123, 359 Mo. 1039.

Tex.—*McDermott v. Steck Co.*, Civ. App., 138 S.W.2d 1106. 60 C.J. p 790 note 29.

83. Ark.—*Lindley v. Marriott*, 114 S.W.2d 453, 196 Ark. 1178.

Mo.—*Tucker v. Holder*, 225 S.W.2d 123, 359 Mo. 1039.

84. Ark.—*Martin v. Rolfe*, 184 S.W. 2d 70, 207 Ark. 1072.

60 C.J. p 790 note 32.

85. Ark.—*Martin v. Rolfe*, *supra*. N.Y.—*Grosch v. Kessler*, 177 N.E. 10, 256 N.Y. 477.

Okl.—*Mitchell v. Jackson*, 60 P.2d 390, 177 Okl. 441.

60 C.J. p 790 note 33, p 796 note 43.

86. Mo.—*Gooch v. Botts*, 20 S.W. 192, 110 Mo. 419.

87. Mo.—*Tucker v. Holder*, 225 S.W. 2d 123, 359 Mo. 1039.

Dower interest of grantor's wife

Where grantee assumes and pays an encumbrance without knowledge of a right to dower in the grantor's wife, he is subrogated to the encumbrance as against such dower interest.—*Tucker v. Holder*, *supra*.

88. N.J.—*Brooks v. Wentz*, 49 A. 147, 61 N.J.Eq. 474.

89. N.D.—*First Nat. Bank v. Plante*, 235 N.W. 135, 60 N.D. 512.

mortgage or deed of trust is entitled to subrogation to the rights of the holder of the mortgage or deed of trust which he discharged,⁹⁰ but according to some authorities this rule applies only where the purchaser acted under a mistake of fact and not where his mistake was one of law.⁹¹ Moreover, it has been held that, where the conveyance to him is invalid, the grantee is a mere volunteer and is

not entitled to subrogation to the mortgage which he discharged.⁹²

A purchaser of realty encumbered by a mortgage or a deed of trust which he does not assume may be entitled to subrogation as far as he has paid and discharged the mortgage or deed of trust for the protection of his interest;⁹³ and the benefit of this rule extends to the purchaser's grantee,⁹⁴ but not

90. Ala.—Carter v. Carter, 38 So.2d 557, 251 Ala. 598—Myers v. Ellison, 31 So.2d 353, 249 Ala. 367.

Ark.—Martin v. Rolfe, 184 S.W.2d 70, 207 Ark. 1072.

Miss.—Jackson v. Overton, 96 So. 742.

Okl.—Mitchell v. Jackson, 60 P.2d 390, 177 Okl. 441.

60 C.J. p 794 notes 12, 13, 15 [a].

Invalid devise

Where a purchaser of realty encumbered by a mortgage assumed payment of the mortgage as part of the purchase price and willed the property to his wife, and the wife discharged such mortgage under the belief that she owned the land as devisee, although in fact the will was invalid, the wife will have a lien on the land for the amount paid by her.—Coudert v. Coudert, 5 A. 722, 43 N. J.Eq. 407.

91. N.J.—Bentley v. Whittemore, 18 N.J.Eq. 366.

60 C.J. p 795 notes 21, 22.

92. Ark.—Grayson v. Bauschlicher, 79 S.W.2d 990, 190 Ark. 414.

Purchaser from grantee while litigation was pending was not purchaser in good faith and was not entitled to subrogation.—Grayson v. Bauschlicher, supra.

93. U.S.—Hurt v. Read, C.C.A.Tex., 108 F.2d 282.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Idaho.—Gerken v. Davidson Grocery Co., 69 P.2d 122, 57 Idaho 670.

Mass.—Porter v. Engel, 189 N.E. 798, 286 Mass. 33.

Mo.—**Corpus Juris cited in** Tucker v. Holder, 225 S.W.2d 123, 126, 359 Mo. 1039.

N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A. 2d 416, 1 N.J.Super. 532.

Ohio.—Ehrman v. Bayer, App., 41 N. E.2d 900—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

Tex.—Ricketts v. Alliance Life Ins. Co., Civ.App., 135 S.W.2d 725, error dismissed, judgment correct.

60 C.J. p 791 note 62, p 792 notes 63, 70, p 796 note 46.

Purchaser of an equity of redemption, on paying off a prior mortgage, is entitled to be subrogated to the

rights of the persons paid, the mortgages paid being considered a part of the purchaser's title to the premises.—Gautney v. Gautney, 46 So.2d 198, 253 Ala. 584—60 C.J. p 796 notes 45, 48.

Purchaser of part of property covered by mortgage

One who purchased two of the three tracts covered by a mortgage and tendered the full amount of the mortgage to the mortgagee became subrogated to all of his rights.—First Nat. Bank v. Schunk, 276 N.W. 290, 201 Minn. 359.

Partial subrogation

(1) A purchaser of land encumbered by a mortgage, making part payment to the mortgagee of the debt secured by the mortgage, is entitled to be subrogated pro tanto as to subsequent encumbrances.—Fuller v. Irvin, 42 P. 1094, 1 Kan.App. 248—60 C.J. p 792 note 77.

(2) One who purchased property subject to two mortgages is not entitled to subrogation as against the second to the extent of the payments he made on the first mortgage, and is not entitled to share pro rata in the proceeds of a sale on the foreclosure of the second mortgage to the extent that he has paid the second mortgage.—Schreyer v. Saunders, 56 N.Y.S. 921, 39 App.Div. 8.

(3) Partial subrogation generally see supra § 10.

Partial assumption

Where father who owned two ranches encumbered by one mortgage conveyed one ranch to his three sons in consideration of their assumption of only one half of entire indebtedness, the sons who discharged more than their share of a common debt in order to protect their ranch were entitled to be subrogated to rights of the lienholders to the extent that their payment exceeded their assumed share.—Hurt v. Read, C.C.A.Tex., 108 F.2d 282.

An assignee of the mortgagor, on being compelled for the protection of his interest to pay the mortgage, is not a volunteer.—Tarbell v. Durant, 17 A. 44, 61 Vt. 516.

Where the mortgage discharged is not a valid lien on the land, the pur-

chaser is not entitled to subrogation.—Wooten v. Doss, 102 S.E. 647, 25 Ga.App. 91.

Deed to mortgagee

(1) The text rule has been applied in favor of a mortgagee who takes a deed instead of foreclosing and he is subrogated to his mortgage as against junior liens of which he had no knowledge.—Perry v. Perry, 221 N. W. 674, 53 S.D. 585.

(2) On the other hand, a purchaser from the mortgagee, to whom the mortgagor had quitclaimed the property has been denied subrogation to the mortgage as against junior liens.—Novak v. Kruse, 123 N.E. 519, 288 Ill. 363.

(3) A mortgagee who in purchasing property releases his mortgage in part payment, relying on a promise that a prior mortgage would be released, cannot be subrogated to the rights he would have had under the canceled mortgage where the release of the prior mortgage was forged, and the same rule applies to his vendee.—Johnson v. Coffin, 273 P. 486, 127 Kan. 405.

Loss suffered by mortgagee

Contract to purchase land subject to mortgage made purchaser, as to mortgagor, primarily liable for mortgage debt, and, where purchaser in consideration of postponement of mortgage foreclosure proceedings indemnified mortgagee to extent of amount of taxes in arrears against ultimate deficiency in mortgage security and failed to consummate the purchase, and mortgagee sustained a net loss after application of indemnity, but executed satisfaction of mortgage bond, purchaser's assignee was not entitled, because of such release, to return of indemnity.—Bater v. Cleaver, 176 A. 889, 114 N.J.Law 346.

Purchase subject to a number of mortgages

One who purchased subject to four mortgages and paid the first is not subrogated thereto so as to defeat the other mortgages.—Guernsey v. Kendall, 55 Vt. 201.

94. Miss.—Nixon v. Julian, 18 So. 366, 72 Miss. 570.
N.Y.—Tompkins v. Seely, 29 Barb 212.

to a volunteer.⁹⁵ Thus, where money due on the mortgage is paid by such purchaser, it is in the nature of an equitable assignment, substituting him who pays in the place of the mortgagee,⁹⁶ and it makes no difference whether he took an assignment of the mortgage as a release, or whether a discharge was made and evidence of the debt canceled;⁹⁷ and no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it.⁹⁸ The purchaser's right of subrogation to the mortgage he discharged includes its priority over junior liens⁹⁹ of which he did not have actual knowledge,¹ where he was not culpably negligent in failing to learn of the junior lien,² even though he had constructive notice thereof.³ Even where the mortgage is discharged of record, the purchaser may be subrogated thereto as against junior lienors who did not change their position in reliance on the recorded discharge.⁴ Whether one who purchases subject to a mortgage which he discharges is subrogated to the mortgagee's rights

in other security he holds for the payment of the mortgage debt has been held to depend on the equities of the case and whether the price paid by the purchaser, including the discharge of the mortgage, is in excess of the value of the land.⁵ Where the purchaser is compelled to pay a mortgage which was released by a guardian without authority, he is subrogated to the guardian's rights as to the substituted security taken by the guardian,⁶ although he cannot compel the guardian first to resort to such security.⁷ Where a mortgagor conveys the property expressly subject to the mortgage and the purchaser reconveys, with a covenant against encumbrances not excepting the mortgage, and such purchaser satisfies the mortgage, he obtains no right of subrogation to the rights of the mortgagee.⁸

As a general rule, a purchaser who discharges a mortgage or deed of trust which he has assumed is not entitled to subrogation⁹ to the prejudice of a junior lien claimant of whose lien he had actual¹⁰ or constructive¹¹ notice at the time of payment, in

95. Cal.—Macfarlane v. Faulkner, 37 P.2d 161, 1 Cal.App.2d 722.

Abstractor liable to purchaser

Where abstractor who issued certificate of title in which it was erroneously shown that certain property was free from mortgages subsequently paid mortgage on property, abstractor was volunteer and not entitled to recover payments made from original mortgagors, in absence of assignment of rights of purchasers for whom abstract was made, since no privity of contract existed between abstractor and original mortgagors, particularly where original mortgagors had notified abstractor they were not liable on mortgage.—Macfarlane v. Faulkner, *supra*.

96. D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

60 C.J. p 792 notes 67, 68.

97. Tex.—Houston First Nat. Bank v. Ackerman, 8 S.W. 45, 70 Tex. 315.

60 C.J. p 792 note 69.

98. Ark.—Jefferson v. Edrington, 14 S.W. 99, 53 Ark. 545.

99. Ohio.—Ehrman v. Bayer, App., 41 N.E.2d 900—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

1. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Ohio.—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

2. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

Ohio.—State Savings & Loan Ass'n v. Engel, 4 Ohio Supp. 118, affirmed, App., 72 N.E.2d 779.

3. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., 62 A.2d 416, 1 N.J.Super. 532.

4. N.J.—Camden County Welfare Board v. Federal Deposit Ins. Corp., *supra*.

5. Miss.—Haraway v. Sledge & Norfleet Co., 11 So.2d 903, 194 Miss. 133, 145 A.L.R. 735, suggestion of error overruled 12 So.2d 436, 194 Miss. 133, 145 A.L.R. 735.

6. Tex.—Freiberg v. De Lamar, 27 S.W. 151, 7 Tex.Civ.App. 263.

7. Tex.—Freiberg v. De Lamar, *supra*.

8. N.Y.—Weeks v. Garvey, 4 N.Y.S. 890, 56 N.Y.Super. 557.

9. Ala.—Duke v. Kilpatrick, 163 So. 640, 231 Ala. 51.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Fla.—Whyel v. Smith, 134 So. 552, 101 Fla. 971.

Ind.—Storer v. Warren, 192 N.E. 325, 99 Ind.App. 616.

Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

Mo.—Tucker v. Holder, 225 S.W.2d 123, 359 Mo. 1039—State ex rel. State Highway Commission v. Houchens, App., 235 S.W.2d 97.

Pa.—Klopfenstein v. Chadbourne, 161 A. 642, 105 Pa.Super. 530.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

60 C.J. p 793 notes 92, 2, p 794 note 10.

Reasons for rule

(1) A purchaser who discharges an encumbrance which he has assumed is the person primarily liable and has paid his own debt.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Ind.—Storer v. Warren, 192 N.E. 325, 99 Ind.App. 616.

Ky.—Smith v. Feltner, 83 S.W.2d 506, 259 Ky. 833.

Mo.—State ex rel. State Highway Commission v. Houchens, App., 235 S.W.2d 97.

Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334.

(2) A purchaser assuming a mortgage is a volunteer.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833—60 C.J. p 793 note 91.

10. Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

Tenn.—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

60 C.J. p 793 note 93.

11. Ark.—Lindley v. Marriott, 114 S.W.2d 453, 196 Ark. 1178.

Ky.—Corpus Juris quoted in Smith v. Feltner, 83 S.W.2d 506, 509, 259 Ky. 833.

60 C.J. p 793 notes 94, 98, 99.

the absence of an agreement between the parties that he will be subrogated,¹² or an assignment of the mortgage.¹³ This rule has been applied, even though the purchaser expended large sums of money in improving the premises and assumed and paid other liens thereon prior to the lien as to which he seeks priority.¹⁴ A purchaser of realty who assumes and discharges a mortgage, believing in good faith that he has good title, although he has no title, is entitled to subrogation,¹⁵ and there is authority holding that a purchaser who assumes a mortgage which he subsequently pays is subrogated thereto as against a junior lien of which he did not have actual knowledge at the time of the purchase,¹⁶ on the theory that the existence of the junior lien brings him within the rule permitting subrogation in favor of a purchaser whose title has failed.¹⁷

A purchaser who believed he was acquiring the fee but actually got only a life estate has been subrogated to the protection of a mortgage he assumed and discharged as against the remaindermen,¹⁸ but it has been held that one who purchases with knowledge of a mortgage which he subsequently discharges is not subrogated to the rights of the mortgagee as against the remaindermen when it develops that he acquired only a life estate and not the fee.¹⁹ A purchaser who assumed and paid a mortgage has been subrogated to the rights of the mortgagee as against the dower interest of his grantor's wife.²⁰ On the other hand, a purchaser assuming and discharging a mortgage under the belief that he was acquiring the full title has been

denied subrogation, although he acquired only a half interest where he had constructive notice of the limitation on his interest,²¹ and a purchaser who assumed and discharged a mortgage on the entire tract has been denied subrogation, although the deed to him was deficient as to the quantity of land conveyed.²²

Where a grantee, assuming a mortgage, conveys to a third person who pays the mortgage in order to protect his title, such third person is entitled to be subrogated to the rights of the mortgagee,²³ particularly where he takes an assignment of the mortgage.²⁴ Where a grantee of a part of mortgaged premises assumes to pay the debt, but the grantee of the other part is compelled to pay in order to protect his interest, such latter grantee is not a mere volunteer,²⁵ and is entitled to be subrogated to the rights of the mortgagor against the grantee assuming payment,²⁶ unless the payment is of only part of the obligation.²⁷ A purchaser assuming payment of a mortgage cannot, by suffering the mortgage to be foreclosed and purchasing the title of a purchaser at the foreclosure sale, obtain rights additional to those passing under the original conveyance.²⁸

Where the purchaser as part of the purchase price pays off an existing mortgage or deed of trust, or it is agreed that the purchase money shall be so used, so that the purchaser will receive a title free of the mortgage or deed of trust, the authorities are in sharp conflict as to the purchaser's right of subrogation.²⁹ Some author-

Assumption of all encumbrances

Where a purchaser assumes all encumbrances on the land at the time of conveyance as part of the purchase price, he is not entitled to be subrogated to the rights of mortgagees paid as against a recorded judgment existing at the time of the conveyance, even though it is subsequent to the mortgage.—*Martin v. C. Aultman & Co.*, 49 N.W. 749, 80 Wis. 150—60 C.J. p 794 note 3.

12. Ky.—*Corpus Juris* quoted in *Smith v. Feltner*, 83 S.W.2d 506, 509, 259 Ky. 833.
60 C.J. p 793 note 95.

13. Ky.—*Corpus Juris* quoted in *Smith v. Feltner*, supra.
Okl.—*Tynes v. Smith*, 234 P. 637, 105 Okl. 100.

14. Iowa.—*Witt v. Rice*, 57 N.W. 951, 90 Iowa 451—*Afton First Nat. Bank v. Thompson*, 34 N.W. 184, 72 Iowa 417.

15. Neb.—*Betts v. Sims*, 53 N.W. 1005, 35 Neb. 840, 37 Am.S.R. 470.
60 C.J. p 794 note 16, p 795 notes 17, 20.

16. Ark.—*Commonwealth Building & Loan Ass'n v. Martin*, 49 S.W.2d 1046, 185 Ark. 858.
Ohio.—*Hill v. Hurless*, 4 Ohio Supp. 1.

17. Ala.—*Shields v. Hightower*, 108 So. 525, 214 Ala. 608, 47 A.L.R. 506.
Me.—*Williams v. Libby*, 105 A. 855, 118 Me. 80.

18. Mo.—*Tucker v. Holder*, 225 S.W. 2d 123, 359 Mo. 1039.

19. S.C.—*Robinson v. Lowery*, 30 S. E. 487, 52 S.C. 464.

20. Ind.—*Fowler v. Maus*, 40 N.E. 56, 141 Ind. 47.

21. Ala.—*Duke v. Kilpatrick*, 163 So. 640, 231 Ala. 51.

22. Tenn.—*Cole v. Patty*, 134 S.W.2d 160, 175 Tenn. 334.

23. Ill.—*Thomas v. Home Mut. Bldg. Loan Ass'n*, 90 N.E. 1081, 243 Ill. 550.

Mich.—*Kollen v. Sooy*, 137 N.W. 808, 172 Mich. 214.

24. Mich.—*Kollen v. Sooy*, supra.

25. Ark.—*Walker v. Mathis*, 194 S. W. 702, 128 Ark. 317.

26. Ark.—*Walker v. Mathis*, supra.

27. Ala.—*Thompson v. Menefee*, 100 So. 107, 211 Ala. 168.
60 C.J. p 794 note 8.

Partial subrogation generally see supra § 10.

28. Ind.—*Heaton v. Grant Lodge No. 335*, I. O. O. F., 103 N.E. 488, 55 Ind.App. 100.

29. D.C.—*Burgoon v. Lavezzo*, 92 F. 2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Or.—*Belcher v. Belcher*, 87 P.2d 762, 161 Or. 341, rehearing denied 89 P 2d 593, 161 Or. 341.

ities hold that under such circumstances the purchaser is entitled to subrogation³⁰ as against junior liens³¹ of which he did not have actual notice,³² at least where the purchaser relied on fraudulent representations of the vendor that the property was

otherwise free of encumbrances.³³ Other authorities hold that the purchaser is not entitled to subrogation as against junior encumbrances³⁴ of which he had at least constructive notice,³⁵ or of which

Reason for conflict

Such a purchaser is in a position similar to one who buys subject to a mortgage in that he acquires an interest in the property and pays the debt of another, but he is also in a position similar to a purchaser who assumes a mortgage in that he pays as a result of his own contractual obligation.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

30. La.—*Nelson v. Stewart*, 136 So. 665, 173 La. 203—*Bradford v. Duce*, App., 49 So.2d 64.
60 C.J. p 796 note 45 [a].

Defensive right

Under statute providing that subrogation takes place of right for benefit of purchaser of any immovable property, who employs the price of his purchase in paying creditors, to whom the property was mortgaged, the subrogation acquired is an equitable defensive subrogation, intended to consolidate the property in the purchaser's hands, and protect him from eviction therefrom at the instance of other creditors, and, when amount paid by purchaser to mortgage creditors does not exceed the purchase price, the subrogation acquired is limited to the property purchased, and does not confer rights on purchaser to be actively exercised against third persons.—*Waldron v. Moore*, La.App., 11 So.2d 28—60 C.J. p 789 note 18 [b].

Purchaser held not a volunteer

(1) In general.
D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.
Ill.—*Young v. Morgan*, 89 Ill. 199.
Ohio.—*Joyce v. Dauntz*, 45 N.E. 900, 55 Ohio St. 538.

(2) Purchaser was required by his contract of purchase to pay the mortgage and so was not a volunteer.—*Tom Lyle Grocery Co. v. Rhodes*, 177 So. 777, 180 Miss. 530.

31. U.S.—*Barnes v. Cady*, Ohio, 232 F. 318, 146 C.C.A. 366.
Ala.—*Gautney v. Gautney*, 46 So.2d 198, 253 Ala. 584.
Colo.—*Capitol Nat. Bank v. Holmes*, 95 P. 314, 43 Colo. 154, 16 L.R.A., N.S., 470.

D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.
Me.—*Williams v. Libby*, 105 A. 855, 118 Me. 80.
Miss.—*Tom Lyle Grocery Co. v. Rhodes*, 177 So. 777, 180 Miss. 530.

Ohio.—*Hill v. Hurless*, 4 Ohio Supp. 1.
Utah.—*Johnson v. Tootle*, 47 P. 1033, 14 Utah 482.
60 C.J. p 792 notes 74, 75.

Partial subrogation

(1) Where payment by the purchaser only partially discharges the mortgage, he is entitled to be subrogated pro tanto as against subsequent encumbrances.—*Joyce v. Dauntz*, 45 N.E. 900, 55 Ohio St. 538.

(2) A purchaser under a contract entitling him to apply deferred purchase money to liens and encumbrances existing on the property, purchasing at fair value for less than the amount of a mortgage thereon, is entitled to be subrogated pro tanto.—*Lazzell v. Keenan*, 87 S.E. 80, 77 W.Va. 180.

(3) Partial subrogation generally see supra § 10.

Security

The purchaser's right of subrogation is not affected by the fact that he took other security against subsequent encumbrances from his grantor.—*Smith v. Dinsmore*, 16 Ill.App. 115, reversed on other grounds 4 N.E. 648, 119 Ill. 656.

32. D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

N.Y.—*Ptaszynski v. Flack*, 31 N.Y.S. 2d 599, 263 App.Div. 831.
Ohio.—*Hill v. Hurless*, 4 Ohio Supp. 1.

Constructive notice of other liens and encumbrances was irrelevant on the question of subrogation.

Colo.—*Capitol Nat. Bank v. Holmes*, 95 P. 314, 43 Colo. 154, 16 L.R.A. 470, 127 Am.S.R. 108.

D.C.—*Burgoon v. Lavezzo*, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.
Me.—*Williams v. Libby*, 105 A. 855, 118 Me. 80.

Miss.—*Prestridge v. Lazar*, 95 So. 837, 132 Miss. 168.

N.H.—*Wilson v. Kimball*, 27 N.H. 300.

Ohio.—*Joyce v. Dauntz*, 45 N.E. 900, 55 Ohio St. 538—*Hill v. Hurless*, 4 Ohio Supp. 1.

The allowance of subrogation does not restrict effect of record of junior lien, with respect to which subrogation is sought, but merely replaces such lien in its original position junior to lien as to which subrogation is allowed.—*Burgoon v. Lavezzo*, 92

F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Negligence not prejudicial to junior lienor

In absence of some prejudice resulting to junior lienor from change of owners of senior lien, mere fact that one acquiring senior lien was negligent in not discovering existence of junior lien would not defeat right of subrogation.—*Joyce v. Dauntz*, 45 N.E. 900, 55 Ohio St. 538—*Hill v. Hurless*, 4 Ohio Supp. 1.

33. Utah.—*Johnson v. Tootle*, 47 P. 1033, 14 Utah 482.

34. Ga.—*Citizens Mercantile Co. v. Basom*, 123 S.E. 883, 158 Ga. 604, 37 A.L.R. 378.

Iowa.—*Stastny v. Pease*, 100 N.W. 482, 124 Iowa 587—*Goodyear v. Goodyear*, 33 N.W. 142, 72 Iowa 329.

Kan.—*Kuhn v. National Bank*, 87 P. 551, 74 Kan. 456, 118 Am.S.R. 332.
Ky.—*Smith v. Feltner*, 83 S.W.2d 506, 259 Ky. 833.

Okl.—*Fidelity & Deposit Co. v. Vance*, 245 P. 578, 135 Okl. 24—*Kahn v. McConnell*, 131 P. 682, 37 Okl. 217, 47 L.R.A., N.S., 1189.

Or.—*Belcher v. Belcher*, 87 P.2d 762, 161 Or. 341, rehearing denied 89 P.2d 593, 161 Or. 341.

Pa.—*Klopfenstein v. Chadbourne*, 161 A. 642, 105 Pa.Super. 530.

Wash.—*De Roberts v. Stiles*, 64 P. 795, 24 Wash. 611.
60 C.J. p 793 note 88.

The purchaser is a mere volunteer since he was not under a duty to purchase or to discharge the mortgage.

Mo.—*Wade v. Beldmeir*, 40 Mo. 486.

Okl.—*Fidelity & Deposit Co. v. Vance*, 245 P. 578, 135 Okl. 24—*Kahn v. McConnell*, 131 P. 682, 37 Okl. 219, 47 L.R.A., N.S., 1189.

Or.—*Belcher v. Belcher*, 87 P.2d 762, 161 Or. 341, rehearing denied 89 P.2d 593, 161 Or. 341.

35. Ark.—*Lindley v. Marriott*, 114 S.W.2d 453, 196 Ark. 1178.

Ga.—*Bank of Canton v. Nelson*, 160 S.E. 232, 173 Ga. 185—*Federal Land Bank of Columbia v. Barron*, 160 S.E. 228, 173 Ga. 242.

Iowa.—*Stastny v. Pease*, 100 N.W. 482, 124 Iowa 587—*Goodyear v. Goodyear*, 33 N.W. 142, 72 Iowa 329.

Kan.—*Kuhn v. National Bank*, 87 P. 551, 74 Kan. 456, 118 Am.S.R. 332.

he had actual knowledge,³⁶ although he will be allowed subrogation as against a junior lien of which he had no notice, actual or constructive.³⁷ Where the purchaser did not acquire title to the property, he is entitled to subrogation to the lien of the mortgage discharged,³⁸ and the purchaser has been held entitled to subrogation as against the dower interest of his grantor's wife who did not join in the conveyance.³⁹ Where land, encumbered by a mortgage, is subsequently mortgaged with power of sale, and is then conveyed to another who assumes both mortgages, and such grantee conveys to plaintiff by warranty deed subject to the first mortgage but with the undertaking of the grantee to have the second mortgage discharged, and the second mortgagee, under his power of sale, advertises the property for sale but is paid both the mortgage debt and expenses of advertising by plaintiff, plaintiff, as owner of the equity of redemption, is entitled to subrogation as against the original mortgagor for the amount of the mortgage debt,⁴⁰ but not for the expenses of advertising.⁴¹

b. Vendor's Lien

A purchaser of land encumbered by a vendor's lien may be entitled to be subrogated thereto as against junior encumbrances where he discharges the lien to protect his interest.

A purchaser of land encumbered by a vendor's lien, paying such lien in order to protect his interest, is not a mere volunteer,⁴² and may be entitled to be subrogated to the benefit of the lien as against a junior encumbrancer⁴³ or a coöwner,⁴⁴ and his right extends to his grantee.⁴⁵ It has been held

that, where a purchaser under a warranty deed is compelled to free his land from a vendor's lien, he is entitled to be subrogated to the rights of the creditor paid, as against those personally liable for the debt secured by the vendor's lien.⁴⁶ Where, in accordance with the agreement of the parties, the purchase price is used to discharge a vendor's lien on the property, the purchaser has been held subrogated to the vendor's lien as against junior encumbrances.⁴⁷

Assumption of encumbrance. Where a grantee, as part consideration for the land, assumes and pays a vendor's lien note thereon, he thereby extinguishes the lien, and is not entitled to be subrogated to the rights of the lienholder.⁴⁸ However, having assumed the lien without knowledge of a junior deed of trust, on payment of the assumed lien he may be entitled to subrogation where the subsequent lienor has suffered no injury thereby.⁴⁹

Failure of title. A purchaser, having purchased his title or interest in good faith and having discharged a vendor's lien thereon, where his title is defective, is an equitable assignee of such lien⁵⁰ and is entitled to be subrogated to the rights of the lienholder.⁵¹ So a purchaser, assuming as part of the purchase price a vendor's lien thereon, whose title is defective, is entitled to be subrogated to the vendor's rights.⁵² The grantee of property title to which fails by reason of a prior outstanding contract of sale to another of which he had notice has been subrogated to his grantor's rights as to the balance of the purchase price under the contract of sale.⁵³

N.J.—Garwood v. Eldridge, 2 N.J.Eq. 145, 34 Am.D. 195.

Or.—Belcher v. Belcher, 87 P.2d 762, 161 Or. 341, rehearing denied 89 P.2d 593, 161 Or. 341.

Wis.—Conner v. Welch, 8 N.W. 260, 51 Wis. 431.

36. Fla.—Hirsch v. Lincoln Securities Co., 160 So. 12, 118 Fla. 164. 60 C.J. p 794 note 9.

37. Ga.—Federal Land Bank of Columbia v. Barron, 160 S.E. 228, 173 Ga. 242.

38. Conn.—Paton v. Robinson, 71 A. 730, 81 Conn. 547.

Usurious transaction

Where a purchaser of bonds secured by a trust deed on premises subject to a prior mortgage agreed that part of the purchase price would be used to discharge the mortgage, if the agreement of sale is usurious and void, payment of the mortgage

does not entitle the purchaser to subrogation.—Baldwin v. Moffett, 94 N.Y. 82.

39. Ind.—Overturf v. Martin, 84 N. E. 531, 170 Ind. 308.

Or.—House v. Fowle, 29 P. 890, 22 Or. 303.

40. Mass.—Back v. Gallagher, 114 Mass. 28.

41. Mass.—Back v. Gallagher, *supra*.

42. Va.—Fulkerson v. Taylor, 41 S. E. 863, 100 Va. 426. 60 C.J. p 795 note 25.

43. Va.—Fulkerson v. Taylor, *supra*. W.Va.—McNeil v. Miller, 2 S.E. 335, 29 W.Va. 480.

44. Tex.—Downing v. Jeffrey, Civ. App., 173 S.W.2d 241, error refused.

45. Tenn.—Smith v. Peace, 1 Lea 586. 60 C.J. p 795 note 30.

46. Tex.—Newby v. Harbison, Civ. App., 185 S.W. 642.

47. Tex.—Harrison v. First Nat. Bank, Com.App., 238 S.W. 209.

W.Va.—McNeil v. Miller, 2 S.E. 335, 29 W.Va. 480.

48. Tex.—Hatton v. Bodan Lumber Co., 123 S.W. 163, 57 Tex.Civ.App. 478.

60 C.J. p 795 note 33.

49. Tenn.—Dixon v. Morgan, 285 S. W. 558, 154 Tenn. 389.

50. Iowa.—Dillow v. Warfel, 32 N. W. 194, 71 Iowa 106.

51. Ky.—Woodland Cemetery Co. v. Ellison, 80 S.W. 169, 25 Ky.L. 2069. 60 C.J. p 795 note 36.

52. Tenn.—Christian v. Clark, 10 Lea 630. 60 C.J. p 795 note 37.

53. Wis.—Peper v. Eveland, 272 N. W. 11, 224 Wis. 267.

c. Judgment Lien

One purchasing land without knowledge of a judgment lien thereon which he is compelled to pay is entitled to be subrogated to the rights of the judgment creditor.

One purchasing land without knowledge of a judgment lien thereon which he is compelled to pay is entitled to be subrogated to the rights of the judgment creditor,⁵⁴ and he may be subrogated to the judgment creditor's lien against other property of the judgment debtor;⁵⁵ and if, to save his land from sale, he has paid several judgment liens, he is entitled to be subrogated to the liens of such creditors against any other land of his vendor.⁵⁶ In like manner the vendee of land encumbered with judgment liens who deposits money in court to pay the senior judgment becomes subrogated to the rights of such judgment creditor to the extent of his payment, as against the junior judgment creditor,⁵⁷ although by mistake the amount deposited is not quite enough to satisfy the senior judgment in full.⁵⁸

In the absence of an agreement preventing application of the doctrine of subrogation, where a purchaser of land encumbered by judgment liens partially discharges a judgment thereon, it has been held that he is entitled to be subrogated pro tanto to the rights of the judgment creditor.⁵⁹ A grantee of land who, through neglect to record his deed, has had the land taken from him on execution issued on a judgment rendered against his grantor, in an action on a debt secured by a mortgage of the grantor's other land, may maintain a bill in equity against his grantor and the judgment creditor to be subrogated, to the extent of his loss by the levy, to all the rights of the latter under the mortgage not required for the full satisfaction of the debt.⁶⁰ So, a purchaser of attached property who, even after suit, uses the purchase money to discharge existing judgment liens is entitled to subrogation

where the property is decreed to be sold.⁶¹ Where a judgment debtor conveyed part of his land, the grantee assuming the judgment debt, the grantee of the rest of the land, being compelled to pay the judgment for his own protection, is entitled to be subrogated to the rights of the vendor against the one who assumed the judgment,⁶² and his claim is entitled to priority over that of a purchaser at a foreclosure sale of a mortgage subsequently given.⁶³ Where one in possession of land under a contract of purchase buys at an execution sale on a judgment against his vendor, he is subrogated to the creditor's rights against his vendor, and to the vendor's rights in the surplus of the purchase price.⁶⁴

Failure of title. Where a purchaser of land encumbered by judgment liens has discharged such liens, but his title fails, he is entitled to be subrogated to the rights of the lienholders.⁶⁵

d. Chattel Mortgage; Deed of Trust; Conditional Sale

A purchaser of a chattel from a mortgagee may be subrogated to the rights of his grantor, and a purchaser of a chattel who discharges the lien of a conditional seller has been held entitled to subrogation.

In general, a bona fide purchaser from a chattel mortgagee will, under principles of subrogation, succeed to all the rights of his grantor,⁶⁶ even though he has no contract of assignment.⁶⁷ So, where a chattel, encumbered with other chattels by a chattel mortgage, is sold and, by consent of the parties, the purchase money credited as part payment of the debt secured by the mortgage, such purchaser is not a mere stranger or volunteer,⁶⁸ and the equitable doctrine of subrogation applies for his protection,⁶⁹ particularly when receiving an assignment of the mortgage.⁷⁰ However, under the general principle that one seeking subrogation must come into court with clean hands, as discussed supra

54. Ark.—Jansen v. Perrin, 19 S.W. 2d 1105, 179 Ark. 927.

60 C.J. p 791 note 49.

55. Ark.—Jansen v. Perrin, supra. 60 C.J. p 791 note 50.

56. Ark.—Jansen v. Perrin, supra. W.Va.—Beall v. Walker, 26 W.Va. 741.

57. Pa.—Appeal of Sower, 15 A. 898, 1 Mon. 49.

58. Pa.—Appeal of Sower, supra.

59. N.C.—Brown v. Harding, 89 S. E. 222, 86 S.E. 1010, 171 N.C. 686, 170 N.C. 253, Ann.Cas.1917C 548,

retaxation of costs denied 90 S.E. 3, 172 N.C. 835.

Partial subrogation generally see supra § 10.

60. Mass.—Wall v. Mason, 102 Mass. 313.

61. Ky.—Beall v. Barclay, 10 B.Mon. 261.

62. Iowa.—Barr v. Patrick, 3 N.W. 743, 52 Iowa 704.

63. Iowa.—Barr v. Patrick, supra.

64. Colo.—Ross v. Brown, 212 P. 835, 72 Colo. 560.

60 C.J. p 797 note 74 [b].

65. W.Va.—Blair v. Mounts, 24 S.E. 620, 41 W.Va. 706.

66. Mont.—Potter v. Lohse, 77 P. 419, 31 Mont. 91.

60 C.J. p 790 note 37.

67. Mont.—Potter v. Lohse, supra.

68. Ohio.—O. S. Kelly Co. v. Lobenthal, 15 Ohio Cir.Ct. 343, 8 Ohio Cir. Dec. 300.

69. Ohio.—O. S. Kelly Co. v. Lobenthal, supra.

70. S.C.—C. M. Davis & Son v. Butler, 93 S.E. 193, 107 S.C. 548.

§ 6, where purchasers of a chattel encumbered by a mortgage, on being convicted of conversion, have paid such judgment, such payment does not entitle them to be subrogated to the right of the chattel mortgagee.⁷¹ A purchaser of chattels, encumbered by a deed of trust, on being compelled to discharge the lien in order to protect his interest, is not a mere volunteer,⁷² and is entitled to be subrogated to the rights of the holder of the trust deed.⁷³

A purchaser of a chattel who assumes and pays a mortgage thereon is not entitled to subrogation.⁷⁴ Where a purchaser of land encumbered by a chattel mortgage assumes payment of the mortgage as part of the purchase price, he is not entitled to be subrogated to the benefits of the encumbrance.⁷⁵

Failure of title. A purchaser of a chattel who, in good faith of his title or interest, although not having title or interest, discharges a chattel mortgage thereon is entitled to be subrogated to the rights of the chattel mortgagee.⁷⁶

Conditional sale. A purchaser of a chattel who discharges the lien of a conditional seller has been held entitled to subrogation.⁷⁷

Purchaser of pledged property. A purchaser of stock pledged as collateral security, the purchase money discharging the debt for which the pledge was made, becomes subrogated to the rights of the pledgee, where he acquired no title because of the pledgee's want of authority to sell.⁷⁸

§ 34. — Purchasers of Equity of Redemption

One who purchases a naked equity of redemption as such and pays for nothing more is not subrogated to the lien of a mortgage which he pays off.

One who purchases a naked equity of redemption as such and pays for nothing more is not subrogated to the lien of a mortgage which he pays off,⁷⁹ since he has received all the estate he purchased and paid for.⁸⁰

Redemption. One, not a volunteer, redeeming from the foreclosure of an encumbrance has been held to be entitled to be subrogated to the rights of the purchaser at the foreclosure sale⁸¹ and to the lien of the encumbrance.⁸² It has been said that, where the purchaser of land at an execution sale accepts money tendered for redemption by a person not entitled to redeem, the person paying the money will be subrogated to the purchaser's right to the deed.⁸³

§ 35. — Purchasers at Execution, Foreclosure, Judicial, and Similar Sales

Where necessary in order to secure equity to a purchaser at an execution or judicial sale, he may be subrogated to the rights of the creditor whose claim the purchase money paid, and such subrogation is generally awarded a purchaser at an invalid execution or judicial sale.

Where necessary in order to secure equity to a purchaser at an execution⁸⁴ or judicial⁸⁵ sale, he

71. Ala.—Galliland v. Williams, 61 So. 291, 181 Ala. 173.

72. Ark.—Corpus Juris quoted in Hunter v. Jennings, 227 S.W.2d 946, 948, 216 Ark. 886. 60 C.J. p 790 note 44.

73. Ark.—Corpus Juris quoted in Hunter v. Jennings, 227 S.W.2d 946, 948, 216 Ark. 886.

Miss.—Ellis-Jones Drug Co. v. Coker, 125 So. 826, 156 Miss. 775, suggestion of error overruled and setting aside judgment refused 127 So. 283, 156 Miss. 775.

74. Ark.—Lindley v. Marriott, 114 S.W.2d 453, 196 Ark. 1178.

75. Iowa.—Hubbard v. Le Barron, 81 N.W. 681, 110 Iowa 443. 60 C.J. p 790 note 46.

76. Kan.—H. Sinning v. Sumpter, 121 P. 332, 86 Kan. 454. 60 C.J. p 791 note 47.

77. N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.

Priority over chattel mortgage

(1) The rights of conditional seller of automobile, which were acquired by subsequent buyer through payment of conditional seller's claim, were superior to a chattel mortgage placed on automobile by conditional buyer before sale to subsequent buyer.—Meisel Tire Co. v. Ralph, supra.

(2) Transferee of chattels subject to conditional sales contract and lien of subsequent mortgage was subrogated to right of conditional seller as to amount of final payment on contract, where transferee in return therefor took assignment of seller's title.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 139 Cal.App. 427.

78. Tex.—Brinkman v. Rick, Civ. App., 19 S.W.2d 808. 60 C.J. p 790 note 37 [a].

79. Ohio.—Joyce v. Dauntz, 45 N.E. 900, 55 Ohio St. 538.

80. Ohio.—Joyce v. Dauntz, supra.

81. Ariz.—Mosher v. Conway, 46 P. 2d 110, 45 Ariz. 463.

Redemption not necessary for protection of interest

With respect to right of purchaser at second improvement sale for failure to pay paving assessments to be subrogated to right of purchaser at third improvement sale, second purchaser was justified in redeeming from third sale for protection of second purchaser's rights under first sale, notwithstanding it might ultimately be determined as matter of law that such redemption was unnecessary.—Mosher v. Conway, supra.

82. S.D.—Buhl v. McDowell, 242 N.W. 638, 60 S.D. 22.

83. N.Y.—In re Eleventh Ave., 81 N.Y. 436.

84. La.—Roberts v. Edwards, 52 So. 272, 126 La. 194. 60 C.J. p 797 note 74.

85. U.S.—Brown v. Crawford, D.C. Or., 252 F. 248. 60 C.J. p 797 note 75.

may be subrogated to the rights of the creditor whose claim the purchase money paid, and the grantee of the purchaser is likewise entitled to be subrogated to such rights.⁸⁶ Thus one purchasing at the foreclosure of a mortgage or deed of trust may be subrogated to the mortgage or deed of trust.⁸⁷ Where part of the purchase price at a foreclosure sale is used to discharge a prior encumbrance, the purchaser has been held entitled to subrogation to such prior encumbrance,⁸⁸ but, where the payment of such prior liens is made by order of the court, subrogation has been denied on the theory that it is the money of the debtor, not that of the purchaser, that is used to discharge the liens.⁸⁹ Where land encumbered by judgment liens is sold at a partition sale, the purchaser agreeing that the purchase money will be applied to discharging the judgments, the purchaser is entitled to be subrogated to the rights of the judgment creditors.⁹⁰ Where property was foreclosed under a deed of trust and the purchaser transferred the purchase certificate to the owner and took back a new deed of trust, he has been denied subrogation as against an intervening lien of which he had knowledge.⁹¹

The general rule discussed supra § 32 that a purchaser who discharges an encumbrance which he is not primarily obligated to pay is entitled to be subrogated to the encumbrance discharged applies in favor of a purchaser at an execution⁹² or judicial⁹³ sale. The buyer of lands under a decree in partition, who paid the full purchase price and

then discovered judgments which were liens against the individual interests of some of the owners and paid them, is entitled to be subrogated, with respect to the purchase price, to the rights of such distributees as should have paid the judgments.⁹⁴ A purchaser at an execution sale may, before the time for redemption expires, pay the debt secured by a prior trust deed and be subrogated thereto,⁹⁵ and, where purchasers of land at a sale by virtue of a deed of trust pay notes secured by a lien on the land superior to the trust lien, they are not volunteers⁹⁶ and are entitled to be subrogated to the rights of the payee.⁹⁷ However, it has been held that a purchaser at a chattel mortgage foreclosure sale who buys goods which are sold subject to a lien for rent is not, on payment of the lien, entitled to be subrogated to the lienor's rights.⁹⁸ The doctrine of subrogation has been held unavailable to a purchaser seeking to have his payment of a prior lien applied toward the purchase price.⁹⁹ It has been held that a purchaser at a sheriff's sale for a debt of a husband, who pays a mortgage which had been given by the husband and his wife on land owned by them as tenants in common as security for a debt of the husband, is not entitled to be subrogated to the mortgagee's rights as against the wife's interest;¹ and that, in the case of an administrator's sale of land subject to a mortgage by husband and wife, where the purchaser discharges the mortgage, he is not entitled to be subrogated to the rights of the mortgagee as against the widow's right

Partial subrogation

(1) Where money bid by purchaser at mortgage foreclosure sale does not discharge mortgage debt in full, purchaser is not subrogated to whole debt, but only pro tanto to extent of bid.—*Nodaway County v. Alumbaugh*, 153 S.W.2d 74, 348 Mo. 354.

(2) Partial subrogation generally see supra § 10.

86. Ohio.—*Lumbermen's Mortg. Co. v. Stevens*, 187 N.E. 641, 46 Ohio App. 5.

Okl.—*Douglass v. Hanawalt*, 165 P.2d 333, 196 Okl. 369.

Equities not warranting subrogation

Security deed holder purchasing property at foreclosure sale, and purchasing quitclaim deed from purchaser at sale for all taxes owed by security deed grantor's successor on various properties, was not entitled to subrogation against holders of security deeds to other of successor's delinquent properties, who acquired title thereto on foreclosure.—*Moor v.*

Interstate Mortg. Co. of Texas, 167 S.E. 173, 176 Ga. 117.

87. Okl.—*Douglass v. Hanawalt*, 165 P.2d 333, 196 Okl. 369.

60 C.J. p 798 note 86, p 797 note 75 [c].

Protection of title

One who purchased property at mortgage foreclosure sale became subrogated to mortgagee's rights for protection of title.—*Lumbermen's Mortg. Co. v. Stevens*, 187 N.E. 641, 46 Ohio App. 5.

88. La.—*Nelson v. Stewart*, 136 So. 565, 173 La. 203.

89. Ga.—*Lowe v. Rawlins*, 10 S.E. 204, 83 Ga. 320, 6 L.R.A. 73.

60 C.J. p 798 note 84, p 799 note 92.

90. Ind.—*Dunning v. Seward*, 90 Ind. 63.

91. Colo.—*Home Owners' Loan Corp. v. Meyer*, 136 P.2d 282, 110 Colo. 501.

92. Mass.—*Warren v. Sherwood*, 150 N.E. 902, 255 Mass. 206.
60 C.J. p 798 note 76.

93. Tenn.—*Hudson v. Chandler & Co.*, 14 Tenn.App. 496.
60 C.J. p 798 note 77.

94. Ind.—*Spray v. Rodman*, 43 Ind. 225.

95. Cal.—*Swain v. Stocton Sav., etc., Soc.*, 21 P. 365, 78 Cal. 600, 12 Am. S.R. 118.

96. Tex.—*Schneider v. Sellers*, 61 S.W. 541, 25 Tex.Civ.App. 226.

97. Tex.—*Hill v. Gomez*, Civ.App., 260 S.W. 618—*Schneider v. Sellers*, 61 S.W. 541, 25 Tex.Civ.App. 226.

98. Iowa.—*Bolton v. Lambert*, 34 N.W. 294, 72 Iowa 483.
60 C.J. p 798 note 83.

99. R.I.—*Brunette v. Myette*, 102 A. 520, 40 R.I. 546.

1. Pa.—*Zeller v. Henry*, 27 A. 559, 157 Pa. 1.
60 C.J. p 799 note 93.

of dower.² A purchaser under a judgment against a vendor has been denied subrogation to the vendor's lien for the purchase price, where notes given for the price were in the possession of third persons.³

As against the purchaser at an execution sale, it has been held that the execution debtor will not be substituted to the rights of the holder of a prior mortgage lien by paying the debt which it secures,⁴ and this rule extends to the enforcement of the prior mortgage lien by a sale of the property and its purchase by a third person with funds belonging to the execution debtor.⁵ Where goods are attached and sold by the sheriff who pays liens out of the proceeds, one of the attaching creditors who is not paid in full is not entitled to be subrogated to the rights of the lien discharged.⁶

Invalid sales. While it has been held that a purchaser at a void execution sale is a mere volunteer⁷ and is not subrogated to the rights of the creditor whose claim his payment is used to discharge,⁸ the decided preponderance of authority⁹

is that a purchaser in good faith at a void execution¹⁰ or judicial¹¹ sale is not a volunteer, and, in purchasing at such void execution¹² or judicial¹³ sale, is entitled to be subrogated to the rights of creditors to the payment of whom the purchase money was applied. So, where the purchase money of an invalid execution¹⁴ or judicial¹⁵ sale is applied to the discharge of encumbrances, the purchaser is entitled to the benefit of the encumbrances discharged. Further, a purchaser under a decree, obtained without appearance of defendant, on an attachment on land as property of defendant, in which he has only an equity, without designating it to be such, who has paid off the vendor's lien, will be subrogated to the vendor's rights.¹⁶ So a purchaser of land at an invalid sale under partition proceedings, taking deed without warranty, acquires all the rights of the heirs at the time of sale.¹⁷

On the other hand, it has been held that the right of subrogation extends only to a purchaser in good faith.¹⁸ If there was no subsisting lien to be dis-

2. Ill.—Cox v. Garst, 105 Ill. 342.

3. Miss.—Lyle v. Clark, 24 So. 966.

4. Ky.—Atkins v. Emison, 10 Bush 9.

5. Ky.—Atkins v. Emison, supra.

6. Miss.—Wohner v. Handy, 8 So. 331, 68 Miss. 153.

7. N.Y.—Charles H. Dauchy Co. v. Wilkinson, 295 N.Y.S. 666, 251 App. Div. 53.

8. N.Y.—Charles H. Dauchy Co. v. Wilkinson, supra.

9. Ark.—Bond v. Montgomery, 20 S. W. 525, 56 Ark. 563, 35 Am.S.R. 119.

10. Ark.—Bond v. Montgomery, supra.

11. Ark.—Bond v. Montgomery, supra.

12. Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554—Davis v. Hudson, 244 S.W. 68, 195 Ky. 766.

Tex.—Corpus Juris cited in Hendron v. Yount-Lee Oil Co., Civ.App., 119 S.W.2d 171, 174.
60 C.J. p 799 note 99.

Failure to join party

Statute providing for subrogation of purchaser at sale on execution to the right of creditors did not entitle purchaser at sheriff's sale pursuant to order in partition proceeding to indemnify for defective title resulting from failure to make one coparcener

a party to proceeding.—Kain v. Weitzel, 50 N.E.2d 605, 72 Ohio App. 229.

13. Fla.—Bridier v. Burns, 4 So.2d 853, 148 Fla. 587, opinion supplemented 7 So.2d 142, 150 Fla. 238. Ga.—Hirsch v. Northwestern Mut. Life Ins. Co., 13 S.E.2d 165, 191 Ga. 524.

Ky.—Townsend v. Tipton, 160 S.W.2d 161, 289 Ky. 766, 142 A.L.R. 306. Mo.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.
60 C.J. p 799 note 1.

Purchaser's right to subrogation where foreclosure under power of sale in mortgage or deed of trust is invalid see Mortgages § 594 f.

Where a foreclosure sale or decree is void, the purchaser will be entitled, as far as the land is concerned, to be subrogated to all the rights therein of the mortgagee or owner of the debt secured.

Fla.—Trueman Fertilizer Co. v. Lester, 20 So.2d 349, 155 Fla. 338—Edason v. Central Farmers' Trust Co., 129 So. 698, 100 Fla. 348—Quinn Plumbing Co. v. New Miami Shores Corp., 129 So. 690, 100 Fla. 413, 73 A.L.R. 600—Oakland Properties Corporation v. Hogan, 117 So. 850, 96 Fla. 52—Meyer v. Florida Home Finders, 105 So. 267, 90 Fla. 128—Key West Wharf & Coal Co. v. Porter, 58 So. 599, 63 Fla. 448, Ann. Cas.1914A 173.

Ind.—Bodkin v. Merit, 1 N.E. 625, 102 Ind. 293—Ray v. Detchon, 79 Ind. 56.

Ky.—Lewis v. Creech, 176 S.W.2d 898, 296 Ky. 305.

N.C.—Kemp v. Kemp, 85 N.C. 491.

Ohio.—Doyle v. Breneman, 4 Ohio S. & C.P. 22, 2 Ohio N.P. 415.

S.C.—Bailey v. Bailey, 19 S.E. 669, 728, 41 S.C. 337, 44 Am.S.R. 713.

Tex.—Howard v. Stahl, Civ.App., 211 S.W. 826.

42 C.J. p 264 note 2.

14. Ark.—Bond v. Montgomery, 20 S.W. 525, 56 Ark. 563, 35 Am.S.R. 119.

60 C.J. p 800 note 2.

15. Fla.—Bridier v. Burns, 4 So.2d 853, 148 Fla. 587, opinion supplemented 7 So.2d 142, 150 Fla. 238.

Ky.—Townsend v. Tipton, 160 S.W.2d 161, 289 Ky. 766, 142 A.L.R. 306.
60 C.J. p 800 note 3.

Priority over junior lien

Where holder of a junior judgment lien against mortgaged property was not made a party to foreclosure proceedings, the person acquiring title through purchaser at foreclosure sale became subrogated to the rights of original mortgagee and was entitled to reforeclosure of mortgage as against holder of judgment.—Trueman Fertilizer Co. v. Lester, 20 So. 2d 349, 155 Fla. 338.

16. Tenn.—Lane v. Marshall, 1 Heisk. 30.

17. S.C.—Givens v. Carroll, 18 S.E. 1030, 40 S.C. 413, 42 Am.S.R. 889.
60 C.J. p 800 note 5.

18. Ky.—King v. Huni, 81 S.W. 254,

charged by the purchaser at the sale made under a decree of foreclosure of a vendor's lien, there is no room for subrogation, as the purchaser could not occupy a better position than plaintiff in the void decree.¹⁹ Where land was sold to satisfy a claim against an estate, but one of the heirs was not made party to the proceeding, it has been held that the purchaser is not entitled to subrogation to the claim discharged or to the right of the other heirs to contribution as against the heir not party to the proceeding.²⁰

§ 36. — Subsequent Encumbrancers

As a general rule a junior encumbrancer who discharges a senior lien for the protection of his own interest is entitled to subrogation to the lien discharged.

A junior encumbrancer who, in order to preserve his own security, is compelled to pay a prior encumbrance held by another is not a mere volunteer,²¹ and, as equitable assignee,²² is entitled to be subrogated to the rights of the prior lienor whose lien he has paid,²³ including all securities held by such prior encumbrancer.²⁴ In some jurisdictions this is the rule by reason of statute.²⁵

On the other hand, subrogation has been denied on the theory that the remedy of subrogation is re-

stricted to cases where there exists a relation of principal and surety or guarantors, or other specified relation which entitles the payor to succeed to the rights of the person paid.²⁶ Subrogation will not be granted where the payment is voluntary, as where a junior mortgagee pays an installment of a senior mortgage without a necessity of protecting his interest.²⁷ Thus, where a valid tender of payment of his claim is made to the junior lienor, he no longer has any interest in the property and his subsequent discharge of a senior encumbrance is voluntary and does not entitle him to subrogation,²⁸ and, where the mortgagee pays prior encumbrances as an advance to the debtor and not for the protection of his mortgage interest, subrogation to the encumbrances will be denied.²⁹ A senior encumbrancer discharging a junior encumbrance is a mere volunteer and is not entitled to subrogation since he does not act for the protection of his interest.³⁰ On the same principle, in order to entitle a junior encumbrancer to subrogation, the lien discharged must rest on the land subject to his encumbrance and not on any other lands.³¹ Where the junior encumbrancer is primarily liable for the debt secured by the senior encumbrance, as where he has assumed it, he is not entitled to subrogation on discharging the senior encumbrance.³²

85 S.W. 723, 118 Ky. 450, 25 Ky.L. 2266, 27 Ky.L. 528.
60 C.J. p 801 note 6.

19. Ark.—Meher v. Cole, 7 S.W. 451, 50 Ark. 361, 7 Am.S.R. 101.

20. Mo.—Roberts v. Best, 72 S.W. 657, 172 Mo. 67.

21. Cal.—Stein v. Simpson, 230 P.2d 816, 37 Cal.2d 79.

Conn.—*Corpus Juris* cited in Rollins v. Holcomb, 190 A. 260, 261, 122 Conn. 664.

La.—Reconstruction Finance Corp. v. Thomson, 171 So. 553, 186 La. 1.
Neb.—Allyn v. Dreher, 246 N.W. 731, 124 Neb. 342.
60 C.J. p 801 note 9.

22. Ohio.—Penn v. Atlantic, etc., R. Co., 3 Ohio Dec., Reprint, 508, 11 Am.L.Reg., N.S., 576.
Vt.—Downer v. Wilson, 33 Vt. 1.

23. Ala.—Crutchfield v. Johnson & Latimer, 8 So.2d 412, 243 Ala. 73.
Cal.—Stein v. Simpson, 230 P.2d 816, 37 Cal.2d 79—Diehl v. Hanrahan, 155 P.2d 853, 68 Cal.App.2d 32.
La.—Reconstruction Finance Corp. v. Thomson, 171 So. 553, 186 La. 1.
Neb.—Crawford State Bank v. McEwen, 272 N.W. 226, 132 Neb. 399.
Ohio.—In re Outhwaite's Estate,

Prob., 94 N.E.2d 122, affirmed, App., 94 N.E.2d 59.

60 C.J. p 801 note 11.
Subrogation of redemptioners from mortgages see Mortgages § 875.

Compulsion

Generally, the right of subrogation is given to one who, having a lien on specific property, discharges a prior lien thereon in order to protect his own claim, and the general rule applies notwithstanding he was not compelled to do so.—Diehl v. Hanrahan, 155 P.2d 853, 68 Cal.App.2d 32.

Lien for material

Where purchaser of lot took possession before execution and delivery of deed and built house thereon, giving notes to lumber company for materials used, and lumber company filed lien against property on claim against purchaser, cost of materials was purchaser's debt rather than vendor's obligation under covenant of warranty in deed, and, hence, vendor had lien superior to interest of purchaser's grantee for amounts paid by vendor on purchaser's notes.—Robertson v. Lewis, 115 S.W.2d 264, 195 Ark. 989.

24. N.Y.—Dings v. Parshall, 7 Hun 522.

Wash.—Johnson v. National Bank of

Commerce, 277 P. 79, 152 Wash. 47.

25. Cal.—Riverside Portland Cement Co. v. Anchor Laundry Co., 271 P. 367, 94 Cal.App. 407.
60 C.J. p 801 note 13.

26. Ill.—Dunlap v. Peirce, 168 N.E. 277, 336 Ill. 178, 66 A.L.R. 181.
Relationship of subrogee to debt discharged generally see supra § 8.

27. Ky.—Huffman v. Martin, 10 S.W. 2d 636, 226 Ky. 137.

28. Cal.—Stein v. Simpson, 230 P.2d 816, 37 Cal.2d 79.

29. Ark.—Cantley v. Danaher, 87 S.W.2d 81, 191 Ark. 733.

30. Cal.—Lineker v. McColgan, 202 P. 936, 54 Cal.App. 771.
60 C.J. p 787 note 93 [a].

31. Ill.—Smith v. Dinsmoor, 4 N.E. 648, 119 Ill. 656.

32. N.D.—Morris v. Twichell, 249 N.W. 905, 63 N.D. 747.

Subrogation as against other liens denied

Holder of junior mortgage who assumed payment of prior mortgage cannot, by assignment or subrogation, keep superior lien alive as against other liens.—Morris v. Twichell, supra.

Ordinarily a junior chattel mortgagee,³³ junior mortgagee,³⁴ a beneficiary³⁵ or trustee³⁶ of a junior deed of trust, or a junior judgment creditor,³⁷ who, in order to preserve his own security, is compelled to pay a prior encumbrance held by another is entitled to be subrogated to the rights of the prior lienor or mortgagee whose lien or mortgage he has paid, to the extent of the amount paid.³⁸ A judgment creditor is entitled to subrogation to a chattel mortgage which he discharges in order to enforce or protect his lien on the attached property,³⁹ even though it is subsequently determined that the debtor had no interest in the property.⁴⁰ The fact that there are liens or encumbrances inferior to the encumbrance discharged does not affect the right to subrogation.⁴¹ Where the junior mortgagee discharges a prior encumbrance and is subrogated thereto, the prior encumbrance does not become subordinated to intervening encumbrances, but retains its priority over such intervening encumbrances.⁴² Moreover, a junior encumbrancer who takes up a prior encumbrance, which was also a lien on prop-

erty other than that bound by the second, may resort to the property bound by the first encumbrance and not bound by the second, and enforce the lien of the first on it;⁴³ and a junior judgment creditor who, on the fraudulent representations of his debtor that there are no other liens, advances money to redeem lands from a prior judgment sale, is entitled to be subrogated to the lien of the purchaser at such sale, in order to protect himself from the lien of a judgment prior to his own, of which he was ignorant at the time of the redemption, although the owner of such judgment was innocent of the fraud.⁴⁴

Where an encumbrance is discharged as consideration for the giving of a mortgage, it has been held that the mortgagee is entitled to subrogation to the encumbrance discharged;⁴⁵ but it has also been held that subrogation will be denied under such circumstances unless there was an understanding or agreement for subrogation.⁴⁶ Subrogation to an encumbrance discharged in consideration of the mortgage has been denied as against intervening liens of which the mortgagee had notice,⁴⁷ but

33. Tex.—Sweeney v. Farmers' Rice Milling & Storage Co., Civ.App., 137 S.W. 1147.

60 C.J. p 802 note 14.

34. Ala.—Crutchfield v. Johnson & Latimer, 8 So.2d 412, 243 Ala. 78. Miss.—Goosby v. Byrd, 13 So.2d 33, 194 Miss. 568.

Neb.—Crawford State Bank v. McEwen, 272 N.W. 226, 132 Neb. 399—Allyn v. Dreher, 246 N.W. 731, 124 Neb. 342.

N.J.—Brown v. Carpenter, 156 A. 471, 109 N.J.Eq. 208.

N.C.—Sherrill v. Hood, 181 S.E. 330, 208 N.C. 472.

S.C.—Watson v. Fowler, 163 S.E. 640, 165 S.C. 288.

Tex.—Burg v. Hitzfeld, Civ.App., 89 S.W.2d 272, error dismissed.

Wis.—Vogt v. Calvary Lutheran University Missionary Soc., 251 N.W. 239, 213 Wis. 380.

60 C.J. p 802 note 15.

Mortgagee's right to protect title generally see Mortgages § 298.

Junior mortgage on part of property

Fact that creditor had second mortgage on part only of tract subject to first mortgage did not prevent creditor, on payment, from being subrogated to first mortgagee's rights.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Lien not in existence

Ordinarily a junior mortgagee is not entitled to be subrogated to a lien which did not exist when his mort-

gage was taken.—Anthes v. Schroeder, 103 N.W. 1072, 74 Neb. 172.

Wife's equitable title

Where husband, after divorce decree giving his wife equitable title, executed second mortgage without her knowledge, right of second mortgagee, satisfying first mortgage, to be subrogated to lien thereof, was subject to wife's right to redeem by paying amount actually advanced by second mortgagee to discharge first mortgage indebtedness.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

35. Mo.—Grafeman Dairy Co. v. Mercantile Club, 241 S.W. 923.

60 C.J. p 803 note 16.

36. U.S.—Memphis, etc., R. Co. v. Dow, Ark., 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.

60 C.J. p 803 note 17.

37. Ga.—Carlton v. Reeves, 122 S.E. 320, 157 Ga. 602.

60 C.J. p 803 note 18.

38. Mo.—Rayburn v. Mitchell, 16 S.W. 592, 106 Mo. 365, 27 Am.S.R. 350.

Neb.—Crawford State Bank v. McEwen, 272 N.W. 226, 132 Neb. 399—Allyn v. Dreher, 246 N.W. 731, 124 Neb. 342.

Wis.—Vogt v. Calvary Lutheran University Missionary Soc., 251 N.W. 239, 213 Wis. 380.

60 C.J. p 804 note 19.

39. Okl.—Smith v. Southwestern Engraving Co. of Oklahoma, 11 P.2d 921, 157 Okl. 211.

40. Cal.—Fuller v. Harwell, 15 P.2d 562, 126 Cal.App. 654.

41. La.—Decuir v. Carnes, 138 So. 103, 173 La. 563.

Encumbrancer owning inferior lien

Fact that person having first mortgage on entire tract also had third mortgage on part thereof did not deprive second mortgagee of right to pay first mortgage and to be subrogated.—Decuir v. Carnes, supra.

42. Ala.—Berry v. Bankers Mortg. Bldg. & Loan Ass'n, 168 So. 427, 232 Ala. 395.

60 C.J. p 804 note 21.

43. U.S.—Peter v. Smith, D.C., 19 F. Cas.No.11,020, 5 Cranch C.C. 383.

Pa.—Selinger v. Myers, 24 Pa.Co. 71.

44. Ind.—Backer v. Pyne, 30 N.E. 21, 130 Ind. 288, 30 Am.S.R. 231.

45. La.—White System of Alexandria v. Fitzhugh, App., 5 So.2d 555. Third person advancing means to discharge encumbrance see infra § 38.

46. U.S.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ga.—Mumford v. Foss, 111 S.E. 653, 153 Ga. 66.

47. Ohio.—Zimpher v. Schwartz, 27 N.E.2d 499, 64 Ohio App. 7.

W.Va.—Price v. Lovins, 187 S.E. 318, 117 W.Va. 624.

subrogation has been allowed where the junior lienholder is not prejudiced and not placed in any position worse than that in which he would be if the senior encumbrance had not been discharged,⁴⁸ and it has also been held that, where there is an agreement for subrogation, the mortgagee's knowledge of intervening liens does not bar his right to subrogation as against such liens.⁴⁹

Where the mortgagee had no knowledge of the intervening lien at the time he paid the prior encumbrance, he is entitled to subrogation to the protection thereof as against the intervening lien.⁵⁰ Where the mortgage or other security given in consideration of the discharge of an encumbrance is invalid, the mortgagee will be subrogated to the lien of encumbrance which he discharged,⁵¹ and one discharging an encumbrance in reliance on a promise that he will be given security is entitled to subrogation where the new security is not given.⁵² While there is authority that a third person who discharges a prior deed of trust under false representations that an intervening lienholder had agreed to give the third person's security priority will be entitled to subrogation even though the transaction involving the third person is usurious,⁵³ there is also authority to the contrary.⁵⁴ A tender which fails to discharge the prior lien because it is accompanied by conditions which the subsequent mortgagee is not entitled to make will not subrogate the subsequent mortgagee to the lien of the prior mortgage;⁵⁵ and the mere fact that inferior lienors, acting in their own interests and to accomplish a purpose of their own, have incidentally benefited a superior lienor does not

subrogate them to the rights of the superior lienor.⁵⁶

The right of subrogation does not exist in favor of the holder of a second mortgage to the prejudice of a first mortgage.⁵⁷ Thus, a junior mortgagee has been denied subrogation as against the senior mortgagee where he paid taxes and assessments without notice to the senior mortgagee of the mortgagor's default, since the senior mortgagee was thereby deprived of his right to foreclose for the mortgagor's default,⁵⁸ particularly where the junior mortgagee has been collecting the rents and profits.⁵⁹ A junior lienholder who, without knowledge of prior lienholders, takes possession of a wrecked motor vehicle and causes it to be repaired is not, although he pays for the repairs, entitled to be subrogated to the repairman's lien rights.⁶⁰ Subrogation will not be allowed as against one who acted in reliance on the recorded release of an earlier encumbrance.⁶¹ Thus, one who took a mortgage and paid and discharged an earlier mortgage has been denied subrogation to the discharged mortgage as against another who before the mortgage was recorded gave and recorded a mortgage in reliance on the recorded discharge of the earlier mortgage.⁶² The holder of a deed of trust fraudulent as to creditors has been denied subrogation against creditors where he discharges a prior deed of trust.⁶³

Part payment of senior claim. As a general rule, a junior encumbrancer who pays part of the claim of the senior encumbrancer is not entitled to partial subrogation to the senior encumbrance, as against the senior encumbrancer, where such subrogation would prejudice the senior encumbrancer.⁶⁴ So, as

Negligent failure to learn of lien
Cal.—Jack v. Wong Shee, 92 P.2d 449,
33 Cal.App.2d 402.

48. Cal.—Copp v. Millen, 77 P.2d
1093, 11 Cal.2d 122.

**Good faith belief that intervening
liens had been discharged warrants
subrogation.**—Jack v. Wong Shee, 92
P.2d 449, 33 Cal.App.2d 402.

49. Ill.—Kankakee Federal Savings
& Loan Ass'n v. Arnove, 47 N.E.2d
874, 318 Ill.App. 261.

50. Cal.—Kenney v. Kenney, 217 P.
2d 151, 97 Cal.App.2d 60.

51. Ark.—Chaffe v. Oliver, 39 Ark.
531.
60 C.J. p 814 note 63.

52. Nev.—Lockwood v. Marsh, 3
Nev. 133.
S.D.—Baker v. Baker, 49 N.W. 1064,
2 S.D. 261, 39 Am S.R. 776.

53. Mo.—State Sav. Trust Co. v.
Spencer, App., 201 S.W. 967.

54. N.Y.—Perkins v. Hall, 12 N.E.
48, 105 N.Y. 539.

55. Mich.—Schmittiel v. Moore, 60
N.W. 279, 101 Mich. 590.

56. Ill.—McCormick v. Bauer, 13 N.
E. 852, 122 Ill. 573.

57. Neb.—Skinkle v. Huffman, 71 N.
W. 1004, 52 Neb. 20.

58. Ark.—Federal Land Bank of St.
Louis v. Richland Farming Co., 21
S.W.2d 954, 180 Ark. 442.

Insufficient notice

In mortgage foreclosure suit wherein junior mortgagee contended that he was entitled to first lien for taxes, insurance, and repair costs he had paid on mortgaged property, fact that senior mortgagee knew that junior mortgagee was forwarding money for taxes was insufficient notice to senior mortgagee that money

was being provided by junior mortgagee where junior mortgagee merely informed senior mortgagee that he was mortgagors' attorney and that all notices should be sent to him.—Cantley v. Danaher, 87 S.W.2d 81, 191 Ark. 733.

59. Ark.—Cantley v. Danaher, supra.

60. Kan.—Central Kansas Motor Co.
v. Kline, 198 P. 949, 109 Kan. 227.

61. U.S.—Coonrod v. Kelly, C.C.N.J.,
113 F. 378, affirmed 119 F. 841, 56
C.C.A. 353.

62. U.S.—Coonrod v. Kelly, supra.

63. Mo.—Mansur, etc., Implement
Co. v. Jones, 45 S.W. 41, 143 Mo.
253.

64. Ga.—Erwin v. Brooke, 166 S.E.
777, 159 Ga. 683.
60 C.J. p 804 note 37.
Partial subrogation generally see supra § 10.

a general rule, a junior mortgagee, who claims to be entitled to subrogation, stands in the same position in respect of a partial payment of the senior mortgage debt as a surety does in respect of a partial payment of a claim against his principal;⁶⁵ and, in the absence of an agreement for subrogation, a junior encumbrancer,⁶⁶ chattel mortgagee,⁶⁷ or mortgagee,⁶⁸ by the payment of part of the senior mortgage, is not subrogated pro tanto to the senior mortgagee's interest. However, when the right of subrogation is the result of an express agreement, it is no objection that it extends only to a part of a chattel mortgage⁶⁹ or mortgage.⁷⁰ A junior mortgagee who, for the protection of his own security, pays an installment due on the first mortgage, has been, to the extent of such advancement, as against the mortgagor, subrogated to the rights of the holder of the first mortgage,⁷¹ each installment being regarded as an entire debt,⁷² and may, on payment by the mortgagor of the balance due on the prior mortgage, enforce by action his lien for the amount so advanced.⁷³ If the junior mortgagee has paid a part of the prior mortgage under the belief arising from the conduct or representations of the senior mortgagee that this was the full extent of his claim, he

may be allowed a priority of his claim before the senior mortgagee can participate.⁷⁴

Homestead rights. It has been held that subrogation will not be allowed as against homestead rights.⁷⁵

§ 37. — Grantors or Mortgagors Paying after Transfer of Mortgaged Property

Where the mortgagor pays the mortgage after he has conveyed the property, he is ordinarily entitled to be subrogated to the rights of the mortgagee.

Where a grantor, mortgagor, or chattel mortgagor conveys the mortgaged property, and his grantee assumes payment of the mortgage, as between such parties the former becomes a surety and the latter the principal debtor, and, in accordance with the general rule, discussed *infra* § 47, that a surety who pays the debt of the principal is subrogated to the rights and remedies of the creditor, where the grantor⁷⁶ or mortgagor⁷⁷ or a chattel mortgagor⁷⁸ pays the debts secured, he is entitled to subrogation thereto, and to all of the rights of the mortgagee,⁷⁹ and may foreclose the mortgage

65. Ill.—Loeb v. Fleming, 15 Ill.App. 503.
Part payment by surety see *infra* § 48.

66. R.I.—Chapman v. Cooney, 57 A. 928, 25 R.I. 657.
60 C.J. p 805 note 40.

67. Ind.—Stuckman v. Roose, 46 N. E. 680, 147 Ind. 402.
Tex.—Cason v. Connor, 18 S.W. 668, 83 Tex. 26.

68. Okl.—Marks v. Baum Bldg. Co., 175 P. 818, 73 Okl. 264.
60 C.J. p 805 note 42.

Failure to disclose mortgagor's default

Where a junior mortgagee paid the interest on a senior mortgage without disclosing the mortgagor's default, he will be denied pro tanto subrogation to the senior mortgage, since to allow it would put the claim for reimbursement of interest on a parity with the senior mortgagee's claim for payment of the principal, and might prejudice him.—Allyn v. Dreher, 246 N.W. 731, 124 Neb. 342.

69. Ind.—Stuckman v. Roose, 46 N. E. 680, 147 Ind. 402.
Tex.—Cason v. Connor, 18 S.W. 668, 83 Tex. 26.

70. Ill.—Blue Island First Securities Co. v. Irrgang, 252 Ill.App. 290.
60 C.J. p 805 note 46.

71. Okl.—Marks v. Baum Bldg. Co., 175 P. 818, 73 Okl. 264.
60 C.J. p 805 note 47.

72. N.D.—Rouse v. Zimmerman, 212 N.W. 515, 55 N.D. 94.

73. Neb.—Skinkle v. Huffman, 71 N. W. 1004, 52 Neb. 20.

74. Tex.—Cason v. Connor, 18 S.W. 668, 83 Tex. 26.

75. Tex.—Burg v. Hitzfeld, Civ.App., 89 S.W.2d 272, error dismissed.

76. U.S.—Gross v. Tierney, C.C.A. W.Va., 55 F.2d 578.

N.D.—Clark v. Henderson, 244 N.W. 314, 62 N.D. 503, 84 A.L.R. 347.
60 C.J. p 805 note 55.

77. Ala.—McKleroy v. Dishman, 142 So. 41, 225 Ala. 131.

Ariz.—Smith v. Mangels, 240 P.2d 168, 73 Ariz. 203.

Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

Ill.—Prudential Ins. Co. of American v. Bass, 191 N.E. 284, 357 Ill. 72.
—Brand v. Schmitz, 11 N.E.2d 974, 293 Ill.App. 114—Sleicher v. Turek, 259 Ill.App. 467.

Iowa.—Monticello State Bank v. Schatz, 268 N.W. 602, 222 Iowa 335.
N.J.—Cherry v. Orth & Coan, 159 A. 524, 110 N.J.Eq. 175.

N.Y.—First Nat. Bank & Trust Co. of Walton v. Eisenrod, 32 N.Y.S. 2d 641, 263 App.Div. 227—In re Oster's Estate, 16 N.Y.S.2d 612,

258 App.Div. 930, reargument denied 18 N.Y.S.2d 1014, 259 App.Div. 791.

60 C.J. p 805 note 56.

Voluntary payment

Mortgagors who voluntarily extinguished mortgage debt which their purchaser assumed became subrogated without formal assignment to benefit of security, which, as equitable assignees, they could enforce for money expended.—Lewis v. Hunt, 24 P.2d 557, 133 Cal.App. 520.

78. Ariz.—Smith v. Mangels, 240 P. 2d 168, 73 Ariz. 203.
60 C.J. p 806 note 57.

Unrecorded mortgage; subsequent mortgagee with notice

Where mortgagors, after having conveyed their interest in restaurant fixtures subject to unrecorded mortgage which buyers assumed, were compelled to pay the principal debt, mortgagors were entitled to foreclose the mortgage, even though mortgage was unrecorded and buyers had given another mortgage on the same property to real estate broker in payment of commission, where broker had actual knowledge of prior unrecorded mortgage.—Smith v. Mangels, *supra*.

79. U.S.—Gross v. Tierney, C.C.A.W. Va., 55 F.2d 578.
Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

for his own benefit,⁸⁰ sue to recover the land,⁸¹ or sue the vendee in an action at law for money paid.⁸² Similarly, where one sells land which is subject to a vendor's lien which is assumed by the purchaser, the seller, on being compelled to discharge the lien, is subrogated thereto.⁸³ The mortgaged property is generally regarded as the primary fund for the payment of the mortgage so that a mortgagor who pays the mortgage after he has transferred the property is subrogated to the rights of the mortgagee, even though his transferee has not assumed the mortgage,⁸⁴ and his right to be subrogated to the position of the prior mortgagee is not defeated by his having taken a second mortgage⁸⁵ or bond⁸⁶ as security. So, where land is conveyed subject to a judgment lien, and the vendor discharges the lien, his assignee is entitled to be subrogated thereto as against such grantee,⁸⁷ or an assignee of the grantee not a bona fide purchaser without notice of the judgment lien.⁸⁸

If the grantee does not assume the mortgage, he does not incur any personal liability for the payment of the debt, so that the mortgagor or grantor

who pays the mortgage is not subrogated to any personal claim against the grantee.⁸⁹ Where a mortgagor conveys by a warranty deed without excepting the mortgage, he is not subrogated to the mortgage which he subsequently discharges.⁹⁰ One who executed a lien on the property after assuming a mortgage thereon has been denied subrogation as against the lienor where, after transferring the land, he discharges the mortgage.⁹¹ Where the mortgagor gives the purchaser notes as security against a mortgage on the property and, after the mortgage has been discharged, the purchaser collects the notes and conveys the land on security of a purchase-money mortgage, the mortgagor is entitled to be subrogated to the lien of the purchase-money mortgage to the amount of the notes, at least where the rights of third persons do not intervene.⁹² Where a mortgage, after being pledged as security for a note, was assigned, and the mortgagor thereafter paid the note and received the note and mortgage, he is subrogated in the place of the payee of the note as his assignee, and will be allowed the amount paid as credit on the mortgage on foreclosure by the assignee thereof.⁹³

Iowa.—Monticello State Bank v. Schatz, 268 N.W. 602, 222 Iowa 335.
N.Y.—In re Oster's Estate, 16 N.Y. S.2d 612, 258 App.Div. 930, reargument denied 18 N.Y.S.2d 1014, 259 App.Div. 791, appeal denied 28 N.E.2d 417, 283 N.Y. 779.
60 C.J. p 806 note 58.

Right of redemption

Where the mortgagor conveys the mortgaged premises to one assuming the mortgage, who thereafter conveys and takes a junior mortgage from his grantee as a part of the purchase price, the mortgagor, on being compelled to pay a deficiency after sale of the premises on foreclosure of the first mortgage, has a right in equity as surety to redeem which is paramount to the statutory right of his grantee as a junior lienholder.—Wise v. Laird, 199 N.W. 487, 198 Iowa 357.

80. Ariz.—Smith v. Mangels, 240 P. 2d 168, 73 Ariz. 203.
N.Y.—First Nat. Bank & Trust Co. of Walton v. Eisenrod, 32 N.Y.S.2d 641, 263 App.Div. 227.
N.D.—Clark v. Henderson, 244 N.W. 314, 62 N.D. 503, 84 A.L.R. 347.
60 C.J. p 806 note 59.

81. Ga.—Dunson v. Lewis, 119 S.E. 846, 156 Ga. 692.

82. Ga.—Dunson v. Lewis, *supra*.
60 C.J. p 806 note 61.

83. Tex.—Brown v. Farquhar, Civ. App., 225 S.W. 541.

84. Cal.—Vincent v. Garland, 58 P. 2d 1320, 14 Cal.App.2d 725.

Ill.—Lillie v. McFarlin, 25 N.E.2d 896, 304 Ill.App. 27.

N.Y.—Robert S. Smith Corp. v. Kraushaar, 292 N.Y.S. 410, 249 App. Div. 789—National Sav. Bank of City of Albany v. Fermac Corporation, 271 N.Y.S. 836, 241 App.Div. 204, affirmed 195 N.E. 145, 266 N.Y. 443—Cherry v. Monroe, 2 Barb.Ch. 618.

Pa.—In re Smith's Estate, 40 Pa.Dist. & Co. 342, affirmed 23 A.2d 450, 343 Pa. 539.

Va.—Seward v. New York Life Ins. Co., 152 S.E. 346, 154 Va. 154.
60 C.J. p 806 note 64.

Where mortgage debt is satisfied from other property of mortgagor, he will be subrogated to the rights of the mortgagee to enable him to indemnify himself out of the mortgaged premises.—Funk v. McReynolds, 33 Ill. 481.

Payor held to have right to foreclose mortgage

Va.—Seward v. New York Life Ins. Co., 152 S.E. 346, 154 Va. 154.
60 C.J. p 806 note 65.

Partial subrogation

The vendor must have paid the entire debt, and not merely the interest on the debt secured by the deed of trust, in order to be entitled to subrogation.—Campbell v. Jones, Tex.

Civ.App., 230 S.W. 710—60 C.J. p 807 note 76.

85. N.H.—Passumpsic Sav. Bank v. Weeks, 59 N.H. 239.

86. N.Y.—Cherry v. Monroe, 2 Barb. Ch. 618.

87. Iowa.—Home Loan & Investment Co. v. Burrows, 224 N.W. 72, 207 Iowa 1071.
60 C.J. p 807 note 71.

88. Iowa.—Home Loan & Investment Co. v. Burrows, *supra*.

89. N.Y.—Robert S. Smith Corp. v. Kraushaar, 292 N.Y.S. 410, 249 App. Div. 789.
80 C.J. p 806 note 63.

Subsequent indorsement of note

Where mortgage was given to secure note, and vendee did not assume mortgage, but did subsequently indorse note, mortgagor on discharging note could not hold vendee on indorsement.—Gursky v. Rosenberg, 287 P. 575, 105 Cal.App. 410.

90. Wis.—Van Valkenburgh v. Jantz, 154 N.W. 373, 161 Wis. 336.

91. Fla.—Clermont-Minneola Country Club v. Loblaw, 143 So. 129, 106 Fla. 122.

92. Ind.—McGuffey v. McClain, 30 N.E. 296, 130 Ind. 327.

93. N.J.—Kamena v. Huelbig, 23 N.J.Eq. 78.

§ 38. Third Persons Advancing Means to Discharge Debt or Encumbrance Securing It

In order that third persons who advance the means to discharge a debt or encumbrance securing it may be entitled to subrogation, it is essential that there be an assignment, legal or equitable, from the creditor, or an agreement or understanding with the debtor that such third persons shall in effect become creditors, or that such third persons have acted because of their own liability or to protect an interest of their own.

In order that a third person advancing the means to discharge a debt or encumbrance securing it may be entitled to subrogation there must be an assignment, legal or equitable, from the original creditor,⁹⁴ or an agreement or understanding on the part of the person liable to pay that the person furnishing the money to pay the debt shall in effect become the creditor,⁹⁵ or the person furnishing the money must have done so because he is liable as

surety or in some other secondary capacity,⁹⁶ or for the purpose of protecting some real⁹⁷ or supposed⁹⁸ right or interest of his own. Hence, the mere fact that, at the instance of the debtor, a third person lends money with which to pay a debt or obligation, does not entitle the lender to subrogation to a lien held for the enforcement of the debt or obligation.⁹⁹ So a third person who, on his own motion, advances money to discharge a debt is regarded as a mere volunteer,¹ and, in the absence of an agreement for subrogation, cannot be subrogated to the rights of the creditor as to security held by the creditor.²

A third person who lends money to pay a debt at the instance of the debtor, with an agreement or understanding with the debtor that he shall be entitled to the benefit of the security held by the creditor, in the absence of intervening equities,³ will

94. Kan.—*Corpus Juris* quoted in *Katschor v. Ley*, 113 P.2d 127, 135, 153 Kan. 569.

60 C.J. p 807 note 81.

Subrogation of:

Insurance agent paying premium see *supra* § 26.

Person advancing money to school officer see *Schools and School Districts* § 329 a (4).

95. Kan.—*Corpus Juris* quoted in *Katschor v. Ley*, 113 P.2d 127, 135, 153 Kan. 569—*Crippen v. Chappel*, 11 P. 453, 35 Kan. 495, 57 Am.R. 187.

Tenn.—*Corpus Juris* cited in *Robertson v. Wade*, 68 S.W.2d 487, 492, 17 Tenn.App. 457.

Debtor's promise to pay

Debtor's promise to creditor to pay his debt and other loans to be made him by creditor out of money to be paid debtor for easement in land was held not to entitle such creditor to subrogation to a bank lien where debtor paid bank instead of creditor out of proceeds.—*Windham v. Citizens Nat. Bank*, Tex.Civ.App., 105 S.W.2d 348, error dismissed.

Estoppel certificate by which debtor asserted security deed was first lien was held insufficient to constitute agreement for creditor's subrogation to lien paid with proceeds of loan.—*Colonial Hill Co. v. Mortgage Bond & Trust Co.*, 162 S.E. 531, 174 Ga. 204.

96. Kan.—*Corpus Juris* quoted in *Katschor v. Ley*, 113 P.2d 127, 135, 153 Kan. 569—*Crippen v. Chappel*, 11 P. 453, 35 Kan. 495, 57 Am.R. 187.

97. U.S.—*Corpus Juris* cited in

Adler v. Nicholas, C.C.A.Colo., 166 F.2d 674, 679.

Kan.—*Corpus Juris* quoted in *Katschor v. Ley*, 113 P.2d 127, 135, 153 Kan. 569—*Crippen v. Chappel*, 11 P. 453, 35 Kan. 495, 57 Am.R. 187.

N.C.—*Corpus Juris* quoted in *Boney v. Central Mut. Life Ins. Co. of Chicago*, 197 S.E. 122, 126, 213 N.C. 563.

60 C.J. p 802 note 14 [a].

98. U.S.—*Corpus Juris* cited in *Adler v. Nicholas*, C.C.A.Colo., 166 F.2d 674, 679.

Kan.—*Corpus Juris* quoted in *Katschor v. Ley*, 113 P.2d 127, 135, 153 Kan. 569—*Crippen v. Chappel*, 11 P. 453, 35 Kan. 495, 57 Am.R. 187.

N.C.—*Corpus Juris* quoted in *Boney v. Central Mut. Life Ins. Co. of Chicago*, 197 S.E. 122, 126, 213 N.C. 563.

99. N.Y.—*The Thrift v. Michaelis*, 254 N.Y.S. 335, 234 App.Div. 120, reversed on other grounds 181 N.E. 580, 259 N.Y. 302.

Ohio.—*Federal Union Life Ins. Co. v. Deitsch*, 189 N.E. 440, 127 Ohio St. 505.

Pa.—*Home Owners' Loan Corp. v. Crouse*, 30 A.2d 330, 151 Pa.Super. 259.

Tenn.—*Robertson v. Wade*, 68 S.W. 2d 487, 17 Tenn.App. 457.

Tex.—*Ramey v. Cage*, Civ.App., 90 S.W.2d 626.

60 C.J. p 807 note 87.

1. Pa.—*International Harvester Co. v. Tuscarora Tp. (No. 2)*, 43 Pa. Super. 417.

60 C.J. p 807 note 89.

Right of volunteer to subrogation see *supra* § 9.

2. U.S.—*Union Joint Stock Land Bank of Detroit, Mich. v. Byers*,

C.C.A.Pa., 100 F.2d 82, certiorari denied 59 S.Ct. 642, 306 U.S. 653, 83 L.Ed. 1052.

Ga.—*Graves v. Carter*, 64 S.E.2d 450, 208 Ga. 5—*Callan Court Co. v. Citizens & Southern Nat. Bank*, 190 S.E. 831, 184 Ga. 87.

Ill.—*Lake View Trust & Savings Bank v. Rice*, 279 Ill.App. 538.

Iowa.—*Parks v. Carlisle Clay Products Co.*, 277 N.W. 731, 224 Iowa 1024.

Md.—*Harford Bank of Bel Air v. Hopper's Estate*, 181 A. 751, 169 Md. 314.

N.H.—*Mitchell v. Smith's Estate*, 4 A.2d 355, 90 N.H. 36.

N.J.—*Adelman v. Biber*, 17 A.2d 819, 19 N.J.Misc. 63.

Tex.—*Federal Reserve Bank of Dallas v. Smylie*, Civ.App., 134 S.W.2d 838.

60 C.J. p 808 note 91.

"A voluntary lender is never subrogated."—*Andrews v. St. Louis Joint Stock Land Bank of St. Louis*, C.C.A. Mo., 127 F.2d 799, 803—*Town of River Junction v. Maryland Cas. Co.*, C. C.A.Fla., 110 F.2d 278, 281, 134 A.L.R. 727, certiorari denied *Maryland Cas. Co. v. Town of River Junction*, 60 S.Ct. 1077, 310 U.S. 634, 84 L.Ed. 1404.

Advance by junior lienholder

The mere fact that a junior lienholder advances money which has been used by the borrower to discharge superior liens does not entitle the lender to be subrogated to the rights of the lienholders so paid.—*Iberville Planting & Mfg. Co. v. Monongahela Coal Co., La.*, 168 F. 12, 93 C.C.A. 404.

3. Md.—*Milholland v. Tiffany*, 2 A. 831, 64 Md. 455.

60 C.J. p 808 note 94.

be subrogated to all the rights of the creditor whose claim has been discharged,⁴ as against the debtor.⁵ The agreement in which subrogation may be based may be either express⁶ or clearly⁷ implied,⁸ although it is disputed whether a mere understanding is sufficient.⁹ So a person who advances money to another which is used to discharge a valid preëxisting lien on property, if not a mere volunteer, is entitled by subrogation to all the remedies which the

original lienholder possessed as against the property.¹⁰ Thus, a third person, having agreed to advance money to discharge an encumbrance on property of another, where he is not a volunteer,¹¹ and where payment is made under an agreement that he will be substituted in place of the holder of the encumbrance,¹² is entitled to subrogation, whether such agreement is express¹³ or whether such agree-

Conventional subrogation

Under doctrine of conventional subrogation, where lender of money lent it with intention that he be substituted to position of creditor whose debt was paid with the money, but without taking an assignment, and there were no intervening equities to be prejudiced, the matter would be treated as if an assignment had been executed.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

4. U.S.—Empire Trust Co. v. U. S. Trust Co. of N. Y., C.C.A.Minn., 165 F.2d 829—In re Lauer, D.C.N.J., 38 F.Supp. 691.

Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Burch v. Burch, 165 So. 387, 231 Ala. 464—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

Ark.—Lueken v. Burch, 219 S.W.2d 235, 214 Ark. 921.

Ga.—McCullum v. Lark, 200 S.E. 276, 187 Ga. 292—Flournoy Plumbing Co. v. Home Owners Loan Corporation, 182 S.E. 507, 181 Ga. 459—Colonial Hill Co. v. Mortgage Bond & Trust Co., 162 S.E. 531, 174 Ga. 204.

Kan.—Williamstown Baptist Church v. Henley, 148 P.2d 269, 158 Kan. 324.

Ky.—Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326.

N.Y.—Peoples Trust Co. of Malone v. School Dist. No. 6, Town of Westville, 9 N.Y.S.2d 34, 169 Misc. 961.

Pa.—In re Price's Estate, Orph., 98 Pittsb.Leg.J. 145.

Tex.—Mikulenska v. Mikulenska, Civ. App., 168 S.W.2d 517—Colvin v. Millard, Civ.App., 61 S.W.2d 591.

Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

W.Va.—King v. Parham, 161 S.E. 443, 111 W.Va. 43.

60 C.J. p 808 note 95.

Claims against bank

A third person, who at the instance of a bank advances money to dis-

charge claims of bank's creditors, may be entitled to be subrogated to their rights.

Ill.—Vandever v. Bailey, 281 Ill. App. 382.

Tex.—Reconstruction Finance Corp. v. Brady, Civ.App., 150 S.W.2d 357, error refused.

Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

Lack of diligence by third person
in searching the record will not prevent equity from applying doctrine of conventional subrogation, unless such lack of diligence amounts to culpable or unjustifiable negligence.—Martin v. Hickenlooper, 59 P.2d 1139, 90 Utah 150, 107 A.L.R. 762, rehearing denied 61 P.2d 307, 90 Utah 185.

Absence of consent

Subrogation may, under statute, be effected without the creditor's consent where the debtor, in order to make payment, has borrowed money by a public instrument reciting therein his purpose and in the receipt the source of payment.—Hutchinson v. Rice, 29 So. 898, 105 La. 474—13 C.J. p 813 note 69.

5. Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

60 C.J. p 808 note 96.

6. Wash.—In re Farmers' & Merchants' State Bank of Nooksack, supra.

60 C.J. p 808 note 98.

7. Fla.—Lovingood v. Butler Const. Co., 131 So. 126, 100 Fla. 1252, 74 A.L.R. 513.

8. Wash.—In re Farmers' & Merchants' State Bank of Nooksack, 26 P.2d 631, 175 Wash. 78.

60 C.J. p 809 note 1.

9. U.S.—Browder v. Hill, Tenn., 136 F. 821, 69 C.C.A. 499.

10. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.

Miss.—Russell v. Grisham, 170 So. 900, 177 Miss. 435.

60 C.J. p 809 note 3.

Lien of equal dignity

(1) It is held to be essential to the operation of the text rule that the parties contemplate that the person advancing the money will have security of equal dignity with the lien discharged.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

(2) Accordingly, in the absence of facts from which such understanding could be implied, one advancing money to satisfy a secured claim against a debtor was not entitled to subrogation as a secured creditor.—In re Lauer, D.C.N.J., 38 F.Supp. 691.

11. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

60 C.J. p 809 note 4.

Agreement with debtor or creditor

One who advances money, under agreement with either debtor or creditor that he shall acquire rights which persons paid had under a bond or other contract, is not a volunteer with respect to right to subrogation.—Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

12. Ala.—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

Kan.—Williamstown Baptist Church v. Henley, 148 P.2d 269, 158 Kan. 324.

60 C.J. p 809 note 5.

13. Ala.—Shaddix v. National Surety Co., 128 So. 220, 221 Ala. 268.

60 C.J. p 809 note 6.

Legal or conventional subrogation

(1) Where a lender in no way related to property and not required to protect any interest advances money to pay off lien, there is no legal subrogation, the case being one of conventional subrogation, if any.—Martin v. Hickenlooper, 59 P.2d 1139, 90 Utah 150, 107 A.L.R. 762, rehearing denied 61 P.2d 307, 90 Utah 185.

ment is implied.¹⁴ Under a mortgage trust agreement creating a prior lien in favor of a bondholder who pays ground rent with respect to which the mortgagor is in default, and providing for notice to the trustee, a bondholder advancing money for such purpose is not entitled to subrogation where he fails to give proper and timely notice.¹⁵

Since legal subrogation may take place with or without an agreement, as discussed supra § 3, where it is equitable that a person furnishing money to pay a debt of another should be substituted for the creditor or in the place of the creditor he will be so subrogated,¹⁶ as where the money is advanced on a mistake of fact and no interests of third persons have intervened¹⁷ and where the parties to the transaction have not altered their positions.¹⁸ So a third person who advances money to discharge a debt or lien securing it, under circumstances which would operate as a fraud against him, if he were not subrogated, is entitled to subrogation.¹⁹

The right of persons discharging encumbrances to subrogation is discussed supra §§ 31-37.

Application of payment. Before a third person advancing money to discharge a debt or encum-

brance will be entitled to subrogation it is necessary that the money advanced be so applied,²⁰ and the duty devolves on the person seeking subrogation to see that such application is made;²¹ his right to subrogation, if any, will be measured by the amount actually applied.²² Accordingly, where part of the proceeds of a loan secured by a pledge, which is unenforceable, is applied to pay a balance remaining due on a prior loan the lender may, to the extent of such application, be entitled to be subrogated to the rights of the creditor under the prior loan.²³ It has been indicated that no right to subrogation can arise where the money advanced is to be applied at the discretion of the debtor.²⁴

Existence of claim or obligation. In accordance with the rule that there must exist a claim or obligation against a debtor to be subrogated to, as considered supra § 7, in order that a third person advancing money to pay a debt or discharge a lien may be entitled to subrogation, it is essential that such a claim or obligation exists.²⁵

Extent of security. The new creditor who is entitled to subrogation on advancing money to pay outstanding indebtedness is entitled to all of the security of the old creditor,²⁶ and he is entitled to such protection to secure a legitimate rate of interest

(2) Nature of legal and conventional subrogation see supra §§ 3, 4.

14. Ala.—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

Kan.—Williamstown Baptist Church v. Henley, 148 P.2d 269, 158 Kan. 324.

60 C.J. p 809 note 7.

15. Ohio.—Baker v. Neil House Co., 180 N.E. 207, 41 Ohio App. 536.

16. Cal.—Olson v. Cornwell, 25 P. 2d 879, 134 Cal.App. 419.

Ga.—Board of Education of Candler County v. Franklin, 49 S.E.2d 804, 204 Ga. 364.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

Ky.—First Nat. Bank of Grayson v. Holbrook, 217 S.W.2d 787, 309 Ky. 326—Owensboro Banking Co. v. Lewis, 106 S.W.2d 1000, 269 Ky. 277.

Okl.—Corpus Juris quoted in Bourquin v. Feland, 117 P.2d 789, 791, 189 Okl. 498.

60 C.J. p 715 note 8, p 809 note 14.

Husband giving wife money to pay note

Under statute abolishing curtesy and giving husbands an interest in the property of their wives who die

intestate, a husband giving his wife money to pay a note secured by a mortgage executed by the wife was not a volunteer and was entitled to subrogation.—Ogden v. Watts, 54 S.W.2d 292, 186 Ark. 500.

17. Ind.—Home Owners' Loan Corp. v. Henson, 29 N.E.2d 873, 217 Ind. 554.

Unjust enrichment

The text rule is particularly applicable where to deny subrogation would result in third persons being unjustly enriched at the expense of lender.—Home Owners' Loan Corp. v. Henson, supra.

18. Ind.—Home Owners' Loan Corp. v. Henson, supra.

19. Tex.—First Texas Joint Stock Land Bank of Houston v. Chapman, Civ.App., 48 S.W.2d 651, error dismissed.

One induced by fraud to advance money to discharge the debt of another was entitled to subrogation.—Gladowski v. Felczak, 31 A.2d 718, 346 Pa. 660, 151 A.L.R. 418.

20. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Groom v. Federal Land Bank of

New Orleans, 199 So. 237, 240 Ala. 335.

Tex.—Calderon v. Gonzales, Civ.App., 158 S.W.2d 349.

21. Ala.—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

Tex.—Calderon v. Gonzales, Civ.App., 158 S.W.2d 349.

22. Tex.—Calderon v. Gonzales, supra.

23. N.Y.—Reconstruction Finance Corp. v. Eastern Terra Cotta Realty Corp., 48 N.Y.S.2d 920, appeal dismissed 51 N.Y.S.2d 94.

24. Ala.—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

25. Ala.—Shaddix v. National Surety Co., 128 So. 220, 221 Ala. 268.

Tort claim paid and released

The government was not entitled to subrogation with respect to wages and medical expenses of injured soldier who had already been paid by tort-feasor and had executed a release therefor.—Standard Oil Co. of Cal. v. U. S., C.C.A. Cal., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067.

26. Tex.—Gibraltar Sav. & Bldg.

provided for in the new loan, notwithstanding such rate is higher than that provided by the outstanding indebtedness.²⁷

Part payment of debt. In accordance with the general rule discussed supra § 10, in order that a third person advancing the means to discharge a debt may be entitled to subrogation, it is essential that the whole debt be discharged,²⁸ but it has been held that this rule is not to be invoked for the protection of the debtor.²⁹

Reliance on defective or invalid security. If a loan is made for the purpose of discharging a lien on property of the borrower, in reliance on security which turns out to be defective or invalid, the lender will be subrogated to the lien discharged from his money;³⁰ and, where a third person advances money to discharge the encumbrance on property of another, with the express³¹ or implied³² understanding that he is to obtain a first lien, but fails to obtain such lien, equity will require that the first lien be kept alive, if necessary to protect the lender³³ who is entitled to be subrogated to the rights of the encumbrancer paid from his money.³⁴

Priority. The third person's right to subrogation is usually regarded as superior to all those inferior to the encumbrance paid,³⁵ including intervening liens or encumbrances of which the third person is ignorant,³⁶ provided such ignorance does not amount to culpable or unjustifiable negligence,³⁷ and as against encumbrancers who have not changed their position because of the transaction.³⁸

Particular debts or encumbrances. The mere fact that money lent to a devisee of realty charged with payment of legacies is appropriated by such devisee to such payment does not entitle the lender to be subrogated to the rights of the legatees.³⁹ Where rent money is advanced to a tenant under a sale agreement, the lender is not subrogated to the lien of the landlord.⁴⁰ A loan of money to a county or board of education for a purpose other than to discharge outstanding warrants does not entitle the lender to be subrogated to the warrant holders paid out of the money.⁴¹ Where a senior mortgagee requires payment of certain tax liens as a condition to permitting deferred payment of matured mortgages, a junior mortgagee who lends the mortgagor money to discharge the liens does not thereby

Ass'n v. Harper, Civ.App., 41 S.W. 2d 130, 133, error refused.

27. Tex.—Gibraltar Sav. & Bldg. Ass'n v. Harper, supra.

Reason for rule

"The interest charge is but incidental . . . and subject to variation within statutory limits, according to the exigencies of economic conditions."—Gibraltar Sav. & Bldg. Ass'n v. Harper, supra.

28. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

29. Tex.—Sherman v. El Paso Nat. Bank, Civ.App., 100 S.W.2d 402, error dismissed.

30. U.S.—Town of River Junction, Fla., v. Maryland Cas. Co., C.C.A. Fla., 133 F.2d 57.

Idaho.—Peterson v. Hague, 4 P.2d 350, 51 Idaho 175.

Miss.—Russell v. Grisham, 170 So. 900, 177 Miss. 435—Federal Land Bank of New Orleans v. Miles, 152 So. 472, 169 Miss. 43.

N.J.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266.

Okl.—Equitable Life Assur. Soc. of U. S. v. McFadden, 72 P.2d 795, 181 Okl. 162.

Tenn.—Harris v. Fourth & First Joint Stock Bank, 8 Tenn.App. 301.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

Wis.—Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289.
60 C.J. p 809 note 8.

31. U.S.—Union Central Life Ins. Co. of Cincinnati, Ohio v. Drake, Neb., 214 F. 536, 181 C.C.A. 82.

32. U.S.—Union Central Life Ins. Co. of Cincinnati, Ohio v. Drake, supra.

33. U.S.—Bigley v. Jones, D.C.Okl., 64 F.Supp. 389.

Miss.—Russell v. Grisham, 170 So. 900, 177 Miss. 435.

N.J.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266.
60 C.J. p 809 note 11.

34. Ky.—Corpus Juris cited in Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 391, 301 Ky. 487, 164 A.L.R. 769.

Miss.—Russell v. Grisham, 170 So. 900, 177 Miss. 435.

N.J.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266.

Tenn.—Harris v. Fourth & First Joint Stock Bank, 8 Tenn.App. 301.
60 C.J. p 809 note 12.

35. Ala.—Shaddix v. National Surety Co., 128 So. 220, 221 Ala. 268.

Okl.—Corpus Juris cited in Bourquin v. Feiland, 117 P.2d 789, 791, 189 Okl. 498.

36. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

37. Ala.—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

Mere constructive notice of intervening incumbrance, imputed from existing recordation, does not preclude one advancing money to discharge prior incumbrance at debtor's instance from invoking doctrine of equitable subrogation, at least in the absence of culpable negligence.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

38. Mass.—Worcester North Sav. Inst. v. Farwell, 198 N.E. 897, 292 Mass. 568.

N.J.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266.

39. N.Y.—Sommers v. Schrader, 69 N.Y.S. 866, 59 App.Div. 340.

40. S.C.—Bostick v. Ammons, 41 S. E. 310, 63 S.C. 302.

41. Ill.—Thorp v. Board of Education of City of Chicago, 90 N.E.2d 71, 404 Ill. 588.

60 C.J. p 820 note 49.

become subrogated to them as against the senior mortgagee.⁴² In the absence of interest or an agreement, a son who lends to his father funds to pay tax assessments is not entitled to be subrogated to the tax lien.⁴³ Moreover, in the absence of agreement, fraud, accident, or mistake, where a borrower's lack of power to convey property is a matter of record a third person lending money is not entitled to subrogation merely because it is used to discharge tax liens, in the absence of a showing that such money was lent without knowledge of the condition of the title.⁴⁴ Where, however, under an agreement for subrogation, money is advanced to discharge liens owed by another, the lender is entitled to be subrogated to the lien so discharged,⁴⁵ and one who lends money which is used to pay local improvement assessments may be subrogated to the liens of such assessments.⁴⁶ A holder of municipal bonds originally secured by assessments against property owners for municipal improvements may, with respect to a special assessment fund, be subrogated to the rights of other bondholders who have been favored by the municipality.⁴⁷ Under a statutory provision that refunding bondholders shall be subrogated to all the rights of the holders of

the original municipal indebtedness, the holders of refunding bonds have the same rights as the holders of the original obligations.⁴⁸ Where one advances money to a corporation to take up its note and receives from the corporation corporate bonds to secure the repayment, he cannot also avail himself of a mortgage executed by the corporation to the indorser of the note.⁴⁹

A person who lends or advances money to an executor or administrator on a promise by note or other contract may, where such money is used to pay estate debts and where the representative is entitled to reimbursement from the estate for the debts paid by him, be subrogated to his right of reimbursement from the estate.⁵⁰ This is particularly true where it clearly appears that the money advanced has been applied beneficially in the payment of estate debts,⁵¹ and where the money is advanced or paid to an executor de son tort or creditor of the estate and applied by him to estate debts.⁵² The rule applies only to the extent that the money advanced has been actually used in the payment of debts for which the estate was legally bound,⁵³ or is otherwise used to benefit the estate.⁵⁴ The right

42. N.J.—Van Winkle v. Fordonsky, 168 A. 383, 114 N.J.Eq. 121.

43. N.J.—Kocher v. Kocher, 39 A. 536, 56 N.J.Eq. 547.

44. Tenn.—Old Nat. Bank v. Swearingen, 72 S.W.2d 545, 167 Tenn. 529.

45. Ala.—Shaddix v. National Surety Co., 128 So. 220, 221 Ala. 268. 60 C.J. p 820 note 52.

Liens for taxes, assessments, and repairs

Where property owner agreed that, if lienholder would pay taxes, paying assessments, and cost of repainting, owner would, under extension agreement, proceed to make monthly payments, and lienholder pursuant to agreement advanced money but owner's wife refused to execute formal extension agreement, lienholder was entitled to be recognized as subrogee of liens of city, county, and state for taxes and special assessments, and of statutory lien for repairs.—Atlantic Life Ins. Co. v. Klotz, 181 So. 519, 182 Miss. 243.

46. Ala.—City Realty & Mortgage Co. v. Tallapoosa Lumber Co., 164 So. 55, 231 Ala. 238.

47. Pa.—Palmer v. City of Erie, 9 A. 2d 378, 337 Pa. 5.

Other bondholders paid out of general funds

Where city, apparently recognizing

indebtedness resulting from paying improvements as a general liability, when pressed by certain bondholders, payable out of assessments, paid out sufficient funds out of its general funds to leave a balance of assessment, owner of unpaid bonds was subrogated to the rights of the bondholders so favored against the special fund of assessments earmarked for payment of all the bonds.—Palmer v. City of Erie, supra.

48. Ala.—City of Mobile v. Merchants Nat. Bank of Mobile, 33 So. 2d 457, 250 Ala. 159—Lang v. City of Mobile, 195 So. 248, 239 Ala. 331.

49. S.C.—Ravenel v. Lyles, 17 S.C. Eq. 281.

50. Ark.—Reed v. Futrall, 115 S.W. 2d 542, 195 Ark. 1044—**Corpus Juris** cited in Christian v. People's Trust Co., 45 S.W.2d 857, 858, 185 Ark. 55.

Neb.—Gilbert v. First Nat. Bank, Minatare, Neb., 48 N.W.2d 401, 154 Neb. 404.

N.Y.—Rushworth v. Powers, 267 N.Y.S. 328, 149 Misc. 401, affirmed in re Whipple's Will, 281 N.Y.S. 693, 244 App.Div. 884, and Rushworth v. Powers, 281 N.Y.S. 693, 244 App. Div. 885.

Or.—First Nat. Bank of Portland v. Connolly, 138 P.2d 613, 172 Or. 434, rehearing denied 143 P.2d 243, 172 Or. 434.

Tex.—Corpus Juris quoted in Sherman v. El Paso Nat. Bank, Civ. App., 100 S.W.2d 402, 409, error dismissed.

24 C.J. p 71 note 70, p 443 note 19. Subrogation of persons interested in administration of estates generally see supra § 15.

Executor's lack of authority to borrow

Fact that executor was without authority under the will to borrow money does not alter the text rule.—Dixon v. Davis, D.C.S.C., 31 F.Supp. 912.

51. Neb.—Gilbert v. First Nat. Bank, Minatare, Neb., 48 N.W.2d 401, 154 Neb. 404.

52. Neb.—Gilbert v. First Nat. Bank, Minatare, Neb., supra.

53. Neb.—Gilbert v. First Nat. Bank, Minatare, Neb., supra. 24 C.J. p 443 note 20.

54. U.S.—Dixon v. Davis, D.C.S.C., 31 F.Supp. 912.

Advances to beneficiaries

Generally, where proceeds of notes executed by executor to bank are expended for advances to beneficiaries of testator's estate, bank which furnished the money for the advance would be subrogated to the rights of executor as a charge against the beneficiaries profiting from such advances.—Dixon v. Davis, supra.

of one advancing money, used to pay estate debts, to enforce the original claim on which the advance is made may render reliance on the doctrine of subrogation unnecessary.⁵⁵

§ 39. — Mortgage or Deed of Trust

- a. In general
- b. Loan or discharge under agreement

a. In General

The mere fact that money lent is applied by the borrower in payment of a mortgage, which is thus extinguished, does not entitle the lender to be subrogated to the lien of the mortgage extinguished. Where the mortgage has been foreclosed, a redemptioner who is not himself liable as a principal debtor, but who is compelled to redeem for the protection of his own lien on the mortgaged premises, is entitled to subrogation to the rights of the senior mortgage.

The mere fact that money lent is applied by the borrower in payment of a mortgage, which is thus extinguished, does not entitle the lender to be subrogated to the lien of the mortgage extinguished,⁵⁶ nor does the fact that, from the proceeds of a later encumbrance, prior mortgages have been paid in order that the lien might be removed afford ground

for subrogation thereto;⁵⁷ nor can the lender be subrogated to the rights of a prior mortgagee where his mortgage has been paid, without the consent of the mortgagor, out of the proceeds of a subsequent invalid mortgage executed by an agent without authority.⁵⁸ So, the fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate, to pay off the prior mortgage is subrogated to the rights of the holder of such mortgage, affords no reason why equity should permit the person so advancing the money to be subrogated to the rights of the holder of the first mortgage.⁵⁹ While the status of the deed of trust discharged by borrowed money may be considered in determining the lender's right to subrogation,⁶⁰ it is not in itself sufficient that the status of other lienors will not be affected by the subrogation.⁶¹

In the absence of an agreement for subrogation, one who advances the means of discharging a mortgage or deed of trust is a mere stranger or volunteer who is not entitled to subrogation,⁶² particularly where subrogation would result in manifest injustice to an innocent person such as a junior mortgagee.⁶³

Business venture

Bank lending money to executrix who used greater part thereof in business venture was not entitled to subrogated lien against assets of estate for money advanced.—*E. H. Shelman & Co., Incorporated Bankers, v. Livers' Ex'x*, 16 S.W.2d 800, 229 Ky. 90.

Taxes on property of estate

Where executor borrowed from bank money which was used to discharge executor's statutory duty to pay taxes due on property of the testator's estate, bank was entitled to the executor's right of reimbursement.—*Dixon v. Davis*, D.C.S.C., 31 F. Supp. 912.

55. Tex.—*Sherman v. El Paso Nat. Bank, Civ.App.*, 100 S.W.2d 402, error dismissed.

Right to enforce notes

Reliance on doctrine of subrogation on the part of a bank which advanced money to be used in payment of claims against the estate was unnecessary where bank was entitled to enforce its original claim against the administrators on notes given for advance.—*Sherman v. El Paso Nat. Bank, supra*.

56. Fla.—*Fee v. Peery*, 154 So. 140, 114 Fla. 556.

Iowa.—*Home Owners' Loan Corp. v. Rupe*, 283 N.W. 108, 225 Iowa 1044.

Minn.—*Kingery v. Kingery*, 241 N.W. 583, 185 Minn. 467.

Tenn.—*McCoy v. Hight*, 39 S.W.2d 271, 162 Tenn. 507.
60 C.J. p 809 note 18.

Ship mortgage

A third person making advances to mortgagor to be used to make payments of principal and interest due on preferred ship mortgage was not entitled to be subrogated to lien of the mortgagee, particularly as against mortgagee itself which had not been paid in full.—*R. F. C. v. The William D. Mangold*, D.C.N.Y., 99 F. Supp. 651.

57. Ohio.—*Zimpher v. Schwartz*, 27 N.E.2d 499, 64 Ohio App. 7.

Pa.—*Grambo v. South Side Bank & Trust Co.*, 14 A.2d 925, 141 Pa.Super. 176.
60 C.J. p 810 note 19.

58. Kan.—*Gray v. Zelmer*, 72 P. 228, 66 Kan. 514.

59. Fla.—*Boley v. Damel*, 72 So. 644, 72 Fla. 121, L.R.A.1917A 734.

Neb.—*Rice v. Winters*, 63 N.W. 830, 45 Neb. 517.

60. Mo.—*State Sav. Trust Co. v. Spencer, App.*, 201 S.W. 967.

61. Mo.—*State Sav. Trust Co. v. Spencer, supra*.

62. U.S.—*Union Joint Stock Land Bank of Detroit, Mich., v. Byers*,

C.C.A.Ga., 100 F.2d 82, certiorari denied 59 S.Ct. 642, 306 U.S. 653, 83 L.Ed. 1052.

Fla.—*Fee v. Peery*, 154 So. 140, 114 Fla. 556.

Ga.—*Jackson v. Blackwell*, 160 S.E. 772, 173 Ga. 614.

Iowa.—*Home Owners' Loan Corp. v. Rupe*, 283 N.W. 108, 225 Iowa 1044.
N.J.—*Vaux v. Vaux*, 172 A. 68, 115 N.J.Eq. 586.

Pa.—*Home Owners' Loan Corp. v. Mitchell, Com.Pl.*, 24 West.Co. 137.

Wis.—*Schuetz v. Schuetz*, 296 N.W. 70, 237 Wis. 1.—*Bank of Baraboo v. Prothero*, 255 N.W. 126, 215 Wis. 552.

60 C.J. p 810 notes 28, 30.

Fact of discharge and intent

The fact that money advanced by volunteer actually discharged mortgage and was intended to be applied to that purpose does not alter the text rule.—*Schuetz v. Schuetz*, 296 N.W. 70, 237 Wis. 1.—*Bank of Baraboo v. Prothero*, 255 N.W. 126, 215 Wis. 552.

63. Ala.—*Jefferson Standard Life Ins. Co. v. Brunson*, 145 So. 156, 226 Ala. 16.

Manifest injustice toward second mortgagee

Where subrogation of a lender taking third mortgage on portion of block as security for loan of money to pay off first mortgage on entire

As against a person on whose interest the mortgage discharged by reason of the loan was not a charge, no right of subrogation can exist.⁶⁴ Where there is no evidence that the lender gave or lent the money, expecting it to be paid on the mortgage or on any particular indebtedness, the right of subrogation to the mortgage does not exist⁶⁵ and a person advancing money to another to enable him therewith to make a loan to a third person, on the security of an equitable mortgage, is not entitled to subrogation thereby.⁶⁶

One who, having no interest to protect, voluntarily lends money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein,⁶⁷ especially where the mortgage securing such voluntary loan covers more of the mortgagor's property, and is for a greater indebtedness.⁶⁸ One who advances money on a mortgage on the strength of false representations that there was but one other encumbrance on the premises, and that such money would be applied to the payment thereof, but which was in fact applied in payment of notes secured by another mortgage, will not be subrogated to the rights of the mortgagee in the second mortgage where there was no agreement therefor.⁶⁹

Unless the money lent or advanced is actually applied to the discharge of the obligation, no right

of subrogation to the rights of the holder thereof can exist,⁷⁰ particularly where inequity would result from subrogation.⁷¹ The mere fact that part of the proceeds of a subsequent mortgage was applied by the mortgagor in discharge of a purchase-money mortgage does not entitle the subsequent mortgagee to subrogation to the rights of the purchase-money mortgage.⁷²

On foreclosure; redemption. A redemptioner who is compelled to redeem for the protection of his own lien on the mortgaged premises is entitled to subrogation to the rights of the senior mortgagee,⁷³ unless he is himself liable as a principal debtor.⁷⁴ A redemptioner may be entitled to be subrogated to the rights of the mortgagee or foreclosure sale purchaser where the equities demand it,⁷⁵ as where he is a surety for the payment of the mortgage debt;⁷⁶ but the right to subrogation does not necessarily flow from the right of redemption.⁷⁷ A redemption by one not authorized to redeem gives no right of subrogation to the redemptioner,⁷⁸ but subrogation has been allowed to a redemptioner who believed himself to be the owner of the property but who was thereafter held to have no title thereto.⁷⁹ One furnishing money to redeem a homestead from a mortgage foreclosure does not lose his right to subrogation merely because he agrees to take a mortgage from the homestead claimant.⁸⁰ Where a person who is entitled to redeem fails to do so within the time required,

block would be manifestly unjust to an innocent mortgagee under a second mortgage on the entire block, subrogation would be refused.—*Jefferson Standard Life Ins. Co. v. Brunson*, *supra*.

64. Mich.—*Skupinski v. Provident Mortg. Co.*, 221 N.W. 338, 244 Mich. 309.

65. Ohio.—*Hickey v. Conine*, 27 Ohio Cir.Ct. 369, affirmed 74 N.E. 1137, 71 Ohio St. 548.

66. N.J.—*Van Winkle v. Williams*, 38 N.J.Eq. 105, affirmed 38 N.J.Eq. 654.

67. Mich.—*Lentz v. Stoflet*, 273 N.W. 763, 280 Mich. 446.

N.J.—*Vaux v. Vaux*, 172 A. 68, 115 N.J.Eq. 586.

Or.—*McBride v. McBride*, 36 P.2d 175, 148 Or. 478.
60 C.J. p 811 note 33.

68. Mich.—*Lentz v. Stoflet*, 273 N.W. 763, 280 Mich. 446.

69. Iowa.—*Barber v. Lyon*, 15 Iowa 37.

70. Ala.—*Federal Land Bank of New Orleans v. Henderson*, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.
60 C.J. p 811 note 36.

71. Wis.—*Union Trust Co. of Maryland v. Rodeman*, 264 N.W. 508, 220 Wis. 453.

72. N.J.—*Ayers v. Staley*, Ch., 18 A. 1046.

73. Minn.—*Buettel v. Harmount*, 49 N.W. 250, 46 Minn. 481.
N.Y.—*Jenkins v. Continental Ins. Co.*, 12 How.Pr. 66.

Parents who furnished money to their child, the mortgagor, to redeem were subrogated to the rights of the foreclosing mortgagee.—*Leser v. Smith*, 189 N.W. 38, 219 Mich. 509.

74. N.Y.—*Jenkins v. Continental Ins. Co.*, 12 How.Pr. 66.
42 C.J. p 450 note 74.

75. Minn.—*Buettel v. Harmount*, 49 N.W. 250, 46 Minn. 481.
42 C.J. p 449 note 72.

While there are still rights of redemption outstanding, the lien on which a redemption is made may pass by subrogation to any subsequent redemptioner.—*Lowry v. Akers*, 52 N.W. 922, 50 Minn. 508.

76. Me.—*Allen v. Alden*, 85 A. 3, 109 Me. 516.

Right to assignment

Where one redeeming from a mortgage is a surety for the mortgage debt, he is entitled to an assignment to perfect his right of subrogation.—*Allen v. Alden*, 85 A. 3, 109 Me. 516.

77. N.Y.—*Jenkins v. Continental Ins. Co.*, 12 How.Pr. 66.

78. Ill.—*Huber v. Hess*, 61 N.E. 61, 191 Ill. 305.
42 C.J. p 449 note 65.

79. N.J.—*Coudert v. Coudert*, 5 A. 722, 43 N.J.Eq. 407.

80. Vt.—*Hunt v. Davis*, 96 A. 814, 90 Vt. 153.

he cannot thereafter entitle himself to subrogation merely by advancing the redemption money to another who redeems.⁸¹ Where the proceeds of a mortgage loan are used to satisfy a final decree in foreclosure of a prior mortgage, the lender under the subsequent mortgage has been held to be entitled to be subrogated to the lien of the prior mortgage.⁸² A purchaser at a foreclosure sale or his vendee may, on the mortgagor's repudiation of the foreclosed mortgage on the ground that the land was homestead be subrogated to the rights of the mortgagee of a prior mortgage which was refinanced by the proceeds of the foreclosed mortgage.⁸³

A junior mortgagee or judgment creditor, on redeeming from a prior mortgage, either before or after foreclosure thereof,⁸⁴ is usually held, where there are no intervening rights, to be entitled to subrogation to the rights of the prior mortgagee,⁸⁵ at least as far as is necessary for the protection of his own interests;⁸⁶ and the right extends also to his grantee to whom he conveys the property after redemption.⁸⁷ His redemption may, however, be a satisfaction and discharge of the mortgage if he so intends,⁸⁸ but the general rule allowing subrogation is so well established that it has been held that in order to have the effect of payment the redemption must be made in such unmistakable terms that there can be no doubt of the intent to extinguish and discharge the mortgage.⁸⁹ If the junior encumbrancer is entitled to be so subrogated, the right continues whether or not he thereafter

enforces his junior encumbrance;⁹⁰ nor is it lost by his acceptance of payment and satisfaction of his own mortgage at its maturity.⁹¹

b. Loan or Discharge under Agreement

- (1) In general
- (2) Agreement to take security discharged
- (3) Agreement to take new security

(1) In General

A person who advances money pursuant to an agreement that it shall be applied to the payment of an existing mortgage may be subrogated to the rights of the mortgagee.

The equities of the case may require that a person who advances money pursuant to an agreement that it shall be applied to the payment of an existing mortgage be subrogated to the rights of the mortgagee.⁹² A third person who discharges the obligation represented by a note secured by a trust deed, under an agreement whereby the mortgagor is to transfer the mortgaged property to him, is entitled to be subrogated to all the rights of the original holder of the note.⁹³

(2) Agreement to Take Security Discharged

One who advances the means of discharging a debt secured by a deed or mortgage, under an agreement to take the security discharged, is not a volunteer and is entitled to subrogation.

One who advances the means of discharging a

81. Iowa.—Berry v. Krittenbrink, 186 N.W. 428, 192 Iowa 1324.

Junior lienholder furnishing money to primary debtor

Where primary debtor on foreclosure of mortgage, with money furnished by a junior lienholder whose time for redemption had expired, redeemed the land, such junior lienholder was not entitled to be subrogated to the rights of the prior lienholder.—Berry v. Krittenbrink, *supra*.

82. N.J.—Hudson County Caledonian Bldg. & Loan Ass'n v. Cole, 15 A. 2d 621, 128 N.J.Eq. 172.

83. Ala.—Butler v. Wilson, 194 So. 669, 239 Ala. 221.

84. Del.—Stoeckle v. Rosenheim, 87 A. 1006, 10 Del.Ch. 195.

85. U.S.—Brown v. Crawford, D.C. Or., 252 F. 248.

Me.—Bernstein v. Blumenthal, 143 A. 698, 127 Me. 393—Allen v. Alden, 85 A. 3, 109 Me. 516.

Okl.—Boyd v. McKenney, 246 P. 406, 118 Okl. 8, 42 C.J. p 450 note 76.

86. U.S.—Brown v. Crawford, D.C. Or., 252 F. 248.

Okl.—Boyd v. McKenney, 246 P. 406, 118 Okl. 8, 42 C.J. p 450 note 77.

Where foreclosure not sought

The right to subrogation does not exist when senior mortgagee does not seek to foreclose.—In re Ryan, 215 N.Y.S. 571, 216 App.Div. 619.

87. Conn.—Weinstein v. Montowese Brick Co., 99 A. 488, 91 Conn. 165.

88. Ill.—Illinois Nat. Bank v. School Trustees, 71 N.E. 1070, 211 Ill. 500, 42 C.J. p 450 note 79.

89. Ill.—Illinois Nat. Bank v. School Trustees, *supra*, 42 C.J. p 450 note 80.

90. Vt.—Chandler v. Dyer, 37 Vt. 345.

91. Mich.—Powers v. Golden Lumber Co., 5 N.W. 656, 43 Mich. 468.

92. Kan.—Tillotson v. Goodman, 114 P.2d 845, 154 Kan. 31.

Antenuptial agreement for protection of homestead

Where husband and wife before their marriage entered into an antenuptial agreement whereby the wife was to advance a certain sum to the husband to be applied to the payment of a mortgage on certain realty, in order to protect it as their homestead, and whereby the husband was to repay the money to the wife, administrator of wife's estate was entitled to invoke the right of subrogation against the husband, as against contention that wife in making advancement acted as a mere volunteer.—Tillotson v. Goodman, *supra*.

93. Tex.—Hendrix v. Gabrysich, Civ. App., 190 S.W.2d 516. Subrogation of parties to bills or notes see *supra* §§ 22-24.

debt secured by a mortgage or deed of trust,⁹⁴ or advances the means of discharging the mortgage or deed of trust,⁹⁵ under an express⁹⁶ or implied⁹⁷ agreement or understanding that he is to have the benefit of the security held by the person paid, is not a mere stranger or volunteer, and, in the absence of other intervening rights,⁹⁸ is entitled to hold the lien as subrogee,⁹⁹ even though the agreement is only with the debtor,¹ and although the mortgage or deed of trust was released of record,² unless the security was issued but the transaction for which it was given was not consummated.³ However, in order to have subrogation the person to whose place subrogation is claimed must have been entitled to rights.⁴ It is also essential that the money advanced by the third person be actually applied on the security to which he seeks subrogation,⁵ and his right thereto, if any, will be measured by the amount actually so applied.⁶

(3) Agreement to Take New Security

A third person who advances the means of discharging debts secured by deed or mortgage, under an agreement to take new security of equal rank with that discharged, is not a mere stranger or volunteer, and where he fails to obtain such security he is entitled to subrogation.

Where a third person advances the means of discharging a debt secured by a mortgage or deed of trust,⁷ or advances the means of discharging the mortgage or deed of trust,⁸ with the agreement or understanding that he shall have new security of equal rank with that discharged, he is not a mere stranger or volunteer. Accordingly, where the new security is refused,⁹ or where, following such agreement, even though implied,¹⁰ a loan to pay a debt is made,¹¹ or means to discharge such encumbrance are obtained by loan,¹² and the new security is invalid or defective, or where, relying

94. Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326. 60 C.J. p 811 note 39.

95. Mo.—Neer v. Neer, App., 80 S.W. 2d 240. 60 C.J. p 811 note 42.

96. Ga.—Wilkins v. Gibson, 38 S.E. 374, 113 Ga. 31, 84 Am.S.R. 204. Tex.—First State Bank of Wylie v. Farmers', etc., Bank of Farmersville, Civ.App., 262 S.W. 225.

97. Kan.—Williamstown Baptist Church v. Henley, 148 P.2d 269, 158 Kan. 324.

Mo.—Neer v. Neer, App., 80 S.W.2d 240. Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326. 60 C.J. p 812 note 50.

98. Mo.—Neer v. Neer, App., 80 S.W. 2d 240.

99. Ala.—Burch v. Burch, 165 So. 387, 231 Ala. 464. D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944. Mo.—Neer v. Neer, App., 80 S.W.2d 240. 60 C.J. p 812 notes 45, 48.

1. Ala.—Burch v. Burch, 165 So. 387, 231 Ala. 464. 60 C.J. p 813 note 51.

2. Mo.—Neer v. Neer, App., 80 S.W. 2d 240. Neb.—Chrisman v. Daniel, 278 N.W. 565, 134 Neb. 326. 60 C.J. p 813 note 52.

3. U.S.—Blount v. Farmers' Bank of Greenville, N. C., D.C.N.C., 297 F. 277, affirmed, C.C.A., 8 F.2d 443. 60 C.J. p 813 note 53.

4. N.C.—Blacknall v. Hancock, 109 S.E. 72, 182 N.C. 369.

5. Tex.—Calderon v. Gonzales, Civ. App., 158 S.W.2d 349.

6. Tex.—Calderon v. Gonzales, supra.

7. Cal.—Jack v. Wong Shee, 92 P. 2d 449, 33 Cal.App.2d 402. 60 C.J. p 813 note 55.

8. U.S.—Ingram v. Jones, C.C.A.Okl., 47 F.2d 135.

Ala.—Gautney v. Gautney, 46 So.2d 198, 253 Ala. 584—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Berry v. Bankers Mortg. Bldg. & Loan Ass'n, 168 So. 427, 232 Ala. 395.

Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

Ga.—McCollum v. Lark, 200 S.E. 276, 187 Ga. 292.

Ill.—Kaminskas v. Cespauskis, 17 N. E.2d 558, 369 Ill. 566—Kankakee Federal Savings & Loan Ass'n v. Arrove, 47 N.E.2d 874, 318 Ill. App. 261.

Ind.—Home Owners' Loan Corp. v. Henson, 29 N.E.2d 873, 217 Ind. 554.

N.J.—Brooklyn Trust Co. v. Podvin, 83 A.2d 548, 15 N.J.Super. 398.

N.Y.—The Thrift v. Michaelis, 181 N. E. 580, 259 N.Y. 302.

Ohio.—Union Trust Co. v. Lessovitz, 199 N.E. 614, 51 Ohio App. 69.

Okl.—Mid-Continent Life Ins. Co. v. Goforth, 143 P.2d 154, 193 Okl. 314.

—Bourquin v. Feland, 117 P.2d 789, 189 Okl. 498—United Federal Savings & Loan Ass'n of Tulsa v. Johnson, 73 P.2d 846, 181 Okl. 328 —Home Owners' Loan Corp. v. Parker, 73 P.2d 170, 181 Okl. 234—

Landis v. State ex rel. Commissioners of Land Office, 66 P.2d 519, 179 Okl. 547, 151 A.L.R. 403. 60 C.J. p 813 note 57.

Reliance on security other than mortgage

The fact that lender, to some extent, relied on security other than mortgage does not preclude subrogation under the text rule.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So. 2d 829, 253 Ala. 54.

9. Mich.—Smith v. Sprague, 222 N. W. 207, 244 Mich. 577. 60 C.J. p 813 note 59.

10. Ark.—Roark v. Matthews, 188 S. W. 841, 125 Ark. 378. 60 C.J. p 814 note 61.

11. Ark.—Davies v. Pugh, 99 S.W. 78, 81 Ark. 253. Miss.—Clark v. Clark, 58 Miss. 68.

12. Cal.—U. S. Building & Loan Ass'n of Los Angeles v. Salisbury, 17 P.2d 140, 217 Cal. 35.

Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

Fla.—Brannon v. Hills, 149 So. 556, 111 Fla. 491—Federal Land Bank of Columbia v. Dekle, 148 So. 756, 108 Fla. 555—Schilling v. Bank of Sulphur Springs, 147 So. 218, 109 Fla. 181—Federal Land Bank of Columbia v. Godwin, 145 So. 883, 107 Fla. 537.

Idaho.—Peterson v. Hague, 4 P.2d 350, 51 Idaho 175.

Ill.—Kaminskas v. Cespauskis, 17 N.E. 2d 558, 369 Ill. 566—Kankakee Federal Savings & Loan Ass'n v. Arrove, 47 N.E.2d 874, 318 Ill.App. 261.

on an agreement or understanding that he will have a first lien, the person advancing the funds does not obtain a first lien, because of intervening encumbrances, he may be subrogated to the rights of the creditor or lienholder paid, even though the encumbrance paid has been discharged of record,

where other persons have not changed their position in reliance on the recorded discharge,¹³ if not chargeable with culpable and inexcusable neglect,¹⁴ and unless his right has been waived,¹⁵ or he is estopped to claim subrogation.¹⁶ Subrogation does not extend to a person who lent money on an

Ind.—Home Owners' Loan Corp. v. Henson, 29 N.E.2d 873, 217 Ind. 554.
Iowa.—Home Owners' Loan Corp. v. Rupe, 283 N.W. 108, 225 Iowa 1044.
Kan.—Kuske v. Staley, 28 P.2d 728, 138 Kan. 869.

Mass.—Home Owners' Loan Corp. v. Baker, 12 N.E.2d 199, 299 Mass. 158.
N.J.—Brooklyn Trust Co. v. Podvin, 83 A.2d 548, 15 N.J.Super. 398—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266—Elmora & West End Building & Loan Ass'n v. Dancy, 155 A. 796, 108 N.J.Eq. 542.

N.C.—Investment Securities Co. v. Gash, 164 S.E. 628, 203 N.C. 126.
Ohio.—Union Trust Co. v. Lessovitz, 199 N.E. 614, 51 Ohio App. 69—Federal Union Life Ins. Co. v. Deitsch, 189 N.E. 440, 127 Ohio St. 505.

Okl.—Mid-Continent Life Ins. Co. v. Goforth, 143 P.2d 154, 193 Okl. 314—United Federal Savings & Loan Ass'n of Tulsa v. Johnson, 73 P.2d 846, 181 Okl. 328—Landis v. State ex rel. Commissioners of Land Office, 66 P.2d 519, 179 Okl. 547, 151 A.L.R. 403—Watson v. Butler, 40 P.2d 653, 170 Okl. 350.

Tex.—Hays v. Spangenberg, Civ.App., 94 S.W.2d 899—Burton v. Connecticut General Life Ins. Co., Civ.App., 72 S.W.2d 318, error refused.
Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

Wis.—Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289.
60 C.J. p 814 note 64.

Loan in excess of amount applied on mortgage

The fact that the amount of loan exceeds amount of money received by prior mortgagee did not deprive the lender of the right of subrogation as to the amount actually received, particularly where it appeared that the portion of the loan not received was used for the purpose of paying charges, expenses, attorney's fees, and taxes on the mortgaged property.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.

13. U.S.—Stowers v. Wheat, C.C.A. Fla., 78 F.2d 25—Ingram v. Jones, C.C.A.Okl., 47 F.2d 135—Bigley v. Jones, D.C.Okl., 64 F.Supp. 389.
Ala.—Gautney v. Gautney, 46 So.2d 198, 253 Ala. 584—Federal Land

Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54—Berry v. Bankers Mortg. Bldg. & Loan Ass'n, 168 So. 427, 232 Ala. 395.

Cal.—U. S. Building & Loan Ass'n of Los Angeles v. Salisbury, 17 P.2d 140, 217 Cal. 35—Jack v. Wong Shee, 92 P.2d 449, 33 Cal.App.2d 402.

Conn.—Home Owners' Loan Corp. v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.

Fla.—Brannon v. Hills, 149 So. 556, 111 Fla. 491—Federal Land Bank of Columbia v. Dekle, 148 So. 756, 108 Fla. 555—Federal Land Bank of Columbia v. Godwin, 145 So. 883, 107 Fla. 537.

Ga.—McCollum v. Lark, 200 S.E. 276, 187 Ga. 292.

Ill.—Kaminskas v. Cespauskis, 17 N.E.2d 558, 369 Ill. 566—Kankakee Federal Savings & Loan Ass'n v. Arrove, 47 N.E.2d 874, 318 Ill.App. 261.

Iowa.—Home Owners' Loan Corp. v. Rupe, 283 N.W. 108, 225 Iowa 1044.
Mass.—Worcester North Sav. Inst. v. Farwell, 198 N.E. 897, 292 Mass. 568.

Miss.—Home Owners' Loan Corp. v. Moore, 185 So. 253, 184 Miss. 283.
Neb.—Equitable Life Assur. Soc. of U. S. v. Person, 284 N.W. 260, 135 Neb. 800.

N.J.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266—Brooklyn Trust Co. v. Podvin, 83 A.2d 548, 15 N.J.Super. 398.

N.Y.—The Thrift v. Michaelis, 181 N.E. 580, 259 N.Y. 302—Home Owners' Loan Corp. v. Tobin, 23 N.Y.S.2d 451, 175 Misc. 316.

Ohio.—Federal Union Life Ins. Co. v. Deitsch, 189 N.E. 440, 127 Ohio St. 505—Union Trust Co. v. Lessovitz, 199 N.E. 614, 51 Ohio App. 69.

Okl.—Bourquin v. Feland, 117 P.2d 789, 189 Okl. 498—Home Owners' Loan Corp. v. Parker, 73 P.2d 170, 181 Okl. 234—Equitable Life Assur. Soc. of U. S. v. McFadden, 72 P.2d 795, 181 Okl. 162—Landis v. State ex rel. Commissioners of Land Office, 66 P.2d 519, 179 Okl. 547, 151 A.L.R. 403.

Or.—Corpus Juris cited in Metropolitan Life Ins. Co. v. Craven, 101 P. 2d 237, 239, 164 Or. 274.

R.I.—Industrial Trust Co. v. Hanley, 165 A. 223, 53 R.I. 180.

Utah.—Martin v. Hickenlooper, 59 P. 2d 1139, 90 Utah 150, 107 A.L.R.

762, rehearing denied 61 P.2d 307, 90 Utah 185.

Wis.—Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289—Home Owners' Loan Corp. of Washington, D. C., v. Dougherty, 275 N.W. 363, 226 Wis. 8—Bank of Baraboo v. Prothro, 255 N.W. 126, 215 Wis. 552.

60 C.J. p 814 notes 65-67, 69, p 815 note 70.

Leasing

One who advanced money on mortgage subsequent to leasing for purpose of paying off mortgage debt existing prior thereto was subrogated to right of prior mortgagee.—McCain v. Bradford, 13 Ky.L. 333.

Erroneous description of mortgagor

Fact that mortgagor who signed new trust deed was erroneously described as a bachelor did not preclude subrogation under the text rule where the new mortgagee who advanced the money did not know of the mortgagor's marriage, and money lent on new trust deed was used to pay existing trust deed.—Kaminskas v. Cespauskis, 17 N.E.2d 558, 369 Ill. 566.

14. Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.
Ga.—McCollum v. Lark, 200 S.E. 276, 187 Ga. 292.

Va.—Federal Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 179 Va. 394.

60 C.J. p 815 note 71.

Matters held not to bar subrogation

(1) Failure of lender to obtain a properly executed mortgage.—Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730, 241 Wis. 112, 140 A.L.R. 1289.

(2) Failure of Home Owners' Loan Corporation, as lender, to notify local attorney of existence of third mortgage in making settlement, where third mortgagee was benefited rather than prejudiced by transaction in that first mortgagee accepted less than full amount due on mortgage.—Home Owners' Loan Corp. v. Collins, 184 A. 621, 120 N.J.Eq. 266.

15. Ga.—Wilkins v. Gibson, 38 S.E. 374, 113 Ga. 31, 84 Am.S.R. 204.
60 C.J. p 816 note 72.

16. Ill.—Calumet & Chicago Canal & Dock Co. v. Davis, 218 Ill.App. 176.

60 C.J. p 816 note 73.

agreement that it would be used to discharge a mortgage securing a loan given on an agreement that it would be used to discharge a prior mortgage;¹⁷ nor can one who has advanced money to pay a lien note at the request of the debtor, taking a mortgage as security, be subrogated to the lien to the prejudice of a lien held by the creditor to secure other notes.¹⁸

A third person's right to be subrogated where he has advanced money to pay a debt secured by mortgage has been held not to be defeated by mere notice of an intervening lien,¹⁹ particularly where he, innocently and without negligence, believes that such lien is no longer a lien on the property in question.²⁰ A third person is not required to exercise the highest degree of care to discover intervening liens,²¹ but he will not be permitted to shut his eyes and ignore facts brought to his knowledge.²² Notice of intervening liens may, however, preclude subrogation,²³ especially where the entire debt secured by mortgage, as to which subrogation is sought, has not been discharged.²⁴ Subrogation will not be granted to the prejudice of persons who, without notice of the claim of the person seeking subrogation, have changed their position.²⁵

Under the rule that subrogation will not be granted to relieve a person of the consequences of his own unlawful act, considered *supra* § 6, a third person who, having advanced money to discharge a prior mortgage and having received a new mort-

gage as security, materially alters it, is not entitled to subrogation.²⁶

§ 40. — Maritime Lien

A third person who, at the request of the master, lends money for the discharge of a maritime lien is entitled to subrogation.

A third person who, at the request of the master, lends money for the discharge of maritime liens is not a volunteer,²⁷ and is entitled to be subrogated to the benefit of the liens so discharged.²⁸ So, where the master of a ship obtains money from another for purposes which are maritime in their character, and subsequently borrows money of libellant and repays the lender, libellant is entitled to a lien on the vessel, as standing in the same position as that in which the lender stood.²⁹ Further, one who advances checks to secure payment of a repair bill on a vessel is subrogated, when the checks are cashed by the repairman, to his lien to the extent that the checks are paid to the repairman in satisfaction of his bill.³⁰ On the other hand, the fact that a person lends securities for the general use of a shipowner, who gets them discounted and applies part of the proceeds in satisfaction of a bottomry on the ship, raises no equity in behalf of the lender to be subrogated to the lien of a bottomry creditor;³¹ and the same rule applies to a party advancing money to an owner of a steamer to pay for necessities, so that he is not legally subrogated to the privileges of the persons paid.³² A creditor

17. Ala.—*Bigelow v. Scott*, 33 So. 546, 135 Ala. 236.

18. Ky.—*Gaskill v. Huffaker*, 49 S. W. 770, 20 Ky.L. 1555.

19. Cal.—*Jack v. Wong Shee*, 92 P. 2d 449, 33 Cal.App.2d 402.

Miss.—*Home Owners' Loan Corp. v. Moore*, 185 So. 253, 184 Miss. 283.

20. Cal.—*Jack v. Wong Shee*, 92 P. 2d 449, 33 Cal.App.2d 402.

Reliance on forged release

Cal.—*Jack v. Wong Shee*, *supra*.

21. Ala.—*Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co.*, 42 So.2d 829, 253 Ala. 54—*Whitson v. Metropolitan Life Ins. Co.*, 142 So. 564, 225 Ala. 262.

22. Ala.—*Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co.*, 42 So.2d 829, 253 Ala. 54—*Whitson v. Metropolitan Life Ins. Co.*, 142 So. 564, 225 Ala. 262.

23. Ohio.—*Canton Morris Plan Bank v. Most*, 184 N.E. 765, 44 Ohio App. 180.

Construction in progress

Where new mortgage was given and old mortgage canceled, assignee of new mortgage could not, as against laborers and materialmen, be subrogated to assignor's rights under old mortgage, where assignor knew that construction was in progress, and was chargeable with knowledge of statute affording opportunity for protection against intervening mechanics' liens.—*Canton Morris Plan Bank v. Most*, *supra*.

24. W.Va.—*Price v. Lovins*, 187 S.E. 318, 117 W.Va. 624.

Notice of junior mortgage and outstanding notes

A mortgagee advancing money to discharge a prior first mortgage is not entitled to subrogation where he had full knowledge of junior deed of trust and should have discovered that some of mortgagors' notes were outstanding in hands of third person, and entire debt to security for which mortgagee sought to be subrogated had not been discharged.—*Price v. Lovins*, *supra*.

25. Me.—*Federal Land Bank of Springfield v. Smith*, 151 A. 420, 129 Me. 233.

60 C.J. p 816 note 76.

26. Kan.—*Johnson v. Moore*, 5 P. 406, 33 Kan. 90.

27. U.S.—*Fielder v. Bay Construction Co.*, C.C.A.Fla., 5 F.2d 227—*The Richmond*, D.C.Del., 2 F.2d 903.

28. U.S.—*Fielder v. Bay Const. Co.*, C.C.A.Fla., 5 F.2d 227.
60 C.J. p 816 note 86.

29. U.S.—*The Thomas Sherlock*, D. C. Ohio, 22 F. 253.

30. U.S.—*The Odysseus III*, D.C. Fla., 77 F.Supp. 297.

31. U.S.—*Stalker v. The Henry Kneeland*, D.C.N.Y., 22 F.Cas.No.13-282.

32. La.—*Mississippi Agricultural Bank v. The Jane*, 19 La. 1.
60 C.J. p 816 note 83.

to whom a ship has been hypothecated for advances made before it was built, without an agreement that on payment the lien should be continued in his favor, or an assignment of the debt, does not become subrogated to the privilege lien of materialmen by reason of having paid the orders drawn by the builder in favor of the materialmen.³³

Lien for salvage. One who has advanced money to pay off a lien for salvage, under an agreement that he shall be subrogated to such lien, is entitled to payment from the proceeds of the sale of a vessel in admiralty in priority to claims based on prior personal judgments against the owners.³⁴

§ 41. — Mechanic's or Wage Lien

A person who advances money for the express purpose of discharging mechanics' liens, and it is so applied, is entitled to subrogation, as is a third person who makes such an advance under an agreement or understanding that he shall be subrogated.

Where a third person advances money for the express purpose that it be used to discharge mechanics' liens, and it is so applied, he is entitled to subrogation to the rights of the lienholders,³⁵ even

though such liens have been canceled.³⁶ So, where a third person advances money to discharge liens of mechanics on an agreement or understanding for subrogation, he is entitled to be subrogated to their rights as against the contractor's surety.³⁷ Moreover, where such a loan is made in reliance on a mortgage which is defective or invalid, the lender is entitled to subrogation.³⁸ Mortgagees who lend money which is used to pay materialmen's and laborers' liens on property purchased by the mortgagor after he has contracted to convey to others may be entitled to be subrogated to his rights.³⁹ So, also, a third person who discharges a mechanic's lien on the understanding that he is to have a first lien on the property is entitled to subrogation where intervening encumbrances of which he was ignorant prevent his obtaining such first lien,⁴⁰ even though the mechanic's lien has been discharged of record.⁴¹

In the absence of an agreement or understanding for subrogation, a third person who advances money which is used to discharge claims of laborers or materialmen is not thereby entitled to be subrogated to the rights of the lienholders,⁴² including their rights under the contractor's bond,⁴³ or as to the

33. U.S.—The Hull of a New Ship, D.C.Me., 12 F.Cas.No.6,859, 2 Ware 203.

34. U.S.—The Dredge No. 1, D.C.N.Y., 137 F. 110.

35. Ky.—Corpus Juris cited in Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 391, 301 Ky. 487—Mowl Const. Co. v. Covington Trust & Banking Co., 80 S.W.2d 560, 258 Ky. 485.

Miss.—Sadler v. Glenn, 199 So. 305, 190 Miss. 112.

Wash.—Corpus Juris cited in Western Steel Casting Co. v. Edland, 61 P.2d 155, 157, 187 Wash. 666.

60 C.J. p 816 note 91.

Subrogation of surety paying principal's debt to rights of creditor see *infra* §§ 47-56.

Subcontractor who had lien for own labor on building, and paid off his laborers, was entitled to be subrogated to laborers' lien rights, which are preferable to that of subcontractor.—Tilly v. Bauman, 139 So. 762, 174 La. 71.

Absence of written or formal assignment to the third person is immaterial where money was lent to a contractor for the purpose of paying laborers' and materialmen's liens and it was actually used for that purpose.—Southern Exchange Bank v. American Sur. Co. of New York, 144 S.W.2d 203, 284 Ky. 251.

Mechanic's lien note assigned to lender

Where lender was assigned mechanic's lien note which loan was made to pay, lender became subrogated to mechanic's debt and lien.—Continental Southland Savings & Loan Ass'n v. Bunyard, Tex.Civ.App., 109 S.W.2d 276.

36. Iowa.—Carr Hardware Co. v. Chicago Bonding & Surety Co., 181 N.W. 680, 190 Iowa 1320.

37. Ky.—Western Cas. & Sur. Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769—Southern Exchange Bank v. American Sur. Co. of New York, 144 S.W.2d 203, 284 Ky. 251. 60 C.J. p 817 note 93.

38. Ala.—Brasher v. Grayson, 117 So. 301, 217 Ala. 674. 60 C.J. p 817 note 94.

39. Ind.—Mishawaka-St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85, 209 Ind. 433, 105 A.L.R. 881.

40. W.Va.—Huggins v. Fitzpatrick, 135 S.E. 19, 102 W.Va. 224.

41. W.Va.—Huggins v. Fitzpatrick, *supra*.

42. U.S.—In re Braker, C.C.A.Ohio, 127 F.2d 652—Town of River Junction v. Maryland Cas. Co., C.C.A. Fla., 110 F.2d 278, 134 A.L.R. 727, certiorari denied Maryland Cas. Co.

v. Town of River Junction, 60 S.Ct. 1077, 310 U.S. 634, 84 L.Ed. 1404.

Ky.—Skaggs v. Elkhorn Coal Corp., 180 S.W.2d 88, 297 Ky. 330—Southern Coal Co. v. Martin's Fork Coal Co., 151 S.W.2d 394, 286 Ky. 679. La.—Bank of Bienville v. Fidelity & Deposit Co. of Maryland, 135 So. 26, 172 La. 687.

Miss.—Sadler v. Glenn, 199 So. 305, 190 Miss. 112.

Ohio.—Canton Morris Plan Bank v. Most, 184 N.E. 765, 44 Ohio App. 180.

Tex.—Verschoyle v. Holifield, 123 S.W.2d 878, 132 Tex. 516.

60 C.J. p 817 note 97.

Lack of power to convey matter of record

Where, in the absence of agreement, fraud, accident, or mistake, the borrower's lack of power to convey was matter of record, of which lender did not allege he was ignorant, he was not entitled to lien by way of subrogation because money lent was used to pay for roof on property, particularly where any lien for roof had expired before lender's suit.—Old Nat. Bank v. Swearingen, 72 S.W.2d 545, 167 Tenn. 529.

43. La.—Bank of Bienville v. Fidelity & Deposit Co. of Maryland, 135 So. 26, 172 La. 687.

Tex.—Verschoyle v. Holifield, 123 S.W.2d 878, 132 Tex. 516.

60 C.J. p 817 note 98.

fund retained under the contract.⁴⁴ An assignment given subsequent to payment for material does not entitle a third person furnishing money for such payment to be subrogated.⁴⁵ Where a third person takes a mortgage and lends money on condition that it be used to pay certain claims for labor and materials against the premises, and to obtain releases, and there is no evidence of an intention on the part of the mortgagee to keep the claims alive, he is not entitled to be subrogated to the rights of the holders of such claims as have been paid;⁴⁶ and, where the claims so discharged were not perfected liens, no right of subrogation exists.⁴⁷ Further, the lender of money used to discharge materialmen's liens cannot be subrogated to the rights of the lienholders as against a purchaser from the borrower under a contract requiring conveyance free from encumbrances, where such purchaser was without notice of the loan.⁴⁸

While it has been held that one not a mere volunteer, who, with an honest purpose to relieve the wage earner, and not for the purpose of personal gain, advances money in payment of wages earned is entitled to be subrogated to the rights of the employee paid,⁴⁹ including the statutory right of preference,⁵⁰ and that a person who advances money to pay wages of those employed specially in

an emergency for protection of public peace is entitled to subrogation,⁵¹ a third person who advances money to pay wages without any legal liability or contract to do so is a mere volunteer⁵² and is not entitled to subrogation.⁵³

Wages of seamen. One who advances wages to seamen in reliance on an order by the master in his favor, which order has been accepted by the company, has been held entitled to be substituted in the place of the seamen paid.⁵⁴

§ 42. — Vendor's Lien

A third person who at the instance of the debtor lends money which is used to pay a debt secured by a vendor's lien is entitled to subrogation; but the mere fact that borrowed money is used to discharge a vendor's lien does not entitle the lender to be subrogated to the rights of the vendor.

One who lends money to pay a debt secured by a vendor's lien at the instance of the debtor is not a volunteer or stranger⁵⁵ and if, when he makes the payment, he manifests an intention to keep the lien alive for his protection, he will be deemed in equity a purchaser of the encumbrance,⁵⁶ and will be subrogated to the lien he has discharged,⁵⁷ in the absence of culpable negligence,⁵⁸ and his right is superior to the dower right of the widow of the vendee⁵⁹ and to the rights of junior lienholders.⁶⁰

44. U.S.—*Lawrence v. U. S.*, C.C.S.C., 71 F. 228, affirmed 76 F. 545, 22 C. C.A. 646.

60 C.J. p 817 note 99.

45. La.—*Bank of Bienville v. Fidelity & Deposit Co. of Maryland*, 135 So. 26, 172 La. 687.

46. Minn.—*Wentworth v. Tubbs*, 55 N.W. 543, 53 Minn. 388.

47. Ark.—*Superior Lumber Co. v. National Bank of Commerce*, 2 S.W.2d 1093, 176 Ark. 300—*Young Men's Building Association v. Ware*, 249 S.W. 545, 158 Ark. 137.

48. Mich.—*Fraser v. Fleming*, 157 N.W. 269, 190 Mich. 238.

49. Ohio.—*In re Standard Wagon Co.*, 4 Ohio S. & C. P. 188, 3 Ohio N.P. 168.

60 C.J. p 817 note 5, p 818 note 6.

50. Ohio.—*In re Standard Wagon Co.*, supra.

51. Ohio.—*City of Youngstown v. First Nat. Bank*, 140 N.E. 176, 106 Ohio St. 235.

60 C.J. p 818 note 8.

52. Mo.—*Suddath v. Gallagher*, 28 S.W. 880, 126 Mo. 393.

N.J.—*In re North River Constr. Co.*,

38 N.J.Eq. 433, affirmed 40 N.J.Eq. 340.

53. Ga.—*Macon Exch. Bank v. Macon Constr. Co.*, 25 S.E. 326, 97 Ga. 1, 33 L.R.A. 800.

60 C.J. p 818 note 10.

54. Md.—*Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md.Ch. 310.

55. Tex.—*Citizens Sav. Bank & Trust Co. v. Spencer*, Civ.App., 105 S.W.2d 671, error dismissed *Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt., v. Spencer*, 110 S.W.2d 1151, 130 Tex. 384.

60 C.J. p 819 note 34.

56. Ark.—*Rodman v. Saunders*, 44 Ark. 504.

57. Miss.—*Box v. Early*, 178 So. 793, 181 Miss. 19.

Tex.—*Citizens Sav. Bank & Trust Co. v. Spencer*, Civ.App., 105 S.W.2d 671, error dismissed *Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt., v. Spencer*, 110 S.W.2d 1151, 130 Tex. 384—*Mayes v. Baugh*, Civ.App., 68 S.W.2d 1097.

60 C.J. p 819 note 36.

Release of notes; failure to assign lien

The subrogation of the assignee of original mortgages under trust deed,

to rights of vendors whose liens were extinguished by the loan secured by the trust deed, was not defeated as defective merely because original purchase-money notes were released by holders and because the notes and liens were not assigned to the assignee.—*Glasscock v. Travelers Ins. Co.*, Tex.Civ.App., 113 S.W.2d 1005, error refused.

Mortgage and notes unenforceable against realty

One who lent money to pastor of church for purchase of realty for church use had vendor's lien on realty by subrogation for unpaid balance of amount lent, plus accrued interest, even though notes and mortgage executed to lender by pastor as security for repayment of loan were unenforceable as against realty, to which pastor had no title.—*Lauderdale v. Peace Baptist Church of Birmingham*, 19 So.2d 538, 246 Ala. 178.

58. Ark.—*Stephenson v. Grant*, 271 S.W. 974, 168 Ark. 927.

60 C.J. p 819 note 37.

59. Ind.—*Fisher v. Johnson*, 5 Ind. 492.

60. Ky.—*Kentucky Lumber & Mill Work Co. v. Kentucky Title Sav-*

Moreover, mortgagees who lend money which is used to discharge a vendor's lien on property which is purchased by the mortgagor after he has contracted to convey to others may be entitled to be subrogated to his rights.⁶¹ A third person who advances money to take up and extend a debt secured by a vendor's lien under an agreement that such person shall stand in the place of the original holder of the indebtedness may be entitled to subrogation.⁶² So, also, where money is expressly advanced to extinguish a vendor's lien, with the just expectation on the part of the lender, of obtaining a valid security, but the security given is invalid or defective, the lender is entitled to be subrogated to the lien discharged.⁶³ Similarly, if payment of the vendor's lien is made under such circumstances as would operate as a fraud if the vendee should be permitted to insist that the security for the debt was discharged by the payment, he will be subrogated to the lien.⁶⁴

The mere fact that borrowed money is used to discharge a vendor's lien does not entitle the lender to be subrogated to the rights of the vendor.⁶⁵ One who lends money to be applied in payment of part of the purchase price of land, there being no agreement or understanding that he should be substituted to the lien of the vendor, or that he might in any way look to the land as equity for payment, is not entitled to the rights of the vendor;⁶⁶ and

one who lends money to pay off a note given for the purchase money of land is not entitled to be subrogated to the lien of the vendor, although the money so borrowed is used to pay off the lien.⁶⁷ A person furnishing money to take up some notes secured by a vendor's lien is not entitled to subrogation as against the payee of other notes secured by the same lien in the absence of an agreement for subrogation with such payee.⁶⁸ Where, following a loan to pay off one note secured by a vendor's lien, a person attempts to discharge another note secured by the same lien, but such tender is refused by the vendor, and the person attempting payment lends the money for such purpose, taking a mortgage as security, he is not entitled to share pro rata with the first lender.⁶⁹ One who lends money at the request of a vendee in order to discharge a vendor's lien cannot be subrogated to the lien discharged as against a purchaser from the vendee under a contract requiring conveyance free from encumbrances, where the purchaser is without knowledge of the loan.⁷⁰

In order to have a lender subrogated to the vendor's lien, there must be such a lien,⁷¹ and the lien must have been discharged out of the loan.⁷² Under the doctrine of part payment, considered supra § 10, a person whose money is used to discharge one of several vendor lien notes securing a debt is not thereby subrogated as against the creditor whose

ings Bank & Trust Co., 211 S.W. 765, 184 Ky. 244, 5 A.L.R. 391.
Tex.—Sullivan v. Doyle, 194 S.W. 136, 108 Tex. 368.

61. Ind.—Mishawaka-St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85, 209 Ind. 433, 105 A.L.R. 881.

62. Tex.—Glasscock v. Travelers Ins. Co., Civ.App., 113 S.W.2d 1005, error refused.

Transfer of instruments

Subrogation under text rule does not depend on a formal transfer of the instruments evidencing the original indebtedness.—Glasscock v. Travelers Ins. Co., supra.

63. Ala.—Bell v. Bell, 56 So. 926, 174 Ala. 446, 37 L.R.A., N.S., 1203, 60 C.J. p 820 note 44.

64. Ala.—Gibson v. Gibson, 76 So. 949, 200 Ala. 591, 60 C.J. p 820 note 45.

65. Ark.—Kline v. Ragland, 14 S.W. 474, 47 Ark. 111, 60 C.J. p 818 notes 19, 23.

Lien assumed by vendee

The lending of money to a vendee

who has assumed a vendor's lien as part of the purchase price does not entitle the lender to subrogation.—Austin v. Pulschen, 42 P. 306, 110 Cal. 12, reheard 44 P. 788, 112 Cal. 528.

Promise to give security

The mere fact that the borrower promised to give the lender security in return for his loan which was to be applied to the payment of the purchase price of realty does not, on the borrower's refusal to do so, entitle the lender to subrogation.—Campan v. Molle, 57 P. 208, 124 Cal. 415.

Taking of security

A person advancing money to a purchaser of land, which is used in completing his payment of the purchase money, who at the time takes a deed of trust on the premises to secure himself, there being no privity or arrangement between him and the vendor that he shall succeed to the lien of the vendor, will not be entitled to be subrogated to the rights of the vendor, so as to hold the entire premises against a second purchaser from the first of a part of the land,

who was in possession under his contract before the execution of the trust deed.—Alison v. Patrick, 116 So. 918, 217 Ala. 520—60 C.J. p 819 note 27.

66. Ga.—Lutes v. Warren, 92 S.E. 58, 146 Ga. 641, 60 C.J. p 818 note 21.

67. Tex.—Cage v. Shapard, 46 S.W. 839, 19 Tex.Civ.App. 206, 60 C.J. p 818 note 22.

68. Tex.—Braun v. Hickman, Civ. App., 176 S.W. 879.

69. Ky.—Federal Land Bank of Louisville v. Marvin, 14 S.W.2d 762, 228 Ky. 242, 70 A.L.R. 1392.

70. Mich.—Fraser v. Fleming, 157 N.W. 269, 190 Mich. 238.

71. Ark.—Young Men's Bldg. Assoc. v. Ware, 249 S.W. 545, 158 Ark. 137, Cal.—Campan v. Molle, 57 P. 208, 124 Cal. 415.

72. Tex.—Pope v. Witherspoon, Civ. App., 231 S.W. 837.

debt is only partially paid.⁷³ A third person who advances the money to take up and extend a vendor's lien note at most becomes subrogated to the vendor's lien,⁷⁴ and does not acquire any superior title to the land.⁷⁵

Purchaser of vendor's lien notes, where purchase and not extinguishment of the debt is intended, is not a volunteer and is entitled to be subrogated to the vendor's lien.⁷⁶

§ 43. Third Person Making Advancements for Necessaries, or to Discharge Encumbrance on Property of Person Incompetent to Contract

A person who advances the means to obtain necessities for an incompetent person may be entitled, by subrogation, to a charge against his estate, and a person who advances the means to discharge an encumbrance on the property of an incompetent may be subrogated to the protection of the encumbrance.

A person who advances the means to obtain necessities for one incompetent to contract, such as an infant,⁷⁷ married woman,⁷⁸ or insane person,⁷⁹ is entitled, by subrogation, to a charge against the estate, and one who furnishes money and service in good faith for one for whose support land is charged is entitled to be subrogated to the rights of the beneficiaries and has a lien on the land,⁸⁰ unless the contract for support is personal and limited as to

place.⁸¹ Where a third person, not being bound therefor, voluntarily advances the means of discharging an encumbrance, relying on a void security no right of subrogation exists,⁸² and where no encumbrance exists, a mortgagee under a mortgage executed by the guardian of an incompetent person cannot claim subrogation on the theory that his money was used to discharge encumbrances.⁸³ A bona fide purchaser from a grantee of an insane grantor will not be entitled to subrogation by reason of the fact that the consideration for the conveyance was used for the support and maintenance of the incompetent grantor.⁸⁴

Shipwrecked seamen. Under a statute requiring the United States to bear the cost of repatriating shipwrecked seamen, one who, on repudiation of this obligation, is compelled to discharge it, is subrogated to the rights of the seamen against the United States.⁸⁵

§ 44. Persons Owning Funds or Property Applied by Others to Debts or Encumbrances

One whose property is applied by others to the satisfaction of a debt or encumbrance is subrogated to the rights of the creditor or encumbrancer.

One whose property is applied by others to the satisfaction of a debt or encumbrance is subrogated to the rights of the creditor or encumbrancer;⁸⁶

⁷³ Tex.—Sullivan v. Doyle, 194 S. W. 136, 108 Tex. 368.

⁷⁴ Tex.—Morgan v. Darlington, Civ. App., 192 S.W.2d 327.

⁷⁵ Tex.—Morgan v. Darlington, supra.

⁷⁶ U.S.—Gross v. Tierney, C.C.A. W.Va., 55 F.2d 578.

Purchaser of interest coupon note

Where in addition to provision for payment of annual interest on vendor's lien note secured by deed of trust, there were ten interest coupon notes attached to principal note, purchaser of one of interest coupon notes from holder of principal note was subrogated to all rights, liens, and equities of holder of principal note, although lien transferred to him was made subordinate to superior lien retained by holder.—Hughes v. Stovall, Tex.Civ.App., 135 S.W.2d 603, error dismissed, judgment correct.

⁷⁷ Ky.—Corpus Juris quoted in Vance v. Atherton, 67 S.W.2d 968, 971, 252 Ky. 591.

60 C.J. p 821 note 54.

⁷⁸ Ky.—Corpus Juris quoted in Vance v. Atherton, supra.

N.J.—Asche v. Wakeley, 163 A. 278, 112 N.J.Eq. 60.

60 C.J. p 821 note 55.

⁷⁹ Ky.—Corpus Juris quoted in Vance v. Atherton, 67 S.W.2d 968, 971, 252 Ky. 591.

Mo.—McKay v. Snider, 190 S.W.2d 886, 354 Mo. 674.

60 C.J. p 821 note 56.

Amount applied on indebtedness

Lien vested in person lending money to insane person by equitable subrogation to lien securing prior valid indebtedness discharged by loan extended only to amount of loan applied on prior indebtedness.—Hays v. Spangenberg, Tex.Civ.App., 94 S.W.2d 899.

⁸⁰ Ind.—Federal Land Bank of Louisville v. Luckenbill, 13 N.E.2d 531, 213 Ind. 616.

Ky.—Corpus Juris quoted in Vance v. Atherton, 67 S.W.2d 968, 971, 252 Ky. 591.

S.D.—Application of Mach, 25 N.W.2d 881, 71 S.D. 460.

60 C.J. p 821 note 57.

Husband's right to subrogation

Where land of aged parents, one of whom was incompetent, was conveyed to their son in consideration of his supporting them for life, whether their daughter's husband was entitled to be subrogated to lien securing the son's agreement was immaterial in determining daughter's right to such subrogation.—Vance v. Atherton, 67 S.W.2d 968, 252 Ky. 591.

⁸¹ Ky.—Corpus Juris quoted in Vance v. Atherton, 67 S.W.2d 968, 971, 252 Ky. 591—Eastern State Hospital v. Goodman, 160 S.W. 171, 155 Ky. 628.

⁸² N.Y.—Corbin v. Dwyer, 63 N.Y. S. 822, 30 Misc. 488, modified on other grounds 68 N.Y.S. 1136, 57 App.Div. 630.

⁸³ Wash.—Curry v. Willson, 107 P. 367, 57 Wash. 509.

⁸⁴ U.S.—German Sav., etc., Soc. v. De Lashmuth, C.C.Or., 67 F. 399.

⁸⁵ U.S.—American Mail Line v. U. S., 59 F.Supp. 921, 105 Ct.Cl. 1.

⁸⁶ U.S.—Standard Oil Co. of Cal.

and subrogation may also be allowed where funds to which one is equitably entitled has been applied to the payment of debts of another, in which case the former is subrogated to the position of the latter.⁸⁷ The right to subrogation is particularly ap-

propriate where the circumstances under which the application is made results in unjust enrichment.⁸⁸ Accordingly, the beneficiary of an insurance policy may be subrogated to the rights of a person paid from its proceeds;⁸⁹ the beneficiaries of a trust,

V. U. S., C.C.A.Cal., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067—In re Franklin Saving & Loan Co., D.C.Tenn., 34 F. Supp. 585.

Ind.—*Corpus Juris* cited in *Wilson v. Todd*, 26 N.E.2d 1003, 1005, 217 Ind. 183, 129 A.L.R. 192.

Ky.—*Broadbuss v. Tevis*, 177 S.W.2d 901, 297 Ky. 168—*Chapman v. Blackburn*, 175 S.W.2d 26, 295 Ky. 606.

N.Y.—*Winthrop v. Hyman*, 7 N.Y.S. 2d 183, affirmed 20 N.Y.S.2d 1015, 259 App.Div. 877, reargument denied 21 N.Y.S.2d 395, 259 App.Div. 1001, affirmed *Winthrop v. Loewenthal*, 35 N.E.2d 893, 285 N.Y. 721.

Pa.—*Potoczny, to Use of City of Philadelphia v. Vallejo*, 85 A.2d 675, 170 Pa.Super. 377—In re *McGrath's Estate*, 46 A.2d 735, 159 Pa.Super. 78—*Auto Building & Loan Ass'n v. Hall*, 177 A. 581, 117 Pa.Super. 104.

60 C.J. p 821 note 62.

87. U.S.—*MacKinnon v. American Agar Co.*, C.C.A.Cal., 73 F.2d 835—*McNair v. Davis*, C.C.A.Fla., 68 F.2d 935, certiorari denied 54 S.Ct. 780, 292 U.S. 647, 78 L.Ed. 1497.

Ala.—*Bradley v. Bentley*, 163 So. 351, 231 Ala. 28.

Ind.—*Corpus Juris* cited in *Wilson v. Todd*, 26 N.E.2d 1003, 1005, 217 Ind. 183, 129 A.L.R. 192.

Ky.—*Broadbuss v. Tevis*, 177 S.W.2d 901, 297 Ky. 168—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1—*McCracken County v. Lakeview Country Club*, 70 S.W.2d 938, 254 Ky. 515.

Miss.—*Robert G. Bruce Co. v. Spears*, 187 So. 756, 187 Miss. 405.

Mo.—*Netherton v. Farmers' Exchange Bank of Gallatin*, 63 S.W. 2d 156, 228 Mo.App. 296.

Mont.—*State ex rel. Blenkner v. Stillwater County*, 66 P.2d 788, 104 Mont. 387.

N.Y.—In re *Interborough Parkway from Brooklyn Borough Line to Cypress Hills Street in Borough of Queens*, City of New York, 7 N.Y. S.2d 346, 255 App.Div. 211, reargument denied In re *Interborough Parkway Borough of Queens*, City of New York, 8 N.Y.S.2d 998, 255 App.Div. 974—*Winthrop v. Hyman*, 7 N.Y.S.2d 183, affirmed 20 N.Y.S. 2d 1015, 259 App.Div. 877, reargument denied 21 N.Y.S.2d 395, 259 App.Div. 1001, affirmed *Winthrop v. Loewenthal*, 35 N.E.2d 893, 285

N.Y. 721—*Application of Lafayette Nat. Bank of Brooklyn*, 4 N.Y.S.2d 356, 254 App.Div. 207—*Bonham v. Coe*, 292 N.Y.S. 423, 249 App.Div. 428, affirmed 12 N.E.2d 566, 276 N.Y. 540.

Okl.—*City of Barnsdall v. Barnsdall Nat. Bank of Barnsdall*, 23 P.2d 373, 164 Okl. 167.

Pa.—*Gladowski v. Felczak*, 31 A.2d 718, 346 Pa. 660, 151 A.L.R. 418.

R.I.—*Hogan v. Cooney*, 155 A. 240, 51 R.I. 395.

Tex.—*Kaminski v. Kaminczak*, Civ. App., 86 S.W.2d 883—*Pfeuffer v. Haas*, Civ.App., 55 S.W.2d 111, error dismissed.

Wis.—*Vogt v. Calvary Lutheran University Missionary Soc.*, 251 N.W. 239, 213 Wis. 380.

60 C.J. p 822 note 63.

Notice precluding right to object

Holder of vendor's lien notes executed by guardian, who received payments with knowledge of fact that wards' funds were illegally used, became party to fraud practiced on wards by guardian and could not object to wards' being given benefit of security.—*Kaminski v. Kaminczak*, Tex.Civ.App., 86 S.W.2d 883.

88. U.S.—*Standard Oil Co. of Cal. v. U. S.*, C.C.A.Cal., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067.

Ky.—*Broadbuss v. Tevis*, 177 S.W.2d 901, 297 Ky. 168—*Chapman v. Blackburn*, 175 S.W.2d 26, 295 Ky. 606.

Okl.—*City of Barnsdall v. Barnsdall Nat. Bank of Barnsdall*, 23 P.2d 373, 164 Okl. 167.

Pa.—*Gladowski v. Felczak*, 31 A.2d 718, 346 Pa. 660, 151 A.L.R. 418—*Potoczny, to Use of City of Philadelphia v. Vallejo*, 85 A.2d 675, 170 Pa.Super. 377—In re *McGrath's Estate*, 46 A.2d 735, 159 Pa.Super. 78.

89. U.S.—*Mutual Life Ins. Co. of New York v. Illinois Nat. Bank of Springfield*, Ill., D.C.Mich., 34 F. Supp. 206, affirmed, C.C.A., *Mackie v. Mackie*, 126 F.2d 469.

Surety

(1) Surety on insured's bonds, paid from proceeds of life policies naming surety as beneficiary, was subrogated to insurer's rights under trust deeds executed by insured as mortgagor.—*Russell v. Owen*, 165 S.E. 687, 203 N.C. 262.

(2) Subrogation of sureties generally see *infra* §§ 46-62.

Subrogation to rights of mortgagee

(1) Where mortgagee, having lien on insurance on debtor's life and also on realty, elected to take payment out of insurance money, administrator selling realty held proceeds subject to rights of insurance beneficiaries, under subrogation doctrine, to receive sum equal to amount of insurance money taken by mortgagee.—*Barbin v. Moore*, 159 A. 409, 85 N.H. 362, 83 A.L.R. 62.

(2) Where proceeds of fire insurance, taken out for the protection of a particular person, were used partially to satisfy a mortgage on the insured property, such person was entitled to be subrogated to mortgagee's rights to extent that funds were thus diverted.—*Taylor v. Smithtown Country, Outing & Beach Club, Inc.*, 27 N.Y.S.2d 624, 262 App. Div. 764, affirmed 50 N.E.2d 1008, 291 N.Y. 588.

Insurance policy used as collateral

(1) Whether the beneficiary of life insurance policies used as collateral will be subrogated to the rights of persons paid from their proceeds depends on the intention of insured.

U.S.—*Mutual Life Ins. Co. of New York v. Illinois Nat. Bank of Springfield*, Ill., D.C.Mich., 34 F. Supp. 206, affirmed, C.C.A., *Mackie v. Mackie*, 126 F.2d 469.

N.J.—*Fidelity Union Trust Co. v. Phillips*, 68 A.2d 574, 5 N.J.Super. 529, affirmed 71 A.2d 352, 4 N.J. 28.

N.Y.—In re *Cummings' Estate*, 105 N.Y.S.2d 104, 200 Misc. 467—In re *Scheer's Will*, 114 N.Y.S.2d 288.

Pa.—In re *Weissman's Estate*, 62 Pa. Dist. & Co. 73.

Va.—*Smith v. Coleman*, 35 S.E.2d 107, 184 Va. 259, 160 A.L.R. 1876.

(2) In proper cases the beneficiary has been held to be so entitled.

U.S.—*Mutual Life Ins. Co. of New York v. Illinois Nat. Bank of Springfield*, Ill., D.C.Mich., 34 F. Supp. 206, affirmed, C.C.A., *Mackie v. Mackie*, 126 F.2d 469.

N.Y.—In re *Stafford's Estate*, 101 N.Y.S.2d 904, 278 App.Div. 612—In re *Cummings' Estate*, 105 N.Y.S. 2d 104, 200 Misc. 467—In re *Jones' Estate*, 81 N.Y.S.2d 386—In re *Reinhold's Estate*, 68 N.Y.S.2d 347.

Pa.—In re *Schwartz's Estate*, Orph., 38 Del.Co. 315, 13 Monroe L.R. 76—In re *Price's Estate*, Orph., 98 Pittsb.Leg.J. 145.

the assets of which have been misappropriated to the benefit of another trust by one who is trustee for both, may be entitled to subrogation;⁹⁰ a purchaser of land subject to a lien whose funds the creditor misapplies by using them to cancel a lien on other property is entitled to be subrogated to the rights of the holder of the canceled lien;⁹¹ a person whose agent fraudulently uses his money to pay off a mortgage on property of another, is entitled to be subrogated to the rights of the original mortgagee;⁹² and where a public officer, in order to raise money to settle his accounts with the government, borrows money from another and contracts to assign his right against the depositary and give subrogation to such lender, the latter is entitled to subrogation.⁹³ So, also, one who lends money on a mortgage, which is invalid because of the mortgagor's lack of title may be entitled to subrogation where the mortgage money is applied for the benefit of the

property attempted to be mortgaged.⁹⁴

If claimant's funds are not shown to have been used in the payment of a debt or encumbrance there is no right of subrogation;⁹⁵ subrogation will not be permitted to work an injustice against innocent persons;⁹⁶ nor is an individual entitled to be subrogated to rights of the state in its sovereign capacity.⁹⁷ So also a purchaser of property which turns out to be subject to a prior lien is not entitled to be subrogated to a mortgage lien on other property purchased by the vendor which lien the vendor paid off with the money obtained from the purchaser,⁹⁸ and a purchaser of a worthless note whose money was used to pay off another note is not subrogated to collateral securing the note paid off;⁹⁹ and it has been held that if a guardian uses his ward's money to pay off a vendor's lien on his own land the ward is not subrogated to the vendor's

Va.—*Smith v. Coleman*, 35 S.E.2d 107, 184 Va. 259, 160 A.L.R. 1376. 60 C.J. p 821 note 62 [b].

(3) In other cases the beneficiary has been held not to be so entitled. Ky.—*Froman v. Froman's Ex'r*, 188 S.W.2d 361, 293 Ky. 1—*Berger v. Berger*, 94 S.W.2d 618, 264 Ky. 225. N.J.—*Fidelity Union Trust Co. v. Phillips*, 68 A.2d 574, 5 N.J.Super. 529, affirmed 71 A.2d 352, 4 N.J. 28. N.Y.—*In re Kelley's Estate*, 296 N.Y.S. 223, 251 App.Div. 847—*In re Scheer's Will*, 114 N.Y.S.2d 288. Pa.—*In re Weissman's Estate*, 62 Pa. Dist. & Co. 73.

90. Mass.—*Hill v. Wiley*, 3 N.E.2d 1015, 295 Mass. 396—*Newell v. Hadley*, 92 N.E. 507, 206 Mass. 335, 29 L.R.A., N.S., 908.

Absence of prejudice

In suit by trustee of first trust to be subrogated to beneficiaries of second trust against one who as trustee for both trusts had misappropriated assets of first trust to replace misappropriated assets of second trust, and against surety of trustee as to second trust, subrogation would result in no injury to beneficiaries of second trust and hence would not be denied, where probate court had settled accounts of such trust and beneficiaries took no appeal.—*Hill v. Wiley*, 3 N.E.2d 1015, 295 Mass. 396.

91. Ga.—*Cornelia Bank v. First Nat. Bank*, 154 S.E. 234, 170 Ga. 747. 60 C.J. p 822 note 64.

92. U.S.—*Cotton v. Dacey*, C.C.Kan., 61 F. 481.

93. Miss.—*Brookhaven Commercial*

Bank v. Hardy, 53 So. 395, 97 Miss. 755.

94. Pa.—*Gladowski v. Felczak*, 31 A.2d 718, 346 Pa. 660, 151 A.L.R. 418.

Subrogation of persons making improvements on land of another generally see *infra* § 45.

Money used for improvements and taxes

Where mortgagee lent money on real estate for purpose of discharging valid encumbrances and for placing valuable improvements on property, and fund was so used, but mortgagor's title failed, lender was entitled to subrogation to the rights of mortgagor in possession under occupying claimants statute, with respect to lasting and valuable improvements and taxes paid, to extent money lent had been spent on improvements and taxes.—*United Federal Savings & Loan Ass'n of Tulsa v. Johnson*, 73 P.2d 846, 181 Okl. 328.

Right dependent on lender's innocence

Where, at time of conveyance to grantee, property was encumbered by judgment lien and building was unfit for occupancy and grantee executed mortgage and used proceeds thereof to satisfy judgment lien and repair property, mortgagees' right to equitable lien after determination that grantee's title was defective was dependent on his innocence in making mortgage loan.—*Gladowski v. Felczak*, 31 A.2d 718, 346 Pa. 660, 151 A.L.R. 418.

95. S.D.—*Clinton Mining & Mineral Co. v. Trust Co. of North America*, 151 N.W. 998, 35 S.D. 253. 60 C.J. p 822 note 66.

Attorneys having no lien on funds used

Fact that proceeds received by compensation claimant were used by him to pay mortgage indebtedness of himself and wife on property owned by them jointly did not entitle attorneys who represented claimant in the proceedings to be subrogated to the mortgage by reason of fact that fund which they assisted in creating was used in paying the mortgage indebtedness, since attorneys had no lien on compensation received by claimant.—*Terry v. Claypool*, 65 N.E. 2d 889, 77 Ohio App. 87.

96. Ky.—*Title Ins. & Trust Co. v. McCracken County*, 92 S.W.2d 89, 263 Ky. 302.

Right of county as against corporate bondholders

County, treasurer of which converted county funds and remitted them to trustee to pay bonded indebtedness of private corporation, was not entitled to be subrogated to rights of innocent bondholders, and, hence, was not entitled to be subrogated to lien on mortgaged security, worth less than indebtedness to unpaid bondholders.—*Title Ins. & Trust Co. v. McCracken County*, *supra*.

97. Ill.—*Nelson v. John B. Colegrove & Co. State Bank*, 188 N.E. 461, 354 Ill. 408.

98. Ala.—*Shields v. Hightower*, 108 So. 525, 214 Ala. 608, 47 A.L.R. 506.

99. Mo.—*Ricketts v. Finkelston*, App., 211 S.W. 391. 60 C.J. p 822 note 68.

lien discharged.¹ Where the surety of a contractor was secured by an assignment of the money to become due under the contract and by a mortgage on the contractor's homestead, a partner of the contractor who garnished a sum due on the contract, sued for an accounting, and obtained judgment was not entitled to be subrogated to the mortgage security where, after the surety had been paid from the sum due on the contract, the balance left was insufficient to pay the partner's judgment.² Where partners agree that partnership assets shall be transferred to a bank to satisfy the debts of individual partners, general creditors of the partnership are not entitled to be subrogated to a partner's right to have partnership assets appropriated to partnership indebtedness.³ Where a payee, to whom a note has been intrusted for a special purpose by the makers, wrongfully alters the note and pledges it to secure a loan for his own purposes plaintiff, whose funds the payee takes without authority to repay the loan, will not be subrogated to the rights of the pledgee,⁴ nor will he be subrogated to the rights of a holder in due course against the maker, on the theory of an implied agreement by the payee that on use of the funds to pay his debt he should be subrogated to the rights of the holder in due course as against him.⁵

Contract as controlling right to subrogation. The terms of a contract under which the funds or property of one person are used to pay the debts of another will control the right to subrogation and the

extent thereof.⁶

§ 45. Persons Making Improvements on Land of Another

A person making improvements on the land of another under an honest belief that he is the owner may be subrogated to the extent of such improvements, particularly where the person making the improvements is not a mere stranger.

Where a person has materially improved land under the belief, honestly entertained with reasonable grounds, that he is the owner of the land, and the aid of a court of equity is sought by the true owner to enforce his title, it will be granted only on condition that such innocent person shall be compensated to the extent of the benefit which he has conferred on the owner; and this right may be enforced by subrogation.⁷ The same rule applies where a senior creditor enforces a lien or charge against the land.⁸ The rule particularly applies where the one making improvements on the land of another was not a mere stranger or intermeddler, but was under a duty to do so.⁹ A third person whose property has been used to make improvements on land at the request of the purchaser under an executory contract to purchase may forfeit any right to be subrogated to the rights of the purchaser by failing to tender payment of delinquent installments.¹⁰ Materialmen furnishing materials to a lessee are not entitled to exercise the lessee's privilege of paying rent due under a lease providing for forfeiture for nonpayment of rent.¹¹

B. SURETIES OR GUARANTORS

§ 46. In General

The doctrine of subrogation applies on behalf of a surety who has been compelled to pay the debt of his principal.

The doctrine of subrogation is universally applied on behalf of a surety who has been compelled

to pay the debt of his principal.¹² A surety is a special kind of secured creditor, since his claim against the principal is secured by his right of subrogation to the remedies of the creditor which he has been compelled to pay,¹³ and on insolvency of the principal he may retain for his protection, even

1. Ind.—French v. Sheplor, 43 Am. R. 67, 83 Ind. 266.

2. Kan.—Fidelity & Deposit Co. of Maryland v. Helwig, 213 P. 666, 113 Kan. 174.
60 C.J. p 823 note 70.

3. Ala.—Wade v. Brantley & Crawley Const. Co., 161 So. 101, 230 Ala. 345.

4. U.S.—Pensacola State Bank v. Thornberry, Ky., 226 F. 611, 141 C.C.A. 367.

5. U.S.—Pensacola State Bank v. Thornberry, supra.

6. U.S.—Hunter Mfg. & Commission Co. v. Mebane, C.C.A.S.C., 43 F.2d 539.
60 C.J. p 823 note 73.

7. Me.—Pratt v. Thornton, 28 Me. 355, 48 Am.D. 492.

8. Ind.—Troost v. Davis, 31 Ind. 34.
60 C.J. p 823 note 75.

9. Ky.—Talbot v. Lancaster, 9 S.W. 694, 10 Ky.L. 475.
60 C.J. p 823 note 76.

10. Wash.—Pioneer Sand & Gravel

Co. v. Hedlund, 34 P.2d 878, 178 Wash. 273.

11. Ky.—Mayfield Planing Mills v. Jackson Purchase Stock Yards Co., 58 S.W.2d 617, 248 Ky. 449.

12. Iowa.—Randell v. Fellers, 252 N.W. 787, 218 Iowa 1005.
W.Va.—Fredeking v. Read, 169 S.E. 387, 113 W.Va. 722.

13. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

as against a bona fide purchaser, any assets in his hands belonging to the principal.¹⁴ With respect to the right to subrogation, a surety who binds himself to make good for the failure of his principal faithfully to perform his duty does not contract to make him perform it, nor can it be said that such surety is a participant in the wrongdoing of his principal because he knew of the illegality.¹⁵

The law of the state in which contracts were made and other papers relating to a loan and guaranty were executed governs in determining the guarantor's right of subrogation, rather than the law of the state in which some of the notes given for the loan were made payable.¹⁶

§ 47. Subrogation to Rights of Creditor

a. In general

14. N.Y.—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.
15. Utah.—Beaver County v. Home Indem. Co., 52 P.2d 435, 88 Utah 1.
16. U.S.—Reconstruction Finance Corp. v. Maryland Cas. Co., D.C. Md., 23 F.Supp. 1008.
17. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Johnson v. Mercer, C.C.A. Tex., 128 F.2d 357—In re National Motorship Corp., C.C.A.N.Y., 96 F.2d 88, certiorari denied Home Indemnity Co. v. National Motorship Corp., 59 S.Ct. 68, 305 U.S. 610, 83 L.Ed. 388—Pinckney v. Wylie, C.C. A.Tex., 86 F.2d 541—Hartford Accident & Indemnity Co. v. Coggin, C.C.A.N.C., 78 F.2d 471, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—Coahoma County, Miss., v. Mississippi Fire Ins. Co., C.C.A.Miss., 68 F.2d 489—Alexander v. Young, C.C.A.Kan., 65 F.2d 752—Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 63 F.2d 833—American Surety Co. of New York v. Lewis State Bank, C.C.A. Fla., 58 F.2d 559—In re Cummins Const. Corp., D.C.Md., 81 F.Supp. 193—Reconstruction Finance Corp. v. Maryland Cas. Co., D.C.Md., 23 F.Supp. 1008—*Corpus Juris* cited in U. S., for Use and Benefit of Johnson, v. Morley Const. Co., D.C. N.Y., 17 F.Supp. 378, 387, modified on other grounds U. S. ex rel. Johnson v. Morley Const. Co., 98 F.2d

- 781, certiorari denied Maryland Casualty Co. v. U. S., for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421—In re Clear Lake Beach Co., D.C.Cal., 12 F.Supp. 250—T. H. Mastin & Co. v. Pickering Lumber Co., D.C.Cal., 2 F.Supp. 605.
- Ala.—Watkins v. Maryland Cas. Co., 33 So.2d 346, 250 Ala. 84—Dirago v. Taylor, 150 So. 150, 227 Ala. 271—U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.
- Ark.—Johnston v. Missouri Pac. R. Co., 160 S.W.2d 39, 203 Ark. 1036.
- Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145—Painter v. Berglund, 87 P.2d 360, 31 Cal.App.2d 63—San Diego County v. Croghan, 38 P.2d 474, 2 Cal.App.2d 494—Holmes v. Hughes, 14 P.2d 149, 125 Cal.App. 290.
- Colo.—Cobbey v. Peterson, 3 P.2d 298, 89 Colo. 350.
- Del.—Hardcastle v. Commercial Bank of Delaware, 1 W.W.Harr. 374—Leiter v. Carpenter, 22 A.2d 393, 26 Del.Ch. 85.
- Fla.—Standard Acc. Ins. Co. v. Bear, 184 So. 97, 134 Fla. 523, 127 A. L.R. 1.
- Ga.—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 71 Ga.App. 112.
- Ill.—People ex rel. Nelson v. Chicago Lawn State Bank, 28 N.E.2d 294, 306 Ill.App. 107.
- Ind.—Fidelity & Deposit Co. of Maryland v. Sluss, 15 N.E.2d 372, 214 Ind. 258, 117 A.L.R. 575.
- Iowa.—Ohio Cas. Ins. Co. v. Galvin, 269 N.W. 254, 222 Iowa 670, 108 A. L.R. 1036—*Corpus Juris* cited in American Surety Co. of New York v. State Trust & Savings Bank of

- Mt. Pleasant, 254 N.W. 338, 340, 218 Iowa 1.
- Ky.—National Sur. Corp. v. First Nat. Bank, 128 S.W.2d 766, 278 Ky. 273—Davis v. Kinnard, 112 S.W.2d 412, 271 Ky. 428.
- Minn.—National Surety Co. v. Webster Lumber Co., 244 N.W. 290, 187 Minn. 50.
- Md.—Blair v. Baker, 76 A.2d 129.
- Miss.—New Amsterdam Cas. Co. v. Wood, 57 So.2d 141, 213 Miss. 499—U. S. Fidelity & Guaranty Co. v. State, for Use of Merchants Bank & Trust Co., 188 So. 911, 186 Miss. 1.
- Mo.—In re Phillips' Estate, 211 S.W. 2d 728, 357 Mo. 947—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.
- Mont.—U. S. Building & Loan Ass'n v. Burns, 4 P.2d 703, 90 Mont. 402.
- Neb.—*Corpus Juris* cited in Burks v. Packer, 9 N.W.2d 471, 474, 143 Neb. 373—Larson v. Burnann, 252 N.W. 614, 126 Neb. 85.
- N.J.—Bluestone Building & Loan Ass'n of West New York v. Glasser, 176 A. 314, 117 N.J.Eq. 392—Guise v. John C. Guise, Inc., 163 A. 121, 112 N.J.Eq. 11.
- N.Y.—Van Schaick v. Rex Novelty Works, 273 N.Y.S. 4, 241 App.Div. 480, affirmed 195 N.E. 145, 266 N.Y. 441, reargument denied 195 N.E. 186, 266 N.Y. 530—Foreman v. Louis Jacques Const. Co., 257 N.Y. S. 45, 235 App.Div. 494, modified on other grounds 185 N.E. 690, 261 N.Y. 429—In re McClancy's Estate, 45 N.Y.S.2d 917, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760—National Sur. Co. v. Trilby Realty Corp., 293 N.Y.S. 219, 249

- b. Compensated or hired sureties
c. Time of accrual

a. In General

A surety or guarantor, by payment of the debt of his principal at a time when he is obliged to make payment, acquires an immediate right to be subrogated, to the extent necessary to obtain reimbursement or contribution, to all rights, remedies, and securities which were available to the creditor to obtain payment from the person or property of any person who, as to the surety, is primarily liable for the debt.

A surety, by payment of the debt of his principal at a time when he is obliged to make payment, acquires an immediate right to be subrogated, to the extent necessary to obtain reimbursement or contribution, to all rights, remedies, and securities which were available to the creditor to obtain payment from the person or property of any person who, as to the surety is primarily liable for the debt,¹⁷ or of a

cosurety who is bound to contribute.¹⁸ The rule is confirmed by statute in a number of states¹⁹ and is usually applied without apparent regard to the question of whether the person seeking subrogation is technically a guarantor or a surety,²⁰ although a statute providing for subrogation of sureties seems

App.Div. 566—*In re Harris' Estate*, 293 N.Y.S. 250, 161 Misc. 793.

Ohio.—*Maryland Cas. Co. v. Gough*, 65 N.E.2d 858, 146 Ohio St. 305.

Okl.—*Standard Accident Ins. Co. v. U. S. Cas. Co.*, 188 P.2d 204, 199 Okl. 530.

Or.—*Walsh v. Young*, 180 P.2d 535, 181 Or. 185.

Pa.—*Plummer v. Wilson*, 185 A. 311, 322 Pa. 118—*Bryn Mawr Trust Co. v. Cole*, 159 A. 445, 306 Pa. 274—*Lit Bros., to Use of Kaplan, v. Goodman*, 18 A.2d 519, 144 Pa. Super. 43—*Himes v. Keller*, 3 Watts & S. 401—*Grant v. Grant*, Com.Pl., 20 Erie Co. 244.

Tenn.—*Fitts v. Terminal Warehousing Corp.*, 93 S.W.2d 1265, 170 Tenn. 198.

Tex.—*Fenner v. American Sur. Co. of New York*, Civ.App., 156 S.W.2d 279, error refused—*Corpus Juris cited in Fidelity & Deposit Co. of Maryland v. Farmers & Merchants Nat. Bank of Nocona*, Civ.App., 121 S.W.2d 503, 506, error dismissed—*City Nat. Bank of Houston v. Moody*, Civ.App., 115 S.W.2d 745, error dismissed—*American Surety Co. of New York v. M-B Ice Cream Co.*, Civ.App., 38 S.W.2d 118, affirmed, Com.App., 65 S.W.2d 287.

Utah.—*Great Am. Indem. Co. v. Berryessa*, 248 P.2d 367.

Va.—*Dickenson v. Charles*, 4 S.E.2d 351, 173 Va. 393—*Jones v. U. S. Fidelity & Guaranty Co.*, 182 S.E. 560, 165 Va. 349.

W.Va.—*Central Trust Co. v. Bank of Mullens*, 150 S.E. 221, 107 W.Va. 679.

Wis.—*In re Bratt*, 43 N.W.2d 817, 257 Wis. 447—*Winter v. Trepte*, 290 N.W. 599, 234 Wis. 193—*Murphy v. National Paving Co.*, 281 N.W. 705, 229 Wis. 100.
60 C.J. p 740 note 6, p 714 note 94.

Recourse of:

Creditor to indemnity or security of surety see *Principal and Surety* §§ 282-284.

Surety to indemnity and rights given to cosurety see *Principal and Surety* §§ 348-350.

Rights of sureties:

Generally see *Principal and Surety* §§ 286-342.

To:

Require that creditor first exhaust security given by principal see *Principal and Surety* § 288.

Surrender of securities held by creditor see *Principal and Surety* § 292.

Held not surety entitled to subrogation

Ill.—*Nelson v. John B. Colegrove & Co. State Bank*, 268 Ill.App. 56, affirmed 188 N.E. 461, 354 Ill. 408.

Assertion by surety

Claim of surety on depository bond of bank in which trustee deposited funds of bankrupt estate to be subrogated to rights of trustee against bank must be asserted by surety and not by trustee.—*Shertzer v. Williams*, 168 So. 573, 232 Ala. 558.

Cosureties

Where cosureties paid judgment and took assignment thereof and subsequently principal received bequest of money insufficient to pay entire judgment, such cosureties were each entitled to recover half of such amount.—*Hunt v. Starks*, 75 S.W.2d 787, 256 Ky. 120.

Surety for insolvent debtor

(1) A subrogated surety to the extent of the amount of his payment should be clothed with all of the creditor's rights and remedies as they stood at the time of the debtor's insolvency.—*American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem*, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

(2) Since a creditor may file for amount of his entire claim against insolvent as it stood at inception of receivership, insolvent's surety who has paid claim in whole or in part and who is, therefore, subrogated to creditor's right to dividends from principal's insolvent estate is likewise entitled to such dividends, calculated, not on basis of what surety paid, but on amount of original claim, creditor in such case claiming and proving as trustee pro tanto for surety.—*Commonwealth ex rel. Schnader v. National Sur. Co.*, 37 A.2d 753, 349 Pa. 599.

Stipulation held not to prejudice right

A surety's right to subrogation to creditor's rights is not prejudiced by stipulation between creditor and principal that perishable property shall be sold and proceeds placed in trust to await decision in a suit to be brought against surety, where, after its commencement, the trustee is made a party and trust fund is subject to court's order.—*Omaha Grain Exch. v. National Surety Co.*, 174 N.W. 426, 103 Neb. 820.

Against principals participating in fraud

Cal.—*Painter v. Berglund*, 87 P.2d 360, 31 Cal.App.2d 63.

18. Mont.—*Sun River Stock & Land Co. v. Montana Trust & Savings Bank*, 262 P. 1039, 81 Mont. 222.
N.Y.—*Niagara County Nat. Bank & Trust Co. v. La Port*, 253 N.Y.S. 433, 233 App.Div. 501—*Cuyler v. Ensworth*, 5 Paige 32.

Pa.—*Commonwealth ex rel. Schnader v. National Surety Co.*, 37 A.2d 753, 349 Pa. 599.

Tex.—*Patterson v. Fuller*, Civ.App., 110 S.W.2d 1230, error dismissed.
60 C.J. p 741 note 7.

Subrogation against cosurety limited to amount he is bound to contribute see *infra* § 52.

19. U.S.—*Street v. Pacific Indemnity Co.*, C.C.A.Cal., 79 F.2d 68, certiorari denied 55 S.Ct. 595, 297 U.S. 718, 80 L.Ed. 1003.

Ala.—*Reese v. Mackentepe*, 140 So. 550, 224 Ala. 372.
60 C.J. p 740 note 5.

Statutes declaratory of common law

Ala.—*Bradley v. Bentley*, 163 So. 351, 231 Ala. 28.

Cal.—*Johnson v. Mortgage Guarantee Co.*, 4 P.2d 208, 117 Cal.App. 416.
60 C.J. p 740 note 5 [a].

Term "surety" within statute means one who has been forced to pay a debt, which was primary obligation of another, and which other should have paid in exoneration of former.—*Bradley v. Bentley*, 163 So. 351, 231 Ala. 28.

20. U.S.—*U. S. v. Lewin*, D.C.Cal., 29 F.Supp. 512—*Whitcher v. Welch*, D.C.Mass., 22 F.Supp. 763.

Del.—*Leiter v. Carpenter*, 22 A.2d 393, 26 Del.Ch. 85.

Mont.—*Sun River Stock & Land Co. v. Montana Trust & Savings Bank*, 262 P. 1039, 81 Mont. 222.

Okl.—*Janeway v. Security Bank & Trust Co. of Ponca City*, 58 P.2d 892, 177 Okl. 342.
60 C.J. p 742 note 8.

On payment of the debt by the guarantor:

(1) He is subrogated to the rights of the creditor whom he pays.
U.S.—*Allen v. See*, C.A.Colo., 196 F. 2d 608.

Wis.—*Winter v. Trepte*, 290 N.W. 599, 234 Wis. 193.
60 C.J. p 742 note 8.

(2) He is entitled in equity to subrogation to all securities held by the creditor.

to have been considered as excluding subrogation of guarantors.²¹ The general rule applies in favor of a surety who is wife of the principal as well as to any other surety.²²

b. Compensated or Hired Sureties

Paid or compensated sureties are entitled to the benefits of the doctrine of subrogation to the same extent as occasional and gratuitous sureties, although the fact that the surety has been paid for assuming the risk may be considered in balancing the equities.

Paid or compensated sureties, engaged in suretyship as a business enterprise, are entitled to the benefits of the doctrine of subrogation to the same extent as occasional and gratuitous sureties;²³ but the fact that the surety has been paid for assuming the risk may be considered in balancing the equities,²⁴ and seems to have been a material underlying factor which has caused some courts to refuse subrogation where the rights of innocent third per-

sons are likely to suffer if subrogation is granted,²⁵ as where liability exists by virtue of a harsh common-law rule, and its application is sought by a surety who has been paid to protect against such a loss.²⁶

c. Time of Accrual

For the purpose of determining the right to which the surety can be subrogated, his right is not regarded as accruing until the time of payment, but, for the purpose of determining the superiority of his rights over those of the principal or creditor and those claiming under them, the surety's equity is regarded as relating back to, or having its inception at, the time when the contract of suretyship is entered into.

As discussed *infra* § 48 a (1), a surety must generally have paid the debt before he can proceed to enforce a right of subrogation, and apparently for the purpose of determining the rights to which the surety can be subrogated his right is not regarded as accruing until the time of payment;²⁷ but, at

U.S.—*Allen v. See*, C.A.Colo., 196 F.2d 608—*Scott v. Norton Hardware Co.*, C.C.A.Va., 54 F.2d 1047—*American Water Works, etc., Co. v. Home Water Co.*, C.C.Ark., 115 F.171, appeal dismissed *American Water Works, etc., Co. v. City of Little Rock*, 24 S.Ct. 855, 194 U.S. 639, 48 L.Ed. 1162.

Cal.—*Winklemen v. Sides*, 88 P.2d 147, 31 Cal.App.2d 387.

Wash.—*Blewett v. Bash*, 61 P. 770, 22 Wash. 536.

(3) He may enforce any remedy which creditor has against the principal debtor.

Cal.—*Ingalls v. Bell*, 110 P.2d 1068, 43 Cal.App.2d 356.

Del.—*Letter v. Carpenter*, 22 A.2d 393, 26 Del.Ch. 85.

N.Y.—*Union Trust Co. of Rochester v. Willsea*, 9 N.E.2d 820, 275 N.Y. 164, 112 A.L.R. 1175.

Guaranty of mortgage

(1) Mortgage guarantor was a surety, entitled to assert right of subrogation in condemnation award for advancement of interest paid to mortgagee.—*In re City of New York Rapid Transit Route 109, Section 3*, 278 N.Y.S. 280, 244 App.Div. 102.

(2) Where mortgage guaranty company had made payments to certificate holders under its guaranty, and also paid expense of foreclosure, while record owner of consolidated bond and mortgage sued for partial foreclosure, and wholly owned subsidiary of mortgage company purchased property at foreclosure sale, subsidiary became subrogated to rights of mortgage company, even if mortgage company was trustee of mortgage for benefit of certificate

holders, and fact that payments by company had not been made until after title was taken did not preclude subrogation of subsidiary where payments were made as part of plan to acquire property.—*Prudential Ins. Co. of America v. Liberdar Holding Corp.*, C.C.A.N.Y., 85 F.2d 504.

Guarantor of corporate stock dividends

Guarantor by paying dividends on corporate preferred stock in accordance with guaranty and taking assignments of the payee stockholders' rights to dividends thereafter declared for the period covered by such payment became subrogated to the rights of the preferred stockholders, and payment by corporation of a lesser amount for release of guarantor's contingent claim for reimbursement constituted a distribution to guarantor in nature of a dividend, even though there was no formal declaration of dividend.—*Mid-West Rubber Reclaiming Co. v. C. I. R.*, C.C.A.7, 131 F.2d 157.

21. Ga.—*Electric City Brick Co. v. Hagler*, 149 S.E. 126, 163 Ga. 836. 60 C.J. p 742 note 9.

22. Mass.—*Ricker v. Ricker*, 143 N.E. 539, 248 Mass. 549. 60 C.J. p 742 note 10.

23. U.S.—*Martin v. Federal Surety Co.*, C.C.A.Minn., 58 F.2d 79—*Federal Deposit Ins. Corporation v. American Surety Co. of New York*, D.C.Ky., 39 F.Supp. 551.

Ark.—*Arkansas Power & Light Co. v. Fidelity & Cas. Co. of New York*, 121 S.W.2d 890, 197 Ark. 187.

Fla.—*Standard Acc. Ins. Co. v. Bear*, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.

Iowa.—*Corpus Juris cited in American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant*, 254 N.W. 338, 341, 218 Iowa 1.

Ky.—*National Surety Corporation v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273.

Or.—*In re Liquidation of Bank of Woodburn*, 42 P.2d 740, 149 Or. 649. 60 C.J. p 742 note 11.

24. Ky.—*National Sur. Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273.

25. U.S.—*Federal Deposit Ins. Corporation v. American Surety Co. of New York*, D.C.Ky., 39 F.Supp. 551.

60 C.J. p 742 note 12.

26. U.S.—*Federal Deposit Ins. Corporation v. American Surety Co. of New York*, *supra*.

27. Ala.—*Corpus Juris cited in Crews v. U. S. Fidelity & Guaranty Co.*, 185 So. 370, 371, 237 Ala. 14.

N.Y.—*U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority*, 74 N.E.2d 226, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694—*Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 190 N.E. 330, 264 N.Y. 159—*Corpus Juris cited in In re McClancy's Estate*, 45 N.Y.S.2d 917, 923, 182 Misc. 866, affirmed 51 N.Y.S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760. 60 C.J. p 743 note 14.

Surety as creditor of principal from date of payment or from date of

least, for the purpose of determining the superiority of the surety's rights over those of the principal, or creditor, and those claiming under them, a surety's equity, or potential right to subrogation, is generally regarded, either as relating back to, or having its inception at, the time when the contract of suretyship is entered into.²⁸ The purpose of this doctrine of relation back is simply to do justice to the surety, and it will not be applied to give the surety rights the creditor never possessed,²⁹ or so as to result in injustice to third persons.³⁰

§ 48. — Matters Essential to Creation or Existence of Right

- a. Payment
- b. Specific agreement for, or acceptance of, rights
- c. Contract with, or request from, principal
- d. Other matters

contract of suretyship see Principal and Surety § 301.
Surety's interest in preservation and collection of collateral see Principal and Surety § 289.

28. U.S.—U. S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F. Supp. 375.

Fla.—Standard Accident Ins. Co. v. Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.

N.Y.—*Corpus Juris* cited in *In re McClancy's Estate*, 45 N.Y.S.2d 917, 922, 182 Misc. 866, affirmed 51 N.Y. S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760.
Or.—Schiska v. Schramm, 51 P.2d 668, 151 Or. 647.
60 C.J. p 743 note 15.

Right of surety on supersedes bond
Ky.—Barker v. Illinois Surety Co., 184 S.W. 377, 169 Ky. 441.

Rights of sureties on construction contractors' bonds

U.S.—Standard Acc. Ins. Co. of Detroit, Mich., v. Federal Nat. Bank of Shawnee, C.C.A.Okl., 112 F.2d 692, opinion adhered to 115 F.2d 34—Street v. Pacific Indemnity Co., C.C.A.Cal., 79 F.2d 68, certiorari denied 55 S.Ct. 595, 297 U.S. 718, 80 L.Ed. 1003—New York Cas. Co. v. Zwerner, D.C.Ill., 58 F.Supp. 473—Maryland Cas. Co. v. City of Pittsburgh, D.C.Pa., 51 F.Supp. 459—U. S. Fidelity & Guaranty Co. v. Bank of Brewton, D.C.Ala., 4 F. Supp. 272—U. S. Fidelity & Guaranty Co. v. U. S., 92 Ct.Cl. 144.

Ala.—Maryland Casualty Co. v. Dupree, 136 So. 811, 223 Ala. 420.

N.Y.—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 190 N.E. 330, 264 N.Y. 159—Hedley v. New Amsterdam Cas. Co. of New York, 46 N.Y.S.2d 388, 267 App.Div. 800, affirmed 60 N.E.2d 130, 293 N.Y. 921—Century Cement Mfg. Co. v. Fiore, 36 N.Y.S.2d 332, 264 App.Div. 475—Municipal Housing Authority of City of Utica v. H. G. Hatfield Elec. Corp., 34 N.Y. S.2d 995, 264 App.Div. 99—U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 48 N.Y.S. 2d 16, affirmed 59 N.Y.S.2d 291, 269 App.Div. 978, motion denied 73 N.E.2d 577, 296 N.Y. 1002, affirmed 74 N.E.2d 226, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694.

R.I.—U. S. Fidelity & Guaranty Co. v. Rhode Island Covering Co., 167 A. 143, 53 R.I. 397.

S.C.—Brown Const. Co. v. Massachusetts Bonding & Insurance Co., 179 S.E. 697, 176 S.C. 76, followed in 181 S.E. 5, 177 S.C. 306.
60 C.J. p 743 note 15.

29. N.D.—Gilbertson v. Northern Trust Co., 207 N.W. 42, 53 N.D. 502, 42 A.L.R. 1353.

60 C.J. p 743 note 16.
Surety as acquiring, by way of subrogation, no greater rights than were possessed by creditor see *infra* § 52.

30. N.D.—Gilbertson v. Northern Trust Co., *supra*.

31. Ky.—Cornett's Ex'r v. Rice, 187

a. Payment

- (1) In general
- (2) Necessity that payment be under compulsion
- (3) Part payment

(1) In General

Generally a surety or guarantor is not entitled to be subrogated to the securities and rights of the creditor until he has paid, or at least secured the payment of, the debt for which he is surety.

While equity, to avoid circuity of action and a multiplicity of suits, will often render a decree to protect the surety's right of subrogation, even before he has paid the debt,³¹ the rule, as generally stated, is that a surety or guarantor is not entitled to be subrogated to the securities and rights of the creditor until he has paid the debt for which he is surety,³² or, at least, it has been held, until

S.W.2d 454, 299 Ky. 256, 160 A.L.R. 413.

60 C.J. p 743 note 19.

Right to have securities and other property of principal first applied see Principal and Surety § 288 b.

Acquiescence of creditors

Bank, sued as party to principal's misappropriation, may not complain that surety, suing on theory of subrogation to rights of creditors, has not paid the creditors, where the latter are in court acquiescing, and all parties are protected by decree.—American Surety Co. v. Grace, 271 S.W. 739, 151 Tenn. 575.

All parties before court

Guardian's surety was entitled to decree subrogating him to rights of ward against bank which knowingly misapplied proceeds of ward's estate, on surety's payment to ward of amount misapplied although surety had not yet paid such amount, where all parties were before court and liability to ward of both surety and bank had been established.—Goodwin v. American Sur. Co. of New York, 68 P.2d 619, 190 Wash. 457.

32. U.S.—Town of Hamden v. American Sur. Co., C.C.A.Conn., 93 F.2d 432—Martin v. National Sur. Co., C.C.A.Mo., 85 F.2d 135, affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822—U. S. Fidelity & Guaranty Co. v. Baronovich, C.C.A.Alaska, 82 F. 2d 728—Federal Deposit Ins. Corp. v. American Sur. Co. of New York, D.C.Ky., 39 F.Supp. 551—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375, re-

he has secured the payment of the debt.³³ Payment must be of the particular debt in connection with which the right to which subrogation is claimed exists,³⁴ and must be made on the debt of the principal for which the surety was bound, and not in discharge of some debt which is primarily the surety's own.³⁵

Manner and medium of payment. It is immaterial in what way a surety satisfied the debt provided he was discharged from liability to his creditor,³⁶ and it is not necessary that the surety must sustain some personal loss.³⁷ It is not essential that payment be in money; whatever the creditor accepts in satisfaction will operate as payment.³⁸ Where a surety furnished money to his principal, to be applied on the debt of the principal, and the money was thus applied by the principal, the surety is as fully entitled to be subrogated to any securities held by the creditor as if he had paid the debt in person;³⁹ and, where the principal paid the debt by the proceeds of a crop in which the surety had a part interest,

the surety must be regarded as having paid the debt to the extent that his part of the proceeds were used in the extinguishment of the debt.⁴⁰

(2) Necessity That Payment Be under Compulsion

A surety who voluntarily pays a debt for which he is not legally liable is not entitled to subrogation, but it is not essential that the surety wait until after the suit and judgment.

Although one who pays a debt under the mistaken belief that he is bound as surety will be entitled to subrogation,⁴¹ a surety who voluntarily pays a debt for which he is not legally liable is not entitled to subrogation, since he occupies no better position than a stranger or volunteer.⁴² Payment is, of course, involuntary and entitles the surety to subrogation where it comes as the result of legal proceedings against him;⁴³ but it is not essential that the surety wait until after the suit and judgment,⁴⁴ since, as soon as he becomes chargeable for performance by the principal, he may immediately discharge

versed on other grounds, C.C.A., 103 F.2d 1016.

Ark.—Haley v. Brewer, 249 S.W.2d 128—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

Ala.—Pickens County v. Johnson, 149 So. 252, 227 Ala. 190, followed in Montgomery v. Johnson, 149 So. 257, 227 Ala. 196.

Colo.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254, 96 Colo. 127.

Fla.—Ferguson v. Brogan, 149 So. 772, 111 Fla. 224.

Ind.—Southern Surety Co. v. Merchants' & Farmers' Bank of Avilla, 176 N.E. 846, 203 Ind. 173, rehearing denied 179 N.E. 327, 203 Ind. 173.

Ky.—Cornett's Ex'r v. Rice, 187 S.W. 2d 454, 299 Ky. 256, 160 A.L.R. 413.

Minn.—Bennett v. Bennett, 42 N.W. 2d 39, 230 Minn. 415—Anderson v. Peterson State Bank, 254 N.W. 459, 191 Minn. 404.

N.J.—Stulz-Sickles Co. v. Fredburn Const. Corporation, 169 A. 27, 114 N.J.Eq. 475.

N.Y.—Corpus Juris cited in In re McClancy's Estate, 45 N.Y.S.2d 917, 922, 182 Misc. 866, affirmed 51 N.Y. S.2d 90, 268 App.Div. 876, and affirmed 61 N.E.2d 752, 294 N.Y. 760—New Jersey Equities Co. v. Mandel, 36 N.Y.S.2d 601, 178 Misc. 783—People, by Van Schaick, v. Lawyers' Title & Guaranty Co., 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in re People, by Van Schaick, 271 N.Y.S. 950, 241 App. Div. 808, affirmed People, by Van

Schaick v. Lawyers' Title & Guaranty Co., 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in re Lawyers' Title & Guaranty Co., 192 N.E. 414, 265 N.Y. 287, motion granted in re People, by Van Schaick, 195 N.E. 126, 266 N.Y. 402.

Okl.—Berger v. City of Vinita, 40 P.2d 1, 170 Okl. 214.

Or.—Schiska v. Schramm, 51 P.2d 668, 151 Or. 647.

Tex.—New York Cas. Co. v. State, Civ.App., 161 S.W.2d 150, affirmed 169 S.W.2d 158, 140 Tex. 549.

Wis.—Luce v. Fidelity & Cas. Co. of New York, 268 N.W. 131, 222 Wis. 50.

60 C.J. p 743 note 20.

Necessity for, and sufficiency of, payment generally see supra § 10.

33. Miss.—Lee v. Griffin, 31 Miss. 632.

34. Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.

60 C.J. p 744 note 22.

Subrogation to securities for other debts see infra § 52.

35. Ala.—Turner v. Teague, 73 Ala. 554.

60 C.J. p 744 note 23.

Payment to protect self as surety

Where it did not appear that payment of part of debtors' debt by plaintiff was made to protect himself as surety or that debtors were financially irresponsible, plaintiff was not entitled to be legally subrogated to lien securing debt.—Ramey v. Cage, Tex.Civ.App., 90 S.W.2d 626.

36. Ill.—State Bank & Trust Co. v. Commercial Trust & Savings Bank, 21 N.E.2d 157, 300 Ill.App. 435.

37. Ill.—State Bank & Trust Co. v. Commercial Trust & Savings Bank, supra.

38. Ala.—Knighton v. Curry, 62 Ala. 404.

60 C.J. p 744 note 24.

39. Ohio.—Zuellig v. Hemerle, 53 N.E. 447, 60 Ohio St. 27, 71 Am.S.R. 707.

Va.—Hatcher v. Hatcher, 1 Rand. 53, 22 Va. 53.

40. Ala.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

41. U.S.—U. S. Fidelity & Guaranty Co. v. McClintock, D.C.Wyo., 26 F. 2d 944, modified on other grounds, C.C.A., 28 F.2d 1015.

60 C.J. p 744 note 26.

Effect of payment under a mistake as to legal obligation generally see supra § 9.

42. Ark.—American Bank & Trust Co. v. Langston, 22 S.W.2d 381, 180 Ark. 643.

60 C.J. p 744 note 27.

Voluntary payment as not entitling the payer to subrogation see supra § 9.

43. Ala.—Corpus Juris cited in Crews v. U. S. Fidelity & Guaranty Co., 185 So. 370, 371, 237 Ala. 14.

60 C.J. p 745 note 28.

44. Ala.—Singleton v. U. S. Fidelity & Guaranty Co., 70 So. 169, 195 Ala. 506.

the obligation and become by subrogation entitled to all the remedies possessed by the creditor,⁴⁵ and the surety may even be entitled to subrogation, by reason of payment made before maturity,⁴⁶ but in such case his right thereto is not enforceable until the debt has matured.⁴⁷

While one who has made payment officiously is not entitled to subrogation,⁴⁸ a surety is not officious where he was under duty to make the payment.⁴⁹

Payment after levy on sufficient of principal's property. The levy of execution on sufficient property of the principal to pay the judgment does not divest a surety of the judgment debtor of all interest in the judgment, so as to render his subsequent payment of the judgment a voluntary payment, and to deprive him of all recourse against the sheriff for the latter's wrongful release of the levy.⁵⁰

Payment after running of limitations in favor of surety. If the surety pays the debt after it is barred as to him by the statute of limitations, he is a volunteer, and not entitled to subrogation.⁵¹

(3) Part Payment

In order that the surety may have subrogation, the debt must be fully paid, and, although the surety has paid the entire amount for which he is liable, he is not entitled to be subrogated to securities or rights which are held to enforce payment of other sums which remain unpaid; but this does not mean that the surety must pay the whole debt for which he became surety, it being sufficient if the surety has paid part and the balance has been otherwise satisfied.

To prevent impairment of the creditor's superior right to the possession and benefit of all securities and rights attaching to the debt until it is paid in full, it is generally held that, in order that the surety may have subrogation, the debt must be fully paid;⁵² and, although the surety has paid the entire

45. La.—Barnes v. Crandell, 11 La. Ann. 119.
60 C.J. p 745 note 30.

Surety held not mere volunteer

(1) Surety who, by agreement with contractor on government job, advanced money by means of a joint bank account to pay bills for labor and materials which contractor was unable to pay was not a mere volunteer, although surety also advanced money to the same contractor through the bank account for another government contract, and took mortgage and indemnity agreement as additional security for the advances.—Massachusetts Bonding & Ins. Co. v. Fago Const. Corp., D.C.Md., 82 F. Supp. 619.

(2) Wife who signed note as surety for husband and hence was not bound thereon was not a volunteer in paying note, where such payment was necessary to protect her one-half interest in realty mortgaged to secure the note and life estate in husband's interest devised to her.—Evans' Adm'r v. Evans, 199 S.W.2d 734, 304 Ky. 28.

46. La.—Wiggin v. Flower, 5 Rob. 406.
60 C.J. p 745 note 31.

47. Minn.—Felton v. Bissel, 25 Minn. 15.

48. Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

49. Pa.—National Surety Corp. v. Nulton, supra.

50. Wash.—Murray v. Meade, 32 P. 780, 5 Wash. 693.

51. Kan.—Weber Implement & Au-

tomobile Co. v. Dubach, 295 P. 979, 132 Kan. 309.

52. U.S.—In re Prudence-Bonds Corp., C.C.A.N.Y., 102 F.2d 531—State of Mississippi, for Use and Benefit of Leflore County, v. First Nat. Bank, C.C.A.Miss., 66 F.2d 9, certiorari denied U. S. Fidelity & Guaranty Co. v. State of Mississippi for Use and Benefit of Leflore County, Miss., 54 S.Ct. 101, 290 U. S. 678, 78 L.Ed. 585—Glades County, Fla., v. Detroit Fidelity & Surety Co., C.C.A.Fla., 57 F.2d 449—National Surety Corp. v. Cherokee County Bank, Centre, D.C.Ala., 57 F.Supp. 370—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C. C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217.

Ala.—Pickens County v. Johnson, 149 So. 252, 227 Ala. 190, followed in Montgomery v. Johnson, 149 So. 257, 227 Ala. 196—U. S. Fidelity & Guaranty Co. v. R. S. Armstrong & Bro., 142 So. 576, 225 Ala. 276.

Fla.—Ferguson v. Brogan, 149 So. 772, 111 Fla. 224.

Ill.—Corpus Juris cited in Robbins v. Slavin, 11 N.E.2d 651, 656, 292 Ill.App. 479—Aetna Casualty & Surety Co. of Hartford, Conn., v. Village of Maywood, 262 Ill.App. 206.

Mass.—Leventhal v. Krinsky, 90 N.E. 2d 545, 325 Mass. 336, 17 A.L.R.2d 281—Hill v. Wiley, 3 N.E.2d 1015, 295 Mass. 396.

Mich.—Whitman v. Royal Oak Tp., 256 N.W. 835, 209 Mich. 146.

Miss.—U. S. Fidelity & Guaranty Co. v. Sunflower County, 12 So.2d 142, 194 Miss. 680.

Mo.—Guilford Bank of Guilford v. Hubbell, App., 138 S.W.2d 690.

Mont.—Corpus Juris cited in American Surety Co. of New York v. Clarke, 20 P.2d 831, 832, 94 Mont. 1.

N.J.—Bluestone Building & Loan Ass'n of West New York v. Glasser, 176 A. 314, 117 N.J.Eq. 392.

N.Y.—American Sur. Co. of New York v. Gerold, 7 N.Y.S.2d 447, 255 App. Div. 285, reargument denied 8 N.Y.S.2d 662, 255 App.Div. 950—Globe Indemnity Co. v. Atlantic Lighterage Corporation, 278 N.Y.S. 212, 244 App.Div. 97, affirmed 2 N.E.2d 640, 271 N.Y. 234—In re Jahren's Estate, 283 N.Y.S. 779, 157 Misc. 435—In re Jiavaras' Estate, 283 N.Y.S. 276, 157 Misc. 303.

N.C.—Citizens' Bank v. White, 162 S. E. 736, 202 N.C. 311.

Ohio.—Corpus Juris quoted in City of Findlay v. American Surety Co. of New York, 198 N.E. 591, 595, 50 Ohio App. 429.

Pa.—Marsh v. Baldwin, Com.Pl., 20 Erie Co. 28—American Surety Co. v. United Societies, Com.Pl., 93 Pittsb.Leg.J. 308.

S.D.—Wieland v. Westcott, 263 N.W. 904, 64 S.D. 552.

Tex.—New York Cas. Co. v. State, Civ.App., 161 S.W.2d 150, affirmed 160 S.W.2d 158, 140 Tex. 549—Fidelity & Deposit Co. of Maryland v. Farmers & Merchants Nat. Bank of Nocona, Civ.App., 121 S.W.2d 503, error dismissed.

60 C.J. p 745 note 35.

amount for which he is liable, he is not entitled to be subrogated to securities or rights which are held to enforce payment of other sums which remain unpaid.⁵³

While the rule as to partial payment is sometimes so narrowly stated as to make it seem that the surety must pay the entire debt himself, it does not in truth mean that in every instance the surety

Fact that surety has separate indemnity contract from debtor does not permit surety to be subrogated before the debt is paid in full or to achieve the same result by claiming indemnity instead of subrogation.—*Jenkins v. National Surety Co.*, Utah, 48 S.Ct. 445, 277 U.S. 253, 72 L.Ed. 874—*Southern Surety Co. v. Braley*, C.C.A.Mo., 64 F.2d 893.

Pro tanto subrogation

(1) In absence of provision in surety contract to the contrary, the surety is not entitled to anything but equitable subrogation as contrasted with pro tanto subrogation.—*Maryland Cas. Co. v. Southern Pac. Co.*, C.C.A.Cal., 119 F.2d 672—60 C.J. p 745 note 35 [c].

(2) Appropriation of rents and profits of mortgaged premises by guarantor of mortgage was held pro tanto transfer of mortgagee's security to guarantor within rule prohibiting pro tanto subrogation.—*People, by Van Schaick, v. Lawyers' Title & Guaranty Co.*, 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed *In re People, by Van Schaick*, 271 N.Y.S. 950, 241 App.Div. 808, affirmed *People, by Van Schaick v. Lawyers' Title & Guaranty Co.*, 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted *In re Lawyers' Title & Guaranty Co.*, 192 N.E. 414, 265 N.Y. 287, motion granted *In re People, by Van Schaick*, 195 N.E. 126, 266 N.Y. 402.

(3) However, sureties on guardian's bond who did not pay ward all of money converted by guardian were held entitled to have their claim sustained to extent of amount paid, against bank which permitted guardian to withdraw guardianship funds for his own use.—*State ex rel. Robertson v. Bank of Granville*, 68 S.W.2d 969, 17 Tenn.App. 512.

Guaranty of stock dividends

(1) One who guaranteed to holders of corporation's preferred stock the payment of dividends and redemption of principal was not entitled to be subrogated to the rights of holders of stock so redeemed until the entire balance of preferred stock outstanding had been redeemed, or in some manner satisfied, although he had been released from further performance of his guaranty, and whether or not his guaranty applied only to the shares retired, or to the entire outstanding issue.—*Ellis v. Thompson*, 8 N.E.2d 430, 104 Ind.App. 492.

(2) Where, after partial perform-

ance of guaranty, the corporation was reorganized and guarantor was released from further liability on the guaranty, remaining preferred stockholders were justified in assuming that the only preferred stock to be considered in the future was that held by them, as against contention that guarantor was subrogated to rights of holders of stock redeemed.—*Ellis v. Thompson*, supra.

(3) Rights of holders of stock previously redeemed to which guarantor claimed to be subrogated ceased to exist and never became a lien or charge on the assets of the new corporation.—*Ellis v. Thompson*, supra.

Conventional subrogation

Where obligee under an order for payment of alimony assigned portion of her rights to surety without prejudice when surety partially paid obligation of principal, surety acquired no greater right than obligee and could not enforce a conventional subrogation based on the express assignment against principal.—*New Jersey Equities Co. v. Mandel*, 36 N.Y.S.2d 601, 178 Misc. 783.

53. U.S.—*American Sur. Co. of N. Y. v. Sampson*, Cal., 66 S.Ct. 571, 327 U.S. 269, 90 L.Ed. 663—*American Surety Co. of New York v. Westinghouse Electric Mfg. Co.*, Fla., 56 S.Ct. 9, 296 U.S. 133, 80 L.Ed. 105—*Town of Hamden v. American Sur. Co.*, C.C.A.Conn., 93 F.2d 482, certiorari denied *American Sur. Co. v. Town of Hamden*, 58 S.Ct. 647, 803 U.S. 648, 82 L.Ed. 1109—*Southern Surety Co. v. Braley*, C.C.A.Mo., 64 F.2d 893—*Commercial Casualty Ins. Co. v. Lawhead*, C.C.A.W.Va., 62 F.2d 928, certiorari denied 53 S.Ct. 527, 289 U.S. 731, 77 L.Ed. 1480—*Commissioners of Sinking Fund of Louisville v. Anderson*, D.C.Ky., 20 F.Supp. 217, affirmed for plaintiff, C.C.A., 110 F.2d 961, certiorari denied *Commissioner of Sinking Fund of City of Louisville v. Anderson*, 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—*American Bonding Co. v. Anderson*, D.C.Ky., 20 F.Supp. 217, reversed on other grounds for defendant, C.C.A., 110 F.2d 961.

Ind.—*Washington Tp. Board of Finance v. American Surety Co. of New York*, 183 N.E. 492, 97 Ind.App. 45.

Mich.—*Oakland County v. Central West Casualty Co.*, 254 N.W. 158, 266 Mich. 438, affirmed 255 N.W. 733, 268 Mich. 117.

N.Y.—*Metropolitan Life Ins. Co. v. 727 Madison Ave. Corp.*, 55 N.Y.S.2d 190.

Ohio.—**Corpus Juris quoted in City of Findlay v. American Surety Co. of New York**, 198 N.E. 591, 595, 50 Ohio App. 429.

60 C.J. p 746 note 36.

Subrogation to securities for other debts see *infra* § 52.

Surety bound for only part of debt

(1) Sureties on bonds given by bank as county depository were not entitled to subrogation to extent of losses paid county where bonds did not cover sheriff's and tax collector's account carried in same bank as bank and county had intended.—*State of Mississippi, for Use and Benefit of Leflore County, v. First Nat. Bank*, C.C.A.Miss., 66 F.2d 9, certiorari denied U.S. *Fidelity & Guaranty Co. v. State of Mississippi for Use and Benefit of Leflore County*, Miss., 54 S.Ct. 101, 290 U.S. 678, 78 L.Ed. 585.

(2) Surety securing part of deposit could not receive pro rata share of dividends on amount paid where depositor's claim was not fully paid by insolvent bank.—*Blair v. Board of Education of Prairie Tp., Franklin County*, 176 N.E. 99, 38 Ohio App. 303—60 C.J. p 746 note 36 [a] (3).

(3) Surety paying part of deposit secured was not subrogated to depositor's claim which was not entirely paid.

Ohio.—*Blair v. Board of Education of Prairie Tp., Franklin County*, supra.

Pa.—*City of Philadelphia v. National Surety Co.*, 173 A. 181, 315 Pa. 356—*American Surety Co. v. United Societies*, Com.Pl., 98 Pittsb.Leg.J. 308.

60 C.J. p 746 note 36 [a] (3).

(4) Village's excess deposits over amount permitted by ordinance did not constitute trust funds for benefit of village, and were not preferred claim on bank's insolvency to which surety on depository bonds had right to be subrogated.—*Aitna Casualty & Surety Co. of Hartford, Conn., v. Village of Maywood*, 262 Ill.App. 206.

(5) Guarantor, on being compelled to pay part of note guaranteed, in order to be subrogated to holder's rights under trust deed, would be required to bid at foreclosure sale amount due holder.—*J. D. Halstead Lumber Co. v. Security Title Insurance & Guaranty Co.*, 3 P.2d 52, 116 Cal.App. 679.

must pay the whole debt for which he became surety,⁵⁴ since the essence of the rule is simply that the creditor must be fully paid,⁵⁵ and in general it is sufficient if the balance of the creditor's debt has been otherwise satisfied.⁵⁶ Although the surety does not pay the full amount of the debt, he will be subrogated to all the benefits which the creditor had against the principal to the extent of his payment if he pays a part of the debt and the balance is paid by the principal⁵⁷ or some other person,⁵⁸ or, it has been held, if he pays a sum by way of compromise which the creditor agrees to take in satisfaction of the debt.⁵⁹ Moreover, the failure of the surety to pay the full penal sum of his undertaking does not deprive him of the right of subrogation if the debt has been fully paid.⁶⁰

It is only as between creditor and surety that the latter has no right on partial payment of the debt to come in and share the securities with the creditor.⁶¹ Only a creditor holding the securities can object to a subrogation pro tanto of a surety who has paid a portion of the debt, whether the surety has entirely satisfied the debt or not,⁶² and the creditor may allow the surety to be subrogated before the indebtedness is wholly extinguished.⁶³

Contractual provision for pro tanto subrogation. Although in some jurisdictions pro tanto subrogation clauses are held invalid,⁶⁴ there is some authority to the effect that a stipulation for pro tanto subrogation does not violate law or public policy,⁶⁵ and such provisions have been given effect;⁶⁶ but,

54. U.S.—National Surety Corp. v. Cherokee County Bank, Centre, Ala., D.C.Ala., 57 F.Supp. 370—Piedmont Coal Co. v. Hustead, C.C. A.Pa., 294 F. 247, 32 A.L.R. 556, certiorari denied 44 S.Ct. 331, 264 U.S. 582, 68 L.Ed. 860.
Ala.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

55. Iowa.—James v. Day, 37 Iowa 164.

N.Y.—Gifford v. Rising, 12 N.Y.S. 430.

56. U.S.—National Surety Corp. v. Cherokee County Bank, Centre, Ala., D.C.Ala., 57 F.Supp. 370—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

Ala.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.
60 C.J. p 747 note 40.

57. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—In re Realty Associates Securities Corp., D.C.N.Y., 66 F.Supp. 416, affirmed, C.C.A., Kelby v. Manufacturers Trust Co., 162 F.2d 350, affirmed in part and modified in part on other grounds In re Realty Associates Securities Corp., 163 F.2d 387, certiorari denied Manufacturers Trust Co. v. Realty Associates Securities Corp., 68 S.Ct. 218, 332 U.S. 336, 92 L.Ed. 409, Meredith v. Realty Associates Securities Corp., 68 S.Ct. 219, 332 U.S. 336, 92 L.Ed. 409, and Vanneck Realty Corp. v. Realty Associates Corp., 68 S.Ct. 219, 332 U.S. 336, 92 L.Ed. 409—National Surety Corp. v. Cherokee County Bank, Centre, Ala., D.C.Ala., 57 F.Supp. 370.

Ala.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

N.C.—U. S. Fidelity & Guaranty Co. v. Hood, 175 S.E. 135, 206 N.C. 639.
60 C.J. p 747 note 42.

58. U.S.—National Surety Corp. v. Cherokee County Bank, Centre, Ala., D.C.Ala., 57 F.Supp. 370.

59. U.S.—In re Kent Refining Co., D. C.Mich., 20 F.Supp. 661.

S.D.—In re Petersen's Estate, 295 N. W. 494, 67 S.D. 540.
60 C.J. p 747 note 41.

Compromise precluding subrogation

Where a surety compromises liability to obligee so that obligee is not paid full sum, obligee is left in full possession and control of the debt and the remedies for its enforcement, precluding subrogation.—New Jersey Equities Co. v. Mandel, 36 N.Y. S.2d 601, 178 Misc. 783.

60. Or.—Schiska v. Schramm, 51 P. 2d 668, 151 Or. 647.

61. Mo.—Fisher v. Columbia Bldg., etc., Assoc., 59 Mo.App. 430.

62. U.S.—Corpus Juris cited in Hurt v. Read, C.C.A.Tex., 108 F.2d 282, 283.

60 C.J. p 747 note 44.

63. U.S.—Corpus Juris cited in Hurt v. Read, supra.

60 C.J. p 747 note 45.

64. U.S.—Maryland Casualty Co. v. Sparks, C.C.A.Mich., 76 F.2d 929.

La.—Davis v. West Louisiana Bank, 99 So. 207, 155 La. 245.

Mich.—Whitman v. Royal Oak Tp., 256 N.W. 835, 269 Mich. 146—Sparks v. Detroit Fidelity & Surety Co., 255 N.W. 757, 268 Mich. 183—Oakland County v. Central West Casualty Co., 254 N.W. 158, 266 Mich. 438, affirmed 225 N.W. 733, 268 Mich. 117.

Mont.—American Surety Co. of New

York v. Clarke, 20 P.2d 831, 94 Mont. 1.

Provision treated as surplusage see Depositaries § 9 b (3).

Subrogation reducing statutory liability on bond

Any right of subrogation provided in statutory bond securing municipal bank deposit which has effect of reducing surety's statutory obligation is void, and surety's right to subrogation on payment of principal sum of bond to obligee must be determined by general rules of equity.—City of Findlay v. American Surety Co. of New York, 198 N.E. 591, 50 Ohio App. 429.

Agreement to subrogate held without consideration

Where surety on official bond of county tax collector paid only face amount of bond to state on discovery of defalcations by collector in excess of face amount of the bond, an agreement and receipt executed by state's attorney general purporting to subrogate surety to any of state's rights to recover defalcations was without consideration.—National Surety Corp. v. Cherokee County Bank, Centre, D.C.Ala., 57 F.Supp. 370.

65. Tex.—Southern Surety Co. of New York v. Hollis, Civ.App., 45 S. W.2d 716, affirmed Hollis v. Southern Surety Co. of New York, Com. App., 63 S.W.2d 374.

66. Tex.—Hollis v. Southern Surety Co. of New York, Com.App., 63 S. W.2d 374.

Contract construed and held not to show that payment of draft in settlement of loss under depository bond by surety was not intended to be payment of loss resulting from insolvency of depository with respect to surety's right to proportionate subrogation under bond.—Southern Surety

before a contract will be construed to authorize a pro tanto subrogation in favor of a surety which will be to the detriment of the creditor, the contract should be so certain as to admit of no doubt on that question.⁶⁷

Payment of installment. It has been held that, where subrogation will enable a surety to recover installments which he paid after the principal refused to pay, and will not affect or disturb any securities held by the creditor, it will be granted without compelling him to wait for all the installments to fall due.⁶⁸

b. Specific Agreement for, or Acceptance of, Rights

A special agreement for subrogation of the surety is unnecessary; nor need the surety signify his election and acceptance of such right at the time of the payment.

The right to subrogation arises simply because of the suretyship and the payment of the debt by the surety, and a specific or special agreement for sub-

rogation is unnecessary;⁶⁹ nor need the surety signify his election and acceptance of such right at the time of payment.⁷⁰ Indeed it is immaterial that, at the time of payment, there is no knowledge of the equitable right to be subrogated as long as there is an intent to retain all general rights in the premises;⁷¹ and, in the absence of proof to the contrary, equity will presume that the surety has made payment with the intention of keeping the rights of the creditor afoot for his benefit;⁷² but, if it is shown that the surety's payment was made as a gift, with an intent to relieve the principal's property from encumbrance, there can be no subrogation.⁷³

c. Contract with, or Request from, Principal

The right to be subrogated to the rights of the creditor against the principal is not dependent on the principal's having requested or contracted with the surety or guarantor to enter into the undertaking.

The right to be subrogated to the rights of the creditor against the principal debtor is not dependent on the latter's having requested or contracted

Co. of New York v. Hollis, 45 S.W.2d 716, affirmed Hollis v. Southern Surety Co. of New York, Com.App., 63 S.W.2d 374.

General rule as yielding to contract

The rule that an insurer or indemnitor will not be subrogated to the disadvantage of his indemnitee or permitted to compete with the indemnitee for a share in the security given by principal must yield to terms of contracts between the parties.—Commissioner of Insurance v. Conveyancers Title Ins. & Mortg. Co., 15 N.E.2d 820, 300 Mass. 457.

67. Ill.—*Ætna Casualty & Surety Co. of Hartford, Conn. v. Village of Maywood*, 262 Ill.App. 206. 60 C.J. p 747 note 46.

Held not contract authorizing pro tanto subrogation

U.S.—*Maryland Cas. Co. v. Southern Pac. Co.*, C.C.A.Cal., 119 F.2d 672.

Ind.—*Washington Tp. Board of Finance v. American Surety Co. of New York*, 183 N.E. 492, 97 Ind. App. 45.

N.D.—*Olsen v. Baird*, 201 N.W. 993, 52 N.D. 1.

60 C.J. p 747 note 46 [a].

68. Ga.—*Fender v. Fender*, 117 S.E. 676, 30 Ga.App. 319.

Interest installments

(1) It has been held that mortgage guarantor's advancement to mortgagee of each complete installment of interest due was payment of such claim in full, creating equity of subrogation therefor.

U.S.—*Prudential Ins. Co. of America v. Liberdar Holding Corp.*, C.C.A. N.Y., 85 F.2d 504.

N.Y.—*In re City of New York Rapid Transit Route 109, Section 3*, 278 N.Y.S. 280, 244 App.Div. 102.

(2) On the other hand, there is authority to the effect that guarantor of mortgage could resort to income derived from mortgaged premises for its own reimbursement only after payment of all principal and interest due under its guaranty.—*People, by Van Schaick, v. Lawyers' Title & Guaranty Co.*, 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in *re People by Van Schaick*, 271 N.Y.S. 950, 241 App.Div. 808, affirmed *People, by Van Schaick v. Lawyers' Title & Guaranty Co.*, 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in *re Lawyers' Title & Guaranty Co.*, 192 N.E. 414, 265 N.Y. 287, motion granted in *re People, by Van Schaick*, 195 N.E. 126, 266 N.Y. 402.

(3) Guarantor of mortgage was not entitled to use rents collected from owner of mortgaged premises to reimburse itself for interest payments previously made by guarantor to mortgagee out of guarantor's own funds.—*People, by Van Schaick, v. New York Title & Mortgage Co.*, 268 N.Y.S. 572, 149 Misc. 488, 150 Misc. 351, affirmed in *re People, by Van Schaick*, 271 N.Y.S. 949, 241 App.Div. 807, affirmed *People, by Van Schaick v. New York Title & Mortgage Co.*, 191 N.E. 723, 265 N.Y. 30, reargument denied and motion granted in *re New York Title and Mortgage Co.*,

192 N.E. 414, 265 N.Y. 287, motion granted in *re People, by Van Schaick*, 195 N.E. 126, 266 N.Y. 402—*People, by Van Schaick, v. Lawyers' Title & Guaranty Co.*, 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in *re People, by Van Schaick*, 271 N.Y.S. 950, 241 App.Div. 808, affirmed *People, by Van Schaick v. Lawyers' Title & Guaranty Co.*, 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in *re Lawyers' Title & Guaranty Co.*, 192 N.E. 414, 265 N.Y. 287, motion granted in *re People, by Van Schaick*, 195 N.E. 126, 266 N.Y. 402.

69. Ind.—*Fidelity & Deposit Co. of Maryland v. Sluss*, 15 N.E.2d 372, 214 Ind. 258, 117 A.L.R. 575.

Ky.—*National Sur. Corp. v. First Nat. Bank*, 128 S.W.2d 766, 278 Ky. 273.

N.Y.—*Ely v. Stone*, 17 N.Y.S.2d 266, 173 Misc. 117.

60 C.J. p 747 note 48.

70. Ala.—*Watts v. Eufaula Nat. Bank*, 76 Ala. 474.

60 C.J. p 747 note 49.

71. Ohio.—*Dempsey v. Bush*, 18 Ohio St. 376.

72. Minn.—*McArthur v. Martin*, 23 Minn. 74.

Ohio.—*Hill v. King*, 26 N.E. 988, 48 Ohio St. 75.

73. Vt.—*Scott v. Scott*, 2 S.E. 431, 33 Vt. 251.

with the surety or guarantor to enter into his undertaking;⁷⁴ and a surety or guarantor is entitled to be subrogated to the creditor's rights against the principal although he has become bound at the request of the creditor alone,⁷⁵ or at the request of one who has a property interest to protect by payment of the debt and who would be entitled to subrogation had he paid the debt,⁷⁶ even though the principal has no notice of the relationship existing between the subrogee and the creditor.⁷⁷ Where there was no express or implied request by the debtor, however, and where he received no benefit from the filing of a bond, and it was not intended that he should, and the person paying the debt has failed to establish a superior equity, the payment was that of a volunteer not entitled to subrogation.⁷⁸

d. Other Matters

Various matters, such as the exhaustion of legal remedies against the principal, usefulness or valuelessness of the right, and indenticalness in undertakings of principal and surety, have been held not essential to the creation or existence of the right of a surety to subrogation.

Various matters have been held not essential to the creation or existence of the right of a surety to subrogation.⁷⁹ Thus, a surety may, as a general rule, be subrogated to, and enforce, the rights and remedies of the creditor, although he has not exhausted his legal remedies against the principal.⁸⁰ Moreover, subrogation to a personal right against the principal will not be refused because, at the time, subrogation seems entirely useless due to the insolvency of the principal, since the latter's situation may improve and complete reimbursement eventually be afforded by way of subrogation;⁸¹ but subroga-

tion to a right, which is of no practical advantage to the surety and which is not necessary for his protection, will be refused where other rights are involved which would make it inequitable to grant subrogation.⁸²

Identicalness in undertakings of principal and surety. It is not essential to the right of subrogation that the surety or guarantor become bound by the same instrument, and at the same time, as the principal,⁸³ and it is immaterial that the principal has failed to affix his signature to the bond on which the surety has become bound.⁸⁴

§ 49. — Right of Subrogation as Dependent on, or Affected by, Acts of Creditor in General

- a. Release or discharge of rights after payment by surety
- b. Dealings subsequent to suretyship but before payment

a. Release or Discharge of Rights after Payment by Surety

The fact that the creditor, after payment by the surety, cancels and surrenders a security without any stipulation that it shall be kept alive, or wrongfully proceeds to enter a satisfaction or discharge of record, will not defeat the surety's right to be subrogated.

The fact that the creditor, after payment by the surety, cancels and surrenders a security without any stipulation that it shall be kept alive,⁸⁵ or wrongfully proceeds to enter a satisfaction or discharge of record,⁸⁶ will not defeat the surety's right to be subrogated and enforce the right as against the principal,⁸⁷ or anyone in his shoes who has not taken in reliance on the apparent discharge.⁸⁸ The

74. U.S.—*Alexander v. Young*, C.C.A. Kan., 65 F.2d 752.

Pa.—*National Surety Corp. v. Nulton*, 55 Pa. Dist. & Co. 149, 60 C.J. p 748 note 55.

75. U.S.—*Alexander v. Young*, C.C.A. Kan., 65 F.2d 752.

Pa.—*National Surety Corp. v. Nulton*, 55 Pa. Dist. & Co. 149, 60 C.J. p 748 note 56.

76. Ind.—*Davis v. Schlemmer*, 50 N. E. 373, 150 Ind. 472, 60 C.J. p 748 note 57.

77. Tex.—*Kirk v. Collier*, Civ.App., 28 S.W.2d 1087.

78. Cal.—*Holmes v. Hughes*, 14 P.2d 149, 125 Cal.App. 290. Subrogation of surety of surety generally see *infra* § 59 b.

79. Vt.—*Hall v. Windsor Sav. Bank*, 121 A. 582, 124 A. 593, 97 Vt. 125. Necessity for assignment from creditor see *infra* § 50.

80. Vt.—*Hall v. Windsor Sav. Bank*, *supra*, 60 C.J. p 748 note 59.

81. La.—*Calliham v. Turner*, 3 Rob. 299.

82. N.J.—*In re Hewitt*, 25 N.J.Eq. 210.

83. Va.—*Enders v. Brune*, 4 Rand. 438, 25 Va. 438, 60 C.J. p 748 note 53.

84. Ky.—*U. S. Fidelity & Guaranty Co. v. Board of Education of City of Maysville*, 15 S.W.2d 255, 228 Ky. 426, 60 C.J. p 748 note 54.

85. Ohio.—*Smith v. Folsom*, 88 N.E. 546, 80 Ohio St. 218, 60 C.J. p 749 note 67.

Subrogation to rights released or discharged prior to payment generally see *infra* § 52.

86. Pa.—*Goldman v. Mitchell-Fletcher Co.*, 141 A. 231, 292 Pa. 354, 60 C.J. p 749 note 68.

87. Ohio.—*Smith v. Folsom*, 88 N.E. 546, 80 Ohio St. 218.

Pa.—*Goldman v. Mitchell-Fletcher Co.*, 141 A. 231, 292 Pa. 354.

88. U.S.—*O'Neal v. Stuart*, C.C.A. Tenn., 281 F. 715.

Iowa.—*Rand v. Barrett*, 24 N.W. 530, 66 Iowa 731.

Against whom surety will be subrogated generally see *infra* § 55.

surety will be subrogated in priority to a second lien, which the creditor holds for a debt on which the surety is not bound, where the creditor makes the release or discharge of the first lien securing the debt on which the surety is bound with the expectation of gaining priority for the second lien,⁸⁹ and this seems to be true, although the creditor is ignorant of the suretyship at the time he compels payment from the surety.⁹⁰ An invalid attempt by the creditor to sell pledged property to himself without adequate notice after payment of the debt by the surety will not defeat the surety's right to be subrogated to the pledge.⁹¹

b. Dealings Subsequent to Suretyship but before Payment

Where securities are originally given, when the surety becomes bound, to secure only the debt for which the surety is obligated, the creditor cannot defeat the surety's right to be subrogated to the security on payment of only the debt for which he is bound by adding other debts for which the surety is not bound and having them secured by the same property; and if two distinct debts secured by a first and second mortgage on the debtor's property are purchased by the same person, a surety for the first debt may be subrogated to the first mortgage on payment of that debt alone.

Where securities are originally given, at the time the debt is contracted and the surety becomes bound, to secure only the debt for which the surety is obligated, the creditor cannot, by adding other debts for which the surety is not bound and having them secured by the same property, defeat the surety's right to be subrogated to the security on payment of only the debt for which he is bound.⁹² If two independent and distinct debts, secured by a first and

second mortgage on the property of the debtor, are subsequently purchased by the same person, a surety for the first debt is entitled to be subrogated to the first mortgage on payment of that debt alone;⁹³ and, if a debt secured by a surety and a mortgage is subsequently transferred to one who has previously purchased the fee of the mortgaged premises, the surety, on payment of the debt, is entitled to be subrogated to the mortgage and enforce it against the premises to the same extent as if the fee were owned by someone other than the creditor.⁹⁴

Where, before payment has been made by the surety, the creditor fraudulently releases a security, on the property of the principal, for a nominal consideration, to one who has taken the property from the principal for an inadequate consideration and in collusion with the creditor, and the fact of the release is concealed from the surety until after payment, he will be subrogated to the security and may enforce it against the purchaser.⁹⁵

§ 50. — Assignment by Creditor

While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated, the completion of the surety's subrogation is not dependent on a formal assignment or transfer; and, if the surety is not entitled to subrogation, an assignment will not give the surety a right of subrogation he would not otherwise have.

While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated,⁹⁶ in which case there is no occasion to invoke the doctrine of

89. Ill.—Ottawa City Bank v. Dudgeon, 65 Ill. 11.

90. Pa.—Kirby v. Coolbaugh, 7 Pa. Super. 91.

91. Ohio.—Hellman v. Pogue, 32 Ohio Cir.Ct. 559, affirmed 98 N.E. 1131, 85 Ohio St. 463.

92. Mo.—Schell City Bank v. Reed, 54 Mo.App. 94.

60 C.J. p 750 note 74.

Necessity for payment of all debts secured where security is originally given to secure debts in addition to those for which surety is bound see *infra* § 52.

93. Mo.—Schell City Bank v. Reed, *supra*.

94. Ill.—Hubbard v. Hubbard, 161 Ill.App. 623.

60 C.J. p 750 note 76.

95. Colo.—Scott v. Gregory, 206 P. 574, 71 Colo. 300.

Subrogation to rights which have been released prior to payment generally see *infra* § 52.

96. U.S.—Corpus Juris cited in *re* Stratton, D.C.Cal., 53 F.Supp. 131, 133, affirmed, C.C.A., American Sur. Co. of N. Y. v. Sampsells, 148 F.2d 986, affirmed 66 S.Ct. 571, 327 U.S. 269, 90 L.Ed. 663.

Cal.—Corpus Juris quoted in *Meyers v. Bank of America Nat. Trust & Savings Ass'n*, 77 P.2d 1084, 1086, 11 Cal.2d 92.

Ga.—Fetzer v. American Surety Co. of New York, 167 S.E. 338, 46 Ga. App. 287.

60 C.J. p 749 note 63.

Necessity of agreement for subrogation see *supra* § 48 b.

Prosecution of assigned claim

The successful prosecution of suit by surety on bond of company contracting with Veterans' Administra-

tion to erect hospital for injunction against payment of check, issued by federal treasury to contractor on administration's final warrant, did not affect surety's power to prosecute claims assigned to it by subcontractors on its payment thereof.—U. S. ex rel. Johnson v. Morley Const. Co., C.C.A.N.Y., 98 F.2d 781, certiorari denied Maryland Cas. Co. v. U. S., for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421.

Who may question transfer

Where decree obtained by town against town collector's sureties, which was satisfied of record by payment from sureties, expressly transferred by subrogation to sureties the cause of action against bank alleged to have aided collector's defalcation, the town alone could question that transfer.—State Bank & Trust Co. v. Commercial Trust & Savings Bank, 21 N.E.2d 157, 300 Ill.App. 435.

subrogation,⁹⁷ the completion of the surety's subrogation and his right to pursue the rights and remedies of the creditor are not dependent on the willingness of the latter to make an assignment, since in equity the surety's payment causes an assignment by operation of law and no formal assignment or transfer is necessary.⁹⁸ On the other hand, it seems that, if the surety is not entitled to subrogation, an assignment by the creditor will be ineffectual to give the surety a right of subrogation he would not otherwise have;⁹⁹ his rights must be measured by the application of equitable principles in the first instance, his recovery being dependent on a right in equity, and not by virtue of an asserted legal right under an assignment.¹

Judgment. A judgment obtained against the prin-

cipal may be transferred by the judgment creditor to the surety who satisfied the judgment,² and, in a majority of states where a surety, on paying the judgment, takes an assignment thereof either to himself or to a third person, he may enforce the judgment against his principal,³ but, according to some decisions, the assignment must be made to a third person, an assignment to the surety himself extinguishing the original obligation.⁴ An assignment to the surety, it is held, is subordinate to the rights of subrogation,⁵ and the right of the surety to pursue the assigned judgment depends on subrogation rather than on the assignment.⁶ Indeed, it is held that no actual assignment is necessary; the surety is considered on equitable principles as entitled to an assignment, and equity will consider as done that which should have been done, and, if neces-

97. U.S.—American Sur. Co., of N. Y. v. Baker, C.A.N.C., 172 F.2d 689.

98. U.S.—U. S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235.

Ala.—U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Cal.—*Corpus Juris* quoted in Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 1086, 11 Cal.2d 92—Painter v. Berglund, 87 P.2d 360, 31 Cal.App.2d 63.

Ky.—Davis v. Kinnard, 112 S.W.2d 412, 271 Ky. 428.

Miss.—*Corpus Juris* cited in Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 389, 196 Miss. 50.

Mo.—In re Phillips' Estate, 211 S.W.2d 728, 357 Mo. 947—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.

Pa.—Commonwealth ex rel. Schnader v. National Sur. Co., 37 A.2d 753, 349 Pa. 599—Lit Bros., to Use of Kaplan, v. Goodman, 18 A.2d 519, 144 Pa.Super. 43—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

Tenn.—Davis v. Arnett, 177 S.W.2d 29, 27 Tenn.App. 1.
60 C.J. p 749 note 64.

Payment by surety as enabling him to enforce debt and evidences and incidents thereof see *infra* § 54 b.

99. Cal.—*Corpus Juris* quoted in Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 1086, 11 Cal.2d 92.

Miss.—*Corpus Juris* cited in Oxford Production Credit Ass'n v. Bank of Oxford, 16 So.2d 384, 389, 196 Miss. 50.

S.D.—*Corpus Juris* quoted in American Sur. Co. v. Western Sur. Co., 22 N.W.2d 429, 432, 71 S.D. 126.
60 C.J. p 749 note 65.

1. Cal.—Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 11 Cal.2d 92.

2. Cal.—Painter v. Berglund, 87 P.2d 360, 31 Cal.App.2d 63.
34 C.J. p 691 note 73.

Payment by surety as extinguishing judgment generally see Judgments § 556.

Recovery of payment of judgment by surety from creditor see the C.J.S. title Principal and Surety § 295.

Writing

(1) Judgment creditor's assignment of judgment against principal to surety who satisfied judgment was held not required to be in writing.—Painter v. Berglund, *supra*.

(2) However, under some statutes a writing is required.—Blackman v. Joiner, 1 So. 851, 81 Ala. 344—34 C. J. p 691 note 73 [a].

Assignment construed

Where surety on bond of realty broker and salesman satisfied judgment obtained against broker and salesman, judgment creditor's assignment to surety of "judgment obtained . . . in . . . action against" broker was assignment against salesman as well, as against contention that quoted phrase constituted words of limitation and not of description.—Painter v. Berglund, 87 P.2d 360, 31 Cal.App.2d 63.

3. Cal.—Tucker v. Nicholson, 84 P. 2d 1045, 12 Cal.2d 427—*Corpus Juris* quoted in Tompkins v. Powers, 289 P. 685, 106 Cal.App. 464.

Neb.—Orchard & Wilhelm Co. v. Sexson, 229 N.W. 17, 119 Neb. 370, followed in Askew v. Sexson, 229 N. W. 19, 119 Neb. 369.

34 C.J. p 691 note 73.

Protection of surety's interests by assignment

(1) With respect to assignment of judgment to surety, a surety always has a right to protect his interests when called on to pay debt on which he was not primarily liable.—Bogden v. Milauckas, 40 N.E.2d 91, 313 Ill. App. 311.

(2) This he may do by having the judgment assigned to a third person and kept alive for his benefit.—Katz v. Moessinger, 110 Ill. 372—34 C.J. p 691 notes 73, 74.

(3) If intention was not to extinguish judgment against principal and surety, surety so paying judgment is entitled to assignment of such judgment, with all rights and liens which attach to it in the creditor's hands.—In re Phillips' Estate, 211 S.W.2d 728, 357 Mo. 947—Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

(4) Where intent is to preserve judgment in favor of a surety as against principal debtor, the taking of an assignment of judgment by surety is conclusive evidence of intent of parties to keep the judgment alive and in force for benefit of assignee.—Bogden v. Milauckas, 40 N. E.2d 91, 313 Ill.App. 311.

(5) Assignment of judgment to surety as not extinguishment thereof generally see Judgments § 562.

4. N.C.—Stewart v. Parker, 35 S.E. 2d 615, 225 N.C. 551—Saleed v. Abeyounis, 9 S.E.2d 399, 217 N.C. 644—Jones v. Rhea, 151 S.E. 255, 198 N.C. 190.
34 C.J. p 691 note 74.

5. Cal.—Painter v. Berglund, 87 P. 2d 360, 31 Cal.App.2d 63.

6. Cal.—Painter v. Berglund, *supra*.

sary for his protection, will decree an assignment to be made.⁷ Statutes authorizing a surety who has paid a judgment to obtain an assignment thereof from the creditor and proceed summarily by judgment or by action at law against the principal do not restrict the equitable doctrine of subrogation.⁸ Where one of several sureties pays the judgment, the taking of an assignment of the judgment to himself does not satisfy it against the other judgment debtors.⁹

§ 51. — Waiver by Surety

A surety may waive his rights as subrogee by express agreement or by implication.

The right to subrogation can be availed of only by a surety alert in discharging his duty,¹⁰ and not guilty of inequitable conduct.¹¹ The right of a surety who pays the principal's debt to be substituted to the creditor's rights is optional, to be waived or enforced as the surety may elect.¹² Not being a matter of contract it may be waived or discharged

without consideration,¹³ and once waived it is gone.¹⁴

A surety may waive his rights as subrogee by express agreement,¹⁵ or by implication by the doing of an act inconsistent with the enforcement of such rights,¹⁶ as, it seems, by taking inconsistent independent rights or securities as a means of obtaining reimbursement.¹⁷ The act relied on as a waiver must actually be inconsistent with the enforcement of the creditor's rights by way of subrogation, however,¹⁸ and the fact that indemnity is taken from the principal at the time the contract of suretyship is entered into will not prevent the surety from subsequently asserting subrogation to the creditor's rights where there is nothing to show that such indemnity was intended to provide an exclusive remedy for the surety.¹⁹ The fact that the surety in a prior action unsuccessfully attacked as fraudulent a deed of trust made by the principal to secure his creditors does not preclude him from asserting his right to be subrogated to the rights of the creditor under the deed of trust.²⁰

7. W.Va.—George v. Crim, 66 S.E. 526, 66 W.Va. 421.
34 C.J. p 691 note 75.

8. Ky.—Davis v. Kinnard, 112 S.W. 2d 412, 271 Ky. 428—Sanders & Walker v. Herndon, 93 S.W. 14, 122 Ky. 760.

9. Kan.—Honce v. Schram, 85 P. 535, 73 Kan. 368.

10. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

Waiver and loss of right generally see supra § 13.

11. U.S.—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., supra.

12. Ala.—Watts v. Eufaula Nat. Bank, 76 Ala. 474.

Tenn.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198—Belcher v. Wickersham, 68 Tenn. 111.

13. N.Y.—Ely v. Stone, 17 N.Y.S.2d 266, 173 Misc. 117.

14. N.Y.—Ely v. Stone, supra.

15. Or.—First Nat. Bank v. U. S. Fidelity & Guaranty Co., 271 P. 57, 127 Or. 147.

For valuable consideration, surety may forego his rights and permit third person to receive money from debtor free from his claims.—Oregon

Surety & Casualty Co. v. U. S. Nat. Bank of Eugene, 300 P. 336, 136 Or. 573.

Agreement to payment to another

Surety, agreeing to state's payment of sums due road contractor to bank to induce latter to lend him money, waived right of subrogation.—Oregon Surety & Casualty Co. v. U. S. Nat. Bank of Eugene, supra.

16. U.S.—Fidelity & Casualty Co. of New York v. Massachusetts Mut. Life Ins. Co., C.C.A.N.C., 74 F.2d 881.

60 C.J. p 750 note 80.

Settlement with principal

Where surety on insolvent bank's bond, who after paying sanitary district amount of bond became subrogated to district's right against bank to extent of amount paid, settled his claim with solvent bank for a lesser amount, and settlement was approved by court in authorizing bank to reopen following its reorganization, all rights of surety to subrogation, whether under his agreement with district or on equitable doctrine of subrogation, terminated with such settlement.—Fidelity & Cas. Co. of N. Y. v. Niles Bank Co., 71 N.E.2d 742, 79 Ohio App. 15.

17. Ala.—Watts v. Eufaula Nat. Bank, 76 Ala. 474.

60 C.J. p 750 note 81.

Surety's release of indemnity as barring him from enforcing creditor's

lien against purchaser from principal see infra § 55.

18. Ala.—Tennessee Valley Bank v. Aaron, 104 So. 135, 213 Ala. 29.
60 C.J. p 750 note 82.

19. U.S.—Massachusetts Bonding & Ins. Co. v. Fago Const. Corp., D.C. Md., 82 F.Supp. 619.
60 C.J. p 750 note 83.

20. Tenn.—Motley v. Harris, 1 Lea 577, 580.

Reason for rule

"He sought no right of subrogation in that case to the rights of Mrs. Settle [a secured creditor] under the deed of trust. No such question was involved, and none such was adjudged or could have been . . . He now comes on an entirely different state of facts to assert a right claimed in a definite form on an independent equity, no way involved or brought before the court then for adjudication, consequently not affected by that decree . . . He . . . comes in on the footing of a right asserted and maintained and now owned by Mrs. Settle, to which he seeks to be subrogated. He is to stand in her shoes, take her place, if he succeeds in his present contention, so that if the right is a good one, other things out of the way, he occupies her place, and is entitled to have it enforced for his benefit to the same extent that she could have done."—Motley v. Harris, supra.

§ 52. — Extent and Limitations of Subrogation Generally

A surety has a right to be made whole when he fulfills his obligation under a contract of suretyship, but can acquire, by way of subrogation, no greater rights than were possessed by the creditor.

A surety has a right to be made whole when he fulfills his obligation under a contract of suretyship,²¹ and this includes interest on the money ex-

pended by him in fulfilling his obligations until repaid,²² but not interest and attorney's fees which he was compelled to pay to the creditor because of his own fault in compelling the creditor to sue instead of paying the amount clearly owed without suit.²³

A surety can acquire, by way of subrogation, no greater rights than were possessed by the creditor²⁴

21. U.S.—Glenn v. American Sur. Co., C.C.A.Ky., 160 F.2d 977—Alexander v. Young, C.C.A.Kan., 65 F.2d 752—Reconstruction Finance Corp. v. Maryland Cas. Co., D.C. Md., 23 F.Supp. 1008.

N.Y.—Alamar v. Dunbar Const. Co., 270 N.Y.S. 773, 151 Misc. 30.

Set-off held improper

In action by surety on fidelity bonds issued to an insurer to recover as insurer's subrogee on a bank's indorsement of drafts issued by insurer in payment of fraudulent accident claims presented by adjuster on ground that payees' indorsements were forged, amount which surety recovered against adjuster in legal proceedings based on his fraudulent transactions was not required to be set off against any judgment recovered by surety against bank where the only reasonable conclusion was that moneys recovered from adjuster in those proceedings were not identical moneys that he received as a result of his fraudulent transactions.—Fidelity & Deposit Co. of Maryland v. Union Trust Co. of Rochester, D.C.N.Y., 37 F.Supp. 3.

22. U.S.—Glenn v. American Sur. Co., C.C.A.Ky., 160 F.2d 977—Alexander v. Young, C.C.A.Kan., 65 F.2d 752.

N.Y.—U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 74 N.E.2d 226, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694.

W.Va.—Central Trust Co. v. Bank of Mullens, 150 S.E. 221, 107 W.Va. 679.

23. U.S.—Union Indemnity Co. v. Stevens, C.C.A.Miss., 57 F.2d 839.

Costs incurred in defending former action

In action to recover tax penalties from taxpayers by surety of county treasurer, who paid tax penalties accruing because of treasurer's delay in depositing checks received in payment of taxes and who by virtue of payment was subrogated to rights of county, recovery was strictly limited to amount of penalties paid by surety, with interest, and could not include costs incurred in defense of former action of county against sure-

ty in connection with penalties.—American Sur. Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

24. U.S.—Aetna Cas. & Sur. Co. v. Kishwaukee Special Drainage Dist., C.C.A.Ill., 143 F.2d 471, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635—City of Philadelphia, to Use of Warner Co. v. National Sur. Corp., C.C.A.Pa., 140 F.2d 805—City of Akron v. Fidelity & Cas. Co. of New York, C.C.A.Ohio, 136 F.2d 238—Maryland Cas. Co. v. Cox, C.C.A.Tenn., 104 F.2d 354—National Surety Co. v. Perth Amboy Trust Co., C.C.A.N.J., 76 F.2d 87—American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 133 A.L.R. 509—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375, reversed on other grounds, C.C.A., 103 F.2d 1016.

Ark.—Little Rock St. Improvement Dist. No. 508 v. Taylor, 40 S.W.2d 786, 184 Ark. 92.

Colo.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254, 96 Colo. 127. Conn.—Spitz v. Century Indemnity Co., 28 A.2d 874, 129 Conn. 396.

La.—Corpus Juris cited in Motors Securities Co. v. Aetna Ins. Co. of Hartford, App. 17 So.2d 316, 318.

Mo.—Thompson v. Korte, 58 S.W.2d 497, 227 Mo.App. 1094.

Neb.—Metropolitan Cas. Co. of New York v. First Nat. Bank of Omaha, 297 N.W. 593, 139 Neb. 329—Federal Land Bank of Omaha v. Worley, 282 N.W. 476, 135 Neb. 493.

N.J.—Guise v. John C. Guise, Inc., 163 A. 121, 112 N.J.Eq. 11.

N.Y.—Slowmach Realty Corporation v. Leopold, 253 N.Y.S. 500, 236 App. Div. 330—Corpus Juris cited in New Amsterdam Cas. Co. v. McMahon, 93 N.Y.S.2d 32, 34, 196 Misc. 746—People v. Nelson, 257 N.Y.S. 361, 143 Misc. 339.

W.Va.—Central Trust Co. v. Bank of Mullens, 150 S.E. 221, 107 W.Va. 679.

60 C.J. p 751 note 84.

Derivative right

The right of subrogation is derivative, comes solely from the assured, and can only be enforced in his right.—American Surety Co. of New York v. Town of Islip, 48 N.Y.S.2d 749, 268 App.Div. 92.

Rights of creditor considered in action by surety

In action by board of county commissioners and surety on county treasurer's bond against bank for conversion of county sinking fund securities, where petition pleaded cause of action against bank in favor of surety on principle of subrogation, but did not state cause of action against bank in favor of county, county could not recover in action, but rights which county might have against bank would be considered in order properly to apply the principle of subrogation.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102.

Interest on deposit

Where state, although entitled to a preference, could not recover interest on deposit for period following insolvency of depository bank, either from liquidating agent of bank or corporation which purchased assets of bank under agreement to pay in full all claims entitled to priority, there being no contract calling for payment of interest on state's deposit, surety on depository bond who paid state amount of deposit, and thereby was subrogated to state's rights, was not entitled to such interest.—Standard Accident Ins. Co. v. Luther Williams Bank & Trust Co., 181 S.E. 201, 51 Ga.App. 633.

Guarantor of dividends on corporate preferred stock, having paid in accordance with guaranty and taken assignments of the payee stockholders' rights to dividends thereafter declared for the period covered by such payments, did not have a valid subsisting claim against the corporation but only a right to reimbursement out of contingent future profits, and, until a dividend should be declared, guarantor had no evidence of indebtedness but merely a right to a proportionate share of the earned profits when and if they might accrue and

at the time of the payment which effected the subrogation;²⁵ and one who acquires or succeeds to rights, claims, or securities through subrogation takes them burdened with the limitations and disqualifications to which they were subject in the hands of the person for whom he is substituted.²⁶ Thus, although the asserted right originally existed in favor of the creditor, there usually can be no subrogation to it if it has been released or extinguished before payment by the surety, since subrogation is generally limited to such rights as exist at the date of payment.²⁷ Furthermore, a surety will be subrogated only to such rights and securities as are held by the creditor with respect to the particular debt or contract for which the surety is bound;²⁸ and, unless there is an agreement causing the result to be otherwise,²⁹ sureties on an obligation given to procure a loan with which to discharge another debt or encumbrance cannot be subrogated to the rights of the creditor whose debt or encumbrance is dis-

charged, but only to the rights of the lender or the creditor in the debt for which they are bound.³⁰ Where a lien or security is originally given to secure the debt for which the surety is bound, and also other debts due the same creditor for which the surety is not bound, unless there is an agreement specifically requiring that the collateral first be applied to the debt for which the surety is bound,³¹ the surety will not be subrogated to the creditor's prejudice if the collateral is needed to satisfy the debts for which the surety is not bound;³² nor can a surety be subrogated to collateral which the creditor has exhausted in application on the debt to the benefit of the surety.³³

Subrogation is limited to indemnification or reimbursement, and a surety will be subrogated to, and can enforce, the rights of the creditor only to the extent necessary to obtain reimbursement for the amount which the surety has actually paid.³⁴ If

be ordered distributed.—*Mid-West Rubber Reclaiming Co. v. C. I. R.*, C. C.A.7, 181 F.2d 157.

25. U.S.—*Alexander v. Young*, C.C.A. Kan., 65 F.2d 752.

Time of accrual of rights to which surety can be subrogated generally see supra § 47 c.

Remedies nonexistent at time of payment

The statute relieving public officers from liability for loss of funds deposited in insolvent banks, and providing for payment of claims by governmental unit, is remedial and does not create new rights as far as claimants and subrogation rights of officer's surety are concerned, and did not give officers' sureties subrogation rights against county for money paid before enactment of statute to discharge circuit court clerk's liability.—*Commercial Cas. Ins. Co. v. Board of Com'rs of Fountain County*, 19 N. E.2d 476, 215 Ind. 440.

26. U.S.—*Alexander v. Young*, C.C.A. Kan., 65 F.2d 752.

27. U.S.—*Alexander v. Young*, supra. Ill.—*Priess v. Buschbaum*, 76 N.E.2d 195, 332 Ill.App. 565. 60 C.J. p 751 note 85.

Release of security or rights as discharging surety see *Principal and Surety* §§ 197-207.

Right to subrogation where creditor fraudulently attempts to release security to third person before payment by surety see supra § 49 b.

Loss of lien

(1) Federal government's statutory lien for delinquent income taxes having been lost as against subse-

quent purchaser of property for value without notice, where notice of lien was not filed as required by statute, taxpayer's surety subrogated to government's right by payment of taxes also lost lien.—*American Surety Co. of New York v. M-B Ise Kream Co.*, Tex.Com.App., 65 S.W.2d 287.

(2) Surety required to pay corporation's taxes did not have equitable lien against assets of corporation sold to bona fide purchaser under facts.—*American Surety Co. of New York v. M-B Ise Kream Co.*, Tex.Civ. App., 33 S.W.2d 118, affirmed, Com. App., 65 S.W.2d 287.

28. Ala.—*U. S. Fidelity & Guaranty Co. v. First Nat. Bank*, 140 So. 755, 224 Ala. 375.

N.Y.—*American Sur. Co. of New York v. Town of Islip*, 48 N.Y.S.2d 749, 268 App.Div. 92. 60 C.J. p 751 note 86.

Surety on depositary's bond as not subrogated to securities given to secure excess deposits see *infra* § 59 a.

Funds due under another contract

Surety of defaulted highway contractor was not entitled to fund in highway commission's hands due for work on another road contract defaulted by principal and completed by another surety.—*Fidelity & Casualty Co. of New York v. Copenhagen Contracting Co.*, 165 S.E. 528, 159 Va. 126.

29. N.H.—*Fifield v. Mayer*, 104 A. 887, 79 N.H. 82. 60 C.J. p 752 note 87.

30. La.—*Pugh v. Sample*, 49 So. 526, 123 La. 791, 39 L.R.A., N.S., 834. 60 C.J. p 752 note 88.

Subrogation of persons advancing money to pay debt or encumbrance see supra §§ 38-42.

31. N.C.—*Tysor v. Lutterloh*, 57 N.C. 247.

32. Conn.—*Hudson Trust Co. v. Cushman*, 105 A. 344, 93 Conn. 119. 60 C.J. p 752 note 90.

33. Ga.—*Marshall v. Dixon*, 9 S.E. 167, 82 Ga. 435.

34. U.S.—*Union Indemnity Co. v. Stevens*, C.C.A.Miss., 57 F.2d 839—*American Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem*, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S. Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509. 60 C.J. p 753 note 93.

Payment of surplus after sale of mortgaged property

Surety obtaining mortgaged personal property of principal debtor under right of subrogation must sell property and pay over to principal debtor surplus over amount necessary to reimburse surety for his part payment of mortgage indebtedness.—*Bradley v. Bentley*, 163 So. 351, 231 Ala. 28.

Satisfaction of judgment for less than amount thereof

A surety, who satisfied judgment obtained on surety bond for an amount less than judgment and obtained assignment of judgment, stood in position of judgment creditor except that surety's recovery by execution on judgment was limited to amount paid by surety with interest

a surety has been fully reimbursed he will not be subrogated.³⁵ As against a cosurety the paying surety will be subrogated only in the amount which the cosurety is equitably bound to contribute.³⁶

Recovery on instrument evidencing debt. A surety on a bill or note, who brings suit on the instrument with respect to which he has been subrogated to the creditor's rights, may recover attorneys' fees provided for in the instrument,³⁷ although the surety has paid the debt without suit so that he has not been compelled to pay attorneys' fees to the creditor;³⁸ and he is entitled to the benefit of a provision for the waiver of certain procedure by the maker.³⁹ According to some cases the surety can recover the rate of interest stipulated in the note on the amount he has been compelled to pay;⁴⁰ but there is authority for limiting the surety's recovery to legal interest only if the amount stipulated in the instrument is higher.⁴¹

§ 53. — Assignment and Transfer of Surety's Rights

Rights which a surety has acquired by way of subrogation are assignable by him, and may pass to his personal representatives or to lien creditors or transferees of the surety's property.

Rights which a surety has acquired by way of subrogation are assignable by him;⁴² and they may pass to his personal representatives,⁴³ or to his lien creditors whose rights are affected by the enforcement of the debt against the property of the surety,⁴⁴ or to a transferee of the surety's property

who, in order to prevent it from being taken in satisfaction of the debt, is compelled to pay such debt.⁴⁵

§ 54. — Rights and Remedies to Which Subrogated

- a. In general
- b. Debt itself and evidences and incidents thereof
- c. Collateral securities generally
- d. Rights and remedies given by law or obtained by legal proceedings
- e. Rights and remedies against third persons

a. In General

A surety's right to be subrogated to all rights and remedies of the creditor is not limited to judgments. It is available in the distribution of funds in control of the court, and includes rights and remedies of which the surety was ignorant at the time he entered into the contract of suretyship as well as rights acquired by the creditor subsequent to such time, and rights acquired under or arising out of the contract secured.

The paying surety is favored in the law, and his right to be subrogated to all rights and remedies of the creditor is not limited to judgments.⁴⁶ The right is available in the distribution of funds in control of the court;⁴⁷ and it includes rights and remedies of which the surety was ignorant at the time the contract of suretyship was entered into,⁴⁸ or rights and remedies which have been given to, or acquired by, the creditor subsequent to such time.⁴⁹

and costs.—*Painter v. Berglund*, 87 P.2d 360, 31 Cal.App.2d 63.

Necessary expenditures

Right of surety of building contractor to be subrogated to rights which obligee under bond had to funds in hands of contractee, earned by contractor before default, is limited to reimbursement for necessary expenditures in completing abandoned contract.—*Glens Falls Indemnity Co. v. American Awning & Tent Co.*, 180 A. 367, 55 R.I. 284, reargument denied 181 A. 297, 55 R.I. 308.

35. Iowa.—*Culbertson v. Salinger*, 108 N.W. 454, 131 Iowa 307. 60 C.J. p 753 note 94.

36. Mass.—*New Bedford Sav. Inst. v. Hathaway*, 134 Mass. 69, 45 Am. R. 289. 60 C.J. p 753 note 95.

37. Tex.—*Carpenter v. Minter*, 12 S.W. 180, 72 Tex. 370. 60 C.J. p 753 note 97.

Subrogation to debt and evidences thereof see *infra* § 54 b.

38. Tex.—*Carpenter v. Minter*, 12 S.W. 180, 72 Tex. 370—*Beville v. Boyd*, 41 S.W. 670, 42 S.W. 318, 16 Tex.Civ.App. 491.

39. Ind.—*Josselyn v. Edwards*, 57 Ind. 212.

40. U.S.—*Cooper v. Jewett, S.D.*, 233 F. 618, 147 C.C.A. 426. 60 C.J. p 753 note 1.

41. Cal.—*Waldrup v. Black*, 16 P. 226, 74 Cal. 409.

42. Cal.—*San Francisco Sav. Union v. Long*, 55 P. 708, 123 Cal. 107. 60 C.J. p 753 note 4.

Indemnitor of surety as entitled to rights of surety see *infra* § 62.
Surety of surety as entitled to rights of surety see *infra* § 59 b.

43. Vt.—*Wilder's Ex'x v. Wilder*, 72 A. 203, 82 Vt. 123. 60 C.J. p 753 note 5.

44. Pa.—*Neff v. Miller*, 8 Pa. 347. Marshaling assets by subrogation of one creditor to rights of other creditor having two funds see *Marshaling Assets and Securities* § 21.

45. Tex.—*Darrow v. Summerhill*, 58 S.W. 158, 24 Tex.Civ.App. 208.

46. Pa.—*Lit Bros., to Use of Kaplan, v. Goodman*, 18 A.2d 519, 144 Pa. Super. 43.

47. Pa.—*Lit Bros., to Use of Kaplan, v. Goodman*, *supra*.

48. Kan.—*Blitz v. Metzger*, 241 P. 259, 119 Kan. 760, rehearing denied 245 P. 161, 120 Kan. 555. 60 C.J. p 754 note 8.

49. N.Y.—*Havens v. Willis*, 3 N.E. 313, 100 N.Y. 482. 60 C.J. p 754 note 9.

Rights acquired under or arising out of contract secured. A surety, bound for the performance of a contract, who has been compelled to make good the defaults of his principal, will in general be subrogated to all rights which the creditor has under the terms of the contract⁵⁰ or has acquired by virtue thereof.⁵¹

b. Debt Itself and Evidences and Incidents Thereof

The rule widely accepted in America is that the surety's payment of the debt is regarded in equity as a purchase by the surety, and operates as an equitable assignment to him of the debt and all its evidences and incidents, so that he may enforce it to the extent necessary to obtain reimbursement from the principal and contribution from a cosurety.

It is the widely accepted American rule that, no matter what the effect of payment at law, it is, in equity, by virtue of the doctrine of subrogation, to be regarded as a purchase by the surety, and op-

erating as an equitable assignment to him of the debt and all its evidences and incidents, so that he may enforce it to the extent necessary to obtain reimbursement from the principal,⁵² or contribution from a cosurety,⁵³ although the English rule, refusing subrogation to the debt and dependent rights extinguished at law by payment, has apparently been followed in some jurisdictions, in this country,⁵⁴ and has created difficulties in a number of American states.⁵⁵

c. Collateral Securities Generally

A surety will be subrogated to any collateral security which has been given the creditor by the principal or a cosurety to secure payment of the debt for which the surety is bound.

A surety will, in general, be subrogated to any collateral security which has been given the creditor by the principal,⁵⁶ or which has been given the

50. Mich.—Myres v. Yaple, 27 N.W. 536, 60 Mich. 339.
Minn.—Torp v. Gulseth, 33 N.W. 550, 37 Minn. 135.

51. Mich.—Fraser v. Fleming, 157 N.W. 269, 190 Mich. 238.
60 C.J. p 759 note 38.

52. Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

Mo.—In re Phillips' Estate, 211 S.W.2d 728, 357 Mo. 947—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.

Tenn.—Corpus Juris cited in Hunt v. Hoppe, 124 S.W.2d 306, 308, 22 Tenn.App. 540.

Va.—Etna Casualty & Surety Co. v. Whaley, 3 S.E.2d 395, 178 Va. 11.
60 C.J. p 755 note 17.

Assignment by creditor see supra § 50.

As to bill or note paid by guarantor or surety see infra § 59 c.

Payment as discharging debt generally see Payment § 38.

Payment by surety as causing assignment by operation of law generally see supra § 50.

Recovery of interest and attorney's fees where surety is suing principal on instrument to which he has been subrogated see supra § 52.

Relation somewhat analogous to a constructive trust arises in favor of the guarantor or surety paying debt of principal, under doctrine of subrogation.—Leiter v. Carpenter, 22 A.2d 393, 26 Del.Ch. 85.

Extinguishment of debt as giving rise to subrogation right

Surety's right of subrogation is not lost because debt of principal is

extinguished by surety's payment, but it is because of such extinguishment that right of subrogation arises.—Commonwealth ex rel. Schnader v. National Sur. Co., 37 A.2d 753, 349 Pa. 599.

Subrogation to rights at time of payment

The surety is subrogated to all rights and remedies which were possessed by the creditor at the time of payment rather than to such as remain thereafter.—Sublett v. McKinney, 19 Tex. 438—60 C.J. p 757 note 19.

Judgment

(1) Surety paying judgment may seek subrogation in equity.

Cal.—Corpus Juris quoted in Tompkins v. Powers, 289 P. 685, 687, 106 Cal.App. 464.

Idaho.—Agren v. Staker, 267 P. 460, 46 Idaho 36.

Pa.—Grant v. Grant, Com.Pl., 20 Erie Co. 244—General State Authority to Use of v. Anthony, Com.Pl., 19 Leh. L.J. 116.

S.D.—In re Petersen's Estate, 295 N.W. 494, 67 S.D. 540.

60 C.J. p 755 note 17—34 C.J. p 690 note 71.

(2) Even though judgment is satisfied of record, surety paying it will be subrogated.—City Nat. Bank of Wichita Falls, Tex., now for Use of Newhams v. Atkinson, 175 A. 507, 316 Pa. 526.

53. Minn.—Felton v. Bissel, 25 Minn. 15.

60 C.J. p 757 note 18.

54. N.C.—Stewart v. Parker, 35 S.E.2d 615, 225 N.C. 551—Saleed v.

Abeyounis, 9 S.E.2d 399, 217 N.C. 644.

60 C.J. p 754 notes 10–15.

55. Tex.—Fox v. Kroeger, 35 S.W.2d 679, 119 Tex. 511.

60 C.J. p 755 note 16.

56. U.S.—Allen v. See, C.A.Colo., 196 F.2d 608—Prudence Realization Corp. v. Prudence-Bonds Corp., C.A.N.Y., 189 F.2d 931.

Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145—Johnson v. Mortgage Guarantee Co., 4 P.2d 208, 117 Cal. App. 416.

Colo.—Cobbey v. Peterson, 3 P.2d 298, 89 Colo. 350.

Conn.—Spitz v. Century Indemnity Co., 28 A.2d 874, 129 Conn. 396.

Ill.—Holyoke v. Continental Ill. Nat. Bank & Trust Co., 104 N.E.2d 838, 346 Ill.App. 284.

Neb.—Larson v. Bumann, 252 N.W. 614, 126 Neb. 85.

N.J.—Steneck Trust Co. v. Steneck Club, 169 A. 341, 12 N.J.Misc. 30.

Ohio.—City of Toledo v. Fidelity & Deposit Co. of Maryland, 187 N.E. 790, 46 Ohio App. 97.

Pa.—Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 12 A.2d 925, 338 Pa. 389.

—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—Double Dollar Building & Loan Ass'n v. Kushin, 159 A. 39, 306 Pa. 121—Grant v. Grant, Com.Pl., 20 Erie Co. 244.

60 C.J. p 757 note 21—14a C.J. p 697 notes 42, 43.

As against whom surety may be subrogated to and enforce securities of creditor generally see infra § 55. Collateral security in form of subsequent or independent surety see infra § 56.

creditor by a cosurety,⁵⁷ to secure payment of the debt for which the surety is bound.

Vendors' liens. A surety for the purchase price of land will be subrogated to an express vendor's lien reserved in the deed to the vendee,⁵⁸ or to a vendor's lien existing because of the retention of legal title until the entire contract price has been paid.⁵⁹ While there are a number of cases which might seem to suggest that a surety will be subrogated even to an implied vendor's lien given to a vendor who has parted with legal title,⁶⁰ it has been held that, since the taking of a surety for the purchase money operates as a waiver or extinguishment of such a lien in favor of the vendor, the surety cannot thereafter acquire such a lien by way of subrogation;⁶¹ and in some of the jurisdictions which once followed the rule that payment by a surety is an extinguishment so that he cannot be subrogated to the debt itself, or incidents depending thereon, as discussed supra subdivision b of this section, it seems to have been held that an implied vendor's or grantor's lien is an incident extinguished by payment, to which a surety is not entitled to be subrogated.⁶²

Collateral given by third persons. It has been

said that a surety will not be subrogated to collateral security or indemnity which has been furnished the creditor by a third person or stranger,⁶³ but a surety will be subrogated to the creditor's rights against means of payment provided by a third person,⁶⁴ and a surety will be subrogated to security given by a third person to the principal to secure performance of the former's promise to the principal to assume and pay the debt for which the surety is bound,⁶⁵ or to securities given by a purchaser to the creditor to secure payment for purchased property previously belonging to the principal, but sold by the creditor on execution, under a judgment obtained against the principal for the debt on which the surety is bound.⁶⁶

d. Rights and Remedies Given by Law or Obtained by Legal Proceedings

- (1) In general
- (2) Priorities and special privileges and remedies

(1) In General

A surety will be subrogated to all legal rights and remedies available to the creditor to obtain payment of the debt, and to any rights which the creditor has ac-

Necessity that debt be fully satisfied before surety is entitled to securities see supra § 48 a (3).

Securities for other debts see supra § 52.

Wrongful discharge or release of securities by creditor see supra § 49.

Chattel mortgage

(1) In general.

Ark.—Holt v. Gregory, 244 S.W.2d 951, 219 Ark. 798.

Tenn.—Davis v. Arnett, 177 S.W.2d 29, 27 Tenn.App. 1.

60 C.J. p 757 note 21 [b].

(2) Fact that mortgage was marked "paid" and that record of mortgage was marked "satisfied" did not affect surety's right of subrogation against primary debtor.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

(3) Fact that value of mules and wagon mortgaged by tenant exceeded value of landlord's share of cotton crop which was applied by bank toward payment of mortgage indebtedness did not prevent landlord, as tenant's surety, from recovering mules and wagon in detinue action against tenant, under right of subrogation.—Bradley v. Bentley, supra.

Record satisfaction of mortgage

Where complainant's intestate as surety on note secured by real estate

mortgage paid the indebtedness and was subrogated to rights and remedies of mortgagee, record satisfaction of mortgage made by one acting under power of attorney from mortgagee could not defeat rights of complainant.—McGlaughn v. Pearman, 18 So.2d 80, 245 Ala. 524.

Debt merged with judgment

The merging of indebtedness evidenced by mortgage notes with judgment on mortgage debt did not change nature of indebtedness, but mortgage continued to secure mortgage debt and remained as security for one in position of surety who was compelled to pay the debt.—Priess v. Buchsbaum, 76 N.E.2d 195, 332 Ill. App. 565.

Legal and equitable title to collateral security vested in surety on surety's payment of debt.—McGlaughn v. Pearman, 18 So.2d 80, 245 Ala. 524.

57. Ala.—Fawcetts v. Kimmey, 33 Ala. 261.

Mass.—North Ave. Sav. Bank v. Hayes, 74 N.E. 311, 188 Mass. 135.

58. U.S.—O'Neal v. Stuart, C.C.A.

Tenn., 281 F. 715.

60 C.J. p 758 note 24.

59. Mo.—Fulkerson v. Brownlee, 69 Mo. 371.

60 C.J. p 758 note 25.

60. Ind.—Ballew v. Roler, 24 N.E. 976, 124 Ind. 557, 9 L.R.A. 481.

60 C.J. p 758 note 26.

61. N.J.—Knickerbocker Trust Co. v. Carteret Steel Co., 32 A. 146, 79 N.J.Eq. 501.

60 C.J. p 758 note 28.

Subrogation as to rights which have been released or extinguished generally see supra § 52.

Waiver of vendor's lien by taking of note or bond with surety see the C.J.S. title Vendor and Purchaser § 411, also 66 C.J. p 1267 note 49 et seq.

62. Ala.—McNeill v. McNeill, 36 Ala. 109, 76 Am.D. 320.

60 C.J. p 758 note 30.

63. S.D.—Western Surety Co. v. Walter, 182 N.W. 635, 44 S.D. 112, 24 A.L.R. 1519.

60 C.J. p 759 note 32.

Subrogation to creditor's rights against third persons generally see infra subdivision e of this section.

64. N.C.—Walker v. Crowder, 37 N. C. 478.

65. La.—Scott v. Featherston, 5 La. Ann. 306.

66. N.Y.—Ottman v. Moak, 3 Sandf. Ch. 431.

quired by the pursuit of such remedies, as well as to statutory and common-law liens which exist in favor of the creditor to secure payment of the debt.

A surety will, in general, be subrogated to all legal rights and remedies available to the creditor, to obtain payment of the debt,⁶⁷ and to any rights which the creditor has acquired by the pursuit of such remedies.⁶⁸ Thus, where a surety pays a judgment rendered against the principal and surety, the surety is entitled to proceed in the name of the original judgment plaintiff to enforce collection of the judgment in any way in which such plaintiff could have proceeded.⁶⁹

Liens. Sureties will generally be subrogated to any statutory⁷⁰ or common-law⁷¹ lien which exists in favor of the creditor to secure payment of the debt.

(2) Priorities and Special Privileges and Remedies

Generally a surety who has paid the debt will be subrogated to any right of priority, special privilege, or remedy which the law accords to the debt, or in connection with its enforcement because of the character of the debt or the character or status of the creditor.

The generally accepted rule seems to be that a surety who has paid the debt will be subrogated to such right of priority, special privilege, or remedy where the law accords a right of priority to the debt,⁷² or some particular remedy or privilege in connection with its enforcement,⁷³ because of the character of the debt⁷⁴ or the character or status of the creditor,⁷⁵ even as against a cosurety or his estate.⁷⁶ Thus, a surety for a debt owing to a state⁷⁷ or the United States⁷⁸ will usually be sub-

67. U.S.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—*Corpus Juris* cited in U. S. v. Roanoke Motor Co., D.C.Va., 8 F. Supp. 228, 230.

60 C.J. p 759 note 40.

Right of action on debt itself see supra subdivision b of this section. Specific legal rights and remedies to which particular classes of sureties are subrogated see infra §§ 59–61. Subrogation to creditor's right to prove claim against bankrupt estate of principal see Bankruptcy § 397.

Surety barred from proving claim as preferred creditor where creditor has received preference see Bankruptcy § 388 b.

68. Ala.—Watkins v. Maryland Casualty Co., 33 So.2d 346, 250 Ala. 84. 60 C.J. p 759 note 41.

Executions

(1) A surety who pays an execution may be subrogated to rights of creditor provided it is made to appear that the execution is intended to be used for his benefit.—Clemens v. Prout, 3 Stew. & P., Ala., 345—60 C. J. p 759 note 41 [c].

(2) A surety who has paid only a part of the amount due cannot invoke the doctrine of subrogation to control the execution so as to reimburse himself.—Cherry v. Singleton, 66 Ga. 206.

69. Ala.—Watkins v. Maryland Casualty Co., 33 So.2d 346, 250 Ala. 84. 60 C.J. p 759 note 41.

70. Minn.—Benson v. Saffert-Gugisberg Cement Const. Co., 201 N.W. 424, 161 Minn. 269.

60 C.J. p 760 note 43.

Collateral securities generally see supra subdivision c of this section.

Tax collector's sureties subrogated to statutory lien see infra § 60 a.

Vendor's lien see supra subdivision c of this section.

71. Ky.—Barker v. Illinois Surety Co., 184 S.W. 377, 169 Ky. 441.

60 C.J. p 760 note 44.

72. U.S.—In re Charles Nelson Co., D.C.Cal., 29 F.Supp. 56—T. H. Mastin & Co. v. Pickering Lumber Co., D.C.Cal., 2 F.Supp. 605.

Ark.—*Corpus Juris* quoted in Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York, 121 S.W.2d 890, 892, 197 Ark. 187.

N.Y.—In re Harris' Estate, 293 N.Y. S. 250, 161 Misc. 793.

Or.—In re Liquidation of Bank of Woodburn, 42 P.2d 740, 149 Or. 649.

60 C.J. p 761 note 48.

73. U.S.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Salmon v. State of Alabama for Use and Benefit of U. S. Fidelity & Guaranty Co., C.C.A. Ala., 81 F.2d 845.

Ohio.—Fidelity & Casualty Co. of New York v. Niles Bank Co., Com. Pl., 70 N.E.2d 229, affirmed 71 N.E. 2d 742, 79 Ohio App. 15.

60 C.J. p 761 note 49.

74. U.S.—Salmon v. State of Alabama for Use and Benefit of U. S. Fidelity & Guaranty Co., C.C.A. Ala., 81 F.2d 845.

Fla.—Cuesta, Rey & Co. v. Newson, 136 So. 551, 102 Fla. 853.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

60 C.J. p 760 note 46.

75. U.S.—Salmon v. State of Alabama for Use and Benefit of U. S.

Fidelity & Guaranty Co., C.C.A. Ala., 81 F.2d 845.

Or.—In re Liquidation of Bank of Woodburn, 42 P.2d 740, 149 Or. 649.

60 C.J. p 761 note 47. Sureties for depositories of public funds as entitled to prior payment by subrogation see infra § 59 a.

76. Ark.—*Corpus Juris* quoted in Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York, 121 S.W.2d 890, 892, 197 Ark. 187.

60 C.J. p 762 note 50.

77. U.S.—Salmon v. State of Alabama for Use and Benefit of U. S. Fidelity & Guaranty Co., C.C.A. Ala., 81 F.2d 845.

Ark.—*Corpus Juris* quoted in Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York, 121 S.W.2d 890, 892, 197 Ark. 187.

Fla.—Cuesta, Rey & Co. v. Newson, 136 So. 551, 102 Fla. 853.

Ill.—People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 307 Ill.App. 464.

Ky.—Owens v. Maryland Casualty Co., 141 S.W.2d 867, 283 Ky. 462.

N.Y.—New Amsterdam Casualty Co. v. McMahon, 93 N.Y.S.2d 32, 196 Misc. 746—In re Harris' Estate, 293 N.Y.S. 250, 161 Misc. 793.

W.Va.—State ex rel. Doddridge County Court v. Doddridge County Bank, 182 S.E. 884, 116 W.Va. 683.

60 C.J. p 762 note 51.

78. U.S.—Barnett v. American Surety Co. of New York, C.C.A. Okl., 77 F.2d 225—Standard Accident Ins. Co. v. U. S., Ct.Cl., 97 F.Supp. 829—American Tobacco Co. v. South Carolina Nat. Bank, D.C.S.C., 15 F. Supp. 215—*Corpus Juris* cited in U. S. v. Roanoke Motor Co., D.C. Va., 8 F.Supp. 228, 230—American Surety Co. of New York v. Carbon Timber Co., C.C.A. Wyo., 263 F. 295.

rogated to the sovereign right to have prior payment from the estate of the principal. However, a surety's right of subrogation to the priority of the United States cannot operate contrary to the interests of the United States,⁷⁹ and there are a number of cases establishing the view that a state's prerogative right of preference or priority is not a right which will pass to a surety by way of subrogation.⁸⁰ Furthermore, a claim of priority may be untenable under the controlling statutes,⁸¹ and such a claim will not be allowed where it would be inequitable to allow it.⁸² Under a statute providing that, when the principal in any bond given to the United States is insolvent and the surety pays the money due on the bond, he shall have such priority as is given to the United States, the right of the surety thereunder exists only where the facts fall strictly within the provisions of the statute.⁸³ Ap-

parently a surety subrogated to a priority can claim priority only with respect to the amount actually paid and not for interest accruing after the payment.⁸⁴

e. Rights and Remedies against Third Persons

A surety may become subrogated to the rights and remedies of the creditor against a third person if the right of the surety is superior to the equities of the one against whom the right is sought to be enforced.

A surety may become subrogated to the civil⁸⁵ rights and remedies of the creditor against a third person,⁸⁶ such as a third person, who as to the principal is primarily liable for the debt or default which the surety has been compelled to satisfy,⁸⁷ or who, although not liable to the principal, should equitably be regarded as primarily liable as to the surety;⁸⁸ but, with respect to the latter, subrogation

Fla.—Cuesta, Rey & Co. v. Newson, 136 So. 551, 102 Fla. 853.

Neb.—State v. Thurston State Bank, 237 N.W. 293, 121 Neb. 407.

Or.—In re Liquidation of Bank of Woodburn, 42 P.2d 740, 149 Or. 649.

Pa.—In re Harr, 179 A. 725, 319 Pa. 193.

60 C.J. p 762 note 52.

79. U.S.—Standard Accident Ins. Co. v. U. S., Ct.Cl., 97 F.Supp. 829.

80. Colo.—U. S. Fidelity & Guaranty Co. v. McFerson, 241 P. 728, 78 Colo. 338.

60 C.J. p 763 note 54.

81. Ala.—Montgomery v. Wadsworth, 148 So. 419, 226 Ala. 667.

Idaho.—Commercial Casualty Ins. Co. v. Boise City Nat. Bank, 98 P.2d 637, 61 Idaho 124.

Neb.—State ex rel. Sorenson v. South Omaha State Bank, 260 N.W. 278, 128 Neb. 733.

Surety paying trustees in bankruptcy amount of their deposit in insolvent bank was held not entitled to preference over other creditors.—Hartford Accident & Indemnity Co. v. Green, 134 So. 487, 223 Ala. 96.

82. Ill.—People ex rel. Nelson v. Phillip State Bank & Trust Co., 30 N.E.2d 771, 307 Ill.App. 464.

Pa.—In re Gordon, 5 A.2d 554, 334 Pa. 317.

83. Ohio.—American Surety Co. v. Akron Sav. Bank Co., 27 Ohio Cir. Ct. 586.

65 C.J. p 1370 note 63.

84. N.Y.—People v. Metropolitan Surety Co., 161 N.Y.S. 616, 175 App. Div. 43.—U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 146 N.Y. S. 804, 161 App.Div. 429, affirmed 107 N.E. 1087, 213 N.Y. 629.

85. N.Y.—American Surety Co. of New York v. Town of Islip, 48 N.Y. S.2d 749, 268 App.Div. 92.

Criminal prosecution

(1) Fine collected from co-conspirator with town supervisor fraudulently to obtain highway money was imposed as punishment for crime, and town's right thereto under statute was entirely independent of any civil right or remedy against conspirators, so that surety on supervisor's bond, by payment of loss sustained by town, did not become entitled to proceeds of fine paid over to town.—American Surety Co. of New York v. Town of Islip, supra.

(2) Criminal prosecution and payment of fine did not affect civil liability of supervisor and co-conspirator as joint tort-feasors to compensate town for loss, or impair civil right or remedy of either the town or surety on supervisor's bond.—American Surety Co. of New York v. Town of Islip, supra.

86. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258.—American Surety Co. v. Bank of California, C. C.A.Or., 133 F.2d 160.

Minn.—National Surety Co. v. Webster Lumber Co., 244 N.W. 290, 187 Minn. 50.

Miss.—U. S. Fidelity & Guaranty Co. v. State, for Use of Merchants Bank & Trust Co., 188 So. 911, 186 Miss. 1.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

60 C.J. p 763 note 58 [b].

Against whom surety may be subrogated to rights of creditor in property of principal generally see infra § 55.

Collateral securities furnished by third persons see supra subdivision c of this section.

Subrogation of judicial sureties to creditor's rights against third persons see infra § 61.

Subrogation of surety of surety or indemnitor against original principal or one indemnified see infra § 59 b.

Subrogation of sureties for sheriff to: Beneficiary's right of action on note given sheriff by purchasers of property at judicial sale see infra § 60 a.

Creditor's rights against judgment debtor whose debt sureties have satisfied because of wrong of principal see infra § 60 a.

Owner's right of action against judgment creditor to whom property wrongfully seized is delivered by sheriff see infra § 60 a.

87. Tex.—Corpus Juris cited in Fidelity & Deposit Co. of Maryland v. Farmers & Merchants Nat. Bank of Nocona, Civ.App., 121 S.W.2d 503, 506, error dismissed. 60 C.J. p 763 note 57.

Enforcement of stockholders' liability

Guarantors on bank's bond to indemnify another bank taking over first bank's assets were entitled to be subrogated to rights of transferee bank for payments under guaranty, including the right to enforce the stockholders' liability for the satisfaction of the debt.—Scott v. Norton Hardware Co., C.C.A.Va., 54 F.2d 1047.

88. U.S.—Martin v. Federal Surety Co., C.C.A.Minn., 58 F.2d 79.

Minn.—National Surety Co. v. Webster Lumber Co., 244 N.W. 290, 187 Minn. 50.

60 C.J. p 763 note 58.

will be denied if the equities of the third person are equal or superior to those of the surety.⁸⁹

When it is sought to enforce the right of subrogation, something more must be shown than that defendant could have been compelled by the original creditor to pay the debt,⁹⁰ and the right of a surety to recover from a third person does not stand on the same footing as the right to recover from the principal.⁹¹ The right to recover from a third person is conditional on whether or not the right of the one seeking subrogation is superior to the equities of those against whom the right is sought to be enforced, in contrast to the right to recover from the principal, which is absolute.⁹² A surety will not be subrogated to the primary and payee-creditor's right of action against a third person, who, as to the surety, is also a creditor, so that the surety would have been liable to such third person had the latter been compelled to pay.⁹³

Joint debtor of principal. A surety for one joint debtor, on being compelled to pay the entire debt, will be subrogated to the creditor's rights against the other debtors.⁹⁴

Persons who have assumed and agreed to pay debt. Where a third person has agreed to assume and pay the debt, a surety for the original debtor, on being compelled to pay the debt, will be subrogated to the creditor's rights against the third person who has assumed and agreed to pay;⁹⁵ but sureties for the one who has assumed the debt will not be subrogated to the creditor's rights against the one whose debt their principal has agreed to pay.⁹⁶

Wrongdoers and tort-feasors in general. A surety is entitled to be subrogated to the rights of the original creditor against a third person whose wrongful dealings with the principal were the cause of the default.⁹⁷ There must have been either par-

89. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258—American Surety Co. of New York v. First Nat. Bank, C.C.A.Pa., 96 F.2d 813.

Tex.—Fenner v. American Surety Co. of New York, Civ.App., 97 S.W.2d 741, affirmed American Surety Co. of New York v. Fenner, 125 S.W.2d 258, 133 Tex. 37—American Surety Co. of New York v. Bache, Civ. App., 82 S.W.2d 181, error refused. 60 C.J. p 763 note 59.

Superior equities of third person

(1) The surety on federal agent's fidelity bond was not entitled, under doctrine of subrogation, to recover amount of check, drawn on United States treasury and indorsed in payee's name and cashed by such agent, from subsequent innocent indorsers receiving no benefit from transaction.—National Surety Corp. v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

(2) Where county treasurer was primarily liable to county for defalcation of deputy treasurer and plaintiff surety company, as surety on treasurer's bond, paid county that portion of shortage not paid by treasurer from proceeds of surety bond on deputy, and treasurer repaid plaintiff part of such amount and gave plaintiff a note for balance secured by mortgage on property valued in excess of amount due plaintiff, but plaintiff made no attempt to enforce collection of notes, plaintiff was not entitled to be subrogated to rights of county, if any, to recover from public accountant whose alleged negligence was responsible for the loss, it being inequitable to require the

latter person to pay the balance.—Fidelity & Deposit Co. of Maryland v. Atherton, 144 P.2d 157, 47 N.M. 443.

90. Miss.—National Surety Corp. v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

91. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258.

Miss.—National Surety Corp. v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

92. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258—American Surety Co. v. Bank of California, C.C.A.Or., 133 F.2d 160.

Miss.—National Surety Corp. v. Edwards House Co., 4 So.2d 340, 191 Miss. 884, 137 A.L.R. 697.

93. Minn.—Southern Surety Co. v. Tessum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136. 60 C.J. p 764 note 60.

94. Tex.—Taul v. Epperson, 38 Tex. 492.

60 C.J. p 764 note 61.

Subrogation to principal's right to enforce contribution see infra § 57.

95. Wash.—Corpus Juris cited in U. S. Fidelity & Guaranty Co. v. Western Seafood Co., 67 P.2d 892, 893, 190 Wash. 200.

60 C.J. p 764 note 63.

Subrogation to rights of principal see infra § 57.

Note given to pay for another's defalcations

Where father gave note to hotel to pay for sums allegedly embezzled by

son, surety on fidelity bond held by hotel, on payment to hotel of entire amount embezzled, was subrogated to hotel's rights and entitled to assignment of note.—Great American Indemnity Co. v. Berryessa, Utah, 248 P.2d 867.

Contractual relations

(1) Before debtor's surety can be subrogated to creditor's rights to recover debt, which surety was required to pay, from third person who has agreed to pay debt, such third person must have agreed with debtor or creditor to pay debt by contract on sufficient consideration.—U. S. Fidelity & Guaranty Co. v. Western Seafood Co., 67 P.2d 892, 190 Wash. 200.

(2) Surety which was required to pay state salmon catch tax imposed on packing company which had been operating fish cannery under lease was not subrogated to state's rights so as to be able to maintain action to recover payment made from subsequent lessee which had agreed with owners of cannery to pay balance of tax due, since, as far as contractual relations with state or packing company were concerned, owners and subsequent lessee were entire strangers.—U. S. Fidelity & Guaranty Co. v. Western Seafood Co., supra.

96. La.—Davis v. Carroll, 20 La. Ann. 199.

97. U.S.—Hodgins v. National Surety Corp., D.C.Wis., 41 F.Supp. 881. Cal.—Indemnity Ins. Co. of North America v. Sampson, 104 P.2d 374, 40 Cal.App.2d 119.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

participation in the original wrongful act or negligence on the part of the third party sought to be charged,⁹⁸ but it is not necessary that such negligence be culpable or gross.⁹⁹ Subrogation on behalf of a surety is never applied against an innocent person wronged by the principal's fraud.¹

Where a sheriff has become liable to the creditor because of his failure to perform his legal duties in making the debt out of the property of the principal, a surety who thereafter pays the debt will be subrogated to the creditor's right of action against the sheriff² and the sureties on his official bond.³ A surety for one of two joint tort-feasors will be subrogated to the creditor's rights against the other, to the extent of one half the debt, where the situation is such that there is a right of contribution as

between the tort-feasors.⁴ There are also cases to the effect that a surety for one tort-feasor may be subrogated to the creditor's rights against the other, even though the principal has no right of contribution against the other tort-feasor,⁵ but as to this there is some authority to the contrary.⁶

Persons receiving trust property or participating in breach of trust. When a surety for a fiduciary, or person occupying a representative or official position, has made good a default of the principal resulting from a misapplication or misappropriation of trust assets, the surety will be subrogated to the rights of the beneficiary or obligee against a third person who has received the trust property with notice or without value,⁷ or who, with knowledge, has participated in the breach of trust by assisting

N.Y.—American Surety Co. of New York v. Town of Islip, 48 N.Y.S.2d 749, 268 App.Div. 92.

Tex.—Fenner v. American Surety Co. of New York, Civ.App., 156 S.W.2d 279, error refused.

Wis.—Martineau v. Mehlberg, 267 N.W. 9, 221 Wis. 347.

Wrong compelling surety's payment
A surety is generally subrogated to the rights of the creditor against third parties whose wrongs have compelled surety to make payment.—American Surety Co. of New York v. Town of Islip, 48 N.Y.S.2d 749, 268 App.Div. 92.

98. U.S.—American Surety Co. v. Bank of California, C.C.A.Or., 133 F.2d 160—Martin v. Federal Surety Co., C.C.A.Minn., 58 F.2d 79.

Fidelity bond

(1) The doctrine of subrogation does not apply in favor of a surety company on a fidelity bond against persons who did not participate in the wrongful act of the wrongdoer.

U.S.—American Surety Co. of New York v. Lewis State Bank, C.C.A.Fla., 58 F.2d 559.

Cal.—Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 11 Cal.2d 92—J. G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 103 Cal.App.2d 767—Jones v. Bank of America Nat. Trust & Savings Ass'n, 121 P.2d 94, 49 Cal.App.2d 115.

(2) A brokers' surety which paid brokers' customers for loss sustained when brokers' office manager cashed checks payable to customers by forging their signatures could not, under doctrine of subrogation, recover from collecting bank which cashed the checks the loss sustained, since neither such bank nor the surety was a wrongdoer, and equity would not

compel the bank, admittedly an innocent party, to bear the loss.—Jones v. Bank of America Nat. Trust & Savings Ass'n, supra.

99. U.S.—Martin v. Federal Surety Co., C.C.A.Minn., 58 F.2d 79.

1. U.S.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, C.A.Tex., 172 F.2d 258—American Surety Co. of New York v. Lewis State Bank, C.C.A.Fla., 58 F.2d 559. Cal.—Meyers v. Bank of America Nat. Trust & Savings Ass'n, 77 P.2d 1084, 11 Cal.2d 92—J. G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 103 Cal.App.2d 767.

2. Md.—Merryman v. State, 5 Harr. & J. 423.

60 C.J. p 764 note 65.

3. Md.—Merryman v. State, supra. Subrogation of sheriff's sureties to creditor's rights against judgment debtor see *infra* § 60 a.

4. Pa.—Goldman v. Mitchell-Fletcher Co., 141 A. 231, 292 Pa. 354.

5. N.Y.—Kolb v. Nat. Surety Co., 68 N.E. 247, 176 N.Y. 233.

60 C.J. p 764 note 68.

6. Cal.—Adams v. White Bus Line, 195 P. 389, 184 Cal. 710.

7. U.S.—Hodgins v. National Surety Corp., D.C.Wis., 41 F.Supp. 831—Fidelity & Deposit Co. of Maryland v. Bank of Smithfield, D.C.Va., 11 F.Supp. 904.

Ark.—Corpus Juris cited in Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York, 121 S.W.2d 890, 892, 197 Ark. 187—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

Ky.—Baker v. McIntosh, 172 S.W.2d 29, 294 Ky. 527—Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use and Benefit of Nel-

son County, 60 S.W.2d 345, 249 Ky. 170.

Or.—Corpus Juris cited in American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 609, 171 Or. 287, 148 A.L.R. 926.

Tex.—New Amsterdam Casualty Co. v. First Nat. Bank, Civ.App., 134 S.W.2d 470, error dismissed, judgment correct.

Va.—Jones v. U. S. Fidelity & Guaranty Co., 182 S.E. 560, 165 Va. 349—Webb v. U. S. Fidelity & Guaranty Co., 182 S.E. 557, 165 Va. 388.

W.Va.—U. S. Fidelity & Guaranty Co. v. Hood, 7 S.E.2d 872, 122 W.Va. 157.

60 C.J. p 764 note 70—53 C.J. p 419 note 39.

Public moneys deposited to account of tax collector constituted trust fund, as regards recovery from depository by collector's sureties.—U. S. Fidelity & Guaranty Co. v. Dime Bank Title & Trust Co., D.C.Pa., 46 F.2d 823.

Receipt in payment of principal's personal tax obligations

(1) A surety on Marion County treasurer's fidelity bond was not precluded, as Marion County's subrogee, from recovering from Multnomah County and city which received Marion County's checks in payment of treasurer's personal tax obligations, on theory that neither county tax collector nor city treasurer could accept anything other than money in payment of taxes, where checks were cashed by county and city.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

(2) Nor is surety precluded from maintaining action on theory that bond also protected Multnomah County and the city and that their equities were equal or superior to

or enabling the principal to misappropriate the prop- | erty.⁸ A surety cannot follow trust funds into the

those of surety, since under statute right to sue on bond accrues to person injured by misconduct, and Multnomah County and city participating in misconduct could not claim that they were injured thereby.—*American Surety Co. of New York v. Multnomah County*, supra.

Return or repayment

(1) In action by bank teller's surety to recover from stockbrokers money abstracted by teller and represented by drafts and checks presented to brokers for purchase of stock, where all funds received by the brokers from the teller were received in bad faith, the brokers could not discharge their obligation to the bank by paying to the teller the money, or a part thereof, which they had received in bad faith from the teller, unless the teller in turn paid such amounts to the bank.—*Fenner v. American Surety Co. of New York*, Tex.Civ.App., 156 S.W.2d 279, error refused.

(2) Where it appeared that prior to time the teller began trading with the brokers he was short in his accounts with bank and where money of the teller was paid by brokers to the surety without condition or request regarding how it was to be applied, the surety had the right to apply it to the oldest indebtedness.—*Fenner v. American Surety Co. of New York*, supra.

8. U.S.—*Federal Deposit Ins. Corporation v. American Surety Co. of New York*, D.C.Ky., 39 F.Supp. 551. Ark.—*Corpus Juris* cited in *Arkansas Power & Light Co. v. Fidelity & Casualty Co. of New York*, 121 S.W.2d 890, 892, 197 Ark. 187.

Cal.—*Indemnity Ins. Co. of North America v. Sampson*, 104 P.2d 374, 40 Cal.App.2d 119.

D.C.—*Anacostia Bank v. U. S. Fidelity & Guaranty Co.*, 119 F.2d 455, 73 App.D.C. 388, 134 A.L.R. 995.

Ill.—*Fidelity & Casualty Co. of New York v. Heitman Trust Co.*, 46 N.E.2d 155, 317 Ill.App. 256.

Kan.—*Fidelity & Deposit Co. of Maryland v. Atchison, T. & S. F. Ry. Co.*, 75 P.2d 283, 147 Kan. 127. Neb.—*Webber v. Spencer*, 27 N.W.2d 824, 148 Neb. 481.

Okl.—*Corpus Juris* cited in *Fourth Nat. Bank v. Board of Com'rs of Craig County*, 95 P.2d 878, 885, 186 Okl. 102.

Tenn.—*Akers v. Gillentine*, 231 S.W.2d 369, 191 Tenn. 35.—*State ex rel. Robertson v. Bank of Granville*, 68 S.W.2d 969, 17 Tenn.App. 512.

Tex.—*Bacon v. Wright*, Civ.App., 52 S.W.2d 1111, error refused.

Va.—*Jones v. U. S. Fidelity & Guaranty Co.*, 182 S.E. 560, 165 Va. 349.

Wis.—*Martineau v. Mehlberg*, 267 N.W. 9, 221 Wis. 347. 60 C.J. p 765 note 71.

Dependent on breach of bond

As regards right of county tax collector's surety, which paid amount of judgment rendered against it representing taxes for which collector failed to account because of unlawful withdrawals, to recover from county depository, under doctrine of subrogation for depository's alleged wrongful participation in the making of the unlawful withdrawals, the rights of the surety, if any, were determinable solely by whether or not the collector breached his bond to account to the county for moneys received by him.—*Fidelity & Deposit Co. of Maryland v. Farmers & Merchants Nat. Bank of Nocona, Tex.* Civ.App., 121 S.W.2d 503, error dismissed.

Joint control agreement

As regards surety's right of subrogation, agreement between surety and guardian requiring countersigning by surety of checks, drafts, etc., drawn by guardian, and for joint control of contents of safety deposit box, did not cast on surety responsibility of investigating value and security of bonds purchased by guardian with funds of ward.—*Fidelity & Casualty Co. of New York v. Heitman Trust Co.*, 46 N.E.2d 155, 317 Ill.App. 256.

Bank

Sureties on guardian's bond were subrogated to rights of ward to claim against assets of bank for guardianship funds paid to guardian individually for his own use.—*State ex rel. Robertson v. Bank of Granville*, 68 S.W.2d 969, 17 Tenn.App. 512.

Unlawful agreement between official and depository

(1) An agreement between depository bank and tax collector that items received by collector would be deposited in a collection account and would thereafter be distributed by collector to his depository accounts being unlawful in so far as it undertook to change bank's responsibility for deposits, and not precluding bank from becoming liable to the state for permitting collector to withdraw money from collection account otherwise than by means of checks in favor of treasurers or for his compensation, collector's surety, which had reimbursed state for amount of shortage in collector's accounts, was entitled to recover from bank, as subrogee of state, the sums paid by surety to state.—*Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Waco, C.C.A.Tex.*, 100 F.2d

807, rehearing denied 101 F.2d 974, certiorari denied *Citizens Nat. Bank of Waco v. Fidelity & Deposit Co. of Maryland*, 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1509.

(2) The depository's right to ultimate recourse on county tax collector personally does not defeat right of collector's surety in such case to recover from bank sums paid by surety to make good shortage in collector's accounts.—*Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Waco, C.C.A.Tex.*, 101 F.2d 974, certiorari denied *Citizens Nat. Bank of Waco v. Fidelity & Deposit Co. of Maryland*, 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1509.

(3) Where tax collector was short in highway account at another bank and made withdrawals evidently to cover the shortage, surety company which paid shortage in collection account was not because of fact that company was also surety on highway account estopped from recovering from bank as subrogee of state, since bank by permitting such withdrawals made it possible to cover up the shortage.—*Citizens Nat. Bank of Waco, Tex. v. Fidelity & Deposit Co. of Maryland, C.C.A.Tex.*, 117 F.2d 852, certiorari denied 61 S.Ct. 947, 313 U.S. 570, 85 L.Ed. 1528.

(4) Under statute requiring depository to pay tax money deposited in it only to treasurers entitled to receive it, depository was required to know the purpose of checks drawn by county tax collector which were not made payable to treasurers, and the collector's surety had right to assume that bank would require collector to comply with the law.—*Citizens Nat. Bank of Waco, Tex. v. Fidelity & Deposit Co. of Maryland, C.C.A.Tex.*, 117 F.2d 852, certiorari denied 61 S.Ct. 947, 313 U.S. 570, 85 L.Ed. 1528.

(5) The surety was not liable for and the bank was not entitled to set off against surety's claim amount allegedly due to bank from tax collector as penalty for failure to deposit ad valorem and motor vehicle fees collected by the tax collector.—*Citizens Nat. Bank of Waco, Tex. v. Fidelity & Deposit Co. of Maryland, C.C.A.Tex.*, 117 F.2d 852, certiorari denied 61 S.Ct. 947, 313 U.S. 570, 85 L.Ed. 1528.

Proof of wrongful motive held unnecessary

Iowa.—*Randell v. Fellers*, 252 N.W. 787, 218 Iowa 1005.

Okl.—*Fourth Nat. Bank v. Board of Com'rs of Craig County*, 95 P.2d 878, 186 Okl. 102.

hands of one who is not responsible therefor even to the beneficiary or creditor.⁹

When the third person has paid value, or has received no benefit from the misappropriation, and has acted innocently, without negligence, and with constructive notice only, there are some cases which regard his equity as superior and deny subrogation to the surety, although the third person is liable to the creditor because of constructive notice or technical breach of duty.¹⁰ Other cases, however, appear to grant subrogation even in such a situation,¹¹ and, if the circumstances are such as to show negligence, or positive wrong, on the part of the third person, subrogation is quite uniformly granted against him, although there was no benefit received and no actual knowledge or intention to participate in the breach of trust.¹²

Apparently a person who participates innocently, and is the victim of an official's wrong, is a person to whom the surety is liable under a statute making the bond of an official for the benefit of any person injured by his wrongful act, and because of such

liability to the third person the surety will not be subrogated against him;¹³ but it seems that such a statute does not prevent subrogation against one who knowingly or negligently participates in an official's breach of trust.¹⁴

§ 55. — Against Whom Surety May Enforce Liens and Securities of Creditor

A surety's right to subrogation to the claim of a paid creditor may not be asserted to the detriment of innocent creditors of an insolvent cosurety, and generally not against persons acquiring the property, or interests in the property, of the debtor prior to the date of the suretyship undertaking, but a surety may generally enforce the liens and securities of the creditor on the property of the principal against persons acquiring the property or an interest therein subsequent to the contract of suretyship, although before payment.

A surety's right to subrogation to the claim of a paid creditor may not be asserted to the detriment of innocent creditors of an insolvent cosurety.¹⁵

Persons acquiring property or interest previous to suretyship. As a general rule a surety will not be

Expiration of term of office

The town collector's sureties, who had reimbursed town for collector's failure to pay excess commissions into town treasury, were not barred from recovering against bank alleged to have aided collector, on ground that town had lost its right against collector on expiration of his term of office and that collector's only duty was to pay funds to his successor, where collector had not paid money retained either to town treasurer or to his successor.—*State Bank & Trust Co. v. Commercial Trust & Savings Bank*, 21 N.E.2d 157, 300 Ill.App. 435.

9. Ala.—*Bank of Guntersville v. United States Fidelity & Guaranty Co.*, 75 So. 168, 201 Ala. 19. 60 C.J. p 765 note 72.

10. U.S.—*American Surety Co. of New York v. Waggoner Nat. Bank*, D.C.Tex., 13 F.Supp. 295, affirmed, C.C.A., *American Surety Co. of New York v. Waggoner Nat. Bank of Vernon, Tex.*, 83 F.2d 99. 60 C.J. p 765 note 73.

Depository innocently paying on forged indorsements

Subrogation will not be enforced as against a depository innocently paying out public moneys on warrants payable to fictitious payees and wrongfully indorsed by the principal.—*American Surety Co. of New York v. Lewis State Bank*, C.C.A.Fla., 58 F.2d 559.

Repayment of loan applied to payment of taxes.

Where bank's loan to sheriff was used to pay taxing units for taxes collected by sheriff and no part of loan was used for sheriff's individual use, surety on bond of sheriff who defaulted in paying over taxes collected to taxing units was not entitled to subrogation against bank whose loan was paid by sheriff from taxes collected, notwithstanding bank knew that payment was made out of taxes.—*Maryland Casualty Co. v. Walker*, 78 S.W.2d 34, 257 Ky. 397.

Innocent purchaser of trust property

(1) Where trustee misappropriated proceeds of sale of trust property, the equities of surety on trustee's bond, arising by reason of surety's obligation to make good defalcation of trustee, were not greater than those of innocent purchaser and, hence, surety was not entitled to subrogation against purchaser.—*National Casualty Co. v. Caswell & Co.*, 45 N.E.2d 698, 317 Ill.App. 66.

(2) Where purchaser of trust property made check payable to trustee individually and trustee misappropriated money which surety on trustee's bond was obliged to pay, under Uniform Fiduciary Obligations Act, failure of purchaser to add words "as trustee" to name of trustee on check did not indicate such negligence on part of purchaser as would entitle surety to subrogation

against purchaser.—*National Casualty Co. v. Caswell & Co.*, supra.

11. N.Y.—*National Surety Co. v. National City Bank of Brooklyn*, 172 N.Y.S. 413, 184 App.Div. 771. 60 C.J. p 766 note 74.

12. Okl.—*Corpus Juris* cited in *Fourth Nat. Bank v. Board of Com'rs of Craig County*, 95 P.2d 878, 885, 186 Okl. 102. 60 C.J. p 766 note 75.

13. U.S.—*American Surety Co. of New York v. Robinson*, C.C.A.Ga., 53 F.2d 22. 60 C.J. p 766 note 76.

14. Tenn.—*Dobbins v. Carroll*, 192 S.W. 166, 137 Tenn. 133.

15. U.S.—*In re Commercial Nat. Bank of Philadelphia*, D.C.Pa., 54 F.Supp. 570.

Contractor's surety's right to retained percentages as against assignees of principal see *infra* § 59 d (2).

Creditor's rights against third persons see *supra* § 54 e.

Subrogation:

Against subsequent and inferior rights of creditor himself see *supra* § 49 b.

Of depository's surety to state's right of priority against general creditors and depositors see *infra* § 59 a.

substituted to the liens and securities of the creditor where to permit him to enforce them would defeat an interest acquired and held by a third person in the property of the principal which interest, although subordinate to that of the creditor, is prior in date to the undertaking of the surety.¹⁶ Where, however, the surety becomes bound, and the creditor takes a mortgage to secure the debt, in ignorance of a prior unrecorded mortgage which the principal has previously given on the same property, the surety is entitled to be subrogated to the creditor's mortgage and to enforce his right of priority over the unrecorded mortgage,¹⁷ even though the surety receives notice of the latter mortgage shortly before he pays the debt.¹⁸

Persons acquiring interest in principal's property subsequent to suretyship. Since, to prevent its impairment by act of the principal, a surety's equity or right to be subrogated is regarded as coming into existence at the time the contract of suretyship is entered into, as discussed supra § 47 c, a surety may generally enforce the liens and securities of the creditor on the property of the principal, against persons acquiring the property, or an interest therein, subsequent to the contract of suretyship, although before payment, to the same extent as could the creditor, for as to such persons the surety is usually considered as having the superior equity.¹⁹ If the person acquiring the subsequent interest has notice of the surety's claims, as well as of the rights of the creditor, the superiority of the surety's equity is even more clear.²⁰ Exceptions are made, and

subrogation to, or enforcement of, the creditor's rights will be denied as against subsequent purchasers and encumbrancers where there are circumstances which would render it inequitable;²¹ and a surety, of course, cannot enforce a lien or security of the creditor against a subsequent purchaser or encumbrancer where the lien or security is unenforceable even by the creditor.²²

Release by surety, of indemnity given by principal, after land subject to a lien of the creditor has been sold to a third person, does not prevent the surety from being subrogated to the lien against the third person where the release has been made in ignorance, and without notice, of the equitable rights of the purchaser.²³

§ 56. — Subrogation as between Successive and Independent Sureties

- a. Successive sureties
- b. Independent sureties

a. Successive Sureties

If a subsequent surety becomes bound for the benefit of the principal alone, without the consent or agreement of the original surety, and probably to his prejudice, the first surety is entitled to subrogation against the subsequent one, and the latter is denied subrogation against the former, but the rule is otherwise where there is no prejudice to the first surety, or where the second becomes bound for the benefit, and with the concurrence, of the first surety.

If a subsequent surety becomes bound for the benefit of the principal alone, without the consent or

16. N.Y.—In re Kelley's Estate, 289 N.Y.S. 1079, 160 Misc. 421, affirmed 296 N.Y.S. 923, 251 App.Div. 847. 60 C.J. p 768 note 85.

Subrogation of subsequent sureties against prior sureties see infra § 56 a.

17. Pa.—Gossin v. Brown, 11 Pa. 527.

18. Pa.—Gossin v. Brown, supra.

19. Ind.—Peirce v. Higgins, 101 Ind. 178. 60 C.J. p 766 note 80.

20. N.D.—Farmers' State Bank of Richardton v. Stieg, 219 N.W. 776, 56 N.D. 851.

21. Tenn.—Corpus Juris quoted in Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198.

60 C.J. p 767 note 82.

Entry of satisfaction or discharge by surety

(1) If the surety himself enters a satisfaction and discharge of a recorded lien or security, he cannot thereafter assert it, by way of subrogation, against one who bona fide purchases the property from the principal after entry of the satisfaction.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198—60 C.J. p 767 note 82 [a].

(2) Where surety paid joint judgment against corporation, surety, and another on vendor's lien notes, subsequent encumbrancer of property for valuable cash consideration was not charged with constructive notice that surety, stockholder, and director of corporation intended to assert right of subrogation five months later.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198.

Payment of substantial part of purchase price

Where bank held, as collateral for testator's note, stock and life policy naming widow as beneficiary, and, pursuant to widow's guaranty, deducted amount of note from proceeds of policy, widow was held not entitled to lien on stock by subrogation to bank's rights to exclusion of party who paid substantial part of purchase price under contract with testator to purchase stock which, if applied in reduction of bank loan, would have paid the entire note, released the stock, and left the proceeds of the policy unimpaired.—In re Kelley's Estate, 289 N.Y.S. 1079, 160 Misc. 421, affirmed 296 N.Y.S. 923, 251 App.Div. 847.

22. Mo.—George v. Somerville, 54 S.W. 491, 153 Mo. 7. 60 C.J. p 767 note 83.

23. Ill.—Crawford v. Richeson, 101 Ill. 351.

Waiver by surety see supra § 51.

agreement of the original or prior surety and possibly or probably to his prejudice, the equities of the first surety are regarded as superior, so that he is entitled to subrogation against the subsequent surety,²⁴ and the latter is denied subrogation against the former.²⁵ The rule is otherwise, however, and the second surety may be subrogated against the first where there is no prejudice to the first surety,²⁶ or the second surety becomes bound for the benefit, and with the consent and concurrence, of the first surety;²⁷ and the first surety is not entitled to be subrogated against the second.²⁸ Although there has been no consent or concurrence of the first surety, it seems, according to some cases,

that the superior equities are with the subsequent surety if he enters into his obligation in reliance on the security afforded by the first surety.²⁹

b. Independent Sureties

Generally the doctrine of subrogation will not be applied so as to permit a surety for one independent and distinct obligation to enforce the liability of a surety for an entirely different obligation, although the situation is such that each of the sureties would be liable for the same loss.

While one surety may enforce the liability of another surety bound for an obligation with respect to which the first surety is subrogated to the rights of the creditor,³⁰ and a surety will be subrogated to

24. Ind.—Fidelity & Deposit Co. of Maryland v. Sluss, 15 N.E.2d 372, 214 Ind. 258, 117 A.L.R. 575.

Mo.—Fidelity & Deposit Co. of Maryland v. Mullins, 67 S.W.2d 541, 228 Mo.App. 454.

36 C.J. p 679 note 85—54 C.J. p 643 note 66—60 C.J. p 768 note 89.

Subrogation of subsequent surety to creditor's securities as against one previously acquiring an equity see supra § 55.

Original surety against surety on judicial bond

(1) Where there is a judgment or decree against a principal debtor and his surety, and a third party, at the instance of the principal and for his sole benefit, without the consent or agreement of the original or prior surety and probably or possibly to his prejudice, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment or decree and thus prejudice the rights of the first surety, the equities of the prior surety are superior, if the prior surety, by virtue of his undertaking, has to pay the judgment or any other obligation for the payment of which the surety on the suspending or supersedeas bond is bound under his bond; and the prior surety will be subrogated to all the rights of the creditor under the suspending or supersedeas bond against the surety thereon.

Tex.—Corpus Juris quoted in Campbell v. Land, Tex.Civ.App., 69 S.W.2d 554, 556.

Va.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.

60 C.J. p 768 note 89 [a].

(2) This doctrine, however, has no application to extend the scope of the liability of the surety on a suspending or supersedeas bond beyond the scope of the terms of the bond. It subrogates the prior surety to such

rights, and only such rights, as the creditor has against the surety on the suspending or supersedeas bond. It does not enlarge those rights.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, supra.

(3) Thus, sureties on suspending and supersedeas bonds given on suspending order and supersedeas following order for officer's removal were not liable to surety on officer's original bond for reimbursement of payments for officer's defalcations prior to order for removal.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, supra.

25. U.S.—U. S. v. National Surety Co., D.C.R.I., 298 F. 536.
60 C.J. p 769 note 90.

Surety on supersedeas bond

(1) Surety on supersedeas bond will not, on paying judgment rendered against principal, be subrogated to creditors' remedies against sureties on prior bond of same debtor, in absence of special circumstances rendering his equities equal or superior to theirs.—King v. Hartford Accident & Indemnity Co., 24 P.2d 906, 133 Cal.App. 711.

(2) Thus, sureties on supersedeas bond who were compelled to pay judgment on affirmation were not entitled to recover from surety on release of attachment bond, when stay bond was executed solely at request of judgment debtor without knowledge or consent of surety on prior bond.—King v. Hartford Accident & Indemnity Co., supra—60 C.J. p 769 note 90 [b].

26. Va.—Brown v. Glascock, 1 Rob. 486, 40 Va. 486.
60 C.J. p 769 note 91.

27. Mo.—Fidelity & Deposit Co. of Maryland v. Mullins, 67 S.W.2d 541, 228 Mo.App. 454.
60 C.J. p 770 note 92.

28. Mo.—Fidelity & Deposit Co. of Maryland v. Mullins, supra.

Surety on bond given on appeal from justice court to circuit court by defendant with whom surety joined on appeal to court of appeals, which dismissed appeal, following which surety paid amount of judgment rendered against defendant, who gave bond of another surety on appeal to court of appeals, was not entitled to be subrogated to rights of judgment creditor as against such second surety.—Fidelity & Deposit Co. of Maryland v. Mullins, supra.

29. La.—Howe v. Frazer, 2 Rob. 424.
60 C.J. p 770 note 93.

30. Va.—Hanby v. Henritze, 7 S.E. 204, 85 Va. 177.

60 C.J. p 770 note 95.
Subrogation of sheriff's surety to rights of principal on indemnity bond see infra § 60 a.

Sureties of executor of different estates

Wis.—Fidelity & Casualty Co. of New York v. Maryland Casualty Co., 268 N.W. 226, 222 Wis. 174.

Official surety and sureties for depository

(1) Equities between depository sureties and surety on county treasurer's official bond after bank in which treasurer deposited county funds closed were not equal, and depository sureties had a more primary duty, as regards right of surety on treasurer's official bond to be subrogated against sureties on depository bond; and the surety on treasurer's official bond who was required to pay loss became subrogated to treasurer's right against sureties on depository bond, and could recover against depository sureties any balance owing on depository bond after county was paid in full, notwithstanding official surety knew that treasurer's deposit was illegal or that

the principal's rights against the surety of one who is bound to indemnify the principal,³¹ generally, it seems, the doctrine of subrogation will not be applied so as to permit a surety, for one independent and distinct obligation, to enforce the liability of a surety for an entirely different obligation, although the situation is such that each of the sureties would be liable for the same loss.³² It has been held that, if independent sureties bound to the same creditor, but for different obligations, are both compelled to help make good the same loss, neither surety will be subrogated to the creditor's rights to the ex-

clusion of the other, but both will be subrogated in the proportion in which they discharged the loss.³³

§ 57. Subrogation to Rights of Principal

A surety is subrogated to such rights and remedies as the principal has in connection with the debt, which will afford him a means of reimbursement.

A surety is subrogated to such rights and remedies as the principal has in connection with the debt, which will afford him a means of reimbursement;³⁴ and this right exists independently of an

treasurer and depository sureties participated in illegal transaction, since the surety on official bond was not required to force treasurer to take funds out of bank where they illegally reposed.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.

(2) As regards right of subrogation, county treasurer was creditor of depository bank, whether or not statute exempts him from liability in event bank failed to pay, if bank furnished required surety bond or collateral security, and county was creditor of county treasurer who wrongfully deposited county funds in bank, notwithstanding county could recoup its losses when bank closed from bank, depository sureties, and surety on treasurer's official bond.—Beaver County v. Home Indemnity Co., *supra*.

(3) Where township treasurer's surety wrote treasurer that surety and reinsurers would not continue on his bond unless treasurer protected township deposit otherwise than by accepting bank directors' depository bond, and that treasurer should obtain security and take other steps, surety did not repudiate depository bond so as to bar its action thereon.—Standard Accident Ins. Co. v. Mueller, 9 N.E.2d 361, 291 Ill.App. 56.

(4) Where depository bond ran to treasurer, attempted revocation, if any, of such bond by treasurer's official surety before bank failed and surety became liable could not bar surety's action on depository bond after bank's failure and assignment of bond, since surety had no prior right in bond.—Standard Accident Ins. Co. v. Mueller, *supra*.

(5) Negligence of treasurer in taking collateral security cannot be predicated on fact that deposit was greater than treasurer's books showed, or that collateral securities taken were not worth par, which circumstances were due to fraud and misrepresentation of bank and hence not available to sureties.—National Surety Co. v. Salt Lake County, C.C.

A.Utah, 5 F.2d 34, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421.

31. Ohio.—Maryland Casualty Co. v. Gough, 51 N.E.2d 216, 72 Ohio App. 260.
60 C.J. p 770 note 96.

32. N.Y.—Katz v. Mendelsohn, 184 N.E. 45, 260 N.Y. 434.
60 C.J. p 770 note 97.

Assignment of lease

Surety on bond for assignee which assumed obligations of leasehold, assigned with consent of lessor which reserved all rights against original lessee, was not subrogated to lessor's rights against lessee by paying defaulted rent and taxes under bond, since lessee was in position of surety liable in first instance to lessor and not to assignee, and surety, by paying assignee's obligations, acquired no claim against lessee.—National Surety Co. v. Trilby Realty Corp., 293 N.Y.S. 219, 249 App.Div. 566.

33. Wash.—Minshall v. American Surety Co. of New York, 252 P. 147, 141 Wash. 440.
60 C.J. p 770 note 98.

34. U.S.—Danais v. M. De Matteo Const. Co., D.C.N.H., 102 F.Supp. 874—Massachusetts Bonding & Ins. Co. v. Fago Const. Corp., D.C.Md., 82 F.Supp. 619—National Sur. Corp. v. Allen-Codell Co., D.C.Ky., 70 F.Supp. 189—**Corpus Juris cited in** Maryland Casualty Co. v. U. S., Ct. Cl., 32 F.Supp. 746, 754—U. S. Fidelity & Guaranty Co. v. U. S., 92 Ct.Cl. 144.

Ala.—**Corpus Juris cited in** Dirago v. Taylor, 150 So. 150, 152, 227 Ala. 271.

Cal.—San Diego County v. Croghan, 38 P.2d 474, 2 Cal.App.2d 494—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.

D.C.—Morgenthau v. Fidelity & Deposit Co. of Maryland, 94 F.2d 632, 68 App.D.C. 163.

Ill.—Maxwell, for Use of Maxwell v.

Nieft, 40 N.E.2d 554, 313 Ill.App. 354.

La.—U. S. Fidelity & Guaranty Co. v. Murphy, App., 163 So. 724.

Miss.—U. S. Fidelity & Guaranty Co. v. State, for Use of Merchants Bank & Trust Co., 188 So. 911, 186 Miss. 1.

60 C.J. p 771 note 1.

Appeal by surety from judgment against principal see Appeal and Error § 199.

Counterclaim and set-off by surety of principal's claim see Principal and Surety § 260.

Defenses of principal available to surety see Principal and Surety § 255.

Subrogation of:

Contractor's sureties to rights under contract see *infra* § 59 d.

Fiduciary's surety to principal's right to be reimbursed from estate of beneficiary see *infra* § 60 b.

Sheriff's sureties to rights of sheriff see *infra* § 60 a.

Surety of surety to rights of original surety see *infra* § 59 b.

Surety to rights of creditor see *supra* §§ 47-56.

Principal's claim against creditor

Surety paying state's deposit in insolvent national bank was entitled to state auditor's warrant held by bank, and did not waive right of subrogation by filing proof of claim for only amount of deposit as required by receiver.—Union Indemnity Co. v. Stevens, C.C.A.Miss., 57 F.2d 839.

Equitable principles as basis of right

Statute concerning substantive right of contribution is not a source of right of subrogation, and right of indemnitor to be subrogated to rights and remedies of his principal whose liability he has satisfied stands entirely on principles of equity.—Silver Fleet Motor Exp. v. Zody, D.C.Ky., 43 F.Supp. 459.

Collateral security

On payment of the principal debt by a surety, surety is entitled in equity to be subrogated to principal's

assignment.³⁵ Since a statute providing for subrogation to the rights of the creditor only is but declaratory of the common law,³⁶ such a statute does not preclude a surety from being subrogated to the rights and remedies of his principal as well.³⁷

Apparently there can be no subrogation to rights of the principal which have no connection with the debt which the surety has paid;³⁸ and subrogation to the principal's rights does not seem to extend so far as to entitle a surety on a debt, created for money borrowed, to a specific equitable right in the money, or any property right, or credit, that the principal has obtained with the money.³⁹ Ordinarily, a surety cannot be subrogated to the rights of his principal against other parties where the claims of the principal against those parties rest on an illegal contract with such parties,⁴⁰ but this rule does not pertain where the right of the principal to which the surety claims subrogation is a right to recover

public moneys.⁴¹ Generally, a surety claiming to be subrogated to the rights of his principal stands in the place of the principal; his rights are the same, and defenses good against the principal are good against him.⁴²

Although the right to subrogation never arises until payment is made,⁴³ and the surety loses no right by waiting to present his petition for subrogation until payment is made,⁴⁴ the right of a surety to be subrogated to the rights of its principal against a third person may be waived by taking a position inconsistent with the right to subrogation.⁴⁵ The fact that the surety was informed by the corporate principal's trustees that they considered that the surety was only a general creditor of the principal was immaterial as respects the surety's subrogation to the corporation's rights against an officer thereof on the surety's payment of losses caused by the officer.⁴⁶

rights in any collateral deposited as security for the indebtedness.—*People v. Roseland State Sav. Bank*, 48 N.E.2d 600, 318 Ill.App. 495—60 C.J. p 771 note 1 [c].

Contribution

(1) Indemnitors who paid judgment rendered against their principal for injury to third person resulting from concurrent negligence for which both the principal and defendant were vicariously liable as joint tortfeasors were subrogated to statutory right of their principal to enforce contribution from defendant because of having satisfied the common liability.—*Silver Fleet Motor Exp. v. Zody*, supra.

(2) Judgment debtor's surety in enforcing judgment obtained by plaintiffs against other debtor should not be allowed to go further than to satisfy statutory provisions for contribution between judgment debtors.—*Martin v. Miller*, 272 N.Y.S. 914, 242 App.Div. 38, affirmed 195 N.E. 374, 266 N.Y. 668.

(3) Subrogation to creditor's rights against other debtors see supra § 54 e.

No distinction made between compensated and gratuitous indemnitors

U.S.—*Silver Fleet Motor Exp. v. Zody*, D.C.Ky., 43 F.Supp. 459.

Surety on support bond who has been paying the support order for almost three years may be subrogated to the rights of the principal debtor to seek a vacation of the order.—*Commonwealth v. Oberholtzer*, 68 Pa.Dist. & Co. 298, 65 Montg.Co. 109.

Conditional sale

Sureties, on payment of infant's purchase note given for automobile under conditional sale agreement rescinded by infant, were entitled to automobile returned to seller.—*McKee v. Harwood Automotive Co.*, 183 N.E. 646, 204 Ind. 233.

Redemption from foreclosure sale

A surety compelled to pay a deficiency judgment on the foreclosure of a senior mortgage has been held to have a right to redeem from the sale on the theory of subrogation to the rights of the principal debtor.—*Wise v. Laird*, 199 N.W. 487, 198 Iowa 357—42 C.J. p 376 note 96.

35. U.S.—*Danais v. M. De Matteo* Const. Co., D.C.N.H., 102 F.Supp. 874.

60 C.J. p 771 note 1.

36. Cal.—*In re Elizalde's Estate*, 188 P. 560, 182 Cal. 427.

37. Cal.—*Storm & Butts v. Lipscomb*, 3 P.2d 567, 117 Cal.App. 6. 60 C.J. p 772 note 3.

38. Ga.—*Federal Union Surety Co. v. Blue Ridge Marble Co.*, 82 S.E. 1076, 142 Ga. 353.

Ky.—*Hodge Tobacco Co. v. Sexton*, 179 S.W. 36, 166 Ky. 219.

Personal affair of principal

Where contractor paid owner of house which contractor was repairing for whisky which had been left at house with consent of contractor, and had disappeared therefrom, payment being made after contractor was paid full amount then due him, contractor's surety which was later forced to pay claims for labor and material was not subrogated to any rights which contractor had against

owner arising from whisky controversy, since building contract did not contemplate storage of whisky, and controversy over it was personal affair between owner and contractor.—*U. S. Fidelity & Guaranty Co. v. Murphy*, La.App., 163 So. 724.

39. N.C.—*Carlton v. Simonton*, 94 N.C. 401.

60 C.J. p 772 note 5.

40. Utah.—*Beaver County v. Home Indemnity Co.*, 52 P.2d 435, 88 Utah 1.

41. Utah.—*Beaver County v. Home Indemnity Co.*, supra.

42. U.S.—*U. S. Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, C.C.A. N.Y.*, 65 F.2d 392—*Globe Indemnity Co. v. U. S.*, 84 Ct.Cl. 587, certiorari denied 58 S.Ct. 26, 302 U.S. 707, 82 L.Ed. 546.

43. Wis.—*In re Bienenstok's Estate*, 242 N.W. 572, 208 Wis. 676.

44. Wis.—*In re Bienenstok's Estate*, supra.

45. Wis.—*In re Bienenstok's Estate*, supra.

Failure to object to settlement of principal's claims

Where surety for corporation did not object to order confirming settlement of multiple claims and counterclaim between corporation and deceased officer's estate, it waived right to attack order based on subrogation to single right of corporation.—*In re Bienenstok's Estate*, supra.

46. Wis.—*In re Bienenstok's Estate*, supra.

§ 58. Subrogation to Rights of Cosurety

A surety may be entitled to subrogation to his cosurety's rights.

It has been stated that a surety seeking contribution from a cosurety must permit the cosurety to be subrogated to the rights acquired by the surety on payment of the obligation.⁴⁷ Subrogation of surety to rights of the creditor to obtain payment from a cosurety who is bound to contribute see supra § 47 a. Recourse of surety to indemnity and rights given to cosurety see Principal and Surety §§ 348-350.

Examine Pocket Parts for later cases.

§ 59. Sureties for Particular Purposes or Types of Persons

a. Sureties for public depositaries

- b. Sureties of sureties and indemnitors
- c. Sureties or guarantors on bills or notes
- d. Sureties on construction contractors' bonds

a. Sureties for Public Depositaries

A surety for a public depositary who has been compelled to pay losses resulting from a failure of the depositary will be subrogated to the general rights of the depositor to collect the losses; and, if the depositor is a state having a right to prior payment, the surety may be subrogated to such right.

Where a surety on a bond given to secure the repayment of public funds deposited with a duly designated depositary has been compelled to pay for losses resulting from a failure of the depositary, the surety will be subrogated to the general rights of the depositor to collect the losses from the assets of the depositary,⁴⁸ or a state guaranty fund,⁴⁹ or right of action against one who has given notes

⁴⁷ Miss.—Stanwood v. Clampitt, 23 Miss. 372.

⁴⁸ U.S.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Ward v. First Nat. Bank, C.A.Mo., 76 F.2d 256.

Miss.—Rawlings v. American Oil Co., 161 So. 851, 173 Miss. 683.

N.D.—Baird v. Reinertson, 253 N.W. 159, 64 N.D. 444.

Ohio.—Fidelity & Cas. Co. of N. Y. v. Niles Bank Co., Com.Pl., 70 N.E.2d 229, affirmed 71 N.E.2d 742, 79 Ohio App. 15.

Or.—In re Liquidation of Bank of Woodburn, 42 P.2d 740, 149 Or. 649.

Utah.—Beaver County v. Home Indem. Co., 52 P.2d 435, 88 Utah 1. 60 C.J. p 775 note 37.

Subrogation as dependent on full payment see supra § 48 a (3).

County funds, collected by sheriff and deposited to his account, being public funds, sureties paying county amount thereof, as required by bank's depository bonds, were subrogated to county's position against bank.—Coahoma County, Miss., v. Mississippi Fire Ins. Co., C.C.A. Miss., 68 F.2d 489.

Proportionate subrogation under contractual provision

(1) Held permissible where agreement is valid.—Southern Surety Co. of New York v. Hollis, Tex.Civ.App., 45 S.W.2d 716, affirmed Hollis v. Southern Surety Co. of New York, Com.App., 63 S.W.2d 374.

(2) Held not permissible where agreement is contrary to public policy.—American Surety Co. of New

York v. Clarke, 20 P.2d 831, 94 Mont. 1.

(3) Validity of contractual provisions for pro tanto subrogation of sureties generally see supra § 48 a (3).

Extent of participation in assets

(1) Under a statute providing for the ratable distribution of assets of insolvent national banks, where a state obtained partial satisfaction of its deposit claim against an insolvent national bank, and the surety paid the balance, the surety was entitled to receive future dividends on the basis of the original claim of the state, and the extent of its participation was not required to be measured by the sum actually expended to discharge the principal's obligation, since the surety, succeeding to the state's right, also succeeded to the state's means of enforcing it.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., Pa., 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

(2) In such case it was held the surety was entitled to interest but not to counsel fees.—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, D.C.Pa., 33 F.Supp. 722, reversed on other grounds, C.C.A., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

(3) Under statute providing for sale of bonds pledged by bank to secure repayment of public money deposited therein, and making surplus, after payment of amount due depositing unit and expenses of sale, payable to bank, where city was paid full amount of its deposits in bank which failed, through sale of bonds

pledged by bank, and through payment by surety of bank, and assigned to surety its right to any moneys from claim filed with receiver of bank, surety could not recover from receiver surplus from sale of bonds.—Commercial Casualty Ins. Co. v. Boise City Nat. Bank, 98 P.2d 637, 61 Idaho 124.

(4) Where county, having deposit in closed bank secured by state bonds and indemnity bond, sold state bonds at solicitation of indemnity company which paid remainder of loss and took assignment of county's entire claim against bank, indemnity company could only file claim for amount it was required to pay, it being subrogated to such amount and not to amount of county's original deposit.—U. S. Fidelity & Guaranty Co. v. Hood, 175 S.E. 135, 206 N.C. 639.

(5) Where county depository bonds were insufficient to cover deposits in insolvent depository and provision in one of bonds limiting surety to its "pro rata" liability where deposit exceeded amount of bond was valid, dividends declared by receiver were payable to county until its loss should be satisfied and thereafter to sureties in ratio of their payments to county.—Reichert v. Peoples State Bank for Savings, 263 N.W. 738, 273 Mich. 543.

(6) Sureties on failed bank's county depository bonds were not subrogated by payment of county's claims against bank to funds deposited for payment of bank coupons, such deposits not creating trust.—Coahoma County, Miss., v. Mississippi Fire Ins. Co., C.C.A.Miss., 68 F.2d 489.

⁴⁹ Neb.—State v. Kilgore State Bank, 201 N.W. 901, 112 Neb. 856.

in payment of bonds of the depositary which the depositary was to sell for cash and the proceeds of which he was to deposit.⁵⁰ A surety who was an active participant in a wrongful act in connection with the securing of the deposit may not, however, be permitted to assert a claim for subrogation superior to the claims of innocent depositors and creditors of the bank.⁵¹

In accordance with the general rule, discussed supra § 52, that a surety can be subrogated only to securities held for the particular debt for which the surety is bound, a surety on a depositary's bond will not be subrogated with respect to securities which the depositary has given public officials to

secure the repayment only of deposits in excess of the amount of the penalty of the bond.⁵²

Subrogation to depositor's right of priority. If the depositor is a state having a right to prior payment from the assets of the failed depositary, the surety will, in many jurisdictions, be subrogated to such right as against general depositors and creditors of the depositary.⁵³ A few courts, displaying an unhidden dislike for a rule which permits a surety, who has been paid to assume the risk, to assert a right of priority to the prejudice or exclusion of general depositors and creditors have held that the state's prerogative right of priority is not a right to which such a surety can be subrogated.⁵⁴

50. Miss.—U. S. Fidelity & Guaranty Co. v. First State Bank, 76 So. 747, 116 Miss. 239.

51. Ill.—People ex rel. Barrett v. Fon Du Lac State Bank, 14 N.E.2d 686, 295 Ill.App. 71.

Securing deposit liability in excess of statutory limitation

Ill.—People ex rel. Barrett v. Fon Du Lac State Bank, supra.

Wrongful commingling of school district's money with funds of bank

Mo.—In re Farmers' & Merchants' Bank of Chillicothe, App., 63 S.W. 2d 829.

Assignment of claim to surety held inoperative

Mo.—In re Farmers' & Merchants' Bank of Chillicothe, supra.

52. Wyo.—U. S. Fidelity & Guaranty Co. v. Anderson, 264 P. 1030, 38 Wyo. 88, followed in Kelly v. Anderson, 264 P. 1033, 38 Wyo. 97.

53. Mont.—Aetna Accident & Liability Co. v. Miller, 170 P. 760, 54 Mont. 377, L.R.A.1918C 954, 60 C.J. p 775 note 42.

Priority of public deposits on insolvency of banks generally see Banks and Banking § 532.

Subrogation to priorities generally see supra § 54 d (2).

United States

(1) Under 31 U.S.C.A. § 193, which confers such priority as is secured to the United States on a surety who pays the money due on a bond given to the United States, a surety on a bond, given the United States to secure a deposit of funds which it holds in trust for Indians on a reservation, will be substituted to the government's right of priority against the assets of the insolvent depositary.—In re Liquidation of Bank of Woodburn, 42 P.2d 740, 149 Or. 649—60 C.J. p 775 note 42 [b].

(2) The rule applies, notwithstanding proof of claim filed by United States and certificate of proof of claim issued by liquidating agent and assigned to surety did not claim or grant priority.—Barnett v. American Surety Co. of New York, C.C.A.Okl., 77 F.2d 225.

(3) Since bonds given by a depositary for the money of bankrupt estates secure debts not due or payable to the United States even though the bonds, pursuant to statute, name the United States as payee, sureties on such bonds are not entitled to a preference as respects amounts paid in conformity with the bonds on the insolvency of the depositary.—Florida Bank & Trust Co. of West Palm Beach v. Union Indemnity Co., C.C.A. Fla., 55 F.2d 640, certiorari denied 53 S.Ct. 6, 287 U.S. 600, 77 L.Ed. 522.

(4) Under Oklahoma statute entitling surety who has paid the amount of a depositary bond securing deposits of state, county, municipal, or "other public funds" in a failed bank to participate in pro rata division of assets of bank, the term "other public funds" must be restricted to funds ejusdem generis, and does not apply to depositary bonds securing United States funds, and as thus construed there is no conflict between the state and federal statutes.—Barnett v. American Surety Co. of New York, supra.

Preferred claim

Where sanitary district's deposits with bank were not made in manner required by statute, no title passed to the funds, no relation of debtor and creditor was established, and funds constituted a preferred claim when bank became insolvent, surety on bank's bond which paid full amount of bond to district became subrogated to extent of amount paid.—Fidelity & Casualty Co. of N. Y. v. Niles Bank Co., Com.Pl., 70 N.E.

2d 229, affirmed 71 N.E.2d 742, 79 Ohio App. 15.

Deposit of state, county, etc., funds in bank not designated depositary

Surety on bond executed by bank which was not a designated depositary to secure funds deposited by probate judge, having paid penalty of bond to state, county, and its political subdivisions, was entitled to subrogation, against assets of bank in hands of receiver, to rights of owners of funds and not restricted to such rights as probate judge might have.—Salmon v. State of Alabama, for Use and Benefit of U. S. Fidelity & Guaranty Co., C.C.A.Ala., 81 F.2d 845.

General creditors of insolvent state depositary could not be subrogated to state's preferential rights to exclusion of sureties on depositary bond.—State v. Liberty Bank & Trust Co., 52 S.W.2d 150, 165 Tenn. 40.

54. Pa.—In re South Philadelphia State Bank's Insolvency, 145 A. 520, 295 Pa. 433, 83 A.L.R. 1123, 60 C.J. p 775 note 43.

Unauthorized assignment

State treasurer's assignment without authority of commonwealth's claim as depositor to surety on bond securing deposits gave no rights additional to those acquired by equitable subrogation.—In re South Philadelphia State Bank's Insolvency, supra.

Sovereign right to priority

(1) Sovereign right of state to priority of payment over other depositors in closed bank cannot pass by subrogation to another, although statutory right to priority can so pass.—In re Harr, 179 A. 725, 319 Pa. 193—60 C.J. p 775 note 43 [a].

(2) Surety company paying amount of commonwealth's deposit in insolvent trust company to common-

and other cases have reached the same result by holding that the state, by lending its money at interest, taking security therefor, and other acts, waives its right of priority so that no such right remains to which the surety can be subrogated.⁵⁵ It has also been held that, if the surety asserts its rights under a proof of claim which the state has previously filed as a general creditor, the surety cannot, at the same time, assert that it has been subrogated to the state's rights as a preferred creditor.⁵⁶

A statute, providing that the state may proceed against the assets of an insolvent depositary as a preferred creditor, but that, if the state elects to proceed against the depositary's surety, the latter, by reason of his payment shall not be subrogated to the state's right of preference, defeats the sureties' right of subrogation to the state as a preferred creditor of the bank,⁵⁷ and may validly apply to a surety who executes his bond after the statute becomes effective,⁵⁸ and the fact that the statute applies only to sureties on the bonds of depositaries of state funds does not render it unconstitutional as denying the equal protection of the laws.⁵⁹ Such a statute cannot constitutionally apply to impair the vested right, to be subrogated, of a surety who has executed his bond before passage of the statute, although payment to creditor is not made until afterward.⁶⁰

It has been held, however, that a state's right to prior payment in the event of insolvency of the state depositary, which is in existence at the time a

bond is executed to secure state deposits, may, before the surety has been compelled to make payment, be constitutionally removed or abrogated by legislative enactment so that no right of priority remains to which the surety can be subrogated;⁶¹ but it seems that, if a statute repealing the state's right of priority does not become effective until after insolvency of the depositary, so that the state's right of priority has already accrued, the statute cannot constitutionally apply to prevent the surety from being subrogated to that right.⁶²

b. Sureties of Sureties and Indemnitors

A surety of a surety who is compelled to pay the debt will be subrogated to the creditor's right against his immediate principal, and also to whatever rights his principal had.

A surety of a surety, who is compelled to pay the debt, will be subrogated to the creditor's rights against his immediate principal;⁶³ and he has the same equity to be subrogated to the creditor's rights and remedies against the original debtor as the surety for whom he became bound,⁶⁴ but his rights in this respect are limited to those of the original surety, and, if the latter has been fully paid and indemnified by the principal,⁶⁵ or the principal has a right of set-off arising out of the transaction which would fully defeat his right to reimbursement had he paid the debt,⁶⁶ subrogation against the original principal will be denied the surety of the surety. Likewise, it has been held that the surety on the appeal bond of an indemnitor will not be subrogated to the creditor's rights against the one whom the principal is bound to indemnify.⁶⁷

wealth could not, as subrogees of commonwealth, maintain its position as sovereign entitled to be paid amount of deposit in full; and, where commonwealth was preferred depositor in insolvent trust company under law and not as result of reorganization plan, sureties paying amount of deposit to commonwealth were not entitled to preference.—*Smith v. Capital Bank & Trust Co.*, 191 A. 124, 325 Pa. 369.

55. Wyo.—*National Surety Co. v. Morris*, 241 P. 1063, 34 Wyo. 134, 42 A.L.R. 1290.
60 C.J. p 775 note 44.

56. U.S.—*Brown v. American Bonding Co. of Baltimore, Md., Mont.*, 210 F. 844, 127 C.C.A. 406, certiorari denied 35 S.Ct. 661, 238 U.S. 622, 59 L.Ed. 1494.

57. N.D.—*Jones v. Grady*, 266 N.W. 889, 66 N.D. 479, construing Minnesota statute.

58. Minn.—*In re Farmers' State Bank of North Branch*, 219 N.W. 916, 174 Minn. 583, certiorari denied *Brown v. Veigel*, 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 559.
60 C.J. p 776 note 46.

59. Minn.—*In re Farmers' State Bank of North Branch*, 219 N.W. 916, 174 Minn. 583, certiorari denied *Brown v. Veigel*, 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 559.
60 C.J. p 776 note 47.

60. Minn.—*U. S. Fidelity & Guaranty Co. v. Rathbun*, 199 N.W. 561, 160 Minn. 176.
60 C.J. p 776 note 48.

61. Iowa.—*Leach v. Commercial Sav. Bank of Des Moines*, 213 N.W. 517, 205 Iowa 1154.
60 C.J. p 776 note 49.

Subrogation as to rights which creditor no longer possesses at time of payment generally see supra § 52.

62. N.D.—*State v. Buttzville State Bank*, 144 N.W. 105, 26 N.D. 196.

63. U.S.—*In re Adair Realty & Trust Co.*, D.C.Ga., 35 F.2d 531.
60 C.J. p 781 note 92.

64. Vt.—*McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.
Surety's subrogation to rights of principal generally see supra § 57.

65. N.Y.—*New York State Bank v. Fletcher*, 5 Wend. 85, followed in *Bell v. Greenwood*, 242 N.Y.S. 149, 229 App.Div. 550.

66. Conn.—*Ursini v. Piazza*, 127 A. 350, 101 Conn. 736.
60 C.J. p 781 note 95.

67. N.Y.—*Bell v. Greenwood*, 242 N.Y.S. 149, 229 App.Div. 550.
Doctrine of subrogation as applicable to sureties on appeal bonds generally see infra § 61.

Surety on appeal bond of insurer
Where judgment is rendered

c. Sureties or Guarantors on Bills or Notes

A surety or guarantor who pays a bill or note will be subrogated to all rights and remedies which were available to the holder or owner of the instrument to obtain payment thereof.

A surety⁶⁸ or guarantor⁶⁹ who pays a bill or note will be subrogated to all rights and remedies which were available to the holder or owner of the instrument to obtain payment thereof.

On the question of whether a surety who has paid the debt and been subrogated to the creditor's rights

against the principal can enforce against the latter the bond, note, or other instrument on which the surety is directly liable, the authorities are not in harmony.⁷⁰ It has been held, on the one hand, that the acquiring of the obligation by the surety does not extinguish the obligation,⁷¹ and that, on the payment of a note by the surety thereon, the title, legal and equitable, passes to, and vests in, him, and for all purposes he becomes the owner, legal and equitable, of the paper and all collateral security thereto.⁷² On the other hand, there is authority

against defendant in an action which is completely defended and controlled on his behalf by an insurance company which has agreed to indemnify him against such liability, and the insurance company takes an appeal giving an appeal bond to stay execution on the judgment, the surety on the appeal bond who has become such at the request of insurer only cannot, after being compelled to pay the judgment and after insurer has become insolvent, be subrogated to the rights of the judgment plaintiff against the judgment debtor where the execution of the surety's bond was the thing which prevented insurer's liability to the debtor from being realized on until after insurer became insolvent.

Cal.—Holmes v. Hughes, 14 P.2d 149, 125 Cal.App. 290.

N.Y.—Bell v. Greenwood, 242 N.Y.S. 149, 229 App.Div. 550.

68. Ala.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

Ark.—Holt v. Gregory, 244 S.W.2d 951, 219 Ark. 798.

Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

Ga.—Lamis v. Callianos, 194 S.E. 923, 57 Ga.App. 238—Hartley v. Hartley, 179 S.E. 245, 50 Ga.App. 848—Campbell v. Rybert, 167 S.E. 924, 46 Ga.App. 461—Holton v. Smith, 163 S.E. 516, 44 Ga.App. 832.

Ill.—McKee v. Gaulrapp, 11 N.E.2d 380, 367 Ill. 321, 26 Del.Ch. 85.

Ky.—Moore v. Pope, 86 S.W.2d 540, 260 Ky. 619.

Md.—Embrey v. Embrey, 161 A. 153, 163 Md. 162.

Neb.—Weiner v. Aetna Ins. Co. of Hartford, Conn., 259 N.W. 507, 128 Neb. 575.

Pa.—Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 12 A.2d 925, 338 Pa. 389.

Tenn.—Davis v. Arnett, 177 S.W.2d 29, 27 Tenn.App. 1.

60 C.J. p 735 note 62—14A C.J. p 697 notes 42-43.

Rights against cosureties

Where indorsers of note are cosureties and one surety pays judgment against all, he is subrogated to

rights and securities of creditors against cosureties.—Niagara County Nat. Bank & Trust Co. v. La Port, 253 N.Y.S. 433, 233 App.Div. 501.

Transaction creating suretyship relation

Transaction whereby tenant seeking loan from bank executed note to landlord and landlord indorsed note and transferred chattel mortgage to bank created relationship of principal and surety as between tenant and landlord and gave landlord surety's statutory right of subrogation.—Bradley v. Bentley, 163 So. 351, 231 Ala. 28.

Purchase by comakers

(1) Where three out of four joint comakers purchased notes from payee who had commenced action thereon, and notes were transferred to the three comakers' nominee, the three comakers were entitled to the right of subrogation to all the rights of the payee, and had the right to have the action assigned to their nominee.—Lit Bros., to Use of Kaplan, v. Goodman, 18 A.2d 519, 144 Pa. Super. 43.

(2) In such case entry of judgment against the four comakers would not harm the fourth comaker not joining in purchase of notes, since judgment was in no sense conclusive of rights of the four comakers among themselves, and merely put the three comakers in a position to enforce contribution to the proper extent, if any, and amount of any execution against fourth comaker was subject to control of court in exercise of sound discretion.—Lit Bros., to Use of Kaplan, v. Goodman, supra.

69. U.S.—Allen v. See, C.A.Colo., 196 F.2d 608.

Colo.—Cobbey v. Peterson, 3 P.2d 298, 89 Colo. 350.

Mont.—Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 262 P. 1039, 81 Mont. 222.

N.J.—Steneck Trust Co. v. Steneck Club, 169 A. 341, 12 N.J.Misc. 30.

Or.—Commercial Securities v. Mast,

28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

60 C.J. p 736 note 63.

Collateral pledged by guarantor and maker

Where collateral pledged by guarantor was used to satisfy note, guarantor had right of subrogation in collateral pledged by maker.—Holyoke v. Continental Ill. Nat. Bank & Trust Co., 104 N.E.2d 838, 346 Ill. App. 284.

Erasure of name of coguarantor
from the face of the note does not affect the right of a guarantor of a note to be subrogated to the mortgage which is collateral security.—Blewett v. Bash, 61 P. 770, 22 Wash. 536.

70. Ohio.—Rechtine v. Weis, 2 Ohio Supp. 380.

Subrogation to creditor's right to sue principal on instrument itself generally see supra § 54 b.

71. Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

72. Ala.—Reese v. Mackentepe, 140 So. 550, 224 Ala. 372—Bradley v. Bentley, 163 So. 349, 26 Ala.App. 299, certiorari denied 163 So. 351, 231 Ala. 28.

Cal.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

60 C.J. p 755 note 17 [e].

Payment of bill or note by surety as entitling surety to reimbursement generally see Principal and Surety § 307 a.

Enforcement against principal

Surety can take up note from holder and enforce it against the principal.—Bankers Trust Co. v. Hale & Kilburn Corp., C.C.A.N.Y., 84 F.2d 401.

Cosureties

The execution of new note by two of four sureties on note, in payment of old note, would give sureties so paying a right of action against non-paying sureties on the old note itself.—Patterson v. Fuller, Tex.Civ. App., 110 S.W.2d 1230, error dismissed.

holding that payment by the surety extinguishes the instrument⁷³ and that a surety who has paid a note or other security without taking an assignment from the creditor may not sue thereon directly in an action at law.⁷⁴ The cases which uphold the right of a surety to relief in law or equity are not necessarily based on any continued existence of the original instrument but on the implied obligation of the principal to indemnify him, and do not require the holding that as the basis of relief the original instrument remains undischarged.⁷⁵ Where the guarantor of a note is compelled to discharge his secondary liability thereon, good conscience requires the surrender to him of the obligations of the primary debtor, so that he might proceed thereon to recoup his loss;⁷⁶ and a guarantor who was compelled to pay the holder of a note is entitled to recover from the holder the value of the note and mortgage securing it to which the guarantor became subrogated where the holder has disposed of the note and mortgage.⁷⁷

Where a drawee bank is induced to pay a check because of another bank's guaranty of all previous

indorsement a right of subrogation presumptively arises in favor of the drawee against the guarantor.⁷⁸

d. Sureties on Construction Contractors' Bonds

- (1) In general
- (2) Against whom surety is entitled to unpaid funds

(1) In General

As a general rule a surety for a construction contractor compelled to make good the default of his principal in abandoning the contract or failing to pay materialmen and laborers acquires an interest in unpaid sums under the contract by subrogation to the rights of the principal, owner, or laborers or materialmen whose claims are paid, and is also subrogated to other rights of the principal or materialmen or laborers.

A surety for a construction contractor compelled to make good the default of his principal in abandoning the contract, or failing to pay materialmen and laborers, is usually regarded as acquiring an interest in unpaid sums under the contract by subrogation to the rights of the principal,⁷⁹ owner,⁸⁰

Substituted surety

New surety, who, on signing of renewal note, was substituted for original surety, became entitled by substitution to benefit of property mortgaged to sureties.—*Arnett v. Salyersville Nat. Bank*, 46 S.W.2d 124, 242 Ky. 216.

73. W.Va.—*Perkins v. Hall*, 17 S.E. 2d 795, 123 W.Va. 707.

74. Ohio.—*Rechtine v. Weis*, 2 Ohio Supp. 380.

Subrogation to rights, priorities, and equities

Payment of note by surety has been said to extinguish the original debt, and the surety becomes subrogated only to rights of payee in securities, priorities, and equities.—*Henneke v. Strack*, Mo.App., 101 S.W. 2d 743.

75. W.Va.—*Perkins v. Hall*, 17 S.E. 2d 795, 123 W.Va. 707.

76. Colo.—*Cobbey v. Peterson*, 3 P. 2d 298, 89 Colo. 350.

Secondary character of liability not destroyed

Where claim against guarantor of note was reduced to judgment, secondary character of liability was not destroyed so as to preclude guarantor from being subrogated to holder's rights against maker.—*Cobbey v. Peterson*, supra.

77. Colo.—*Cobbey v. Peterson*, supra.

78. Pa.—*Reimel v. Northwestern Trust Co.*, 155 A. 106, 304 Pa. 121.

Guarantor held presumptively liable to drawee

Pa.—*Reimel v. Northwestern Trust Co.*, supra.

79. U.S.—*Seaboard Sur. Co. v. State of N. D.*, D.C.N.D., 94 F.Supp. 177 —*Massachusetts Bonding & Ins. Co. v. Fago Const. Corp.*, D.C.Md., 82 F.Supp. 619 —*Maryland Cas. Co. v. U. S.*, 69 F.Supp. 132, 107 Ct.Cl. 646 —*Continental Cas. Co. v. City of Pittsburgh*, D.C.Pa., 68 F.Supp. 815 —*Continental Cas. Co. v. City of Pittsburgh*, D.C.Pa., 68 F.Supp. 805 —*U. S. Fidelity & Guaranty Co. v. U. S.*, 92 Ct.Cl. 144 —*Globe Indem. Co. v. U. S.*, 84 Ct.Cl. 587, certiorari denied 58 S.Ct. 26, 302 U.S. 707, 82 L.Ed. 546.

D.C.—*Morgenthau v. Fidelity & Deposit Co. of Maryland*, 94 F.2d 632, 68 App.D.C. 163.

La.—*U. S. Fidelity & Guaranty Co. v. Murphy*, App., 163 So. 724.

R.I.—*U. S. Fidelity & Guaranty Co. v. Rhode Island Covering Co.*, 167 A. 143, 53 R.I. 397.

Wash.—*U. S. Fidelity & Guaranty Co. v. City of Montezano*, 295 P. 934, 160 Wash. 565.

Wyo.—*Corpus Juris cited in State Bank of Wheatland v. Turpen*, 34 P.2d 1, 6, 7, 8, 11, 47 Wyo. 33. 60 C.J. p 777 note 60.

Right of surety as relating back to, or having inception at, time when

suretyship contract is entered into see supra § 47 c.

Trust fund

Percentage authorized to be retained under construction contract was trust fund for benefit of creditors, collectible claims, and surety.—*Stubbs Electric Co. v. Longview School Dist. No. 112 of Cowlitz County*, 279 P. 86, 153 Wash. 33.

80. U.S.—*Miami Conservancy Dist. v. New Amsterdam Cas. Co.*, C.C.A. Ohio, 118 F.2d 604, certiorari denied *New Amsterdam Cas. Co. v. Conservancy Dist.*, 62 S.Ct. 80, 314 U.S. 640, 86 L.Ed. 513—*Standard Acc. Ins. Co. of Detroit, Mich., v. Federal Nat. Bank of Shawnee, C.C.A.Okla.*, 112 F.2d 692, opinion adhered to 115 F.2d 34—*Hartford Accident & Indemnity Co. v. Coggins*, C.C.A.N.C., 78 F.2d 471, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—*Maryland Casualty Co. v. Portland Const. Co.*, C.C.A.Vt., 71 F.2d 658—*Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk*, C.C.A.N.Y., 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—*Farmers' Bank v. Hayes*, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—*In re Cummins Const. Corp.*, D.C.Md., 81 F.Supp. 193—*Munsey Trust Co. of Washington, D. C. v. U. S.*, 67 F.

or laborer or materialman whose claim is paid;⁸¹ | and this is so independently of assignment.⁸²

Supp. 976, 107 Ct.Cl. 131, reversed on other grounds 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022—Hardin County Sav. Bank v. U. S., 65 F. Supp. 1017, 106 Ct.Cl. 577—American Sur. Co. of N. Y. v. City of Louisville Municipal Housing Commission, D.C.Ky., 63 F.Supp. 486, affirmed, C.C.A., Glenn v. American Sur. Co., 160 F.2d 977—New York Cas. Co. v. Zwerner, D.C.Ill., 58 F. Supp. 473—In re Van Winkle, D.C. Ky., 49 F.Supp. 711—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375, reversed on other grounds, C.C.A., 103 F.2d 1016—U. S. Fidelity & Guaranty Co. v. U. S., 92 Ct.Cl. 144—Globe Indem. Co. v. U. S., 84 Ct.Cl. 587, certiorari denied 58 S.Ct. 26, 302 U.S. 707, 82 L.Ed. 546.

Cal.—A. Farnell Blair Co. v. Hollywood State Bank, 227 P.2d 529, 102 Cal.App.2d 418.

N.Y.—U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 74 N.E.2d 226, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 190 N.E. 330, 264 N.Y. 159—Municipal Housing Authority of City of Utica v. H. G. Hatfield Elec. Corp., 34 N.Y.S.2d 995, 264 App. Div. 99.

Pa.—Appeal of Lancaster County Nat. Bank, 155 A. 859, 304 Pa. 437, 76 A.L.R. 912.

R.I.—Glens Falls Indemnity Co. v. American Awning & Tent Co., 180 A. 367, 55 R.I. 284, reargument denied 181 A. 297, 55 R.I. 308.

S.C.—Brown Const. Co. v. Massachusetts Bonding & Insurance Co., 179 S.E. 697, 176 S.C. 76, followed in 181 S.E. 5, 177 S.C. 306.

Wash.—U. S. Fidelity & Guaranty Co. v. City of Montesano, 295 P. 934, 160 Wash. 565.

Wyo.—Corpus Juris cited in State Bank of Wheatland v. Turpen, 34 P.2d 1, 6, 7, 8, 11, 47 Wyo. 33, 60 C.J. p 777 note 61.

Surety held not primary obligor under contract with respect to right of surety to subrogation to rights of state, following cancellation of contract and completion of work by surety, in amount retained by state from contractor.—Stanton v. Babor-Comeau & Co., 6 N.Y.S.2d 231, 168 Misc. 190, affirmed 22 N.Y.S.2d 427, 260 App.Div. 831, appeal denied 24 N.Y.S.2d 1020, 260 App.Div. 980.

Assignment to surety

Oral promise of highway contractor to make written assignments to surety of highway funds, and subsequent written assignments made

after bond was executed, should be considered as single transaction in determining surety's right to reserved percentages.—Southern Surety Co. v. Merchants' & Farmers' Bank of Avilla, 176 N.E. 846, 203 Ind. 173, rehearing denied 179 N.E. 327, 203 Ind. 173.

81. U.S.—In re L. H. Duncan & Sons, C.C.A.Pa., 127 F.2d 640—Miami Conservancy Dist. v. New Amsterdam Cas. Co., C.C.A.Ohio, 118 F.2d 694, certiorari denied New Amsterdam Cas. Co. v. Conservancy Dist., 62 S.Ct. 80, 314 U.S. 640, 86 L.Ed. 513—U. S. Fidelity & Guaranty Co. v. Sweeney, C.C.A. Mo., 80 F.2d 235—Street v. Pacific Indemnity Co., C.C.A.Cal., 79 F.2d 68, certiorari denied 55 S.Ct. 595, 297 U.S. 718, 80 L.Ed. 1003—Farmers' Bank v. Hayes, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S. Ct. 8, 287 U.S. 602, 77 L.Ed. 524—In re Supreme Appliance & Heating Co., D.C.Ky., 100 F.Supp. 200—Maryland Cas. Co. v. U. S., 69 F. Supp. 132, 107 Ct.Cl. 646—Munsey Trust Co. of Washington, D. C., v. U. S., 67 F.Supp. 976, 107 Ct.Cl. 131, reversed on other grounds 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022—New York Cas. Co. v. Zwerner, D.C. Ill., 58 F.Supp. 473—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 40 F.Supp. 782—U. S. Fidelity & Guaranty Co. v. John R. Alley & Co., D.C.Okl., 34 F.Supp. 604.

Ala.—U. S. Fidelity & Guaranty Co. v. First Nat. Bank, 140 So. 755, 224 Ala. 375.

Iowa.—Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 235 Iowa 568.

La.—Winkle Terra Cotta Co. v. Butler, 117 So. 134, 166 La. 241.

Ohio.—Angus v. Aetna Casualty & Surety Co., 177 N.E. 646, 39 Ohio App. 411.

Okl.—Standard Acc. Ins. Co. v. U. S. Cas. Co., 188 P.2d 204, 199 Okl. 530—Fidelity Nat. Bank of Oklahoma City v. U. S. Cas. Co., 131 P.2d 75, 191 Okl. 496.

Pa.—Appeal of Lancaster County Nat. Bank, 155 A. 859, 304 Pa. 437, 76 A.L.R. 912.

Tenn.—Miller Bros. Co. v. Standard Plumbing & Heating Co., 15 Tenn. App. 102.

Tex.—Aetna Casualty & Surety Co. v. Hawn Lumber Co., Civ.App., 62 S.W.2d 329, modified on other grounds 97 S.W.2d 460, 128 Tex. 296, rehearing denied and modified on other grounds 98 S.W.2d 167, 128 Tex. 296—Metropolitan Casualty Ins. Co. v. Cheaney, Civ.App., 32

S.W.2d 691, affirmed, Com.App., 55 S.W.2d 554.

W.Va.—Fidelity & Deposit Co. of Maryland v. Lewis County Court, 15 S.E.2d 302, 123 W.Va. 409.

Wis.—Murphy v. National Paving Co., 281 N.W. 705, 229 Wis. 100.

Wyo.—Corpus Juris cited in State Bank of Wheatland v. Turpen, 34 P.2d 1, 6, 7, 8, 11, 47 Wyo. 284.

60 C.J. p 778 note 62.

Equitable interest in retained percentage

Under surety contract requiring owner to retain percentage of amount due contractor, surety had equitable interest in retained percentage, which could not be diverted without his consent.—American Surety Co. v. Plank & Whitsett, 165 S.E. 660, 159 Va. 1.

Fund as security for surety

The portion of consideration payable under construction contract that state, county, municipality or other public body is required by statute to retain is not only a trust fund for those performing labor and furnishing materials in connection with the work but is also security for surety on performance bond.—Fidelity & Deposit Co. of Maryland v. Herbert H. Conway, Inc., 128 P.2d 764, 14 Wash.2d 551.

Nature of right; priority

The right of surety on performance bond against percentage of consideration payable under construction contract retained by school district gained through subrogation to the claims of creditors paid by surety would be merely the right of the ordinary materialman dependent on the proper filing of notice of claim, and not entitled to priority as against other creditors.—Fidelity & Deposit Co. of Maryland v. Herbert H. Conway, Inc., supra.

Enforcement of lien

Contractor's surety is entitled to exoneration by enforcement of materialman's lien under title-retaining contract.—New Jersey Fidelity & Plate Glass Ins. Co. v. General Electric Co., 168 S.E. 425, 160 Va. 342.

82. U.S.—Hartford Accident & Indemnity Co. v. Coggin, C.C.A.N.C., 78 F.2d 471, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—Lacy v. Maryland Casualty Co., C.C.A.N.C., 32 F.2d 48—Danais v. M. De Matteo Const. Co., D.C.N.H., 102 F. Supp. 874.

60 C.J. p 777 notes 60, 61, p 778 note 62.

Such a surety will also be subrogated to other rights of the principal,⁸³ materialmen or laborers,⁸⁴ or owner;⁸⁵ but it has been held that an optional right on the part of the owner in the event of default to take over the contractor's materials and supplies for use in completion of the contract is not a right held in trust, such as retained percentages, but is one which is waived by a demand on the surety to complete the contract, and he cannot be subrogated thereto.⁸⁶ The surety on a bond to hold the owner harmless from liens arising for labor and materials is not entitled to be subrogated as against the owner to the right of lienors whose claims he discharged by payment.⁸⁷

Where a government contractor completed the work contracted for, but remained indebted to materialmen, and the surety paid the amount of the

penalty of the bond into court, which was distributed ratably among the materialmen, leaving substantial balances still owed to them by the contractor, the surety is not subrogated to any right of the government in retained percentages owing to the contractor, since the government had no claim on the fund after completion of the work contracted for; nor is the surety subrogated to the rights of the materialmen, since the debt owed by the contractor to them remained unsatisfied.⁸⁸

By paying the claims of laborers or materialmen in accordance with the requirements of an additional bond given for their protection, a surety is not subrogated to any right of the owner or of the contractor where the construction contract conferred no rights on the laborers or materialmen to obtain payment of their bills or to file liens, and where the

83. U.S.—Maryland Casualty Co. v. City of Cincinnati, D.C. Ohio, 291 F. 834.

Rights against subcontractors

(1) Generally, a surety who, under the requirement of his bond, completes the contract of a defaulting contractor, may be subrogated to all rights and remedies of the defaulting contractor against a third person, who, by a subcontract, was obligated and wrongfully failed to perform some part of the work which the surety was required to complete, although no relation of contract or of privity existed between the surety and the subcontractor, but surety stands in no better position than the principal contractor through whom his right is derived.

U.S.—National Sur. Corp. v. Allen-Codell Co., D.C. Ky., 70 F. Supp. 189. Cal.—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal. App. 6.

(2) Where contractor abandoned the contract, and subcontractor was therefore justified in treating the subcontract as terminated and in refusing to perform it, contractor's surety, who was compelled to complete the work, could not recover from subcontractor for work uncompleted under the subcontract, particularly where surety was guilty of deliberate delay and inexcusable neglect in completing the contract.—National Sur. Corp. v. Allen-Codell Co., supra.

(3) The fact that surety of contractor took from contractor an assignment of contractor's rights under his contract with subcontractor added nothing to surety's rights to recover from subcontractor.—National Sur. Corp. v. Allen-Codell Co., supra.

84. N.J.—Guise v. John C. Guise, Inc., 163 A. 121, 112 N.J. Eq. 11. Pa.—Du Bois v. U. S. Fidelity & Guaranty Co., 18 A.2d 802, 341 Pa. 85, 60 C.J. p 778 note 66.

Rights against contractor

Contractor's surety, by paying materialmen's claims, was subrogated to the rights of the materialmen against the contractor.—Du Bois v. U. S. Fidelity & Guaranty Co., 18 A.2d 802, 341 Pa. 85—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90—In re Troutwine's Estate, 178 A. 302, 117 Pa. Super. 525.

Rights of guarantor against surety on performance bond

General contractor who as guarantor paid materialman's claim against subcontractor succeeded to materialman's rights against surety on subcontractor's performance bond.—McClelland v. New Amsterdam Cas. Co., 185 A. 198, 322 Pa. 429—60 C.J. p 778 note 66 [b].

Lien

Surety on contractor's bond is entitled to subrogation to materialman's lien on payment of debt due materialman.—Well-McLain Co. v. Maryland Casualty Co., 258 N.W. 175, 217 Wis. 126—60 C.J. p 778 note 66 [c].

Owner wrongfully paying out percentage required to be retained under construction contract was liable to surety on contractor's bond.—Stubbs Electric Co. v. Longview School Dist. No. 112 of Cowlitz County, 279 P. 86, 153 Wash. 33.

Rights against bank satisfying debt out of retained percentages
The surety on a municipal paving

contractor's bond, who paid claim of subcontractor against contractor and was subrogated to rights of subcontractor, was not precluded from suing bank which had satisfied contractor's indebtedness to bank out of retained percentages paid by city on contract by fact that neither surety nor subcontractor sued bank within the time for bringing suit on the bond after work was completed, since subcontractor was not limited to suit on contractor's bond but had independent remedy, to which surety succeeded by subrogation, of suing bank within period of general statute of limitations if fund could be traced into bank.—Murphy v. National Paving Co., 281 N.W. 705, 229 Wis. 100.

85. N.Y.—American Sur. Co. of New York v. Tannhauser, 37 N.Y.S.2d 450, affirmed 39 N.Y.S.2d 996, 265 App. Div. 999, appeal denied 41 N.Y.S.2d 192, 265 App. Div. 1053.

Fraud

On payment of laborers and materialmen as required by bond, the surety of a contractor for construction of schoolhouse for board of education becomes subrogated to any cause of action in fraud which board of education had against contractor.—American Surety Co. of New York v. Tannhauser, supra.

86. Wash.—U. S. Fidelity & Guaranty Co. v. Ryan, 214 P. 433, 124 Wash. 329, 39 A.L.R. 109, 60 C.J. p 778 note 67.

87. Ala.—Central Lumber Co. v. Schilleci, 148 So. 614, 227 Ala. 29.

88. U.S.—American Surety Co. of New York v. Westinghouse Electric Mfg. Co., C.C.A. Fla., 75 F.2d 377, affirmed 56 S.Ct. 9, 296 U.S. 133, 80 L.Ed. 105.

contract contained no provision entitling the owner to withhold funds owing to the contractor for the payment of such claims;⁸⁹ and the mere fact that the contractor, after completion of work on the general contract, defaulted on a new contract, which was completed by the surety who was paid therefor, does not entitle the surety to subrogation with respect to funds retained under the general contract.⁹⁰

As the subrogation is limited to the extent necessary for reimbursement, the fact that the surety completes the contract at a profit does not entitle him to unpaid sums in excess of the amounts he has actually expended.⁹¹ Interest is not, however, considered profit within the rule.⁹²

A surety can acquire no right in the nature of a mechanic's lien other than through the contractor, on the theory of subrogation to the contractor's right, and hence cannot acquire it where the contractor is entitled to no such equity because he breached the contract without justification.⁹³ A surety for a construction contractor is not precluded from being subrogated to the rights of the principal in moneys due under the contract by the fact that at the time of making advances on behalf of the principal he took additional indemnity and security, in the absence of an agreement that the surety

would look only to such security and indemnity agreement.⁹⁴ Unpaid claims for labor are not defeated by the surety's right of subrogation to claims paid by the surety for materials furnished, since labor claims are independent of materialmen's claims and of equal dignity therewith in the matter of priority.⁹⁵ Where a statute provides for laborers' and materialmen's liens on street improvement assessments and bonds, which, however, terminate if no action to enforce them is brought within a specified period, a surety paying claims of laborers and materialmen after termination of their lien is not entitled to such lien by subrogation.⁹⁶

A surety of a subcontractor compelled to pay a judgment obtained by the contractor for breach of the subcontract is legally subrogated to the rights of the contractor against the principals on the bond.⁹⁷

Amounts paid and distributed. The lien of the surety is restricted to funds due, retained, or unpaid at the time of the default.⁹⁸ Accordingly, where payments are made to the contractor unconditionally, he can use the money so paid in any way he desires, and as to such payments the right of subrogation does not inhere to a surety of the payee.⁹⁹ Thus, a surety is not entitled to subrogation as to payments made by the owner to the con-

89. U.S.—City of Philadelphia, to Use of Warner Co., v. National Sur. Corp., C.C.A.Pa., 140 F.2d 805. Pa.—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90.—In re Troutwine's Estate, 178 A. 302, 117 Pa.Super. 525.

Cases involving single bond distinguished

"Under federal statutes a single bond is required which must provide for the completion of the contract and the payment of labor and materialmen. . . . It has been held by federal courts that there is a direct contractual obligation to the government as a party to the contract, binding on the contractor and surety, to pay labor and materialmen. Consequently when the contractor fails to pay labor and materialmen, it is tantamount to a breach of its contract with the United States government. When this occurs and the surety pays the labor and materialmen, it stands in the position of a surety completing a contractual obligation of a defaulting contractor and performing an equitable duty to the United States. It is therefore entitled to subrogation to the rights

of the United States in the fund. . . . In Pennsylvania, where our statutes and the facts coincide with the cases decided by the federal courts, we are in harmony with those decisions as illustrated by Lancaster County National Bank's Appeal, 155 A. 859, 861, 304 Pa. 437."—Du Bois v. U. S. Fidelity & Guaranty Co., 18 A. 2d 802, 805, 341 Pa. 85.

90. Pa.—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90.

91. N.J.—Union Stone Co. v. Hudson County, 65 A. 466, 71 N.J.Eq. 657.

60 C.J. p 778 note 64.
Extent and limitations of subrogation to rights of creditor generally see supra § 52.

92. U.S.—Glenn v. American Sur. Co., C.C.A.Ky., 160 F.2d 977.

93. N.J.—Jersey Land Co. v. Gunzenhauser, 176 A. 371, 117 N.J.Eq. 463.

94. U.S.—Massachusetts Bonding & Ins. Co. v. Fago Const. Corp., D.C. Md., 82 F.Supp. 619.

95. Okl.—Standard Acc. Ins. Co. v. U. S. Cas. Co., 188 P.2d 204, 199 Okl. 530.

96. U.S.—American Surety Co. of New York v. City of Santa Barbara, C.C.A.Cal., 56 F.2d 769, certiorari denied 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535.

Reason for rule

Whatever rights the surety might have secured in and to the bonds and assessments by reason of the prompt payment of the lien claimants were lost by his delay beyond the period within which action was required on the part of the claimants to perfect and continue their lien.—American Surety Co. of New York v. City of Santa Barbara, supra.

97. La.—R. P. Farnsworth & Co. v. Estrade, Cotton & Fricke, App., 166 So. 160, amended and rehearing denied 166 So. 676.

98. U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375, reversed on other grounds, C.C.A., 103 F.2d 1016.

99. U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., supra.

tractor and transferred by the latter to a creditor or assignee prior to the contractor's default,¹ or even after the default if the indebtedness was bona fide and the creditor had no knowledge of the contractor's default.² The transfer of the fund does not of itself discharge the equities attached to it where the contractor, on receiving payment from the owner, fails to pay laborers or materialmen, and transfers the money received to a creditor or assignee;³ the surety is entitled to subrogation if the creditor or assignee receives such payment with knowledge of the contractor's default and prior to the surety's knowledge thereof.⁴ It has been held that the surety is entitled to recover from the as-

signee money paid by the owner to the assignee and contractor jointly, to the extent that such money was applied on the contractor's debt to the assignee, but not to the extent that the money was used to pay for labor and materials.⁵

Volunteer. In accordance with the general rule, stated supra § 9, that a mere volunteer who pays the debt of another is not entitled to subrogation, a surety on a contractor's bond who elects to complete the work is not entitled to be subrogated where the contractor was justified in refusing to go ahead with the work under contract, so that there was no liability on the part of the surety to complete the work or respond in damages.⁶

1. U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., supra.
Va.—School Board of Carroll County v. First Nat. Bank, 170 S.E. 625, 161 Va. 127.

2. U.S.—California Bank v. U. S. Fidelity & Guaranty Co., C.C.A. Cal., 129 F.2d 751—Fidelity & Deposit Co. of Maryland v. Union State Bank of Minneapolis, D.C.Md., 21 F.2d 102.
60 C.J. p 780 note 83.

Equitable lien founded on assignment of future payments

(1) Under federal law, a surety may obtain relief by way of equitable lien founded on an assignment to it of future payments, but the lien is unenforceable against a transferee for value without notice of the assignment.—First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., C.C.A.N.J., 132 F.2d 114, certiorari denied Aetna Cas. & Sur. Co. v. First Camden Nat. Bank & Trust Co., 63 S.Ct. 1157, 319 U.S. 749, 87 L.Ed. 1704.

(2) Where national bank did not know of assignment by contractor to surety of retained percentages of payments under federal contract on default, or of agreement giving surety control over payments to contractor, surety under federal law had no equitable lien on payments made to contractor as against bank which applied moneys received by contractor to unsecured debt owed bank by contractor, and such debt constituted "value."—First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., C.C.A.N.J., 132 F.2d 114, certiorari denied Aetna Cas. & Sur. Co. v. First Camden Nat. Bank & Trust Co., 63 S.Ct. 1157, 319 U.S. 749, 87 L.Ed. 1704.

(3) Under New Jersey law, a surety's claim to funds remaining in hands of owner founded on an assignment by contractor of funds due from owner is void as to claimants for labor and materials where the

contractor retains dominion over the contract moneys.—First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., C.C.A.N.J., 132 F.2d 114, certiorari denied Aetna Cas. & Sur. Co. v. First Camden Nat. Bank & Trust Co., 63 S.Ct. 1157, 319 U.S. 749, 87 L.Ed. 1704.

(4) Where federal contractor agreed to turn over payments to surety but was allowed to collect payments without any supervision, assignment to surety of retained percentages and payments on default was void under New Jersey law as against bank to which contractor paid moneys received from federal government to discharge an unsecured debt owed to bank, which had no knowledge of the assignment, since bank was a transferee for value.—First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., C.C.A.N.J., 132 F.2d 114, certiorari denied Aetna Cas. & Sur. Co. v. First Camden Nat. Bank & Trust Co., 63 S.Ct. 1157, 319 U.S. 749, 87 L.Ed. 1704.

Payment based on false affidavit

Where no liens had been filed by materialmen or laborers, and board of education in good faith paid contractor who made false affidavits that all bills had been paid, the board's obligations to the contractor were discharged and board had no cause of action against contractor for conversion of which contractor's surety could avail himself against contractor after payment by surety of materialmen, laborers and others; nor could surety as subrogee maintain action against contractor either on ground that contractor had perpetrated a common law fraud against laborers and materialmen or on ground that they had an action under the lien law declaring that funds received by contractor for public improvement constitute trust funds and punishing as a larceny their misapplication by contractor.—American

Surety Co. of New York v. Tannhauser, 37 N.Y.S.2d 450, affirmed 39 N.Y.S.2d 996, 265 App.Div. 999, appeal denied 41 N.Y.S.2d 192, 265 App.Div. 1053.

3. U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 40 F.Supp. 782.

4. U.S.—U. S. Fidelity & Guaranty Co. v. Bank of Brewton, D.C.Ala., 4 F.Supp. 272.

Held not payment under contract

Road contractor's assignee applying portion of reserve percentage due contractor to payment of advancements made to contractor and paying remainder to contracting firm and partners thereof with knowledge contractor was in default could not avoid liability to contractor's surety on ground that in effect reserve percentage had been paid to contractor under contract.—U. S. Fidelity & Guaranty Co. v. Bank of Brewton, supra.

Estoppel to claim assignment ineffective

Where town in paying to bank a construction contract progress payment, which had been assigned to bank by contractor, did not act on contractor's certificate to town that he had paid claims in full, executed in connection with obtaining a prior progress payment, the certificate did not estop contractor's surety to claim that assignment was ineffective because contractor was in default under his contract when the assignment was made, and was not entitled to further payments.—Town of River Junction, Fla., v. Maryland Cas. Co., C.C.A.Fla., 133 F.2d 57.

5. Mich.—Fidelity & Casualty Co. of New York v. Livingston, 208 N.W. 446, 234 Mich. 375.
60 C.J. p 780 note 83.

6. U.S.—Anderson v. U. S., 97 Ct.Cl. 545.

(2) Against Whom Surety Is Entitled to Unpaid Funds

The right of the contractor's surety to be subrogated with respect to unpaid funds is usually regarded as superior to the claims of general creditors, the contractor or his receiver or trustee, the assignee of funds due under the contract, and various other persons.

The right of the contractor's surety to be subrogated with respect to unpaid funds is usually regarded as superior to the claims of general creditors,⁷ the contractor,⁸ a receiver of the contractor,⁹ the contractor's trustee in bankruptcy,¹⁰ a materialman who had assisted the contractor in deceiving the surety as to the contractor's assets,¹¹ or any person who receives or appropriates the proceeds of the contract with notice of the contractor's default and of the surety's rights,¹² or even creditors who seek to attach the fund after the contract of suretyship

has been entered into,¹³ and apparently although the creditor may be one who has performed work for the contractor prior to the latter's abandonment.¹⁴ A surety who has paid laborers and materialmen, as required by an additional bond given for their protection, has no right, by subrogation, superior to that of other creditors of the contractor, to funds in the hands of the owner, however, notwithstanding the contractor had failed to pay such laborers and materialmen and had ceased work on the contract where the contractor was never in default, and the contract was never turned over to the surety for completion, there being no provision in the construction contract conferring rights on laborers or materialmen to obtain payment of their bills or to file liens, and no provision entitling the owner to withhold funds owing to the contractor for the payment of such claim.¹⁵ It has been held that,

7. U.S.—U. S. Fidelity & Guaranty Co. v. John R. Alley & Co., D.C.Okl., 34 F.Supp. 604.

R.I.—U. S. Fidelity & Guaranty Co. v. Rhode Island Covering Co., 167 A. 143, 53 R.I. 397.
60 C.J. p 778 note 69.

Right of subrogation as to amounts paid and distributed see *supra* subdivision d (1) of this section.

Inapplicability of lien statutes

The statutes providing for liens on production of one's labor and on real estate or improvements thereon are inapplicable to claimed liens for public liability and workmen's compensation insurance premiums on retained percentages of contract prices due insured for construction of public works, and question whether such statutes were complied with is immaterial in determining whether insurer obtained preference or lien independently of mechanic's lien statutes and, if so, status thereof, with respect to claim of surety on insured's contract performance bond to payment from such fund of amount of materialmen's claims paid by surety.—Standard Acc. Ins. Co. v. U. S. Cas. Co., 188 F.2d 204, 199 Okl. 530.

Attorney's fees

Where road contractor agreed to save surety on road contractor's performance bond harmless against all liability, damages, loss and expenses, including counsel and attorney's fees which surety might be called on to incur by reason of executing bond, and surety held valid assignment of prefinal estimate and retained percentage on road contract against which there were no valid and unpaid claims, surety in action to determine liability under bond was properly reimbursed for attorney's fees out of retained percentage of road contract.

—Associated Indem. Corp. v. Del Guzzo, 81 P.2d 516, 195 Wash. 486.

8. U.S.—Standard Acc. Ins. Co. v. U. S. Ct.Cl., 97 F.Supp. 829.

N.J.—National Sur. Corp. v. Barth, 89 A.2d 104, 20 N.J.Super. 100.

N.Y.—U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 74 N.E.2d 226, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 190 N.E. 330, 264 N.Y. 159.

9. Ind.—Southern Ry. Co. v. Bretz, 104 N.E. 19, 181 Ind. 504.
60 C.J. p 778 note 70.

10. U.S.—In re L. H. Duncan & Sons, C.C.A.Pa., 127 F.2d 640.

Claims paid by surety after adjudication in bankruptcy

Where surety under statutory bonds guaranteeing performance by bankrupts of a highway construction contract with the Commonwealth of Pennsylvania and payment of materialmen and laborers paid claims for labor and material exceeding amount remaining due from commonwealth on contract and took assignments from those whose claims were paid, and surety, under Pennsylvania law, was otherwise entitled to subrogation to unpaid balance due from commonwealth on the contract, fact that bankrupts were adjudicated bankrupt before surety paid laborers and materialmen did not affect surety's right of subrogation, the surety being subrogated in this case to the rights of the laborers and materialmen, and not to those of the contractor, and such right was paramount to trustee's right to fund remaining due under contract.—In re L. H. Duncan & Sons, *supra*.

11. Ill.—Coudy Bros. Lumber Co. v. Board of Education, 262 Ill.App. 493.

12. U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 18 F.Supp. 375.

13. R.I.—U. S. Fidelity & Guaranty Co. v. Rhode Island Covering Co., 167 A. 143, 53 R.I. 397.

S.C.—Brown Const. Co. v. Massachusetts Bonding & Insurance Co., 179 S.E. 697, 176 S.C. 76, followed in 181 S.E. 5, 177 S.C. 306.
60 C.J. p 778 note 71.

14. Md.—Stehle v. United Surety Co., 68 A. 600, 107 Md. 470.

15. Pa.—Du Bois v. U. S. Fidelity & Guaranty Co., 18 A.2d 802, 341 Pa. 85—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90.

Bonds not incorporated into contract

Highway contractor's surety, who paid claims against contractor for labor and materials in accordance with his obligation on additional bonds for labor and materials, could not incorporate the additional bonds into the construction contract because of a general reference in the introduction of the contract that everything contained in the contract, as well as the proposal or bid, was made part of the specifications and contract, in order to entitle him to a preference over creditors of contractor for money due under contract.—Du Bois v. U. S. Fidelity & Guaranty Co., 18 A.2d 802, 341 Pa. 85.

Effect of agreement for completion of work

Agreement between contractor, who was financially unable to continue with work on the contract, and another for the "financing, supervi-

where the surety's bond covered the contractor's obligation to materialmen which remained substantially unsatisfied notwithstanding payment by the surety of the amount of the penalty of the bond, the surety is not subrogated to any rights or remedies with respect to percentages retained under the contract, the enforcement of which would operate to the prejudice or injury of the materialmen.¹⁶ There are cases to the effect that, where the surety's bond does not render him liable for labor and material, his rights in unpaid funds, where he completes the contract after abandonment, are superior to the claims of those who have furnished labor and material to the contractor prior to the abandonment.¹⁷ Although a subcontractor is not entitled to recover the balance due for municipal work under the contractor's statutory bond because of failure to file proper notice thereunder, he may recover the bal-

ance out of unpaid money held by the city as against the surety on the contractor's bond who took an assignment of the contract and completed the work thereunder on the contractor's default, by virtue of a provision in the specifications requiring an assignment of the contract by the contractor to be subject to a prior lien for services rendered or materials supplied.¹⁸

The surety's right relates back to the date of the contract and is superior to a claim of the United States for unpaid taxes for periods subsequent to the date of the contract of suretyship, although prior to the date of payment by the surety;¹⁹ this rule applies where the owner is a mere stakeholder and has no rights of his own to assert,²⁰ and it does not prevent the United States from setting off against the sums retained by it, pursuant

sion and completion of the work" by the other for a stated compensation, did not confer on contractor's surety, who had paid claims against contractor for labor and materials in accordance with his obligation on additional bonds, any special interest in funds due under the contract, and would not entitle surety to a preference over other creditors of the contractor.—*Du Bois v. U. S. Fidelity & Guaranty Co.*, *supra*.

Joint indemnity agreement covering construction and additional bonds

Under indemnity agreement whereby, in event of breach of contracts by contractor, surety became subrogated to rights of contractor in construction contracts, surety who paid certain materialmen was not entitled to priority in payment on distribution of balance of money received by contractor's administrator from school district, where administrator completed contracts which did not require contractor to pay materialmen, although contractor executed one joint indemnity agreement covering his applications for construction bonds and additional bonds to protect materialmen.—*In re Troutwine's Estate*, 178 A. 302, 117 Pa.Super. 525.

Death of contractor worked no breach of contracts with respect to right of surety to recover under indemnity agreement whereby, in event of breach of contracts by contractor, surety became subrogated to rights of contractor in contracts.—*In re Troutwine's Estate*, *supra*.

16. U.S.—*American Surety Co. of New York v. Westinghouse Electric Mfg. Co.*, C.C.A.Fla., 75 F.2d 377, affirmed 56 S.Ct. 9, 296 U.S. 133, 80 L.Ed. 105.

17. U.S.—*Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk*, C.C.A.N.Y., 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603. 60 C.J. p 779 note 73.

In New York

(1) Although the point was not directly in issue, since the surety company made no claim to any portion of "earned moneys" including retained percentages remaining unpaid at the time of the contractor's abandonment, the court of appeals indicated that the logic of the rule of the text is not easy of escape.—*Arrow Iron Works, Inc. v. Greene*, 183 N.E. 515, 260 N.Y. 330.

(2) "*Laski v. State of New York*, 217 N.Y.S. 48, 217 App.Div. 420, affirmed 159 N.E. 655, 246 N.Y. 569, which is strongly relied upon for the contrary view, can have little vitality after the *Arrow* decision."—*Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk*, C.C.A.N.Y., 66 F.2d 730, 736, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.

(3) Under contract for public improvement providing that on default by contractor state could cancel contract and call on surety to complete work and that amount retained by state from contractor should be forfeited, successor to surety who had assumed liability of surety on bond to state and who after cancellation of contract elected to complete contract on request by state with understanding that he was to be subrogated to rights of state to fund remaining unpaid to contractor was subrogated to rights of state to apply retained funds to cost of completion, and, hence, liens of lienors who had

furnished labor and material to contractor were not enforceable against fund retained by state from contractor and paid to successor to surety.—*Stanton v. Babor-Comeau & Co.*, 6 N.Y.S.2d 231, 168 Misc. 190, affirmed 22 N.Y.S.2d 427, 260 App.Div. 831, appeal denied 24 N.Y.S.2d 1020, 260 App.Div. 980.

18. Mich.—*City of St. Johns v. Hudson-Howe, Inc.*, 15 N.W.2d 147, 309 Mich. 240.

19. U.S.—*Glenn v. Anderson Sur. Co.*, C.C.A.Ky., 160 F.2d 977. N.J.—*National Sur. Corp. v. Barth*, 89 A.2d 104, 20 N.J.Super. 100.

Decisions differentiated and reconciled

"The Supreme Court's recent decision in *United States v. Munsey Trust Co.*, 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022, decided June 23, 1947, neither reaches nor points a contrary result. There, the Government, itself in possession of the fund, asserted a claim of its own by way of set-off and, to the extent of that set-off, the fund upon which the surety's lien could operate was necessarily reduced. Quite different is such case from one like the present—as the Supreme Court observed—where 'the owner [defendant Authority herein] was a mere stakeholder and had no rights of its own to assert'. *United States v. Munsey Trust Co.*, *supra*."—*U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority*, 74 N.E.2d 226, 227, 297 N.Y. 31, reargument denied 77 N.E.2d 9, 297 N.Y. 694.

20. U.S.—*U. S. v. Munsey Trust Co. of Washington, D. C.*, Ct.Cl., 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022.

to a construction contract, claims against the contractor.²¹ On the other hand, it has been held that, with respect to the amount of the unpaid balance against which the surety claims subrogation, the owners who have subsequent to the acceptance of the bond advanced money to the contractors in the form of a loan for a purpose foreign to the construction have no right to pay the contractor by deducting the amount of the debt from the payments due, or to become due, under the contract.²² Where a statute makes the lien of a state for taxes superior to all other liens and obligations except those due the

United States, a state tax lien takes priority over the claim of a surety to be subrogated to the rights of laborers and materialmen.²³

Assignee of funds due under contract. As against one to whom the contractor has assigned the funds after the contract of suretyship has been entered into, the surety's rights are generally held to be superior whether the surety has been compelled to complete the contract after abandonment,²⁴ or has only paid claims for labor or material which the contractor has left unsatisfied,²⁵ particularly where

21. U.S.—*U. S. v. Munsey Trust Co. of Washington*, D. C., 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022.
 Contra *Maryland Cas. Co. v. U. S.*, Ct.Cl., 53 F.Supp. 436.

Owner not general creditor

"One whose own appropriation and payment of money is necessary to create a fund for general creditors is not a general creditor. He is not compelled to lessen his own chance of recovering what is due him by setting up a fund undiminished by his claim, so that others may share it with him. In fact he is the best secured of creditors; his security is his own justified refusal to pay what he owes until he is paid what is due him."—*U. S. v. Munsey Trust Co. of Washington*, D. C., Ct.Cl., 67 S.Ct. 1599, 1602, 332 U.S. 234, 91 L.Ed. 2022.

22. Va.—*American Surety Co. v. Plank & Whitsett*, 165 S.E. 660, 159 Va. 1.

23. W.Va.—*Fidelity & Deposit Co. of Maryland v. Lewis County Court*, 15 S.E.2d 302, 123 W.Va. 409.

24. U.S.—*Standard Acc. Ins. Co. of Detroit, Mich., v. Federal Nat. Bank of Shawnee*, C.C.A.Okl., 112 F.2d 692, opinion adhered to 115 F.2d 34—*Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk*, C.C.A.N.Y., 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—*First Nat. Bank v. Fidelity & Deposit Co. of Maryland*, C.C.A.Kan., 65 F.2d 959—*Farmers' Bank v. Hayes*, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—*Maryland Cas. Co. v. City of Pittsburgh*, D.C.Pa., 51 F.Supp. 459—*Maryland Cas. Co. v. Lincoln Bank & Trust Co.*, D.C.Ky., 18 F.Supp. 375, reversed on other grounds, C.C.A., 103 F.2d 1016.

- Ala.—*Citizens' Bank of Guntersville v. Pearson*, 116 So. 350, 217 Ala. 391.

- N.Y.—*Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity and Guaranty Co.*, 190 N.E. 330, 264 N.Y. 159.

- Va.—*School Board of Carroll County v. First Nat. Bank*, 170 S.E. 625, 161 Va. 127.
 60 C.J. p 779 note 75-76.

Contractor not formally declared in default

- U.S.—*Hardin County Sav. Bank v. U. S.*, 65 F.Supp. 1017, 106 Ct.Cl. 577.

What law governs

(1) In determining whether amount of percentage retained by state of South Dakota under highway construction contract therewith and paid by it to surety on contractor's bond is subject to equitable lien, superior to surety's claims through subrogation and impressed with trust, in favor of South Dakota bank, which loaned money to contractor on note, secured by his assignment of moneys due under contract, law of such state governs, as note, assignment, and bond were contracts made and to be performed therein.—*Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls*, C.C.A.S.D., 121 F.2d 288.

(2) In determining whether amount of percentage retained by state of Minnesota under highway construction contract and paid by it to surety on contractor's bond, made and to be performed in such state, after contractor's default, is subject to equitable lien, superior to surety's claims through subrogation and impressed with trust, in favor of South Dakota bank, which loaned money to contractor on note secured by assignment to bank of moneys due him under contract, law of Minnesota applies, although note and assignment were made and to be performed in South Dakota, since situs of fund involved is located in Minnesota.—*Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls*, supra.

25. U.S.—*Farmers' Bank v. Hayes*, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—*U. S. Fidelity & Guaranty Co. v. Bank of Brewton*, D.C. Ala., 4 F.Supp. 272.

- Ala.—*Maryland Casualty Co. v. Dupree*, 136 So. 811, 223 Ala. 420.

- Ind.—*Southern Surety Co. v. Merchants' & Farmers' Bank of Avilla*, 176 N.E. 846, 203 Ind. 173, rehearing denied 179 N.E. 327, 203 Ind. 173.

- Miss.—*Jackson Lumber Co. v. Moseley*, 11 So.2d 199, 193 Miss. 804—*Davis Co. v. D'Lo Guaranty Bank*, 138 So. 802, 162 Miss. 829.

- N.Y.—*Hedley v. New Amsterdam Casualty Co. of New York*, 46 N.Y. S.2d 388, 267 App.Div. 800, affirmed 60 N.E.2d 130, 293 N.Y. 921—*Century Cement Mfg. Co. v. Fiore*, 36 N.Y.S.2d 332, 264 App.Div. 475.

- Okl.—*Fidelity Nat. Bank of Oklahoma City v. U. S. Cas. Co.*, 131 P.2d 75, 191 Okl. 496.

- Tenn.—*Miller Bros. Co. v. Standard Plumbing & Heating Co.*, 15 Tenn. App. 102.

- Wis.—*Murphy v. National Paving Co.*, 281 N.W. 705, 229 Wis. 100.

- Wyo.—*Corpus Juris cited in State Bank of Wheatland v. Turpen*, 34 P.2d 1, 7, 47 Wyo. 284.
 60 C.J. p 779 note 77.

Contractual provisions for benefit of obligee

The provisions of the performance bond permitting assignment by the contractor without notice to surety were for the benefit of the obligee and did not create equitable considerations in favor of an assignee sufficient to override surety's right to subrogation for his outlay on contractor's default.—*Municipal Housing Authority of City of Utica v. H. G. Hatfield Elec. Corp.*, 34 N.Y.S.2d 995, 264 App.Div. 99.

Payment to assignee rendering owner liable

Payment by school board of retained fund on completed school building contract to contractor's assignee having notice of outstanding claims was held to render school board liable to surety on school contractor's bond paying laborer and material claims.—*Claiborne Parish School Board v. Fidelity & Deposit*

the construction contract provides for the protection of laborers or materialmen or a statute requires it to do so.²⁶ Moreover, the rule applies even though the assignment was executed prior to the time the suretyship contract was entered into.²⁷ An assignee who knew of the contractor's default when appropriating reserve percentages due the contractor cannot complain of negligence and delay of the surety in discovering the contractor's default where the surety had no duty to investigate.²⁸

Some of the cases granting the surety superiority seem to have involved only assignees whose advances to the contractor were not shown to have been used in the performance of the contract, and as

against such assignees the surety has been granted a superior right not only with respect to retained percentages,²⁹ but also earned and unpaid monthly estimates,³⁰ and sums in addition to the contract price, which have been appropriated to pay the contractor for extra costs;³¹ but a considerable number of cases have gone further and hold that the assignee's claim is inferior, although the assignment has been made to secure the repayment of loans which have been given to finance the contractor in the performance of his work and which have been so used,³² although the fund involved is composed of periodical installments due and earned, but unpaid, at the time of abandonment,³³ or re-

Co. of Maryland, C.C.A.La., 40 F.2d 577.

Actual or constructive notice of surety's right

Unless bank taking alleged assignment of moneys to become due under state highway contract had no actual or constructive notice of surety's right to subrogation, surety's rights were superior; but a bank taking such assignment was bound to know that statute, contract, and bond made rights of materialmen and workmen paramount to contractor's rights, on which provision they and surety could rely, and was put on inquiry into circumstances under which contractor's surety assumed liability.—Appeal of Lancaster County Nat. Bank, 155 A. 859, 304 Pa. 437, 76 A.L.R. 912.

26. U.S.—Maryland Cas. Co. v. City of Pittsburgh, D.C.Pa., 51 F.Supp. 459.

Pa.—Appeal of Lancaster County Nat. Bank, 155 A. 859, 304 Pa. 437, 76 A.L.R. 912.

60 C.J. p 779 note 77.

27. U.S.—Seaboard Sur. Co. v. State of N. D., D.C.N.D., 94 F.Supp. 177, 183.

Reason for rule

"The assignment to the bank was made at a time when no contract existed between Rolfsen and the State of North Dakota. There was actually nothing to assign. The proposed contract could not come to fruition without the issuance of a statutory bond, such as the surety provided in the instant case. The question, then, of priority in time appears not too important. Certainly the surety's rights with reference to equitable subrogation became effective when its obligation was fixed—that is, by the execution of the bond and its acceptance by the State of North Dakota. The bank's rights under its assignment became effective only after

er there was in existence something to assign. The surety's bond had to be issued and accepted by the State of North Dakota before the contract could come into existence. That was a necessary prerequisite and known to be such by the bank. The Court must conclude, then, that the execution of the assignment prior to the existence of the contract gave the bank no superior rights."—Seaboard Sur. Co. v. State of N. D., supra.

28. U.S.—U. S. Fidelity & Guaranty Co. v. Bank of Brewton, D.C.Ala., 4 F.Supp. 272.

29. U.S.—Seaboard Sur. Co. v. State of N. D., D.C.N.D., 94 F.Supp. 177, 60 C.J. p 779 note 78.

30. Cal.—Castro v. Malcolm, 226 P. 976, 66 Cal.App. 635.

60 C.J. p 779 note 79.

31. U.S.—London & Lancashire Indemnity Co. of America v. Endres, C.C.A.Kan., 290 F. 98.

32. U.S.—Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk, C.C.A.N.Y., 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—Farmers' Bank v. Hayes, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—Standard Accident Ins. Co. v. U. S., Ct.Cl., 97 F.Supp. 829—U. S. Fidelity & Guaranty Co. v. Bank of Brewton, D.C.Ala., 4 F.Supp. 272.

Miss.—Jackson Lumber Co. v. Moseley, 11 So.2d 199, 193 Miss. 804.

N.Y.—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 190 N.E. 330, 264 N.Y. 159—Century Cement Mfg. Co. v. Fiore, 36 N.Y.S.2d 332, 264 App.Div. 475—Municipal Housing Authority of City of Utica v. H. G. Hatfield Elec. Corp., 34 N.Y.S.2d 995, 264 App.Div. 99—Perlin v. Greenberg, 94 N.Y. S.2d 411, 196 Misc. 865.

Okl.—Fidelity Nat. Bank of Oklahoma City v. U. S. Cas. Co., 131 P.2d 75, 191 Okl. 496.

60 C.J. p 780 note 81.

Notice of contract and surety bond

Persons taking assignments from highway contractor are chargeable with notice of terms of contract and surety bond and that reserved fund is for indemnity of surety.—Southern Surety Co. v. Merchants' & Farmers' Bank of Avilla, 176 N.E. 846, 203 Ind. 173, rehearing denied 179 N.E. 327, 203 Ind. 173.

33. U.S.—Standard Acc. Ins. Co. of Detroit, Mich. v. Federal Nat. Bank of Shawnee, C.C.A.Okl., 112 F.2d 692, opinion adhered to 115 F.2d 34—Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk, C.C.A.N.Y., 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—Farmers' Bank v. Hayes, C.C.A.Tenn., 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—Lacy v. Maryland Casualty Co., C.C.A.N.C., 32 F.2d 48.

Wyo.—Corpus Juris cited in State Bank of Wheatland v. Turpen, 34 P.2d 1, 6, 7, 8, 11, 47 Wyo. 284.

Contract authorizing owner to apply fund to cost of completion

Where contractor, after assigning to bank moneys due under contract with state for public improvement, defaulted, contractor's surety completing work at loss was entitled to money due contractor at time of default, where contract provided state could apply such money to cost of completion.—Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., 190 N.E. 330, 264 N.Y. 159.

Additional collateral immaterial

Fact that assignee of state contract secured additional collateral for loans to contractor was held immaterial in determining respective rights of assignee and defaulting

served percentages under the contract,³⁴ and even though the assignee has voluntarily paid laborers and materialmen.³⁵

There is, however, authority for denying the surety complete subrogation and making an equitable adjustment by ordering a pro rata distribution of the fund where the assignee's loan has been used in the contract;³⁶ and apparently the surety's rights are inferior if the loans are made with the surety's knowledge and without objection on his part,³⁷ or if, at the time the surety becomes bound, he has knowledge of a financing arrangement which the contractor has already entered into with the assignee;³⁸ the assignee's rights are clearly superior where the surety expressly consents to the making of the loan to the contractor, to aid him in the contract, and to the assignment, as security, of the sums to be paid under the contract.³⁹ Moreover, it has been held that the equity of a bank lending money to be used, and used, for the payment of laborers and materialmen was superior to that of a surety who would have had to supply the money

for such payment if the bank had not done so,⁴⁰ and, furthermore, there is authority asserting the right of an assignee to apply funds covered by the assignment to an antecedent indebtedness where the assignee had no knowledge or notice of the contractor's agreement with the surety that the indebtedness incurred in making the improvement would be paid out of the funds received therefor.⁴¹

In some states a distinction is drawn between retained percentages and monthly estimates or progress payments to be made to the contractor as the work progresses, the surety being subrogated as against an assignee with respect to the former funds,⁴² but not with respect to the latter.⁴³

In Minnesota, if, in accordance with an agreement made in advance, the assignee makes loans which are used to pay for labor and material for which the surety would have been liable had they remained unpaid, the right of the surety to be subrogated to the place of the laborers and materialmen he pays is inferior to the claim of the assignee;⁴⁴

contractor's surety to unpaid balance applicable to contract, doctrine of marshaling assets being inapplicable.—*Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity and Guaranty Co.*, 263 N.Y.S. 854, 146 Misc. 819, modified on other grounds 266 N.Y.S. 753, 239 App.Div. 100, reversed on other grounds 190 N.E. 330, 264 N.Y. 159.

34. U.S.—*Standard Accident Ins. Co. of Detroit, Mich. v. Federal Nat. Bank of Shawnee, C.C.A.Okl.*, 112 F.2d 692, opinion adhered to 115 F.2d 34.—*Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk, C.C.A.N.Y.*, 66 F.2d 730, certiorari denied 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.—*Farmers' Bank v. Hayes, C.C.A.Tenn.*, 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524.

N.Y.—*Scarsdale Nat. Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 266 N.Y.S. 753, 239 App.Div. 100, reversed on other grounds 190 N.E. 330, 264 N.Y. 159.

Identifiable funds

Reserve percentage held back to secure performance of contract can be subjected in equity to lien of contractor's surety as long as it can be identified and followed.—*U. S. Fidelity & Guaranty Co. v. Bank of Brewton, D. C.Ala.*, 4 F.Supp. 272.

35. U.S.—*Farmers' Bank v. Hayes, C.C.A.Tenn.*, 58 F.2d 34, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524.

36. Kan.—*Fidelity & Deposit Co. of Maryland v. City of Stafford*, 144 P. 852, 93 Kan. 539.

37. N.Y.—*People v. Syracuse Third Nat. Bank*, 54 N.E. 35, 159 N.Y. 382.

38. U.S.—*Massachusetts Bonding & Ins. Co. v. Chouteau Trust Co., C. C.A.Mo.*, 264 F. 793.
60 C.J. p 780 note 86.

39. Or.—*First Nat. Bank v. U. S. Fidelity & Guaranty Co.*, 271 P. 57, 127 Or. 147.

Estoppel

Contractor's surety, inducing bank to make advances to contractor and consenting to payment to bank, was estopped to deny indebtedness for advancement, and could not deny obligation to pay contractor's note with reasonable attorney's fees.—*Cole v. Reeves*, 294 P. 1099, 135 Or. 98.

40. Ky.—*Southern Exchange Bank v. American Sur. Co. of New York*, 144 S.W.2d 203, 284 Ky. 251.

Third person advancing money to pay mechanics' liens under agreement for subrogation as entitled to be subrogated as against contractor's surety generally see *supra* § 41.

Void assignment of progress payment

Where assignment by contractor of progress payment on work done under construction contract with town was void, but loans secured by assignment were used to pay labor and material claims for which surety on

contractor's bond would have been liable, bank which made loans and received progress payment was not a mere volunteer under Florida law, and under doctrine of subrogation could prevent surety from recovering in equity amount paid to bank under the assignment.—*Town of River Junction, Fla. v. Maryland Cas. Co., C.C.A.Fla.*, 133 F.2d 57.

41. Okl.—*Metropolitan Casualty Ins. Co. of New York v. United Brick & Tile Co.*, 29 P.2d 771, 167 Okl. 402, followed in *United Brick & Tile Co. v. Southwestern Const. Co.*, 29 P.2d 777, 167 Okl. 407.

42. Miss.—*Jackson Lumber Co. v. Moseley*, 11 So.2d 199, 193 Miss. 804.
60 C.J. p 781 note 88.

Entire contract price treated as retainage

In determining rights of surety on bridge contractor's bond, where contract contained no provision for progress payments, entire contract price should be treated as retainage.—*Davis Co. v. D'Lo Guaranty Bank*, 138 So. 802, 162 Miss. 829.

43. Miss.—*Jackson Lumber Co. v. Moseley*, 11 So.2d 199, 193 Miss. 804.
60 C.J. p 781 note 89.

44. Minn.—*Farmers State Bank of Waubun v. Anderson*, 263 N.W. 443, 195 Minn. 475.
60 C.J. p 781 note 90.

"The rule developed in those [Minnesota] cases . . . is that the

but, where the money lent is to be used as the contractor sees fit and is not all applied on the particular contract, the equity of the surety is superior,⁴⁵ except as superiority may be granted to the assignee by consent of the surety.⁴⁶

Statutory provisions on the subject are controlling.⁴⁷ Such statutes are in effect written into the contract, and, if there is a conflict between the contract and the statutes, the latter must prevail.⁴⁸ Under some statutes, it is held that the surety may resort to that portion of the contract price which the owner was required to retain, and that the unpaid balance above that portion belonged to the contractor's assignee, not to the surety.⁴⁹

equity of the surety, through subrogation, is superior to that of one loaning money to the contractor, even though such money goes into performance of the contract, unless such money is loaned under a contract obligating the lender to make advances, (whether or not limited as to aggregate amount), to the contractor for use in performance of the work contract and unless such advances are so used."—Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls, C.C.A.S.D., 121 F.2d 288, 292—Seaboard Sur. Co. v. State of N. D., D.C. N.D., 94 F.Supp. 177, 182.

45. Minn.—Hartford Accident & Indemnity Co. v. Federal Const. Co., 209 N.W. 911, 168 Minn. 202.

Held ordinary loan giving surety superior equity

U.S.—Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls, C.C.A.S.D., 121 F.2d 288, applying Minnesota law.

46. U.S.—Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls, supra.

Consent held to cover unpaid estimates earned at time of consent.—Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls, supra.

Assignee held justified in relying on consent as effective

U.S.—Seaboard Sur. Co. v. First Nat. Bank & Trust Co. in Sioux Falls, supra.

47. Iowa.—Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 235 Iowa 568.

48. Iowa.—Hercules Mfg. Co. v. Burch, supra.

49. Iowa.—Sinclair Refining Co. v. Burch, 16 N.W.2d 359, 235 Iowa 594.

Surety held not entitled to balance above retained percentage:

(1) On ground of contract specification that contractor guaranteed

payment of all just claims, where specification was intended to apply to a contract made by county board of supervisors and contract involved was with state highway commission. —Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 235 Iowa 568.

(2) On ground that assignee did not apply payments received to reduction of contractor's indebtedness. —Hercules Mfg. Co. v. Burch, supra.

50. U.S.—American Sur. Co. of New York v. Baldwin, C.C.A.Ind., 90 F.2d 708—Fidelity & Deposit Co. of Maryland v. Bank of Smithfield, D. C.Va., 11 F.Supp. 904.

Ala.—First Nat. Bank v. American Sur. Co. of New York, 185 So. 365, 237 Ala. 35.

Ariz.—Corpus Juris cited in Button v. Nevin, 36 P.2d 568, 573, 44 Ariz. 247.

Ark.—Arkansas Power & Light Co. v. Fidelity & Cas. Co. of New York, 121 S.W.2d 890, 197 Ark. 187.

Ga.—U. S. Fidelity & Guaranty Co. v. Richmond County, 163 S.E. 482, 174 Ga. 599.

Ill.—People ex rel. Barrett v. State Bank of Herrick, 8 N.E.2d 71, 290 Ill.App. 130.

Ky.—Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort, 95 S.W.2d 793, 264 Ky. 839.

N.Y.—American Surety Co. of New York v. Town of Islip, 48 N.Y.S.2d 749, 268 App.Div. 92—Indemnity Ins. Co. of North America v. Farkas, 89 N.Y.S.2d 741, 195 Misc. 554.

Okl.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102.

S.C.—American Sur. Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

Tex.—J. R. Phillips Inv. Co. v. Road Dist. No. 18 of Limestone County, Civ.App., 172 S.W.2d 707, error refused—New Amsterdam Cas. Co. v. First Nat. Bank, Civ.App., 134 S.W.

§ 60. — Sureties for Fiduciaries and Officials

- a. Officials
- b. Guardians, trustees, executors, and administrators

a. Officials

A surety on the bond of a public official will generally be subrogated to all rights of the creditor or obligee whose claim the surety is compelled to satisfy and also to all rights of the official or principal.

A surety on the bond of a public official will generally be subrogated to all rights of the creditor or obligee whose claim the surety is compelled to satisfy,⁵⁰ and also to all rights of the official or

2d 470, error dismissed, judgment correct.

Utah.—Beaver County v. Home Indem. Co., 52 P.2d 435, 88 Utah 1.

Va.—Jones v. U. S. Fidelity & Guaranty Co., 182 S.E. 560, 165 Va. 349. 60 C.J. p 772 note 7.

Subrogation to priorities and special privileges see supra § 54 d.

Subrogation against persons participating in breach of trust or receiving trust property see supra § 54 e.

Surety on treasurer's later bond, having paid county for losses for which surety on bond given for earlier term was primarily liable, was held subrogated to county's rights against other surety.—Etna Casualty & Surety Co. of Hartford, Conn., v. Board of Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.

Statutory lien on officer's property

(1) A surety paying shortage of county officer could assert county's statutory lien against officer's properties.

Ga.—U. S. Fidelity & Guaranty Co. v. Clarke, 2 S.E.2d 608, 187 Ga. 774.

Ky.—Maryland Cas. Co. v. Holt's Adm'x, 146 S.W.2d 940, 285 Ky. 66 —Maryland Cas. Co. v. Lewis, 124 S.W.2d 48, 276 Ky. 263—Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use and Benefit of Nelson County, 60 S.W.2d 345, 249 Ky. 170.

(2) A surety paying shortage of county treasurer could enforce county's statutory lien against property taken in name of treasurer's wife, if property was purchased with funds stolen from county by treasurer, but not if property was purchased with wife's separate funds.—U. S. Fidelity & Guaranty Co. v. Clarke, supra.

Amount; set-off

Full amount of sureties' payment to school district to make good school tax collector's defalcation was prop-

principal.⁵¹ The right of subrogation goes back to the date of the contract of suretyship and takes priority over an assignment made prior to payment by the surety.⁵²

Sureties for a tax collector will be subrogated to a statutory lien to secure performance of the principal's official duties,⁵³ and, when compelled to pay for uncollected taxes, may be subrogated to the government's⁵⁴ or collector's⁵⁵ rights against delinquent taxpayers whose taxes the sureties have paid. If a collector of both state and county taxes has permitted them to become confused, embezzles an amount equal to the sum owing the state, and then turns the balance over to the county, a surety on a bond for state taxes, who pays the loss, will be subrogated to the state's right to participate in the confused tax funds and pursue its proportionate share in the hands of the county.⁵⁶

er figure to be used as entitled to priority against collector's estate, and indebtedness of one of sureties to tax collector could not be offset against amount paid to district, for purpose of determining extent of priority, since the sureties were subrogated to rights of school district, there being no offset or counterclaim as to taxes.—*In re Harris' Estate*, 293 N.Y.S. 250, 161 Misc. 793.

Enforcement against personal property

Fact that there was very little or no personal property in school tax collector's estate, and that proceedings had been completed for sale of realty to pay debts did not defeat right of subrogation of sureties who had made good collector's defalcation, since presumption existed that collector expended his own moneys first, and that property which he owned at time of his death represented tax moneys.—*In re Harris' Estate*, supra.

51. Cal.—*San Diego County v. Croghan*, 38 P.2d 474, 2 Cal.App.2d 494.

Ill.—*Maxwell, for Use of Maxwell v. Nieft*, 40 N.E.2d 554, 313 Ill.App. 354.

Ky.—*Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort*, 95 S.W.2d 793, 264 Ky. 839.

Utah.—*Beaver County v. Home Indem. Co.*, 52 P.2d 435, 88 Utah 1. 60 C.J. p 772 note 8.

Waiver

A surety does not, by taking additional security, waive right to be subrogated to any security held by prin-

cipal.—*Standard Acc. Ins. Co. v. Mueller*, 9 N.E.2d 361, 291 Ill.App. 56.

52. Cal.—*San Diego County v. Croghan*, 38 P.2d 474, 2 Cal.App.2d 494.

Assignee of salary of tax collector, with notice of facts, could not have priority over rights of surety, who paid assignor's shortages.—*San Diego County v. Croghan*, supra.

53. Ala.—*Cummings v. May*, 20 So. 307, 110 Ala. 479. 60 C.J. p 772 note 9.

Enforcement of lien against purchasers and grantees of principal see supra § 55.

Priority

Sureties on school tax collector's bond who had made good collector's defalcation are entitled to be subrogated to rights of school districts and to priority against estate of collector.—*In re Harris' Estate*, 293 N.Y.S. 250, 161 Misc. 793.

54. U.S.—*American Sur. Co. of New York v. First Nat. Bank, C.C.A.Pa.*, 96 F.2d 813. 60 C.J. p 772 note 10.

Penalties

S.C.—*American Sur. Co. v. Hamrick Mills*, 9 S.E.2d 433, 194 S.C. 221.

55. Md.—*Prather v. Johnson*, 3 Harr. & J. 487.

56. Tex.—*Boaz v. Ferrell, Civ.App.*, 152 S.W. 200.

57. Cal.—*San Diego County v. Croghan*, 38 P.2d 474, 2 Cal.App.2d 494. Ohio.—*Corpus Juris quoted in Maryland Cas. Co. v. Gough*, 51 N.E.2d 216, 218, 72 Ohio App. 260. 60 C.J. p 772 note 12.

If an official's surety has been compelled to pay for the default of a deputy or subordinate of the principal, the surety may be subrogated to the government's right against the principal,⁵⁷ or to the principal's rights against the deputy⁵⁸ and the sureties on the latter's bond;⁵⁹ but, as between the principal and a bank paying out funds on forged endorsements, the surety's rights rise no higher than his principal's,⁶⁰ and, where the superior equity is in the bank, the surety is not entitled to be subrogated as against it.⁶¹

Sureties for financial officials who are compelled to pay for losses resulting from the failure of a depository, in which public funds have been deposited without authority, will be subrogated to the obligee's rights against the failed bank,⁶² and against a subordinate official who has negligently failed to transfer the funds before the bank failed.⁶³

58. Cal.—*San Diego County v. Croghan*, 38 P.2d 474, 2 Cal.App.2d 494. Ky.—*Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort*, 95 S.W.2d 793, 264 Ky. 839.

Ohio.—*Corpus Juris quoted in Maryland Cas. Co. v. Gough*, 51 N.E.2d 216, 218, 72 Ohio App. 260. 60 C.J. p 772 note 13.

59. N.C.—*Brinson v. Thomas*, 55 N.C. 414. 60 C.J. p 772 note 13.

60. Ky.—*Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort*, 95 S.W.2d 793, 264 Ky. 839.

61. Ky.—*Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort*, supra.

Primary liability of officer

Auditor was held primarily liable to commonwealth for loss occasioned by his negligence or by claim clerk's fraud in preparing claims and warrants for fictitious persons, and bank's negligence, if any, in not ascertaining falsity of indorsements of payees designated in commonwealth's checks issued thereon was not primary cause of loss, precluding auditor and his surety from recovering against bank as subrogees of commonwealth, bank having superior equity.—*Commonwealth, for Use of Coleman, v. Farmers Deposit Bank of Frankfort*, supra.

62. Utah.—*Beaver County v. Home Indem. Co.*, 52 P.2d 435, 88 Utah 1. Wis.—*Forest County v. Poppy*, 213 N.W. 676, 193 Wis. 274.

63. Wis.—*Forest County v. Poppy*, supra.

Sheriffs' sureties who have been compelled to satisfy a judgment because of the sheriff's default with respect to its enforcement will be subrogated to the creditor's rights against the judgment debtor.⁶⁴ If the sureties are compelled to pay for property wrongfully taken by the sheriff on legal process, they may be subrogated to the owner's rights against the creditor to whom the property has been delivered,⁶⁵ or to the sheriff's rights against the sureties on a bond which has been given by the creditor to indemnify the sheriff,⁶⁶ or his rights against a purchaser of the property.⁶⁷ Sureties compelled to pay parties beneficially interested the amount due on a judicial sale of property will be subrogated to the beneficiaries' rights with respect to a note which the sheriff has taken from a purchaser of the property.⁶⁸

b. Guardians, Trustees, Executors, and Administrators

A surety for a fiduciary charged with the handling or administration of an estate will be subrogated to the rights and remedies of the creditors or beneficiaries whose claims he has satisfied, and to the rights of the principal in connection therewith.

A surety for a fiduciary charged with the handling or administration of an estate, such as a guardian, trustee, executor, or administrator, will, on payment of the claims of creditors or beneficiaries, be subrogated to their rights and remedies⁶⁹ against the principal⁷⁰ or his property;⁷¹ or against a co-surety,⁷² an insolvent bank in which trust assets have been deposited and for which the surety has been compelled to respond,⁷³ a debtor of the estate, whom the principal has wrongfully attempted to

64. Ala.—Saint v. Ledyard, 14 Ala. 244.

60 C.J. p 773 note 17.

65. Iowa.—Skiff v. Cross, 21 Iowa 459.

66. Cal.—Title Guaranty & Surety Co. v. Duarte, 201 P. 790, 54 Cal. App. 260.

60 C.J. p 773 note 19.

Subrogation of surety to rights of principal generally see supra § 57.

67. Ark.—Meyer Bros. Drug Co. v. Davis, 56 S.W. 788, 68 Ark. 112. Ill.—Morgan v. Oberly, 85 Ill. 74.

68. Mo.—Sweet v. Jeffries, 48 Mo. 279.

69. Ky.—Baker v. McIntosh, 172 S. W.2d 29, 294 Ky. 527. Neb.—Webber v. Spencer, 27 N.W.2d 824, 148 Neb. 481.

60 C.J. p 773 notes 23–25, p 774 notes 26–31.

70. U.S.—Hodgins v. National Surety Corp., D.C.Wis., 41 F.Supp. 881. Iowa.—Corpus Juris cited in American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 340, 218 Iowa 1.

N.Y.—Indemnity Ins. Co. of North America v. Covington, 14 N.Y.S.2d 683, 172 Misc. 310—In re Javaras' Estate, 283 N.Y.S. 276, 157 Misc. 303.

Or.—Brown v. American Sur. Co. of N. Y., 182 P.2d 357, 181 Or. 564.

Wis.—Fidelity & Cas. Co. of New York v. Maryland Cas. Co., 268 N. W. 226, 222 Wis. 174—Martineau v. Mehlberg, 267 N.W. 9, 221 Wis. 347.

60 C.J. p 773 note 23.

Subrogation of subsequent guardian to rights against surety of prior guardian see supra § 28.

Contempt proceedings

In case of defaulting fiduciary whose surety pays amount directed by appropriate decree to be paid by fiduciary, the surety may obtain redress from fiduciary through contempt proceedings.—People ex rel. McCullough v. Sheriff of Kings County, 173 N.E. 851, 254 N.Y. 527—Townsend v. Whitney, 75 N.Y. 425—In re Javaras' Estate, 283 N.Y.S. 276, 157 Misc. 303.

Dividends on money deposited in suspended bank

Where surety on executor's bond who had paid part of judgments recovered in actions on bonds against executor and sureties by beneficiaries under decree of distribution was entitled to be subrogated to rights of one beneficiary in the distribution of dividends on money which executor had on deposit in bank at time of bank's suspension, surety was entitled to receive dividends on basis of amount due before payments were made by surety on judgment; and where in such case the executor paid portion of dividends to beneficiaries before surety asserted claim as subrogee, and notice of payment was not given surety, and there was sufficient amount of dividend payments in executor's hands to make an adjustment, surety's claim in amounts paid beneficiaries could not be defeated by the priority in payment to beneficiaries.—In re Petersen's Estate, 295 N.W. 494, 67 S.D. 540.

71. Iowa.—Corpus Juris cited in American Surety Co. of New York v. State Trust & Savings Bank of Mt. Pleasant, 254 N.W. 338, 340, 218 Iowa 1.

Tenn.—State ex rel. Robertson v. First State Bank of Ripley, 91 S.W. 2d 1039, 19 Tenn.App. 556.

60 C.J. p 773 note 24.

Ordinary legal remedies

Where devisee of specific realty named as executor with power to sell realty qualified as executor and sold the realty from residuary estate, and during administration of estate applied estate's funds to his own use for which he was surcharged, and on becoming insolvent his surety paid the amount of surcharge, and was subrogated to rights of the estate, the surety was limited to the ordinary legal remedies to enforce payment and was not entitled to a lien on the devise for amount of funds so used on theory that executor by applying to his own use funds belonging to the estate thereby elected to receive to that extent payment of his devise in money instead of the realty.—Hartford Acc. & Indem. Co. v. Stout, 2 N.W.2d 315, 140 Neb. 859.

Deed of trust released by misappropriated funds

Surety on administrator's bond, having been required to repay estate funds misappropriated by administrator and used to pay administrator's note and secure a release of deed of trust on land securing note, was entitled to be subrogated to rights of holder of deed of trust against land without pursuing any other remedy.—Brown v. Bibb, 201 S. W.2d 370, 356 Mo. 148.

72. Pa.—Commonwealth v. Marsh, 24 A. 339, 149 Pa. 239. 60 C.J. p 773 note 25.

73. Ala.—Moore v. Esslinger, 167 So. 328, 232 Ala. 251. 60 C.J. p 774 note 26.

Offset

The surety on bond of national bank president as committee for incompetent, after making loss good, became subrogated to estate's claim against bank based on bank's imput-

release⁷⁴ or who has made payment to one having no authority to discharge his liability to the beneficiary;⁷⁵ or against a fund which has been provided by a third person to pay the debt of the principal,⁷⁶ the makers of a note which has been given to repay the estate for trust property previously converted by the principal,⁷⁷ a person to whom the principal has transferred the trust assets under an agreement by the former to discharge the claims against such assets;⁷⁸ or, as shown supra § 54 e, against a third person participating in a breach of trust by the fiduciary.

Where a surety on a guardian's bond is compelled to make good a loss to the property of the ward which is in excess of the value thereof, and by doing so makes the estate of the ward whole in such respect, under these circumstances the surety is subrogated to all rights and interests of the ward in such property.⁷⁹ If the surety's principal is the real defaulter, and the party primarily responsible for a conversion or loss of funds, the surety will not be subrogated to such rights as the beneficiary might have against an innocent co-fiduciary who did not participate in the default, but is liable to the beneficiary simply because of negligent inattention to duty.⁸⁰

Where a fund bequeathed in trust to a minor was by the executor turned over to the minor's guardian who dissipated it, and the surety on the guardian's bond paid the amount to the ward on settlement of the guardian's account and took an assignment of all rights of the legatee against the

executor, the surety by subrogation acquired all the rights of the legatee against the guardian, but is not entitled, either under the right of subrogation or under the assignment, to compel the executor again to pay the legacy.⁸¹

Subrogation to rights of principal. A fiduciary's surety will generally be subrogated to such rights as the principal has to obtain reimbursement,⁸² and to his claim for compensation from the estate;⁸³ but if, because of his misappropriations, the principal is barred from claiming reimbursement from the estate, the surety is likewise barred.⁸⁴ Where a surety on the bond of a trustee is compelled to make good a loss resulting when the trustee committed a breach of trust in the investment of trust funds, the surety, on payment of all moneys due the trust estate, will be subrogated to the pretended investments as existing prior to their repudiation,⁸⁵ and will be entitled to have the benefit of liens discharged by the investments.⁸⁶

§ 61. — Sureties on Bonds in Judicial Proceedings

A surety who becomes bound in judicial proceedings will generally be subrogated to all rights which the creditor has acquired by virtue of the proceedings, and to the principal's rights against third persons who are primarily liable and bound to indemnify him.

A surety who becomes bound in judicial proceedings will generally be subrogated to all rights which the creditor has acquired against the principal by virtue of the proceedings in which the surety became bound,⁸⁷ and will, likewise be subrogated

ed knowledge of conversion by president as committee, and such claim could be used by surety as an offset, dollar for dollar, against claim which receiver of bank had against surety under separate bond indemnifying bank against loss caused by dishonesty of bank employees, the amount of offset allowable being the actual amount which surety was required to pay by law to the incompetent's estate, including both principal and interest.—Federal Deposit Ins. Corporation v. American Surety Co. of New York, D.C.Ky., 39 F.Supp. 551.

74. Tex.—Brown v. Maryland Fidelity, etc., Co., 80 S.W. 593, 98 Tex. 55.
60 C.J. p 774 note 27.

75. Ill.—Lochenmeyer v. Fogarty, 112 Ill. 572.
60 C.J. p 774 note 28.

76. N.C.—Walker v. Crowder, 37 N.C. 478.

77. Tex.—Fidelity & Deposit Co. of Maryland v. Risien, Civ.App., 248 S.W. 1105.

60 C.J. p 774 note 30.

78. N.C.—Kennedy v. Pickens, 38 N. C. 147.

60 C.J. p 774 note 31.

79. Neb.—Webber v. Spencer, 27 N. W.2d 824, 148 Neb. 481.

80. Minn.—Southern Surety Co. v. Tessum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

60 C.J. p 774 note 32.

Copincipal not responsible for misappropriation

Where order settling account of testamentary trustees, one of whom misappropriated part of estate's cash, did not fix equal responsibility on cotrustee, surety on both trustees' bonds was not subrogated to latter trustee's beneficial interest in estate to extent of half amount paid

estate by surety.—In re Whitney's Estate, 11 P.2d 1107, 124 Cal.App. 109.

81. N.J.—In re Searle's Estate, 161 A. 301, 111 N.J.Eq. 67, affirmed 166 A. 199, 113 N.J.Eq. 32.

82. Iowa.—Randell v. Fellers, 252 N.W. 787, 218 Iowa 1005.
60 C.J. p 774 note 33.

83. Cal.—In re Elizalde's Estate, 188 P. 560, 182 Cal. 427.

84. Ala.—Maybury v. Grady, 67 Ala. 147.

85. Iowa.—In re Riordan's Trusteeship, 248 N.W. 21, 216 Iowa 1138.

86. Ky.—Davis v. Woods, 115 S.W. 2d 1043, 273 Ky. 210.

87. N.J.—Gray v. Taylor, Ch., 38 A. 951, modified on other grounds 44 A. 668, 59 N.J.Eq. 621.
60 C.J. p 776 note 52.

to his rights against third persons,⁸⁸ and to other rights and remedies in connection with the debt,⁸⁹ including, unless there are intervening equities which have been created before the surety became bound, liens or securities which have originally been given the creditor to secure the original debt.⁹⁰ Such a surety will also be subrogated to the principal's rights against third persons who are primarily liable and bound to indemnify him.⁹¹ It has been held, however, that statutes relating to the assignment of judgments against a principal and surety to the surety, and issuance of execution thereon, apply only to sureties directly and concurrently liable to suit with their principal, who have been sued and had judgment rendered against them, and not to sureties executing a replevin bond in an ac-

tion of detinue against their principal.⁹²

Bail in criminal cases. Apparently, on grounds of public policy, sureties on bail bonds in criminal cases will not be subrogated to the government's remedies for collecting the penalty from the principal.⁹³ A surety who has paid the amount of a judgment obtained by the United States on a bail bond is not entitled to invoke a state statute to maintain a claim in the same proceeding against a cosurety for contribution.⁹⁴

Appeal bonds. The doctrine of subrogation applies to sureties on an appeal bond. They may pay the judgment affirmed against their principal and be subrogated to all the rights and remedies of appellee,⁹⁵ or subrogated to all the rights and reme-

Right of surety as relating back to, or having inception at, time when suretyship contract is entered into see supra § 47 c.

Subrogation as between successive sureties in judicial proceedings see supra § 56 a.

Subrogation of sureties on judicial bonds given by sureties to creditor's rights against original principal see supra § 59 b.

Subrogation to legal rights and remedies generally see supra § 54 d.

Surety held not entitled to subrogation

Where surety became liable to legatees under will of testator who made bequests to legatees to be paid out of assets of corporation, the stock of which he devised to other parties, on bond surety gave for dissolution of injunction restraining disposal of assets of corporation, surety could not recover on ground of subrogation to rights of legatees from innocent corporate stockholders who, at time corporation was not in default in payments to legatees sold their stock to parties who acquired all stock of corporation and fraudulently sold corporate assets, especially where surety by giving bond made the fraud possible; and he could not recover amount paid legatees, from executors of will on ground executors should have established trust fund for payment of legacies, where will did not impose such duty on executors who were not requested to establish such a fund.—*U. S. Fidelity & Guaranty Co. v. Weis*, 75 P.2d 754, 153 Or. 298.

88. La.—Wilkins v. Bobo, 13 La. Ann. 430.

60 C.J. p 776 note 53.

Subrogation to rights against third persons generally see supra § 54 e.

89. U.S.—Love v. North American Co., Mo., 229 F. 103, 143 C.C.A. 379. 60 C.J. p 777 note 54.

90. Ky.—Barker v. Illinois Surety Co., 184 S.W. 377, 169 Ky. 441.

60 C.J. p 777 note 56.

Subrogation against persons acquiring property or interest previous to suretyship generally see supra § 55.

Surety's subrogation to collateral securities generally see supra § 54 c.

91. N.Y.—Commercial Casualty Ins. Co. v. Capital City Surety Co., 231 N.Y.S. 169, 224 App.Div. 500.

60 C.J. p 777 note 57.

Surety's subrogation to rights of principal generally see supra § 51.

92. Ala.—Peterson v. Drennen Motor Car Co., 53 So.2d 375, 256 Ala. 99.

Sureties held not subrogated under statutes

Where motorcar company brought action in detinue for possession of automobile or its value and damages for use and hire, and defendant in detinue as principal and his sureties executed replevin bond and retained possession of automobile, and defendant in detinue, after judgment against him, failed to deliver automobile or pay judgment, and sheriff indorsed bond as forfeited, and clerk of court issued execution for unpaid balance and costs, and one surety paid balance, and company indorsed in writing on margin of record that judgment had been paid in full, sureties were not subrogated under statutes to rights of company, and could not prevail in action against company for alleged wrongful destruction of judgment lien.—*Peterson v. Drennen Motor Car Co.*, supra.

93. U.S.—U. S. v. Ryder, N.J., 4 S.Ct. 196, 110 U.S. 729, 28 L.Ed. 308.

N.Y.—Corpus Juris cited in New Amsterdam Cas. Co. v. McMahon, 93 N.Y.S.2d 32, 34, 196 Misc. 746.

94. U.S.—U. S. v. Soucy, D.C.Minn., 60 F.Supp. 500.

95. U.S.—Chase Nat. Bank of City of New York v. Mobile & O. R. Co., D.C.Ala., 30 F.Supp. 565.

Pa.—Goldman v. Mitchell-Fletcher Co., 9 Pa.Dist. & Co. 633, affirmed 141 A. 231, 292 Pa. 354.

60 C.J. p 776 notes 52-53, p 777 notes 54-57—4 C.J. p 1283 note 6.

Surety on appeal bond of indemnitor not subrogated to creditor's rights against one whom principal was bound to indemnify see supra § 59 b.

Compliance with statutory procedure

Where surety on appeal bond followed procedure specified by statute for undertaking on appeal after payment of judgment affirmed on appeal, his failure to file notice and claim of contribution under statute dealing generally with sureties did not prevent subrogation against judgment debtor, since specific statutes control general.—*Cozad v. Raisch Improvement Co.*, 32 P.2d 133, 220 Cal. 657.

Payment held not voluntary

Where employee who recovered judgment against employer entered satisfaction in full as to insurer after insurer paid lesser amount under employer's liability policy, insurer who became surety on appeal bond and paid balance of judgment after affirmation on appeal was not volunteer so as to prevent subrogation to rights of employee for balance paid against judgment debtor.—*Cozad v. Raisch Improvement Co.*, supra.

edies of the principal for contribution.⁹⁶ The sureties may recover from their principal the amount paid on the judgment, on affirmance, although such payment was made before the mandate of the appellate court was sent to the lower court.⁹⁷ Where coprincipals on an appeal bond are sureties for each other, the right of subrogation exists between them.⁹⁸ Where sureties on a supersedeas bond executed by an executor or administrator pay the judgment on affirmance, they can only recover against property devised or bequeathed by being subrogated to the rights of the representative, who can only recover as for an original deficiency of assets, and not for a deficiency caused by his own want of diligence and prudent administration.⁹⁹

The right of the sureties to subrogation does not arise until actual payment of the judgment, the mere seizure of property on execution of the judgment being insufficient.¹ Moreover, a surety for a joint tort-feasor on a bond on appeal to stay execution,

who was also the insurer of such tort-feasor on a policy of liability insurance and as such was liable to satisfy the judgment against the insured and other joint tort-feasors, is not entitled, on satisfying the judgment on its affirmance, to be subrogated to the rights of the judgment creditor against the tort-feasors who were not insured and who gave no stay bond on appeal.² A surety on a supersedeas bond who pays a decree entered on appeal which expressly supersedes and sets aside the decree entered at the trial is not subrogated to the lien of the original decree of the trial court.³

§ 62. Indemnitors of Sureties

An indemnitor of a surety compelled to satisfy the surety's liability will be subrogated to his rights.

An indemnitor of a surety compelled to satisfy the liability of the surety will be subrogated to all rights to which the surety would have been subrogated.⁴

IV. ESTABLISHMENT AND ENFORCEMENT OF RIGHT

§ 63. In General

Subrogation is a right of action only which must be established by a judicial proceeding.

The doctrine of subrogation is not self-executing,⁵ and a person by payment does not ipso facto be-

come subrogated to the rights of the creditor;⁶ he acquires only a right to a subrogation⁷ which must be actively asserted before subrogation can actually take place.⁸ The right of substitution and the intention, express or implied, to enforce the right must concur to make a case for subrogation.⁹

Tax lien and taxes

(1) Surety on bond executed to government to stay collection of taxes pending appeal, who is required to pay taxes because of execution of bond, is subrogated to rights of government under tax lien.

U.S.—Fidelity & Casualty Co. of New York v. Massachusetts Mut. Life Ins. Co., C.C.A.N.C., 74 F.2d 881.

Tex.—American Surety Co. of New York v. M-B Ice Cream Co., Com. App., 65 S.W.2d 287.

(2) Certificate of release of lien against taxpayer's property, executed by collector of internal revenue reciting that taxes were paid by surety on taxpayer's bond to stay collection of income tax pending appeal, did not destroy surety's right to subrogation to government's lien.—Fidelity & Casualty Co. of New York v. Massachusetts Mut. Life Ins. Co., supra.

(3) Where supersedeas was allowed cigarette dealer suing to enjoin collection of sales tax on condition he file bond for payment of stamps, and judgment against dealer was affirmed, surety paying for

stamps was subrogated to state's rights, and entitled to recover from dealer, notwithstanding dealer's discharge in bankruptcy.—Fidelity & Casualty Co. of New York v. Whitaker, 168 S.E. 607, 176 Ga. 656.

96. N.Y.—Martin v. Miller, 272 N.Y. S. 914, 242 App.Div. 38, affirmed Martin v. Miller, 195 N.E. 374, 266 N.Y. 668.

97. Ariz.—Sandoval v. U. S. Fidelity, etc., Co., 100 P. 816, 12 Ariz. 348.

98. Ga.—Lewis v. Maulden, 21 S.E. 147, 93 Ga. 758.

99. Ala.—Maybury v. Grady, 67 Ala. 147.

1. La.—Grieff v. The D. S. Stacy, 12 La. Ann. 8.

2. Cal.—Smith v. Fall River Joint Union High School Dist., 34 P.2d 994, 1 Cal.2d 331.

Ohio.—Royal Indemnity Co. v. Becker, 173 N.E. 194, 122 Ohio St. 582, 75 A.L.R. 1481.

3. Iowa.—Eland v. Carter, 237 N.W. 520, 212 Iowa 777, 77 A.L.R. 448.

4. U.S.—Corpus Juris cited in Howell v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 447, 451, certiorari denied Howell v. Helvering, 54 S.Ct. 864, 292 U.S. 654, 78 L.Ed. 1503.

N.Y.—Lopez v. State, 26 N.Y.S.2d 359, 176 Misc. 11.

60 C.J. p 781 note 97.

5. Ga.—Bleckley v. Bleckley, 5 S.E. 2d 206, 189 Ga. 47.

Tenn.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198.

6. Tex.—Downing v. Jeffrey, Civ. App., 173 S.W.2d 241, error refused.

60 C.J. p 823 note 77.

7. Tex.—Downing v. Jeffrey, supra, 60 C.J. p 823 note 78.

8. Tenn.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198.

Tex.—Downing v. Jeffrey, Civ. App., 173 S.W.2d 241, error refused.

60 C.J. p 823 note 79.

9. Tenn.—Cole v. Patty, 134 S.W.2d 160, 175 Tenn. 334.

Subrogation is a right of action only¹⁰ which must be established by a judicial proceeding¹¹ in which two distinct sets of facts are involved, that is, those which show the right to be subrogated and those which show that the claim to which subrogation is had may be enforced against the principal.¹² However, where the right to subrogation is given by statute, the subrogee is subrogated to all the rights of the creditor by vigor of the law and he is not dependent on any judicial proceeding.¹³

§ 64. Nature and Form of Remedy

A right of subrogation is properly a matter of equitable cognizance, but in some jurisdictions and under some statutes it may be enforced at law. It may be enforced by independent or subordinate or ancillary proceedings, and in a proper case may be asserted by a plea or answer, or by cross petition or bill.

A right of subrogation is properly a matter of equitable cognizance¹⁴ and originally was exclusive-

ly so,¹⁵ but, although in many jurisdictions its enforcement is confined to equitable tribunals,¹⁶ in other jurisdictions it is now recognized and enforced at law as well as in equity,¹⁷ and the doctrine is as applicable to suits in admiralty as to actions at law.¹⁸ In some jurisdictions a distinction is made between the establishment of the right and its enforcement,¹⁹ it being held that, when the right of subrogation is in question, the remedy is in equity,²⁰ but, when the right itself is conceded or established, and there remains to be enforced only the right of realizing the value of the subject matter, such right may be within the cognizance of a court of law.²¹

If the right of action to which the subrogee is subrogated is legal, it is enforceable at law;²² if it is equitable he must sue in equity.²³ In some states statutory and code provisions exist prescribing the mode of enforcing the right in particular cases and allow its enforcement at law,²⁴ and relief may

10. Tex.—Downing v. Jeffrey, Civ. App., 173 S.W.2d 241, error refused. 60 C.J. p 823 note 80.

11. Cal.—Jack v. Wong Shee, 92 P. 2d 449, 33 Cal.App.2d 402.

Ga.—Corpus Juris cited in Bleckley v. Bleckley, 5 S.E.2d 206, 213, 189 Ga. 47.

Ohio.—Minks v. Byerly, 20 N.E.2d 536, 60 Ohio App. 240.

Tenn.—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, 54 S.W.2d 964, 165 Tenn. 395.

Tex.—Downing v. Jeffrey, Civ.App., 173 S.W.2d 241, error refused. 60 C.J. p 823 note 81.

12. Ohio.—Zuellig v. Hemerlie, 53 N.E. 447, 60 Ohio St. 27, 71 Am.S.R. 707.

Or.—Cooper v. Sagert, 223 P. 943, 111 Or. 27.

13. Cal.—Holland v. Kodimer, 77 P.2d 843, 11 Cal.2d 40—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256. 60 C.J. p 824 note 83.

14. U.S.—Doleman v. Levine, App. D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402—Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 63 F.2d 833—U. S. Fidelity & Guaranty Co. v. Dime Bank Title & Trust Co., D.C.Pa., 46 F.2d 323—St. Paul Fire & Marine Ins. Co. v. Petroleum Nav. Co., D. C.Wash., 35 F.Supp. 350.

Ga.—Johnson v. Washington, 110 S.E. 889, 152 Ga. 635.

Pa.—Benjamin Franklin Federal Sav. & Loan Ass'n v. Superb Realty Co., 53 Pa.Dist. & Co. 186. 60 C.J. p 824 note 84.

Equitable lien or constructive trust

In some situations, subrogee is entitled only to enforce an equitable lien to prevent unjust enrichment, but in others he can, at his option, enforce either an equitable lien or a constructive trust.—Olivere v. Taylor, 65 A.2d 723, 31 Del.Ch. 53.

15. Cal.—Offer v. Superior Court of City and County of San Francisco, 228 P. 11, 194 Cal. 114.

Iowa.—Baker v. American Surety Co. of N. Y., 159 N.W. 1044, 181 Iowa 634.

16. U.S.—Shelby County, Tex., v. Provident Sav. Bank & Trust Co., C.C.A.Tex., 54 F.2d 602, certiorari denied Provident Savings Bank & Trust Co. v. Shelby County, Texas, 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

W.Va.—Koppers Coal Co. v. Dixie Fire Ins. Co., 3 S.E.2d 52, 121 W.Va. 258. 60 C.J. p 824 note 86.

17. Ga.—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 71 Ga.App. 112. N.J.—Sullivan v. Naiman, 32 A.2d 589, 130 N.J.Law 1282—Camden Trust Co. v. Cramer, 40 A.2d 601, 136 N.J.Eq. 261. 60 C.J. p 824 note 87.

Preferred claims

Federal court has jurisdiction of suits by sureties on insolvent state bank's bonds as depository of bankrupt's funds to establish preferred claims thereto.—Union Indemnity Co. v. Florida Bank & Trust Co., D.C. Fla., 48 F.2d 595, reversed on other grounds, C.C.A., Florida Bank & Trust

Co. of West Palm Beach v. Union Indemnity Co., 55 F.2d 640, 83 A.L.R. 1102, certiorari denied Union Indemnity Co. v. Florida Bank & Trust Co., 53 S.Ct. 6, 287 U.S. 600, 77 L.Ed. 522.

18. U.S.—The Seaboard No. 93, D.C. N.Y., 7 F.Supp. 362.

19. Ohio.—Reed v. Ramey, 80 N.E. 2d 250, 82 Ohio App. 171. 60 C.J. p 824 note 88.

20. Ga.—Jasper School Dist. v. Gormley, 193 S.E. 248, 184 Ga. 756, transferred, see, 196 S.E. 232, 57 Ga.App. 537.

N.J.—Polhemus v. Prudential Realty Corp., 67 A. 303, 74 N.J.Law 570.

21. Ga.—First Nat. Bank of Atlanta v. American Sur. Co., 30 S.E.2d 402, 71 Ga.App. 112.

N.J.—Bater v. Cleaver, 176 A. 889, 114 N.J.Law 346—Adelman v. Biber, 17 A.2d 819, 19 N.J.Misc. 63—Lubowicki v. Travelers Ins. Co., 8 A.2d 842, 18 N.J.Misc. 19. 60 C.J. p 825 note 90.

22. N.J.—Bater v. Cleaver, 176 A. 889, 114 N.J.Law 346—Adelman v. Biber, 17 A.2d 819, 19 N.J.Misc. 63. 60 C.J. p 825 note 91.

23. Cal.—Offer v. Superior Court of City and County of San Francisco, 228 P. 11, 194 Cal. 114.

24. Cal.—Kenney v. Kenney, 217 P. 2d 151, 97 Cal.App.2d 60. 60 C.J. p 825 note 93.

Attachment

The purpose of the provisions of the code giving surety right to attach property of his principal before the debt becomes due, and specifying

be had at law where the equity and law procedure are blended.²⁵ One who is entitled to be subrogated to the rights of another and to enforce such an equity as he may have cannot do so by means of an action for breach of warranty against him in which a personal judgment is demanded.²⁶

Probate jurisdiction. In at least one jurisdiction, where the estate of a deceased is involved, relief by way of subrogation may be granted in a probate court.²⁷ In other jurisdictions it may not,²⁸ and in still another jurisdiction, without deciding as to the propriety of relief in probate, it has been held unnecessary for one claiming subrogation under a mortgage against the land of a deceased to present his claim in a probate court, but he may bring his action in equity by virtue of his equitable claim and lien, without invoking the aid of the administrator or the probate court.²⁹

Independent or subordinate or ancillary proceedings. A court of equity having jurisdiction of the subject matter and parties may grant relief by way of subrogation without compelling the party entitled to it to resort to a separate proceeding.³⁰ So it has been held that one entitled to subrogation may adopt the proceeding of the creditor to whose right he

is subrogated,³¹ and one who has paid a judgment as surety before the question of his suretyship has been determined may have that relation established by applying to the court that rendered the original judgment, and become thus subrogated to the rights of the judgment creditor.³²

However, the right of a surety to subrogation need not be determined in the suit between the creditor and the principal.³³ Where the issue of subrogation is not raised prior to the rendition of judgment, such relief cannot be obtained by motion filed subsequent thereto, but relief must be sought in an independent action.³⁴ Where the surety on an appeal bond has paid a decree, a proceeding by him in aid of an execution levied in another county cannot be regarded as a supplemental bill so as to relieve it from the necessity of being filed in the county where the land affected lies and where defendants reside.³⁵ An insurer of an owner against loss because of injuries sustained by reason of ownership of the premises, whose offer to pay judgments against owner and lessee for injuries sustained on assignment of the judgments was refused by the injured persons, is entitled to a temporary injunction restraining the injured persons from issu-

character of judgment to be rendered, was to enable the surety to protect his rights when property of principal was about to get beyond the reach of the surety.—*Cornett's Ex'r v. Rice*, 187 S.W.2d 454, 299 Ky. 256, 160 A.L.R. 413.

Execution after judgment

The statute entitling surety who pays judgment on surety bond to repayment from principal was intended to provide convenient method of procedure to enable debtor, holding right of judgment, to claim and execute for the whole or proportion of judgment to which such debtor might be entitled. The statute gives to the surety the remedy of using the judgment itself as a summary proceeding instead of seeking relief by slow and burdensome steps to the same end, and, where execution after judgment has been resorted to as a proceeding under doctrine of subrogation for mere purpose of reimbursement, a separate action on assignment of the judgment or in assumption would be an idle act.—*Painter v. Berglund*, 87 P.2d 360, 31 Cal.App.2d 63.

Reinstatement of mortgage

Where mortgage to which purchaser at foreclosure became subrogated was canceled from record by error, purchaser could have mortgage rein-

stated in proceedings to annul cancellation.—*Nelson v. Stewart*, 136 So. 565, 173 La. 203.

25. Cal.—*Offer v. Superior Court of City and County of San Francisco*, 228 P. 11, 14, 194 Cal. 114. 60 C.J. p 825 note 94.

26. S.C.—*Tilgman Lumber Co. v. Matheson*, 70 S.E. 1033, 88 S.C. 432.

27. Ala.—*McNeill v. McNeill*, 36 Ala. 109, 76 Am.D. 320. 60 C.J. p 825 note 96.

28. Mo.—*Peck v. Fillingham's Estate*, 202 S.W. 465, 199 Mo.App. 277. 60 C.J. p 825 note 97.

29. Utah.—*Fullerton v. Bailey*, 53 P. 1020, 17 Utah 85.

30. Fla.—*Brogan v. Ferguson*, 133 So. 317, 101 Fla. 1311. N.Y.—*Mahnk v. Blanchard*, 253 N.Y. S. 307, 233 App.Div. 555.

Ohio.—*Rippel v. Rippel*, App., 97 N. E.2d 229.

Pa.—*Reimel v. Northwestern Trust Co.*, 155 A. 106, 304 Pa. 121—*Stalwart Bldg. & Loan Ass'n v. Borbeck*, 191 A. 204, 126 Pa.Super. 395—*Auto Building & Loan Ass'n v. Hall*, 177 A. 581, 117 Pa.Super. 104.

Wis.—*Murphy v. National Paving Co.*, 281 N.W. 705, 229 Wis. 100. 60 C.J. p 825 note 99.

A motion for judgment over is but a continuation of the original suit.—*Williams v. Cantrell*, 124 S.W.2d 29, 22 Tenn.App. 443.

Only in original action

The equitable doctrine of subrogation can only be enforced in the original action and not in a separate suit.—*City of Philadelphia v. Philadelphia Rapid Transit Co.*, 10 A.2d 434, 337 Pa. 1.

31. W.Va.—*Brown v. Thompson*, 128 S.E. 309, 99 W.Va. 56. 60 C.J. p 826 note 1.

32. Pa.—*Packer v. Vandevender*, 13 Pa.Co. 31. 60 C.J. p 826 note 2.

33. Ohio.—*Grant v. Ludlow*, 8 Ohio St. 1.

Bank's right to be subrogated to any right of action payee might have against drawers of check would not be considered in drawers' action against bank for damages for bank's failure to stop payment on check.—*Kentucky-Farmers Bank v. Staton*, 235 S.W.2d 767, 314 Ky. 313.

34. Okl.—*Heflin v. Harned*, 16 P.2d 590, 160 Okl. 194.

35. Ill.—*McDonald v. Asay*, 27 N.E. 929, 139 Ill. 123.

ing execution against him pending his action to have his rights against the lessee determined.³⁶

Assertion by way of defense. In a jurisdiction in which a right to subrogation may be asserted in an action at law it may be urged by a plea in an action at law³⁷ or by a cross petition therein,³⁸ or by a cross bill in a suit in equity.³⁹ A right to subrogation may be raised by an answer in foreclosure proceedings,⁴⁰ but it has been held that a cross bill rather than an answer is the proper pleading by which a defendant should seek relief by subrogation against an intervening statutory lien which plaintiff is seeking to enforce.⁴¹ A codefendant may present his claim for exoneration by the other defendants in a cross bill.⁴²

§ 65. Conditions Precedent

Compliance with requirements of conditions precedent is necessary, but as a general rule the surety is not bound to exhaust his remedies against the principal before seeking the benefits of subrogation, and he may, without first proceeding at law, file his bill in equity for subrogation.

Demand on the person whose liability is sought to be fixed by subrogation is not necessary before suit,⁴³ and, in the absence of a statute to the contrary,⁴⁴ notice of payment need not be made.⁴⁵ As a general rule the surety is not bound to exhaust his remedies against the principal before seeking the benefits of subrogation.⁴⁶ He may, without first proceeding at law, file his bill in equity for subrogation,⁴⁷ on notice to the principal.⁴⁸ Where, although subrogation is sought, complainant's rights are primarily based on a decree rescinding an alleged fraudulent act, the restoration of the status

quo is not required.⁴⁹

Tender. In the application of the rule that, under some circumstances, payment need not be made by the subrogee before he may enforce his right to subrogation, as discussed supra § 10, it has been held that, where the amount due is uncertain, plaintiff may come into a court of equity and ask that it be ascertained and that on payment of the amount found he be subrogated without making a tender prior to the commencement of the action.⁵⁰ So, where the rights of the parties may be fully protected without the necessity of the money's being brought into court, it may be sufficient for plaintiff to aver his readiness and ability to pay and tender payment of the amount due in his bill.⁵¹

§ 66. Time to Sue, Limitations, and Laches

Where the creditor refuses to recognize a right to subrogation and the rights of innocent third persons may intervene, the person claiming subrogation may proceed at once to have his rights established. The right may be barred by the statute of limitations, and laches in taking advantage of the right will forfeit it.

Where the creditor refuses to recognize a right to subrogation and the rights of innocent third persons may intervene, the person claiming subrogation may proceed at once to have his rights established,⁵² and a surety seeking subrogation to the rights of the creditors of his principal may, where he cannot otherwise be advised as to the extent of his liability or the existence of the right of recovery on the part of those claiming that he is liable as a surety, bring them into court and submit to judgment on their claims as proved.⁵³ However, the right of sureties on the bond of a deceased ad-

36. N.Y.—Commercial Casualty Ins. Co. v. Capital City Surety Co., 231 N.Y.S. 169, 224 App.Div. 500.

37. N.Y.—Citizens' Trust Co. of Utica v. R. Prescott & Son, 223 N.Y.S. 184, 221 App.Div. 420.

38. Ky.—Dine v. Donnelly, 121 S.W. 685, 134 Ky. 776.
60 C.J. p 826 note 8.

39. Ala.—Hawkins v. Holman, 195 So. 880, 239 Ala. 541.

40. N.Y.—Sternback v. Friedman, 54 N.Y.S. 608, 34 App.Div. 534.

41. Ala.—Shields v. Pepper, 118 So. 549, 218 Ala. 379.

42. Mass.—Evans, Coleman & Evans v. Pistorino, 139 N.E. 848, 245 Mass. 94.
60 C.J. p 826 note 11.

43. Ind.—Wilson v. Todd, 26 N.E.2d 1003, 217 Ind. 183, 129 A.L.R. 192.
60 C.J. p 827 note 18.

44. Cal.—Painter v. Berglund, 87 P.2d 360, 31 Cal.App.2d 63.

Notice held sufficient

Surety's filing of written assignment of judgment on surety bond to surety who satisfied judgment was a sufficient notice to principals of payment and claim to repayment.—Painter v. Berglund, supra.

45. La.—Steele v. Hough, 141 So. 22, 174 La. 441.

46. Vt.—Hall v. Windsor Sav. Bank, 121 A. 582, 124 A. 593, 97 Vt. 125.
60 C.J. p 827 note 19.

47. R.I.—Hogan v. Cooney, 155 A. 240, 51 R.I. 395.
60 C.J. p 827 note 20.

48. Ky.—Veach v. Wickersham, 11 Bush 261.
60 C.J. p 827 note 21.

49. Del.—Eastern States Petroleum Co. v. Universal Oil Products Co., 49 A.2d 612, 29 Del.Ch. 305.

50. N.Y.—Koehler v. Farmers', etc., Nat. Bank, 5 N.Y.S. 745.
60 C.J. p 827 note 23.

51. Pa.—Hopkins Mfg. Co. v. Ketterer, 85 A. 421, 237 Pa. 285, Ann. Cas.1914B 558.

52. N.H.—Markarian v. Morazines, 144 A. 265, 83 N.H. 479.
60 C.J. p 826 note 12.

53. Ariz.—U. S. Fidelity & Guaranty Co. v. California-Arizona Const. Co., 186 P. 502, 21 Ariz. 172.

ministrator to subrogation to his rights against distributees may be worked out only on a final decree of distribution.⁵⁴

Where the wife redeems from a mortgage real estate in which she has an inchoate right of dower, she may be entitled to the note which is the primary obligation of her husband and to the mortgage, and may have a right of present enforcement in equity if necessary to protect the rights of the parties.⁵⁵

Limitations. The right of subrogation, like other rights of action, is barred by failure to take steps to enforce it within the time prescribed by the statute of limitations.⁵⁶ However, the statute of limitations will not affect the right of a purchaser at a judicial sale, declared to be void at the instance of the heir of the former owner, to be subrogated to the rights of those creditors whose debts were paid by the purchase money.⁵⁷

In some jurisdictions the right to subrogation is not regarded as barred until the bar of the obligation which claimant asserts the right to be subrogated to and the period of limitation as to the rights of a subrogee is that which is applicable to the security to which he became subrogated in the hands of the original creditor,⁵⁸ and it is not material that the subrogee's right of action at law against the person primarily liable shall have been barred.⁵⁹ Under the rule that the right to subrogation is regarded as barred by the period of limitations applicable to

actions on implied undertakings, as discussed in Limitation of Actions § 69, a surety on a note who pays the same and takes an assignment thereof may sue the principal thereon if it is not barred, although his right of action on the implied promise for reimbursement is barred by the statute of limitations,⁶⁰ but a statute giving a surety the legal right to demand an assignment from the creditor on the payment of the debt does not ipso facto work an assignment, and, where the surety's right to reimbursement is barred by limitation before he demands an assignment, he cannot thereafter defeat the statute of limitations by taking an assignment and seeking to enforce the rights of the creditor.⁶¹

Laches. The right of subrogation is one of equity merely, and due diligence must be exercised in ascertaining it, and laches in taking advantage of the right will forfeit it⁶² as against the rights of third persons which have intervened.⁶³ Subrogation is not allowed in favor of one who has permitted the equity he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement.⁶⁴ Thus, a surety who for an unreasonably long time has permitted himself to appear in the light of the principal debtor cannot be subrogated, to the prejudice of intervening equities.⁶⁵

However, lapse of time alone is not generally sufficient to sustain the defense of laches.⁶⁶ Delay that works a disadvantage is necessary⁶⁷ and laches will

54. Cal.—In re Elizalde's Estate, 188 P. 560, 182 Cal. 427—Elizalde v. Murphy, 87 P. 245, 4 Cal.App. 114.

55. Mass.—Fitcher v. Griffiths, 103 N.E. 471, 216 Mass. 174.

56. Philippine.—Broce v. De La Vina, 20 Philippine 423.

Vt.—Moultrou v. Gorham, 34 A.2d 96, 113 Vt. 317.
60 C.J. p 827 note 25.

Statute applicable

Where surety's first effort to enforce subrogation to creditor's rights against debtors under foreign judgment paid by surety was made in Virginia court, Virginia statute of limitations, being remedial in nature and affecting only procedural matters, applied, not that of state in which judgment was rendered.—*Ettna Cas. & Sur. Co. v. Whaley*, 3 S.E. 2d 395, 173 Va. 11.

57. Tenn.—Caldwell v. Palmer, 6 Lea 652.
50 C.J. p 827 note 26.

58. Cal.—Automobile Ins. Co. of Hartford, Conn., v. Union Oil Co.

of Cal., 193 P.2d 48, 85 Cal.App.2d 302—Howell v. Dowling, 126 P.2d 630, 52 Cal.App.2d 487—Painter v. Berglund, 87 P.2d 360, 31 Cal.App. 2d 63.

Del.—Leiter v. Carpenter, 22 A.2d 393, 26 Del.Ch. 85.
60 C.J. p 828 note 30.

59. Okl.—McClure v. Johnson, 65 P. 103, 10 Okl. 668.
60 C.J. p 829 note 31.

60. Tex.—Fox v. Kroeger, 35 S.W.2d 679, 119 Tex. 511.
60 C.J. p 829 note 33.

61. Ky.—Joyce v. Joyce, 1 Bush 474.

62. N.Y.—Farbro Corp. v. A. F. A. Realty Corp., 284 N.Y.S. 298, 246 App.Div. 720, affirmed 4 N.E.2d 741, 272 N.Y. 569—Ely v. Stone, 17 N.Y.S.2d 266, 173 Misc. 117.

N.D.—*Corpus Juris* quoted in Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 48, 64 N.D. 317.

Tenn.—Fitts v. Terminal Warehousing Corp., 93 S.W.2d 1265, 170 Tenn. 198.

60 C.J. p 829 note 35.

63. N.D.—*Corpus Juris* quoted in Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 48, 64 N.D. 317.
60 C.J. p 830 note 36.

64. N.D.—*Corpus Juris* quoted in Baker v. Fargo Building & Loan Ass'n, supra.
60 C.J. p 830 note 37.

65. Ind.—Smith v. Harbin, 24 N.E. 1051, 124 Ind. 434.
60 C.J. p 830 note 38.

66. Ga.—*Corpus Juris* cited in Hadaway v. Hadaway, 14 S.E.2d 874, 877, 192 Ga. 265—*Corpus Juris* cited in Bleckley v. Bleckley, 5 S.E.2d 206, 214, 189 Ga. 47.

N.D.—*Corpus Juris* quoted in Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 48, 64 N.D. 317.
60 C.J. p 830 note 39.

67. U.S.—Maryland Casualty Co. v. Cincinnati, D.C. Ohio, 291 F. 825.

N.D.—*Corpus Juris* quoted in Baker v. Fargo Building & Loan Ass'n, 252 N.W. 42, 48, 64 N.D. 317.

not defeat subrogation where it would be inequitable to deny it.⁶⁸ It is only where injustice will be done that the court declines to interfere on the ground of laches,⁶⁹ so that mere delay will not bar the right to subrogation if the position of the party as against whom subrogation is claimed has not been altered to its disadvantage;⁷⁰ and, where the rights of third persons have not intervened, it has been held that a delay, short of the statutory period of limitations, will not bar a party of his right to be subrogated to the rights of another.⁷¹ Full knowledge of all the facts concurring with a delay for an unreasonable time are essential elements of the defense of laches.⁷² If there is no such obscurity in the transaction and no such loss of evidence as would be likely to produce injustice, there is no laches defeating the right to subrogation.⁷³ A creditor is not entitled to subrogation to a lien which, but for his own laches, he might have had.⁷⁴

§ 67. Parties

General rules as to parties in civil actions apply in proceedings to enforce subrogation; and the right of subrogation cannot be enforced in proceedings to which those whose equities are affected are not parties.

The right of subrogation cannot be enforced in proceedings to which those whose equities are affected are not parties,⁷⁵ but ordinarily persons against whom no relief is sought and who will not be affected by the proceedings are not necessary parties thereto.⁷⁶ Although in some jurisdictions it is held that creditors to whose rights a party seeks to be subrogated are necessary parties to an action to obtain such subrogation,⁷⁷ in other jurisdictions the person to whose rights another seeks to be subrogated is not always a necessary party in a proceeding to that end. If the rights of the creditors will be affected by the proceedings, they must be made parties thereto,⁷⁸ but a creditor who has been fully paid and to whose rights plaintiff is seeking subrogation is not a necessary party;⁷⁹ and, where a pro tanto subrogee seeks to enforce his security subject to the rights of the creditor thereunder, it has been held that such creditor is not a necessary party to the proceedings.⁸⁰

In whose name suit brought. At common law, in an action to enforce subrogation, the subrogee is neither a proper nor a necessary party plaintiff, but he is required to sue in the name of the creditor.⁸¹

68. N.D.—*Corpus Juris* quoted in *Baker v. Fargo Building & Loan Ass'n*, supra.
60 C.J. p 830 note 41.

69. N.D.—*Corpus Juris* quoted in *Baker v. Fargo Building & Loan Ass'n*, supra.
60 C.J. p 830 note 42.

70. N.D.—*Corpus Juris* quoted in *Baker v. Fargo Building & Loan Ass'n*, supra.
Wis.—*Murphy v. National Paving Co.*, 281 N.W. 705, 229 Wis. 100.
60 C.J. p 830 note 43.

71. Ga.—*Bleckley v. Bleckley*, 5 S.E. 2d 206, 189 Ga. 47.
N.D.—*Corpus Juris* quoted in *Baker v. Fargo Building & Loan Ass'n*, 252 N.W. 42, 48, 64 N.D. 317.
Or.—*American Sur. Co. of New York v. Multnomah County*, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.
60 C.J. p 830 note 44.

72. Or.—*American Sur. Co. of New York v. Multnomah County*, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

73. N.D.—*Corpus Juris* quoted in *Baker v. Fargo Building & Loan Ass'n*, 252 N.W. 42, 48, 64 N.D. 317.
60 C.J. p 830 note 45.

74. Pa.—*Appeal of Mechling*, 1 A. 326, 1 Pa.Cas. 135.
60 C.J. p 830 note 46.

75. Okl.—*Berger v. City of Vinita*, 40 P.2d 1, 170 Okl. 214.
60 C.J. p 831 note 48.

The person whose property is to be applied in discharge of a debt by subrogation is a necessary party to the proceeding.—*London & Lancashire Indemnity Co. of America v. Tindall*, 36 N.E.2d 334, 377 Ill. 308.

Original administrator

In suit by surety on original administrator's bond against successor administrator to enforce subrogation to original administrator's rights as distributee, the original administrator was a necessary party.—*London & Lancashire Indemnity Co. of America v. Tindall*, supra.

Transferee of vendor's lien

The statute relied on as requiring a vendor's lien for purchase money of land to be assigned in writing to enable the transferee to enforce the lien is not applicable to suits in equity to enforce right of subrogation.—*Box v. Early*, 178 So. 793, 181 Miss. 19.

Mortgagor's successor

Where bank is entitled to assignment of note and mortgage and entitled to subrogation as against mortgagor's successor in interest as vendor in contract for deed, vendee's interest cannot be decided where successor has not been made party.—*Nippolt v. Farmers' & Merchants'*

State Bank of Springfield, 243 N.W. 136, 186 Minn. 325.

76. U.S.—*New York Cas. Co. v. Sinclair Refining Co.*, C.C.A.Okla., 108 F.2d 65.

Ala.—*Corpus Juris* cited in *Butler v. Wilson*, 194 So. 669, 671, 239 Ala. 221.

Mo.—*Neer v. Neer*, App., 80 S.W.2d 240.

N.J.—*Corpus Juris* quoted in *Mann v. Bugbee*, 167 A. 202, 208, 113 N.J. Eq. 434.
60 C.J. p 831 note 49.

77. Neb.—*State ex rel. Spillman v. Western State Bank*, 262 N.W. 9, 129 Neb. 486.
60 C.J. p 831 note 50.

78. Fla.—*Marianna Nat. Farm Loan Ass'n v. Braswell*, 116 So. 639, 95 Fla. 510.
60 C.J. p 831 note 52.

79. Ark.—*McDaniel v. Conlan*, 204 S.W. 850, 134 Ark. 519.
60 C.J. p 832 note 53.

80. Fla.—*Miami Mortgage & Guaranty Co. v. Drawdy*, 127 So. 323, 99 Fla. 1092.
60 C.J. p 832 note 54.

81. U.S.—*Gray v. U. S.*, D.C.Mass., 77 F.Supp. 869, reversed on other grounds, C.C.A., *State Farm Mut. Liability Ins. Co. v. U. S.*, 172 F.2d 737.

Under statutes requiring an action to be brought in the name of the real party in interest, a subrogee who brings an action at law to recover the right to which he is subrogated has the right to sue in his own name,⁸² although it may be brought on behalf of the subrogee, in the name of the legal plaintiff.⁸³ A statute allowing an assignee of a chose in action to sue in his own name has been held not applicable to suits in equity to enforce a right of subrogation.⁸⁴ In a law court, independent of statute, where subrogation applies, suit must be brought in the name of the person whose real rights are being litigated.⁸⁵ A subrogee is not entitled to sue in his own name where he does not discharge all of the obligation, but only part of it;⁸⁶ and apart from statute, the indemnitor's right by subrogation to stand in the place of his indemnitee, who is entitled to a part only of the proceeds of a single cause of action, does not carry with it any authority to maintain the action in his own name.⁸⁷

Joinder. Cosureties may maintain a joint bill in equity to enforce their right of subrogation,⁸⁸ they may be properly joined as plaintiffs,⁸⁹ and they need not join, as defendants, those against whom they are not seeking to assert any right.⁹⁰ Guarantors of notes, which after payment the holders assigned to them jointly, can bring a joint action thereon

against the maker whether the funds with which the notes were discharged were individual funds of the several guarantors, or owned jointly by them.⁹¹ After there has been a partial subrogation, the subrogees may join with others in bringing action.⁹²

Person against whom there may be recovery over. Under a statute providing that, when a defendant will have a right of action against a third person for the amount of the recovery against him, such third person may be made a party defendant, a defendant liable for injuries to plaintiff is entitled to have a physician whose negligent treatment of the injury prevented a complete cure made a party defendant.⁹³

§ 68. Pleading

The pleadings of one claiming a right to subrogation should clearly and distinctly state the facts which give rise to the right claimed, and should conform to the general rules of pleading in civil actions.

The right of subrogation presents a justiciable issue, which should be made up and brought to the attention of the court by proper and orderly pleading.⁹⁴ Ordinarily, subrogation in order to be available must be pleaded by the party claiming it.⁹⁵ As in other actions, every intendment is to be made against the pleader in an action for subrogation.⁹⁶

Prior to enactment of real party in interest statute, a person who acquired whole of a cause of action by equitable subrogation could have brought suit on the chose in action only in name of person from whom such interest had been acquired.—*Verdier v. Marshallville Equity Co.*, 46 N.E.2d 636, 70 Ohio App. 434.

82. U.S.—*Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp.*, D.C.N.Y., 92 F.Supp. 445.
Ohio.—*Rechtine v. Wels*, 2 Ohio Supp. 380.
60 C.J. p 832 note 56.

83. U.S.—*Ridgeland Box Mfg. Co. v. Sinclair Refining Co.*, D.C.S.C., 82 F.Supp. 274.
Cal.—*J. G. Boswell Co. v. W. D. Felder & Co.*, 230 P.2d 386, 103 Cal. App.2d 767.

Pa.—*Noll v. Kurtz*, Com.Pl., 53 Lanc. L.Rev. 123—*Eplett v. Russell*, Com. Pl., 65 Montg.Co. 277, 14 Som.Leg. J. 405—*Standard Motor Freight, Inc. v. Boston Ins. Co.*, Com.Pl., 92 Pittsb.Leg.J. 387.

Rule gives plaintiff, and not the court, the right of choice to determine whether a subrogee shall become plaintiff in the action, and to that extent modifies the mandatory

provision that the action must be prosecuted by the real party in interest, and the proper interpretation of rule is to be determined by considering the object to be attained, the removal of the prejudice which had formerly resulted to insurance companies acquiring subrogation rights by reason of their payment of claims.—*Levin v. Hanson Garage, Inc.*, 44 Pa.Dist. & Co. 21.

84. Miss.—*Box v. Early*, 178 So. 793, 181 Miss. 19.

85. Del.—*Ierardi v. Farmers' Trust Co. of Newark*, 151 A. 822, 4 W.W. Harr. 246.
60 C.J. p 832 note 57.

86. N.Y.—*Employers' Liability Assur. Corp., Limited, of London, England v. Daley*, 67 N.Y.S.2d 233, 271 App.Div. 662, affirmed 77 N.E. 2d 515, 297 N.Y. 745, dissenting opinion 68 N.Y.S.2d 743, 271 App. Div. 662.

87. U.S.—*Doleman v. Levine*, App. D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

88. Ky.—*Kleiser v. Scott*, 6 Dana 137.
60 C.J. p 832 note 58.

89. U.S.—*U. S. Fidelity & Guaranty*

Co. v. Dime Bank Title & Trust Co., D.C.Pa., 46 F.2d 323.

90. U.S.—*U. S. Fidelity & Guaranty Co. v. Dime Bank Title & Trust Co.*, supra.

91. Colo.—*Cone v. Eldridge*, 119 P. 616, 51 Colo. 564.

92. U.S.—*Ridgeland Box Mfg. Co. v. Sinclair Refining Co.*, D.C.S.C., 82 F.Supp. 274.

93. Wis.—*Fisher v. Milwaukee Electric Ry. & Light Co.*, 180 N.W. 269, 173 Wis. 57.
60 C.J. p 832 note 60.

94. Wis.—*Defiance Mach. Works v. Gill*, 175 N.W. 940, 170 Wis. 477.

95. Tex.—*Downing v. Jeffrey*, Civ. App., 173 S.W.2d 241, error refused.
Utah.—*Wilcox v. Cloward*, 56 P.2d 1, 88 Utah 503.
60 C.J. p 833 note 62.

96. N.C.—*Fidelity, etc., Co. v. Jordan*, 46 S.E. 496, 134 N.C. 236.

Silence as to liens

Where complaint by surety against contractor was silent as to existence of any liens against property involved, it could not be assumed that any liens had been filed.—*American Sur. Co. of New York v. Tannhauser*,

A person seeking subrogation should ask for such relief in his pleading,⁹⁷ but it is held that, although a party does not specifically claim the right of subrogation, equity will grant the relief, where it is justified by the facts alleged and established,⁹⁸ under a prayer for general relief.⁹⁹ Also, in an equitable action, if the allegations of the bill show the equities of the parties, subrogation will be applied in favor of a defendant who has not asked for it, where to fail so to do would result in giving plaintiff more than that to which he has shown himself to be equitably entitled.¹

Bill, complaint, or petition. The bill, complaint,

or petition to establish and enforce a right of subrogation should clearly and distinctly state the facts which give rise to the right claimed.² Whether plaintiff seeks his remedy by original or supplemental bill is a mere matter of form not affecting the remedy.³ The pleading must show the right of the person to whose rights subrogation is sought to the lien or thing, the benefit of which is claimed by the subrogee;⁴ it must allege a relationship of the parties out of which the right of subrogation might arise;⁵ it must also allege payment of the debt,⁶ and aver facts showing that in making payment the subrogee was not a mere volunteer;⁷ nor

37 N.Y.S.2d 450, affirmed 39 N.Y.S.2d 996, 265 App.Div. 999, appeal denied 41 N.Y.S.2d 192, 265 App.Div. 1053.

97. Tex.—Downing v. Jeffrey, Civ. App., 173 S.W.2d 241, error refused. 60 C.J. p 833 note 65.

98. Ga.—Bleckley v. Bleckley, 5 S.E. 2d 206, 189 Ga. 47.

Mo.—Netherton v. Farmers' Exchange Bank of Gallatin, 63 S.W.2d 156, 228 Mo.App. 296. 60 C.J. p 833 note 66.

99. Ala.—Burch v. Burch, 165 So. 387, 231 Ala. 464.

Ga.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

Miss.—Box v. Early, 178 So. 793, 181 Miss. 19.

Mo.—Netherton v. Farmers' Exchange Bank of Gallatin, 63 S.W.2d 156, 228 Mo.App. 296. 60 C.J. p 833 note 67.

1. Ill.—Montague & Co. v. Aygarn, 164 Ill.App. 596.

2. Colo.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254, 96 Colo. 127.

Okl.—Corpus Juris quoted in Christ-burgh v. Anderson, 66 P.2d 902, 906, 179 Okl. 552.

Tex.—Downing v. Jeffrey, Civ.App., 173 S.W.2d 241, error refused. 60 C.J. p 833 note 69.

Bills, petitions, and complaints held sufficient or not demurrable

(1) Generally.

Ala.—Butler v. Wilson, 194 So. 669, 239 Ala. 221—Drummond v. Drummond, 168 So. 428, 232 Ala. 401—Dirago v. Taylor, 150 So. 150, 227 Ala. 271.

Ga.—Willis v. Capel, 168 S.E. 291, 176 Ga. 512—Johnson v. Washington, 110 S.E. 889, 152 Ga. 635—Fetzer v. American Surety Co. of New York, 167 S.E. 338, 46 Ga.App. 267.

Idaho.—Peterson v. Hague, 4 P.2d 350, 51 Idaho 175.

Kan.—Fenly v. Revell, 228 P.2d 905, 170 Kan. 705.

Ky.—Fidelity & Deposit Co. of Maryland v. Creech, 133 S.W.2d 938, 280 Ky. 627.

Mo.—O'Neil v. Viviano, App., 105 S.W.2d 985.

Or.—American Sur. Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

Tex.—Kerens Nat. Bank v. Stockton, Civ.App., 61 S.W.2d 572, reversed on other grounds 94 S.W.2d 161, 127 Tex. 326.

(2) To allege notice.—American Sur. Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

(3) To disclose that association was innocent of any knowledge of trust character of funds coming into its possession.—Aetna Casualty & Surety Co. of Hartford, Conn., v. Local Building & Loan Ass'n, 19 P.2d 612, 162 Okl. 141, 86 A.L.R. 526.

Bills, petitions, or complaints held insufficient or demurrable

(1) Generally.

Ala.—Hall v. Hall, 2 So.2d 908, 241 Ala. 397—Groom v. Federal Land Bank of New Orleans, 199 So. 237, 240 Ala. 335.

Ga.—Graves v. Carter, 64 S.E.2d 450, 208 Ga. 5—Telfair Stockton & Co. v. Trust Co. of Ga., 48 S.E.2d 532, 203 Ga. 802.

Ind.—Kamarata v. Hayes Freight Lines, Inc., App., 108 N.E.2d 723.

Miss.—Franklin Life Ins. Co. v. Rogers, 173 So. 428, 178 Miss. 518.

(2) To disclose affirmatively that association parted with value by reason of receipt of trust funds.—Aetna Casualty & Surety Co. of Hartford, Conn., v. Local Building & Loan Ass'n, 19 P.2d 612, 162 Okl. 141, 86 A.L.R. 526.

Necessary allegations

(1) Failure of surety by its pleadings to trace into bank funds which equitably belonged to assured ship-pers deprived surety of any right to

recover funds allegedly appropriated by bank.—Hartford Accident & Indemnity Co. v. Colorado Nat. Bank of Denver, 40 P.2d 254, 96 Colo. 127.

(2) Assignee of second mortgage must allege absence of notice or knowledge of intervening encumbrance on assignee's and assignor's part.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

(3) Subsequent encumbrancer suing for subrogation to first mortgage satisfied by complainant must recognize intervening owner's right to redeem by offer, in bill, to do equity.—Whitson v. Metropolitan Life Ins. Co., supra.

(4) Although the presumption would be that services rendered by a son to his mother were rendered voluntarily and, therefore, would not support a claim of conventional subrogation to mother's rights against deceased father's estate, son suing for conventional subrogation was required only to allege sufficient facts to indicate that both parties intended that compensation should be made, and to negative idea that services were performed merely because of a natural sense of duty or affection arising out of the relationship.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

3. Ill.—McDonald v. Asay, 37 Ill. App. 469, affirmed 27 N.E. 929, 139 Ill. 123.

4. Ga.—Wilkins v. Gibson, 38 S.E. 374, 113 Ga. 31, 84 Am.S.R. 204. 60 C.J. p 834 note 70.

5. W.Va.—Haines v. Kuykendall, 199 S.E. 449, 120 W.Va. 549.

6. Ark.—Broyles v. Edmonson, 104 S.W.2d 813, 193 Ark. 1125.

Kan.—Jones v. Jones, 146 P.2d 405, 158 Kan. 196. 60 C.J. p 834 note 71.

7. Ark.—Broyles v. Edmonson, 104 S.W.2d 813, 193 Ark. 1125. 60 C.J. p 834 note 72.

can plaintiff be subrogated to the rights of a defendant under a contract with a third person in an action in which the terms of the contract are not alleged.⁸

The petition need not anticipate defenses.⁹ Thus, the subrogee need not allege that he has not been repaid.¹⁰ Immaterial or unnecessary matters need not be alleged.¹¹ The sufficiency of the complaint must be judged from the pleading as a whole.¹² Where a subrogee continues an action in the name of plaintiff, he is bound by the original plaintiff's complaint.¹³ Plaintiff may be granted leave to amend his complaint.¹⁴

A statute providing that a suit brought by a subrogee may be either in his name or for his use if

the subrogee shall in his pleading allege on oath that he is the actual bona fide subrogee and set forth how and when he became such applies to a suit in the name of the original owner for the use of the subrogee.¹⁵

Plea or answer. Ordinarily defensive matter must be set up by answer or plea;¹⁶ and, where the right to subrogation is sought by defendant, his plea or answer must contain allegations sufficient to warrant his claim.¹⁷

Issues, proof, and variance. An action to enforce the right of subrogation contemplates the making up of an issue, either of law or of fact, the same as in other actions.¹⁸ Evidence not excluded by any rule or principle of law may be introduced if it

8. Ind.—Citizens' St. R. Co. v. Robins, 42 N.E. 916, 43 N.E. 649, 144 Ind. 671.

9. Neb.—Richards v. Yoder, 6 N.W. 629, 10 Neb. 429.

10. Ala.—Harbin v. Aaron, 110 So. 24, 215 Ala. 218.

11. Ill.—St. Paul-Mercury Indem. Co. of St. Paul v. Hoey, 60 N.E.2d 641, 325 Ill.App. 693.

Ky.—Vance v. Atherton, 67 S.W.2d 988, 252 Ky. 591.
60 C.J. p 834 note 76.

Waiver of right to subrogation

In suit on notes and for foreclosure of mortgage wherein holder of mortgage intervened and plaintiff relied on doctrine of subrogation to extent of payments made on notes secured by mortgage held by intervener, failure of intervener to plead waiver of right to subrogation by taking of new mortgage was unnecessary to entitle intervener to prevail, since, when equitable jurisdiction is properly invoked, court should administer complete relief on all questions raised by evidence, regardless of whether they are pleaded.—Deems v. Milligan, 64 P.2d 701, 179 Okl. 25.

Contract

(1) In suit by testator's son to be subrogated to his mother's rights against estate on ground that mother had agreed that son should be compensated for caring for her by payment of her annuity to him, son was not required to allege a contract with testator or with any legal representative of his estate for performance of services to his mother, or that mother by a written or an express contract agreed to compensate him for services.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

(2) In suit for conventional subrogation, plaintiff was not required to allege that contract relied on was in writing, since an agreement for subrogation need not be in writing.—Bleckley v. Bleckley, *supra*.

Maker as surety

In ostensible maker's suit on note against comaker, recovery of full amount of note, which ostensible maker, actually surety, had paid payee, was authorized, although maker failed to allege that he was surety.—Campbell v. Rybert, 167 S.E. 924, 46 Ga.App. 461.

12. Ind.—Bunting v. Gilmore, 24 N. E. 583, 124 Ind. 113.
60 C.J. p 834 note 77.

13. Cal.—Merner Lumber Co. v. Brown, 21 P.2d 590, 218 Cal. 136.

14. Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

15. Ill.—McKinnon v. Studebaker Sales Co. of Chicago, 245 Ill.App. 596.

16. Ill.—Standard Accident Ins. Co. v. Mueller, 9 N.E.2d 361, 291 Ill. App. 56.
60 C.J. p 835 note 80.

Laches and wrongful conduct

An action by surety on fidelity bond of treasurer of one county against another county was an action at law and, hence, surety was not required to explain long lapse of time between earliest embezzlement and date of suit, but defendant was required to plead that surety was chargeable with laches, and, where such other county was put on notice concerning employment of trust funds, its conduct was *prima facie* wrongful and, hence, county was required to present affirmative defense.

—American Sur. Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

General denial insufficient

In second mortgagee's suit for equitable subrogation to first mortgage, where complainant pleads absence of notice or knowledge of intervening encumbrance, intervening encumbrancer's general denial is insufficient.—Whitson v. Metropolitan Life Ins. Co., 142 So. 564, 225 Ala. 262.

17. Answer held sufficient

Answer alleging that life tenant paid from his own funds purchase-money notes secured by security deed to realty and obtained an assignment of notes and security deed and that he had not agreed to make such payments as part of consideration for conveyance of life estate to him was sufficient to show that life tenant was entitled to be subrogated to rights of his assignors at time of assignment and to assert a lien against the realty for payments made.—Cordell v. Cordell, 56 S.E.2d 251, 206 Ga. 214.

Answer held insufficient

In trespass to try title suit to recover undivided half interest in land in which defendant's pleadings were limited to an answer to plaintiffs' action and contained only a general denial, a plea of not guilty, and a pleading of various statutes of limitation, defendant could not claim to be an "innocent purchaser for value" of the superior title of bank holding vendor's lien note on the property so as to enable defendant thereby to assert right to "subrogation."—Downing v. Jeffrey, Tex.Civ. App., 178 S.W.2d 241, error refused.

18. Wis.—Defiance Mach. Works v. Gill, 175 N.W. 940, 170 Wis. 477.

tends to support or controvert an issue made by the pleadings.¹⁹ Defendants must be permitted to make such defenses to the enforcement of the rights obtained as would have been allowed if the creditor were suing in his own right.²⁰ No facts are properly in issue unless charged in the bill.²¹ The person seeking subrogation must not only allege, but must also prove, the facts entitling him thereto.²² Proof must conform to the pleadings,²³ and no proof can be made of facts not charged.²⁴

§ 69. Evidence

The burden of proof is on the subrogee to establish his right, and the rules as to the admissibility and weight and sufficiency of evidence applicable in civil actions generally apply to proceedings to enforce subrogation.

The burden of proof is on the would-be subrogee to establish his right,²⁵ and on defendant against whom subrogation is sought to establish matters of affirmative defense relied on.²⁶ Where the subrogee establishes a prima facie case, the burden of proof shifts to defendant.²⁷ Where an action is one at law, in which no equitable relief in aid of the

claim is prayed, the subrogee does not have the burden of showing the superior equity as against defendant in order to recover.²⁸

When the person who is interested in the fulfillment of the obligation pays, subrogation may be presumed;²⁹ and, where a loan on insurance policies is obtained from a source other than the lender, and the proceeds of the policies are used to discharge the debt, a presumption in favor of subrogation of the beneficiary to the right of the lender against the borrower's estate arises.³⁰ It is held that, where a stranger to an obligation pays a part of the whole of the debt, there is a presumption that the transaction was a purchase of the debt and accompanying security to the extent of the payment;³¹ and, where the original notes are indorsed and delivered to the guarantors on payment by them of the debt guaranteed, it must be presumed, in the absence of a contrary showing, that they are the owners of the notes.³² It is also held that, if the person paying the debt relies on other security, he is presumed not to expect, or to be entitled to, subrogation.³³

19. Tex.—*Bunton v. Tyler*, Civ.App., 106 S.W.2d 725.

Evidence held erroneously excluded
Tex.—*Bunton v. Tyler*, supra.

20. Ga.—*Wilkins v. Gibson*, 38 S.E. 374, 113 Ga. 31, 84 Am.S.R. 204.

21. Ala.—*Merrell v. Witherby*, 23 So. 994, 26 So. 974, 120 Ala. 418, 74 Am.S.R. 39.
60 C.J. p 835 note 83.

22. Ala.—*Crutchfield v. Johnson & Latimer*, 8 So.2d 412, 243 Ala. 73.
Tex.—*Bradley v. Freeman*, Civ.App., 163 S.W.2d 693—*Hawkins v. Potter*, 130 S.W. 643, 62 Tex.Civ.App. 126.

23. Or.—*Cooper v. Sagert*, 223 P. 943, 111 Or. 27.
60 C.J. p 835 note 85.

24. Ala.—*Merrell v. Witherby*, 23 So. 994, 26 So. 974, 120 Ala. 418, 74 Am.S.R. 39.
60 C.J. p 835 note 86.

25. U.S.—*U. S. v. Munsey Trust Co. of Washington, D. C.*, Ct.Cl., 67 S.Ct. 1599, 332 U.S. 234, 91 L.Ed. 2022—*Maryland Cas. Co. v. Lincoln Bank & Trust Co.*, D.C.Ky., 40 F.Supp. 782—*American Sur. Co. of New York v. First Nat. Bank, D.C.Pa.*, 15 F.Supp. 974, affirmed, C.C.A., 96 F.2d 813.

Ala.—*Whitson v. Metropolitan Life Ins. Co.*, 142 So. 564, 225 Ala. 262.

Ga.—*Colonial Hill Co. v. Mortgage Bond & Trust Co.*, 162 S.E. 531, 174 Ga. 204.

Ill.—*People ex rel. Barrett v. State Bank of Herrick*, 8 N.E.2d 71, 290 Ill.App. 130.

Ky.—*Vance v. Atherton*, 98 S.W.2d 489, 266 Ky. 202—*Title Ins. & Trust Co. v. McCracken County*, 92 S.W. 2d 89, 263 Ky. 302.

Md.—*Blum v. Fox*, 197 A. 117, 173 Md. 527—**Corpus Juris cited in** *Harford Bank of Bel Air v. Hopper's Estate*, 181 A. 751, 756, 169 Md. 314.

Mich.—*American Sur. Co. of N. Y. v. Trenton State Bank of Trenton*, 35 N.W.2d 260, 323 Mich. 276.

Miss.—*Haraway v. Sledge & Norfleet Co.*, 11 So.2d 903, 194 Miss. 133, 145 A.L.R. 735, suggestion of error overruled 12 So.2d 436, 194 Miss. 133, 145 A.L.R. 735.

Or.—*American Sur. Co. of New York v. Multnomah County*, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

Pa.—*Gildner v. First Nat. Bank & Trust Co. of Bethlehem*, 19 A.2d 910, 342 Pa. 145—*Beck v. Belter*, 22 A.2d 90, 146 Pa.Super. 114.

Tenn.—*Hunt v. Hoppe*, 124 S.W.2d 306, 22 Tenn.App. 540.

Tex.—*Ricketts v. Alliance Life Ins. Co.*, Civ.App., 135 S.W.2d 725, error dismissed, judgment correct—*Engbrock v. Haidusek*, Civ.App., 95 S.W.2d 520, error refused—*Ramey v. Cage*, Civ.App., 90 S.W.2d

626—*Minkert v. Minkert*, Civ.App., 263 S.W. 648.
60 C.J. p 835 note 88.

26. U.S.—*Town of River Junction, Fla., v. Maryland Cas. Co.*, C.C.A. Fla., 133 F.2d 57—*Reconstruction Finance Corp. v. Maryland Cas. Co.*, D.C.Md., 23 F.Supp. 1008.
60 C.J. p 835 note 89.

27. U.S.—*Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Waco*, C.C.A.Tex., 100 F.2d 807, rehearing denied 101 F.2d 974, certiorari denied *Citizens Nat. Bank of Waco v. Fidelity & Deposit Co. of Maryland*, 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1509—*Fidelity & Deposit Co. of Maryland v. Bank of Smithfield*, D.C.Va., 11 F.Supp. 904.

28. Ga.—*First Nat. Bank of Atlanta v. American Sur. Co.*, 30 S.E.2d 402, 71 Ga.App. 112.

29. Philippine.—*Panganiban v. Cuevas*, 7 Philippine 477.

30. N.Y.—*In re Cummings' Estate*, 105 N.Y.S.2d 104, 200 Misc. 467.

31. Ohio.—*Neilson v. Fry*, 16 Ohio St. 552, 91 Am.D. 110.

Pa.—*Appeal of Brice*, 95 Pa. 145.
60 C.J. p 836 note 90.

32. Colo.—*Cone v. Eldridge*, 119 P. 616, 51 Colo. 564.
60 C.J. p 836 note 91.

33. Ala.—*Shaddix v. National Surety Co.*, 128 So. 220, 221 Ala. 268.

Payments of notes made by the real owner of the equity raise the presumption that the money was intended as payment as against the contention that the notes were purchased,³⁴ but the ostensible purchase of notes, if doubtful, is presumably a purchase, and not payment.³⁵ As regards a creditor's right of subrogation, in the absence of evidence to the contrary, it is presumed that liens on property owned by defendant and another are discharged from income from the property.³⁶ It is presumed that collateral general in character and applicable to all debts of the principal debtor is what it pur-

ports to be.³⁷ Sureties will not be assumed to have intended to waive their right of subrogation.³⁸ Various other presumptions have been considered in actions by subrogees to establish and enforce their right of subrogation.³⁹

Admissibility. The rules as to admissibility of evidence applicable in civil actions generally apply to proceedings to enforce subrogation.⁴⁰

Weight and sufficiency. General rules apply as to the weight and sufficiency of evidence in proceedings for subrogation.⁴¹

34. Ill.—Harris Trust & Savings Bank v. Lennox, 263 Ill.App. 629.

35. U.S.—Gross v. Tierney, C.C.A. W.Va., 55 F.2d 578.

36. Colo.—Botkin v. Pyle, 14 P.2d 187, 91 Colo. 221.

37. Pa.—Gildner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A.2d 910, 342 Pa. 145.

38. U.S.—Douglass v. Thurston County, C.C.A.Wash., 86 F.2d 899.

39. Intent to keep obligation alive

Three out of four comakers paying notes after payee instituted action thereon and having notes transferred to their nominee to whose use the action was assigned would be presumed to have intended to keep the obligation alive, as against contention that the three comakers paid notes with intent to discharge the notes.—Lit Bros., to Use of Kaplan, v. Goodman, 18 A.2d 519, 144 Pa.Super. 43.

Possession through mistaken delivery

Where administrator's bill was based on theory that his intestate as surety on notes secured by mortgage paid indebtedness and was subrogated to rights and remedies of mortgagee, if administrator mistakenly delivered notes to defendant, possession thus obtained would not suffice to create presumption in defendant's favor.—McGlaughn v. Pearman, 18 So.2d 80, 245 Ala. 524.

Settlement

Where third party tort-feasors before making settlement with firemen for injuries sustained by firemen knew that firemen had received from town under municipal law benefits for such injuries, it might be presumed that settlement did not include any part of payments, made by town, so as to entitle town and its indemnity insurer to recover, out of settlement, amount paid by town to firemen, on theory of equitable subrogation.—Employers' Liability Assur. Corp., Limited, of London, England,

v. Daley, 67 N.Y.S.2d 233, 271 App. Div. 662, affirmed 77 N.E.2d 515, 297 N.Y. 745, dissenting opinion 68 N.Y. S.2d 743, 271 App.Div. 662.

40. Miss.—Neely v. Johnson-Barksdale Co., 12 So.2d 924, 194 Miss. 529.

60 C.J. p 836 note 94.

Evidence held admissible

(1) To prove payment of consideration.—Jenkins & Boyle v. Rogers, 185 So. 603, 184 Miss. 182.

(2) To show how misappropriation actually took place.—Maryland Cas. Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

(3) Other evidence.

Ga.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47—Willis v. Capel, 168 S.E. 291, 176 Ga. 512.

60 C.J. p 836 notes 94 [a], [b].

Evidence held inadmissible

(1) Testimony that intestate had made payments on unidentified note to surety.—Hartley v. Hartley, 179 S. E. 245, 50 Ga.App. 848.

(2) Other evidence.—Van Winkle v. Fordonsky, 168 A. 383, 114 N.J.Eq. 121—60 C.J. p 836 note 94 [c].

41. La.—Steele v. Hough, 141 So. 22, 174 La. 441.

60 C.J. p 836 note 96.

Statements as to evidence required

(1) The subrogation must be clearly proved.—Panganiban v. Cuevas, 7 Philippine 477.

(2) Where subrogee did not establish by preponderance of evidence that he paid for his own account, and not for account of another, he could not prevail.—Shaw v. Wells, La. App., 17 So.2d 387.

(3) Surety was not entitled to recover amount paid where testimony relied on to show liability was uncertain, indefinite, and unsatisfactory.—Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Lubbock, Tex.Civ.App., 120 S.W.2d 113, error dismissed.

(4) Subrogation to rights of mort-

gagee is an appropriate remedy available to third person who has paid mortgage indebtedness on behalf of mortgagor, provided payment of mortgage is sustained by proper degree of proof.—Jones v. Remley, Ohio App., 75 N.E.2d 179.

Prima facie evidence

A decree in favor of town against town collector and his sureties for collector's defalcation was prima facie evidence of facts therein recited in subsequent suit by sureties, who had satisfied decree, based on their right to become subrogated to rights of the town.—State Bank & Trust Co. v. Commercial Trust & Savings Bank, 21 N.E.2d 157, 300 Ill.App. 435.

Evidence held sufficient

(1) Generally.

U.S.—Town of River Junction, Fla., v. Maryland Cas. Co., C.C.A.Fla., 133 F.2d 57—Hurt v. Read, C.C.A. Tex., 108 F.2d 282—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D. C.Ky., 40 F.Supp. 782.

Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.

Cal.—J. D. Halstead Lumber Co. v. Security Title Insurance & Guarantee Co., 3 P.2d 52, 116 Cal.App. 679.

Ga.—Lee v. Holman, 193 S.E. 68, 184 Ga. 694.

Ill.—Coudy Bros. Lumber Co. v. Board of Education, 262 Ill.App. 493.

Kan.—Kuske v. Staley, 28 P.2d 728, 138 Kan. 869.

Ky.—Vance v. Atherton, 98 S.W.2d 489, 266 Ky. 202.

Mass.—Hill v. Wiley, 3 N.E.2d 1015, 295 Mass. 396.

Ohio.—Maryland Cas. Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

Tex.—Mikulenka v. Mikulenka, Civ. App., 168 S.W.2d 517—Fenner v. American Sur. Co. of New York, Civ.App., 156 S.W.2d 279, error refused.

Wis.—Martineau v. Mehlig, 267 N. W. 9, 221 Wis. 347.

§ 70. Trial

General rules with respect to the submission of issues to the jury and to the giving of instructions in civil actions apply in actions for subrogation.

General rules with respect to submission of issues to the jury in civil actions apply in actions for subrogation,⁴² as do the rules as to the giving of instructions.⁴³ Questions of law are for the court,⁴⁴ while questions of fact are for the jury.⁴⁵

(2) To show plaintiff entitled to subrogation.

Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.

Fla.—Indian River Fisheries v. Guerin, 176 So. 94, 129 Fla. 179.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

Mo.—Neer v. Neer, App., 80 S.W.2d 240.

N.J.—Bremus v. Forsatz, 69 A.2d 557, 5 N.J.Super. 435.

N.C.—Sherrill v. Hood, 181 S.E. 330, 208 N.C. 472.

Pa.—Gildner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A.2d 910, 342 Pa. 145.

Tenn.—Turley-Bullington Mortgage Co. v. Brown, 4 Tenn.App. 500.

(3) To show intent of parties.

Ala.—Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 42 So.2d 829, 253 Ala. 54.

Miss.—Box v. Early, 178 So. 793, 181 Miss. 19.

Ohio.—Jones v. Remley, App., 74 N.E. 2d 109, modified on other grounds 75 N.E.2d 179.

(4) To show payment and no repayment.—McGlaughn v. Pearman, 18 So.2d 80, 245 Ala. 524.

(5) To show that payment was voluntary.—Neer v. Neer, Mo.App., 80 S.W.2d 240.

(6) To show payment not voluntary.—Hartley v. Hartley, 179 S.E. 245, 50 Ga.App. 848—60 C.J. p 836 note 96 [d].

(7) To show right to security on payment.—People v. Roseland State Sav. Bank, 48 N.E.2d 600, 318 Ill.App. 495.

(8) To show that note was given as collateral security for payment.—Beauboeuf v. McGehee, La.App., 161 So. 634.

(9) To sustain judgment or decree. Ill.—Harris Trust & Savings Bank v. Lennox, 263 Ill.App. 629.

Ind.—Kamarata v. Hayes Freight Lines, Inc., App., 108 N.E.2d 723.

Evidence held insufficient

(1) Generally.

U.S.—Maryland Cas. Co. v. Lincoln Bank & Trust Co., D.C.Ky., 40 F. Supp. 782.

§ 71. Judgment or Decree

One who is entitled to subrogation may have a judgment or decree entered in his favor which will best insure to him the enjoyment of his equitable right.

One who is entitled to subrogation may have a judgment or decree entered in his favor which will best insure to him the enjoyment of his equitable right.⁴⁶ Thus, the surety may be entitled to have the judgment or decree establish his right of sub-

Kan.—Fidelity & Casualty Co. v. Yoder, 64 P. 1027, 63 Kan. 880.

Tenn.—Morrah v. First Nat. Bank, 65 S.W.2d 830, 16 Tenn.App. 104.

Tex.—Engbrock v. Haidusek, Civ. App., 95 S.W.2d 520, error refused.

(2) To show plaintiff entitled to subrogation.

U.S.—American Sur. Co. of New York v. First Nat. Bank, D.C.Pa., 15 F.Supp. 974, affirmed, C.C.A., 96 F.2d 813.

Tex.—Bradley v. Freeman, Civ.App., 163 S.W.2d 693.

(3) To establish or sustain a cause of action.

Neb.—Lion Bonding & Surety Co. v. Capital Fire Ins. Co., 146 N.W. 1051, 96 Neb. 51.

Ohio.—Jones v. Remley, App., 75 N.E.2d 179.

(4) To raise issue of conventional subrogation.—Ramey v. Cage, Tex. Civ.App., 90 S.W.2d 626.

(5) To establish that holder of legal title to mortgaged property in trust intended to keep debt alive at time of payment of mortgages.—Christburgh v. Anderson, 66 P.2d 902, 179 Okl. 552.

(6) To overcome otherwise contradicted evidence that loan was made solely on credit.—Lion Bonding & Surety Co. v. Capital Fire Ins. Co., 146 N.W. 1051, 96 Neb. 51.

(7) To prove conversion.—Lion Bonding & Surety Co. v. Capital Fire Ins. Co., supra.

42. Okl.—New Amsterdam Cas. Co. v. Shi, 72 P.2d 789, 181 Okl. 166. 60 C.J. p 837 note 98.

Demurrer to evidence held properly sustained

Okl.—New Amsterdam Cas. Co. v. Shi, supra.

43. Ga.—Investors' Syndicate v. Thompson, 158 S.E. 20, 172 Ga. 203.

60 C.J. p 837 note 99.

44. Or.—American Sur. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

Court could not hold as matter of law that inquiry would have failed

to disclose embezzlement.—American Sur. Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

45. Ga.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

Questions held for jury

(1) Whether plaintiff's failure to give notice of his claim against an estate and his delay in filing suit to be subrogated against estate cast suspicion on his claim and affected his credibility as a witness.—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47.

(2) The question of bad faith.—Fenner v. American Sur. Co. of New York, Tex.Civ.App., 156 S.W.2d 279, error refused.

Finding of fact held unnecessary in view of undisputed testimony.—Fenner v. American Sur. Co. of New York, supra.

46. Ala.—Burch v. Burch, 165 So. 387, 231 Ala. 464.

Mo.—Brown v. Bibb, 201 S.W.2d 370, 356 Mo. 148. 60 C.J. p 837 note 1.

Interpretation of decree

A decree providing that surety on bond which insolvent national bank had executed to qualify as a depository for funds of bankrupt estates be subrogated to any remaining dividends paid or to be paid by bank's receiver on claims filed with him by bankruptcy trustees had to be interpreted as adjudicating no greater right to dividends than sound legal principles would permit, and surety, which paid trustees' claims in full, could not obtain by subrogation dividends which were not paid and could not be paid to them, since when claims were paid trustees' right to collect dividends ceased.—Maryland Cas. Co. v. Cox, C.C.A.Tenn., 104 F.2d 354.

Judgment over

Where engineering and legal services were wrongfully paid out of bond or special improvement fund instead of general fund of drainage district, and actions were brought for benefit of district against officers and sureties, the judgment against defendants

rogation against the principal;⁴⁷ and, where the subrogee pays off the debt for which he is bound, during the prosecution of an action by the creditor, he may ask the court to render judgment for him instead of for the creditor;⁴⁸ but, where the right demanded is disputed by other parties to the action having adverse interests, the court will go no further than to direct the subrogation on such terms as may be justified, leaving the conflicting claims to be determined by future adjudication.⁴⁹ Also, where the principal has been discharged in bankruptcy, the court will not provide in the judgment for subrogation of the surety against the principal.⁵⁰ A subrogee is ordinarily entitled to recover interest on the sum involved from the date of payment,⁵¹ although, under particular circumstances, such right has been denied.⁵²

A creditor who obtains a judgment against several defendants, by one of whom it is paid, can-

not interfere to prevent a decree of subrogation in favor of the party paying against the other defendants for that portion of the debt which they should pay.⁵³ The recovery of a money judgment in an action to enforce a right of subrogation is merely incidental to the subrogation.⁵⁴

Generally, a pro tanto subrogation will not be decreed,⁵⁵ but it will be decreed where justice requires.⁵⁶

§ 72. Review

It has been held that subrogation, being an equitable remedy, can be properly reviewed in higher courts only by appeal.

It has been held that subrogation, being an equitable remedy, can be properly reviewed in higher courts only by appeal,⁵⁷ and the proceedings therein should be in analogy to equity practice, as by petition and answer and not on mere notice.⁵⁸

should provide that sureties on payment of judgment should have judgment over against drainage district which should be directed to make such payment out of general fund and to levy any necessary tax therefor.—*State ex rel. Lester v. Baker*, 160 P.2d 264, 160 Kan. 180.

Judgments held not erroneous

Cal.—*Merner Lumber Co. v. Brown*, 21 P.2d 590, 218 Cal. 136.

Ga.—*U. S. Fidelity & Guaranty Co. v. Clarke*, 2 S.E.2d 608, 187 Ga. 774.

Tex.—*Fenner v. American Sur. Co. of New York*, Civ.App., 156 S.W.2d 279, error refused.

Judgment held unwarranted

Tex.—*Citizens Sav. Bank & Trust Co. v. Spencer*, Civ.App., 105 S.W.2d 671, error dismissed *Citizens Sav. Bank & Trust Co. of St. Johnsbury, Vt. v. Spencer*, 110 S.W.2d 1151, 130 Tex. 384.

47. Iowa.—*Bankers' Surety Co. v. Linder*, 137 N.W. 496, 156 Iowa 486, 60 C.J. p 837 note 2.

48. Ky.—*Perkins v. Scott*, 7 Ky.L. 608.

49. N.Y.—*McLean v. Tompkins*, 18 Abb.Pr. 24.

50. Tex.—*Edrington v. Gee*, Civ. App., 30 S.W.2d 360.

51. Ill.—*Fidelity & Cas. Co. of New York v. Heitman Trust Co.*, 46 N.E. 2d 155, 317 Ill.App. 256.

Ky.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28—*Federal Deposit Ins. Corp. v. Wilhoit*, 180 S.W.2d 72, 297 Ky. 339—*Broaddus v. Tevis*, 177 S.W.2d 901, 297 Ky. 168.

The purchaser of an equity of redemption, on paying off a prior mortgage, is entitled to interest thereon from the time of payment, at the rate specified in such mortgage, in a suit for the foreclosure thereof. Ind.—*Braden v. Graves*, 85 Ind. 92. Vt.—*Walker v. King*, 45 Vt. 525.

52. Subrogee of claim against damage award

Subrogee of a preferred claim against a damage award was not entitled to interest on claim, where award was insufficient to satisfy all claims.—*In re Neptune Ave. in City of Brooklyn*, 300 N.Y.S. 545, 165 Misc. 577.

Claims not entitled to priority

Where there were other claims against percentage of consideration payable under construction contract retained by school district and rights of surety on performance bond acquired through subrogation to claims of creditors paid by surety were not shown to be entitled to priority as against other creditors, so that pro rata share of retained fund to which surety was entitled could not be determined until disbursement of the fund by court, school district was not liable to surety for interest on reserve fund retained by it after demand made by surety that it be paid into registry of court.—*Fidelity & Deposit Co. of Maryland v. Herbert H. Conway, Inc.*, 128 P.2d 764, 14 Wash.2d 551.

Enjoyment of estate

Where life tenant by satisfying husband's debt was able to enjoy for

more than thirty-five years the life estate which husband devised to her in the realty mortgaged to secure such debt, although life tenant thereby became entitled to be subrogated to mortgagee's lien against husband's interest in the realty, the rights of her heirs were fully protected by adjudging them a lien against remainder interest in the realty for the amount life tenant paid in satisfying debt without allowing interest thereon.—*Evans' Adm'r v. Evans*, 199 S.W.2d 734, 304 Ky. 28.

53. Iowa.—*Bankers' Surety Co. v. Linder*, 137 N.W. 496, 156 Iowa 486. Pa.—*Springer v. Springer*, 43 Pa. 518.

54. N.Y.—*Pittsburgh-Westmoreland Coal Co. v. Kerr*, 115 N.E. 465, 220 N.Y. 137.

55. N.J.—*Camden County Welfare Board v. Federal Deposit Ins. Corp.*, 62 A.2d 416, 1 N.J.Super. 532—*Schmid v. First Camden Nat. Bank & Trust Co.*, 22 A.2d 246, 130 N.J. Eq. 254.

Part payment of debt generally see supra § 10.

56. N.J.—*Camden County Welfare Board v. Federal Deposit Ins. Corp.*, 62 A.2d 416, 1 N.J.Super. 532—*Schmid v. First Camden Nat. Bank & Trust Co.*, 22 A.2d 246, 130 N.J. Eq. 254.

57. Pa.—*Springer v. Springer*, 43 Pa. 518, 60 C.J. p 838 note 8.

58. Pa.—*Springer v. Springer*, 43 Pa. 518.

SUBSCRIBE. While the word "subscribe," which is derived from the Latin words "sub" and "scribo,"¹ has a well-defined meaning,² its significance when used in written instruments frequently must be sought in the context and attendant circumstances.³

The strict definition of the word "subscribe" involves the idea of a written signature,⁴ and the term ordinarily means the signing of one's own name,⁵ although this is not its necessary and universal signification,⁶ since frequently the term has reference to the place of signature rather than to the manner thereof.⁷

The primary⁸ and literal⁹ meaning of the word "subscribe" is to write under;¹⁰ to write underneath,¹¹ as one's name;¹² to write the name un-

der;¹³ to write the name at the bottom or end of a writing;¹⁴ to write below a documentary statement.¹⁵

Thus, primarily,¹⁶ and as popularly employed,¹⁷ the word "subscribe," when applied to the act of signing one's name to an instrument in writing,¹⁸ that is, a printed or written instrument,¹⁹ means,²⁰ and is limited to,²¹ a signature beneath²² or at the end²³ of the instrument; that is, the signature must be at the end of the instrument, rather than at some other place.²⁴

Since the strict definition of the word "subscribe" involves the idea of a written signature, as stated supra note 4, the term frequently is defined as meaning to set one's hand to a writing;²⁵ to sign

1. Miss.—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.
N.Y.—In re Arcowsky's Will, 11 N.Y. S.2d 853, 854, 171 Misc. 41.
"Sub" defined see ante p 552 notes 19-25.
"Scribo" defined see 79 C.J.S. p 473 note 40.50.

2. N.Y.—In re Yakel, 195 N.Y.S. 355, 357, 118 Misc. 641.

Phrases employing the word and as to which more recent adjudications have not been found see 60 C.J. p 840-950 notes 42-44.

3. N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

4. Iowa.—Rutenbeck v. Hohn, 121 N.W. 698, 700, 143 Iowa 13, 136 Am.S.R. 731.

- N.Y.—Mills v. Friedman, 181 N.Y.S. 285, 292, 111 Misc. 253.

5. Mass.—Smith v. Buffum, 115 N.E. 669, 226 Mass. 400, L.R.A.1917D 894.

6. Mass.—Smith v. Buffum, supra.

7. Ind.—Ashwell v. Miller, 103 N.E. 37, 39, 54 Ind.App. 381.

- Iowa.—Loughren v. B. F. Bonniwell & Co., 101 N.W. 287, 125 Iowa 518, 106 Am.S.R. 319.

8. Ind.—Ashwell v. Miller, 103 N.E. 37, 39, 54 Ind.App. 381.

9. N.C.—Corporation Commission of North Carolina v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

- Va.—French v. Beville, 62 S.E.2d 883, 886, 191 Va. 842.

10. Ind.—Wild Cat Branch v. Ball, 45 Ind. 213, 216.

- Miss.—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.

To set under or to write under

- Iowa.—Loughren v. B. F. Bonniwell

- & Co., 101 N.W. 287, 125 Iowa 518, 106 Am.S.R. 319.

- 60 C.J. p 838 note 10.

11. Cal.—In re Moore's Estate, 206 P.2d 413, 414, 92 Cal.App.2d 120.

- Miss.—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.

- Va.—French v. Beville, 62 S.E.2d 883, 886, 191 Va. 842.

- 60 C.J. p 838 note 16.

12. Cal.—In re Moore's Estate, 206 P.2d 413, 414, 92 Cal.App.2d 120.

- 60 C.J. p 838 note 17.

13. Ind.—Wild Cat Branch v. Ball, 45 Ind. 213, 216.

- Miss.—In re George's Estate, 45 So. 2d 571, 572—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.

14. Miss.—In re George's Estate, 45 So.2d 571, 572—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388.

Similarly defined

- (1) To write at the bottom or end of a writing or instrument.—Wild Cat Branch v. Ball, 45 Ind. 213, 216.

- (2) To write one's name beneath or at the end of an instrument.—Matter of Griffin, 106 N.Y.S. 24, 26, 56 Misc. 21.

15. N.Y.—In re Arcowsky's Will, 11 N.Y.S.2d 853, 854, 171 Misc. 41.

- N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

16. Ind.—Miller v. Miller, 104 N.E. 588, 591, 55 Ind.App. 644.

17. N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

18. Ind.—Miller v. Miller, 104 N.E. 588, 591, 55 Ind.App. 644.

19. N.C.—Corporation Commission

- v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

20. Ind.—Miller v. Miller, 104 N.E. 588, 591, 55 Ind.App. 644.

21. N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

22. Ind.—Miller v. Miller, 104 N.E. 588, 591, 55 Ind.App. 644.

23. Ind.—Miller v. Miller, supra.
N.C.—Corporation Commission v. Wilkinson, 160 S.E. 292, 294, 201 N.C. 344.

Etymology and definition of the word "subscribe" as given by lexicographers show that its meaning, when applied to a signature to an instrument in writing, is the signature or writing of one's name beneath or at the end of an instrument. This is also its popular signification.

- N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376.

- R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

Ordinarily it implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document.—Ashwell v. Miller, 103 N.E. 37, 39, 54 Ind.App. 381—60 C.J. p 839 note 21.

24. Iowa.—Loughren v. B. F. Bonniwell & Co., 101 N.W. 287, 288, 125 Iowa 518, 106 Am.S.R. 319.

25. Ala.—Hughes v. Merchants Nat. Bank of Mobile, 53 So.2d 386, 390—Riley v. Riley, 36 Ala. 496, 502.
N.C.—Pridgen v. Pridgen, 35 N.C. 259, 260.

Similarly defined

To set one's name to a paper in token of promise to give a certain

with one's own hand;²⁶ to sign with one's name;²⁷ to sign (one's name) to a document;²⁸ to sign in witness or attestation.²⁹

The term "subscribe" is further defined as meaning to assent;³⁰ to consent;³¹ to give consent to something written by signing³² one's name;³³ to give consent to, as something written, or to bind oneself to the terms of, by writing one's name beneath;³⁴ to attest or give consent or evidence knowledge, by underwriting, usually, but not necessarily, the name of the subscriber.³⁵

The word "subscribe" has various other meanings, and it may also mean to agree;³⁶ to agree to pay;³⁷ to agree in writing to furnish a sum of money, or its equivalent, for a designated purpose.³⁸ By common usage it is often employed to include an agreement, written or oral, to give or pay some amount to a designated purpose, more usually, perhaps, to some purpose for the promotion of which numerous persons are uniting their means and their efforts.³⁹

"Subscribe" may also mean to enter one's name for a newspaper, a book, etc.⁴⁰

"Subscribe" has been held to be equivalent to "attest by writing" see 7 C.J.S. p 692 note 30, and interchangeable with "take,"⁴¹ and it has been distinguished from "inscribe" see 44 C.J.S. p 334

note 251. "Subscribe" and "sign" and various forms thereof have been compared and distinguished in Signatures § 1 a.

—**Subscribing.** The present participle of the verb "subscribe."⁴² It has been said that the word "subscribing" has for all practical purposes the same meaning as "signing," when applied to the act of affixing a name to a written instrument,⁴³ and that such a subscribing may legally be done by another for the party to such instrument, if done at his request,⁴⁴ and that it may be done with pen and ink, pencil, stamp, stencil, typewriter, or type.⁴⁵

"Subscribing" has been distinguished from "attesting" see 7 C.J.S. p 691 note 22.

Subscribing witness. The term has a clear and certain meaning as to which all the authorities are in agreement.⁴⁶ It is defined as meaning one who subscribes his name to a writing in order to be able at a future time to prove its due execution;⁴⁷ one who was present when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution;⁴⁸ one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it, as a witness of the execution;⁴⁹ one who sees a writing executed, or hears it acknowledged, and at the request of the

sum.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.

26. Cal.—In re Moore's Estate, 206 P.2d 413, 414, 92 Cal.App.2d 120. Miss.—Baker v. Baker's Estate, 24 So. 2d 841, 844, 199 Miss. 338.

27. N.Y.—In re Yakel, 195 N.Y.S. 355, 357, 118 Misc. 641.

28. Cal.—In re Moore's Estate, 206 P.2d 413, 414, 92 Cal.App.2d 120. Miss.—Baker v. Baker's Estate, 24 So. 2d 841, 844, 199 Miss. 338.

Similarly defined

To sign one's name to a letter or other document.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.

29. Eng.—Roberts v. Phillips, 4 E. & B. 450, 455, 82 E.C.L. 450, 119 Reprint 162. 60 C.J. p 838 note 11.

30. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163. 60 C.J. p 839 note 35.

31. Eng.—Roberts v. Phillips, 4 E. & B. 450, 455, 82 E.C.L. 450, 119 Reprint 162.

32. Ky.—Weiss v. Hanscom, 205 S. W.2d 485, 487, 305 Ky. 687.

Miss.—Baker v. Baker's Estate, 24 So. 2d 841, 844, 199 Miss. 338.

33. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163. 60 C.J. p 838 note 8.

34. Cal.—In re Moore's Estate, 206 P.2d 413, 414, 92 Cal.App.2d 120.

35. Cal.—Weiner v. Mullaney, 140 P.2d 704, 712, 59 Cal.App.2d 620. 60 C.J. p 839 note 6.

36. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.

Iowa.—Ashton v. Stoy, 64 N.W. 804, 805, 96 Iowa 197, 30 L.R.A. 584.

37. Iowa.—Rutenbeck v. Hohn, 121 N.W. 698, 700, 143 Iowa 13, 136 Am.S.R. 731. 60 C.J. p 840 note 39.

38. Wash.—Strong v. Eldridge, 36 P. 696, 698, 8 Wash. 595. 60 C.J. p 839 note 38.

39. Iowa.—Rutenbeck v. Hohn, 121 N.W. 698, 700, 143 Iowa 13, 136 Am.S.R. 731.

N.Y.—Mills v. Friedman, 181 N.Y.S. 285, 292, 111 Misc. 253.

40. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.

41. Mo.—State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 90, 317 Mo. 1078. 60 C.J. p 1209 note 29.

42. Webster New Int.D.

43. Ind.—Ashwell v. Miller, 103 N. E. 37, 40, 54 Ind.App. 381.

44. Ind.—Ashwell v. Miller, supra.

45. Ind.—Ashwell v. Miller, supra.

46. N.Y.—In re Rothstein's Estate, 233 N.Y.S. 235, 236, 133 Misc. 547.

47. N.Y.—In re Rothstein's Estate, supra—In re Shaw's Will, 82 N.Y. S.2d 298, 301.

48. N.Y.—In re McDonough's Estate, 193 N.Y.S. 734, 736, 201 App. Div. 203—In re Shaw's Will, 82 N.Y.S.2d 298, 301—Hollenback v. Fleming, 6 Hill 303, 304, 305.

49. N.Y.—In re Rothstein's Estate, 233 N.Y.S. 235, 236, 133 Misc. 547. 60 C.J. p 839 note 27.

party thereupon signs his name as a witness;⁵⁰ one who writes his name under an attesting clause;⁵¹ an attesting witness.⁵²

In order to make a good subscribing witness, it is requisite that he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party.⁵³ The witness need not be present at the moment of execution, and if he is called in by the parties immediately afterwards and told that it is their deed or agreement and requested to sign his name as a witness, that will be enough, since the execution by the parties and the subscription by the witness are then considered as parts of the same transaction.⁵⁴

Except as statutes have changed or modified the rule, it is held generally that in the case of attested instruments proof of execution or authenticity must be made by the subscribing witnesses if available, see Evidence § 739. Alteration of instrument as to subscribing witness see Alteration of Instruments § 27.

The law relating to subscribing witnesses is, to a large extent, in connection with the execution of testamentary instruments, and thus is treated throughout the title Wills; and for specific references see the index to that title and consult the Descriptive-Word Index.

—Subscribed. It has been said that the word "subscribed," which is derived from the Latin "subscribo,"⁵⁵ literally⁵⁶ and according to its derivation,⁵⁷ means to write beneath;⁵⁸ to write under⁵⁹ or underneath.⁶⁰ It involves a writing,⁶¹ and in its habitual use, and according to both its popular and literary signification, is limited to a signature at the end of a printed or written instrument,⁶² and in its technical⁶³ sense means signed at the bottom;⁶⁴ signed underneath.⁶⁵

It has a secondary meaning which is purely metaphorical, denoting the consent, assent, or promise thus conveyed, without reference to the external mode of expressing it,⁶⁶ but this secondary sense is excluded when actual writing is spoken of, and applies only when the word is used as a neuter or intransitive verb, accompanied by the preposition "to."⁶⁷

"Subscribed" has been held synonymous with "executed" see 33 C.J.S. p 120 note 31, and it has been distinguished from "attested" see 7 C.J.S. p 692 note 40.1, and "issued" see 48 C.J.S. p 778 note 15.

SUBSCRIBER. It has been said that the word "subscriber" has a well-understood meaning,⁶⁸ and is defined as one who subscribes;⁶⁹ one who contributes to an undertaking by subscribing.⁷⁰ The

50. Or.—Luper v. Werts, 23 P. 850, 855, 19 Or. 122.
60 C.J. p 839 note 25.

51. Ga.—Smith v. Crotty, 38 S.E. 110, 111, 112 Ga. 905.
60 C.J. p 839 note 28.

52. N.Y.—In re Rothstein's Estate, 233 N.Y.S. 235, 236, 133 Misc. 547. "Attesting witness" see 7 C.J.S. p 692 note 32.

53. N.Y.—In re Rothstein's Estate, 233 N.Y.S. 235, 236, 133 Misc. 547 —In re Shaw's Will, 82 N.Y.S.2d 298, 301.

54. N.Y.—In re Shaw's Will, supra—Hollenback v. Fleming, 6 Hill 303, 304, 305.

55. N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376.
R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

56. Neb.—Myers v. Moore, 110 N.W. 989, 78 Neb. 448.

N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376—Davis v. Shields, 26 Wend. 341, 357.

R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

57. N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376—Davis v. Shields, 26 Wend. 341, 357.

R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

58. N.Y.—Davis v. Shields, 26 Wend. 341, 357.

Phrases employing the word "subscribed" and as to which more recent adjudications have not been found see 60 C.J. p 839 notes 32, 33, p 840 note 44.

59. N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376.

R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

60. Neb.—Myers v. Moore, 110 N.W. 989, 78 Neb. 448.

N.Y.—James v. Patten, 6 N.Y. 9, 12, 55 Am.D. 376.

R.I.—Attorney General v. Clarke, 59 A. 395, 396, 26 R.I. 470.

61. N.D.—Hagen v. Gresby, 159 N.W. 3, 6, 34 N.D. 349, L.R.A.1917B 281.

62. N.Y.—James v. Patten, 6 N.Y. 9, 13, 55 Am.D. 376.

Or.—Commercial Credit Corporation

v. Marden, 62 P.2d 573, 576, 155 Or. 29, 112 A.L.R. 931.

Similarly stated

In habitual use it denotes the writing the name at the end of any writing, in token of assent or attestation, according to the import of the writing itself.—Davis v. Shields, 26 Wend., N.Y., 341, 357.

63. Minn.—In re Cravens' Estate, 225 N.W. 398, 399, 177 Minn. 437.

64. Minn.—In re Cravens' Estate, supra.

65. Miss.—In re George's Estate, 45 So.2d 571, 572.

66. N.Y.—James v. Patten, 6 N.Y. 9, 13, 55 Am.D. 376—Davis v. Shields, 26 Wend. 341, 357.

67. N.Y.—Davis v. Shields, supra.

68. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.

69. Ind.—State v. Hazzard, supra. Iowa.—Ashton v. Stoy, 64 N.W. 804, 805, 96 Iowa 197, 30 L.R.A. 584.

70. Ind.—State v. Hazzard, 80 N.E. 149, 150, 168 Ind. 163.
60 C.J. p 840 note 48.

term is applied to a person who becomes bound by a subscription to the capital stock of a corporation as stated in Corporations § 283. The word "subscriber" is also applied to a person who enters his name for a paper, book, map, or the like.⁷¹

SUBSCRIPTION. The act of writing one's name under a written instrument; the affixing one's signature to any document, whether for the purpose of authenticating or attesting it, of adopting its terms as one's own expressions, or of binding one's self by an engagement which it contains.⁷² While the strict definition of the word "subscription" involves the idea of a written signature,⁷³ by common usage the term is often employed to include an agreement, written or oral, to give or pay some amount to a designated purpose, more usually perhaps, to some purpose for the promotion of which numerous persons are uniting their means and their efforts.⁷⁴

Thus term may be used in the sense of a making of a formal written promise.⁷⁵

It has been said that subscription is mechanical,⁷⁶ and the act of the hand,⁷⁷ as distinguished from attestation which is mental and the act of the senses, see 7 C.J.S. p 693 note 73.

Subscriptions as promises in writing by one or more persons to contribute money or other property absolutely, or conditionally, for purposes of a charitable, educational, religious, or other public nature are treated in Subscriptions § 1 et seq.

Subscriptions to the capital stock of a corporation are considered generally in Corporations §§ 282-387.

Subscription by witnesses as essential to the validity of a will see the C.J.S. title Wills §§ 182-197, also 68 C.J. p 671 note 8-p 713 note 88.

71. Ind.—State v. Hazzard, *supra*. 60 C.J. p 840 note 49.

72. Black L.D.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 840 note 55.

73. Iowa.—Rutenbeck v. Hohn, 121 N.W. 698, 700, 143 Iowa 13, 136 Am.S.R. 731. 60 C.J. p 840 note 53.

74. Iowa.—Rutenbeck v. Hohn, *supra*.

N.Y.—Mills v. Friedman, 181 N.Y.S. 285, 292, 111 Misc. 253.

75. Ind.—State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County, 76 N.E. 986, 990, 166 Ind. 162.

76. Neb.—In re Aden's Estate, 279 N.W. 794, 796, 134 Neb. 810.

Va.—French v. Beville, 62 S.E.2d 883, 886, 191 Va. 842—Ferguson v. Fer-

guson, 47 S.E.2d 346, 351, 187 Va. 581.

60 C.J. p 840 note 53 [b].

The mere manual or mechanical act of bearing witness to.—People v. Kempner, 95 N.Y.S.2d 425, 427.

77. N.Y.—People v. Kempner, *supra*. Va.—French v. Beville, 62 S.E.2d 883, 886, 191 Va. 842—Ferguson v. Ferguson, 47 S.E.2d 346, 351, 187 Va. 581.

60 C.J. p 840 note 53 [b].

SUBSCRIPTIONS

This Title includes promises in writing by one or more persons to contribute money or other property absolutely, or conditionally, for purposes of a charitable, educational, religious, or other public nature; acceptance of such promises and performance of conditions thereof, and rights and liabilities of the parties thereupon; and actions on such subscriptions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition and nature—p 731
- 2. Form and contents—p 732
- 3. Execution and delivery—p 733
- 4. Acceptance—p 734
- 5. Consideration—p 734
- 6. — Failure of consideration—p 740
- 7. Validity of assent in general—p 740
- 8. Fraud and misrepresentation—p 740
- 9. Illegal and ultra vires subscriptions—p 741
- 10. Construction—p 741
- 11. Assignment—p 743
- 12. Title to funds subscribed—p 744
- 13. Performance of conditions—p 744
- 14. — Time of performance—p 747
- 15. — Change of plan or purpose—p 748
- 16. — Abandonment of undertaking—p 748
- 17. — Subscription conditioned on other subscriptions—p 749
- 18. Payment—p 749
- 19. Revocation and lapse—p 750
- 20. Release or discharge of subscriber—p 751
- 21. Recovery back of subscriptions—p 752
- 22. Actions—p 753

See also descriptive word index in the back of this Volume

§ 1. Definition and Nature

A "subscription contract" or "subscription" has been defined as a written contract by which one engages to contribute a sum of money for a designated purpose gratuitously; but a subscription, in the absence of consideration, is regarded as a mere offer; furthermore, the promise need not be to pay money, but may be for the performance of other acts.

A "subscription contract" or "subscription," as it

is often called, is defined as a written contract by which one engages to contribute a sum of money for a designated purpose gratuitously, as in the case of subscribing to a charity.¹ However, such a definition is too broad, since subscriptions need not be in writing, but may be oral, as discussed infra § 2, and the courts have considered a subscription, in the absence of consideration therefor, as a mere offer,² which becomes binding when accepted, as

1. Black L.D.

Other definitions

(1) A written contract by which one engages to contribute a sum of money for a designated purpose.—

Heller v. Elwood Board of Trade, 47 N.E. 649, 180 Ind.App. 188.

(2) Similar statements see 60 C.J. p 953 note 1 [a].

2. Cal.—First Trust & Savings Bank

of Pasadena v. Coe College, 47 P.2d 481, 8 Cal.App.2d 195—Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 129 Cal.App. 541.

discussed *infra* § 4, or when the offerer is estopped to deny the validity of the promise, as discussed *infra* § 5 b (2). Furthermore, the promise need not be to pay money, but may be for the performance of other acts,³ as, for example, to give a note,⁴ to convey land,⁵ or to furnish labor and material.⁶

§ 2. Form and Contents

Although the nature and extent of the obligation of the subscription must be definite and certain, no particular formality is necessary to a contract of subscription, and it is not necessary that the payee be named in the subscription paper.

No particular formality is necessary to a contract of subscription,⁷ but any form or statement by which an intent to effect such an agreement or contract appears is sufficient.⁸ In the absence of statutory provisions to the contrary, and subject to the limitations imposed on oral contracts generally by the statute of frauds, subscriptions need not be in writing, but may be oral.⁹ The subscription contract may consist of separate sheets or documents if they are properly related.¹⁰ The writing must be more than a mere proposal contemplating further proceedings,¹¹ although a promise to pay "at my convenience" was held not unenforceable as an illusory promise,¹² but to constitute a promise in effect to pay when the promisor was able, when payment was convenient or opportune or could be made without

difficulty, discomfort, trouble, or personal inconvenience.¹³

Date. The paper is not invalid if undated.¹⁴

Certainty and definiteness. As in the case of contracts generally, the nature and extent of the obligation of a subscription contract must be certain and definite.¹⁵ A promise to pay an amount not stated or determinable is too indefinite.¹⁶

Designation of payee. It is not necessary that the payee should be named in the subscription paper; it is sufficient if there is an acceptance by the party intended;¹⁷ and it is not necessary that the payee have been in existence at the time the subscription was made.¹⁸ In the absence of a designated payee there can be no recovery by a person or corporation which was not contemplated as payee.¹⁹ The beneficiary may appoint an agent to whom notes for subscriptions may be made payable.²⁰

Subscription in aid of railroad. A subscription or contribution, made merely for the purpose of aiding a railroad company and not in exchange for stock, is not subject to statutory provisions relating to subscriptions to stock of the company.²¹ Furthermore, a committee of subscribers representing the whole number in offering aid to a railroad company, or agents acting therein for the subscribers,

III.—In re Drain's Estate, 36 N.E.2d 608, 311 Ill.App. 481.

Mo.—Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 346 Mo. 628.

60 C.J. p 954 note 41.

Executory contract

A subscription of a fixed amount to a charitable institution, a part of which was payable in cash when construction of a certain building was begun and balance to be paid within a fixed time, was merely a contract.—In re Carson's Estate, 37 A.2d 488, 349 Pa. 529.

3. Iowa.—Chicago University v. Emmert, 79 N.W. 285, 108 Iowa 500.

Vt.—State University v. Buell, 2 Vt. 48.

60 C.J. p 953 note 8.

4. Iowa.—Chicago University v. Emmert, 79 N.W. 285, 108 Iowa 500.

5. Pa.—Harrisburg Board of Trade v. Eby, 1 Dauph.Co. 99.

W.Va.—Union Stopper Co. v. McGara, 66 S.E. 698, 66 W.Va. 403.

6. Vt.—State University v. Buell, 2 Vt. 48.

7. Ind.—State v. Hazzard, 80 N.E. 149, 168 Ind. 163.

8. Ind.—State v. Hazzard, *supra*. 60 C.J. p 953 note 12.

Delivery of check as not constituting enforceable subscription see *infra* § 3 b.

9. Ky.—Lewis v. Durham, 265 S.W. 934, 205 Ky. 403.

60 C.J. p 953 note 15.

10. Iowa.—Davis v. Campbell, 61 N.W. 1053, 98 Iowa 524.

60 C.J. p 953 note 16.

11. Mass.—Newburyport First Universalist Soc. v. Currier, 3 Metc. 417.

12. Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.

13. Del.—American University v. Todd, *supra*.

14. Ind.—Allen v. Clinton County, 101 Ind. 553.

15. N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923.

Pa.—In re Wanamaker's Estate, 17 Pa.Dist. & Co. 496.

60 C.J. p 953 note 20.

Letters

Enforceable obligation will not arise out of an alleged subscription for the benefit of a charitable institution where letters relied on to establish subscription are vague in phraseology.—In re Wanamaker's Estate, 17 Pa.Dist. & Co. 496.

16. Pa.—Estate of Patchen, 22 Pa. Dist. 56, 58.

17. Ga.—Owenby v. Georgia Baptist Assembly, 74 S.E. 56, 137 Ga. 698, Ann.Cas.1913B 238.

60 C.J. p 953 note 22.

18. Ill.—Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 71 N.E. 22, 210 Ill. 26, 102 Am.S.R. 145.

60 C.J. p 954 note 23.

19. Ky.—Warwick Turnpike Road Co. v. Hutchinson, 56 S.W. 806, 22 Ky.L. 201.

Nev.—Wheeler v. Floral Mill, etc., Co., 9 Nev. 254.

20. Ky.—Webb v. Dunn, 248 S.W. 840, 198 Ky. 111.

21. Mich.—Wright v. Irwin, 35 Mich. 347.

have only such authority as is conferred on them,²² and cannot go beyond their instructions.²³ So a committee or agent authorized to offer aid on certain terms has no power to bind the subscribers to any other terms.²⁴ However, an agent given discretionary power to make a contract with a railroad company on such terms as he may deem for the best interests of the subscribers has power to bind them to furnish depot grounds and a right of way.²⁵

§ 3. Execution and Delivery

- a. Execution
- b. Delivery

a. Execution

The subscriber's name may be signed to the contract by the solicitor of the subscription where the subscriber authorized the signing. Revenue stamps must be affixed as required.

The subscription paper need not be signed by the payee,²⁶ and the signing of the subscriber's name by the solicitor of the subscription is sufficient to create a valid subscription contract where the subscriber authorized the signing.²⁷ Furthermore, in so far as a person may transact business under a name other than his real name, the promisor need not use his real name in signing a subscription contract.²⁸

Affixing revenue stamps. Where by reason of statutory provisions a subscription requires a revenue stamp, it is no objection to the validity of a subscription that a single stamp, sufficient to cover the aggregate amount of duties on all of several

subscriptions on one page of a subscription book, was used instead of a separate stamp for each subscription.²⁹ In the case of a tax imposed by the United States, it has been held that the amount of stamps required on each sheet of a subscription to which he affixes and cancels stamps is determined conclusively by the internal revenue collector.³⁰

b. Delivery

There must be an actual or constructive delivery of the subscription paper.

Although there must be an actual or constructive delivery of the subscription paper,³¹ a subscription is not of the class of agreements which requires a formal or particular delivery to the payee or beneficiary,³² since it is not necessary for the validity of the subscription that the payee have been in existence at the time of the subscription, as discussed supra § 2. While the subscriber may, before delivery of the subscription, withdraw therefrom even after signing it,³³ after delivery of the paper the subscription becomes a contract between the beneficiary and each of the subscribers,³⁴ although the mere delivery of a check to an institution which is engaged in activities both charitable and private and supported in part by the contributions of others does not result in an enforceable subscription contract.³⁵

Subscription in aid of railroad. Since the committee or agent authorized to offer aid on certain terms has no power to bind the subscribers to any other terms, as discussed supra § 2, the delivery of a subscription other than on the conditions on which such delivery was authorized is not binding on the subscribers.³⁶

22. Tex.—Darnell v. Lyon, 22 S.W. 304, 960, 85 Tex. 455.

23. Tex.—Darnell v. Lyon, supra.

24. Ind.—Drover v. Evans, 59 Ind. 454.

Tex.—Darnell v. Lyon, 22 S.W. 304, 960, 85 Tex. 455.

25. Iowa.—Cedar Rapids, etc., R. Co. v. Stewart, 25 Iowa 115.

26. Ark.—Turner v. Baker, 30 Ark. 186.

27. Ark.—Arkansas Christian College v. Malone, 271 S.W. 964, 168 Ark. 1167.
60 C.J. p 954 note 30.

28. Wis.—Hodges v. Nalty, 89 N.W. 535, 113 Wis. 567.
60 C.J. p 954 note 28.

29. Iowa.—St. Louis, etc., R. Co. v. Eakins, 30 Iowa 279.

30. Vt.—Green Mountain Cent. Inst. v. Britain, 44 Vt. 13.

31. Ind.—Rothenberger v. Glick, 52 N.E. 811, 22 Ind.App. 288.
60 C.J. p 954 note 35.

32. Ill.—Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 71 N.E. 22, 210 Ill. 26, 102 Am.S.R. 145.

Escrow

Written instrument, containing testator's pledge to college, which was delivered by testator to third person for delivery to college on death of testator, was held to be an escrow deliverable to college on testator's death, notwithstanding testator re-

tained privilege to withdraw instrument, where privilege was never exercised.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.

33. Ind.—Rothenberger v. Glick, 52 N.E. 811, 22 Ind.App. 288.

34. Ind.—Rothenberger v. Glick, supra.
Necessity of acceptance see infra § 4.

35. Kan.—In re Brown's Estate, 155 P.2d 445, 159 Kan. 408.

36. Iowa.—Davenport, etc., R. Co. v. O'Connor, 40 Iowa 477.
Mich.—Saginaw, etc., R. Co. v. Chapell, 22 N.W. 278, 56 Mich. 190.

§ 4. Acceptance

As in the case of contracts generally, it is essential that there should be an acceptance of the offered subscription.

Since a promise to pay a subscription is, in the absence of consideration therefor, a mere offer, as discussed supra § 1, it may be withdrawn at any time before acceptance.³⁷ As in the case of contracts generally, it is essential that there should be an acceptance of the offered subscription³⁸ within a reasonable time after the offer has been made,³⁹ although the acceptance need not be express; it may be implied,⁴⁰ as where liability or expense is incurred on the faith of the offer⁴¹ or the conditions stipulated are complied with.⁴² Nonacceptance may also be implied from the actions of the promisee.⁴³ It is not necessary that the subscriber should be notified that the subscription has been accepted,⁴⁴ although the contrary has been asserted.⁴⁵ However, if the subscription prescribes an express method of acceptance this requirement must be complied with.⁴⁶ A subscription solicited without previous authorization may be subsequently ratified and

accepted by the payee.⁴⁷

Subscription in aid of railroad. A contract of subscription made in aid of a railroad company becomes binding, and the company becomes entitled to the money or other aid subscribed, when, and only when, it has accepted the contract.⁴⁸

§ 5. Consideration

- a. In general
- b. What constitutes consideration

a. In General

A subscription must be supported by a consideration.

As in the case of contracts generally, a subscription must be supported by a consideration,⁴⁹ and a mere promise to pay, or a naked promise to give is not sufficient or enforceable in the absence of consideration.⁵⁰ The statement of the subscription in the form of a loan by the payee to the subscriber will not evade this result;⁵¹ but, where the subscrip-

37. Cal.—First Trust & Savings Bank of Pasadena v. Coe College, 47 P.2d 481, 8 Cal.App.2d 195—Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 129 Cal.App. 541.

Ill.—In re Drain's Estate, 36 N.E.2d 608, 311 Ill.App. 481.

Mo.—Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 346 Mo. 628. 60 C.J. p 954 note 41.

Necessity of acceptance before death or insanity see infra § 19.

38. Mo.—Missouri Wesleyan College v. Shulte, supra. 60 C.J. p 954 note 43.

Who may accept

Where subscriber signed agreement to subscribe certain amount for erection of high school for religious corporation which subscription was accepted by pastor of church but not by board of directors of the corporation which took no action to ratify subscription agreement by corporate action before subscriber's death, on subscriber's death subscription was revoked and his estate was not bound thereby.—In re McCanna's Estate, 284 N.W. 502, 230 Wis. 561—Sun Prairie M. E. Church v. Sherman, 36 Wis. 404.

39. Tex.—McCrimmin v. Cooper, 27 Tex. 118.

40. Mo.—Missouri Wesleyan College

v. Shulte, 142 S.W.2d 644, 346 Mo. 628.

60 C.J. p 955 note 45.

41. Cal.—Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 129 Cal.App. 541.

Mo.—Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 346 Mo. 628.

N.Y.—In re Metz' Estate, 30 N.Y.S. 2d 502, 262 App.Div. 508. 60 C.J. p 955 note 46.

42. Wis.—Superior Consol. Land Co. v. Bickford, 67 N.W. 45, 93 Wis. 220.

43. Pa.—Estate of Patchen, 22 Pa. Dist. 56.

44. Ill.—Merchants' Bldg. Impr. Co. v. Chicago Exch. Bldg. Co., 71 N.E. 22, 26, 210 Ill. 26, 102 Am.S.R. 145. 60 C.J. p 955 note 49.

45. Va.—Galt v. Swain, 9 Gratt. 633, 50 Va. 633, 60 Am.D. 311.

46. Me.—Wiswell v. Bresnahan, 24 A. 385, 84 Me. 397. 60 C.J. p 955 note 51.

47. Vt.—Middlebury College v. Williamson, 1 Vt. 212.

Wis.—Leonard v. Lent, 43 Wis. 83.

48. Ind.—Smith v. Davidson, 45 Ind. 396.

Mich.—Northern Cent. Michigan, etc., R. Co. v. Eslow, 40 Mich. 222.

49. U.S.—Corpus Juris cited in Trustees of Baker University v. Clelland, C.C.A.Mo., 86 F.2d 14, 18.

Ala.—Pass v. First Nat. Bank, 149 So. 718, 25 Ala.App. 519.

Ark.—David v. Chambers, 185 S.W. 443, 123 Ark. 293.

Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.

Mo.—Corpus Juris quoted in Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 346 Mo. 628.

N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

60 C.J. p 955 note 55.

Consideration or promissory estoppel which may be implied is necessary to sustain liability on charitable subscription.—Tioga County General Hospital v. Tidd, supra.

Fledge to college under written instrument executed by testator was held not unenforceable against testator's estate on ground that it was a gift inter vivos and therefore void, where instrument was supported by consideration.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.

50. N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

W.Va.—Wesleyan University v. Hubbard, 20 S.E.2d 677, 124 W.Va. 434. 60 C.J. p 955 note 56.

51. Ind.—Butler University v. Scoonover, 16 N.E. 642, 114 Ind. 381, 5 Am.S.R. 627.

tion takes the form of a promissory note, reciting that defendant had borrowed and received the amount named therein, the promise has been held not without consideration.⁵² It is not necessary that the consideration be expressed,⁵³ or exist at the time of the making of the subscription contract,⁵⁴ but it may be supplied by the subsequent conduct of the payee or beneficiary.⁵⁵

Adequacy. As in the case of contracts generally, the court will not inquire into the adequacy of the consideration,⁵⁶ although an exception exists where there is a mere exchange of money or coin the value of which is exactly fixed.⁵⁷

b. What Constitutes Consideration

- (1) In general
- (2) Work done or obligations or expenses incurred
- (3) Mutual promises of subscribers

- (4) Mutual promises of subscriber and payee or beneficiary
- (5) Benefit to promisor

(1) In General

General rules as to what constitutes consideration for a contract have been applied to subscriptions, but as a matter of public policy courts sustain subscriptions for a public object if any consideration can be found, and have been willing and apparently anxious to discover a consideration which will uphold them.

Although general rules as to what constitutes consideration for a contract have been applied to subscriptions,⁵⁸ and various matters have been held to constitute,⁵⁹ or not to constitute,⁶⁰ consideration, as a matter of public policy courts sustain subscriptions for a public object if any consideration can be found,⁶¹ and the general course of decisions is favorable to their binding obligation.⁶²

The objection of a want of consideration has not always been regarded with favor,⁶³ and the courts have been willing and apparently anxious to discover a consideration which will uphold subscriptions,⁶⁴ with the result that the usual tendency

52. Mass.—Fisher v. Ellis, 3 Pick. 322.

53. La.—Baptist Hospital v. Cappel, 129 So. 425, 14 La.App. 626. 60 C.J. p 955 note 59.

54. Ala.—Pass v. First Nat. Bank, 149 So. 718, 25 Ala.App. 519. Cal.—First Trust & Savings Bank of Pasadena v. Coe College, 47 P.2d 481, 8 Cal.App.2d 195.

55. Ala.—Pass v. First Nat. Bank, 149 So. 718, 25 Ala.App. 519.

Mutuality of the promise is to be tested by the situation existing at the time it is sought to enforce the subscription, not by that existing at the time of the signing of the instrument.

Ala.—Pass v. First Nat. Bank, supra. Ga.—Owenby v. Georgia Baptist Assembly, 74 S.E. 56, 137 Ga. 698, Ann.Cas.1913B 238.

Ill.—In re Drain's Estate, 36 N.E.2d 608, 311 Ill.App. 481.

Ohio.—Irwin v. Lombard University, 46 N.E. 63, 56 Ohio St. 9, 60 Am.S.R. 727, 36 L.R.A. 239.

56. Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.

Extent of consideration for charitable subscription is unimportant, charitable gifts not being founded on full and adequate monetary consideration. —Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

57. Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.

Recital of receipt of one dollar was insufficient to support promise to pay five thousand dollars to a university. —American University v. Todd, supra.

58. Md.—Sterling v. Victor Cushwa & Sons, 183 A. 593, 170 Md. 226. N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923.

W.Va.—Wesleyan University v. Hubbard, 20 S.E.2d 677, 124 W.Va. 434.

59. Kan.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.

Md.—Sterling v. Victor Cushwa & Sons, 183 A. 593, 170 Md. 226.

N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923.—In re Borden's Will, 41 N.Y.S.2d 269, affirmed 47 N.Y.S.2d 120, 267 App.Div. 823, 830, appeal denied 47 N.Y.S.2d 583, 267 App.Div. 905.

60. Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449. W.Va.—Wesleyan University v. Hubbard, 20 S.E.2d 677, 124 W.Va. 434.

61. N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923.—First M. E. Church v. Howard's Estate, 233 N.Y.S. 451, 133 Misc. 723.—In re Borden's Will, 41 N.Y.S.2d 269, affirmed 47 N.Y.S.2d 120, 267 App.Div. 823, 830, appeal denied 47 N.Y.S.2d 583, 267 App.Div. 905.

62. Ill.—In re Drain's Estate, 36 N.E.2d 608, 311 Ill.App. 481.

Mo.—**Corpus Juris** quoted in Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 648, 346 Mo. 628.

Ohio.—Irwin v. Lombard University, 46 N.E. 63, 56 Ohio St. 9, 36 L.R.A. 239, 60 Am.S.R. 727.

Subscription contracts are favored in law as calculated to foster public and quasi-public enterprises. As a matter of public policy, the courts are desirous that subscribers should not evade their deliberate promises of contribution, and their tendency therefore is to adopt such a rule as will sustain the subscription as a legal obligation.

Ala.—Pass v. First Nat. Bank, 149 So. 718, 25 Ala.App. 519.

Neb.—Continental Co. of Lincoln v. Ehlers, 278 N.W. 497, 134 Neb. 278.

N.J.—More Game Birds in America v. Boettger, 14 A.2d 778, 125 N.J.Law 97.

Charitable purpose

Where the purposes of a nonprofit corporation were to conserve game birds, to establish hatcheries and refuges, and to teach vermin control, such purposes were charitable purposes, with respect to defendant's liability to pay balance remaining due on an allegedly charitable subscription to corporation.—More Game Birds in America v. Boettger, supra.

63. N.Y.—Barnes v. Perine, 12 N.Y. 18, 23.

64. N.J.—**Corpus Juris** cited in Fryns v. Fair Lawn Fur Dressing Co., 168 A. 862, 865, 114 N.J.Eq. 462.

of the courts is to attempt, on some more or less plausible theory, to sustain such agreements with at least a modicum of lip service to the usually applicable principles of contracts,⁶⁵ and, in some cases, the subscribers have been held liable when perhaps on strict principles there was not a legal consideration for the contract.⁶⁶ However, the fundamental principle that contractual undertakings to be performed in the future must be supported by a valuable consideration in order to be enforceable is not to be ignored,⁶⁷ and it has been held that an actual rather than an illusory consideration, or at least an estoppel of the promisor to object, is necessary to render a charitable subscription enforceable.⁶⁸

Statutory duty of promisee to disburse funds. In a few cases the promise has been supported partly or wholly on the theory that if the beneficiary has been authorized, by its own charter or by other legislation, to receive money and appropriate it to the purpose of the subscription, then such legislation together with the promise of the subscriber creates a legal obligation to pay the subscription,⁶⁹ it having

been said that the legal duty imposed on the beneficiary to expend the fund constitutes a consideration⁷⁰ or that the right to recover under these circumstances rests on the ground of public policy.⁷¹

Moral obligation. While a moral obligation is not usually regarded as consideration for contracts generally, in at least one instance a subscription has been enforced explicitly on the ground that the promise is supported by a moral obligation.⁷²

(2) Work Done or Obligations or Expenses Incurred

It is generally held that, where the promisee, in reliance on the subscription, has assumed the performance of some duty, or has performed services, or has done work, expended money, or incurred liability, a consideration is thereby furnished for the subscriber's promise; or the doctrine of promissory estoppel may be applied.

It is generally held that, where the promisee, in reliance on the subscription, has assumed the performance of some duty,⁷³ or has performed services,⁷⁴ or has done work, expended money, or in-

N.C.—*Corpus Juris* cited in *James v. Sartin Dry Cleaning Co.*, 181 S.E. 341, 342, 208 N.C. 412.
60 C.J. p 956 note 63.

65. N.Y.—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921.

Rationes decidendi

Recovery on subscription agreements has become the rule rather than the exception, and an analysis of the cases indicates the presence of three different rationes decidendi for the attainment of this result, the first being the spelling out of an ordinary bilateral contract; second, the completion of a contract which was initially unilateral; and third, the invocation of promissory estoppel.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921.

66. Mo.—*Scottish Rite Temple Ass'n of Kansas City v. Lucksinger*, 101 S.W.2d 511, 231 Mo.App. 486.

N.J.—*Corpus Juris* cited in *More Game Birds in America v. Boettger*, 14 A.2d 778, 780, 125 N.J.Law 97—*New Jersey, etc., Dispensary v. Wright*, 113 A. 144, 95 N.J.Law 462.
60 C.J. p 956 note 64.

67. Ky.—*Floyd v. Christian Church Widows and Orphans Home*, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230.

68. Ky.—*Lake Bluff Orphanage v. Magill's Ex'rs*, 204 S.W.2d 224, 305

Ky. 391.—*Floyd v. Christian Church Widows and Orphans Home of Kentucky*, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230.

In considering the desirability, from a standpoint of public policy, of holding all subscriptions to charities enforceable, and, when necessary, inventing considerations sufficient for that purpose, the court stated, "But, in considering all the possible results from such a course, the inquiry arises, whether, after all, it is beneficial to society to confer upon an institution, no matter how worthy, the rights of a creditor, and the consequent power to compel one who has promised to donate to its cause, to fulfil his pledge, irrespective of how large a portion of a diminished or insolvent estate it might consume, and regardless of whether the institution has changed its position for the worse in reliance upon 'the subscription.'"—*Floyd v. Christian Church Widows and Orphans Home*, 176 S.W.2d 125, 131, 296 Ky. 196, 151 A.L.R. 1230.

69. Ky.—*Kentucky Female Orphan School v. Fleming*, 10 Bush 234.
60 C.J. p 959 note 92.

Text rule has been applied even where charter authority is not shown.—*Hyden v. Scott-Lees Collegiate Institute*, 163 S.W.2d 295, 291 Ky. 139.

70. Ky.—*Kentucky Female Orphan School v. Fleming*, 10 Bush 234, 238.

71. Ohio.—*Irwin v. Lombard Univ.*, 46 N.E. 63, 56 Ohio St. 9, 60 Am.S.R. 727, 36 L.R.A. 239.

72. Pa.—*Caul v. Gibson*, 3 Pa. 416.

73. Ala.—*Corpus Juris* cited in *Pass v. First Nat. Bank*, 149 So. 718, 719, 25 Ala.App. 519.

Cal.—*First Trust & Savings Bank of Pasadena v. Coe College*, 47 P.2d 481, 8 Cal.App.2d 195.

Ill.—*In re Drain's Estate*, 36 N.E.2d 608, 311 Ill.App. 481.

Mo.—*Corpus Juris* quoted in *Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 648, 346 Mo. 628.

N.Y.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.
60 C.J. p 956 note 67.

74. Ala.—*Corpus Juris* cited in *Pass v. First Nat. Bank*, 149 So. 718, 719, 25 Ala.App. 519.

Cal.—*First Trust & Savings Bank of Pasadena v. Coe College*, 47 P.2d 481, 8 Cal.App.2d 195.

Ill.—*In re Drain's Estate*, 36 N.E.2d 608, 311 Ill.App. 481.

Mo.—*Corpus Juris* quoted in *Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 648, 346 Mo. 628.—*Scottish Rite Temple Ass'n of Kansas City v. Lucksinger*, 101 S.W.2d 511, 231 Mo.App. 486.

N.Y.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.—*Keuka College v. Ray*, 60 N.E. 325, 167 N.Y. 96.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.

curred liability,⁷⁵ a consideration is thereby furnished for the subscriber's promise; and the gratuitous promise is converted into a valid and enforceable contract.⁷⁶

In following the foregoing rules some courts have regarded the acts done, or duties or liabilities assumed, as having been done or assumed at the request of the promisor, considering that the promise to pay involves such request,⁷⁷ and contains it by implication;⁷⁸ and the performance of the acts mentioned has been considered a compliance with the request.⁷⁹ However, where the subscription is a mere naked promise, and the acts done by the beneficiary cannot be considered as having been done at the request of the subscriber, such acts do not constitute consideration for the subscription;⁸⁰ and, where there is nothing on the face of the paper to show consideration and nothing to show that the

work done would not have been done were it not for the subscriptions, there is no consideration.⁸¹ The reliance that furnishes a ground for recovery need not have been exclusively on the promise of the subscriber.⁸²

Expenses in obtaining subscriptions are not such expenses as will constitute consideration for the subscription.⁸³

Estoppel in lieu of consideration. While the cases that allow recovery of subscriptions on the ground of expenditure made, or work done, in reliance on the subscription, usually state the reason in terms of consideration, there are some cases where expenditure having been made or work done, on the faith of the subscription, the court has placed the right of recovery on the ground of an estoppel invoked against the promisor,⁸⁴ and this doctrine

75. U.S.—*C. I. R. v. Bryn Mawr Trust Co.*, C.C.A.3, 87 F.2d 607—*Trustees of Baker University v. Clelland*, C.C.A.Mo., 86 F.2d 14.
- Ark.—*Wells v. Costello*, 70 S.W.2d 561, 189 Ark. 116—*David v. Chambers*, 185 S.W. 443, 123 Ark. 293.
- Cal.—*First Trust & Savings Bank of Pasadena v. Coe College*, 47 P.2d 481, 8 Cal.App.2d 195—*Calvary Presbyterian Church of South Pasadena v. Brydon*, 41 P.2d 377, 4 Cal. App.2d 676.
- Ill.—*In re Drain's Estate*, 36 N.E.2d 608, 311 Ill.App. 481—*Cutwright v. Preachers' Aid Soc.*, 271 Ill.App. 168.
- Mo.—*Corpus Juris* quoted in *Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 648, 346 Mo. 628—*Fredericktown Chamber of Commerce v. Chaney*, App., 250 S.W.2d 820—*Scottish Rite Temple Ass'n of Kansas City v. Lucksinger*, 101 S.W.2d 511, 231 Mo.App. 486.
- N.Y.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.
- Pa.—*In re Wanamaker's Estate*, 17 Pa.Dist. & Co. 496.
- Tex.—*Rouff v. Washington & Lee University*, Civ.App., 48 S.W.2d 483, error refused.
- 60 C.J. p 956 note 69.

Maintenance of church by trustees in reliance on pledge is consideration to pledgor.—*In re Taylor's Estate*, 260 N.Y.S. 836, 236 App.Div. 571, reargument denied 261 N.Y.S. 1027, 238 App.Div. 755, affirmed 188 N.E. 122, 262 N.Y. 688.

Agreement was held enforceable either as bilateral or unilateral contract, or on ground of estoppel where

subscriber executed agreement to subscribe to college a certain sum for "two memorial windows—note payable in eight quarterly payments," and pursuant thereto executed notes, and college thereafter employed and paid architects to draw plans for projected building and work in connection therewith was instituted.—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921.

76. U.S.—*Trustees of Baker University v. Clelland*, C.C.A.Mo., 86 F.2d 14.
- Ala.—*Corpus Juris* cited in *Pass v. First Nat. Bank*, 149 So. 718, 719, 25 Ala.App. 519.
- Ill.—*In re Drain's Estate*, 36 N.E.2d 608, 311 Ill.App. 481.
- Mo.—*Corpus Juris* quoted in *Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 648, 346 Mo. 628—*Kansas City School Dist. v. Sheldley*, 40 S.W. 656, 138 Mo. 672, 60 Am.S.R. 576, 37 L.R.A. 406—*Fredericktown Chamber of Commerce v. Chaney*, App., 250 S.W.2d 820—*Scottish Rite Temple Ass'n of Kansas City v. Lucksinger*, 101 S.W.2d 511, 231 Mo.App. 486.

Unilateral contract

Charitable subscription is enforceable as constituting offer of unilateral contract which becomes binding obligation when charity accepts offer by incurring liability in reliance thereon.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582—*In re Metz's Estate*, 30 N.Y.S.2d 502, 262 App.Div. 508—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921—*In re Borden's Will*, 41 N.Y.S.2d 269, affirmed 47 N.Y.S.2d 120, 267 App.Div. 823, 830, appeal denied 47 N.Y.S.2d 583, 267 App. Div. 905.

77. N.Y.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.
- 60 C.J. p 957 note 71.

78. N.Y.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.
- 60 C.J. p 958 note 72.

79. N.Y.—*Barnes v. Perine*, 12 N.Y. 18.

80. N.Y.—*Albany Presb. Church v. Cooper*, 20 N.E. 352, 112 N.Y. 517, 8 Am.S.R. 767, 3 L.R.A. 468.

81. N.Y.—*Hull v. Pearson*, 56 N.Y. S. 518, 38 App.Div. 588.

82. Iowa.—*Brokaw v. McElroy*, 143 N.W. 1087, 162 Iowa 288, 50 L.R.A., N.S., 835.
- 60 C.J. p 958 note 76.

83. Ill.—*Cutwright v. Preachers' Aid Soc.*, 271 Ill.App. 168.
- 60 C.J. p 958 note 77.

84. U.S.—*Brown v. U. S.*, Ct.Cl., 37 F.Supp. 444.

- Ill.—*In re Drain's Estate*, 36 N.E.2d 608, 311 Ill.App. 481—*Cutwright v. Preachers' Aid Soc.*, 271 Ill.App. 168.

- Mo.—*Corpus Juris* cited in *Gershon v. Ashkanazie*, 199 S.W.2d 38, 46, 239 Mo.App. 1012.

- N.Y.—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921.
- 60 C.J. p 960 note 98.

Application of promissory estoppel doctrine

(1) Doctrine of promissory estoppel applies so as to render charitable subscription enforceable where there is an agreement by individuals to subscribe funds for accomplishment of an enterprise which would not oth-

of promissory estoppel has been adopted in some jurisdictions as the equivalent of consideration.⁸⁵

Subscription in aid of railroad. The general rule as to work done or obligations or expenses incurred, with respect to furnishing consideration, has been applied to subscriptions in aid of a railroad,⁸⁶ and, where the railroad has performed the work, the subscriber cannot claim want or inadequacy of consideration for the contract.⁸⁷ The fact that a company was already organized to build the railroad at the time the subscription was made,⁸⁸ or that without such subscription the railroad would nevertheless have been built,⁸⁹ will not defeat the promise.

(3) Mutual Promises of Subscribers

A conflict of authority exists as to whether the mutual promises of subscribers constitute a consideration for the subscription.

erwise be undertaken or continued, or where charities have incurred obligations, expended money, or performed undertakings which they would not otherwise have incurred, expended, or performed without regard or reference to subscriptions of other persons.—*Lake Bluff Orphanage v. Magill's Ex'rs*, 204 S.W.2d 224, 305 Ky. 391.—*Floyd v. Christian Church Widows and Orphans Home*, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230.

(2) However, right of the charity to take action on promise contained in a charitable subscription must be gauged by terms of the instrument as they may be judicially construed, coupled with factor of whether those terms are of a character which promisor should have reasonably expected to induce action of a definite and substantial character on part of promisee.—*Lake Bluff Orphanage v. Magill's Ex'rs*, 204 S.W.2d 224, 305 Ky. 391.

(3) Furthermore, it has been held that the doctrine of promissory estoppel need be applied only where a request or invitation that the promisee go on with his work cannot be implied in fact from the subscription agreement.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.—*In re Lord's Will*, 25 N.Y.S.2d 747, 175 Misc. 921.

85. N.Y.—*Allegheny College v. Nat. Chautauqua County Bank*, 159 N.E. 173, 246 N.Y. 369, 57 A.L.R. 980.—*I. & I. Holding Corporation v. Gainsburg*, 296 N.Y.S. 752, 251 App. Div. 550, affirmed 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.

86. Ind.—*Cook v. McNaughton*, 24 N.E. 361, 28 N.E. 74, 128 Ind. 410. Mich.—*Stevens v. Corbitt*, 33 Mich. 458. 51 C.J. p 468 note 73.

87. Ind.—*Chicago, etc., R. Co. v. Derkes*, 3 N.E. 239, 103 Ind. 520. Mich.—*Wright v. Irwin*, 35 Mich. 347.

88. Mich.—*Stevens v. Corbitt*, 33 Mich. 458.

89. Mich.—*Stevens v. Corbitt*, supra.

90. U.S.—*Helvering v. Safe Deposit & Trust Co. of Baltimore*, C.C.A.4, 95 F.2d 806.—*C. I. R. v. Bryn Mawr Trust Co.*, C.C.A.3, 87 F.2d 607.

Ark.—*Byington v. Little Rock Chamber of Commerce*, 201 S.W. 122, 132 Ark. 361.—*David v. Chambers*, 185 S.W. 443, 123 Ark. 293.—*Rogers v. Galloway Female College*, 44 S.W. 454, 64 Ark. 627, 39 L.R.A. 636.

Cal.—*Calvary Presbyterian Church of South Pasadena v. Brydon*, 41 P.2d 377, 4 Cal.App.2d 676.—*Board of Home Missions and Church Extension of M. E. Church v. Manley*, 19 P.2d 21, 129 Cal.App. 541.

Ga.—*Kennedy v. Brooks*, 168 S.E. 294, 176 Ga. 363.—*Glass v. Grant*, 167 S.E. 727, 46 Ga.App. 327.

Iowa.—*Young Men's Christian Ass'n v. Caward*, 239 N.W. 41, 213 Iowa 408.

Kan.—*Cotner College v. Hyland*, 299 P. 607, 133 Kan. 322.

Md.—*Sterling v. Victor Cushwa & Sons*, 183 A. 593, 170 Md. 226.

Mich.—*Better Business Bureau of Detroit v. First Nat. Bank-Detroit*, 296 N.W. 665, 296 Mich. 513.

Mo.—*Scottish Rite Temple Ass'n of Kansas City v. Lucksinger*, 101 S.W.2d 511, 231 Mo.App. 486.

N.C.—*Rutherford College v. Payne*, 184 S.E. 827, 209 N.C. 792.—*Greenville Supply Co. v. Whitehurst*, 163 S.E. 446, 202 N.C. 413.

Pa.—*In re Wanamaker's Estate*, 17 Pa.Dist. & Co. 496. 60 C.J. p 958 note 78.

Bank guaranty

Agreement subscribing to fund created for purpose of keeping bank from being closed for insolvency, which related that it was made in consideration of agreement of other subscribers and which was made to replace prior subscription agreements which were released, was held not invalid for want of consideration.—*Sterling v. Victor Cushwa & Sons*, 183 A. 593, 170 Md. 226.

91. Del.—*American University v. Todd*, 1 A.2d 595, 9 W.V.Harr. 449. Ill.—*Cutwright v. Preachers' Aid Soc.*, 271 Ill.App. 168.

N.Y.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273. 60 C.J. p 958 note 79.

92. Ohio.—*Irwin v. Lombard University*, 46 N.E. 63, 56 Ohio St. 9, 60 Am.S.R. 727, 36 L.R.A. 239.

93. Ohio.—*Irwin v. Lombard University*, supra.

94. Ky.—*Floyd v. Christian Church Widows and Orphans Home of Kentucky*, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230.

themselves, provide a sufficient consideration to render them enforceable,⁹⁵ although mutual agreements to donate land for the construction of a railroad, to donate funds for the construction of a highway, and to subscribe to stock of a corporation, as discussed in Corporations § 295, have been upheld on this ground, as well as other grounds.⁹⁶

(4) Mutual Promises of Subscriber and Payee or Beneficiary

An express agreement by the payee or beneficiary to do certain acts in return for the subscription is sufficient consideration, and it has been held that acceptance of the subscription creates at least an implied promise of the payee or beneficiary to carry out the purpose for which the subscription is made, which is deemed consideration for the promise to pay.

An express agreement by the payee or beneficiary to do certain acts in return for the subscription is sufficient consideration.⁹⁷ In endeavoring to sustain subscription contracts, some courts have held that by acceptance of the subscription the payee or beneficiary promises, at least impliedly,⁹⁸ to carry out the purpose for which the subscription is made, this promise being deemed consideration for the promise to pay.⁹⁹ However, this view has been rejected on the ground that the promise implied in the acceptance involves no act ad-

vantageous to the subscriber or detrimental to the beneficiary or payee, and hence does not involve a case of mutual promises,¹ and that the duty of the payee would arise from trusteeship rather than a contractual promise.²

(5) Benefit to Promisor

It has been held that a benefit to the promisor, although it is enjoyed by him in common with other persons, or even with the public generally, furnishes a consideration for the promise.

It has been held occasionally that the object being meritorious, and beneficial to the promisor, this benefit to him, although it is to be enjoyed by him in common with other persons, or even with the public generally, furnishes a consideration for the promise,³ and the general rule discussed in Contracts § 84 that the benefits accruing to property owners from the establishment of public buildings, military headquarters, or manufacturing plants or other private buildings constitute a valuable consideration for their contracts relative thereto has been applied to subscription contracts.⁴ It has also been held that the consideration need not be of any benefit to the subscriber to a public⁵ or charitable⁶ purpose.

95. Ky.—Floyd v. Christian Church Widows and Orphans Home of Kentucky, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230 (holding statement in McDonald's Ex'r v. Transylvania University, 118 S.W.2d 171, 274 Ky. 168, to be dictum and not precedent.)

96. Ky.—Floyd v. Christian Church Widows and Orphans Home of Kentucky, 176 S.W.2d 125, 296 Ky. 196, 151 A.L.R. 1230—Eagles v. Hafendorfer, 265 S.W. 35, 204 Ky. 696—Curry v. Kentucky Western R. Co., 78 S.W. 435, 25 Ky.L. 1372—Cadiz R. Co. v. Roach, 72 S.W. 280, 114 Ky. 934, 24 Ky.L. 1761.

97. U.S.—Trustees of Baker University v. Clelland, C.C.A.Mo., 86 F.2d 14.

Cal.—First Trust & Savings Bank of Pasadena v. Coe College, 47 P.2d 481, 8 Cal.App.2d 195.
60 C.J. p 959 note 88.

98. Me.—Central Maine General Hospital v. Carter, 132 A. 417, 125 Me. 191, 44 A.L.R. 1333.

Mo.—Corpus Juris cited in Scottish Rite Temple Ass'n of Kansas City v. Lucksinger, 101 S.W.2d 511, 231 Mo.App. 486.

N.Y.—Allegheny College v. National Chautauqua County Bank, 159 N.E. 173, 246 N.Y. 369, 57 A.L.R. 980—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

60 C.J. p 959 note 84.

Bilateral or unilateral contract theory

Generally, where recovery is allowed on a subscription agreement based on the law of contracts whether of the bilateral or unilateral variety, a return promise or a request for the performance of an act is implied, notwithstanding there is no express counter promise or request, provided an intention to that effect is reasonably deducible from the acts of the parties.—In re Lord's Will, 25 N.Y.S. 2d 747, 175 Misc. 921.

99. Me.—Central Maine General Hospital v. Carter, 132 A. 417, 125 Me. 191, 44 A.L.R. 1333.

N.Y.—Allegheny College v. National Chautauqua County Bank, 159 N.E. 173, 246 N.Y. 369, 57 A.L.R. 980—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.
60 C.J. p 959 note 85.

1. Ohio.—Johnson v. Otterbein University, 41 Ohio St. 527.

2. N.Y.—Albany Presb. Church v. Cooper, 20 N.E. 352, 112 N.Y. 517, 8 Am.S.R. 767, 3 L.R.A. 468.

3. Mich.—Detroit First Universalist Church v. Pungs, 86 N.W. 235, 126 Mich. 670.

60 C.J. p 959 note 89.

4. Ark.—Abraham v. Blytheville Industrial Ass'n, 114 S.W.2d 32, 195 Ark. 778.

Contract of a city merchant to pay money to city industrial committee to obtain location of large factory in city was supported by consideration.—Abraham v. Blytheville Industrial Ass'n, supra.

5. N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923—First M. E. Church of Mt. Vernon v. Estate of Howard, 233 N.Y.S. 451, 133 Misc. 723—In re Borden's Will, 41 N.Y.S.2d 269, affirmed 47 N.Y.S.2d 120, 267 App.Div. 823, 830, appeal denied 47 N.Y.S.2d 583, 267 App.Div. 905.

6. Ga.—Glass v. Grant, 167 S.E. 727, 46 Ga.App. 327—Miller v. Oglethorpe University, 100 S.E. 784, 24 Ga.App. 388.

§ 6. — Failure of Consideration

The rules relating to failure of consideration in contracts generally apply to subscriptions.

The rules relating to failure of consideration in contracts generally apply to subscriptions.⁷ In determining whether the consideration for a subscription has failed, the consideration is tested by the situation existing at the time it is sought to enforce the subscription,⁸ and a total failure of consideration may be shown in bar of an action to enforce the subscription.⁹ However, the consolidation of corporations in furtherance of their general purpose does not constitute a failure of consideration absolving a subscriber from his obligation,¹⁰ and it has been held that there is no failure of consideration where, although the terms of the subscription have not been literally complied with, there has been a substantial compliance therewith.¹¹

§ 7. Validity of Assent in General

The rules as to the validity and reality of assent to contracts generally apply to subscriptions.

The rules as to the validity and reality of assent to contracts generally apply to subscriptions.¹² The effect of fraud and misrepresentation on subscriptions is discussed *infra* § 8.

7. Neb.—*Cotner College v. Estate of Hester*, 51 N.W.2d 612, 155 Neb. 279.

Failure of consideration as to contracts generally see Contracts §§ 129-131.

Failure of stipulated consideration

Since the only failure of consideration sufficient to constitute a defense is failure in the very consideration stipulated by the terms of the pledge itself, use of funds by association for purposes other than that for which funds were pledged would not constitute failure of consideration for pledge contract in action to recover amount remaining unpaid on subscription.—*Young Men's Christian Ass'n v. Caward*, 239 N.W. 41, 213 Iowa 408.

8. Neb.—*Cotner College v. Estate of Hester*, 51 N.W.2d 612, 155 Neb. 279.

9. Neb.—*Cotner College v. Estate of Hester*, *supra*.

Abandonment

Where subscription note was executed in behalf of college corporation at time it was conducting general program of Christian education with equipment therefor consisting of lands, buildings, and faculty, located in suburban community, and

property thereafter was lost, faculty discharged, and program completely abandoned and new and completely different program established in small quarters in metropolitan surroundings, there was failure of consideration for subscription note which relieved maker from obligation to perform.—*Cotner College v. Estate of Hester*, *supra*.

10. Ky.—*Central University of Kentucky v. Walin*, 90 S.W. 1066, 122 Ky. 65, 28 Ky.L. 1041.

11. Ala.—*Pass v. First Nat. Bank*, 149 So. 718, 25 Ala.App. 519.

N.Y.—*In re De Brabant's Estate*, 95 N.Y.S.2d 324, 197 Misc. 923.

60 C.J. p 960 note 2.
Nonperformance of conditions see *infra* §§ 13-16.

12. Ky.—*Executor of McDonald v. Transylvania University*, Lexington, 118 S.W.2d 171, 274 Ky. 168.

Neb.—*In re Steininger's Estate*, 297 N.W. 159, 139 Neb. 284.

Ohio.—*Cincinnati Summer Opera Ass'n v. Williams*, 16 N.E.2d 1000, 58 Ohio App. 513.

Mental capacity

Ky.—*Executor of McDonald v. Transylvania University*, Lexington, 118 S.W.2d 171, 274 Ky. 168.

§ 8. Fraud and Misrepresentation

Rules as to the effect of fraud, and misrepresentation without fraud, relating to contracts generally apply to subscriptions.

Rules as to the effect of fraud, and misrepresentation without fraud, relating to contracts generally apply to subscriptions,¹³ and hence a misrepresentation, if made innocently, has been held to be no defense at law to a subscriber,¹⁴ although, if a misrepresentation of a material fact was made honestly without intention to deceive, the person making a charitable subscription in reliance thereon is justified in canceling the subscription.¹⁵

In accordance with the general rules it has been held that, if a false representation was made intentionally for the purpose of deceiving, the person making the charitable subscription in reliance thereon is justified in canceling the subscription,¹⁶ and if the execution of a contract to give a subscription is induced by a fraudulent representation of fact it is not binding on the subscriber; the fraud affords a defense.¹⁷ It is essential, however, that the fraud should relate to the subject matter of the contract.¹⁸ Statements by the beneficiary or payee before the subscriptions were made cannot be relied on as fraud when the subscribers themselves subsequently pre-

Neb.—*In re Steininger's Estate*, 297 N.W. 159, 139 Neb. 284.

Advanced age and physical ailments alone are not sufficient to show coercion and duress.—*Cincinnati Summer Opera Ass'n v. Williams*, 16 N.E.2d 1000, 58 Ohio App. 513.

13. Ky.—*Scott v. Blanton*, 7 Ky.L. 379.

N.Y.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273.

60 C.J. p 960 notes 4-7.

14. Ky.—*Scott v. Blanton*, 7 Ky.L. 379.

15. N.Y.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273.

16. N.Y.—*Tioga County General Hospital v. Tidd*, *supra*.

17. Mich.—*Chicago Bldg., etc., Co. v. Yell*, 89 N.W. 329, 129 Mich. 517.

60 C.J. p 960 note 4.

Subscription in aid of railroad

Okl.—*Cooper v. Ft. Smith & W. R. Co.*, 99 P. 785, 23 Okl. 139.

18. Ariz.—*Lount v. Young Men's Christian Ass'n of Phoenix*, 140 P. 819, 16 Ariz. 34.

60 C.J. p 960 note 5.

pared the written subscriptions without incorporating such statement.¹⁹ Unauthorized statements by persons not parties to the contract cannot be the basis of fraud.²⁰

Misrepresentations as to other subscriptions. A fictitious subscription, made only for the purpose of inducing others to subscribe in good faith, renders subscriptions thus secured void,²¹ although the fictitious subscriber himself is estopped by his fraudulent representation to deny the validity of his own promise.²² Where one has agreed to subscribe on condition that the subscriptions total a certain amount, it is fraud to include in the total a subscription which plaintiff has agreed need not be paid²³ or a subscription made on terms different from that sought to be enforced.²⁴ Failure to disclose the fact that an apparently bona fide subscription is not so in fact is a fraud on subsequent subscribers.²⁵

Promissory representations. In accordance with the general rule, where a representation which induced the subscription is promissory in its nature, and not a statement of existing fact, it has been held that the contract cannot be avoided by the subscriber because of such misrepresentation.²⁶

Opinions. Since a mere representation of opinion, although erroneous, does not avoid contracts generally, a subscription contract is not affected by representations which are so loose and general,²⁷ or are so manifestly mere statements of opinion,²⁸ that the promise cannot be deemed to have relied on them as being statements of fact.

§ 9. Illegal and Ultra Vires Subscriptions

General rules relating to ultra vires contracts and

the illegality of contracts, such as contracts contrary to public policy, have been applied to subscriptions.

General rules relating to ultra vires contracts and the illegality of contracts, such as contracts contrary to public policy, have been applied to subscriptions.²⁹ Thus, a subscription which has for its purpose the accomplishment of ends which are in contravention of public policy is invalid.³⁰ A contract whereby certain citizens of a town agreed to pay a specified sum to aid in the erection of a power plant, in order to increase the facilities for furnishing electric light to the town, is not illegal on its face.³¹ The legality of subscriptions made to public officers or to public corporations in aid of public works has been upheld where the object for which the subscription was made was within the powers of the beneficiary,³² and this is true of subscriptions to private corporations;³³ but a subscription to a private corporation for a purpose which is beyond the legal power of the corporation is invalid.³⁴ Where the funds have been expended on the project for which the money was subscribed, and all other subscribers have paid, defendant cannot raise the question of ultra vires.³⁵ Whether bonds issued by a city on the faith of subscriptions are issued ultra vires is a question not available to a subscriber.³⁶

§ 10. Construction

Although subscription contracts for public or quasi-public purposes are construed, where possible, to support a recovery, and doubtful questions are to be resolved against the subscriber, the rules of construction of contracts generally apply to the construction of subscription contracts.

Although, as a matter of public policy, subscription contracts for public or quasi-public purposes are construed, if reasonably possible, to support a re-

19. Tex.—Stith v. Graham, Civ.App., 146 S.W. 661.

20. Ky.—Breckinridge County v. Beard, 27 S.W.2d 427, 233 Ky. 828. 60 C.J. p 960 note 7.

21. Vt.—Middlebury College v. Loomis, 1 Vt. 189.

22. Pa.—Estate of Pierson, 6 Pa. Dist. 23, 18 Pa.Co. 651. Vt.—Blodgett v. Morrill, 20 Vt. 509.

23. N.H.—New London Literary, etc., Inst. v. Prescott, 40 N.H. 330.

24. N.Y.—New York Exch. Co. v. De Wolf, 31 N.Y. 273.

25. Ky.—Sigler v. R. W. Winstead & Co., 125 S.W. 272.

26. Ala.—Corpus Juris quoted in Pass v. First Nat. Bank, 149 So. 718, 25 Ala.App. 519. 60 C.J. p 961 note 14.

27. Mass.—Gorman v. Carroll, 7 Allen 199.

28. Iowa.—Davis v. Campbell, 61 N. W. 1053, 93 Iowa 524.

Ky.—Chambers v. Kentucky Baptist Education Soc., 1 B.Mon. 215.

29. Ill.—Hall v. Virginia, 91 Ill. 535. Mass.—Amherst Academy v. Cowles, 6 Pick. 427, 17 Am.D. 387.

Mich.—Better Business Bureau of Detroit v. First Nat. Bank-Detroit, 296 N.W. 665, 296 Mich. 513.—North Star Tp. v. Cowdry, 179 N.W. 259, 212 Mich. 7.—Sutton v. Rann, 112 N.W. 721, 149 Mich. 35.

30. Ky.—Berryman v. Cincinnati Southern R. Co., 14 Bush 755. Mo.—Workman v. Campbell, 46 Mo. 305.

31. Mich.—Sutton v. Rann, 112 N.W. 721, 149 Mich. 35.

32. Kan.—Board of County Com'rs of Neosho County v. Burdick, 244 P. 866, 120 Kan. 698. 60 C.J. p 961 note 23.

33. Mass.—Amherst Academy v. Cowles, 6 Pick. 427, 17 Am.D. 387.

34. Mich.—Underwood v. Waldron, 12 Mich. 73.

35. Mich.—North Star Tp. v. Cowdry, 179 N.W. 259, 212 Mich. 7.

36. Ill.—Hall v. Virginia, 91 Ill. 535.

covery,³⁷ and doubtful questions are to be resolved against the subscriber,³⁸ the rules of construction of contracts generally apply to the construction of subscription contracts,³⁹ such as the rule that the contract will be construed, if possible, to carry out the intent of the parties,⁴⁰ the rule that the contract will be construed as a whole,⁴¹ and when clear and explicit it will be enforced according to its terms,⁴² and the rules of construction as to written and printed portions of a contract.⁴³

A subscription contract will be construed with respect to the intent of the parties at the time, and the court will consider the subject matter of the agreement, the inducement which influenced the subscription, the circumstances under which it was

made, and the phraseology thereof,⁴⁴ and, in determining the meaning of particular words used in the subscription contract, the subject matter concerning which they were used and the circumstances calling for their application to the subject are to be considered.⁴⁵

Joint or several liability of subscriber. Where two or more persons sign a subscription paper, each promising to pay a stated sum, the liability of the subscribers is several and not joint,⁴⁶ but, if two or more persons sign a subscription paper without placing opposite their respective names the amounts of their subscriptions, the liability of the subscribers is joint and several,⁴⁷ and there are cases where the subscribers are found in fact to be joint principals

37. Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237. Tex.—Rouff v. Washington & Lee University, Civ.App., 48 S.W.2d 483, error refused. 60 C.J. p 962 note 36.

Amount and elements of recovery

(1) Where a subscription was conditioned on plaintiff's paying to a third person on his obligation an amount equal to the amount subscribed, plaintiff may recover from the subscriber only the amount actually paid on the obligation, with interest thereon, where the obligation was settled for a sum smaller than the amount subscribed.—Better Business Bureau of Detroit v. First Nat. Bank-Detroit, 296 N.W. 665, 296 Mich. 513.

(2) Where plaintiff recovered on subscription agreement, defendant was liable for interest and attorneys' fees, as provided in agreement, although he alleged inconsistencies between subscription agreement and another instrument, where he failed to show any damage because of alleged inconsistency.—Dorner v. Heffner, 58 P.2d 1308, 15 Cal.App.2d 97.

Liberal construction

Subscription agreements for benefit of charities are given a liberal construction and are recognized as favorites of the law.—In re Brown's Estate, 155 P.2d 445, 159 Kan. 408.

38. Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237. Tex.—Rouff v. Washington & Lee University, Civ.App., 48 S.W.2d 483, error refused. Vt.—Eastern States Agricultural and Industrial League v. Vall's Estate, 124 A. 568, 97 Vt. 495, 38 A.L.R. 845.

39. Ky.—Ex parte Walker's Ex'r, 68 S.W.2d 745, 253 Ky. 111. 60 C.J. p 961 note 32.

40. Wash.—De Pauw University v. Ankeny, 166 P. 1148, 97 Wash. 451.

41. Ky.—Ex parte Walker's Ex'r, 68 S.W.2d 745, 253 Ky. 111. 60 C.J. p 962 note 38.

Subscription in aid of railroad

A subscriber to a list for a fund in aid of railway construction will not be permitted to deny a contract authorizing trustees to contract with the railway company, where the subscription list recites that such contract was attached.—Quannah, A. & P. Ry. Co. v. Dickey, Tex.Civ.App., 179 S.W. 69.

42. Ky.—Sparks v. Moore, 279 S.W. 1107, 212 Ky. 720.

43. U.S.—Brown v. U. S., Ct.Cl., 37 F.Supp. 444. Cal.—University of Southern California v. Bryson, 283 P. 949, 103 Cal. App. 39.

44. Ind.—Richards v. Wilson, 112 N. E. 780, 790, 185 Ind. 333. 60 C.J. p 961 note 33.

Intent controlling over written terms

A limitation in a pledge card that it should not be considered binding on the subscriber's estate will not be given effect after the subscriber's death where it is clear from all the facts and circumstances that he did not intend that his pledge should be so limited.—Rector, Church Wardens and Vestrymen of St. Mark's Church in Village of Westhampton Beach v. Bankers Trust Co., 96 N.Y.S. 2d 554, 197 Misc. 32.

45. Ark.—Rogers v. Galloway Female College, 44 S.W. 454, 64 Ark. 627, 39 L.R.A. 636. 60 C.J. p 962 note 42.

Success

Subscription to pay pro rata share of any deficit resulting from the operation of a summer opera season, which was to continue for a period of two or more weeks "according to the success of the enterprise," was properly construed to mean that continuation of the season was not to depend on financial success, since word "success" means attainment of a desired end, which may have no relation whatever to money or money profits.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 58 Ohio App. 513.

46. Cal.—George Herz & Co. v. Solt, 72 P.2d 251, 23 Cal.App.2d 178. 60 C.J. p 970 note 59.

Subscription in aid of railroad

(1) Where subscribers for purpose of aiding railroad each promise definite or maximum amount, liability of subscribers is several and not joint. Ind.—Brownlee v. Lowe, 20 N.E. 801, 117 Ind. 420.

Tex.—Wellington Railroad Committee v. Crawford, Com.App., 216 S.W. 151. 51 C.J. p 468 note 70.

(2) However, although subscription agreement contains promise for definite amount, subsequent provision of subscription contract in aid of railway construction for a bond to pay damages to abutting owners if relinquishments were not obtained was an indemnity contract on which the subscriber is jointly and severally liable primarily for the amount of his subscription, enforceable although not reduced to judgment.—Quannah, A. & P. Ry. Co. v. Dickey Tex.Civ.App., 179 S.W. 69.

47. Minn.—Cornish v. West, 84 N. W. 750, 82 Minn. 107.

acting through the payee as their agent for the purpose of carrying out the enterprise for which the subscription is made.⁴⁸ However, it has been held that, where a number of subscribers sign a subscription paper, each promising to pay the same amount, and other subscribers subsequently sign the same subscription paper and fail to indicate the amounts of their subscriptions, the liability of the last subscribers is several and not joint.⁴⁹

§ 11. Assignment

Under general rules as to the assignability of rights of one party to a contract, the contractual rights against the subscriber may be assignable.

Under general rules as to the assignability of rights of one party to a contract, the contractual right against the subscriber may be assignable.⁵⁰ The assignee has only the rights of his assignor⁵¹ and takes the subscription subject to all the equities existing between the original parties;⁵² and, where the first of two assignments is invalid, the second assignee obtains nothing from his assignor.⁵³ The assignment by the promisee of an unaccepted subscription conveys no rights to the assignee.⁵⁴ A statute creating a college and authorizing the trustees of a previously existing academy to assign to it all property which the academy had received authorizes and validates an otherwise good assignment.⁵⁵

As in the case of assignments generally, in the absence of anything making a written assignment

necessary, a subscription may be assigned without any formal writing.⁵⁶ The borrowing of money by the subscribers' representatives for the completion of the project is an equitable assignment of the subscription to the lender.⁵⁷ It is no defense that the payee procured another to do the work which the payee agreed to do in return for the subscription where it was not a personal confidence reposed in the payee by the subscriber.⁵⁸

Subscription in aid of railroad. In accordance with the general rules, where a subscription or promise to contribute expressly runs to the designated railroad company and to its successors and assigns, the performance of the conditions of the subscription by another company to which the original grantee has assigned its franchises and property, including such subscription, will enable the successor company to enforce the promise in its own name,⁵⁹ unless the assignor company has failed or refused to accept or act on the contract;⁶⁰ and, even in the absence of such express terms, any railroad company performing the conditions of the subscription ordinarily is entitled to the benefit thereof,⁶¹ provided it derives its title thereto from the original company,⁶² unless it appears that the identity of the company to which a subscription is made is a material part of the agreement.⁶³ However, in the absence of such a provision, an independent company not showing title so derived cannot recover on such a contract unless the subscriber has consented to the change.⁶⁴

48. Me.—Robinson v. Robinson, 10 Me. 240.
Pa.—Ridgely v. Dobson, 3 Watts & S. 118.

49. Minn.—Cornish v. West, 84 N. W. 750, 82 Minn. 107.

50. N.Y.—I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532, 276 N. Y. 427, 115 A.L.R. 582.

60 C.J. p 963 note 45.
Assignee as proper party plaintiff see *infra* § 22.

Payment of subscription by assignee
Payment by plaintiff to clearinghouse of amount assumed by defendant in subscription agreement, which court found clearinghouse accepted for assignment to plaintiff of its cause of action against defendant, was not a voluntary payment by plaintiff of defendant's subscription which extinguished the subscription and prevented clearinghouse from assigning anything to plaintiff.—Dorner v. Heffner, 58 P.2d 1308, 15 Cal.App. 2d 97.

Assumption of liabilities

Purported transfer of subscription without assumption of cross obligation by assignee does not authorize assignee's recovery against subscriber.—Candler v. Yaarab Temple Bldg. Co., 172 S.E. 63, 178 Ga. 63, answers conformed to 172 S.E. 344, 48 Ga.App. 163.

51. Wash.—Mann v. O'Neil, 69 P. 635, 29 Wash. 115.

52. Wis.—Rockwell v. Daniels, 4 Wis. 432.

53. Wash.—Mann v. O'Neil, 69 P. 635, 29 Wash. 115.

54. N.Y.—Van Rensselaer v. Aikin, 44 N.Y. 126.

55. Mass.—Amherst Academy v. Cowls, 6 Pick. 427, 17 Am.D. 387.

56. Wis.—Oconto Chamber of Commerce v. Grandall, 185 N.W. 544, 175 Wis. 477.

57. Utah.—Bank of American Fork v. Smith, 140 P. 122, 44 Utah 284.

58. Mo.—Southern Hotel Co. v. Chouteau, 53 Mo. 572.

59. Ind.—Smith v. Hollett, 34 Ind. 519.

51 C.J. p 469 note 96.

60. Ind.—Smith v. Davidson, 45 Ind. 396.

Tex.—McFarland v. Lyon, 23 S.W. 554, 4 Tex.Civ.App. 586.

61. Mich.—Van Buren Div. of Toledo, etc., R. Co. v. Lamphear, 20 N.W. 590, 54 Mich. 575.

51 C.J. p 469 note 98.

62. Mich.—Van Buren Div. of Toledo, etc., R. Co. v. Lamphear, *supra*.

63. Kan.—Scott City Northern R. Co. v. Wilkinson, 137 P. 1193, 91 Kan. 333, 335.

Mich.—Van Buren Div., Toledo, etc., R. Co. v. Lamphear, 20 N.W. 590, 54 Mich. 575.

64. Mich.—Van Buren Div., etc., R. Co. v. Lamphear, *supra*.

§ 12. Title to Funds Subscribed

The title to funds subscribed and paid on a subscription, or to property purchased with the funds, depends on the intention of the subscribers.

The title to funds subscribed and paid on a subscription, or to property purchased with the funds, depends on the intention of the subscribers.⁶⁵ It has been held that, where the subscribed funds have been paid to the committee which raised the subscription, the title to the funds did not thereby pass to the beneficiary.⁶⁶ If, however, the subscription list to which the subscribers' names are signed is headed, "Subscriptions and donations to" the beneficiary, and the money is received by its treasurer, title to the funds passes to the beneficiary.⁶⁷ One who has no title to funds subscribed cannot require their payment.⁶⁸

Subscription in aid of railroad. The members of a committee of subscribers to a fund in aid of a railroad, authorized to hold and disburse the sub-

scription fund, are not, as to their cosubscribers, trustees of such fund so as to require them to account as such for its disposition or disbursement,⁶⁹ but where they expend the fund in violation of the conditions on which it was subscribed they are liable to stockholders for the amount so expended.⁷⁰

§ 13. Performance of Conditions

- a. In general
- b. Subscriptions in aid of railroads

a. In General

The conditions prescribed by the subscription contract must be complied with before recovery can be had thereon, although recovery is allowed where there has been a substantial, although not a literal, performance of the conditions.

The conditions prescribed by the subscription contract must be complied with before recovery can be had thereon,⁷¹ but, where the condition is performed, the contract is binding.⁷² Where a sub-

65. N.H.—Downes v. Francetown Union Cong. Soc., 63 N.H. 151.

66. Ark.—Larrimer v. Murphy, 82 S.W. 168, 72 Ark. 552.

60 C.J. p 963 note 56.

67. N.Y.—Church of Redeemer v. Crawford, 43 N.Y. 476.

68. N.Y.—Irish Free State v. Guaranty Safe Deposit Co., 222 N.Y.S. 182, 129 Misc. 551.

60 C.J. p 963 note 58.

69. Tex.—Faires v. Cockerill, Civ. App., 29 S.W. 669, reversed on other grounds 31 S.W. 190, 88 Tex. 428.

70. N.Y.—Gould v. Seney, 9 N.Y.S. 818, 56 Hun 649.

71. Mo.—Corpus Juris cited in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 825.

Neb.—Continental Co. of Lincoln v. Eilers, 278 N.W. 497, 134 Neb. 278. 60 C.J. p 963 note 59.

Time of enforcement test

Whether condition precedent contained in subscription contract has been complied with is tested by situation existing at time subscription is sought to be enforced, and not by that existing at time of signing of instrument, in absence of specific limitation to the contrary in subscription agreement.—Continental Co. of Lincoln v. Eilers, supra.

Pledge or donation payable after death

- (1) Pledge or donation payable aft-

er donor's death as a matter of necessary public policy and of implied intention and understanding between parties was held subject to implied condition that it would not be paid until debts of donor's estate were satisfied, although debts were incurred after pledge or donation.—In re Luce's Estate, 291 N.W. 562, 137 Neb. 846.

(2) Payment of claims against insolvent's estate see Executors and Administrators § 685.

Conditions held complied with

(1) Under contract whereby deceased pledged twenty-five thousand dollars to church in consideration of trustees' agreeing to erect new building for not less than two hundred thousand dollars, and in consideration of subscriptions of members, pledge was held binding obligation payable when contract for new church was signed, although less than two hundred thousand dollars was subscribed.—Ex parte Walker's Ex'r, 68 S.W.2d 745, 253 Ky. 111.

(2) Where subscribers to industrial credit fund agreement agreed to pay to trustee assessments based on participation certificates issued pursuant to loans which were to be approved by seven of board of industrial fund directors, vote of president of lending bank which was subscriber and which became insolvent was held properly counted as one of seven votes required for approval of loan, so as to bind other subscribers on their participation certificates, where

under agreement seven impartial votes were not required.—Faulkner v. Lowell Trust Co., 189 N.E. 215, 285 Mass. 375.

(3) Other conditions see 60 C.J. p 963 note 59 [b].

Conditions held not performed

(1) Where a charitable institution solicited subscriptions for the erection of a memorial building, which was described in literature distributed as a new three-story brick structure, and subscriber contracted to pay the school a fixed amount when "construction of the building is begun," the institution did not perform the contract by repairing an old wooden structure and naming it the memorial building.—In re Carson's Estate, 37 A.2d 488, 349 Pa. 529.

(2) Other conditions see 60 C.J. p 963 note 59 [c].

72. Ky.—Ex parte Walker's Ex'r, 68 S.W.2d 745, 253 Ky. 111.

Mo.—Corpus Juris cited in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 825. 60 C.J. p 964 note 60.

Endowers could not complain that hospital was not conducted exclusively as homeopathic where rooms endowed were restricted to giving homeopathic treatment.—Hoffstot v. Fifth Ave. Hospital of City of New York, 249 N.Y.S. 399, 140 Misc. 206, affirmed 257 N.Y.S. 1034, 236 App.Div. 667, affirmed 188 N.E. 28, 262 N.Y. 479.

scription is made to a project on condition that the building be located at a certain place, with a stipulation as to the value of the building, the location, and not the value, is the condition on compliance with which the subscription becomes binding.⁷³ A condition that a building be erected does not require that it be completed.⁷⁴ Where the original agreement was made on certain conditions, and afterward a substitute agreement without conditions was made, the conditions of the original subscription do not pass to the substitute subscription.⁷⁵ The possible or probable failure of performance of a condition subsequent is no bar to the recovery of the sum subscribed.⁷⁶

Substantial performance. Recovery is allowed where there has been a substantial, although not literal, performance of the conditions;⁷⁷ but the doctrine of substantial performance has no application where the charitable institution deliberately departs from the contract and attempts to substitute another type of performance.⁷⁸

Performance of collateral agreements. The performance of a collateral and contemporaneous promise is not a condition precedent to recovery on the subscription.⁷⁹

Payment from specified fund. General rules as

to contracts limiting payment of an obligation to a particular fund have been applied to conditional subscriptions payable out of a particular fund.⁸⁰ Thus, in such an instance, the existence or sufficiency of the particular fund is a condition precedent to the liability,⁸¹ subject, of course, to the qualification that a dereliction in duty of the subscriber with respect thereto cannot be permitted to defeat its creation or sufficiency.⁸²

b. Subscriptions in Aid of Railroads

In order to be entitled to the benefit of a subscription in aid of a railroad, the railroad must comply, at least substantially, with the conditions attached to the subscription, including conditions as to construction and operation, or location of the road, termini, and stations.

A railroad company becomes entitled to the money or other aid subscribed after acceptance of the contract when, acting in good faith,⁸³ it has performed or at least substantially performed all the conditions precedent prescribed therein,⁸⁴ unless the performance of such conditions has been waived.⁸⁵ On the fulfillment by the railroad company of all conditions attached to such a subscription, the liability of the subscriber or promisor becomes complete,⁸⁶ and he cannot thereafter withdraw his subscription or repudiate his promise;⁸⁷ and, where a railroad company, in reliance on a sub-

73. Kan.—Judson University v. Kin-kaid, 31 P. 1074, 50 Kan. 369.

74. Ill.—Johnston v. Ewing Female University, 35 Ill. 518.

75. Ky.—Wilgus v. Trustees of Cincinnati Southern R. Co., 10 Ky.Op. 566.

76. Wis.—La Fayette County Monument Corp. v. Magoon, 42 N.W. 17, 73 Wis. 627, 8 L.R.A. 761. 60 C.J. p 964 note 64.

77. Ky.—Bickett v. Meade County, 252 S.W. 1017, 200 Ky. 157.

Mo.—Corpus Juris cited in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 825. Neb.—Corpus Juris cited in Continental Co. of Lincoln v. Eilers, 278 N.W. 497, 498, 134 Neb. 278. 60 C.J. p 964 note 65.

What constitutes substantial performance

A subscription payable when the building is inclosed is payable when the main portion thereof is inclosed, although two towers connected therewith are not inclosed.—Snell v. Clinton M. E. Church, 58 Ill. 290.

78. Pa.—In re Carson's Estate, 37 A.2d 488, 349 Pa. 529.

Cy pres doctrine inapplicable

Decedent's subscription to charitable institution providing for payment of fixed amount when construction of certain building was commenced was at most "executory contract" and not "executed gift" to trustees for charity, to which doctrine of cy pres could be applied.—In re Carson's Estate, supra.

79. Ill.—Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 71 N.E. 22, 210 Ill. 26, 102 Am.S.R. 145—Howell v. Methodist Episcopal Church, 61 Ill.App. 121.

80. Ky.—Lake Bluff Orphanage v. Magill's Ex'rs, 204 S.W.2d 224, 305 Ky. 391.

Payment from estate

Where estate note given as a charitable subscription provided that note should be payable out of what was left of maker's estate after satisfaction of certain undisclosed specific bequests when life estates given his niece and husband had terminated, on specific bequests of maker's last will more than consuming his estate, the charity had no enforceable claim on its estate note, especial-

ly where specific bequests were not disproportionate to total estate which maker believed he would leave.—Lake Bluff Orphanage v. Magill's Ex'rs, supra.

81. Ky.—Lake Bluff Orphanage v. Magill's Ex'rs, supra.

82. Ky.—Lake Bluff Orphanage v. Magill's Ex'rs, supra.

83. Tex.—Miller v. Gulf, etc., R. Co., 65 Tex. 659.

84. Mo.—St. Louis, etc., R. Co. v. Houck, 97 S.W. 963, 120 Mo.App. 634.

Okl.—Hanna v. Mosher, 98 P. 358, 22 Okl. 501.

Wash.—Hunt v. Upton, 87 P. 56, 44 Wash. 124.

51 C.J. p 469 note 84.

85. Ind.—Crane v. Indiana, etc., R. Co., 59 Ind. 165.

51 C.J. p 469 note 85.

86. Mich.—Stevens v. Corbitt, 33 Mich. 458.

87. Tex.—Stevens v. Corbitt, supra —Buchel v. Lott, Civ.App., 15 S. W. 413.

scription, has fulfilled the conditions thereof, the subscribers cannot be heard to say that the company had no power to accept or to become a party to the subscription agreement.⁸⁸ If, however, the company fails to comply with such conditions, or otherwise breaks the subscription contract, it cannot hold the subscribers liable thereon,⁸⁹ even though they have derived some benefit from the road as constructed or the work done;⁹⁰ and in case of such failure or breach a subscriber may withdraw his promise,⁹¹ and may either treat the contract as terminated and sue for damages for its breach,⁹² or treat it as rescinded and recover back money or property which he has advanced, as discussed *infra* § 21.

Where the contract of each subscriber is separate and distinct from the contracts of other subscribers, even though on the same paper,⁹³ a condition annexed to one subscriber's signature is in no way affected by the fact that other subscribers annex different conditions to their signatures.⁹⁴

Construction, maintenance, and equipment of railroad. A subscription in aid of a railroad may validly be made conditional on the completion and operation of the road.⁹⁵ Furthermore, it has been held that a subscription or promise to contribute in aid of a proposed railroad ordinarily is deemed to be subject to the implied condition that the road shall be constructed and operated,⁹⁶ unless the contrary appears from the terms of the subscription.⁹⁷

In order to be entitled to the benefit of such subscription a company must comply substantially with all the conditions thereof relative to the construc-

tion, maintenance, and equipment of the road.⁹⁸ A condition that the road shall be "completed" does not require that the road shall be in complete running order and completely equipped for receiving, carrying, and discharging passengers and freight, but it is sufficient if the road be so far completed as to allow trains to be operated thereon;⁹⁹ and a condition that the road shall be completed and put in operation is complied with when it is so far completed that it is used and operated for the transportation of persons and property,¹ even though the company does not own the rolling stock used in such operation.² However, a condition requiring the construction of a railroad is not complied with by operating over the line of another railroad company under a lease³ or running agreement.⁴

A condition that the road shall be equipped means that it shall have thereon the necessary engines, cars, and other appliances for its ordinary use;⁵ and a condition that it shall be running requires more than the passage of one train over the road, where it is in an unfinished state.⁶

Location of road, termini, and stations. A subscription or promise may validly be made conditional on the construction of a railroad to a specified place or along a specified route,⁷ or the location of a station at a specified point.⁸ The railroad company is entitled to the benefit of such a subscription only on complying at least substantially with all of the conditions thereof relative to the location of the railroad⁹ and its termini¹⁰ and stations;¹¹ and, where a railroad company in consideration of gifts or contributions has engaged to lay out its road in a specified place, it will not be allowed to change the

88. Ind.—Chicago, etc., R. Co. v. Derkes, 3 N.E. 239, 103 Ind. 520—Doherty v. Arkansas, etc., R. Co., 82 S.W. 899, 5 Ind.T. 537.

89. Tex.—Wellington Railroad Committee v. Crawford, Com.App., 216 S.W. 151.

60 C.J. p 469 note 89.

90. Ind.—Carlisle v. Terre Haute, etc., R. Co., 6 Ind. 316.

91. Mich.—Michigan Midland, etc., R. Co. v. Bacon, 33 Mich. 466.

92. U.S.—Reusens v. Mexican Nat. Constr. Co., C.C.N.Y., 22 F. 522, 23 Blatchf. 19, motion denied 6 S. Ct. 945, 118 U.S. 49, 30 L.Ed. 77. 51 C.J. p 469 note 92.

93. N.M.—Miller v. Preston, 17 P. 565, 4 N.M. 314.

94. N.M.—Miller v. Preston, *supra*.

95. Okl.—Ward v. Missouri, etc., R. Co., 157 P. 775, 59 Okl. 31.

96. Mich.—Stevens v. Corbitt, 33 Mich. 458.

97. Ky.—Berryman v. Cincinnati Southern R. Co., 14 Bush 755.

98. Iowa.—Burlington, etc., R. Co. v. Whitney, 43 Iowa 113. 51 C.J. p 470 note 5.

99. Ill.—Ogden v. Kirby, 79 Ill. 555. 51 C.J. p 470 note 12.

1. Iowa.—Courtright v. Deeds, 37 Iowa 503.

Mich.—Tower v. Detroit, etc., R. Co., 34 Mich. 328.

2. Iowa.—Courtright v. Deeds, 37 Iowa 503.

3. Mich.—Brown v. Dibble, 32 N.W. 656, 65 Mich. 520.

4. Iowa.—Lawrence v. Smith, 11 N.W. 674, 57 Iowa 701.

5. Ill.—Paris, etc., R. Co. v. Henderson, 89 Ill. 86.

6. Ill.—Paris, etc., R. Co. v. Henderson, *supra*.

7. Mo.—Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am.R. 97. 51 C.J. p 468 note 66.

8. Mo.—Missouri Pac. R. Co. v. Tygard, *supra*. 51 C.J. p 468 note 68.

9. Mo.—Hayti Dev. Co. v. Barnes, 216 S.W. 733. 51 C.J. p 470 note 21.

10. Ill.—Ogden v. Kirby, 79 Ill. 555. 51 C.J. p 470 note 22.

11. Mo.—Hayti Dev. Co. v. Barnes, 216 S.W. 733. 51 C.J. p 470 note 23.

line of its road or do by indirection what is equivalent thereto without compensation to the contributors.¹²

A condition that a station shall be established requires a station building with the usual and necessary facilities and equipment for the convenience of passengers and the reception of freight,¹³ and is not complied with by erecting a building without such facilities and without a ticket office, and at which trains do not stop except on signal.¹⁴ Where the condition is that a station shall be built within a specified distance of a designated point, such distance, unless otherwise provided by the terms of the subscription, is to be measured in a straight line¹⁵ rather than along the traveled route.¹⁶ Under a subscription contract expressly permitting the location of a station to be selected by the company, a subscriber cannot refuse payment on the ground that at the time he signed the contract it was the intention to establish the station at a place more advantageous to him.¹⁷

§ 14. — Time of Performance

Where time of performance is of the essence of the subscription contract, a noncompliance with this requirement is a defense to the subscriber. Generally, time of performance is of the essence of a subscription in aid of a railroad.

According to the weight of authority the time of performance, when prescribed by the subscription contract, is of the essence of the contract, and a noncompliance with this requirement is a defense to the subscriber,¹⁸ although performance was com-

pleted shortly after the time stipulated.¹⁹ However, where time is not of the essence of the contract, a failure to complete the project within a specified time does not release the subscriber from liability.²⁰ If no time for performance is prescribed, then performance must be within a reasonable time,²¹ but in such a case time is not of the essence and a mere lapse of time will not avoid the subscription or forfeit rights under it,²² and a subscriber wishing to rescind for delay must give notice of his intention to do so and allow a reasonable time.²³

A stipulation extending the time for performance does not waive a requirement that the project be completed before the subscriber becomes liable.²⁴ Delay caused by failure of the subscribers to pay their subscriptions is no defense.²⁵ Furthermore, where the subscription agreement is unconditional, it has been held that the completion of the project within a reasonable time is not essential to a recovery.²⁶ A subscriber's requests, over a period of years, for extensions of time within which to pay his subscription have been held to waive any delay in performance.²⁷

Subscription in aid of railroad. A subscription or promise to contribute to a railroad company may be conditioned on the construction of a railroad to a specified place or along a specified route within a specified time,²⁸ and, in such a case according to the weight of authority, the time of performance is of the essence of the contract, and a noncompliance with this requirement is a defense to the

12. Ohio.—Chapman v. Mad River, etc., R. Co., 6 Ohio St. 119.

13. Mich.—Port Huron, etc., R. Co. v. Richards, 51 N.W. 680, 90 Mich. 577.

14. Mich.—Port Huron, etc., R. Co. v. Richards, supra.

15. Iowa.—Courtwright v. Strickler, 37 Iowa 382.

Mo.—Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am.R. 97.

16. Mo.—Missouri Pac. R. Co. v. Tygard, supra.

17. Tex.—Faires v. Cockerill, Civ. App., 29 S.W. 669, reversed on other grounds 31 S.W. 190, 88 Tex. 428.

18. Conn.—St. Paul's Episcopal Church v. Fields, 72 A. 145, 81 Conn. 670.
60 C.J. p 965 note 67.

19. Kan.—Memphis, etc., R. Co. v. Thompson, 24 Kan. 170.

20. Utah.—Bank of American Fork v. Smith, 140 P. 122, 44 Utah 284.
60 C.J. p 965 note 69.

21. Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237.

Mo.—Scottish Rite Temple Ass'n of Kansas City v. Lucksinger, 101 S.W.2d 511, 231 Mo.App. 486.
60 C.J. p 965 note 70.

Time held reasonable

Six years.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237.

Time held not reasonable

Thirteen years.—In re Carson's Estate, 37 A.2d 488, 349 Pa. 529.

22. Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237.

23. Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., supra.

24. Minn.—Bohn Mfg. Co. v. Lewis, 47 N.W. 652, 45 Minn. 164.

25. Tex.—Herron-Robbins v. Allen, Civ.App., 159 S.W. 1046.
60 C.J. p 965 note 72.

26. Tex.—Rouff v. Washington & Lee University, Civ.App., 48 S.W.2d 483, error refused.

Death of subscriber

University's failure to complete founding of engineering school before subscriber's death was immaterial, where written subscription was unconditional.—Rouff v. Washington & Lee University, supra.

27. Tex.—Rouff v. Washington & Lee University, supra.

28. Mo.—Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am.R. 97.

subscription.²⁹ Thus, the railroad company, in order to be entitled to the benefit of a subscription, must comply with the condition that within a specified time, or on or before a specified date, the road shall be made ready for the operation of trains,³⁰ be built and equipped,³¹ or be completed and in operation,³² or that it shall be constructed to a certain place or between certain places,³³ or a train of cars be run between specified points.³⁴

§ 15. — Change of Plan or Purpose

Any material change in the plan or purpose for which the subscription was made cannot be effected without the consent of the subscriber, and, if such a change is made without his consent, he is thereby released in the absence of a waiver or an estoppel to deny his consent to the change.

Any material change in the plan or purpose for which the subscription was made cannot be effected without the consent of the subscriber,³⁵ and, if such a change is made without his consent, he is thereby released unless there has been a waiver³⁶ or unless he has estopped himself to deny his consent to the change.³⁷ However, a change in matters which were in no way an inducement to defendant's subscription³⁸ or a change of plans to carry out the purpose for which the money was subscribed³⁹ does not affect the liability of the subscriber.

§ 16. — Abandonment of Undertaking

There can be no recovery against the subscriber if the enterprise is abandoned before the accomplishment of the purpose contemplated by the subscription paper. Generally, money may not be diverted from the purpose for which it was subscribed.

If the enterprise is abandoned before the accomplishment of the purpose contemplated by the subscription paper, no recovery can be had against the subscriber,⁴⁰ since the law implies a condition that the enterprise shall not be abandoned,⁴¹ and that the enterprise must exist when payment is demanded.⁴² Thus, an abandonment of the enterprise after the payee or beneficiary has sued and obtained a judgment against the subscriber, but before enforcement of the judgment, entitled the subscriber to relief.⁴³

A total abandonment or frustration of the project is necessary to relieve the subscriber from liability,⁴⁴ and, where the project is partially completed, a cessation of work, because of the shortage of funds due to the failure of pledgors to pay the full amount of their pledges, is not a total abandonment relieving the subscriber from liability,⁴⁵ and, if the purpose which is fairly to be deemed the object of the subscription is substantially accomplished, a subsequent cessation of the enterprise ordinarily will not relieve the subscriber from liability,⁴⁶ and a temporary suspension of the project during a period of financial difficulties is not an abandonment.⁴⁷

Where the subscriptions are insufficient to carry out the purpose, a proposed consolidation of associations for the accomplishment of such purpose is authorized as being in conformity with the primary object of the subscribers,⁴⁸ and, even if inactivity for a long period of time worked a forfeiture, the original association or its successor alone had the right to object to such a plan as the funds collected became the property of the association.⁴⁹

29. Okl.—Federal Trust Co. v. Coyle, 126 P. 800, 34 Okl. 635—Cooper v. Ft. Smith & W. R. Co., 99 P. 785, 23 Okl. 139.

60 C.J. p 965 note 67.

30. Fla.—Persinger v. Beville, 12 So. 366, 31 Fla. 364.

31. Ill.—Paris, etc., R. Co. v. Henderson, 89 Ill. 86.

32. Ill.—Ogden v. Kirby, 79 Ill. 555. Iowa.—Courtright v. Deeds, 37 Iowa 503.

51 C.J. p 470 note 8.

33. Ind.—Low v. Studabaker, 10 N. E. 301, 110 Ind. 57.

51 C.J. p 470 note 9.

34. Ind.—Moore v. Campbell, 12 N. E. 495, 111 Ind. 328.

51 C.J. p 470 note 10.

35. Neb.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279. 60 C.J. p 965 note 73.

36. Neb.—Cotner College v. Hester's Estate, supra. 60 C.J. p 965 note 74.

37. Neb.—Cotner College v. Hester's Estate, supra. 60 C.J. p 966 note 75.

38. Ky.—Baskett v. Ohio Valley Banking & Trust Co., 125 S.W. 1066.

39. La.—Baptist Hospital v. Cappel, 129 So. 425, 14 La.App. 626. 60 C.J. p 966 note 77.

40. Neb.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279.

N.C.—Rutherford College v. Payne, 184 S.E. 827, 209 N.C. 792. 60 C.J. p 966 note 78.

41. Neb.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279.

42. Neb.—Cotner College v. Hester's Estate, supra.

N.Y.—Commercial Travelers' Home Assoc. v. McNamara, 88 N.Y.S. 443, 95 App.Div. 1.

43. N.M.—Turknett v. Western College of New Mexico Conference of Methodist Episcopal Church, South, 145 P. 138, 19 N.M. 572.

44. N.Y.—In re Metz' Estate, 30 N.Y. S.2d 502, 262 App.Div. 508.

45. N.Y.—In re Metz' Estate, supra.

46. Mich.—Ayres v. Dutton, 49 N.W. 897, 87 Mich. 528, 113 L.R.A. 698. 60 C.J. p 966 note 79.

47. Wash.—Michels v. Rustemeyer, 56 P. 380, 20 Wash. 597. 60 C.J. p 966 note 80.

48. Ky.—Becker v. Evangelical Hospital Ass'n of Louisville, 221 S.W. 2d 76, 310 Ky. 516.

49. Ky.—Becker v. Evangelical Hospital Ass'n of Louisville, supra.

Where the subscriptions have been given for a building to be built at a certain place, which has been erected, the subscribers may enjoin the beneficiary from removing the building to another place.⁵⁰

Diversion or misapplication of funds. It has been stated that there is an implied condition that money shall not be diverted from the purpose for which it was subscribed,⁵¹ and it has been held that, where money is solicited, donated, and received as a fund for a particular purpose, the donee of the fund is without authority to apply the fund to any other purpose,⁵² although it has been held that, where money has been subscribed for a specified purpose and the subscriber's liability has become fixed, a subsequent misapplication of the funds will not release him.⁵³ Where money is contributed for the construction of a building for specified purposes, there is no diversion of funds where, although the building is not completed, the basement thereof is used for the purposes specified.⁵⁴

§ 17. — Subscription Conditioned on Other Subscriptions

Where a subscription is conditioned on other sub-

scriptions, a compliance with the conditions binds the subscriber.

A subscription conditioned on other subscriptions to a certain amount requires that they shall be valid subscriptions,⁵⁵ and to the amount designated,⁵⁶ on the same terms as that sued on,⁵⁷ although the others need not be exact counterparts;⁵⁸ and, where the conditions are complied with, the subscriber is bound.⁵⁹ A condition that other subscriptions to a certain amount must be subscribed and well secured is satisfied by subscriptions to that amount by responsible persons.⁶⁰ The condition "well secured" does not require a surety.⁶¹ It is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all,⁶² except where there is consent to a variation of conditions as to some of the subscribers.⁶³ Where the subscription proper does not show that it is conditioned on the obtaining of other equal subscriptions, such a condition cannot be relied on to avoid payment.⁶⁴

§ 18. Payment

Where the subscriber's liability has become fixed, payment must be made in accordance with the terms of the contract.

50. Pa.—Cushman v. Church of Good Shepherd, 29 A. 872, 162 Pa. 280.

51. Neb.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279.

52. Ind.—Indianapolis Bible Institute v. Kiddey, 187 N.E. 846, 98 Ind.App. 567.

Use for different purpose as failure of consideration see supra § 6.

Subscription for double purpose

Where subscription was conditioned on necessary funds being raised to pay college's indebtedness and additional pledges were made for double purpose of paying debts and building a dormitory, the fact that sufficient funds were raised to pay all indebtedness, had the funds been so applied rather than using portion thereof for building dormitory, and that all indebtedness was not paid until some time later, did not relieve subscriber of its obligation, since creditors gained, rather than lost, through increased subscriptions from inclusion of additional purpose, and carrying out that purpose was not a diversion of funds.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237.

53. Ind.—Franklin College v. Hurlburt, 28 Ind. 344.

54. N.Y.—In re Metz' Estate, 30 N.Y.S.2d 502, 262 App.Div. 508.

55. Mo.—Corpus Juris quoted in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 823.

60 C.J. p 966 note 84.

56. Mo.—Corpus Juris quoted in Fredericktown Chamber of Commerce v. Chaney, supra.

60 C.J. p 966 note 85.

57. Mo.—Corpus Juris quoted in Fredericktown Chamber of Commerce v. Chaney, supra.

N.Y.—Stewart v. Trustees of Hamilton College, 2 Den. 403.

58. Mo.—Corpus Juris quoted in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 823.

Vt.—Eastern States Agricultural and Industrial League v. Vail's Estate, 124 A. 568, 97 Vt. 495, 38 A.L.R. 845.

59. Md.—Sterling v. Victor Cushwa & Sons, 183 A. 593, 170 Md. 226.

60 C.J. p 967 note 88.

Substantial performance

(1) A condition in agreement of subscription to provide funds for building of new church, that agreement was not valid unless a sum total of "\$30,000 has been signed" was substantially complied with so as to render subscriber liable on his one thousand dollar note, where

twenty-five thousand three hundred twenty-five dollars was obtained in signed pledges and five thousand two hundred ten dollars consisted of collections from oral pledges and cash donations and contributions from parishioners of church.—Continental Co. of Lincoln v. Eilers, 278 N.W. 497, 134 Neb. 278.

(2) Where subscribers' agreement was to pay if thirty thousand dollar fund was raised to build an addition to a shoe factory, the raising of twenty-six thousand six hundred ninety-four dollars was not substantial compliance, and subscribers were not liable on their agreement, notwithstanding addition had been built costing only twenty-three thousand dollars.—Fredericktown Chamber of Commerce v. Chaney, Mo.App., 250 S.W.2d 820.

30. Conn.—Somers v. Miner, 9 Conn. 458.

61. Conn.—Somers v. Miner, supra.

62. Mo.—Corpus Juris quoted in Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820, 823.

60 C.J. p 967 note 91.

63. Conn.—North Ecclesiastical Soc. v. Matson, 36 Conn. 26.

64. N.Y.—Locke v. Taylor, 146 N.Y.S. 256, 161 App.Div. 44.

Where the subscriber's liability has become fixed, general rules apply as to payment.⁶⁵ Thus, payment must be made on the date prescribed, if one is stated in the subscription,⁶⁶ or at once, if payable on demand,⁶⁷ and it is no excuse that, if the money is paid, it may be misapplied.⁶⁸ Payment may be made directly to the person to whom the nominal payee was bound to turn over the money.⁶⁹ A devise for a specific purpose does not satisfy a balance due on the subscriber's death on a subscription for a different object.⁷⁰

Where the promise is to pay as the work progresses, the work need not be completed before payment is due.⁷¹ It is no ground for refusal to pay that another subscriber was allowed to deduct his subscription from the purchase price of land sold by him to the beneficiary in furtherance of the purpose for which the subscriptions were made.⁷²

Demand. An action on a subscription will lie without first making a demand for payment,⁷³ in the absence of anything in the contract requiring it,⁷⁴ and no demand need be made where the time and place of payment are specified in the contract.⁷⁵ Under a statute requiring a demand before entering suit, the subscription must be due and payable at the time of the demand, and if not yet due the demand is insufficient.⁷⁶

Interest can be charged on a subscription only for the time elapsing after payment has become due,⁷⁷ but it cannot be allowed against a delinquent subscriber in the absence of proof showing when the beneficiary expended money in carrying out the project.⁷⁸

Abatement of subscriptions. If less than the amount subscribed is expended on the undertaking, each subscriber is liable only for his pro rata share of the total sum expended.⁷⁹

§ 19. Revocation and Lapse

In the absence of consent by the obligee or of provisions in the subscription agreement, the subscription may be revoked on notice by the subscriber only before it is accepted, and before a consideration is furnished. A subscription lapses by the death or insanity of the subscriber if such an event occurs before there is an acceptance and before a consideration is furnished.

The subscription may be revoked on notice⁸⁰ by the subscriber, if the subscription has not yet been accepted and no consideration has been furnished therefor,⁸¹ but not after there has been an acceptance and a consideration furnished,⁸² unless by consent of the obligee,⁸³ or cancellation or change is permitted by the terms of the instrument.⁸⁴ A subscriber may be estopped to claim revocation.⁸⁵

65. Iowa.—McCormack v. Reece, 3 Greene 591.

Mich.—Erwin v. Lapham, 27 Mich. 311.

60 C.J. p 967 notes 97, 98, 7-9.

66. Ind.—Petty v. Church of Christ, 95 Ind. 278.

60 C.J. p 967 note 97.

Subscription in aid of railroad

Or.—Coos Bay, etc., R., etc., Co. v. Dixon, 48 P. 360, 30 Or. 584.

67. Ky.—Paint Lick Turnpike Co. v. Wallace, 6 Ky.Op. 316.

Minn.—Brimhall v. Van Campen, 8 Minn. 13, 82 Am.D. 118.

68. Ind.—Brown v. Marion Commercial Club, 97 N.E. 958, 50 Ind.App. 670.

69. Mich.—Erwin v. Lapham, 27 Mich. 311.

70. Pa.—Trustees of University of Pennsylvania v. Cadwalader, 121 A. 314, 277 Pa. 512.

60 C.J. p 967 note 4.

71. Iowa.—McCormack v. Reece, 3 Greene 591.

72. Conn.—North Ecclesiastical Soc. v. Matson, 36 Conn. 26.

73. Ind.—Allen v. Clinton County, 101 Ind. 553.

60 C.J. p 967 note 7.

74. Ind.—Allen v. Clinton County, supra.

Iowa.—McDonald v. Gray, 11 Iowa 508, 79 Am.D. 509.

Subscription in aid of railroad

Tex.—Miller v. Gulf, etc., R. Co., 65 Tex. 659.

51 C.J. p 469 note 86.

75. Ind.—Higert v. Indiana Asbury University, 53 Ind. 326.

76. Ky.—Administrator of Laughlin v. Owingsville & Mt. Sterling Tpk. Co., 10 Ky.Op. 815.

77. Miss.—Chicago Bldg., etc., Co. v. Higginbotham, 29 So. 79.

60 C.J. p 967 note 5.

Subscription in aid of railroad

Mich.—Stevens v. Corbitt, 33 Mich. 458.

51 C.J. p 471 note 35.

78. Ill.—Hall v. Virginia, 91 Ill. 535.

79. Cal.—Los Angeles Nat. Bank v. Vance, 98 P. 58, 9 Cal.App. 57.

60 C.J. p 967 note 11.

80. Tenn.—Davis, etc., Bldg., etc., Co. v. Cagle, Ch., 53 S.W. 240.

Wis.—Hodges v. Nalty, 89 N.W. 535, 113 Wis. 567.

Execution of new subscription expressly canceling prior subscription cancels prior subscription.—Ex parte Walker's Ex'r, 68 S.W.2d 745, 253 Ky. 111.

81. Mo.—Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820.

60 C.J. p 968 note 13.

82. Ky.—Lake Bluff Orphanage v. Magill's Ex'rs, 204 S.W.2d 224, 305 Ky. 391.

Mo.—Missouri Wesleyan College v. Shulte, 142 S.W.2d 644, 346 Mo. 628.

60 C.J. p 968 note 14.

83. Ga.—Willingham v. Benton, 103 S.E. 497, 25 Ga.App. 412.

84. Ky.—Lake Bluff Orphanage v. Magill's Ex'rs, 204 S.W.2d 224, 305 Ky. 391.

85. Tex.—Rouff v. Washington & Lee University, Civ.App., 48 S.W.2d 483, error refused.

Death or insanity of subscriber. A subscription lapses by the death of the subscriber, if that event occurs before there is an acceptance and before a consideration is furnished,⁸⁶ but not if it occurs thereafter,⁸⁷ nor after a promissory estoppel has arisen,⁸⁸ the rule of revocation by death being applicable only where decedent himself might, if living, have revoked the subscription.⁸⁹ The lapse of the subscription by the subsequent insanity of the subscriber is controlled by the same rules that govern the lapse of the subscription by death.⁹⁰

Subscription in aid of railroad. General rules as to the revocation of a subscription have been applied to a subscription in aid of a railroad.⁹¹ Furthermore, under a contract to raise a bonus for railroad construction, authorizing trustees to contract in the name of the subscribers with the railroad, it has been held that the attempt of a signer of the contract to withdraw the sum subscribed by him does not constitute a revocation of the power of the trustees to contract,⁹² as the power of the trustees under such a contract, when it is accepted by the railroad, is not a naked power revocable at the subscriber's pleasure.⁹³

§ 20. Release or Discharge of Subscriber

Various acts or claims have been considered by the courts and held not to release or discharge a subscriber from his obligation.

Although the subscriber is released from, or is not

bound by, his obligation if the conditions of the subscription have not been fulfilled by the other party, as discussed supra §§ 13-17, various acts or claims have been held not to release or discharge a subscriber from his obligation.⁹⁴ He is not discharged simply because he ceases to benefit by the enterprise for which he has incurred the obligation,⁹⁵ or because of the fact that the beneficiary requires that the subscriptions be guaranteed, which is done,⁹⁶ or because the beneficiary releases the guarantor,⁹⁷ or because an extension of time was given to another subscriber who subsequently paid.⁹⁸ An increase in a specified total after securing defendant's subscription does not release him where the additional amount is covered by further subscriptions.⁹⁹ A substitution of a new agency for carrying out the purpose for which the subscription was made to the old agency does not release the subscriber.¹ Where the contract requires a meeting of all subscribers to make arrangements for carrying out the project, in order to charge the subscribers, one who offers to pay after such meeting is held waives his right to object that he was released because given no notice of the meeting.² Subscribers are not released because money was borrowed to complete the project before the subscribers were called on to pay their subscriptions.³ Where the contract provides for certain yearly payments, the subscriber is not released from liability for payments due during two years because of failure to enforce the first year's payment.⁴

Requests for extension of time to pay subscription were held to have estopped subscriber and estate from claiming revocation.—*Rouff v. Washington & Lee University*, Tex.Civ. App., 48 S.W.2d 483, error refused.

88. Cal.—*First Trust & Savings Bank of Pasadena v. Coe College*, 47 P.2d 481, 8 Cal.App.2d 195.—*Corpus Juris* cited in Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 22, 129 Cal.App. 541. 60 C.J. p 968 note 16.

Subsequent ratification ineffective

Where religious corporation failed to ratify pastor's acceptance of subscription agreement during life of subscriber, after his death the unaccepted subscription could not be validated by corporate officers' adoption of a motion indorsing for the first time by corporate action the pastor's action.—*In re McCanna's Estate*, 284 N.W. 502, 230 Wis. 561.

87. Pa.—*In re Wanamaker's Estate*, 17 Pa.Dist. & Co. 496.

Tex.—*Rouff v. Washington & Lee University*, Civ.App., 48 S.W.2d 483, error refused. 60 C.J. p 968 note 17.

88. N.Y.—*First M. E. Church of Mt. Vernon v. Howard's Estate*, 233 N.Y.S. 451, 133 Misc. 723.

89. Tex.—*Rouff v. Washington & Lee University*, Civ.App., 48 S.W.2d 483, error refused. 60 C.J. p 968 note 19.

90. Ill.—*Beach v. Fairbury First M. E. Church*, 96 Ill. 177. Mo.—*Kansas City School Dist. v. Sheidley*, 40 S.W. 656, 138 Mo. 672, 60 Am.S.R. 576, 37 L.R.A. 406.

91. U.S.—*Doherty v. Arkansas, etc.*, R. Co., Ind.T., 142 F. 104, 73 C.C.A. 328.

92. Tex.—*Quanah, A. & P. Ry. Co. v. Dickey*, Civ.App., 179 S.W. 69.

93. Tex.—*Quanah, A. & P. Ry. Co. v. Dickey*, supra.

94. Ind.—*Brown v. Marion Commercial club*, 97 N.E. 958, 50 Ind.App. 670.

95. Ga.—*Wilson v. Savannah First Presb. Church*, 56 Ga. 554. Vt.—*Woodstock First Cong. Soc. v. Swan*, 2 Vt. 222.

96. Ill.—*Hill v. City Electric R. Co.*, 69 Ill.App. 441.

Ohio.—*Deming v. Ohio Agricultural, etc., College*, 31 Ohio St. 41.

97. Ohio.—*Deming v. Ohio Agricultural, etc., College*, supra.

98. Ga.—*Wilson v. Savannah First Presb. Church*, 56 Ga. 554.

99. S.D.—*Huron Lodge No. 444, B. P. O. E., v. Hinckley*, 210 N.W. 200, 50 S.D. 355, affirmed 222 N.W. 661, 54 S.D. 99.

1. Ky.—*Breckinridge County v. Beard*, 27 S.W.2d 427, 233 Ky. 823 —*Brown v. Farmers' Deposit Bank*, 3 S.W.2d 215, 223 Ky. 171.

2. Mass.—*Bryant v. Goodnow*, 5 Pick. 238.

3. Utah.—*Bank of American Fork v. Smith*, 140 P. 122, 44 Utah 284.

4. Ind.—*Brown v. Marion Commer-*

Where the subscription agreement is one of mutual subscriptions for a common object whereby the promise of the others is a sufficient consideration for the promises of each subscriber, as discussed *supra*, § 5, there can be no release or discharge of any subscriber without the consent of all the others,⁵ and the promisee itself has no authority to release the subscriber without the consent of the other subscribers.⁶

Subscription in aid of railroad. An agreement to release subscribers if public aid shall be voted by a municipality is ineffectual, although such aid is in fact voted, where the municipality is without legal authority to grant such aid.⁷

§ 21. Recovery Back of Subscriptions

A paid subscription may be recovered back on abandonment of the enterprise, or where the agreement expressly provides for recovery, or if the condition on which it was paid has not been fulfilled, or if the subscription was fraudulently procured.

A paid subscription may be recovered back if such recovery be expressly provided for,⁸ if the condition on which it was paid has not been fulfilled,⁹ or if the subscription was fraudulently procured.¹⁰ Subscriptions paid may be recovered back on abandonment of the enterprise.¹¹ Where the subscriptions are to a permanent fund of an association,

the fund subscribed is a trust fund so that it cannot be returned by a majority vote of the members of the association.¹² Where the sums subscribed are gifts, they cannot be recovered.¹³

Subscription in aid of railroad. Where a railroad abandons the enterprise for which money was subscribed, the subscriber may recover it back, even though there was no express provision in the contract to that effect.¹⁴ A subscription in aid of a railroad may be recovered back where there is a failure of complete performance by the railroad,¹⁵ unless an excuse for the failure is shown or that the part performance was beneficial;¹⁶ but recovery has been denied where there has not been a total failure of consideration.¹⁷ Under some statutes, where a railroad is abandoned and no reasonable provision is made for traffic between the points affected by the abandonment, persons who have contributed to its construction are entitled to have their contributions refunded, with interest,¹⁸ or, if rights of way have been granted in payment of the subscriptions, to have a reconveyance thereof,¹⁹ unless they waive their rights by failing to make proof of their claims.²⁰ Under a statute permitting a railroad to change or remove its line and requiring that it return all property or money given for the building of the line, it must be established that money sought to be recovered was paid to the company which built the line and that it was paid and received exclusively

cial Club, 97 N.E. 958, 50 Ind.App. 870.

5. Ga.—Kennedy v. Brooks, 168 S. E. 294, 176 Ga. 363.

6. Ga.—Kennedy v. Brooks, *supra*.

7. Mich.—Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

8. Conn.—Russell v. South Britain Soc., 9 Conn. 508.
N.Y.—Horton v. Howe, 13 Hun 57.
60 C.J. p 969 note 31.

9. Wis.—Conway v. Town of Grand Chute, 155 N.W. 953, 162 Wis. 172.
60 C.J. p 969 note 32.

10. Mich.—Moore v. Universal El. Co., 80 N.W. 1015, 122 Mich. 48.

11. N.Y.—Balluff v. Montross, 102 N.Y.S.2d 543, 199 Misc. 220—First Church of Christ Scientist, in Buffalo v. Schreck, 127 N.Y.S. 174, 70 Misc. 645.

Subscription to aid foreign government

(1) Where a subscription fund was raised to aid foreign government in its fight for independence, and money

was advanced to such government for expenses in floating loan, trustees appointed by government to float loan were authorized to agree that advance for expenses should be considered payment for bonds.—Irish Free State v. Guaranty Safe Deposit Co., 251 N.Y.S. 104, 233 App.Div. 90, affirmed 178 N.E. 819, 257 N.Y. 618.

(2) In view of trustees' authority facts showed agreement by foreign government that claimant might relinquish claim to immediate repayment of loan and receive bonds instead.—Irish Free State v. Guaranty Safe Deposit Co., *supra*.

(3) Thus subscriber to bonds of foreign government was held entitled to share in fund applicable to their payment irrespective of physical delivery of bonds.—Irish Free State v. Guaranty Safe Deposit Co., *supra*.

12. Conn.—Langdon v. Plymouth Cong. Soc., 12 Conn. 113.

13. Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Mass.—Locke v. Belmont Cong. Soc., 32 N.E. 949, 157 Mass. 589.

Reverter of charitable gift see Charities § 67.

Account

Contributors to fund may not call on trustees or owners of fund to account, in absence of provision for reversion.—Montague v. Cooney, 263 N.Y.S. 346, 147 Misc. 125.

14. Tex.—Texas & G. Ry. Co. v. Whiteside, 119 S.W. 126, 55 Tex. Civ.App. 593.

15. Tex.—Bastell v. St. Louis, etc., R. Co., 23 S.W. 552, 4 Tex.Civ.App. 580.
51 C.J. p 469 note 93.

16. Tex.—Batsell v. St. Louis, etc., R. Co., *supra*.

17. Or.—Coos Bay, etc., R., etc., Co. v. Nosler, 48 P. 361, 30 Or. 547.

18. Mich.—Flint, etc., R. Co. v. Rich, 51 N.W. 1001, 91 Mich. 293—In re Flint, etc., R. Co., 63 N.W. 303, 105 Mich. 289.

19. Mich.—In re Flint, etc., R. Co., 63 N.W. 303, 105 Mich. 289.

20. Mich.—Williams v. Flint, etc., R. Co., 74 N.W. 641, 116 Mich. 392.

in consideration of the location and building of the road where it was.²¹

§ 22. Actions

- a. In general
- b. Parties
- c. Pleading
- d. Evidence
- e. Trial

a. In General

An action at law is a proper remedy against a subscriber whose contract is several in nature, but where the subscribers to a fund are numerous equity may have jurisdiction to administer relief in a suit to enforce the subscriptions.

An action at law is a proper remedy against a subscriber whose contract is several in its nature,²² but where the subscribers to a fund are numerous, many of whom deny liability on various grounds, equity has jurisdiction to administer relief in a suit to enforce the subscriptions.²³ Where the subscriber's promise is to convey real estate, the proper

remedy for failure to convey is an action for damages for breach of contract.²⁴ A subscription paper to which defendant's name was added with his consent has been held a contract in writing, within a statute of limitations governing actions on written contracts.²⁵

Defenses. Where the subscriber claimed inconsistencies between the subscription agreement and another instrument, but failed to show that he suffered any damage, the alleged inconsistencies were no defense to the action on the subscription agreement.²⁶

b. Parties

General rules as to parties in civil actions apply as to parties plaintiff and parties defendant in an action on the subscription.

An action on the subscription is properly brought by the other party to the subscription contract.²⁷ General rules apply as to parties plaintiff in an action on the subscription,²⁸ including the rule, existing in some jurisdictions, that the action must be brought by the real party in interest,²⁹ and that the

21. U.S.—Old Colony Trust Co. v. Wickard Bros., Iowa, 224 F. 913, 139 C.C.A. 1.

22. Mass.—Hall v. Thayer, 12 Metc. 130.
60 C.J. p 969 note 38.

Subscription in aid of railroad

Where citizens of a town agreed to make certain payments and do certain things in consideration of construction and operation of a railroad, and executed notes to railroad conditioned on completion of track, within certain time, railroad contractors to whom notes had been transferred could not, on failure to complete road within required time, recover on notes, notwithstanding citizens' breach of contract making performance within required time impossible, where contractor, despite breach, treated contract as in force, since contractors, on breach, had right either to ignore breach and claim rights under contract or treat contract as at an end and sue for breach.—Wellington Railroad Committee v. Crawford, Tex.Com.App., 216 S.W. 151.

23. Ky.—Kentucky Live Stock Breeders' Assoc. v. Miller, 84 S.W. 301, 119 Ky. 393, 27 Ky.L. 39.

24. W.Va.—Union Stopper Co. v. McGara, 66 S.E. 698, 66 W.Va. 403.

25. Iowa.—Ft. Madison First M. E.

Church v. Donnell, 64 N.W. 412, 95 Iowa 494.

26. Cal.—Dorner v. Heffner, 58 P.2d 1308, 15 Cal.App.2d 97.

27. Mo.—Connor v. Paul, 119 S.W. 1006, 138 Mo.App. 13.
60 C.J. p 969 note 41.

28. N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 58 Ohio App. 513.

Corporations

Where the subscription runs to a contemplated corporation, the corporation may sue if, when it is formed, it accepts the subscription and furnishes the consideration, or is the contemplated beneficiary in a jurisdiction where the beneficiary is permitted to sue.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273—60 C.J. p 970 note 58.

Subscriptions in aid of railroads

(1) Where particular individuals guarantee the payment of subscriptions made by others in aid of a railroad company, the company may enforce such subscriptions against the subscribers.

Ky.—Brooksville R. Co. v. Byron, 50 S.W. 530, 20 Ky.L. 1941.

Tex.—Buchel v. Lott, Civ.App., 15 S.W. 413.

Vt.—Lamolle Valley R. Co. v. Marsh, 49 Vt. 37.

(2) However, where certain persons assume the payment of the specified amount to the company and procure subscriptions from others for the purpose of raising money to make such payment, such subscribers are not liable to the company and the persons assuming payment can alone be sued on the contract.—Lamolle Valley R. Co. v. Marsh, supra.

29. N.Y.—In re De Brabant's Estate, 95 N.Y.S.2d 324, 197 Misc. 923 —Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 58 Ohio App. 513.

Real party in interest

(1) Where decedent pledged seventy-five thousand dollars to church organizations for purpose of building a chapel as part of student work in France and claimant was organized to carry on work performed by church center and carried on such work and decedent knew of incorporation and succession and made no objection but tacitly acquiesced, and her contributions were made to claimant, claimant was real party in interest and entitled to maintain action to recover balance of pledge.—In re De Brabant's Estate, 95 N.Y.S. 2d 324, 197 Misc. 923.

party bringing the action on the subscription must have such an interest that the subscriber will be protected from the assertion of further claims on the same cause of action.³⁰ The assignee of a subscription right is the proper party plaintiff in those jurisdictions where the action must be brought by the real party in interest;³¹ and, where suit is brought by the assignee who is the real party in interest, the fact that it should have been brought in a different name is no objection where a statute allows recovery on principles of equity.³²

A beneficiary who is not a party to the contract may sue a delinquent subscriber in those jurisdictions where a third person is allowed to sue on a contract made for his benefit;³³ but in those cases where the only consideration is to be found in the mutual promises of the subscribers, and the jurisdiction is one in which a beneficiary who is not a party to the contract cannot sue on the contract, such subscribers, and not the beneficiary, are the only proper parties plaintiff.³⁴ Although the mere fact that the subscription was made payable to the trustees, who conducted the business affairs of the corporation before and after it ceased to operate, does not preclude the corporation from prosecuting

the action in its corporate name,³⁵ where the subscription calls for payment to designated persons the action on the subscription may be brought by them, as, for example, where the paper provides for payment to a committee,³⁶ to a trustee,³⁷ or to a treasurer,³⁸ and, if the commissioners of a county are designated, a suit by the county treasurer is not proper.³⁹

Under a statute providing that, on questions of common interest to many persons, a suit may be prosecuted or defended by one or more for the benefit of the whole, a part of the subscribers to a fund may sue a delinquent subscriber for the amount promised by him.⁴⁰ Where suit may be brought by a person in whose name a contract for the benefit of a third person is made, without joining the beneficiary, a county officer may sue in his own name on a subscription payable to him for the benefit of the county.⁴¹ Under a statute providing that all suits by or against a township in its corporate capacity shall be brought in the name of such township, a subscription contract really made to the township must be sued on in the name of the township, although the paper promises to pay to the highway commissioner.⁴² Where the subscription

(2) Hospital corporation, into which general committee, constituting voluntary unincorporated association, organization, or entity, was transformed after adopting name of, conducting campaign for fund to construct and equip, and erecting, hospital, was real party in interest, and entitled as successor to all pledges and subscriptions for hospital to maintain action for amount of subscription to such fund.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273.

(3) Transfer or assignment of subscriptions by promisee as security or collateral for debt does not deprive promisee of its right as real party in interest to bring action on unpaid subscriptions.

N.Y.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273.

Ohio.—*Cincinnati Summer Opera Ass'n v. Williams*, 16 N.E.2d 1000, 58 Ohio App. 513.

(4) Merger of college with university did not preclude college from maintaining action against decedent's estate for amount of decedent's subscription for endowment and payment of debts of college, although college board of trustees adopted resolution transferring to university trustees title to all of college's endowment funds, where university of-

ficers testified that such subscription was not property of university and not among college's securities transferred to university.—*Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 346 Mo. 628.

30. N.Y.—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 164 Misc. 273.

31. Neb.—*Gerner v. Church*, 62 N.W. 51, 43 Neb. 690.

Purported transfer of money subscribed to building fund without assumption of cross obligations by assignee did not authorize assignee's recovery against subscriber.—*Candler v. Yaarab Temple Bldg. Co.*, 172 S.E. 63, 178 Ga. 63.

32. Tenn.—*Mt. Carmel Church v. Journey*, 9 Lea 215.

33. N.C.—*Greenville Supply Co. v. Whitehurst*, 163 S.E. 446, 202 N.C. 413.
60 C.J. p 970 note 42.

34. N.H.—*Curry v. Rogers*, 21 N.H. 247.

35. Mo.—*Missouri Wesleyan College v. Shulte*, 142 S.W.2d 644, 346 Mo. 628.

Supervisory board not necessary party

Board of education of church, annual conference of which supervised

business affairs of educational institutions within its jurisdiction, including college, for which it appointed trustees, was not necessary party plaintiff in college's action against decedent's estate for amount of decedent's subscription for endowment and payment of debts of college, although subscription instrument provided that college and such board should share amount subscribed pro rata, since division thereof between them is for them to determine.—*Missouri Wesleyan College v. Shulte*, supra.

36. Wis.—*Hodges v. Nalty*, 80 N.W. 726, 104 Wis. 464.
60 C.J. p 970 note 45.

37. Cal.—*Lasar v. Johnson*, 58 P. 161, 125 Cal. 549.
60 C.J. p 970 note 46.

38. Iowa.—*McDonald v. Gray*, 11 Iowa 508, 79 Am.D. 509.
60 C.J. p 970 note 47.

39. Ind.—*Peirce v. Ruley*, 5 Ind. 69.

40. Wis.—*Hodges v. Nalty*, 80 N.W. 726, 104 Wis. 464.

41. Ky.—*Gaines v. Hume*, 284 S.W. 119, 215 Ky. 27.

42. Mich.—*North Star Tp. v. Cowdry*, 179 N.W. 259, 212 Mich. 7.

is to a county for a county building in a certain city, the city, not being a party to, and having no legal interest in, the contract, cannot sue thereon.⁴³

Rules as to the parties defendant in action on contracts generally apply to actions on subscriptions.⁴⁴ Thus, where two or more persons sign a subscription paper, each promising to pay a stated sum, and the liability of the subscribers is several and not joint, as discussed supra § 10, they must be sued severally on their undertakings.⁴⁵ However, since there are cases where the subscribers are found in fact to be joint principals acting through the payee as their agent for the purpose of carrying out the enterprise for which the subscription is made, as discussed supra § 10, as a consequence in such cases the subscribers must be sued jointly.⁴⁶ It has been held, however, that if one is sued alone he can avail himself only of the nonjoinder of his cosubscribers by plea in abatement.⁴⁷

c. Pleading

General rules governing pleadings in civil actions are applicable to pleadings in actions on subscriptions.

Under rules of general application the declaration, petition, or complaint in an action on a subscription contract must state all facts necessary to constitute a cause of action.⁴⁸ It should allege the purposes of the subscription and that they have been complied

with,⁴⁹ and that the money sought is sought in furtherance of the purpose for which it was promised;⁵⁰ but, in jurisdictions where a written contract of subscription imports a consideration, the complaint in an action to recover a subscription need not allege a consideration;⁵¹ and, where the consideration for each subscription is the other subscriptions, the complaint need not allege the completion of the work for which it was taken,⁵² and such allegation, if made, may be treated as surplusage.⁵³

If by the terms of the subscription contract the subscriber's liability is mainly to pay a pro rata share of any excess of expenses above receipts of an enterprise to be undertaken, a complaint in an action to recover on such subscription must show the total amount subscribed and the amount of the loss.⁵⁴ Where the subscription is due, it is not necessary to allege a demand.⁵⁵ Notice of performance by plaintiff need not be alleged in the complaint where it is clear from the agreement that defendant's performance was to precede plaintiff's performance.⁵⁶ The complaint must show a recoverable interest in the subscription in plaintiffs,⁵⁷ and a corporation afterward formed should allege sufficient facts to show that it accepted the obligations of the promoters.⁵⁸ If a promise to a committee is sued on by a corporation formed after the subscription, and claiming that by operation of law

43. Ga.—*City of Lyons v. Kelley*, 65 S.E. 44, 6 Ga.App. 367.

44. Minn.—*Cornish v. West*, 84 N. W. 750, 82 Minn. 107.
60 C.J. p 970 note 59.

45. Cal.—*Los Angeles Nat. Bank v. Vance*, 98 P. 58, 9 Cal.App. 57.
60 C.J. p 970 note 59.

46. Me.—*Robinson v. Robinson*, 10 Me. 240.

Pa.—*Ridgely v. Dobson*, 3 Watts & S. 118.

47. Me.—*Robinson v. Robinson*, 10 Me. 240.

48. Ga.—*Brooke v. Kennedy*, 158 S. E. 4, 172 Ga. 461.

N.Y.—*I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 276 N.Y. 427, 115 A.L.R. 582.

Pa.—*Anthracite Industries v. Sterlick Creek Coal Co.*, Com.Pl., 32 Luz.Leg.Reg. 392.
60 C.J. p 971 note 63.

49. La.—*Oglethorpe University v. Salmon*, 1 La.App. 645.

Subscription in aid of railroad

(1) A contract, whereby citizens of

a town agreed to make certain payments to, and do certain things for, railroad company on completion and operation of railroad, being an entire contract, a railroad contractor suing on the citizens' notes could not recover without alleging performance of the contract.—*Wellington Railroad Committee v. Crawford*, Tex. Civ.App., 216 S.W. 151.

(2) In an action on notes given by subscribers to a bonus to a railroad company and made conditional on completion of road by certain date, railroad contractor to whom notes had been transferred suing on notes notwithstanding failure to complete road within required time could not avoid such condition on ground of breach of contract by the citizens making such completion impossible without pleading such breach.—*Wellington Railroad Committee v. Crawford*, supra.

(3) Where parties are bound, "in the event a railroad is built to M. with a possible Northern connection," to give a stated amount, a declaration in an action thereon which does not allege that the rail-

road has been built to M, with a possible Northern connection, does not state a cause of action.—*Messer v. Dekle*, 54 So. 366, 61 Fla. 333.

50. La.—*Oglethorpe University v. Salmon*, 1 La.App. 645.

51. Iowa.—*Ft. Madison First M. E. Church v. Donnell*, 64 N.W. 412, 95 Iowa 494.
60 C.J. p 971 note 66.

52. Ind.—*Petty v. Church of Christ*, 95 Ind. 278.

53. Ind.—*Petty v. Church of Christ*, supra.

54. Minn.—*Laramie v. Tanner*, 71 N.W. 1028, 69 Minn. 156.
60 C.J. p 971 note 68.

55. Ind.—*Allen v. Clinton County*, 101 Ind. 553.

56. W.Va.—*Union Stopper Co. v. McGara*, 66 S.E. 698, 66 W.Va. 403.

57. Ark.—*Cartwright v. Dennis*, 260 S.W. 424, 163 Ark. 503.

58. Ga.—*Brooke v. Kennedy*, 158 S. E. 4, 172 Ga. 461.

the rights of the committee vested in the corporation, the petition should allege the facts from which this can be shown.⁵⁹

A complaint to recover back a subscription for failure to perform is bad where by its allegations it shows performance.⁶⁰

Plea, answer, and reply. General rules are applicable to defendant's pleadings.⁶¹ Thus a defense that the receipt of a subscription donation was ultra vires must be pleaded,⁶² and an allegation in the answer that some of the subscribers had settled at less than face value is insufficient to state a defense, in the absence of an allegation that subscriptions on which settlement was made could have been collected in full.⁶³ A plea or answer setting up fraudulent misrepresentations as a defense must allege by whom and by what authority they were made⁶⁴ and that they were relied on.⁶⁵ Where the contract is such that plaintiff need not allege consideration, defendant must allege want of consideration if he seeks to rely on it as a defense.⁶⁶

Where the answer sets up want of consideration, no reply is necessary under a statute providing that there shall be no reply except in cases where matter in confession and avoidance is relied on.⁶⁷ Where defendant in his answer alleges payment, and plaintiff's response fails to deny payment, defendant is entitled to judgment on the pleadings.⁶⁸

Issues, proof, and variance. As in civil actions generally, all material allegations properly put in issue by the pleadings in actions on subscriptions must be proved.⁶⁹ Only such evidence as tends to prove matters put in issue by the pleadings is admissible.⁷⁰ As in other civil actions, there must be no material variance between the pleadings and the proof.⁷¹ Where the petition alleges a promise to a corporation and the contract proved is a promise to a committee, there is a variance.⁷² A plea of fraud in procuring the execution of a subscription cannot be sustained by proof of fraud with respect to the consideration.⁷³ The admission in evidence of the paper with all the names thereon is not a variance, although only defendant's name is mentioned in the declaration.⁷⁴

d. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

(1) Presumptions and Burden of Proof

Rules relating to presumptions and the burden of proof in civil actions generally, and more particularly in actions on contracts, apply in actions on subscriptions.

The rules relating to presumptions and the burden of proof in civil actions generally, and more particularly in actions on contracts, apply in actions on subscriptions.⁷⁵ Thus a presumption of con-

59. Cal.—Christian College v. Hendley, 49 Cal. 347.

60. Ala.—Land Title Guaranty Co. v. Lynchburg Foundry Co., 80 So. 142, 16 Ala.App. 568.

61. Fla.—Groves v. Davis, 70 So. 772, 71 Fla. 57.

60 C.J. p 971 notes 77-81, p 972 note 82.

Insufficient defense

In action by college on notes executed as donation to fifty thousand dollar fund which college agreed to raise and expend in erecting dormitory, allegation in answer that fund of more than fifty thousand dollars was raised out of which fifty thousand dollars was expended in erection of dormitory and a portion of fund over and above the fifty thousand dollars was expended in acquiring other property was insufficient to state a defense.—Hyden v. Scott-Lees Collegiate Institute, 163 S.W.2d 295, 291 Ky. 139.

62. Ky.—Hyden v. Scott-Lees Collegiate Institute, supra.

63. Ky.—Hyden v. Scott-Lees Collegiate Institute, supra.

64. Ky.—Gaines v. Hume, 284 S.W. 119, 215 Ky. 27.

65. N.Y.—Guinzburg v. Blustein, 202 N.Y.S. 333, 121 Misc. 784.

66. Iowa.—Des Moines University v. Livingston, 10 N.W. 738, 57 Iowa 307, 42 Am.R. 42.

Kan.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.

67. Iowa.—Des Moines University v. Livingston, 10 N.W. 738, 57 Iowa 307, 42 Am.R. 42.

68. Ky.—Kentucky University v. McBrayer, 7 Ky.Op. 300.

69. Conn.—St. Paul's Episcopal Church v. Fields, 72 A. 145, 81 Conn. 670.

60 C.J. p 972 note 85.

70. Conn.—St. Paul's Episcopal Church v. Fields, supra.

60 C.J. p 972 note 86.

Whether subscription was conditioned was held not in issue, where there was neither pleading raising the issue, nor evidence, nor finding.—Rouff v. Washington & Lee University, Tex.Civ.App., 48 S.W.2d 483, error refused.

71. Cal.—University of Southern California v. Bryson, 283 P. 949, 103 Cal.App. 39.

60 C.J. p 972 note 88.

72. Cal.—Christian College v. Hendley, 49 Cal. 347.

73. Ill.—Richelieu Hotel Co. v. International Military Encampment Co., 29 N.E. 1044, 140 Ill. 248, 33 Am.S.R. 234.

74. Ill.—Kinsley v. International Military Encampment Co., 41 Ill. App. 259.

75. Mo.—Fredericktown Chamber of Commerce v. Chaney, App., 250 S.W.2d 820.

sideration arises where the subscription is under seal,⁷⁶ or where the promise assumes the form of a promissory note,⁷⁷ or where the subscription paper recites that the promise is given for "value received"⁷⁸ or that it was made in consideration of subscriptions of others.⁷⁹ A statute providing that all contracts in writing shall import a consideration applies to subscription contracts.⁸⁰ Where money is subscribed on condition that other subscriptions aggregating a certain sum are obtained, and subsequent subscribers know of the former subscription, it will be presumed that their subscriptions are made in reliance on the earlier subscription, although it is an instrument complete in itself and separate from the other subscription.⁸¹

The burden is on plaintiff to prove every fact material to his cause of action,⁸² as that the subscription has matured⁸³ or that conditions in the agreement have been complied with;⁸⁴ and, where there is nothing in the contract to show that it was based on valuable consideration, plaintiff has the burden of proving consideration.⁸⁵

The burden is on defendant to prove matters relied on by him as a defense.⁸⁶ Thus, in a proper case, defendant has the burden of proving failure or

want of consideration,⁸⁷ or that a contract reciting consideration is in fact bad for want of consideration,⁸⁸ or that misrepresentations induced the subscription,⁸⁹ or that the subscription was obtained through coercion and duress.⁹⁰ In an action to recover a subscription given on condition that a certain amount be subscribed, which was done, the burden is on defendant to show that any of the subscriptions were invalid.⁹¹ If the contract provides that any surplus of subscription over the price for erecting the plant should belong to the subscribers, the burden is on a delinquent subscriber to show that there was a surplus.⁹²

(2) Admissibility

Rules governing the admissibility of evidence in civil actions generally apply in actions on subscriptions.

Rules governing the admissibility of evidence in civil actions generally apply in actions on subscriptions.⁹³ The subscription list is competent evidence of the contract,⁹⁴ although, under the rule that in a subscription conditioned on other subscriptions there should be no conditions as to the liability of any of the subscribers not applicable to all, as discussed *supra* § 17, in an action on such a conditional subscription an agreement not imposing the same lia-

76. W.Va.—National Valley Bank of Staunton v. Houston, 66 S.E. 465, 66 W.Va. 336.

77. Mo.—Hardin College v. Johnson, 3 S.W.2d 264, 221 Mo.App. 285.

78. Ill.—Beatty v. Western College, 52 N.E. 432, 177 Ill. 280, 69 Am. S.R. 242, 42 L.R.A. 797.—In re Drain's Estate, 36 N.E.2d 608, 311 Ill.App. 481.

N.Y.—In re Barker's Estate, 18 N.E. 2d 656, 279 N.Y. 449.
60 C.J. p 972 note 97.

79. Ga.—Jackson v. Forward Atlanta Commission, 148 S.E. 356, 39 Ga.App. 738.

80. Cal.—First Trust & Savings Bank of Pasadena v. Coe College, 47 P.2d 481, 8 Cal.App.2d 195.—Board of Home Missions and Church Extension of M. E. Church v. Manley, 19 P.2d 21, 129 Cal.App. 541.

Iowa.—Young Men's Christian Ass'n v. Caward, 239 N.W. 41, 213 Iowa 408.

Kan.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.
60 C.J. p 972 note 99.

81. Mich.—Waters v. Union Trust Co., 89 N.W. 687, 129 Mich. 640.

82. Mo.—Fredericktown Chamber of Commerce v. Chaney, App., 250 S. W.2d 820.

83. Ind.—Brown v. Marion Commercial Club, 97 N.E. 958, 50 Ind.App. 670.

84. Mo.—Fredericktown Chamber of Commerce v. Chaney, App., 250 S. W.2d 820.

Tex.—Wasson v. Clarendon College & University Training School, Civ. App., 131 S.W. 852.

85. Ga.—Jackson v. Forward Atlanta Commission, 148 S.E. 356, 39 Ga. App. 738.

86. Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 58 Ohio App. 513.

87. Kan.—Southwestern College of Winfield v. Hawley, 62 P.2d 850, 144 Kan. 652.
60 C.J. p 973 note 7.

Under statute, burden of proving want of consideration for subscription is on party claiming it.—First Trust & Savings Bank of Pasadena v. Coe College, 47 P.2d 481, 8 Cal. App.2d 195.

88. Iowa.—Young Men's Christian

Ass'n v. Caward, 239 N.W. 41, 213 Iowa 408.
60 C.J. p 973 note 8.

89. N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

90. Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 58 Ohio App. 513.

91. Iowa.—Des Moines University v. Livingston, 21 N.W. 564, 65 Iowa 202.

92. Tenn.—Davis, etc., Bldg., etc., Co. v. Dickson, Ch., 53 S.W. 237.

93. Ark.—Abraham v. Blytheville Industrial Ass'n, 114 S.W.2d 32, 195 Ark. 778.

Ga.—Chicago Bldg. & Mfg. Co. v. Butler, 78 S.E. 244, 139 Ga. 816.
51 C.J. p 471 note 33.
Application of parol evidence rule to subscriptions see Evidence § 911.

Evidence held inadmissible

Ark.—Abraham v. Blytheville Industrial Ass'n, 114 S.W.2d 32, 195 Ark. 778.

Ga.—Chicago Bldg. & Mfg. Co. v. Butler, 78 S.E. 244, 139 Ga. 816.

94. N.M.—Miller v. Preston, 17 P. 565, 4 N.M. 396.

bility is inadmissible.⁹⁵ On the question of consideration, it is competent to show that money had been raised and work done in reliance on the subscriptions, and the exclusion thereof is error.⁹⁶ Evidence of publications of defendant's subscription with his consent for the purpose of inducing others to subscribe is admissible, even though defendant was not present when they were made.⁹⁷ Plaintiff may introduce any competent evidence to show an admission by defendant of his promise to contribute⁹⁸ and to show the amount for which defendant is liable.⁹⁹ Where defendant claims a parol inducement to subscribe, plaintiff may introduce evidence that the person offering the inducement was not his agent.¹

On the part of defendant any competent evidence is admissible to show fraud in the procurement of the subscription,² to show the conditions on which the contract was made,³ or to show abandonment of the enterprise.⁴

(3) Weight and Sufficiency

General rules applicable to civil actions govern as to the weight and sufficiency of evidence in actions on subscriptions.

General rules applicable to civil actions govern as to the weight and sufficiency of evidence in actions on subscriptions.⁵ Thus, in an action on a subscription, plaintiff must, where proof of consideration is necessary, establish it by a preponderance of the evidence,⁶ and must likewise establish delivery⁷ and acceptance according to the terms of the subscription.⁸ Circumstantial evidence is or may be sufficient to show reliance on defendant's promise by plaintiff.⁹

Defendant must establish by a preponderance of the evidence any matters of defense which he alleges.¹⁰ Thus, where he seeks to defend on the ground that the contract was never delivered to the proper person, he must prove nondelivery by a preponderance of evidence,¹¹ and this is also true where he seeks to rely on abandonment of the

95. Mo.—Fredericktown Chamber of Commerce v. Chaney, App., 250 S. W.2d 820.

96. Iowa.—Des Moines University v. Livingston, 10 N.W. 738, 57 Iowa 307, 42 Am.R. 42.

97. Iowa.—Brokaw v. McElroy, 143 N.W. 1087, 162 Iowa 288, 50 L.R.A., N.S., 835.

98. Ga.—Young Men's Christian Ass'n v. Estill, 78 S.E. 1075, 140 Ga. 291, 48 L.R.A., N.S., 783, Ann. Cas.1914D 136.

99. Neb.—Lowe v. Keens, 133 N.W. 1127, 90 Neb. 565, Ann.Cas.1913B 430.

1. Ala.—Ex parte South, 88 So. 321, 205 Ala. 31.

2. Vt.—Middlebury College v. Loomis, 1 Vt. 189.
60 C.J. p 973 note 18.

3. Iowa.—Burlington First M. E. Church v. Sweny, 52 N.W. 546, 85 Iowa 627.

4. Wash.—Mann v. O'Neill, 69 P. 635, 29 Wash. 115.

5. Evidence held sufficient

(1) Generally.—In re Wanamaker's Estate, 17 Pa.Dist. & Co. 496.

(2) To establish that the subscription was to be effective only on execution of written contracts, which were never signed by the deceased because of sudden death.—Reno County Community Hospital Ass'n v.

Woodford's Estate, 229 P.2d 730, 171 Kan. 97.

(3) To sustain recovery, as against defense that defendant did not specifically agree to pay sum stated, and that his signature was based on unfulfilled representations as to participation of others in project.—Nelson v. Longmire, 36 P.2d 12, 169 Okl. 80.

Evidence held insufficient

In action against decedent's estate on subscription note, wherein corporation contended that estate was estopped to defend on ground that there had been failure of consideration when educational program in furtherance of which note had been given had been abandoned, evidence was insufficient to show that decedent as maker of note had had any knowledge of change in educational program, or that he had acquiesced therein within purview of doctrine of estoppel.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279.

6. Mo.—Trustees of La Grange Male and Female College at La Grange v. Parker, 200 S.W. 663, 198 Mo. App. 372.
60 C.J. p 973 note 22.

Evidence held sufficient

(1) Testimony that the subscription of each subscriber would have as a consideration the subscriptions of all other subscribers established a valid consideration for a particular subscription.—Better Business Bureau of Detroit v. First Nat. Bank—Detroit, 296 N.W. 665, 296 Mich. 513.

7. Wash.—Michels v. Rustemeyer, 56 P. 380, 20 Wash. 597.
60 C.J. p 973 note 23.

8. Wis.—Evangelish Lutherish St. Martin's Gemeinde v. Preuss, 122 N.W. 719, 140 Wis. 349, 17 Ann.Cas. 1074.
60 C.J. p 973 note 24.

9. Vt.—Eastern States Agricultural and Industrial League v. Vail's Estate, 124 A. 568, 97 Vt. 495, 38 A.L.R. 845.

10. Ga.—Miller v. Oglethorpe University, 100 S.E. 784, 24 Ga.App. 888.

Evidence held sufficient

Neb.—Cotner College v. Hester's Estate, 51 N.W.2d 612, 155 Neb. 279.
Wash.—Gose v. Harris, 82 P.2d 160, 196 Wash. 167.

Evidence held insufficient

Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237.
N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273.

Subscription in aid of railroad

Evidence was held not to show that notes given in connection with proposed construction of railroad were not to become operative unless signed by certain number of persons.—Adair v. First Nat. Bank, 253 Ill. App. 206.

11. Wash.—Michels v. Rustemeyer, 56 P. 380, 20 Wash. 597.

enterprise¹² or want of consideration.¹³ If defendant's evidence is insufficient to defeat recovery of a subscription, it is insufficient to warrant recovery, by way of counterclaim, of payments which he has made.¹⁴

e. Trial

General rules apply as to trial in actions on subscriptions.

General rules apply as to trial in actions on subscriptions.¹⁵ Thus, where the evidence is conflicting, questions of fact are for the jury,¹⁶ such as whether defendant orally subscribed to a fund,¹⁷ whether the subscriber had the mental capacity to make the subscription,¹⁸ whether a subscription was secured through fraud,¹⁹ whether the contract sued on was supported by consideration,²⁰ or whether a campaign committee having power to solicit subscriptions had power to accept them.²¹ Likewise, on conflicting evidence the question of performance

or nonperformance of conditions is for the jury.²²

Since a reasonable time for performance is allowed where no time is specified in the contract, what is a reasonable time for performance is for the jury to determine.²³ Where they are supported by evidence, the court will not reverse findings that the subscription was delivered conditionally²⁴ or that defendant never authorized the signing of his name to the subscription.²⁵ A verdict for plaintiff will not be disturbed where supported by the evidence.²⁶

Where the evidence is such that but one conclusion can be drawn therefrom, the question of plaintiff's reliance on defendant's contract should not be submitted to the jury.²⁷ Where no issue of fact is raised as to the validity and enforceability of the subscription, it is proper to direct a verdict for plaintiff.²⁸ Where the proof shows, without dispute, a want of consideration, a directed verdict for defendant is proper.²⁹

SUBSEQUENS. As the first word of a maxim as to which there have been no recent applications—see 60 C.J. p 974 note 1.

SUBSEQUENT. The word "subsequent" is used in different senses and is susceptible of different significations, and its true meaning in any particular case must be collected from its context and subject

matter.¹

As an adjective² the term "subsequent," in its common and ordinary acceptation,³ means following in time;⁴ coming or being later than something else;⁵ succeeding.⁶

It is defined in a slightly different sense as meaning following as a result;⁷ consequent;⁸ and it has

¹² Wash.—Michels v. Rustemeyer, *supra*.

¹³ Ga.—Miller v. Oglethorpe University, 100 S.E. 784, 24 Ga.App. 388.

¹⁴ Ky.—Brown v. Farmers' Deposit Bank, 3 S.W.2d 215, 223 Ky. 171.

¹⁵ Ga.—Candler v. Yaarab Temple Bldg. Co., 172 S.E. 63, 178 Ga. 63, and answers conformed to 172 S.E. 344, 48 Ga.App. 163.

¹⁶ Neb.—In re Steininger's Estate, 297 N.W. 159, 139 Neb. 284.

¹⁷ Neb.—In re Steininger's Estate, *supra*.

¹⁸ Ky.—Lewis v. Durham, 265 S.W. 934, 205 Ky. 403.

¹⁹ Neb.—In re Steininger's Estate, 297 N.W. 159, 139 Neb. 284.

²⁰ Ark.—Cartwright v. Dennis, 260 S.W. 424, 163 Ark. 503.

²¹ N.J.—New Jersey Orthopaedic Hospital & Dispensary v. Wright, 113 A. 144, 95 N.J.Law 462.

²² N.J.—New Jersey Orthopaedic Hospital & Dispensary v. Wright, *supra*.

²³ Ill.—Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 71 N.E. 22, 210 Ill. 26, 102 Am.S.R. 145. 60 C.J. p 974 note 36.

Subscription in aid of railroad
Ill.—Ogden v. Kirby, 79 Ill. 555.

²⁴ Iowa.—Paddock v. Bartlett, 25 N.W. 906, 68 Iowa 16.

²⁵ Mich.—Waters v. Union Trust Co., 89 N.W. 687, 129 Mich. 640.

²⁶ Wash.—First Methodist Episcopal Church v. Soden, 229 P. 534, 131 Wash. 228.

²⁷ Ark.—Arkansas Christian College v. Malone, 271 S.W. 964, 168 Ark. 1167.

²⁸ Kan.—Young Men's Christian Ass'n v. Sentney, 173 P. 917, 103 Kan. 388.

²⁹ Mich.—Sutton v. Rann, 112 N.W. 721, 149 Mich. 35.

²⁸ N.Y.—Mechanicville War Chest v. Ryan, 181 N.Y.S. 576, 110 Misc. 448.

²⁹ Iowa.—University of Des Moines, Iowa v. Livingston, 10 N.W. 738, 57 Iowa 307.

¹ Conn.—Sands v. Lyon, 18 Conn. 18, 27.

² Va.—Commonwealth v. Ellett, 4 S.E.2d 762, 765, 174 Va. 403.

³ Va.—Commonwealth v. Ellett, *supra*.

⁴ U.S.—In re Andrews, C.A.Ind., 172 F.2d 996, 999.

⁵ Va.—Commonwealth v. Ellett, 4 S.E. 2d 762, 765, 174 Va. 403. 60 C.J. p 974 note 3.

⁶ Va.—Commonwealth v. Ellett, *supra*.

⁷ Va.—Commonwealth v. Ellett, *supra*.

⁸ U.S.—In re Andrews, C.A.Ind., 172 F.2d 996, 999.

⁹ U.S.—In re Andrews, *supra*.

also been construed to mean "next."⁹

"Subsequent" has been distinguished from "second" see 79 C.J.S. p 934 note 87, and it has been held synonymous with, and has also been distinguished from, "since" see 80 C.J.S. p 1307 notes 15, 16.

Phrases employing the term are set out in the note.¹⁰

SUBSEQUENTLY. Afterwards; at a later time.¹¹

SUBSERVIENT. Serving to promote some end;¹² useful as an instrument to promote a purpose;¹³ useful in an inferior capacity.¹⁴

SUBSIDIARY. Furnishing aid; auxiliary; tributary; as, a subsidiary stream;¹⁵ especially, aiding in an inferior position or capacity.¹⁶

"Subsidiary" has been held synonymous with "auxiliary" see 7 C.J.S. p 1300 note 60.

SUBSIDY. Something, usually money, donated or given or appropriated by the government through its proper agencies;¹⁷ a grant of funds or property from a government,¹⁸ as of the state or a municipal corporation,¹⁹ to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public;²⁰ a subvention.²¹

Pecuniary premiums offered by the government to persons enlisting in the public service, or engaging in particular industries, or performing specified services for the public benefit are treated in Bounties § 1 et seq.

SUBSIST. To have existence; to be; to exist or continue to exist;²² also, to provide with subsistence.²³

SUBSISTENCE. That which supports life;²⁴ that which furnishes support to animal life;²⁵ means of support;²⁶ provisions, or that which procures pro-

9. N.J.—Osborn v. Rogers, 19 N.J. Eq. 429, 431.

10. Phrases

(1) "Condition subsequent" see 15 C.J.S. p 812 notes 79–81.

(2) "Subsequent appearance" see Appearances § 1 c (5).

(3) "Subsequent creditor" generally see 21 C.J.S. p 1054 notes 74, 75; gratuitous conveyances made with intent to defraud subsequent creditors see title index to Fraudulent Conveyances.

(4) "Subsequent mortgagee in good faith" is a mortgagee who receives his mortgage without knowledge of the existence of a prior mortgage.—Vanaman v. Fliehr, 71 A. 692, 693, 75 N.J.Eq. 88—60 C.J. p 975 note 9.

(5) "Subsequent negligence" doctrine see Negligence §§ 136–139.

(6) "Subsequent purchaser in good faith for value" distinguished from "creditor" see 21 C.J.S. p 1053 note 54.

(7) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 975 notes 10–44.

11. U.S.—In re Rosenfield, D.C.N.J., 20 F.Cas.No.12,058.

Phrases employing the word and as to which more recent adjudications have not been found see 60 C.J. p 975 notes 47–49.

12. Ill.—Rosehill Cemetery Co. v. Kern, 35 N.E. 240, 243, 147 Ill. 483—People v. Graceland Cemetery Co., 86 Ill. 336, 338, 29 Am.R. 32.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 976 note 53.

13. Ill.—People v. Graceland Cemetery Co., 86 Ill. 336, 338, 29 Am.R. 32.

14. Ill.—Rosehill Cemetery Co. v. Kern, 35 N.E. 240, 243, 147 Ill. 483.

15. Mo.—Baker v. Fenley, 128 S.W. 2d 295, 298, 233 Mo.App. 998.

Phrases

(1) "Subsidiary company" defined see 15 C.J.S. p 648 note 9.1.

(2) "Subsidiary corporation" defined see Corporations § 14.

16. Mo.—Baker v. Fenley, 128 S.W. 2d 295, 298, 233 Mo.App. 998.

An inferior position or capacity
Neb.—Folts v. Globe Life Ins. Co., 223 N.W. 797, 803, 117 Neb. 723.

17. U.S.—Kennecott Copper Corp. v. State Tax Commission, D.C. Utah, 60 F.Supp. 181, 182.

In this country, by the Congress.—Kennecott Copper Corp. v. State Tax Commission, supra.

18. Ariz.—State Tax Commission v. Miami Copper Co., 246 P.2d 871, 876, 74 Ariz. 234.

Mont.—Klies v. Linnane, 156 P.2d 183, 185, 117 Mont. 59.
60 C.J. p 976 note 57.

19. Can.—Attorney-General of Canada v. Quebec & Saguenay R. Co., 23 Can.R.Cas. 310, 17 Can.Exch. 306, 41 Dom.L.R. 576, 580.

20. Ariz.—State Tax Commission v. Miami Copper Co., 246 P.2d 871, 876, 74 Ariz. 234.

Mont.—Klies v. Linnane, 156 P.2d 183, 185, 117 Mont. 59.
60 C.J. p 976 note 57.

It is an artificial way of encouraging an industry or enterprise otherwise than by increasing the value of its product.—Klies v. Linnane, supra.

21. Can.—Attorney-General of Canada v. Quebec & Saguenay R. Co., 23 Can.R.Cas. 310, 17 Can.Exch. 306, 41 Dom.L.R. 576, 580.

22. Webster New Int.D.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 976 notes 62–64.

23. La.—Moise's Succession, 31 So. 990, 991, 107 La. 717.

24. La.—Moise's Succession, 31 So. 990, 991, 107 La. 717.

25. Mo.—Dunnivant v. State Social Security Commission, 150 S.W.2d 1103, 1108, 235 Mo.App. 1107.

26. Mo.—Dunnivant v. State Social Security Commission, supra.
N.C.—Dyer v. Dyer, 194 S.E. 278, 280, 212 N.C. 620.

visions;²⁷ livelihood,²⁸ as, a meager subsistence.²⁹

It has been said that a house in which to live may reasonably come within the meaning of subsistence.³⁰

"Subsistence" has been held synonymous with "support."³¹

SUBSTANCE. The word "substance" is derived from the Latin *sub stare*, meaning to stand under,³² and, while the term is susceptible of different significations according to the circumstances,³³ as its etymology indicates, substance is that which stands under and supports all phenomena, whether material or mental;³⁴ the substratum.³⁵ Substance is the essence³⁶ of the thing itself;³⁷ that which makes a thing what it is, or gives it its essential nature.³⁸

The term "substance" is frequently employed to

signify that which is essential;³⁹ and in this sense is defined as meaning the characteristic and essential components⁴⁰ of anything;⁴¹ the most important element⁴² in any existence;⁴³ the main part;⁴⁴ the essential part;⁴⁵ the essential or material part;⁴⁶ the main or material part;⁴⁷ that in and for which a thing chiefly exists.⁴⁸

The word is sometimes used to indicate the meaning⁴⁹ expressed by any speech or writing;⁵⁰ essential import;⁵¹ purport;⁵² and it may refer to an abstract or compendium.⁵³

"Substance" has various other connotations, and it may also denote body, matter, or the material of which a thing is made;⁵⁴ and in connection with this meaning it has been said that all substances are divided into three general classes; Animal, vegetable, and mineral.⁵⁵

27. Mo.—Dunnavant v. State Social Security Commission, 150 S.W.2d 1103, 1108, 235 Mo.App. 1107.
N.C.—Dyer v. Dyer, 194 S.E. 278, 280, 212 N.C. 620.

Food

La.—Moise's Succession, 31 So. 990, 991, 107 La. 717.

28. Mo.—Dunnavant v. State Social Security Commission, 150 S.W.2d 1103, 1108, 235 Mo.App. 1107.
N.C.—Dyer v. Dyer, 194 S.E. 278, 280, 212 N.C. 620.

29. Mo.—Dunnavant v. State Social Security Commission, 150 S.W.2d 1103, 1108, 235 Mo.App. 1107.

30. N.C.—Edmundson v. Edmundson, 22 S.E.2d 576, 581, 222 N.C. 181.

31. Mont.—Majors v. Lewis and Clark County, 201 P. 268, 269, 60 Mont. 608.

32. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

33. N.Y.—Lincoln Nat. Bank v. John Pierce Co., 164 N.Y.S. 421, 425, 98 Misc. 325.
60 C.J. p 976 note 69.

34. Mo.—Bellows v. Travelers' Ins. Co. of Hartford, Conn., 203 S.W. 978, 984.
60 C.J. p 976 note 68 [a].

35. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

36. Mo.—Bellows v. Travelers' Ins. Co. of Hartford, Conn., 203 S.W. 978, 984.
60 C.J. p 976 note 77.

37. Mo.—Bellows v. Travelers' Ins. Co. of Hartford, Conn., supra.

"Substance," in this sense, is always the essence of an existent thing; it is essence plus existence; a real or determinate subject.—State v. Gregory, 198 N.W. 58, 60, 198 Iowa 316.

38. Iowa.—State v. Gregory, supra.

39. Ill.—Chicago Discount Corporation v. Palmer, 279 Ill.App. 216, 223.

Okl.—McCoy v. State, 223 P.2d 778, 781, 92 Okl.Cr. 412.

S.D.—Potts v. Miller, 39 N.W.2d 667, 671.

60 C.J. p 976 note 78.

40. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

Iowa.—State v. Gregory, 198 N.W. 58, 60, 198 Iowa 316.

41. Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

Iowa.—State v. Gregory, 198 N.W. 58, 60, 198 Iowa 316.

42. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

Iowa.—State v. Gregory, 198 N.W. 58, 60, 198 Iowa 316.

43. Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

Iowa.—State v. Gregory, 198 N.W. 58, 60, 198 Iowa 316.

44. Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

60 C.J. p 977 note 91.

45. Pa.—Commonwealth v. Borden, 61 Pa. 272, 276.

60 C.J. p 977 note 89.

The substance of a thing is its

essential part.—Sanders v. Wyatt, La.App., 176 So. 137, 139.

46. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

60 C.J. p 976 note 88.

Similarly defined

(1) The essential or important part.—Rathbone v. Wirth, 45 N.E. 15, 36, 150 N.Y. 459, 34 L.R.A. 408.

(2) The real or essential part.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

(3) The material thing.—Rathbone v. Wirth, supra.

47. Pa.—Commonwealth v. Borden, 61 Pa. 272, 276.

60 C.J. p 977 note 90.

The substance of a thing is its main or material part.—Sanders v. Wyatt, La.App., 176 So. 137, 139.

48. N.Y.—Rathbone v. Wirth, 45 N.E. 15, 36, 150 N.Y. 459, 34 L.R.A. 408.

49. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

60 C.J. p 977 note 5.

50. Ala.—State v. Tunstall, supra.

51. Ala.—State v. Tunstall, supra.
Idaho.—State v. Lowe, 88 P.2d 502, 505, 60 Idaho 98.

52. Idaho.—State v. Lowe, supra.
60 C.J. p 977 note 7.

53. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

60 C.J. p 976 note 75.

54. U.S.—U. S. v. Brunett, D.C.Mo., 53 F.2d 219, 229.

55. N.M.—Board of Com'rs of Roosevelt County v. Good, 105 P.2d 470, 472, 44 N.M. 495.

The word "substance" is further defined as meaning that which receives modifications.⁵⁶

"Substance" has been held synonymous with "subject" and the words have also been distinguished see ante p 554 notes 64, 65. It is sometimes used in contradistinction to "letter" see 52 C.J.S. p 1054 note 98, and is usually contrasted with, or employed as the antithesis of, "form," but not always so, see 37 C.J.S. p 113 notes 43, 44. "Substance" has also been distinguished from "tenor."⁵⁷

Phrases employing the term are set out in the note.⁵⁸

SUBSTANTIAL. While the word "substantial" is occasionally employed as a noun, and as such is defined as meaning that which is of essential value or worth,⁵⁹ it is more frequently employed as an adjective, and it is as an adjective that the term is treated in the following paragraphs.

The word "substantial" is a relative,⁶⁰ and not an exact,⁶¹ term. It has been said to be as illusive a word as the English language contains,⁶² and is of varied meaning,⁶³ and is susceptible of different meanings according to the circumstances⁶⁴ of its use,⁶⁵ and in considering the word it must be examined in its relation to the context,⁶⁶ and its meaning is to be gauged by all the circumstances surrounding the transaction with respect to which it has been used.⁶⁷

The term has reference to something worthwhile as distinguished from something without value or merely nominal,⁶⁸ and it imports a considerable amount of value in opposition to that which is inconsequential or small,⁶⁹ and in this sense is defined as meaning of real worth and importance;⁷⁰ of considerable value;⁷¹ valuable;⁷² considerable in amount, value, or the like.⁷³ In opposition to that which is inconsequential or small, the term is also

56. Ala.—State v. Tunstall, 40 So. 135, 136, 145 Ala. 477.

57. Eng.—Wright v. Clements, 3 B. & Ald. 503, 506, 5 E.C.L. 292, 106 Reprint 746.
62 C.J. p 709 note 92.

58. Phrases

(1) "Amendment in substance" as distinguished from "amendment in form" see 37 C.J.S. p 114 note 53.

(2) "Defect in substance" as distinguished from "defect in form" see 37 C.J.S. p 114 note 53.

(3) "In substance was true" is commonly and ordinarily understood as meaning "essentially" or "in all material respects" true.—Kleinschmidt v. Johnson, Mo., 183 S.W.2d 82, 86.

(4) "Substance of certificate" as distinguished from "form of certificate" see 37 C.J.S. p 114 note 53.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 976 notes 73, 74, p 977 notes 99–2, 8.

59. Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

60. Cal.—Application of Scroggin, 229 P.2d 489, 491, 103 Cal.App.2d 281—Fuhrman v. American Nat. Building & Loan Ass'n, 14 P.2d 601, 604, 126 Cal.App. 202.

61. Cal.—Application of Scroggin, 229 P.2d 489, 491, 103 Cal.App.2d 281.

No rule of thumb can be laid down fixing its exact meaning.—In re Opening Ballot Boxes and Counting

Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 468, 129 Pa.Super. 302.

62. Pa.—In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, supra.

63. Ind.—McCague v. New York C. & St. L. R. Co., 71 N.E.2d 569, 571, 225 Ind. 83.

"Many illustrations of its use may be found in 60 C.J. 977."—In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 468, 129 Pa.Super. 302.

64. U.S.—Ewald v. Commissioner of Internal Revenue, C.C.A.6, 141 F.2d 750, 752.

Pa.—In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 468, 129 Pa. Super. 302.

65. U.S.—Ewald v. Commissioner of Internal Revenue, C.C.A.6, 141 F.2d 750, 752.

66. Ind.—McCague v. New York C. & St. L. R. Co., 71 N.E.2d 569, 571, 225 Ind. 83.

67. Cal.—Application of Scroggin, 229 P.2d 489, 491, 103 Cal.App.2d 281—Fuhrman v. American Nat. Building & Loan Ass'n, 14 P.2d 601, 604, 126 Cal.App. 202.

68. La.—State v. Breedlove, 7 So. 2d 221, 244, 199 La. 965.

Wash.—In re Krause's Estate, 21 P.2d 268, 270, 173 Wash. 1.

"Thus we speak of a substantial profit or a substantial gift to charity."—Shaughnessy v. Linguistic Soc. of America, Md., 84 A.2d 68, 70.

69. Cal.—Application of Scroggin, 229 P.2d 489, 491, 103 Cal.App.2d 281—Fuhrman v. American Nat. Building & Loan Ass'n, 14 P.2d 601, 604, 126 Cal.App. 202.

70. Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

Ohio.—Tax Commission of Ohio v. American Humane Education Soc., 181 N.E. 557, 558, 42 Ohio App. 4.

71. Ohio.—Tax Commission of Ohio v. American Humane Education Soc., supra.

Considerable and sure

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

72. Ind.—McCague v. New York, C. & St. L. R. Co., supra.

Ohio.—Tax Commission of Ohio v. American Humane Education Soc., 181 N.E. 557, 558, 42 Ohio App. 4.

Having essential value

Md.—Shaughnessy v. Linguistic Soc. of America, 84 A.2d 68, 70.

73. U.S.—Carey v. Social Sec. Board, D.C.Ky., 62 F.Supp. 458, 460—Safe Deposit & Trust Co. of Baltimore v. Magruder, D.C.Md., 34 F.Supp. 199, 202.

Cal.—In re Teed's Estate, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Pa.—Opening of Quincy Township Ballot-Box, 10 Pa.Dist. & Co. 537.

defined as meaning large.⁷⁴

It may be employed as meaning more than "seeming or imaginary,"⁷⁵ and in this sense is defined as meaning not seeming or imaginary;⁷⁶ having real existence;⁷⁷ not illusive;⁷⁸ existing as a substance;⁷⁹ belonging to substance;⁸⁰ consisting of, pertaining

to, of the nature of, or being, substance;⁸¹ actual;⁸² real;⁸³ genuine;⁸⁴ true;⁸⁵ veritable.⁸⁶

The term is frequently employed to indicate that which is serious as opposed to that which is trivial,⁸⁷ and in this sense is defined as meaning that is of moment;⁸⁸ important;⁸⁹ essential;⁹⁰ material;⁹¹

Similarly defined

(1) Considerable in amount or value.—*Shaughnessy v. Linguistic Soc. of America*, Md., 84 A.2d 68, 70.

(2) Considerable in amount.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

(3) A considerable amount.—*McCague v. New York, C. & St. L. R. Co.*, supra.

74. U.S.—*Safe Deposit & Trust Co. of Baltimore v. Magruder*, D.C.Md., 34 F.Supp. 199, 202.

Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

Pa.—*Opening of Quincy Township Ballot-Box*, 10 Pa. Dist. & Co. 537.

75. Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 571, 225 Ind. 83—*Sylvester v. State*, 187 N.E. 669, 670, 205 Ind. 628.

76. Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Va.—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.
60 C.J. p 979 note 73.

Not imaginary

Md.—*Shaughnessy v. Linguistic Soc. of America*, 84 A.2d 68, 70.

77. Md.—*Shaughnessy v. Linguistic Soc. of America*, supra.

78. Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Va.—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.

60 C.J. p 979 note 72.

79. Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

80. Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.

60 C.J. p 977 note 16.

Similarly defined

(1) In substance.—*People v. Omen*, 124 N.E. 860, 863, 290 Ill. 59.

(2) In substance or in a substantial manner.—*Newark Stove Co. v.*

Gray & Dudley Co., D.C.Tenn., 39 F.Supp. 992, 993.

(3) In the main.—*People v. Omen*, supra.

81. Cal.—In re *Teed's Estate*, 247 P.2d 54, 57, 58, 112 Cal.App.2d 638.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

82. U.S.—*Ewald v. Commissioner of Internal Revenue*, C.C.A.6, 141 F.2d 750, 752.

Pa.—In re *Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton*, 195 A. 466, 468, 129 Pa. Super. 302.

Actually existing

Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.
60 C.J. p 977 note 15.

83. Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Va.—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.
60 C.J. p 977 note 19.

Similarly expressed

"A sixth meaning is real or true in the main or for the most part. So we speak of substantial success, or a substantial agreement as to the points discussed."—*Shaughnessy v. Linguistic Soc. of America*, Md., 84 A.2d 68, 70.

84. Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

Genuine and sound

Md.—*Shaughnessy v. Linguistic Soc. of America*, 84 A.2d 68, 70.

85. Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Va.—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.

60 C.J. p 979 note 74.

86. Kan.—*Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554, 145 Kan. 216.
60 C.J. p 979 note 74.

87. N.J.—*Phelps Dodge Copper Products Corp. v. United Elec., Radio & Mach. Workers of America*, 46 A.2d 453, 459, 138 N.J.Eq. 3.

88. La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

That of moment

Vt.—*Vermont Accident Ins. Co. v. Burns*, 40 A.2d 707, 710, 114 Vt. 143.

89. Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Vt.—*Vermont Accident Ins. Co. v. Burns*, 40 A.2d 707, 710, 114 Vt. 143.

Va.—*Bank of Chatham v. Arendall*, 16 S.E.2d 352, 355, 178 Va. 183—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.

Vital and important

Md.—*Shaughnessy v. Linguistic Soc. of America*, 84 A.2d 68, 70.

90. U.S.—*Ewald v. Commissioner of Internal Revenue*, C.C.A.6, 141 F.2d 750, 752.

Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—*McCague v. New York, C. & St. L. R. Co.*, 71 N.E.2d 569, 576, 225 Ind. 83.

La.—*State v. Breedlove*, 7 So.2d 221, 244, 199 La. 965.

Pa.—In re *Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton*, 195 A. 466, 468, 129 Pa. Super. 302.

Vt.—*Vermont Accident Ins. Co. v. Burns*, 40 A.2d 707, 710, 114 Vt. 143.

Va.—*Bank of Chatham v. Arendall*, 16 S.E.2d 352, 355, 178 Va. 183—*Yeary v. Holbrook*, 198 S.E. 441, 450, 171 Va. 266.

60 C.J. p 977 note 17.

Essentially

U.S.—*Newark Stove Co. v. Gray & Dudley Co.*, D.C.Tenn., 39 F.Supp. 992, 993.

91. U.S.—*Ewald v. Commissioner of Internal Revenue*, C.C.A.6, 141 F.2d 750, 752.

Cal.—In re *Teed's Estate*, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ill.—*People v. Chicago & E. I. R. Co.*, 129 N.E. 846, 848, 296 Ill. 246.

fundamental;⁹² pertaining to fundamental right or to the merits, as distinguished from questions of mere form or manner.⁹³

"Substantial" is further defined as meaning having good substance;⁹⁴ having firm or good material;⁹⁵ strong;⁹⁶ stout;⁹⁷ solid;⁹⁸ solidly based;⁹⁹ firm;¹ firmly established.² It also means absolute; complete; certain; sole;³ abundant; plentiful;⁴ weal-

thy, prosperous, and responsible.⁵

"Substantial" has been held to be equivalent to, or synonymous with, "actual" see 1 C.J.S. p 1433 note 54.1, "bodily" see 11 C.J.S. p 375 note 24.1, "corporeal" see 20 C.J.S. p 235 note 6.1, "stable,"⁶ "sturdy,"⁷ and "tangible."⁸

Phrases employing the word are set out in the note.⁹

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

Pa.—In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 468, 129 Pa. Super. 302.

Vt.—Vermont Accident Ins. Co. v. Burns, 40 A.2d 707, 710, 114 Vt. 143.

Va.—Bank of Chatham v. Arendall, 16 S.E.2d 352, 355, 178 Va. 183—Yeary v. Holbrook, 198 S.E. 441, 450, 171 Va. 266.

Similarly defined

(1) Materially.—Newark Stove Co. v. Gray & Dudley Co., D.C.Tenn., 39 F.Supp. 992, 993.

(2) Including material or essential parts.—People v. Omen, 124 N.E. 860, 863, 290 Ill. 59.

92. U.S.—Ewald v. Commissioner of Internal Revenue, C.C.A.6, 141 F.2d 750, 752.

Ill.—People v. Chicago & E. I. R. Co., 129 N.E. 846, 848, 296 Ill. 246.

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

Pa.—In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 468, 129 Pa. Super. 302.

93. Md.—Shaughnessy v. Linguistic Soc. v. America, 84 A.2d 68, 70.

Illustrative use

"Thus the right of trial by jury is a substantial right. Likewise, substantial performance of a contract is one that fulfills reasonably well the essential stipulations, though it is deficient in punctuality of performance or in minor details of manner, for which moderate deduction from the stipulated price would give adequate compensation."—Shaughnessy v. Linguistic Soc. of America, supra.

94. Cal.—In re Teed's Estate, 247 P. 2d 54, 58, 112 Cal.App.2d 638.

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

95. Md.—Shaughnessy v. Linguistic Soc. of America, 84 A.2d 68, 70.

96. Cal.—In re Teed's Estate, 247 P. 2d 54, 58, 112 Cal.App.2d 638.

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

Md.—Shaughnessy v. Linguistic Soc. of America, 84 A.2d 68, 70.

97. Cal.—In re Teed's Estate, 247 P.2d 54, 58, 112 Cal.App.2d 638.

La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

98. Cal.—In re Teed's Estate, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

Kan.—Seglem v. Skelly Oil Co., 65 P.2d 553, 554, 145 Kan. 216.

La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

Md.—Shaughnessy v. Linguistic Soc. of America, 84 A.2d 68, 70. 60 C.J. p 977 note 10.

99. Cal.—In re Teed's Estate, 247 P.2d 54, 58, 112 Cal.App.2d 638.

Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

1. La.—State v. Breedlove, 7 So.2d 221, 244, 199 La. 965.

2. Cal.—In re Teed's Estate, 247 P.2d 54, 58, 112 Cal.App.2d 638.

3. Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 576, 225 Ind. 83.

4. Ind.—McCague v. New York, C. & St. L. R. Co., supra.

5. Md.—Shaughnessy v. Linguistic Soc. of America, 84 A.2d 68, 70.

6. Cal.—In re Teed's Estate, 247 P. 2d 54, 58, 112 Cal.App.2d 638.

7. Cal.—In re Teed's Estate, supra.

8. Cal.—In re Teed's Estate, supra.

9. Phrases

(1) "Substantial capital" distinguished from "nominal capital" see 12 C.J.S. p 1125 note 30.

(2) "Substantial capital improvement" within Emergency Rent Act authorizing rent adjustment see Landlord and Tenant § 509 b (1).

(3) "Substantial character" of injury necessary for relief against nuisance see Nuisances §§ 18 b, 79 a.

(4) "Substantial compliance" see 15 C.J.S. p 668 note 68.1.

(5) "Substantial damages" defined generally see Damages § 2, and references in title index.

(6) "Substantial doubt" see 28 C. J.S. p 60 note 13.1.

(7) "Substantial error" defined see 30 C.J.S. p 1138 note 21.

(8) "Substantial evidence" defined generally see Evidence § 1016; with-in meaning of constitutional or statutory rules governing judicial review of administrative agency's factual finding see Public Administrative Bodies and Procedure § 223 b.

(9) "Substantial interest" defined see 47 C.J.S. p 3 note 35.1.

(10) "Substantial justice" defined see 51 C.J.S. p 1 note 8.

(11) "Substantial part" within rule bringing employment in substantial part in interstate commerce within coverage of Fair Labor Standards Act see Master and Servant § 151 (9) c.

(12) "Substantial parties" defined see Parties § 1 d.

(13) "Substantial performance" generally see the definition Performance 70 C.J.S. p 452 note 8; of contracts generally see Contracts § 508, and of building contracts see Contracts § 509.

(14) "Substantial right" generally see the definition Right 77 C.J.S. p 395 note 43; laws depriving accused of substantial right or immunity as ex post facto see Constitutional Law §§ 443-446.

(15) "Substantial use" construed to mean "practical use."—John Hancock Mut. Life Ins. Co. v. Schroder, 180 So. 327, 331, 235 Ala. 655.

(16) Other phrases as to which more recent adjudications have not

SUBSTANTIALLY. A relative¹⁰ and elastic¹¹ term which should be interpreted in accordance with the context in which it is used.¹² While it must be employed with care and discrimination, it must, nevertheless, be given effect.¹³

"Substantially" is variously defined as meaning in a substantial manner;¹⁴ in substance;¹⁵ in the main;¹⁶ essentially;¹⁷ solidly;¹⁸ actually;¹⁹ really;²⁰ truly;²¹ competently.²²

The term has been construed as not meaning wholly or completely,²³ but it may mean part,²⁴ or about.²⁵

"Substantially" has been compared with, or distinguished from, "duly" see 28 C.J.S. p 586 note

30, "essentially" see 30 C.J.S. p 1228 note 70, "precisely" see 72 C.J.S. p 478 note 7, and "tenor."²⁶

Phrases employing the term are set out in the note.²⁷

SUBSTANTIA PRIOR ET DIGNIOR EST ACCIDENTE. See 60 C.J. p 980 note 34.

SUBSTANTIATE. To establish the existence or truth of, by true or competent evidence;²⁸ to verify.²⁹

"Substantiating" has been distinguished from "circularizing" see 14 C.J.S. p 1121 note 34.

SUBSTANTIVE. Depending on itself;³⁰ relating

been found see 60 C.J. p 977 notes 11-14, p 978 notes 31-48, 57-66, p 979 notes 67-69, 71, 75-82.

10. U.S.—Application of Curley, Cust. & Pat.App., 158 F.2d 300, 304—Robins v. Wettlaufer, Cust. & Pat.App., 81 F.2d 882, 892—Moss v. Patterson Ballagh Corp., D.C. Cal., 89 F.Supp. 619, 628—Valvona-Marchiony Co. v. Marchiony, D.C. N.J., 207 F. 380, 384.

11. N.H.—Auclair Transp. v. Riley, 69 A.2d 861, 863, 96 N.H. 1.

12. U.S.—Application of Curley, Cust. & Pat.App., 158 F.2d 300, 304—Moss v. Patterson Ballagh Corp., D.C. Cal., 89 F.Supp. 619, 628.

13. U.S.—Robins v. Wettlaufer, Cust. & Pat.App., 81 F.2d 882, 892—Valvona-Marchiony Co. v. Marchiony, D.C.N.J., 207 F. 380, 384.

14. Iowa.—Hardin County v. Weels, 78 N.W. 908, 909, 108 Iowa 174. 60 C.J. p 979 note 90.

15. Okl.—Checotah v. Eufaula, 119 P. 1014, 1019, 31 Okl. 85. 60 C.J. p 979 note 91.

16. Wash.—Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346. 60 C.J. p 979 note 92.

17. Wash.—Corpus Juris cited in Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346. 60 C.J. p 979 notes 89, 94.

18. Ark.—Western Assurance Co. v. Altheimer, 25 S.W. 1067, 1069, 58 Ark. 565.

Pa.—Ebling v. Schuylkill Haven Borough, 41 Pa.Co. 353, 360.

19. Tenn.—Staub v. Knoxville, 33 S.W.2d 415, 419, 161 Tenn. 663.

Wash.—Corpus Juris cited in Gilmore v. Red Top Cab Co. of Wash-

ington, 17 P.2d 886, 887, 171 Wash. 346.

20. Ark.—Western Assur. Co. v. Altheimer, 25 S.W. 1067, 1069, 58 Ark. 565. 60 C.J. p 979 note 93.

21. Ark.—Western Assurance Co. v. Altheimer, supra. 60 C.J. p 979 note 95.

22. Wash.—Corpus Juris cited in Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346. 60 C.J. p 979 note 88.

23. Wash.—Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346.

W.Va.—South Penn. Oil Co. v. Knox, 69 S.E. 1020, 1021, 68 W.Va. 362.

24. Wash.—Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346.

25. Wash.—Corpus Juris cited in Gilmore v. Red Top Cab Co. of Washington, 17 P.2d 886, 887, 171 Wash. 346.

W.Va.—South Penn. Oil Co. v. Knox, 69 S.E. 1020, 1021, 68 W.Va. 362.

26. Tex.—Edgerton v. State, Cr., 70 S.W. 90, 91.

27. Phrases

(1) "Substantially a year" within compensation acts providing method for computing average annual wages of injured employee see the C.J.S. title Workmen's Compensation Acts § 293, also 71 C.J. p 798 note 82.

(2) "Substantially as described" as a term appearing in patent claims see Patents § 206.

(3) "Substantially gainful occupation" within War Risk Insurance Act see Army and Navy § 81 c.

(4) "Substantially identical" securities within Revenue Act provi-

sion relating to wash sales see Internal Revenue § 314.

(5) "Substantially the same" means the same in all important particulars.—Valvona-Marchiony Co. v. Marchiony, D.C.N.J., 207 F. 380, 384—60 C.J. p 979 note 97.

(6) "Substantially true" means true without qualification; in all respects material.—McEwen v. New York Life Ins. Co., 139 P. 242, 243, 23 Cal.App. 694—60 C.J. p 979 note 98.

(7) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 979 note 99—p 980 note 33.

28. Mass.—Graves v. School Committee of Wellesley, 12 N.E.2d 176, 179, 299 Mass. 80. Mo.—State v. Lock, 259 S.W. 116, 120, 302 Mo. 400.

A fact is substantiated when it is established by competent evidence.—People v. Hall, 31 P.2d 831, 835, 140 Cal.App., Supp., 745.

29. Mo.—State v. Lock, 259 S.W. 116, 120, 302 Mo. 400.

30. Me.—State v. Ricker, 29 Me. 84, 89.

Phrases

(1) "Substantive felony" defined see Criminal Law § 6.

(2) "Substantive law" defined and distinguished from "adjective law" see 52 C.J.S. p 1026 notes 54-64.

(3) "Substantive offense" defined see Criminal Law § 1 c.

(4) "Substantive rights" defined see 77 C.J.S. p 395 note 43.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 980 notes 44, 45.

to what is essential;³¹ constituent.³²

SUBSTITUTE. The word "substitute" does not have of itself a common-law meaning or any fixed and definite legal meaning;³³ but usually it presents the idea of something or someone substituted for another;³⁴ and, as a noun, "substitute" is defined as meaning one put in place of another;³⁵ one who acts or appears in another's stead;³⁶ one acting for, or taking the place of, another;³⁷ one who or that which stands in the place of another;³⁸ one who or that which takes the place or serves in lieu of another;³⁹ that which is put in the place of another thing, or used instead of something else;⁴⁰ that which stands in lieu of something else.⁴¹

In common speech and as defined by lexicographers,⁴² the verb "to substitute" means to put in place of;⁴³ to take the place of;⁴⁴ to put one person or thing in the place of another;⁴⁵ to put in the place of another person or thing;⁴⁶ to exchange;⁴⁷ to put under.⁴⁸

"Substitute" as a noun has been distinguished

from "deputy" see 26 C.J.S. p 978 note 90, and "device" see 26 C.J.S. p 1295 note 60, and the verb "substitute" has been held synonymous with "restore" see 77 C.J.S. p 323 note 12.

Substituted. It has been said that the word "substituted" describes a replacement of one thing by another;⁴⁹ and in its ordinary sense and well-known meaning designates something placed in a position previously occupied by another thing;⁵⁰ and implies the removal or elimination of the thing replaced,⁵¹ since something cannot be substituted for something else unless that for which the substitution is made is taken out and that which is substituted is inserted in its place.⁵²

Phrases employing various forms of the word are set out in the note.⁵³

SUBSTITUTION. The word "substitution," as employed generally, connotes the replacement of one unit for another unit,⁵⁴ and is defined as meaning change of one thing for another;⁵⁵ the designation

31. U.S.—Stewart-Warner Corp. v. Le Vally, D.C.Ill., 15 F.Supp. 571, 576.

An essential part

U.S.—Stewart-Warner Corporation v. Le Vally, *supra*.

32. U.S.—Stewart-Warner Corp. v. Le Vally, *supra*.

33. Okl.—Ex parte Hunnicutt, 123 P. 179, 185, 7 Okl.Cr. 213.

34. N.J.—Schulz v. State Board of Education, 40 A.2d 663, 669, 132 N.J.Law 345.

Not the real thing or the real person, but a "substitute."—Schulz v. State Board of Education, 40 A.2d 663, 669, 132 N.J.Eq. 345.

35. U.S.—Bulova Watch Co. v. U. S., 21 Cust. & Pat.App., Customs, 156, 160.

Wash.—New Amsterdam Casualty Co. v. Hamilton, 212 P. 147, 148, 123 Wash. 147.

36. U.S.—Bulova Watch Co. v. U. S., 21 Cust. & Pat.App., Customs, 156, 160.

37. U.S.—Bulova Watch Co. v. U. S., *supra*.
Wash.—New Amsterdam Casualty Co. v. Hamilton, 212 P. 147, 148, 123 Wash. 147.

38. N.D.—State v. Fargo Bottling Works Co., 124 N.W. 387, 391, 19 N.D. 396, 26 L.R.A., N.S., 872.

39. U.S.—Bulova Watch Co. v. U. S., 21 Cust. & Pat.App., Customs, 156, 160.

40. Ala.—Henderson v. State, 59 Ala. 89, 90.
60 C.J. p 981 note 51.

41. N.D.—State v. Fargo Bottling Works Co., 124 N.W. 387, 391, 19 N.D. 396, 26 L.R.A., N.S., 872.

42. U.S.—Toledo Edison Co. v. McMaken, C.C.A.Ohio, 103 F.2d 72, 75.

43. Wash.—New Amsterdam Casualty Co. v. Hamilton, 212 P. 147, 148, 123 Wash. 147.
60 C.J. p 981 note 63.

44. U.S.—Tai Lung Co. v. U. S., 18 C.C.P.A., Customs, 35, 37.

45. U.S.—Toledo Edison Co. v. McMaken, C.C.A.Ohio, 103 F.2d 72, 75.

46. Neb.—State ex rel. Woolsey v. Morgan, 294 N.W. 436, 438, 138 Neb. 635.

47. Neb.—State ex rel. Woolsey v. Morgan, *supra*.

48. Wash.—New Amsterdam Casualty Co. v. Hamilton, 212 P. 147, 148, 123 Wash. 147.

49. U.S.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corp., D.C. Pa., 24 F.Supp. 3, 9.

50. N.Y.—In re Cooke's Estate, 264 N.Y.S. 336, 342, 147 Misc. 528—Friedle v. First Nat. Bank, 221 N.Y.S. 292, 296, 129 Misc. 309.

51. U.S.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corporation, D.C.Pa., 24 F.Supp. 3, 9.

This is not quite so reliable a definition to use when one is dealing with legal relations as when concrete objects are in mind.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corporation, *supra*.

52. U.S.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909, 911.

53. Phrases

(1) "Substitute contract" defined and distinguished from "novation" see Contracts § 10.

(2) "Substitute defendant" defined see Parties § 85 c.

(3) "Substitute service" as a railroad term see Railroads § 1 r.

(4) "Substituted complaint" defined see Pleading § 321 a.

(5) "Substituted service" see Admiralty § 106 c (1) (a), Process §§ 43–53, and the title index to Equity.

(6) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 981 notes 53–58, 61, 62, 65, 68–72.

54. N.J.—Public Service Coordinated Transport v. Newark-Elizabeth Independent Bus Owners Ass'n, 69 A.2d 22, 27, 3 N.J. 118.

55. N.Y.—In re Cooke's Estate, 264 N.Y.S. 336, 342, 147 Misc. 528.

by a person of a person or thing to take the place of himself or another person or of some other thing.⁵⁶

The term may be used as meaning the putting in the place of another in an exchange,⁵⁷ and it may be employed as comprising a change in the form of an amendment.⁵⁸

"Substitution" has been held synonymous with "subrogation" see Subrogation § 1, and it has been distinguished from "alteration" see 3 C.J.S. p 900 note 49, "amendatory" see 3 C.J.S. p 1041 note 96, "amendment" see 3 C.J.S. p 1042 note 36.5, and "modification" see 58 C.J.S. p 840 note 4.

The word "substitution" is sometimes employed with reference to dispositions of property, and in Perpetuities § 75 it is stated that "substitution," in the civil law is defined as the act of a testator in naming a second devisee or legatee who is to take the bequest either on failure of the original devisee or legatee or after him. In connection with testamentary dispositions of property, the term "substitution" is generally applied to a limitation intended to provide for the death of a prior devisee or legatee before the period of distribution as stated in the C.J.S. title Wills § 737, also 69 C.J. p 351 note 47. It would appear that courts recognize that there may be two forms of substitution;⁵⁹ one form being a donation of property to a donee, who holds title and possession for life, without the power of alienation, the property to be transmitted at his death to a second one, originally designated by the donor. It is translated as "entail," and if not identical, it is analogous to a conveyance of a fee tail in the common law, and had the same historical origin, in that the device was created to perpetuate the pow-

er and wealth of great feudal families.⁶⁰ The second form of substitution is where a third person is called to take a gift, inheritance, or legacy in case the donee, heir, or legatee does not take it, and, while it is provided by statute in at least one jurisdiction that this shall not be considered a substitution,⁶¹ it has sometimes been referred to judicially as a "vulgar substitution."⁶²

SUBSTITUTIONAL GIFT. See the C.J.S. title Wills §§ 737-746, also 69 C.J. p 351 note 46-p 358 note 46.

SUBSTITUTIONARY LEGACY. See the C.J.S. title Wills § 1125, also 69 C.J. p 982 note 82.

SUBSTRACT. A term which may be used as meaning to take something clandestinely away without the knowledge and, therefore, without the consent of its owner.⁶³

SUBSTRUCTURE. An understructure or foundation.⁶⁴

SUBSURFACE. Situated beneath the surface.⁶⁵

SUBTENANT. Defined see Landlord and Tenant § 1.

SUBTERFUGE. That to which one resorts for escape or concealment.⁶⁶

SUBTERRANEAN. Being or lying under the surface of the earth.⁶⁷

SUBURB. The term "suburb" is well and commonly understood⁶⁸ as meaning an outlying part of a city or town;⁶⁹ a region or place adjacent to a

Similarly defined

"The word 'substitution' means 'to put in place of another thing,' 'serves in lieu of another,' 'having some of its parts replaced.'"—In re Cooke's Estate, *supra*.

56. N.J.—Public Service Coordinated Transport v. Newark-Elizabeth Independent Bus Owners Ass'n, 69 A.2d 22, 27, 3 N.J. 118.

Phrases

(1) "Substitution of parties" generally see Parties §§ 85-89; Equity §§ 159, 164.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 982 notes 79, 80.

57. U.S.—Fuller v. City Nat. Bank, of Huron, D.C.S.D., 52 F.2d 865, 867.

58. Ala.—Jones v. McDade, 75 So. 988, 994, 200 Ala. 230.
60 C.J. p 982 note 78.

59. La.—Swart v. Lane, 106 So. 833, 834, 160 La. 217—In re Courtin, 81 So. 457, 459, 144 La. 971.

60. La.—Breaux v. Breaux, 51 So.2d 73, 79, 218 La. 795.

61. La.Civ.Code art. 1521.

62. La.—Swart v. Lane, 106 So. 833, 834, 160 La. 217—In re Courtin, 81 So. 457, 460, 144 La. 971.

63. Philippine.—U. S. v. Gatmaitan, 4 Philippine 265, 266.

64. New Standard D.

As a railroad term comprising the embankment, cuts, fills, and other things necessary to make up the roadbed see Railroads § 1 j.

65. New Standard D.

"Subsurface waters" defined see the C.J.S. title Waters § 86, also 60 C.J. p 982 note 86.

66. U.S.—Los Angeles Fisheries, Inc. v. Crook, C.C.A.Cal., 47 F.2d 1031, 1035.

67. Webster New Int.D.

"Subterranean streams," "subterranean watercourses," defined see the C.J.S. title Waters § 86, also 60 C.J. p 982 notes 91-93.

68. Tex.—Holguin v. Villalobos, Civ. App., 212 S.W.2d 498, 500.

69. Tex.—Corpus Juris cited in Villalobos v. Holguin, 208 S.W.2d 871, 874, 146 Tex. 474—Redditt v. Nueces Transp. Co., Civ.App., 224 S.W.2d 290, 291—Holguin v. Villalobos, Civ.App., 212 S.W.2d 498, 500.

60 C.J. p 982 note 94.

city;⁷⁰ a smaller place adjacent to a city;⁷¹ an outlying district which is adjacent to the city and convenient for use as a place of residence for those who work in the city;⁷² a town or village so near that it may be used for residence by those who do business in the city.⁷³ It has been said that a suburb of a city is an outlying part of it which may be used for business or for residential purposes or for both.⁷⁴

Suburbs. Collectively, environs; surroundings; outskirts; hence, any adjuncts of a place.⁷⁵ The word signifies the outskirts of a city to live in or have branch stores in.⁷⁶

SUBURBAN. A term employed to designate that district which lies adjacent to and outside the city limits.⁷⁷ Suburban property is that which is located in the outskirts of a city or town,⁷⁸ and the suburban portion of the city is the outlying part; that portion which is remote from the center of trade and population, where the houses are, generally, more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting.⁷⁹ The suburban part of the city may be used for business, or it may be occupied by residences, or it may be used both for residence and

business purposes.⁸⁰

SUBVERSIVE. Tending to subvert; militating strongly against something specified; destructive; subversionary.⁸¹

SUBVERT. To overthrow; to ruin utterly; to corrupt; to destroy.⁸²

SUBWAY. See Street Railroads § 2.

SUCCEED. One of the accepted meanings of the word "succeed" is to take the place of.⁸³

Succeeding. A term said to be susceptible of different significations and capable of being used in different senses.⁸⁴ It is defined as meaning following another thing in order.⁸⁵

SUCCESS. The word "success," according to the dictionaries,⁸⁶ means the favorable termination of something attempted;⁸⁷ the attainment of the proposed object.⁸⁸ It means attainment of the end desired,⁸⁹ and that end may have no relation whatever to money or money profits.⁹⁰

SUCCESSFUL. The word "successful" has a broad and extensive signification,⁹¹ and is defined as mean-

70. Ga.—Piedmont Cotton Mills v. Georgia R., etc., Co., 62 S.E. 52, 61, 131 Ga. 129.

71. Tex.—Corpus Juris cited in Villalobos v. Holguin, 208 S.W.2d 871, 874, 146 Tex. 474—Redditt v. Nueces Transp. Co., Civ.App., 224 S.W.2d 290, 291—Holguin v. Villalobos, Civ.App., 212 S.W.2d 498, 500—Woolf v. Del Rio Motor Transp. Co., Civ.App., 27 S.W.2d 874, 875.

72. Tex.—Villalobos v. Holguin, 208 S.W.2d 871, 874, 146 Tex. 474—Redditt v. Nueces Transp. Co., Civ. App., 224 S.W.2d 290, 291.

73. Ga.—Piedmont Cotton Mills v. Georgia R., etc., Co., 62 S.E. 52, 61, 131 Ga. 129.

74. Tex.—Villalobos v. Holguin, 208 S.W.2d 871, 874, 146 Tex. 474—Redditt v. Nueces Transp. Co., Civ. App., 224 S.W.2d 290, 291.

75. Ga.—Piedmont Cotton Mills v. Georgia R., etc., Co., 62 S.E. 52, 61, 131 Ga. 129.

76. Tex.—Villalobos v. Holguin, 208 S.W.2d 871, 874, 146 Tex. 474—Redditt v. Nueces Transp. Co., Civ. App., 224 S.W.2d 290, 291.

77. Minn.—In re Minneapolis & St.

P. Suburban Ry. Co., 112 N.W. 13, 16, 101 Minn. 132.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 983 notes 2, 3.

78. Del.—Philadelphia, B. & W. R. Co. v. Mayor and Council of Wilmington, 57 A.2d 759, 765, 30 Del. Ch. 213.

"Semirural" see 79 C.J.S. p 1039 notes 46, 47.

79. Ind.—Rowland v. City of Greencastle, 62 N.E. 474, 476, 157 Ind. 591.

80. Ind.—Rowland v. City of Greencastle, supra.

81. New Standard D. Statutes providing for dismissal of civil service employees for advocating subversive doctrines see Officers § 62 c (1).

82. Me.—Chesley v. King, 74 Me. 164, 166, 43 Am.R. 569. 60 C.J. p 983 note 5.

83. Minn.—In re Crosby's Estate, 15 N.W.2d 501, 505, 218 Minn. 149.

84. Conn.—Sands v. Lyon, 18 Conn. 18, 27.

60 C.J. p 983 note 8.

Phrases employing the term "succeeding" and as to which more recent adjudications have not been found see 60 C.J. p 983 notes 9, 10.

85. Cal.—Hurst v. City and County of San Francisco, 201 P.2d 805, 807, 33 Cal.2d 298.

86. Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 1001, 58 Ohio App. 513.

87. Iowa.—Batten v. A. T. Benge Drug Co., 144 N.W. 37, 38, 162 Iowa 280.

A favorable termination Nev.—Cole v. Richmond Min. Co., 1 P. 663, 665, 18 Nev. 120.

88. Iowa.—Batten v. A. T. Benge Drug Co., 144 N.W. 37, 38, 162 Iowa 280.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 983 note 13.

89. Ohio.—Cincinnati Summer Opera Ass'n v. Williams, 16 N.E.2d 1000, 1001, 58 Ohio App. 513.

90. Ohio.—Cincinnati Summer Opera Ass'n v. Williams, supra.

91. Cal.—Matteson v. State Board

ing gaining or having gained success; having the desired effect; resulting or terminating in success;⁹² the obtaining or terminating in the accomplishment of what is desired, intended, or aimed at.⁹³ The courts have stated that only that can be said to be successful which terminates in the accomplishment of what is wished or intended.⁹⁴

SUCCESSFULLY. In a successful manner; with a favorable termination of what is attempted.⁹⁵

SUCCESSION. The term "succession" is defined generally as meaning the act of succeeding, or the state of being successive; a following of things consecutively;⁹⁶ and, as applied to persons, a series of persons following one another.⁹⁷

It is defined more specifically as the act or right of legal or official investment with a predecessor's office, dignity, possessions, or functions;⁹⁸ also, the legal or actual order of so succeeding, or that

which is or is to be vested or taken.⁹⁹

The word "succession" is also applied to lineage or order of descendants,¹ and may be employed to indicate the passing of property,² and in a technical sense it denotes the devolution of title to property under the laws of descent and distribution as stated in Descent and Distribution § 1 c.

SUCCESSIVE. The word "successive" imports concatenation, and it does not define duration,³ and it is defined as meaning following one after another in a line or series.⁴

It has been held synonymous with "consecutive" see 15 C.J.S. p 978 note 53, and has been distinguished from "isolated" see 48 C.J.S. p 776 note 55.

SUCCESSIVELY. By succession;⁵ in a series⁶ or order;⁷ in a successive manner;⁸ consecutively;⁹ one after another.¹⁰

of Education, 136 P.2d 120, 125, 57 Cal.App.2d 991.

92. N.Y.—*Corpus Juris* quoted in *Dornan v. Humphrey*, 106 N.Y.S. 2d 142, 144, 278 App.Div. 1010—*Corpus Juris* quoted in *Diamond v. Diamond*, 108 N.Y.S.2d 864, 870, 200 Misc. 1074.
60 C.J. p 983 note 14.

Phrases

(1) "Successful party" within statutes relating to costs generally see Costs §§ 8-18; on appeal see Costs § 296.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 983 notes 15-20.

93. Cal.—*Corpus Juris* quoted in *Merlino v. Fresno Macaroni Mfg. Co.*, 168 P.2d 182, 185, 74 Cal.App. 2d 120.

N.Y.—*Corpus Juris* quoted in *Dornan v. Humphrey*, 106 N.Y.S.2d 142, 144, 278 App.Div. 1010—*Corpus Juris* quoted in *Diamond v. Diamond*, 108 N.Y.S.2d 864, 870, 200 Misc. 1074.

94. Cal.—*Merlino v. Fresno Macaroni Mfg. Co.*, 168 P.2d 182, 185, 74 Cal.App.2d 120.

N.Y.—*Moore v. Otto Gas Engine Works*, 121 N.Y.S. 631, 633, 136 App.Div. 713.

95. Century D.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 983 note 22, p 984 note 23.

96. New Standard D.

Phrases

(1) "Succession tax" see Taxation § 1111 et seq., and the title index to Internal Revenue.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 984 notes 30-36.

97. Eng.—*Tyrone v. Waterford*, 1 DeG.F. & J. 613, 623, 62 Eng.Ch. 475, 45 Reprint 499.
60 C.J. p 984 note 25.

98. Wis.—*Glascott v. Bragg*, 87 N. W. 853, 854, 111 Wis. 605, 56 L.R.A. 258.

99. Wis.—*Glascott v. Bragg*, supra.

1. Eng.—*Tyrone v. Waterford*, 1 DeG.F. & J. 613, 623, 62 Eng.Ch. 475, 45 Reprint 499.

2. Ohio.—In re *Gatch's Estate*, Prob., 83 N.E.2d 526, 529.

3. Ind.—*Geyer v. Lietzan*, 103 N.E. 2d 199, 201, 230 Ind. 404.

4. U.S.—In re *Buchholtz*, Cust. & Pat.App., 54 F.2d 965, 966.
60 C.J. p 984 note 38.

Phrases

(1) "Successive assignees" see Assignments § 119.

(2) "Successive attachments" see Attachments § 277.

(3) "Successive guardians" see Guardian and Ward § 195.

(4) "Successive indictments" generally see Indictments and Informations § 34.

(5) "Successive informations" see Indictments and Informations § 78.

(6) "Successive larcenies" see Larceny §§ 53, 54.

(7) "Successive mortgages" see Mortgages § 214.

(8) "Successive offenses" see Criminal Law §§ 1958-1973.

(9) "Successive sureties" in judicial proceedings see Principal and Surety § 390.

(10) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 984 notes 39-41.

5. La.—*Derby v. Dancey*, 36 So. 795, 796, 112 La. 891.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 984 note 50.

6. La.—*Derby v. Dancey*, 36 So. 795, 796, 112 La. 891.

Or.—*Walker v. Goldsmith*, 12 P. 537, 555, 14 Or. 125.

7. Or.—*Walker v. Goldsmith*, supra.

Similarly defined

Following in order or uninterrupted course.—*Walker v. Goldsmith*, supra.

8. Or.—*Walker v. Goldsmith*, supra.

9. La.—*Derby v. Dancey*, 36 So. 795, 796, 112 La. 891.

10. La.—*Derby v. Dancey*, supra.

SUCCESSOR. The word "successor" is sometimes considered to be a term of art,¹¹ but it is also regarded as being a plastic word,¹² of the most general signification.¹³

It has a twofold meaning¹⁴ and may be used in the sense of one entitled to succeed as well as in the sense of one who has in fact succeeded.¹⁵

In a proper situation, it may mean succeeding to a place, or a right, or an interest, or a power, official or otherwise.¹⁶ While in modern acceptation the term has a broader significance than succession in respect of the estate of a deceased,¹⁷ it is an apt and appropriate term to designate one to whom property descends, as stated in Descent and Distribution § 1 c.

The term "successor" is variously defined as meaning he that followeth, or cometh in another's place;¹⁸ one that succeeds or follows;¹⁹ one who follows another into a position;²⁰ one who succeeds or takes

the place of another;²¹ one who succeeds to the rights or place of another;²² one who takes the place of another by succession;²³ one who takes the place of a predecessor or preceding thing;²⁴ one who takes the place which another has left, and sustains the like part or character;²⁵ also, a person who has been appointed or elected to some office after another person.²⁶

The word "successors" has been distinguished from "assigns" see 6 C.J.S. p 1036 note 25.

SUCCINCT. Brief; exact; precise.²⁷

SUCCULENT. Full of juice; juicy.²⁸

SUCCURRITUR MINORI; FACILIS EST LAP-SUS JUVENTUTIS. See 60 C.J. p 986 note 84.

SUCESSION LEGITIMA. In Spanish law, issue,²⁹ or lawful heirs.³⁰

11. U.S.—Dunkley Co. v. California Packing Corp., C.C.A.N.Y., 277 F. 996, 999.

12. Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827. 60 C.J. p 985 note 52.

13. U.S.—U. S. v. B. F. Sturtevant Co., C.C.A.Mass., 99 F.2d 72, 73—Dunkley Co. v. California Packing Corp., C.C.A.N.Y., 277 F. 996, 999.

Employed in contracts and statutes the word has no fixed meaning.

U.S.—U. S. v. B. F. Sturtevant Co., C.C.A.Mass., 99 F.2d 72, 74.

Tex.—North Texas Nat. Bank v. Thompson, Civ.App., 23 S.W.2d 494, 499.

14. Cal.—People v. Ward, 40 P. 538, 539, 107 Cal. 236—Bremner v. Alamos Land Co., 53 P.2d 382, 383, 11 Cal.App.2d 150.

15. Cal.—People v. Ward, 40 P. 538, 539, 107 Cal. 236—Bremner v. Alamos Land Co., 53 P.2d 382, 383, 11 Cal.App.2d 150.

16. U.S.—Dunkley Co. v. California Packing Corp., C.C.A.N.Y., 277 F. 996, 999.

60 C.J. p 985 note 59 [a].

17. Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

60 C.J. p 985 note 59.

18. Fla.—Beatty v. Ross, 1 Fla. 198, 209.

Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

Phrases

(1) "Successor or assign" see 6 C.J.S. p 1036 note 30.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 985 note 62—p 986 note 83.

19. Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

Pa.—In re Duncan's Estate, 199 A. 208, 210, 330 Pa. 241—White v. Rairdon, 52 Pa. Dist. & Co. 558, 562, 33 Del.Co. 14.

Tex.—Thompson v. North Texas Nat. Bank, Com.App., 37 S.W.2d 735, 739.

20. Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

60 C.J. p 985 note 55.

21. U.S.—Corpus Juris cited in Wawak Co. v. Kaiser, C.C.A.Ill., 90 F. 2d 694, 697—Park Nat. Bank of Kansas City v. Travelers Indem. Co., D.C.Mo., 90 F.Supp. 275, 277.

Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

60 C.J. p 985 note 56.

According to all lexicographers

U.S.—Wawak Co. v. Kaiser, C.C.A. Ill., 90 F.2d 694, 697—Park Nat. Bank of Kansas City v. Travelers Indem. Co., D.C.Mo., 90 F.Supp. 275, 277.

Kan.—State v. Andrews, 67 P. 870, 877, 64 Kan. 474.

22. Idaho.—Appeal of MacKenzie Auto Equipment Co., 232 P.2d 130, 133, 71 Idaho 362.

23. Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

Tex.—Thompson v. North Texas Nat. Bank, Com.App., 37 S.W.2d 735, 739.

24. Idaho.—Appeal of MacKenzie Auto Equipment Co., Idaho, 232 P. 2d 130, 133, 71 Idaho 362.

25. U.S.—Corpus Juris cited in Wawak Co. v. Kaiser, C.C.A.Ill., 90 F.2d 694, 697.

Iowa.—Corpus Juris quoted in Dille v. Plainview Coal Co., 250 N.W. 607, 613, 217 Iowa 827.

Pa.—White v. Rairdon, 52 Pa. Dist. & Co. 558, 562, 33 Del.Co. 14.

Tex.—Thompson v. North Texas Nat. Bank, Com.App., 37 S.W.2d 735, 739.

26. Pa.—In re Duncan's Estate, 199 A. 208, 210, 330 Pa. 241.

27. Ind.—Logan v. Hite, 13 N.E.2d 702, 703, 214 Ind. 233—Wolfe v. Wilsey, 28 N.E. 1004, 1007, 2 Ind. App. 549.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 986 notes 85, 86.

28. U.S.—U. S. v. A. Sahadi Co., 23 Ct.Cust.App. 293, 299.

29. U.S.—De Rodriguez v. Vivoni, Puerto Rico, 26 S.Ct. 475, 476, 201 U.S. 371, 376, 50 L.Ed. 792.

Puerto Rico.—Costello v. Pumarada, 3 Puerto Rico 308, 318.

30. U.S.—De Rodriguez v. Vivoni, Puerto Rico, 26 S.Ct. 475, 476, 201 U.S. 371, 376, 50 L.Ed. 792.

SUCH. The word "such" is a descriptive,³¹ limiting,³² and relative³³ term, which may be used as an adjective,³⁴ or as an adverb or pronoun.³⁵ It may be employed to refer to a person or thing previously mentioned,³⁶ or for purposes of comparison as to quality or character,³⁷ and it has been said that "such" is essentially a term of comparison.³⁸

In its natural³⁹ and ordinary⁴⁰ sense, and by grammatical usage,⁴¹ the word "such" refers to an antecedent,⁴² some antecedent word or phrase,⁴³

and, more specifically, to the last precedent⁴⁴ antecedent,⁴⁵ unless the meaning would thereby be impaired.⁴⁶ Thus the word "such" refers back to and identifies something previously spoken of,⁴⁷ something that has gone before,⁴⁸ something that has been specified.⁴⁹ It always refers to a class just before pointed out,⁵⁰ and should be construed as referring back to a common subject matter.⁵¹ It may be used as representing the object as already particularized in terms which are not mentioned,⁵²

31. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992—U. S. v. Pittman, C.C.A.Ala., 151 F.2d 851, 852.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 986 note 90.

32. U.S.—U. S. v. Pittman, C.C.A.Ala., 151 F.2d 851, 852.

33. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 986 note 91.

A rather slippery word

U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

34. Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.
Minn.—State v. End, 45 N.W.2d 378, 380, 232 Minn. 266.
S.D.—State ex rel. Hurd v. Blomstrom, 37 N.W.2d 247, 249, 72 S.D. 526.

Relative adjective

Cal.—In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.

35. New Standard D.

36. Ill.—People ex rel. Miller v. Mobile & O. R. Co., 29 N.E.2d 604, 607, 374 Ill. 376—Integrity Mut. Ins. Co. v. Boys, 127 N.E. 748, 751, 293 Ill. 307.

37. Ill.—People ex rel. Miller v. Mobile & O. Ry. Co., 29 N.E.2d 604, 607, 374 Ill. 376—Integrity Mut. Ins. Co. v. Boys, 127 N.E. 748, 751, 293 Ill. 307.

38. Mo.—King v. Board of Trustees of Firemen's Pension Fund, 184 S.W. 929, 932, 192 Mo.App. 583.

Similarly expressed

"Such" is essentially a term of comparison, and to complete its force that with which comparison is made requires to be expressed, implied, or understood. When expressed, "as" or "that" is used before the subject of comparison as the correlative of "such;" as, "such" a voice "as" hers is unusual; the averment was "such that" it could

not be gainsaid. Unlike attributive adjectives, it is not preceded by an article, but the indefinite article is often placed between it and the substantive it qualifies: as, "all," "some," "few," "many," precede "such"; as, "all such" follies; "many such" disasters.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

"Such" always implies from its sense a comparison with another thing, either unexpressed as being involved in the context or expressed, being then followed by "as" or "that" before the thing which is the subject of comparison.—Traders' Ins. Co. v. Dobbins & Ewing, 86 S.W. 383, 385, 114 Tenn. 227.

39. Cal.—In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.

40. Mont.—State v. Second Judicial Dist. Ct., 68 P. 570, 574, 26 Mont. 396.

41. Cal.—In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.

Grammatically

Pa.—Philadelphia v. River Front R. Co., 19 A. 356, 357, 133 Pa. 134.

42. Pa.—Philadelphia v. River Front R. Co., supra.

43. Mont.—State v. Second Judicial Dist. Ct., 68 P. 570, 574, 26 Mont. 396.

44. Cal.—In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.

45. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

Cal.—Corpus Juris cited in In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.
60 C.J. p 988 note 55.

In this respect it is equivalent to "said," "aforesaid," "afore described," and "same," as to all of which the same grammatical rule applies, that is, in the absence of some controlling reason they refer to the last antecedent.—In re Wallace's Estate, supra.

In order to be intelligible it must refer to some antecedent and will generally be construed to refer to the

last antecedent in the context unless some compelling reason appears why it should not be so construed.—American Smelting & Refining Co. v. Stettenheim, 164 N.Y.S. 253, 256, 177 App. Div. 392—In re Jordon, 28 N.Y.S.2d 88, 91, 176 Misc. 557.

As applied to an individual, partnership, etc., "such" must be interpreted to mean the kind of individual or partnership most recently referred to in the context.—In re Brock, 166 A. 785, 787, 312 Pa. 92.

46. Va.—Strawberry Hill Land Corp. v. Starbuck, 97 S.E. 362, 367, 124 Va. 71.
60 C.J. p 988 note 56.

47. Cal.—In re Wallace's Estate, 219 P.2d 910, 913, 98 Cal.App.2d 285.

48. Ill.—People ex rel. Miller v. Mobile & O. R. Co., 29 N.E.2d 604, 607, 374 Ill. 376—Integrity Mut. Ins. Co. v. Boys, 127 N.E. 748, 751, 293 Ill. 307.

49. Tex.—Warner El. Mfg. Co. v. Houston, Civ.App., 28 S.W. 405, 408.
Va.—Strawberry Hill Land Corp. v. Starbuck, 97 S.E. 362, 367, 124 Va. 71.

Similarly stated

It refers to the specific articles mentioned.—Erwin v. Steele, Tex.Civ. App., 228 S.W.2d 882, 885.

50. U.S.—U. S. v. Pittman, C.C.A.Ala., 151 F.2d 851, 852.

Similarly expressed

It signifies that the word or phrase of which it is made an attributive is to be understood as indicating something of the same class or in the same situation as the one already described, and to which it refers.—State v. Second Judicial Dist. Ct., 68 P. 570, 574, 26 Mont. 396.

51. N.Y.—American Smelting & Refining Co. v. Stettenheim, 164 N.Y.S. 253, 256, 177 App.Div. 392.

52. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 988 note 54.

and it may indicate or suggest a person or thing originally specified by a name or designation.⁵³

The word "such" is variously defined as meaning like;⁵⁴ of the like kind;⁵⁵ of the same or like kind;⁵⁶ of that kind;⁵⁷ of this or that kind, character, or measure;⁵⁸ of the kind or sort previously indicated;⁵⁹ of the sort⁶⁰ or degree⁶¹ previously

indicated or contextually implied; before mentioned; previously characterized or specified;⁶² having the particular quality or character specified.⁶³

"Such" is further defined as meaning the same;⁶⁴ of the same class, type, or sort;⁶⁵ the same as previously mentioned or specified;⁶⁶ being the same as what has been mentioned⁶⁷ or indicated;⁶⁸ being

53. Pa.—Judge v. Trust Co., 25 Pa. Dist. 679, 681.
60 C.J. p 987 note 53.

54. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Mo.—State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 788, 360 Mo. 490.
60 C.J. p 986 note 96.

Resembling

Ala.—Harris v. Nashville, etc., R. Co., 44 So. 962, 967, 153 Ala. 139, 14 L.R.A.,N.S., 261.
Kan.—Missouri Pac. R. Co. v. Board of Com'rs of Atchison County, 287 P. 612, 613, 130 Kan. 554.

55. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Minn.—Corpus Juris cited in In re Youmans' Will, 15 N.W.2d 537, 541, 218 Minn. 172, 154 A.L.R. 1171.
Mo.—State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 788, 360 Mo. 490.
Pa.—In re Reed's Estate, 19 A.2d 365, 367, 342 Pa. 54.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 986 note 1.

Of like kind or degree

Ohio.—Charles Behlen Sons' Co. v. Ricketts, 164 N.E. 436, 439, 30 Ohio App. 167.
Tenn.—Traders' Ins. Co. v. Dobbins & Ewing, 86 S.W. 383, 385, 114 Tenn. 227.

56. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Mo.—State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City, 184 S.W. 929, 932, 192 Mo.App. 583.
S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 N.W.2d 707, 710, 69 S.D. 303.

57. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Minn.—Corpus Juris cited in In re Youmans' Estate, 15 N.W.2d 537, 541, 218 Minn. 172, 154 A.L.R. 1171.
Mo.—State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 788, 360 Mo. 490.
N.Y.—In re Watson's Will, 258 N.Y. S. 755, 776, 144 Misc. 213.
Pa.—In re Reed's Estate, 19 A.2d 365, 367, 342 Pa. 54—In re Brock, 166 A. 785, 787, 312 Pa. 92.
S.D.—Haas v. Independent School

Dist. No. 1 of Yankton, 9 N.W.2d 707, 710, 69 S.D. 303.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 986 note 99.

Of that class

Ala.—Harris v. Nashville, etc., R. Co., 44 So. 962, 967, 153 Ala. 139, 14 L.R.A.,N.S., 261.
60 C.J. p 986 note 98.

58. U.S.—Campbell v. Mueller, C.C. A. Ohio, 159 F.2d 803, 806.
Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.

59. Mo.—State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 788, 360 Mo. 490.

60. U.S.—Campbell v. Mueller, C.C. A. Ohio, 159 F.2d 803, 806.
Cal.—People v. Heslen, 163 P.2d 21, 30.

Ill.—People ex rel. Miller v. Mobile & O. R. Co., 29 N.E.2d 604, 607, 374 Ill. 376.
Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.
Minn.—State v. End, 45 N.W.2d 378, 380, 232 Minn. 266.

61. U.S.—Campbell v. Mueller, C.C. A. Ohio, 159 F.2d 803, 806.
Cal.—People v. Heslen, 163 P.2d 21, 30.
Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.
Minn.—State v. End, 45 N.W.2d 378, 380, 232 Minn. 266.

62. Ill.—People ex rel. Miller v. Mobile & O. Ry. Co., 29 N.E.2d 604, 607, 374 Ill. 376.
Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.

63. Pa.—In re Brock, 166 A. 785, 787, 312 Pa. 92.
Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 986 note 93.

Similarly stated

(1) Having the qualities specified.
—U. S. v. Legg, C.C.A.W.Va., 157 F. 2d 990, 992.

(2) Having the quality already or just specified.
Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.
Minn.—State v. End, 45 N.W.2d 378, 380, 232 Minn. 266.

(3) Having the same in quality.—

In re Hull, 110 P. 256, 257, 18 Idaho 475, 30 L.R.A.,N.S., 465.

(4) Being the same in quality.—U. S. v. Legg, supra.

64. Kan.—Missouri Pacific R. Co. v. Board of Com'rs of Atchison County, 287 P. 612, 613, 130 Kan. 554.
Vt.—Ackley v. Fish, 55 Vt. 18, 20.

Equivalent to

Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.

65. Iowa.—State v. Cooper, 265 N.W. 915, 916, 221 Iowa 658.

In the same category

Iowa.—State v. Cooper, supra.

66. Mont.—State ex rel. Anaconda Copper Min. Co. v. District Court, 68 P. 570, 574, 26 Mont. 396.
Pa.—Judge v. Trust Co., 25 Pa. Dist. 679, 681.
S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 S.W.2d 707, 710, 69 S.D. 303.
60 C.J. p 987 note 6.

Similarly defined

(1) The same as has been mentioned.—Warner El. Mfg. Co. v. Houston, Tex.Civ.App., 28 S.W. 405, 408.

(2) The same as has been theretofore mentioned.—Strawberry Hill Land Corp. v. Starbuck, 97 S.E. 362, 366, 124 Va. 71.

(3) The one previously indicated, characterized, or specified.—State ex rel. Hurd v. Blomstrom, 37 N.W.2d 247, 249, 72 S.D. 526.

67. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Idaho.—In re Hull, 110 P. 256, 257, 18 Idaho 475, 30 L.R.A.,N.S., 465.
N.Y.—In re Watson's Will, 258 N.Y. S. 755, 776, 144 Misc. 213.
S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 S.W.2d 707, 710, 69 S.D. 303.

Similarly defined

Of the same kind or class as something mentioned.—People ex rel. Miller v. Mobile & O. Ry. Co., 29 N.E.2d 604, 607, 374 Ill. 376.

68. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.
Idaho.—In re Hull, 110 P. 256, 257, 18 Idaho 475, 30 L.R.A.,N.S., 465.

the same as something understood by the speaker or the hearer, or purposely left indefinite;⁶⁹ similar;⁷⁰ identical;⁷¹ identical with;⁷² identical with, or similar to, something specified⁷³ or implied;⁷⁴ certain;⁷⁵ not other or different.⁷⁶

Phrases employing the word "such" are set out in the note.⁷⁷

SUCKER. A person readily deceived.⁷⁸

SUCROSE. Refined sugar.⁷⁹

SUCTION. Act or process of exerting a force upon a solid, liquid, or gaseous body by reason of a reduced air pressure over part of its surface.⁸⁰ It is practically the same as vacuum, in that both involve rarefaction of air.⁸¹

SUDDEN. While the word "sudden" is of somewhat varied signification,⁸² it does have a primary⁸³ and lexical⁸⁴ meaning, and is defined to mean happening without previous notice or with very brief notice;⁸⁵ coming unexpectedly;⁸⁶ unexpected;⁸⁷ unusual;⁸⁸

S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 S.W.2d 707, 710, 69 S.D. 303.

69. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

A concise and elliptical use by which specification is avoided.—U. S. v. Legg, supra.

70. U.S.—U. S. v. Legg, supra.
Mo.—State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 788, 360 Mo. 490.

Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.
60 C.J. p 987 note 4.

71. U.S.—Japan Import Co. v. U. S., 24 C.C.P.A., Customs, 167, 176—U. S. v. Johnson Co., 9 Ct.Cust.App. 258, 270.

72. N.Y.—In re Watson's Will, 258 N.Y.S. 755, 776, 144 Misc. 213.

73. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

Idaho.—In re Hull, 110 P. 256, 257, 18 Idaho 475, 30 L.R.A., N.S., 465.

Mo.—State v. Kansas City Firemen's Pension Fund Board of Trustees, 184 S.W. 929, 932, 192 Mo.App. 583.

S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 N.W.2d 707, 710, 69 S.D. 303.

74. U.S.—U. S. v. Legg, C.C.A.W.Va., 157 F.2d 990, 992.

Idaho.—In re Hull, 110 P. 256, 257, 18 Idaho 475, 30 L.R.A., N.S., 465.

S.D.—Haas v. Independent School Dist. No. 1 of Yankton, 9 N.W.2d 707, 710, 69 S.D. 303.

Similarly defined

Identical with, or similar to, something which has been already specified or implied.—*Strawberry Hill Land Corporation v. Starbuck, 97 S.E. 362, 367, 124 Va. 71.*

75. Kan.—State v. Estep, 71 P. 857, 859, 66 Kan. 416.

Tex.—Erwin v. Steele, Civ.App., 228 S.W.2d 882, 885.

76. Mont.—State ex rel. Anaconda Copper Min. Co. v. District Court, 68 P. 570, 574, 26 Mont. 396.

S.D.—Haas v. Independent School

Dist. No. 1 of Yankton, 9 S.W.2d 707, 710, 69 S.D. 303.

Tenn.—Traders' Ins. Co. v. Dobbins & Ewing, 86 S.W. 383, 385, 114 Tenn. 227.

60 C.J. p 986 note 95.

77. Phrases

(1) "In such case" as equivalent to "then" see 42 C.J.S. p 483 note 82.

(2) "In such manner" as not synonymous with "in such form" see 42 C.J.S. p 483 note 82.

(3) "Such as" see 6 C.J.S. p 784 notes 58, 59.

(4) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 987 notes 7-37, 41-49, p 988 notes 57-9, p 989 notes 10-34, 36-51.

78. N.Y.—People v. Simmons, 109 N.Y.S. 190, 194, 125 App.Div. 234, 22 N.Y.Cr. 270.

79. U.S.—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A.7, 120 F.2d 258, 261.

80. Webster New Int.D.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 989 notes 56, 57.

81. U.S.—Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co., D.C.Del., 225 F. 138, 142.

66 C.J. p 396 note 68.

82. Del.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry 415.

83. Kan.—Hagaman v. Manley, 42 P. 2d 946, 949, 141 Kan. 647.

84. Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.
Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

85. Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Kan.—Hagaman v. Manley, 42 P.2d 946, 949, 141 Kan. 647.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713—Barnes v. Com-

mercial Auto Body Co., App., 13 S. W.2d 553, 554.

Similarly defined

(1) Happening without notice.—*Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 93, 245 Mo. 598.*

(2) Without previous notice.—*Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry, Del., 415.*

(3) Without warning or preparation.—*Barnes v. Commercial Auto Body Co., Mo.App., 13 S.W.2d 553, 554.*

(4) All at once.—*Barnes v. Commercial Auto Body Co., supra.*

(5) All of a sudden.—*Barnes v. Commercial Auto Body Co., supra.*

86. Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Kan.—Hagaman v. Manley, 42 P.2d 946, 949, 141 Kan. 647.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

60 C.J. p 989 note 59.

Similarly defined

(1) Coming or occurring unexpectedly.—*Hagaman v. Manley, 42 P.2d 946, 949, 141 Kan. 647.*

(2) Come upon or met with unexpectedly.

Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

87. Del.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry 415.

Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 93, 245 Mo. 598—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

88. Ga.—Blackshear v. Liberty Mut.

unlooked for;⁸⁹ unforeseen;⁹⁰ unprepared for.⁹¹

"Sudden" does not mean instantaneous,⁹² but it may mean quick;⁹³ rapid;⁹⁴ hasty by nature;⁹⁵ abrupt; precipitate; rash; violent.⁹⁶

The term "sudden" has been held synonymous with "prompt" see 73 C.J.S. p 131 note 54, and it has been distinguished from "deliberate" see 26 C.J.S. p 690 note 83, and "gradual" see 38 C.J.S. p 973 note 25.

Phrases employing the word "sudden" are set out in the note.⁹⁷

SUDDENLY. It has been said that the word "suddenly" is well understood by the average layman,⁹⁸ although it is an elastic,⁹⁹ relative¹ term, admitting

of much variety of definition.² It is defined as meaning unexpectedly;³ hastily; without preparation or premeditation; quickly; immediately.⁴

"Suddenly" is said to be the antithesis of "gradually" see 38 C.J.S. p 973 note 27.

Various workmen's compensation acts provide that in order for hernia to be compensable it must have appeared suddenly, and the meaning of the word "suddenly" as used in such provisions is discussed in the C.J.S. title Workmen's Compensation Acts § 185, also 71 C.J. p 621 note 16—p 622 note 20.

SUE. To commence or to continue legal proceedings for the recovery of a right;⁵ to proceed with, as an action, and follow it up to its proper termination;⁶ to proceed legally to secure a right or re-

Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

89. Mo.—Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 93, 245 Mo. 598.

90. Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Kan.—Hagaman v. Manley, 42 P.2d 946, 949, 141 Kan. 647.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713—Barnes v. Commercial Auto Body Co., App., 13 S.W.2d 553, 554.

91. Kan.—Hagaman v. Manley, 42 P.2d 946, 949, 141 Kan. 647.

92. Me.—Case of McDougal, 144 A. 446, 127 Me. 491.

Mo.—Vogt v. Ford Motor Co., App., 133 S.W.2d 684, 688.

93. Del.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry 415.

Mo.—Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 93, 245 Mo. 598.

94. Del.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry 415.

Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 93, 245 Mo. 598—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713—Barnes v. Commercial Auto Body Co., App., 13 S.W.2d 553, 554.

95. Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

Similarly defined
Hastily prepared, employed, made, or done.

Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

96. Ga.—Blackshear v. Liberty Mut. Ins. Co., 26 S.E.2d 793, 804, 69 Ga. App. 790.

Md.—Foble v. Knefely, 6 A.2d 48, 53, 176 Md. 474, 122 A.L.R. 831.

Mo.—Lovell v. Williams Bros., App., 50 S.W.2d 710, 713.

Its use may be fairly suggestive of
abrupt, precipitate, rash, or even violent action.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry, Del., 415.

97. Phrases

(1) "Sudden affray," "sudden combat" as element of voluntary manslaughter see Homicide § 43.

(2) "Sudden emergency" doctrine generally see Negligence § 17; see also Motor Vehicles § 257.

(3) "Sudden heat and passion" as a technical term of the common law to describe the offense of manslaughter see Homicide § 42.

(4) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 990 notes 69—74.

98. Mo.—Borgstede v. Waldbauer, 88 S.W.2d 373, 378, 337 Mo. 1205.

99. Ga.—Hardware Mut. Casualty Co. v. Sprayberry, 25 S.E.2d 74, 78, 69 Ga. App. 196.

S.C.—Sligh v. Pacific Mills, 35 S.E. 2d 713, 714, 207 S.C. 316—Layton v. Hammond-Brown-Jennings Co., 3 S.E.2d 492, 494, 190 S.C. 425.

1. U.S.—S. S. White Dental Mfg. Co. v. U. S., 55 F.Supp. 117, 121, 102 Ct.Cl. 115.

2. Ga.—Hardware Mut. Casualty Co. v. Sprayberry, 25 S.E.2d 74, 78, 69 Ga. App. 196.

S.C.—Sligh v. Pacific Mills, 35 S.E.2d 713, 714, 207 S.C. 316—Layton v. Hammond-Brown-Jennings Co., 3 S.E.2d 492, 494, 190 S.C. 425—Rudd v. Fairforest Finishing Co., 200 S. E. 727, 730, 189 S.C. 188.

3. Mo.—Borgstede v. Waldbauer, 88 S.W.2d 373, 378, 337 Mo. 1205.

Phrases

(1) "Happening suddenly" contrasted with "happening instantaneously" see 39 C.J.S. p 773 note 28.

(2) "Too suddenly;" an adverbial phrase which, when applied to starting, implies a precipitate or violent starting.—Cannon v. Delaware Electric Power Co., 24 A.2d 325, 326, 2 Terry, Del., 415.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 990 notes 76—78.

4. Century D.

5. Kan.—Lervold v. Republic Mut. Fire Ins. Co., 45 P.2d 839, 843, 142 Kan. 43, 106 A.L.R. 673.

Mich.—Burr v. Heffner, 286 N.W. 169, 170, 289 Mich. 91.

6. Kan.—Lervold v. Republic Mut.

dress a wrong;⁷ to prosecute;⁸ to prosecute judicially;⁹ to make legal claim;¹⁰ to bring an action against;¹¹ to seek for in law;¹² to gain by legal process.¹³

Sue and be sued. The words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings,¹⁴ and embrace all civil process incident to the commencement or continuance of legal proceedings.¹⁵ The payment of costs by the unsuccessful litigant,¹⁶ the additional allowance made by courts of equity in accordance with sound equity practice,¹⁷ the power to employ counsel,¹⁸ and garnishment¹⁹ have been held to be such incidents.

The capacity of various political entities to sue and be sued is discussed in the C.J.S. titles Counties § 319; District of Columbia § 21; Municipal Corporations § 2186; States § 213; Towns § 182, also 63 C.J. p 215 note 69—p 216 note 75; and United States §§ 175, 176, also 65 C.J. p 1402 note 33—p 1409 note 29.

Sue out. To petition for and take out;²⁰ to apply for and obtain;²¹ to obtain by application;²² to obtain judicially; to issue.²³

Other phrases employing the term "sue" are set out in the note.²⁴

SUERTE. In Spanish law, sowing grounds within the limits of a city, pueblo, or town, for cultivating or planting, as gardens, vineyards, orchards, etc.²⁵

Suerte de caña is defined as each patch or lot into which a large sugar-cane field is divided.²⁶

SUFFER. The exact significance of the term "suffer" varies somewhat with the context of its use.²⁷ It may convey the negative idea of passivity,²⁸ indifference,²⁹ or abstaining from preventive action,³⁰ as distinguished from a demonstrative, active course³¹ or from an affirmative act.³² In this

Fire Ins. Co., 45 P.2d 839, 843, 142 Kan. 43, 106 A.L.R. 673.

7. Ill.—Keller v. Industrial Commission, 183 N.E. 237, 240, 350 Ill. 390.

8. U.S.—U. S. v. Moore, C.C.N.H., 11 F. 248, 251.

9. Ill.—Keller v. Industrial Commission, 183 N.E. 237, 240, 350 Ill. 390.

10. U.S.—U. S. v. Moore, C.C.N.H., 11 F. 248, 251.

11. Ill.—Keller v. Industrial Commission, 183 N.E. 237, 240, 350 Ill. 390.

12. U.S.—U. S. v. Moore, C.C.N.H., 11 F. 248, 251.

Similarly defined

To seek justice or right from, by legal process.—Kuklence v. Vocht, 4 Pa.Co. 370, 372—60 C.J. p 990 note 80.

13. Kan.—Lervold v. Republic Mut. Fire Ins. Co., 45 P.2d 839, 843, 142 Kan. 43, 106 A.L.R. 673.

14. U.S.—Reconstruction Finance Corporation v. J. G. Menihan Corporation, N.Y., 61 S.Ct. 485, 487, 312 U.S. 81, 85 L.Ed. 595.

The capacity to sue or be sued carries with it all powers which are ordinarily incident to the prosecution of an action at law or a suit in equity.—Paslay v. Brooks, 17 S.E.2d 865, 868, 198 S.C. 345.

15. U.S.—Reconstruction Finance Corporation v. J. G. Menihan Corporation, N.Y., 61 S.Ct. 485, 487,

312 U.S. 81, 85 L.Ed. 595—Federal Housing Administration, Region No. 4, v. Burr, Mich., 60 S.Ct. 488, 490, 491, 309 U.S. 242, 84 L.Ed. 724. S.D.—In re Preusler, 291 N.W. 582, 583, 67 S.D. 207.

16. U.S.—Reconstruction Finance Corporation v. J. G. Menihan Corporation, N.Y., 61 S.Ct. 485, 487, 312 U.S. 81, 85 L.Ed. 595.

17. U.S.—Reconstruction Finance Corporation v. J. G. Menihan Corporation, supra.

18. S.C.—Paslay v. Brooks, 17 S.E. 2d 865, 868, 198 S.C. 345.

19. U.S.—Reconstruction Finance Corporation v. J. G. Menihan Corporation, N.Y., 61 S.Ct. 485, 487, 312 U.S. 81, 85 L.Ed. 595.

20. N.C.—McIntyre v. Austin, 59 S. E.2d 586, 588, 232 N.C. 186. 60 C.J. p 990 note 82.

Phrases employing the term "sue out" and as to which more recent adjudications have not been found see 60 C.J. p 990 notes 84—86.

21. Mo.—South Missouri Lumber Co. v. Wright, 21 S.W. 811, 812, 114 Mo. 326. 60 C.J. p 990 note 82.

22. N.C.—McIntyre v. Austin, 59 S. E.2d 586, 588, 232 N.C. 186.

23. U.S.—City of Waxahachie v. Coler, Tex., 92 F. 284, 286, 34 C.C. A. 349. 60 C.J. p 990 note 83.

24. Phrases

(1) "Sue and labor" clause in marine policies see Insurance § 953.

(2) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 990 notes 87—90.

25. Cal.—Hart v. Burnett, 15 Cal. 530, 554. 60 C.J. p 990 note 91.

26. Cal.—Redding v. White, 27 Cal. 282, 286.

27. Cal.—People v. Forbath, 42 P.2d 108, 5 Cal.App.2d Supp. 767.

28. U.S.—In re Thomas, D.C.Pa., 103 F. 272, 274.

Conn.—Corpus Juris cited in Guastamachio v. Brennan, 23 A.2d 140, 141, 128 Conn. 356. 60 C.J. p 991 note 5 [b], [c].

29. U.S.—In re Thomas, D.C.Pa., 103 F. 272, 274.

30. U.S.—In re Thomas, supra.

31. U.S.—Campbell v. Traders' Nat. Bank, D.C.Ill., 4 F.Cas.No.2,370, 2 Biss. 423. 60 C.J. p 991 note 5 [c].

32. U.S.—In re Thomas, D.C.Pa., 103 F. 272, 274.

While word does not connote strong affirmative action, it does involve such an exercise of the will as effects results.—Duncan v. Landis, Pa., 106 F. 839, 848, 45 C.C.A. 666.

connection the word "suffer" necessarily³³ implies³⁴ knowledge of the thing suffered,³⁵ or of what is to be done under the sufferance,³⁶ and it also implies intention³⁷ that what is done is what is to be done.³⁸ It has been said that to suffer an act usually implies the power to prohibit, prevent, or hinder it,³⁹ and that to suffer an act to be done by a person who can prevent it is to permit or consent to it, to approve of it, and not to hinder it.⁴⁰

The term "suffer" is variously defined as meaning to allow;⁴¹ to let;⁴² to permit;⁴³ to admit;⁴⁴ to tolerate;⁴⁵ to put up with;⁴⁶ not to forbid or hinder.⁴⁷

"Suffer" is further defined as meaning to be affected by;⁴⁸ to experience;⁴⁹ to endure;⁵⁰ to undergo;⁵¹ to support;⁵² to bear.⁵³ The word "suf-

33. Va.—*Nolde Bros. v. Chalkey*, 35 S.E.2d 827, 833, 184 Va. 553.

34. Cal.—*Corpus Juris* cited in *People v. Forbath*, 42 P.2d 108, 5 Cal.App.2d 767.

Kan.—*Corpus Juris* cited in *Jackson v. Derby Oil Co.*, 139 P.2d 146, 151, 157 Kan. 53.

Minn.—*State v. Jamieson*, 300 N.W. 809, 810, 211 Minn. 262.

N.Y.—*Houlihan v. Selengut*, 25 N.Y.S.2d 371, 375, 175 Misc. 854—*First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

Va.—*Nolde Bros. v. Chalkey*, 35 S.E.2d 827, 833, 184 Va. 553.

60 C.J. p 990 note 3 [a].

As definitive of a person's criminal conduct the word "suffer" implies knowledge of, coupled with a duty and power to prevent the particular act or omission, the sufferance of which constitutes the offense.—*People v. Forbath*, 42 P.2d 108, 5 Cal.App.2d Supp. 767.

35. Minn.—*State v. Jamieson*, 300 N.W. 809, 810, 211 Minn. 262.

36. N.Y.—*Houlihan v. Selengut*, 25 N.Y.S.2d 371, 375, 175 Misc. 854—*First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

60 C.J. p 990 note 3 [a].

37. N.Y.—*Houlihan v. Selengut*, 25 N.Y.S.2d 371, 375, 175 Misc. 854—*First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

60 C.J. p 990 note 3 [a].

Involves no intent

U.S.—*In re Thomas*, D.C.Pa., 103 F. 272, 274.

38. N.Y.—*Houlihan v. Selengut*, 25 N.Y.S.2d 371, 375, 175 Misc. 854—*First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

60 C.J. p 990 note 3 [a].

39. N.Y.—*Avon Bar & Grill v. O'Connell*, 95 N.Y.S.2d 556, 558, 276 App.Div. 517—*First Nat. Bank & Trust Co. of Port Chester v. New*

York Title Ins. Co., 12 N.Y.S.2d 703, 709, 171 Misc. 854.

60 C.J. p 991 note 7 [b].

40. Minn.—*State v. Jamieson*, 300 N.W. 809, 810, 211 Minn. 262.

60 C.J. p 991 note 7 [c].

A person suffers an act to be done when, although possessed of the power to act and duty requires action, he fails to act.—*State v. Jamieson*, supra.

Word implies negligent as well as a voluntary permission, and is not to be restricted to a mere voluntary or willful permission.—*Adams v. Nichols*, 1 Aik. Vt., 316, 319.

41. U.S.—*Campbell v. Traders' Nat. Bank*, D.C.Ill., 4 F.Cas.No.2,370, 2 Biss. 423.

N.Y.—*Corpus Juris* cited in *First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

Va.—*Nolde Bros. v. Chalkey*, 35 S.E.2d 827, 833, 184 Va. 553.

60 C.J. p 990 note 3.

42. N.Y.—*Corpus Juris* cited in *First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

Wash.—*Willis v. Gerking*, 186 P. 1064, 1065, 109 Wash. 382.

43. U.S.—*Campbell v. Traders' Nat. Bank*, D.C.Ill., 4 F.Cas.No.2,370, 2 Biss. 423.

N.Y.—*Corpus Juris* cited in *First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 12 N.Y.S.2d 703, 709, 171 Misc. 854.

Va.—*Nolde Bros. v. Chalkey*, 35 S.E.2d 827, 833, 184 Va. 553.

60 C.J. p 991 note 5.

44. U.S.—*Duncan v. Landis*, Pa., 106 F. 839, 849, 45 C.C.A. 666.

60 C.J. p 990 note 2.

45. Va.—*Nolde Bros. v. Chalkey*, 35 S.E.2d 827, 833, 184 Va. 553.

60 C.J. p 991 note 6.

46. Va.—*Nolde Bros. v. Chalkey*, supra.

47. Va.—*Nolde Bros. v. Chalkey*, supra.

60 C.J. p 991 note 7.

48. U.S.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

Cal.—*Corpus Juris* quoted in *Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

49. U.S.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

Cal.—*Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

Tex.—*Consolidated Underwriters v. Foxworth*, Civ.App., 196 S.W.2d 87, 94.

50. Cal.—*Corpus Juris* quoted in *Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

60 C.J. p 990 note 94.

Similarly defined

To submit to or be forced to endure the infliction, imposition, or penalty of.—*Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

51. Cal.—*Corpus Juris* quoted in *Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

Tex.—*Consolidated Underwriters v. Foxworth*, Civ.App., 196 S.W.2d 87, 94.

60 C.J. p 990 note 94.

To go or pass through

Cal.—*Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

52. U.S.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

Cal.—*Corpus Juris* quoted in *Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

60 C.J. p 990 note 94.

53. Cal.—*Corpus Juris* quoted in *Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal.App.2d 427.

60 C.J. p 990 note 94.

Similarly defined

(1) To bear up under.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

fer" is also further defined as meaning to sustain;⁵⁴ to be injured.⁵⁵

In a somewhat different sense the word "suffer" means to have the feeling or sensation that arises from the action of something painful, distressing, or the like;⁵⁶ to feel or endure pain; to feel pain, physical or mental;⁵⁷ to endure or undergo without sinking.⁵⁸

"Suffer" has been held equivalent to, or synonymous with, "approve of" see 6 C.J.S. p 129 note 11.1, "consent" see 15 C.J.S. p 982 note 67.1, "not to hinder" see 40 C.J.S. p 401 note 35, and "permit" see 70 C.J.S. p 568 note 70.

It has been compared with, or distinguished from, "allow" see 3 C.J.S. p 889 note 92, "cause" see 14 C.J.S. p 52 note 60, "do" see 27 C.J.S. p 1306 note 7, "permit" see 70 C.J.S. p 568 note 73, and "procure" see 72 C.J.S. p 1207 note 76.

"Suffering" is defined as meaning the undergoing or enduring of pain or distress, or a particular instance of this.⁵⁹ It has been distinguished from "cruelty" see 25 C.J.S. p 16 note 60.

"Suffered," the past participle of "suffer,"⁶⁰ has

been held synonymous with "endured" see 30 C.J.S. p 243.

Phrases employing various forms of the word are set out in the note.⁶¹

SUFFERANCE. Toleration; negative permission by not forbidding; passive consent; license implied from the omission or neglect to enforce an adverse right.⁶² It connotes some opportunity for knowledge and something less than consent.⁶³

SUFFICIENCY. The state or quality of being sufficient; adequacy.⁶⁴ The term has been distinguished from "competency" see 15 C.J.S. p 659 note 66.

SUFFICIENT. The word "sufficient" is derived from the Latin "sufficiens."⁶⁵ It is a relative term,⁶⁶ and its meaning depends on the facts of each case,⁶⁷ and any determination of its meaning must take into account all the circumstances.⁶⁸ As generally understood, it relates to quantity rather than quality,⁶⁹ but it is frequently used in the sense of adequacy and adaptation to the end desired,⁷⁰ and, in law, when anything is said to be sufficient, it means that nothing else is required.⁷¹ It has been said that the

(2) To bear as a victim or the like.—*Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal. App.2d 427.

54. U.S.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

To sustain loss or damage

Cal.—*Wolski v. Industrial Accident Commission*, 161 P.2d 283, 285, 70 Cal. App.2d 427.

55. Cal.—*Wolski v. Industrial Accident Commission*, supra.

56. U.S.—*New York Life Ins. Co. v. Calhoun*, C.C.A.Mo., 97 F.2d 896, 898.

The customary use of the word indicates some experience of conscious pain.—*New York Life Ins. Co. v. Calhoun*, supra.

57. U.S.—*New York Life Ins. Co. v. Calhoun*, supra.

58. U.S.—*New York Life Ins. Co. v. Calhoun*, supra.

59. Del.—*Prettyman v. Topkis*, 3 A. 2d 708, 712, 9 W.W.Harr. 568. 60 C.J. p 992 note 27.

60. Webster New Int.D.

61. "Suffer to occur"

(1) To allow, to admit, to permit.—*Osborne v. Winter*, 24 P.2d 892, 893, 133 Cal.App. 664.

(2) It implies an approval of or acquiescence in an act, and more than nonresistance, and denotes knowledge and intention.—*Leslie v. Federal Finance Co.*, Cal.App., 85 P.2d 568, 573 —*Osborne v. Winter*, 24 P.2d 892, 893, 133 Cal.App. 664.

Other phrases

(1) "Extreme suffering" distinguished from "extreme cruelty" see 25 C.J.S. p 17 note 63.

(2) "Suffer me to do this" compared with "allow me to do this" see 3 C.J.S. p 889 note 6.

(3) "Suffer or permit to work" within provision of Fair Labor Standards Act defining "employ" as including to "suffer or permit to work" see Master and Servant § 151 (4) b.

(4) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 990 notes 95-1, p 991 notes 8-22, p 992 notes 23-25, 28, 29.

62. Black L.D.

Phrases

(1) "Tenancies at sufferance" see Landlord and Tenant §§ 175-183.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 992 notes 31, 32.

63. N.Y.—*People on Inf. of Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 476, 225 N.Y. 25. 60 C.J. p 992 note 30.

64. New Standard D.

Phrases as to which more recent adjudications have not been found see 60 C.J. p 992 notes 36, 37.

65. N.M.—*Nissen v. Miller*, 105 P.2d 324, 326, 44 N.M. 487.

Participle of "sufficio," compounded of "sub" and "facio."—*Nissen v. Miller*, supra.

66. N.Y.—*Albert v. Kern*, 32 N.Y.S. 2d 310, 316, 177 Misc. 852.

Pa.—*Rebel v. Standard Sanitary Mfg. Co.*, 16 A.2d 534, 537, 340 Pa. 313.

67. Pa.—*Rebel v. Standard Sanitary Mfg. Co.*, supra.

68. N.Y.—*Albert v. Kern*, 32 N.Y.S. 2d 310, 316, 177 Misc. 852.

69. S.D.—*State v. Holter*, 142 N.W. 657, 663, 32 S.D. 43, 46 L.R.A., N.S., 376, Ann.Cas.1916A 193.

70. N.M.—*Nissen v. Miller*, 105 P.2d 324, 326, 44 N.M. 487. 60 C.J. p 992 note 43 [b].

71. Miss.—*Spilman v. Gulf & S. I. R. Co.*, 163 So. 445, 446, 173 Miss. 725.

word "sufficient" embraces no more than that which furnishes a plenitude and which, when done, suffices to accomplish the purpose intended in the light of present conditions viewed through the eyes of practical and cautious men.⁷²

The term "sufficient" is variously defined as meaning adequate;⁷³ adequate to suffice;⁷⁴ adequate to wants;⁷⁵ enough;⁷⁶ competent;⁷⁷ equal to the end proposed;⁷⁸ made or suited to the purpose;⁷⁹ that which may be necessary to accomplish an object;⁸⁰ being of such quality, number, force, or value as to serve a need or purpose.⁸¹

"Sufficient" has been held synonymous with "efficient" see 28 C.J.S. p 840 note 39, and "suitable,"⁸² and it has been distinguished from "ample" see 3 C.J.S. p 1059 note 56, "insufficient" see 44 C.J.S. p

424 note 68, and "regulate" see 76 C.J.S. p 609 note 55.

Phrases employing the term are set out in the note.⁸³

SUFFICIENTLY. To a sufficient amount or degree; amply; adequately.⁸⁴ It may have the same import and meaning as the word "securely,"⁸⁵ and, with respect to identification, it has been construed to mean with reasonable certainty.⁸⁶

SUFFIX. A formative element attached to the end of a word or root to modify it.⁸⁷

SUFFOCATE. To destroy the life of by suffocation;⁸⁸ to kill by stopping respiration, as by strangling or asphyxiation;⁸⁹ to stifle; choke; smother;

72. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D. C.Ky., 20 F.Supp. 217, 220.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 34, 260 Ky. 219.

N.M.—Nissen v. Miller, 105 P.2d 324, 326, 44 N.M. 487.

73. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D. C.Ky., 20 F.Supp. 217, 220.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 34, 260 Ky. 219.

Mo.—First Nat. Bank of Kansas City v. University of Kansas City, 245 S.W.2d 124, 130.

N.M.—Nissen v. Miller, 105 P.2d 324, 325, 44 N.M. 487.

74. Fla.—Pensacola, etc., R. Co. v. State, 5 So. 833, 844, 25 Fla. 310, 3 L.R.A. 661.

Sufficing

N.M.—Nissen v. Miller, 105 P.2d 324, 325, 44 N.M. 487.

75. S.D.—State v. Holter, 142 N.W. 657, 663, 32 S.D. 43, 46 L.R.A., N.S., 376, Ann.Cas.1916A 193.

76. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D. C.Ky., 20 F.Supp. 217, 220.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 34, 260 Ky. 219.

Mo.—First Nat. Bank of Kansas City v. University of Kansas City, 245 S.W.2d 124, 130.

N.M.—Nissen v. Miller, 105 P.2d 324, 326, 44 N.M. 487.

60 C.J. p 992 note 42.

77. Cal.—Merchants' Nat. Bank of

Los Angeles v. Continental Nat. Bank of Los Angeles, 277 P. 354, 364, 98 Cal.App. 523.

Fla.—Pensacola, etc., R. Co. v. State, 5 So. 833, 844, 25 Fla. 310, 3 L.R.A. 661.

78. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D. C.Ky., 20 F.Supp. 217, 220.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 34, 260 Ky. 219.

Mo.—First Nat. Bank of Kansas City v. University of Kansas City, 245 S.W.2d 124, 130.

N.M.—Nissen v. Miller, 105 P.2d 324, 326, 44 N.M. 487.

60 C.J. p 992 note 43.

Equal to some given occasion or work

N.M.—Nissen v. Miller, supra.

79. N.M.—Nissen v. Miller, supra.

80. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D. C.Ky., 20 F.Supp. 217, 220.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 34, 260 Ky. 219.

Md.—Varnum v. Thruston, 17 Md. 470, 498.

N.M.—Nissen v. Miller, 105 P.2d 324, 326, 44 N.M. 487.

81. N.M.—Nissen v. Miller, supra.

82. Ark.—Kansas City R. Co. v. Greer, 119 S.W. 1121, 1123, 90 Ark. 531.

83. Phrases

(1) "Sufficient ability" as used in statutes imposing on relatives of sufficient ability liability for support of poor persons see Paupers § 60 b.

(2) "Sufficient cause" generally see 14 C.J.S. p 50 note 14; to warrant re-

moval of an officer see Municipal Corporations § 508 and Officers § 60.

(3) "Sufficient legal provocation" distinguished from "deliberation" see 26 C.J.S. p 692 note 26.

(4) "Sufficient sureties" means sureties adequate to suffice or equal to the end proposed.—Benge v. Foster, Tex.Civ.App., 74 S.W.2d 542, 544 —60 C.J. p 993 note 76.

(5) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 992 note 47—p 993 note 83.

84. New Standard D.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 993 note 85.

85. Ind.—Evansville, etc., R. Co. v. Tipton, 101 Ind. 197, 198.

86. Ky.—Wheeler v. Keeton, 242 S.W.2d 1013, 1014.

87. New Standard D.

Suffixes appearing after names of persons see Names § 5.

88. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, 183 P.2d 288, 294, 80 Cal.App.2d 841.

Similarly defined

(1) To deprive of life by suffocation.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

(2) To extinguish or destroy by, or as by, deprivation of air.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

89. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

Neb.—Stone v. Physicians Casualty Ass'n of America, 266 N.W. 605, 607, 130 Neb. 769.

overwhelm; extinguish.⁹⁰

The term has been held synonymous with "choke" see 14 C.J.S. p 1113 note 54.2, "smother" see 80 C.J.S. p 1337 note 8, and "strangle" see ante p 110 note 51.

Suffocated. Choked or killed by stopping respiration.⁹¹ It has been held synonymous with "asphyxiated" see 6 C.J.S. p 791 note 98.

SUFFOCATION. The stoppage of respiration, or the asphyxia which results from it.⁹²

SUFFRAGE. See the title index to Elections.

SUGAR. A sweet, crystallizable substance, colorless or white when pure, occurring in many plant juices, and forming an important article of human food.⁹³

SUGGEST. To hint; to intimate; to introduce indirectly to the thought; to introduce to another's mind by the prompting of an indirect or mediate association, to place before another's mind problematically;⁹⁴ also to propose with diffidence or modesty.⁹⁵

SUGGESTIO FALSI. An affirmative false representation;⁹⁶ an affirmative fraudulent act,⁹⁷ as distinguished from "suppressio veri" which is a negative act of fraud, as stated in the definition Sup-

pressio veri, post. It has also been stated that it is a rule of equity as well as of law that a "suggestio falsi" is equivalent to a "suppressio veri."⁹⁸

SUGGESTION. In general, a suggesting; presentation of an idea, especially indirectly, as through association of ideas; a bringing before the mind for consideration, action, solution, or the like.⁹⁹ It is not an order or command,¹ but is in the nature of a hint or insinuation, lacking the element of probability.²

In practice the term "suggestion" means a statement, formally entered on the record, of some fact or circumstance which will materially affect the further proceedings in the cause, but which, for some reason, cannot be pleaded.³

"Suggestion" has been distinguished from "confession" see 15 C.J.S. p 820 note 30, and "consent" see 15 C.J.S. p 981 note 27.3.

Correction of judgment of trial court on suggestion of error see Judgments § 250; correction of judgment of appellate court on suggestion of error see Appeal and Error § 1957.

With respect to wills the word "suggestion" is applied especially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view, as stated in the C.J.S. title Wills § 225, also 60 C.J. p 994 note 17.

Similarly defined

(1) To kill, murder, etc., by depriving of air.—Thomas v. Seaside Memorial Hospital of Long Beach, 183 P.2d 288, 294, 80 Cal.App.2d 841.

(2) To kill a person or animal by stopping the supply of air through the lungs, gills, or other respiratory organs.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

90. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

91. D.C.—U. S. v. Barber, 20 D.C. 79, 93.

92. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, 183 P.2d 288, 294, 80 Cal.App.2d 841.

Neb.—Stone v. Physicians Casualty Ass'n of America, 266 N.W. 605, 607, 130 Neb. 769.

93. Webster New Int.D.

Phrases

(1) "Granulated sugar" see 38 C. J.S. p 1071 notes 74-77.

(2) "Refined sugar" see 76 C.J.S. p 324 notes 13, 14; as subject to tariff see Customs Duties § 36.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 993 note 94—p 994 note 99.

94. Ind.—Sims v. Ratcliff, 110 N.E. 122, 124, 62 Ind.App. 184.

Phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 994 note 7.

95. Ind.—Sims v. Ratcliff, supra. 60 C.J. p 994 note 6.

96. N.J.—Turney v. Avery, 113 A. 710, 92 N.J.Eq. 473. 60 C.J. p 994 note 8.

97. W.Va.—Newman v. Kay, 49 S.E. 926, 930, 57 W.Va. 98, 109, 68 L.R.A. 908.

98. N.Y.—Fleming v. Slocum, 18 Johns. 403, 405, 9 Am.D. 224. 60 C.J. p 1175 note 9.

99. Ind.—Artificial Ice & Cold Storage Co. v. Martin, 198 N.E. 446, 449, 102 Ind.App. 74.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 994 notes 14, 15.

1. Miss.—Martin v. Beck, 171 So. 14, 16, 177 Miss. 303.

2. Ohio.—Lopa v. Smith, 174 N.E. 258, 259, 37 Ohio App. 346. 60 C.J. p 994 note 13.

3. Mich.—C. J. Huebel Co. v. Mackinnon, 152 N.W. 1098, 1100, 186 Mich. 617.

Suggestion of:

Bankruptcy as staying suit against bankrupt see Bankruptcy § 491 c. Death as means of abating action see Abatement and Revival § 129.

SUI. A Latin term meaning of himself, herself, | itself, or themselves.⁴

4. Andrews Lat.-Eng.Lex.

Phrases

(1) "Sui generis;" of its own kind or class; that is, the only one of its own kind; peculiar.—Black L.D.—60 C.J. p 1000 note 1.

(2) "Sui hæredes" see 39 C.J.S. p 762 note 35.

(3) "Sui juris;" of his own right; possessing full and civil rights; not under any legal disability, or the power of another, or guardianship; having capacity to manage one's own

affairs; not under legal disability to act for one's self.—Harrison v. Laveen, 196 P.2d 456, 461, 67 Ariz. 337 —60 C.J. p 1000 note 10.

(4) "Non sui juris" see 66 C.J.S. p 604 note 3&.

SUICIDE

This Title includes intentionally killing or attempting to kill one's self and aiding or advising another to kill himself; criminal responsibility for such acts; and prosecution and punishment thereof as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition—p 781
- 2. Criminality—p 782
- 3. Attempts—p 783
- 4. Advising, aiding, or inciting to commit—p 783
- 5. — Compacts to commit—p 784
- 6. Prosecution and punishment—p 784

See also descriptive word index in the back of this Volume

§ 1. Definition

Suicide is the taking of one's own life, and in its technical or legal sense requires that the self-destruction be intentional and by a sane person.

Suicide is the taking of one's own life.¹ When the term "suicide" is employed in its usual or colloquial and popular, as distinguished from its techni-

cal and legal, sense, it includes all cases of self-destruction irrespective of the mental condition of the person committing the act.² In its technical and legal sense it means self-destruction by a sane person³ or the voluntary and intentional destruction of his own life by a person of sound mind,⁴ the further qualification being added by some definitions that he must have attained years of discretion.⁵

1. U.S.—*Stiles v. Clifton Springs Sanitarium Co.*, D.C.N.Y., 74 F. Supp. 907.

Neb.—*Peabody v. Continental Life Ins. Co.*, 257 N.W. 482, 128 Neb. 23.

Words and phrases of similar import in life insurance policies see Insurance §§ 844, 938 d (9), 1577.

2. Tex.—*Jones v. Traders & General Ins. Co.*, Civ.App., 144 S.W.2d 689, 60 C.J. p 995 note 1.

3. U.S.—*Stiles v. Clifton Springs Sanitarium Co.*, D.C.N.Y., 74 F. Supp. 907.

Ga.—*Christensen v. New England Mut. Life Ins. Co.*, 30 S.E.2d 471, 472, 197 Ga. 807, 153 A.L.R. 794.

Mo.—*Edwards v. Business Men's Assur. Co. of America*, 168 S.W.2d 82, 94, 350 Mo. 666.

N.Y.—*Franklin v. John Hancock Mut. Life Ins. Co.*, 80 N.E.2d 746, 748, 298 N.Y. 81.

Tex.—*Jones v. Traders & General Ins. Co.*, Civ.App., 144 S.W.2d 689, 694.

Wis.—*Ladwig v. National Guardian*

Life Ins. Co., 247 N.W. 312, 211 Wis. 56.

25 C.J. p 1011 note 90—60 C.J. p 995 note 2.

Within meaning of insurance policy: Accident insurance policy see Insurance § 773.

Life insurance policy see Insurance §§ 844, 938 d (9).

Mutual benefit insurance policy see Insurance § 1577.

Sanity essential

Where a man of the age of discretion, which at common law was fourteen years, voluntarily kills himself after he loses his mind by sickness, infirmity, or accident, he is not "felo de se," nor can he be said to commit murder upon himself.—*Southern Life & Health Ins. Co. v. Wynn*, 194 So. 421, 29 Ala.App. 207—25 C.J. p 1011 note 90 [a].

As crime or offense

(1) Generally.—*Moore v. Connecticut Mut. L. Ins. Co.*, C.C.Mich., 17 F.Cas.No.9,755, 1 Flipp. 363—60 C.J. p 995 note 2 [b].

(2) Self-murder.—*Prudential Ins. Co. of America v. Petril*, D.C.Pa., 43

F.Supp. 768—60 C.J. p 995 note 2 [b] (3)—(6), (8), (9).

(3) Voluntary, criminal, self-destruction.—*Southern Life & Health Ins. Co. v. Wynn*, 194 So. 421, 422, 424, 29 Ala.App. 207—60 C.J. p 995 note 2 [b] (7).

4. Ala.—*Southern Life & Health Ins. Co. v. Wynn*, supra.
S.C.—*Gibson v. Reliance Life Ins. Co. of Pittsburgh, Pa.*, 172 S.E. 772, 172 S.C. 94.
60 C.J. p 996 note 3.

Other definitions

(1) Generally.—*New York Life Ins. Co. v. Pater*, C.C.A.Ind., 17 F.2d 963, 964—60 C.J. p 996 note 3 [a].

(2) Intentional self-destruction.—*Hall v. Progressive Life Ins. Co.*, 7 S.E.2d 606, 608, 61 Ga.App. 792—60 C.J. p 996 note 3 [a] (1).

(3) Voluntary, intentional, self-destruction.—*Borrison v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835, 846, 351 Mo. 229.

5. S.C.—*Gibson v. Reliance Life Ins. Co. of Pittsburgh, Pa.*, 172 S.E. 772, 774, 172 S.C. 94.

Suicide is something more than self-sought or self-inflicted death.⁶ It is a species of crime or wickedness, something wrong, a kind of self-murder.⁷ In order to constitute suicide the self-destruction must have been intentional⁸ and voluntary,⁹ and not accidental,¹⁰ especially if it is to constitute an offense or crime;¹¹ and, intent being of the essence of the act, this presupposes or requires reason or sanity.¹²

Felo de se. At common law one who was a suicide was termed a *felo de se*.¹³

§ 2. Criminality

Suicide was a felony at common law and under some statutes it is still considered a felony, but under others suicide itself is not a crime and is not punishable as such.

Suicide was a felony at common law,¹⁴ punishable by forfeiture of the goods and chattels of the offender,¹⁵ and the ignominious burial of his body in the highway.¹⁶ In some jurisdictions it is still considered a felony¹⁷ or a crime involving moral turpitude,¹⁸ and the incidents of a criminal act may follow therefrom.¹⁹ In other jurisdictions, however, suicide itself is not a crime and is not punishable as such,²⁰ and the incidents of a criminal act do not

Tex.—Jones v. Traders & General Ins. Co., Civ.App., 144 S.W.2d 689. 25 C.J. p 1011 note 90—60 C.J. p 996 note 4.

6. Ga.—Life Assoc. of America v. Waller, 57 Ga. 533, 536.

7. Ga.—Life Assoc. of America v. Waller, *supra*.

8. U.S.—Stiles v. Clifton Springs Sanitarium Co., D.C.N.Y., 74 F. Supp. 907.

Ga.—Christensen v. New England Mut. Life Ins. Co., 31 S.E.2d 214, 216, 71 Ga.App. 393—Schneider v. Metropolitan Life Ins. Co., 7 S.E.2d 772, 775, 62 Ga.App. 148.

Mo.—Parker v. Aetna Life Ins. Co., 232 S.W. 708, 289 Mo. 42.

Neb.—Peabody v. Continental Life Ins. Co., 257 N.W. 482, 128 Neb. 23.

S.C.—Gibson v. Reliance Life Ins. Co. of Pittsburgh, Pa., 172 S.E. 772, 172 S.C. 94.

Wis.—Ladwig v. National Guardian Life Ins. Co., 247 N.W. 312, 211 Wis. 56.

25 C.J. p 1011 note 91.

Felonious intent

In order to constitute suicide, the deceased must not only have taken his own life, but he must have done so having had at the time the felonious intent to take his own life.—Southern Life & Health Ins. Co. v. Wynn, 194 So. 422, 29 Ala.App. 207.

9. Kan.—Muzenich v. Grand Carniolian Slovenian Catholic Union of United States, 119 P.2d 504, 154 Kan. 537, 138 A.L.R. 818. 25 C.J. p 1011 note 90.

Connotation

The expression "suicide" conveys the idea of voluntary intentional self-destruction.—Fleetwood v. Pacific Mut. Life Ins. Co., 21 So.2d 696, 246 Ala. 571.

10. Kan.—Muzenich v. Grand Carniolian Slovenian Catholic Union of United States, 119 P.2d 504, 154 Kan. 537, 138 A.L.R. 818.

Mo.—Parker v. Aetna Life Ins. Co., 232 S.W. 708, 289 Mo. 42.

11. N.Y.—Shipman v. Protected Home Circle, 67 N.E. 83, 85, 174 N.Y. 398, 63 L.R.A. 347. 60 C.J. p 996 note 5.

12. N.Y.—Shipman v. Protected Home Circle, *supra*. 60 C.J. p 996 note 6.

13. Ala.—Southern Life & Health Ins. Co. v. Wynn, Ala.App., 194 So. 421, 29 Ala.App. 207.

Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176. 25 C.J. p 1011 notes 90-94—60 C.J. p 996 note 4 [b].

14. U.S.—Stiles v. Clifton Springs Sanitarium Co., D.C.N.Y., 74 F. Supp. 907.

Ala.—Southern Life & Health Ins. Co. v. Wynn, 194 So. 421, 29 Ala.App. 207.

Ind.—Corpus Juris cited in Prudential Ins. Co. of America v. Rice, 52 N.E.2d 624, 625, 222 Ind. 231. Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176. N.J.—State v. La Fayette, 188 A. 918, 15 N.J.Misc. 115.

N.Y.—Darrow v. Family Fund Soc., 22 N.E. 1093, 116 N.Y. 537, 6 L.R.A. 495, 15 Am.S.R. 430.

Or.—Wyckoff v. Mutual Life Ins. Co. of New York, 147 P.2d 227, 173 Or. 592. 60 C.J. p 996 note 7.

15. U.S.—Stiles v. Clifton Springs Sanitarium Co., D.C.N.Y., 74 F. Supp. 907.

Ind.—Corpus Juris cited in Prudential Ins. Co. of America v. Rice, 52 N.E.2d 624, 625, 222 Ind. 231. Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176.

N.Y.—Darrow v. Family Fund Soc., 22 N.E. 1093, 116 N.Y. 537, 6 L.R.A. 495, 15 Am.S.R. 430. 60 C.J. p 996 note 8.

Only active punishment was forfeiture of property of decedent.—State v. La Fayette, 188 A. 918, 15 N.J.Misc. 115.

16. Ind.—Corpus Juris cited in Prudential Ins. Co. of America v. Rice, 52 N.E.2d 624, 625, 222 Ind. 231.

Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176. Or.—Wyckoff v. Mutual Life Ins. Co. of New York, 147 P.2d 227, 173 Or. 592.

60 C.J. p 997 note 10.

17. U.S.—Prudential Ins. Co. of America v. Petril, D.C.Pa., 43 F. Supp. 768, 771.

18. Ala.—Southern Life & Health Ins. Co. v. Wynn, 194 So. 421, 29 Ala.App. 207.

19. Ala.—McMahan v. State, 53 So. 89, 168 Ala. 70. 60 C.J. p 997 note 22.

Advising or aiding see *infra* § 4.

Compacts or agreements see *infra* § 5.

Killing another in attempt to commit suicide see Homicide § 21.

Liability for attempt see *infra* § 3.

20. U.S.—Stiles v. Clifton Springs Sanitarium Co., D.C.N.Y., 74 F. Supp. 907.

Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176.

N.Y.—Darrow v. Family Fund Soc., 22 N.E. 1093, 116 N.Y. 537, 6 L.R.A. 495, 15 Am.S.R. 430—Hundert v. Commercial Travelers' Mut. Accident Ass'n of America, 279 N.Y.S. 555, 244 App.Div. 459.

60 C.J. p 997 note 20.

Reason for rule

Forfeiture has been abolished.—State v. La Fayette, 188 A. 918, 15 N.J.Misc. 115.

follow therefrom.²¹ Nevertheless, in such jurisdictions, self-destruction ordinarily involves moral turpitude and is regarded as being wrong,²² and under some statutes it is recognized as a grave public wrong.²³

Whether or not considered as a felony, suicide is not now treated with the same severity as at common law,²⁴ and, since the successful suicide himself is no longer amenable to human punishment,²⁵ ordinarily the question of the criminality of his act is of importance only incidentally,²⁶ as determining the criminality of aiders and abettors, discussed *infra* § 4, or of persons joining in suicide pacts, considered *infra* § 5, or of attempts to commit suicide, discussed *infra* § 3, or in determining whether or not his act was such that it exempts an insurer from liability because his death was in or in consequence of a violation of law, discussed in Insurance §§ 847, 1576.

§ 3. Attempts

The attempt to commit suicide is an indictable offense at common law and under some statutes, but under other statutes it is held not an indictable offense.

If the act of suicide fails to accomplish its pur-

pose, it constitutes an attempt to commit suicide,²⁷ which is unlawful and criminal,²⁸ and an indictable offense both at common law²⁹ and under some statutes.³⁰ Under other statutes, however,³¹ and in the absence of statute,³² an attempt to commit suicide is held not an indictable offense. A statute providing for the crime of an attempt,³³ or assault with intent,³⁴ to commit murder is not applicable to attempts to commit suicide.

§ 4. Advising, Aiding, or Inciting to Commit

At common law and under various statutes one who advises, aids, or incites another to commit suicide is criminally liable as a principal or as an accessory before the fact, but he has been held not criminally liable in jurisdictions where the suicide is regarded as innocent of criminality, unless his direct act takes the life of the suicide.

At common law one who advises or counsels self-murder by another is, if present at the act, a principal;³⁵ if not present he is, if guilty, guilty as an accessory before the fact.³⁶ Under statutes abolishing the distinction between an accessory before the fact and a principal and between principals in the first and second degrees, if the act of suicide is

21. Iowa.—*State v. Campbell*, 251 N. W. 717, 217 Iowa 848, 92 A.L.R. 1176.
60 C.J. p 997 note 21.

22. Or.—*Wyckoff v. Mutual Life Ins. Co. of New York*, 147 P.2d 227, 173 Or. 592.

23. U.S.—*Stiles v. Clifton Springs Sanitarium Co.*, D.C.N.Y., 74 F. Supp. 907.
N.Y.—*Hundert v. Commercial Travelers' Mut. Accident Ass'n of America*, 279 N.Y.S. 555, 244 App.Div. 459.

Malum in se

It is doubtful whether the common-law rule declaring suicide to be malum in se has been changed by the provisions of the New York penal law.—*Stiles v. Clifton Springs Sanitarium Co.*, D.C.N.Y., 74 F.Supp. 907.

Public offender

Since suicide is recognized by statute as a grave public wrong, death by his own hand, unexplained, will class the deceased as a grave public offender.—*Stiles v. Clifton Springs Sanitarium Co.*, *supra*.

24. Or.—*Wyckoff v. Mutual Life Ins. Co. of New York*, 147 P.2d 227, 173 Or. 592.
60 C.J. p 997 notes 12, 13.

25. Me.—*May v. Pennell*, 64 A. 885, 101 Me. 516, 7 L.R.A., N.S., 286, 115 Am.S.R. 334, 8 Ann.Cas. 351.
60 C.J. p 997 note 14.

26. Ala.—*McMahon v. State*, 53 So. 89, 168 Ala. 70.
60 C.J. p 997 note 15.
Liability of insurer for death by suicide:
Accident insurance see Insurance § 773.
Life insurance see Insurance §§ 842-845.
Mutual benefit insurance see Insurance § 1577.

27. N.Y.—*Darrow v. Family Fund Soc.*, 22 N.E. 1093, 116 N.Y. 537, 15 Am.S.R. 430, 6 L.R.A. 495.
60 C.J. p 997 note 23.

28. Mass.—*Commonwealth v. Mink*, 123 Mass. 422, 25 Am.R. 109.

29. N.J.—*State v. La Fayette*, 188 A. 918, 15 N.J.Misc. 115.
60 C.J. p 997 note 25.

Misdemeanor

It was a misdemeanor at common law to attempt to commit suicide.—*State v. La Fayette*, 188 A. 918, 15 N.J.Misc. 115—60 C.J. p 997 note 25 [a].

30. N.J.—*State v. Carney*, 55 A. 44, 69 N.J.Law 478—*State v. La Fayette*, 188 A. 918, 15 N.J.Misc. 115.

N.Y.—*Darrow v. Family Fund Soc.*, 22 N.E. 1093, 116 N.Y. 537, 6 L.R.A. 495, 15 Am.S.R. 430.

31. Me.—*May v. Pennell*, 64 A. 885, 101 Me. 516, 115 Am.S.R. 334, 7 L.R.A., N.S., 286, 8 Ann.Cas. 351.
60 C.J. p 997 note 27.

32. Ind.—*Prudential Ins. Co. of America v. Rice*, 52 N.E.2d 624, 222 Ind. 231.

Iowa.—*State v. Campbell*, 251 N.W. 717, 217 Iowa 848, 92 A.L.R. 1176.

33. Pa.—*Commonwealth v. Wright*, 26 Pa.Co. 666.
60 C.J. p 998 note 29.

34. Pa.—*Commonwealth v. Wright*, *supra*.

35. Ala.—*McMahon v. State*, 53 So. 89, 168 Ala. 70.
60 C.J. p 998 note 33.

Attempts and solicitations to commit murder see Homicide §§ 68-70.
Principals in first degree generally see Criminal Law § 83.

Principal in second degree or aider and abettor generally see Criminal Law §§ 85-89.

36. Ala.—*McMahon v. State*, *supra*.
60 C.J. p 998 note 34.

Accessories before fact generally see Criminal Law §§ 90-94.
Necessity for conviction of principal generally see Criminal Law § 104.

felonious the contributor to the criminal result is guilty whether present or absent,³⁷ but if the act of self-destruction was not a felony because of want of mental capacity he is not punishable if absent, because there can be no accessory before the fact where there can be no principal.³⁸

Without regard to whether or not the act of suicide or self-murder is a felony, it has been held that one who furnishes poison to another for the purpose and with the intent that he shall with it commit suicide, and he accordingly takes and uses it for that purpose,³⁹ or one who, whether or not he furnishes the poison, is present at the taking thereof, participating by persuasion, force, threats, or otherwise in its taking,⁴⁰ if death is thereby caused, may be guilty of murder as a principal. On the other hand, it has been held in a jurisdiction wherein the suicide is regarded as innocent of criminality, as discussed supra § 2, that one who merely furnishes means or agencies or affords an opportunity to the suicide to take his own life is free from criminality;⁴¹ but one whose direct act takes the life of the suicide is criminally liable therefor, as where he furnishes poison to a suicide, knowing the purpose of said suicide, and himself gives the medicine or poison by placing it in the mouth or other portion of the body of such suicide, resulting in death.⁴²

By express provision of some statutes one deliberately assisting another in the commission of self-murder is guilty of manslaughter.⁴³ Such a statute changes the common-law rule that the adviser is guilty of murder as an aider and abettor if present when his advice is carried out.⁴⁴

§ 5. — Compacts to Commit

Where two persons mutually agree to kill themselves

together and one dies from, and the other survives, the attempt, the survivor is guilty of murder of the one who dies unless he abandoned his purpose and endeavored to persuade the other also to abandon it.

If two persons mutually agree to kill themselves together, and the means employed to produce death take effect on one only, the survivor may be held guilty of murder of the one who dies.⁴⁵ Under a statute providing that one deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a conviction cannot be had of one who, after entering into a mutual agreement with another to commit suicide, abandons his purpose and endeavors to persuade the other also to abandon it.⁴⁶

§ 6. Prosecution and Punishment

Subject to particular statutory requirements which may exist in a particular jurisdiction, the rules applicable to criminal prosecutions generally, and particularly those relating to prosecutions for homicide, apply to prosecutions for an attempt to commit suicide and for aiding, advising, or inciting another to commit suicide.

The rules applicable to criminal prosecutions generally, as discussed in Criminal Law §§ 300-1957, and more particularly those relating to prosecutions for homicide, considered in Homicide §§ 139-437, apply to prosecutions for aiding, advising, or inciting another to commit suicide.⁴⁷ In a prosecution for murder where it is not shown or claimed that accused directly administered the poison of which deceased died, but that the taking of it was by his procurement, there must be strict proof of the latter fact,⁴⁸ and the evidence must show beyond a reasonable doubt that he did or said something which aided, encouraged, or induced deceased to kill himself.⁴⁹ Where the evidence that accused did or said anything which induced decedent to kill himself rests wholly on the alleged admissions of ac-

37. Ky.—Commonwealth v. Hicks, 82 S.W. 265, 118 Ky. 637, 26 Ky.L. 511, 4 Ann.Cas. 1154.

60 C.J. p 998 note 36.

38. Ala.—McMahon v. State, 53 So. 89, 168 Ala. 70.

39. Mich.—People v. Roberts, 178 N.W. 690, 211 Mich. 187, 13 A.L.R. 1253.

60 C.J. p 998 note 38.

40. Ill.—Burnett v. People, 68 N.E. 505, 204 Ill. 208, 98 Am.S.R. 206.

60 C.J. p 998 note 39.

41. Tex.—Sanders v. State, 112 S.W. 68, 54 Tex.Cr. 101, 22 L.R.A., N.S., 243.

60 C.J. p 998 note 41.

42. Tex.—Aven v. State, 277 S.W. 1080, 102 Tex.Cr. 478.

Murder

If a person, knowing suicidal intent of another, at suicide's request prepares and places poison in mouth of suicide, he is regarded as administering poison, and in case of death is guilty of murder.—Aven v. State, supra—Sanders v. State, 112 S.W. 68, 54 Tex.Cr. 101, 22 L.R.A., N.S., 243.

43. Mo.—State v. Fitzgerald, 32 S.W. 1113, 130 Mo. 407.

60 C.J. p 998 note 42.

44. Mo.—State v. Webb, 115 S.W. 998, 216 Mo. 378, 20 L.R.A., N.S.,

1142, 129 Am.S.R. 518, 16 Ann.Cas. 518.

45. Ala.—McMahon v. State, 53 So. 89, 168 Ala. 70.

60 C.J. p 998 note 44.

46. Mo.—State v. Webb, 115 S.W. 998, 216 Mo. 378, 20 L.R.A., N.S., 1142, 129 Am.S.R. 518, 16 Ann.Cas. 518.

47. Tex.—Aven v. State, 277 S.W. 1080, 102 Tex.Cr. 478.

48. Ill.—Burnett v. People, 68 N.E. 505, 204 Ill. 208, 98 Am.S.R. 206, 66 L.R.A. 304.

60 C.J. p 999 note 49.

49. Ill.—Burnett v. People, supra.

cused, the jury should be fairly instructed as to the character of, and the weight to be given to, admissions made under the circumstances shown in the case.⁵⁰ Where the statute punishes as manslaughter the deliberate assisting of another in the commission of self-murder, one accused of murder is entitled to an instruction properly submitting to the jury his right to change his mind and escape from the consequences of an agreement with deceased to commit suicide,⁵¹ as well as correct instructions in other respects.⁵² Under an indictment for murder charging accused with "administer-

ing or causing to be administered" to deceased a poison because of which he died, an instruction may be given with respect to the guilt of one who incites another to commit suicide.⁵³ Under a statute to the effect that a conviction cannot be predicated on a confession alone, the trial court was warranted in giving a peremptory instruction to find accused not guilty of the crime of being an accessory before the fact to a suicide, where there was no evidence of accessory acts, save his own confessions.⁵⁴ In some jurisdictions the attempt to commit suicide is punishable as a misdemeanor.⁵⁵

SUI GENERIS. See the definition "Sui" ante p 780 note 4.

SUI HAEREDES. See 39 C.J.S. p 762 note 35.

SUI JURIS. See the definition "Sui" ante p 780 note 4.

SUIT. In one sense the word "suit" means a set of things having individual use, but together constituting an outfit; as, a suit of clothes.¹

In a different sense the word "suit" means generally the act of suing;² the process by which one endeavors to gain an end or object;³ attempt to attain a certain result.⁴

In a legal sense, as an action or proceeding in a court of justice for the enforcement of a right

or claim, or the redress of an injury, see Actions § 1 j.

The right of a foreign state or sovereign to maintain suits in the courts of another and the immunity of a foreign state or sovereign from suits either in its own courts or in the courts of another are treated in International Law § 18.

The right of the United States to maintain suits generally and its immunity from suits generally are treated in the C.J.S. title United States §§ 175-185, also 65 C.J. p 1402 note 34-p 1414 note 10. The right of the United States to maintain suits in the state courts is discussed in United States § 190, also 65 C.J. p 1417 note 48. The particular federal court in which suit may be maintained by the United States is treated in Federal Courts § 45.

The right of a state of the United States to main-

50. Ill.—Burnett v. People, supra.
60 C.J. p 999 note 51.

51. Mo.—State v. Webb, 115 S.W. 998, 216 Mo. 378, 20 L.R.A., N.S., 1142, 129 Am.S.R. 518, 16 Ann.Cas. 518.
60 C.J. p 999 note 52.

52. Mo.—State v. Webb, supra.
60 C.J. p 999 note 53.

53. S.C.—State v. Jones, 66 S.E. 160, 86 S.C. 17.

54. Ky.—Commonwealth v. Hicks, 82 S.W. 265, 118 Ky. 637, 26 Ky.L. 511.

55. N.J.—State v. La Fayette, 188 A. 918, 15 N.J.Misc. 115.

1. New Standard D.

Women's suits

A woman's suit consists of a coat or jacket and a skirt. The skirt is an essential part of the suit. Sweaters often form a part of the suit as

do other accessories, but they are not essential parts of the suit.—Bryant Park Bldg. v. Jane Ardsley Frocks, 108 N.Y.S.2d 748, 749.

2. U.S.—Railroad Co. v. Mississippi, Miss., 102 U.S. 135, 143, 26 L.Ed. 96.

Ill.—Des Chatelets v. Des Chatelets, 11 N.E.2d 13, 14, 15, 292 Ill.App. 357—McPike v. McPike, 10 Ill.App. 332, 333.

Phrases

(1) "Civil suit" defined see Actions § 1 j (2).

(2) "Suit for office" distinguished from "election contest" see Elections § 247 a.

(3) "Suit in forma pauperis" see Admiralty § 199 b (2) (b); see also Appeal and Error §§ 521-525, Costs §§ 146-157, and Federal Courts § 161 i (2).

(4) "Suit money" see Divorce § 202 b (2).

(5) "Suits of a civil nature" within meaning of 28 U.S.C.A. § 41 (1) giving federal district courts original jurisdiction of such suits where there is requisite diversity of citizenship and amount in controversy exceeds three thousand dollars see Federal Courts § 4 c.

(6) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 1000 note 18-p 1003 note 93.

3. Ill.—Des Chatelets v. Des Chatelets, 11 N.E.2d 13, 14, 292 Ill.App. 357—McPike v. McPike, 10 Ill.App. 332, 333.

Similarly defined

The process by which one gains an end or object.—Railroad Co. v. Mississippi, Miss., 102 U.S. 135, 143, 26 L.Ed. 96.

4. Ill.—Des Chatelets v. Des Chatelets, 11 N.E.2d 13, 14, 292 Ill.App. 357—McPike v. McPike, 10 Ill.App. 332, 333.

tain a suit in its own courts and in the courts of a sister state is treated in States § 213. The right of a state to maintain a suit in the federal courts is discussed in Federal Courts §§ 47, 48. The right of a state to maintain a suit against the United States is treated in the C.J.S. title United States § 179, also 65 C.J. p 1408 note 13.

The immunity of a state of the United States from suit in its own courts and in the courts of a sister state is treated in States §§ 214-216, and from suits in the federal courts in Federal Courts § 49.

SUITABLE. A qualifying,⁵ elastic,⁶ and varying⁷ term, dependent on the necessities of changing times or conditions.⁸ It is said to have reference to the use and purpose of the thing spoken of,⁹ and that in order for a thing to be "suitable," as that term is commonly understood, it must be fit and appropriate for the end to which it is to be devoted.¹⁰

The ordinary and general signification¹¹ of the term "suitable" is likely to suit;¹² capable of suiting;¹³ adapted;¹⁴ appropriate.¹⁵ "Suitable" is fur-

ther defined as meaning apt;¹⁶ fit;¹⁷ fitting;¹⁸ proper.¹⁹

In connection with appliances, "suitable" means compatible with safety;²⁰ safe or not defective.²¹

"Suitable" has been held equivalent to, or synonymous with, "adapted to" see 1 C.J.S. p 1452 note 6, "appropriate" see 6 C.J.S. p 123 note 42, "convenient" see 18 C.J.S. p 38 note 10.2, "designed" see 26 C.J.S. p 1238 note 99.1, "fit" see 36 C.J.S. p 884 note 34, "good" see 38 C.J.S. p 937 note 24, "likely to suit" see 53 C.J.S. p 886 note 96, "proper" see 73 C.J.S. p 133 note 9.1, "reasonable" see 75 C.J.S. p 635 note 57, and "sufficient" see ante p 778 note 82.

It has been compared with, or distinguished from, "adequate" see 1 C.J.S. p 1463 note 29, and "fit" see 36 C.J.S. p 884 note 35.

SUITABLENESS. The state or quality of being suitable, in any sense.²² The test of the suitability of an article for a certain purpose is not whether it is commonly used therefor, but whether it possesses actual practical commercial fitness for that purpose.²³

5. Mont.—McFatrige v. District Court, Seventh Judicial District, in and for Richland County, 122 P.2d 834, 839, 113 Mont. 81.

6. Me.—Sawyer v. Gilmore, 83 A. 673, 680, 109 Me. 169.

Tex.—Mumme v. Marrs, 40 S.W.2d 31, 36, 120 Tex. 383.

7. Me.—Sawyer v. Gilmore, 83 A. 673, 680, 109 Me. 169.

8. Tex.—Mumme v. Marrs, 40 S.W.2d 31, 36, 120 Tex. 383.
60 C.J. p 1003 note 1.

9. Mont.—McFatrige v. District Court, Seventh Judicial District, in and for Richland County, 122 P.2d 834, 839, 113 Mont. 81.

The use and purpose referred to are understood from the thing itself or are expressly stated.—McFatrige v. District Court, Seventh Judicial District, in and for Richland County, supra.

10. U.S.—U. S. v. Amerman & Paterson, 9 Cust.App. 244, 246.
60 C.J. p 1003 note 8.

11. Minn.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 249, 255.

N.Y.—Pomerantz v. Jacoby, 266 N.Y. S. 691, 693, 149 Misc. 99.

12. Minn.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 249, 255.

N.Y.—Pomerantz v. Jacoby, 266 N.Y. S. 691, 692, 693, 149 Misc. 99.

Phrases

(1) "Suitable work" or "suitable employment" as used in statutory provisions disqualifying individuals from claiming benefits of unemployment compensation acts where they fail to apply for or accept suitable work or employment see Social Security and Public Welfare § 201.

(2) "Suitable and safe" substantially the same as "good and sufficient" see 38 C.J.S. p 937 note 43.

(3) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 1004 note 18—p 1006 note 67.

13. N.Y.—Pomerantz v. Jacoby, 266 N.Y.S. 691, 692, 693, 149 Misc. 99.
60 C.J. p 1003 note 4.

14. Ga.—Corpus Juris cited in Dorsey v. Clements, 44 S.E.2d 783, 786, 202 Ga. 820.

Minn.—St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 249, 255.

Adaptive

N.Y.—Pomerantz v. Jacoby, 266 N.Y. S. 691, 693, 149 Misc. 99.

15. Ga.—Corpus Juris cited in Dorsey v. Clements, 44 S.E.2d 783, 786, 202 Ga. 820.

N.Y.—Pomerantz v. Jacoby, 266 N.Y. S. 691, 693, 149 Misc. 99.
60 C.J. p 1003 note 3.

Appropriate under the circumstances Wis.—Swinkels v. Wisconsin Michigan Power Co., 267 N.W. 1, 4, 221 Wis. 280.

16. Ga.—Dorsey v. Clements, 44 S.E.2d 783, 786, 202 Ga. 820.

17. Ga.—Corpus Juris cited in Dorsey v. Clements, 44 S.E.2d 783, 786, 202 Ga. 820.
60 C.J. p 1003 note 7.

18. U.S.—White v. U. S., C.C.N.Y., 69 F. 93.

N.Y.—Pomerantz v. Jacoby, 266 N.Y. S. 691, 693, 149 Misc. 99.

19. Ga.—Dorsey v. Clements, 44 S.E.2d 783, 786, 202 Ga. 820.

20. Mo.—Shohoney v. Quincy, O. & K. C. R. Co., 122 S.W. 1025, 1034, 223 Mo. 649.
60 C.J. p 1003 note 5.

21. S.C.—Davis v. Northwestern R. Co., 55 S.E. 526, 528, 75 S.C. 303.

22. Century D.

23. N.Y.—Pomerantz v. Jacoby, 266 N.Y.S. 691, 693, 149 Misc. 99.

SUITOR. In general, a wooer;²⁴ one who solicits a woman in marriage.²⁵

In legal procedure, a party to a suit or action in court.²⁶

SULPHATE. As a noun, a salt or ester of sulphuric acid.²⁷

As a verb, to treat or impregnate with sulphuric acid or a sulphate; to convert into sulphate.²⁸

SULPHIDE. A compound of sulphur with an element or radical; a salt or ester of hydrogen sulphate.²⁹

SULPHITE. A salt or ester of sulphurous acid.³⁰

SULPHONATE. As a noun, a salt or ester of sulphonic acid.³¹

As a verb, to introduce the sulphonic group into; to convert into a sulphonic acid.³²

SULPHUR. An element which occurs in nature as a yellow, brittle, crystalline solid, with resinous luster,

almost tasteless, and emitting when rubbed or warmed a peculiar characteristic odor.³³

SULPHURETS. See Mines and Minerals § 2 b (8).

SULPHUROUS. Of, pertaining to, or containing sulphur; resembling or emanating from sulphur, especially burning sulphur.³⁴

SUM. While the word "sum" must be construed in connection with the context,³⁵ it has a definite meaning appropriate to use with reference to dollars and cents,³⁶ and, except where a different meaning plainly appears, is restricted in its application to money,³⁷ and in this sense it is lexically defined³⁸ as meaning money,³⁹ and this is said to be the sense in which the word is most commonly used.⁴⁰ The term is further defined in this sense as meaning a quantity of money⁴¹ or currency,⁴² and it has been said that one of the primary meanings of the word is to signify a quantity of money.⁴³

The term has several other primary meanings which do not necessarily refer to money,⁴⁴ and is

24. Pa.—Weaver v. Ritter, 14 Pa.Co. 486, 489.

25. Ala.—Carney v. State, 79 Ala. 14, 18.
60 C.J. p 1006 note 71.

26. Black L.D.

Sutor as witness

Mo.—Knorpp v. Wagner, 93 S.W. 961, 967, 195 Mo. 637.
Parties to actions as witnesses see the C.J.S. title Witnesses §§ 120-131, also 70 C.J. p 193 note 13-p 206 note 25.

27. Webster New Int.D.

Sulphate of ammonia

A commercial article, large quantities of which are used for making aqua ammonia, anhydrous ammonia, alum, nitrate of ammonia, and many ammoniacal compounds, as well as in making ammoniated fertilizers, much the larger quantity being used, not for fertilizers, but in the arts.—Marine v. Bartol, C.C.Md., 60 F. 601.

28. U.S.—P. Beiersdorf & Co., Inc., v. U. S., 31 C.C.P.A., Customs, 158, 168.

29. Webster New Int.D.

Sulphide of antimony

The product of a process by which the gangue or slag is separated from the ore by heat.—McKesson v. U. S., C.C.N.Y., 113 F. 996, 997—60 C.J. p 1006 note 76.

Sulphide of zinc white

The commercial name for "lithophone."—Gabriel v. U. S., N.Y., 123 F. 296, 297, 59 C.C.A. 352—60 C.J. p 1006 note 83.

"Lithopone" or "lithophone" defined see 54 C.J.S. p 633 notes 37-40.

30. Ill.—People v. Quality Provision Co., 12 N.E.2d 615, 616, 367 Ill. 610, 114 A.L.R. 1210.

"Sodium sulphite" defined see 81 C.J.S. p 365 note 21.

31. Webster New Int.D.

32. U.S.—P. Beiersdorf & Co., Inc., v. U. S., 31 C.C.P.A., Customs, 158, 168.

33. Century D.

"Sulphur" within Tariff Act see Customs Duties §§ 32, 58.

"Brimstone" as sulphur or a form thereof see 11 C.J.S. p 1139 note 36.50.

Phrases

(1) "Bungo sulphur;" a practically pure sulphur obtained in Bungo Province, Japan, from geyser-like craters which emit sulphurous gases, and vapors, due to volcanic activity.—Newhall v. U. S., 4 Cust.App. 134, 135, 136—60 C.J. p 1006 note 92.

(2) "Flowers of sulphur;" one of the forms evolved from sublimation of sulphur.—Newhall v. U. S., supra.

(3) "Sublimation of sulphur;" the artificial distillation of sulphur, in the course of which the sulphur con-

tent of the article distilled is, after vaporization, deposited, collected, and formed according to the commercial or other uses for which it may be designed.—Newhall v. U. S., supra.

(4) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 1007 notes 95-2, 4, 5.

34. Webster New Int.D.

"Sulphurous acid" defined see 1 C.J. S. p 770 note 84.1.

35. Va.—Grimsley v. Gibson, 113 S. E. 851, 852, 134 Va. 38.

36. D.C.—McMullen v. U. S., 96 F.2d 574, 577, 68 App.D.C. 302.

37. D.C.—McMullen v. U. S., supra. Mass.—Kelley v. Sullivan, 87 N.E. 72, 73, 201 Mass. 34.

38. U.S.—U. S. v. Van Auken, Mich., 96 U.S. 366, 368, 24 L.Ed. 852.

39. U.S.—U. S. v. Van Auken, supra. 60 C.J. p 1007 note 18.

40. U.S.—U. S. v. Van Auken, supra. 60 C.J. p 1007 note 18 [a].

41. D.C.—McMullen v. United States, 96 F.2d 574, 577, 68 App.D.C. 302. 60 C.J. p 1007 note 16.

42. U.S.—U. S. v. Van Auken, Mich., 96 U.S. 366, 368, 24 L.Ed. 852.

43. Va.—Grimsley v. Gibson, 113 S. E. 851, 852, 134 Va. 38.

44. Va.—Grimsley v. Gibson, supra.

defined to mean an amount or aggregate;⁴⁵ total;⁴⁶ a total or aggregate of things;⁴⁷ the aggregate of two or more things taken together;⁴⁸ the result of two or more units added;⁴⁹ whole.⁵⁰

The word "sum" is further defined as meaning debt;⁵¹ remainder;⁵² and share.⁵³

In English law, the term has been employed as referring to a collection, a compendium, a summary or abstract.⁵⁴

"Sum" has been held synonymous with "price" see 72 C.J.S. p 499 note 14, and has been distinguished from "value."⁵⁵

As a verb, the term "sum" is usually employed with "up," and is defined as meaning to comprise in a few words; to recapitulate briefly,⁵⁶ and the term "sum up," as used with reference to legal proceedings, means to present all the proof to the consideration of the jury.⁵⁷

Other phrases employing the term are set out in the note.⁵⁸

SUMA. A Rumanian word, one of the meanings of which is "sum."⁵⁹

SUMERE. A Latin word meaning to take.⁶⁰

SUMMA. As the first word of maxims to which there have been no recent applications see 60 C.J. p 1010 notes 78-80.

SUMMARILY. The word is said not only to have a fixed and clear meaning in ordinary language, but to possess a well-defined meaning in the terms of legal phraseology.⁶¹ It conveys the idea of rapidity of performance and quickness of execution,⁶² and is defined as meaning in a summary manner;⁶³ without ceremony or delay;⁶⁴ short; concise.⁶⁵

SUMMARY. The term is said not only to have a fixed and clear meaning in ordinary language, but to possess a well-defined meaning in the terms of legal proceedings⁶⁶ and phraseology.⁶⁷ It carries with it the idea that, however much the subject matter may be condensed, the sum and substance of it must remain.⁶⁸

45. Pa.—Swartley v. McCracken, 7 Montg.Co. 49, 50.

Similarly defined

(1) Aggregate amount.—Swartley v. McCracken, supra.

(2) Any amount indefinitely.—U. S. v. Van Auken, Mich., 96 U.S. 366, 368, 24 L.Ed. 852.

46. Va.—Grimsley v. Gibson, 113 S. E. 851, 852, 134 Va. 38.

47. D.C.—McMullen v. U.S., 96 F.2d 574, 577, 68 App.D.C. 302.

48. Va.—Grimsley v. Gibson, 113 S. E. 851, 852, 134 Va. 38.

49. Wash.—State v. Seattle, etc., R. Co., 114 P. 431, 433, 62 Wash. 544. 60 C.J. p 1007 note 19.

50. Va.—Grimsley v. Gibson, 113 S. E. 851, 852, 134 Va. 38.

51. Eng.—Joule v. Taylor, 7 Exch. 58, 66, 155 Reprint 855. 60 C.J. p 1008 note 24.

52. N.Y.—In re Schriever's Estate, 155 N.Y.S. 826, 831, 91 Misc. 456. 60 C.J. p 1008 note 25.

53. Conn.—Appeal of Clarke, 39 A. 155, 160, 70 Conn. 195. 60 C.J. p 1008 note 26.

54. Black L.D.

"Several of the old law treatises are called 'sums.' Lord Hale applies the term to summaries of statute law."—Black L.D.

55. U.S.—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F. Supp. 586, 588.

56. Webster New Int.D.

57. Ga.—Johnson v. Kinsey, 7 Ga. 428, 431. 60 C.J. p 1009 note 74.

In English practice, the judge, in charging the jury, is said "to sum up."—Burrill L.D.—60 C.J. p 1009 note 74.

"Summing up"

(1) On the trial of an action by a jury, a recapitulation of the evidence adduced in order to draw the attention of the jury to the salient points. —Black L.D.—60 C.J. p 1010 note 76.

(2) "It has been properly held that 'stating the testimony' means more than repeating it. It includes the idea of stating it in its logical relations to the propositions it is to support or contradict, as well as to the principles of law by which its bearing and force ought to be controlled, or, as it is expressed by the technical phrase, 'summing up.'"—Benedict v. Rose, 16 S.C. 629, 630—60 C.J. p 1010 note 77.

58. Other phrases

(1) "Sum demanded" synonymous with "amount in controversy" see 3 C.J.S. p 1058 note 4.

(2) "Sum in controversy" see 18 C.J.S. p 35 note 34.

(3) Additional phrases as to which more recent adjudications have not been found see 60 C.J. p 1008 note 29—p 1009 note 71.

59. Axelrad Dictionar Complet Roman-Englez.

(Suma data drept) despăgubire

A sum of money given as compensation for loss.—The Prahova, D.C. Cal., 38 F.Supp. 418, 425.

60. Conn.—Morford v. Peck, 46 Conn. 380, 385.

61. Tex.—Staples v. State, Civ.App., 244 S.W. 1068, 1072.

62. Tex.—Staples v. State, supra.

63. Ind.—Clarke v. Evansville, 131 N.E. 82, 84, 75 Ind.App. 500.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1010 notes 90-98.

64. N.Y.—In re Gabelmann, 241 N. Y.S. 405, 408, 136 Misc. 641. 60 C.J. p 1010 note 87.

65. N.Y.—In re Gabelmann, supra.

66. N.J.—Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60.

67. N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. Tex.—Staples v. State, Civ.App., 244 S.W. 1068, 1072.

68. Mass.—Sears v. Treasurer and

As a noun. The term "summary" is defined as meaning an abstract, abridgment, compendium, or epitome;⁶⁹ a synopsis;⁷⁰ a short, concise, summing up;⁷¹ also a short application to a court or judge, without the formality of a full proceeding.⁷² "Summary" has been held to be synonymous with "synopsis."⁷³

As an adjective. Ordinarily the word means short;⁷⁴ concise;⁷⁵ brief; compendious; succinct;⁷⁶ condensed to the utmost possible degree;⁷⁷ reduced into a narrow compass⁷⁸ or into a few words.⁷⁹ The word may be used as conveying the idea of rapidity of performance and quickness of execution;⁸⁰ and hence as meaning performed with-

out ceremony⁸¹ or formality;⁸² quickly executed; rapidly performed;⁸³ without ceremony or delay.⁸⁴

Summary manner. The term "summary manner" is defined as meaning done without delay or formality; quickly executed,⁸⁵ as a summary process;⁸⁶ with least possible delay.⁸⁷ It means a short, concise, immediate proceeding;⁸⁸ a proceeding without a jury.⁸⁹ When the term is used to describe the method required for presenting exceptions on appeal it means stated clearly,⁹⁰ concisely,⁹¹ pointedly, separately,⁹² and singly;⁹³ within a narrow compass.⁹⁴

Other phrases employing the word "summary" are set out in the note.⁹⁵

- Receiver General, 98 N.E.2d 621, 631, 327 Mass. 310.
69. Mass.—Sears v. Treasurer and Receiver General, *supra*.
70. Ohio.—State v. Bettman, 176 N. E. 664, 665, 124 Ohio St. 24.
71. Ohio.—State v. Bettman, *supra*. 60 C.J. p 1010 note 2.
72. Black L.D.
73. Ohio.—State v. Bettman, 176 N. E. 664, 665, 124 Ohio St. 24.
74. N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. 60 C.J. p 1011 note 14.
75. Ind.—Goodwin v. Calumet Supply Co., 23 N.E.2d 602, 604, 107 Ind.App. 487.
- N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. 60 C.J. p 1011 note 10.
76. N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. Ohio.—State v. Bettman, 176 N.E. 664, 665, 124 Ohio St. 24.
77. Ind.—Goodwin v. Calumet Supply Co., 23 N.E.2d 602, 604, 107 Ind.App. 487—Matlon v. Matlon, 175 N.E. 369, 370, 92 Ind.App. 350.
- N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60.
78. N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. 60 C.J. p 1011 note 12.
79. N.J.—Corpus Juris cited in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. 60 C.J. p 1011 note 13.
80. N.J.—Corpus Juris quoted in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60.
- Tex.—Staples v. State, Civ.App., 244 S.W. 1068, 1072.
81. Ind.—Matlon v. Matlon, 175 N.E. 369, 370, 92 Ind.App. 350.
- N.J.—Corpus Juris quoted in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60.
82. Ind.—Goodwin v. Calumet Supply Co., 23 N.E.2d 602, 604, 107 Ind.App. 487.
83. Ind.—Clarke v. Evansville, 131 N.E. 82, 84, 75 Ind.App. 500.
- N.J.—Corpus Juris quoted in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60.
84. N.J.—Corpus Juris quoted in Application of Wellhofer, 83 A.2d 827, 832, 16 N.J.Super. 60. 60 C.J. p 1011 note 20.
85. Tex.—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, 387.
86. Tex.—Joseph v. City of Austin, *supra*.
87. La.—Vance v. Noel, 78 So. 741, 742, 143 La. 477. 60 C.J. p 1011 note 29.
88. Ky.—Phil Hollenbach Co. v. Hollenbach, 204 S.W. 152, 161, 181 Ky. 262, 13 A.L.R. 524. 60 C.J. p 1011 note 27.
89. Minn.—St. Paul v. Robinson, 152 N.W. 777, 778, 129 Minn. 383, Ann. Cas.1916E 845. 60 C.J. p 1011 note 28.
90. Me.—Ricker v. Leavitt, 3 A. 180.
91. Me.—McKown v. Powers, 29 A. 1079, 1081, 86 Me. 291. 60 C.J. p 1011 note 32.
92. Me.—Toole v. Bearce, 39 A. 558, 559, 91 Me. 209.
93. Me.—Ricker v. Leavitt, 3 A. 180.
94. Me.—McKown v. Powers, 29 A. 1079, 1081, 86 Me. 291.
95. Phrases
- (1) "Summary conviction" defined see 18 C.J.S. p 98 notes 95-97.
- (2) "Summary judgment" see Judgments §§ 219-227.
- (3) "Summary jurisdiction" defined see Courts § 15 a.
- (4) "Summary proceedings" generally see Summary Proceedings § 1 et seq. and Criminal Law §§ 367-403.
- (5) "Summary process" see Process § 1 f (1).
- (6) "In a summary way" construed to mean without ceremony or delay.—People v. Grifenhagen, 154 N.Y.S. 965, 970—60 C.J. p 1011 note 20.
- (7) Additional phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1011 note 5, p 1012 notes 37-52.

SUMMARY PROCEEDINGS

This Title includes proceedings which are not according to the course of the common law, and trials in which the established course of a legal proceeding is disregarded; nature of such proceedings, and mode of procedure therein.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition—p 790
- 2. Nature—p 790
- 3. Construction of statutes—p 791
- 4. Procedure—p 792

See also descriptive word index in the back of this Volume

§ 1. Definition

A summary proceeding is a proceeding not according to the course of the common law, or a form of trial in which the ancient established course of a legal proceeding is disregarded.

A summary proceeding has been defined as a proceeding which is not according to the course of the common law,¹ or a form of trial in which the ancient established course of a legal proceeding is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury.² Summary, in such case, means with dispatch, with the least possible delay, and in preference to ordinary legal and regular judicial proceedings.³

§ 2. Nature

Summary proceedings are statutory, except in the few instances where such proceedings were allowed at common law, and they are generally held to be cumulative and judicial in their nature.

Except in those rare instances in which summary procedure was allowed at common law, such as with respect to punishment for contempt, as discussed in Contempt § 62, and suspension or disbarment of attorney, as considered in Attorney and Client § 28, summary proceedings are statutory and may be resorted to only where there is express authority therefor,⁴ or, it has been stated, where the demand made therein is incidental to the main

1. Tenn.—*Canepert v. State*, 89 S. W.2d 164, 169 Tenn. 472.

60 C.J. p 1013 note 2.

"Action" and "special proceeding" distinguished see Actions §§ 1 h (7), 42.

Ordinary proceedings see Actions § 1 h (5).

"Summary process" defined and distinguished see Process § 1 f (1).

2. Ind.—*State ex rel. Weatherholt v. Perry Circuit Court*, 185 N.E. 510, 204 Ind. 673.

N.Y.—*In re Rosenberg's Estate*, 284 N.Y.S. 260, 265, 266, 157 Misc. 490.

Tenn.—*Canepert v. State*, 89 S.W.2d 164, 165, 169 Tenn. 472.

Utah.—*Cox v. Dixie Power Co.*, 16 P. 2d 916, 81 Utah 94.

60 C.J. p 1014 note 3.

Summary and plenary proceedings distinguished

(1) Generally.—*Kerby v. Peters*, 190 A. 511, 514, 172 Md. 1.

(2) The differences are largely procedural rather than substantive.—*Central Republic Bank & Trust Co. v. Caldwell*, C.C.A.Mo., 58 F.2d 721.

(3) The summary proceeding is based on petition and proceeds without formal pleadings; a plenary suit proceeds on formal pleadings.

U.S.—*Central Republic Bank & Trust Co. v. Caldwell*, supra.

Or.—*In re Wells' Estate*, 212 P.2d 729, 187 Or. 462.

(4) In a summary proceeding the necessary parties are cited by order to show cause, a short-time notice of hearing is fixed by the court, the hearing is quite generally on affidavits, and is sometimes ex parte; in a plenary suit a formal summons brings in the parties other than the plaintiff, the time for pleading and hearing is fixed by statute or by rule of court, and the hearing is a full hearing, the usual method being the

examination of witnesses.—*Central Republic Bank & Trust Co. v. Caldwell*, supra.

Proceeding held plenary rather than a summary proceeding.

U.S.—*In re Rockford Produce & Sales Co.*, C.C.A.Ill., 275 F. 811.

Md.—*Kerby v. Peters*, 190 A. 511, 172 Md. 1.

3. La.—*Vance v. Noel*, 78 So. 741, 143 La. 477.

Utah.—*Cox v. Dixie Power Co.*, 16 P. 2d 916, 81 Utah 94.

4. Ark.—*Prairie Creek Coal Mining Co. v. Kittrell*, 155 S.W. 496, 107 Ark. 361.

La.—*Succession of Jamison*, 32 So. 381, 109 La. 279—*Colligan v. Benoit*, App., 141 So. 467.

Mo.—*Corpus Juris cited in In re Parker's Trust Estate*, 67 S.W.2d 114, 119, 228 Mo.App. 400.

demand contained in a suit which is pending between the parties.⁵

Civil or criminal. Summary proceedings are not exclusively criminal in their nature but, as considered in various titles throughout this work, are often available to enforce civil rights, as, for example, proceedings for judgment on motion, discussed in Judgments §§ 219-227; but in one jurisdiction it has been said that a summary proceeding, strictly speaking, is a criminal prosecution, and as such must always be commenced in the name of the commonwealth.⁶

Cumulative or exclusive. Summary proceedings are generally held to be cumulative in their nature,⁷ not interfering with the availability of general remedies⁸ or restricted in their application by the fact that a remedy under general laws is also available.⁹

Judicial or nonjudicial. The fact that a proceeding is summary does not make it any the less judicial.¹⁰

§ 3. Construction of Statutes

Statutes authorizing summary proceedings should be

strictly construed, but not so as to defeat the beneficial objects intended.

Summary proceedings being in derogation of common law¹¹ must conform closely to the statutes authorizing them, as discussed *infra* § 4 a, which are to be strictly construed,¹² so as to apply only in the particular cases or situations specified in the statutes,¹³ and are not to be extended by implication or intendment.¹⁴ However, it has been held that a statute making a particular proceeding a summary one, free from technical and formal obstructions, should be construed liberally.¹⁵ No such restrictive construction should be adopted as will defeat or frustrate the beneficial objects of furnishing a short and expeditious method of recovery in the class of actions mentioned and avoiding unnecessary trouble and expense in the trial.¹⁶

A statute providing for the recovery of an amount due by summary process, as in case of a confession of judgment, has been held to provide a remedy for the more speedy enforcement of an obligation, and not to affect in any manner the obligation of the contract.¹⁷

Statutes providing for summary proceedings have been held to provide only for the future and to be not retroactive.¹⁸

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| <p>Ohio.—Zangerle v. Evatt, 41 N.E.2d 369, 139 Ohio St. 563.
60 C.J. p 1014 note 6.</p> <p>5. La.—Succession of Jamison, 32 So. 381, 109 La. 279—Colligan v. Benoit, App., 141 So. 467—Succession of Schmitt, 4 La.A., Orleans, 10.</p> <p>6. Pa.—Commonwealth v. Shipley, 35 Pa.Co. 132, 136.
60 C.J. p 1014 note 8.</p> <p>7. Tenn.—State v. Howse, 183 S.W. 510, 513, 134 Tenn. 67, L.R.A.1916D 1090, Ann.Cas.1917C 1125.
60 C.J. p 1014 note 10.</p> <p>8. Tex.—Eubanks v. Sites, Civ.App., 146 S.W. 952.
60 C.J. p 1014 note 11.</p> <p>9. Ark.—Levy v. Lawson, 5 Ark. 212.
N.Y.—Hatfield v. Hatfield, 15 N.Y. St. 788.</p> <p>10. Puerto Rico.—Hesse v. Ledesma, 7 Puerto Rico Fed. 520.
“Judicial proceeding” defined see Actions § 1 h (4).</p> <p>11. Ark.—Prairie Creek Coal Mining Co. v. Kittrell, 155 S.W. 496, 107 Ark. 361—Miller v. Farrelly, 25 Ark. 353.</p> | <p>Ga.—Welman v. Harris, 2 Ga.Dec. Pt. II 63.
Ky.—Corpus Juris quoted in Carroll v. Sullivan, 220 S.W.2d 590, 591, 310 Ky. 289.
60 C.J. p 1015 note 14.</p> <p>12. Ark.—Prairie Creek Coal Mining Co. v. Kittrell, 155 S.W. 496, 107 Ark. 361.
Ga.—Welman v. Harris, 2 Ga.Dec. Pt. II 63—Hale v. Burton, Dudley 105.
Ky.—Corpus Juris quoted in Carroll v. Sullivan, 220 S.W.2d 590, 591, 310 Ky. 289.
Me.—Karahalies v. Dukals, 81 A. 1011, 108 Me. 527.
Philippine.—Topacio v. Paredes, 23 Philippine 238.
60 C.J. p 1015 note 16.</p> <p>Limitation of rule
The rule that statutes on summary proceedings are to be strictly construed does not apply to the construction of statutes bearing on the merits of the case merely because the question arises in summary proceedings.—Woodward v. Alston, 12 Heisk., Tenn., 581.</p> <p>13. Ga.—Welman v. Harris, 2 Ga. Dec. Pt. II 63—Hale v. Burton, Dudley 105.</p> | <p>Ky.—Corpus Juris quoted in Carroll v. Sullivan, 220 S.W.2d 590, 591, 310 Ky. 289.
Mo.—In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400.
60 C.J. p 1015 note 17.</p> <p>Not extended to other cases
The right to summary proceedings cannot be extended beyond the cases expressly authorized by law.—Bienvenue v. Bienvenue, 172 So. 516, 186 La. 429—Succession of Esteves, 162 So. 194, 182 La. 604—Succession of Jamison, 32 So. 381, 108 La. 279.</p> <p>14. Ky.—Corpus Juris quoted in Carroll v. Sullivan, 220 S.W.2d 590, 591, 310 Ky. 289.
60 C.J. p 1015 note 18.</p> <p>15. N.H.—Arlington Mills v. Town of Salem, 140 A. 163, 83 N.H. 148.</p> <p>16. Md.—Commercial Credit Corporation v. Schuck, 134 A. 349, 151 Md. 367—Gemmell v. Davis, 18 A. 955, 71 Md. 458.</p> <p>17. La.—Louisiana Citizens' Bank v. Deynoodt, 25 La.Ann. 628.</p> <p>18. Ala.—Crawford v. State, Minor 143.
La.—Louisiana Citizens' Bank v. Deynoodt, 25 La.Ann. 628.</p> |
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§ 4. Procedure

- a. In general
- b. Pleadings
- c. Right to jury trial
- d. Hearing
- e. Relief
- f. Record
- g. Review

a. In General

The procedure in summary proceedings is governed by statute, the provisions of which must be strictly complied with; but the process or notice to defendant to appear need not satisfy the requirements of formal summonses.

Procedure in summary proceedings is governed by the provisions of the statute or statutes under which the proceedings are instituted,¹⁹ which provisions must be strictly complied with,²⁰ and the party pursuing such a remedy must bring his case strictly within the requirements of the statute.²¹ The proceedings are not intended to be carried on in the formal manner in which ordinary actions are prosecuted,²² and it is unnecessary to pursue with exactitude the requirements of the law as normally observed in a civil action between litigants.²³

It has been held that courts as a rule are not hospitable to summary proceedings, and that it is

always a question of discretion whether a court will entertain such a proceeding or will relegate the moving party to a plenary suit.²⁴ The power to bring a citizen before the court summarily and otherwise than in accordance with the duly prescribed procedure is somewhat arbitrary in character and one which should be used sparingly and only when its use is clearly authorized.²⁵

A defendant cannot convert an ordinary action into a summary one by reconvening therein, or a summary action into an ordinary one by the same means.²⁶

Process. In summary proceedings, although defendant must be notified or summoned to appear,²⁷ the process or notice need not satisfy the requirements of formal summonses,²⁸ and it has been stated that a summary proceeding ordinarily implies one begun without summons or subpoena and usually tried on short notice.²⁹

b. Pleadings

Defendant must be apprised of the nature and purpose of the proceeding by such form of pleading as the statute requires, which pleading must show all the facts necessary to support the proceedings, but formal pleading is not usually necessary and defendant may make any proper defense.

Defendant must be apprised of the nature and

19. Mo.—*Corpus Juris* cited in *In re Parker's Trust Estate*, 67 S.W. 2d 114, 119, 228 Mo.App. 400. 60 C.J. p 1015 note 19.

20. Ala.—*Ex parte Buckley*, 53 Ala. 42.

Ark.—*Milor v. Farrelly*, 25 Ark. 353. Ill.—*Village of Lovington v. Gregory*, 122 N.E. 504, 287 Ill. 169.

Ky.—*Carroll v. Sullivan*, 220 S.W.2d 590, 310 Ky. 289.

Me.—*Karahalies v. Dukais*, 81 A. 1011, 108 Me. 527.

Mo.—*Corpus Juris* cited in *In re Parker's Trust Estate*, 67 S.W.2d 114, 119, 228 Mo.App. 400.

Philippine.—*Topacio v. Paredes*, 23 Philippine 238. 60 C.J. p 1015 note 20.

Prerequisite to presumption of jurisdiction

Where property of a citizen may be taken on notice to the owner by publication and without personal service or process, no presumption can be indulged in support of the jurisdiction of the court in which the proceedings are carried on, unless such proceedings are in strict conformity with the statute.—*Village of Lovington v. Gregory*, 122 N.E. 504, 287 Ill. 169.

Within spirit and letter of act

In order that a person may avail himself of a summary remedy he must bring himself within both the spirit and letter of the law.

Nev.—*Johns-Manville, Inc., of California v. Lander County*, 240 P. 925, 48 Nev. 253.

Tex.—*Johnson v. Darr*, 272 S.W. 1098, 114 Tex. 516.

21. Ala.—*Crawford v. State*, Minor 143.

22. Kan.—*Sanford v. Frankhouser*, 24 Kan. 98.

23. Okl.—*Cusack v. Prudential Ins. Co. of America*, 134 P.2d 984, 192 Okl. 218.

24. U.S.—*The Penn Fuel, D.C.N.Y.*, 36 F.2d 272.

25. Wis.—*State ex rel. Ashley v. Circuit Court of Milwaukee County*, 261 N.W. 737, 219 Wis. 38.

26. La.—*Cepro v. Matulich*, 95 So. 226, 152 La. 1072—*Mighell v. Kelly*, 25 So. 101, 51 La. Ann. 281.

27. Utah.—*Cox v. Dixie Power Co.*, 16 P.2d 916, 81 Utah 94. 60 C.J. p 1016 note 51.

Necessity for notice generally see Notice § 14.

Notice in judicial proceedings as essential element of due process of law see Constitutional Law § 619 c. Special or summary proceedings as constituting due process generally see Constitutional Law § 612. Waiver of process generally see Process § 2.

Timely notice required

Mo.—*Mandel v. Bethe*, App., 170 S.W.2d 87.

28. Okl.—*Cusack v. Prudential Ins. Co. of America*, 134 P.2d 984, 192 Okl. 218.

29. U.S.—*In re Rockford Produce & Sales Co.*, C.C.A.Ill., 275 F. 811.

Fixed by court

Short-time notice of hearing is fixed by court.—*Central Republic Bank & Trust Co. v. Caldwell*, C.C.A. Mo., 58 F.2d 721.

Order to show cause

The necessary parties are cited by order to show cause.—*Central Republic Bank & Trust Co. v. Caldwell*, *supra*.

purpose of the proceeding³⁰ by notice,³¹ motion,³² affidavit,³³ information,³⁴ declaration,³⁵ or complaint,³⁶ as the statute may require, which must show all the facts necessary to support the proceedings.³⁷ Formal pleading is not, however, usually necessary in summary proceedings,³⁸ and, unless the statute otherwise provides, it is competent for defendant, without as well as with pleas, to make any proper defense.³⁹ Any defense which could have been pleaded in an ordinary law action will be considered as though formally pleaded.⁴⁰ Defects and irregularities in the pleadings may be cured by amendment or supplemental pleadings.⁴¹

Any evidence which would have been admissible under any form of pleading is admissible.⁴²

c. Right to Jury Trial

As a general rule summary proceedings are triable without a jury.

While the question of the constitutionality of statutes authorizing summary proceedings arises more particularly with respect to infringement of the right to trial by jury guaranteed by the federal Constitution and state constitution, and the due process of law clause, these constitutions have been uniformly construed as not conferring a right to trial by jury in all cases and as not extending the

right to cases in which it was not allowed at common law, but simply as guaranteeing that right unchanged as it existed at common law or by statute in the particular state at the time of the adoption of the constitution, except as modified by the constitution itself; and since at common law the right to trial by jury did not exist in summary proceedings,⁴³ these proceedings are still triable without a jury.⁴⁴ Indeed, if the procedure under the statute is to be without a jury, a jury cannot be called.⁴⁵ However, a legislature cannot authorize a summary procedure in controversies properly triable by jury at common law or according to the practice of the particular jurisdiction prior to the adoption of the constitution.⁴⁶

The question of the right to a jury trial in summary proceedings is discussed in §§ 50-74, 77 of the title Juries with respect to various particular proceedings.

d. Hearing

In summary proceedings a hearing generally is required at which defendant is given an opportunity to hear what is urged against him and to interpose a defense.

Under statutes authorizing summary proceedings, although the hearing is sometimes *ex parte*,⁴⁷ or-

30. Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94. 60 C.J. p 1015 note 22.

31. Ala.—Stanley v. Mobile Bank, 23 Ala. 652.
Ky.—Carroll v. Sullivan, 220 S.W.2d 590, 310 Ky. 289—Johnson v. Bradley, 11 Bush 666.
Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94.

32. Utah.—Cox v. Dixie Power Co., supra.
60 C.J. p 1015 note 24.
Proceedings constituting commencement of special and summary proceedings see Actions § 129 d.

33. Utah.—Cox v. Dixie Power Co., supra.
60 C.J. p 1015 note 25.

34. Mo.—St. Louis v. Knox, 74 Mo. 79.
60 C.J. p 1015 note 26.

35. Ark.—McKisick v. Brodie, 6 Ark. 375.

36. N.J.—State (Feigen, Prosecutor) v. McGuire, 44 A. 972, 64 N.J.Law 152.
Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94.
60 C.J. p 1015 note 28.

Complaint or information in trial without jury for petty misdemeanor or see Criminal Law §§ 373-377.

37. Utah.—Cox v. Dixie Power Co., supra.
60 C.J. p 1016 note 29.

Requisites of petition

The notice in summary proceedings must contain all the requisites of a petition in a regular action.—Carroll v. Sullivan, 220 S.W.2d 590, 310 Ky. 289—Johnson v. Bradley, 11 Bush, Ky., 666.

38. U.S.—Central Republic Bank & Trust Co. v. Caldwell, C.C.A.Mo., 58 F.2d 721.

Or.—In re Wells' Estate, 212 P.2d 729, 137 Or. 462—In re Fisher's Estate, 274 P. 1098, 128 Or. 415.
60 C.J. p 1016 note 30.

39. Va.—Hall v. Ratliff, 24 S.E. 1011, 93 Va. 327.
60 C.J. p 1016 note 32.

40. Or.—In re Fisher's Estate, 274 P. 1098, 128 Or. 415.

41. Ala.—Ex parte Buckley, 53 Ala. 42.
60 C.J. p 1016 note 34.

42. Or.—In re Fisher's Estate, 274 P. 1098, 128 Or. 415.

43. Ark.—State v. Johnson, 26 Ark. 281.

Va.—Yoder v. Commonwealth, 57 S.E. 581, 107 Va. 823.
Right to trial by jury generally see Juries §§ 9-83.

44. U.S.—O'Keith v. Johnston, C.C. A.Cal., 129 F.2d 889.

Ark.—Govan v. Jackson, 32 Ark. 553.
Ohio.—Zangerle v. Ewatt, 41 N.E.2d 369, 372, 139 Ohio St. 563.

Tenn.—Canepari v. State, 89 S.W.2d 164, 169 Tenn. 472.
60 C.J. p 1016 note 38.

Right to trial by jury generally in proceedings other than actions see Juries §§ 50-68.

Trial without jury implied

When a statute provides for a summary proceeding it means without the intervention of a jury.—State ex rel. Mynatt v. King, 191 S.W. 352, 137 Tenn. 17—State v. Howse, 183 S.W. 510, 514, 134 Tenn. 67, L.R. A.1916D 1090.

45. U.S.—O'Keith v. Johnston, C.C. A.Cal., 129 F.2d 889.
60 C.J. p 1016 note 48.

46. N.Y.—Sands v. Kimbark, 27 N. Y. 147.
60 C.J. p 1016 note 49.

47. U.S.—Central Republic Bank &

dinarily it is not,⁴⁸ and defendant is notified or summoned to appear and is given an opportunity to hear what is urged against him,⁴⁹ and to interpose a defense,⁵⁰ after which follows an adjudication of the rights of the parties.⁵¹ The court may continue the hearing as justice and right may demand.⁵² While the hearing is usually or quite generally on affidavits,⁵³ summary proceedings follow the common-law rules of evidence in the absence of a statute providing otherwise.⁵⁴

e. Relief

In summary proceedings the judgment must be such as is authorized by law, and must be supported by, and in conformity with, proof adduced at the hearing.

The judgment in summary proceedings must be such as is authorized by law.⁵⁵ Where no good cause is shown why the relief should not be granted,⁵⁶ or where defendant in a summary proceeding refuses to answer interrogatories propounded to him,⁵⁷ the relief may be given as prayed, or, in some instances, defendant may be given a reasonable time to act or perform before an order is made final.⁵⁸ Whether or not defendant appears evidence must be adduced to establish the right to the relief sought,⁵⁹ and the judgment rendered should be in conformity with the proof adduced.⁶⁰

Summary relief may be refused where the right of the party claiming to be entitled thereto is in doubt,⁶¹ and the party put to his action.⁶² Judgment by default is not authorized.⁶³

Under some statutes a money judgment cannot be recovered by summary proceeding if objected to by defendant.⁶⁴

f. Record

In summary proceedings a record must be made which must show every fact necessary to warrant and sustain a recovery or a legal conviction and that the remedy has been pursued according to the statute.

It is in general essential, more particularly in proceedings of a penal nature, that a record be made⁶⁵ which should show every fact necessary to warrant and sustain a recovery or a legal conviction⁶⁶ and that the remedy has been pursued according to the statute.⁶⁷ Thus, the record must show jurisdiction of the court,⁶⁸ the serving of a summons, notice, or complaint,⁶⁹ or, in the absence of such showing, that defendant appeared,⁷⁰ as well as the evidence⁷¹ and the adjudication of the court,⁷² unless the statute regulating the proceeding specifically provides that any of such matters need not be recorded.⁷³

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| <p>Trust Co. v. Caldwell, C.C.A.Mo., 58 F.2d 721—In re Rockford Produce & Sales Co., C.C.A.Ill., 275 F. 811.</p> <p>48. Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94. 60 C.J. p 1016 note 50.</p> <p>49. Ga.—Western & A. R. Co. v. City of Atlanta, 38 S.E. 996, 113 Ga. 537, 54 L.R.A. 294. 60 C.J. p 1017 note 52.</p> <p>Necessity for hearing in judicial proceedings see Constitutional Law § 622.</p> <p>50. Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94. 60 C.J. p 1017 note 53.</p> <p>51. Tex.—Hamilton v. Ward, 4 Tex. 356. 60 C.J. p 1017 note 54.</p> <p>52. Ala.—Ex parte Buckley, 53 Ala. 42.</p> <p>53. U.S.—Central Republic Bank & Trust Co. v. Caldwell, C.C.A.Mo., 58 F.2d 721—In re Rockford Produce & Sales Co., C.C.A.Ill., 275 F. 811.</p> <p>54. Mo.—In re Mingo Drainage Dist., 183 S.W. 611, 267 Mo. 268.</p> <p>Pa.—Commonwealth v. Borden, 61 Pa. 272.</p> | <p>55. Ark.—Woodburn v. Driver, 99 S. W. 384, 81 Ark. 333. 60 C.J. p 1017 note 55.</p> <p>56. S.C.—State v. Sheriff of Charleston Dist., 8 S.C.L. 145.</p> <p>57. S.C.—State v. Sheriff of Charleston Dist., supra.</p> <p>58. S.C.—State v. Sheriff of Charleston Dist., supra. 60 C.J. p 1017 note 58.</p> <p>59. Ga.—Welman v. Harris, 2 Ga. Dec. Pt. II 63.</p> <p>Ky.—Todd v. Caines, 18 B.Mon. 621—Terrill v. Cecil, 3 Metc. 347. 60 C.J. p 1017 note 59.</p> <p>60. Ky.—Todd v. Caines, 18 B.Mon. 621.</p> <p>61. N.Y.—Sidney Davison Coal Co., Inc. v. Interstate Coal, etc., Co., 193 N.Y.S. 883. 60 C.J. p 1017 note 60.</p> <p>62. S.C.—State v. Sheriff of Charleston Dist., 8 S.C.L. 145. 60 C.J. p 1017 note 61.</p> <p>63. Ky.—Todd v. Caines, 18 B.Mon. 621—Terrill v. Cecil, 3 Metc. 347.</p> <p>Pleadings not confessed—
The plaintiff's pleadings cannot be taken as confessed on defendant's</p> | <p>default.—Todd v. Caines, 18 B.Mon., Ky., 621.</p> <p>64. La.—Cryer v. Cryer, App., 44 So. 2d 517.</p> <p>65. N.J.—Orange v. McGonnell, 59 A. 97, 71 N.J.Law 418. 60 C.J. p 1017 note 62.</p> <p>66. N.J.—Orange v. McGonnell, supra. 60 C.J. p 1017 note 63.</p> <p>67. Ala.—Chandler v. Francis Vandegriff Shoe Co., 10 So. 353, 94 Ala. 233. 60 C.J. p 1018 note 64.</p> <p>68. W.Va.—Mayer v. Adams, 27 W. Va. 244. 60 C.J. p 1018 note 65.</p> <p>69. Ala.—Caldwell v. Guinn, 54 Ala. 64. 60 C.J. p 1018 note 66.</p> <p>70. Ala.—Caldwell v. Guinn, supra.</p> <p>Pa.—Northern Liberties v. O'Neill, 1 Phila. 427.</p> <p>71. N.J.—Orange v. McGonnell, 59 A. 97, 71 N.J.Law 418. 60 C.J. p 1018 note 68.</p> <p>72. Pa.—Commonwealth v. Kostak, 20 Pa.Dist. 107. 60 C.J. p 1018 note 69.</p> <p>73. N.J.—Minard v. Dover, R. & P.</p> |
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g. Review

Summary proceedings may be reviewed by certiorari, but an appeal will not lie in such proceedings unless authorized by statute.

Certiorari may be awarded for the purpose of examining adjudications made in summary proceedings.⁷⁴ In the absence of a statutory provision therefor no appeal will lie in summary proceedings,⁷⁵ and the right is not conferred by a general statute giving a right of appeal from the judgments of particular courts.⁷⁶ Special provision for a full

or limited right to appeal from such proceedings is frequently made by statutes authorizing them, and the appeal must be taken to the court designated by the statute.⁷⁷ Where defendant voluntarily appears the same presumptions as to jurisdictional facts are indulged in on appeal as in the case of actions on summons and complaint.⁷⁸

Notice of application for appeal must be given to the appellee or defendant in error in such proceedings when required by statute⁷⁹ or rule of court.⁸⁰

SUMMER. The season of the year in which the influence of the sun is most directly and continuously felt; the hottest or warmest quarter of the year.¹ The term strictly, perhaps, includes only the months of June, July, and August, yet is frequently used in a more general sense to indicate the warmest period of the year.²

SUMMI CUJUSQUE BONITAS COMMUNE PER-FUGIUM OMNIBUS. See 60 C.J. p 1019 note 6.

SUMMON. As a verb the term is defined generally as meaning to command to appear at a specific time and place; command to attend; cite.³

References to the term "summoning" in connection with juries and grand juries are made in the indexes to the titles Juries and Grand Juries.

SUMMONITIONES. As the first word of a maxim

as to which there have been no recent applications see 60 C.J. p 1020 note 12.

SUMMONS. The word "summons" is defined generally as meaning a call to attend or act, as at a particular place or time.⁴

The word "summons" is employed in the law in connection with both civil and criminal proceedings. On the civil side of the law a summons is a means or process whereby the defendant is notified to appear at the proper time and place to answer the complaint against him, as stated in Process § 1 f (2). On the criminal side a summons is also so employed in some jurisdictions, but only in the case of minor offenses, as stated in Criminal Law § 316. See also the index to the title Criminal Law.

SUMMUM JUS, SUMMA INJURIA. See 60 C.J. p 1021 note 33.

O. Gas Co., 68 A. 910, 76 N.J.Law 132.

Pa.—Commonwealth v. Hardy, 1 Ashm. 410.

74. N.C.—Porter v. Armstrong, 46 S. E. 997, 134 N.C. 447.
60 C.J. p 1018 note 72.

75. N.C.—Brooks v. Morgan, 27 N. C. 481.

Pa.—Philadelphia v. Campbell, 11 Phila. 163, 33 Leg.Int. 12.
Appeal or writ of error in special proceedings generally see Appeal and Error §§ 51, 140.

76. N.C.—Brooks v. Morgan, 27 N. C. 481.
60 C.J. p 1018 note 74.

77. Pa.—Commonwealth v. Tilton, 1 Pa.Dist. & Co. 449.

78. Ala.—Shouse v. Lawrence, 51 Ala. 559.

79. Pa.—Commonwealth v. Tilton, 1 Pa.Dist. & Co. 449.

80. Pa.—Commonwealth v. Tilton, supra.
60 C.J. p 1018 note 79.
Notice of application for appeal generally see Appeal and Error § 470.

1. New Standard D.

2. Neb.—De Witt v. Wheeler, etc., Sewing Mach. Co., 23 N.W. 506, 507, 17 Neb. 533.
60 C.J. p 1019 note 1.

Crops like corn are not harvested in the summer.—Boehler v. Kraay, 264 N.W. 745, 746, 130 Neb. 233.

Phrases

(1) "Summer fallowing" see 35 C. J.S. p 494 note 58.

(2) "Summer months" see Time § 10.

(3) "Summer road;" the smooth surface of sod or earth each side of the paved strip of road, at the same level but inclining gradually to the side, and used by many travelers in good weather in preference to the macadamized road.—Emery v. Philadelphia, 57 A. 977, 978, 208 Pa. 492.

(4) "Summer streetcar" defined see Street Railroads § 1.

3. New Standard D.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1020 notes 9, 11.

4. New Standard D.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C. J. p 1021 notes 23–31.

SUMP. A metal opening somewhat of the shape of a funnel through which water which falls upon a roof enters a down-spout to be carried to the drains below.⁵

5. La.—A. H. White Co. v. Burglass, App., 184 So. 225, 227.
- "Sump" as a mining term see Mines and Minerals § 3 h.
- The upper edge of a sump or funnel is made flush with the roof and the smaller end is inserted into the upper part of the down-spout; it is proper practice to seal with solder the lower end of the sump to the upper end of the down-spout so that if the down-spout is clogged in any way the water will not back up and enter the building by means of this unsealed joint.—A. H. White Co. v. Burglass, supra.

SUNDAY

This Title includes the first day of the week as a day of rest, and, more particularly, its observance by suspension of ordinary business and judicial and other proceedings; effect of violations of laws requiring observance of the day on validity of acts, transactions, and proceedings affected, and on the rights and remedies of persons engaged therein; and prosecution and punishment of such violations as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. DEFINITION AND NATURE, §§ 1, 2

II. REGULATION AND ENFORCEMENT OF SUNDAY OBSERVANCE, §§ 3-23

- A. REGULATIONS, §§ 3-18
- B. ENFORCEMENT OF REGULATIONS, §§ 19-23

III. CIVIL EFFECT OF SUNDAY REGULATIONS ON PRIVATE ACTS AND TRANSACTIONS, §§ 24-40

- A. RIGHTS AND OBLIGATIONS ARISING FROM PRIVATE TRANSACTIONS, §§ 24-38
- B. INJURIES RECEIVED OR INFLICTED ON SUNDAY, §§ 39, 40

IV. JUDICIAL AND OFFICIAL ACTS AND PROCEEDINGS, §§ 41-57

Sub-Analysis

I. DEFINITION AND NATURE—p 799

- § 1. Definition, origin, and nature—p 799
- 2. Duration of day—p 799

II. REGULATION AND ENFORCEMENT OF SUNDAY OBSERVANCE—p 800

A. REGULATIONS—p 800

- § 3. Constitutional and statutory provisions—p 800
- 4. Scope and extent of Sunday laws in general—p 803
- 5. — Work or labor—p 804
- 6. — Business or occupation—p 805
- 7. — Keeping open shop—p 806
- 8. — Disturbance of public—p 809
- 9. — Acts done in exercise of ordinary calling—p 810
- 10. — Exceptions in general—p 811
- 11. — Necessity or charity—p 812
- 12. — Persons observing another day—p 815
- 13. Particular acts or transactions permitted or prohibited—p 816
- 14. — Barber shops and drug stores—p 823
- 15. — Buying and selling generally—p 825
- 16. — Carriage or transportation of persons or property—p 826
- 17. — Furnishing food or refreshments—p 829
- 18. — Sports and entertainments—p 831

See also descriptive word index in the back of this Volume

II. REGULATION AND ENFORCEMENT OF SUNDAY OBSERVANCE—Continued**B. ENFORCEMENT OF REGULATIONS—p 841**

- § 19. Prosecutions for violation of criminal statutes—p 841
- 20. — Complaint, indictment, or information—p 841
- 21. — Evidence—p 843
- 22. — Trial and review—p 845
- 23. Actions and proceedings under penal statutes—p 847

III. CIVIL EFFECT OF SUNDAY REGULATIONS ON PRIVATE ACTS AND TRANSACTIONS—p 848**A. RIGHTS AND OBLIGATIONS ARISING FROM PRIVATE TRANSACTIONS—p 848**

- § 24. What law governs—p 848
- 25. Validity of negotiations or consummation on Sunday—p 848
- 26. — Negotiations for contracts and preliminary transactions—p 848
- 27. — Formation and consummation of contracts—p 849
- 28. — Miscellaneous transactions—p 853
- 29. — Competency as evidence of Sunday admissions, entries, or statements—p 855
- 30. Rescission of Sunday contracts—p 855
- 31. Ratification or renewal of Sunday acts or contracts—p 856
- 32. Contracts contemplating or requiring Sunday performance—p 858
- 33. Rights of third persons—p 859
- 34. Actions—p 859
- 35. — Right of action and defenses—p 860
- 36. — Pleadings—p 862
- 37. — Evidence—p 865
- 38. — Trial, judgment and review—p 866

B. INJURIES RECEIVED OR INFLICTED ON SUNDAY—p 867

- § 39. Resultant rights and liabilities—p 867
- 40. Actions—p 869

IV. JUDICIAL AND OFFICIAL ACTS AND PROCEEDINGS—p 870

- § 41. In general—p 870
- 42. Civil process—p 870
- 43. — Attachment; garnishment; bail process—p 872
- 44. — Execution or final process—p 873
- 45. Criminal process—p 873
- 46. — Search warrants—p 874
- 47. Notices and publications—p 874
- 48. Bail and other bonds and recognizances—p 875
- 49. Filing pleadings and other papers—p 876
- 50. Taking of depositions—p 876
- 51. Holding court—p 877
- 52. — Discharge of jury—p 879
- 53. Judgment, order, or decree, and proceedings for review—p 879
- 54. Arbitration and award—p 881
- 55. Miscellaneous matters of judicial or official nature—p 881
- 56. Proceedings to assert defects; waiver of defects—p 882
- 57. Proceedings on Saturday against persons observing seventh day—p 883

See also descriptive word index in the back of this Volume

I. DEFINITION AND NATURE

§ 1. Definition, Origin, and Nature

- a. Definition, nature, and distinctions
- b. Origin

a. Definition, Nature, and Distinctions

Sunday, the first day of the week, is legally a day of rest. "Sunday," "Sabbath," "the Lord's Day," and "the first day of the week" are used interchangeably.

Sunday is a day of the week, the first day of the week;¹ a day of dual character;² a holy day;³ the day set apart for cessation from all secular employment by the Christian world.⁴ It is a day of rest⁵ and, legally considered, merely a day of rest.⁶

The words "Sabbath" and "Sunday" are not strictly synonymous, the one signifying the Jewish Sabbath, which is the seventh day of the week, and the other, the first day of the week;⁷ but the expressions "the first day of the week," the "Sabbath," "the Lord's day," and "Sunday" are used interchangeably and synonymously, both in legislation⁸ and in common parlance.⁹ The Sabbath is a day of rest and worship, generally recognized as such.¹⁰

The Jewish Sabbath, as observed by orthodox Jews, begins with the appearance of the stars, or at sundown Friday evening, and ends with the appearance of the stars, or at sundown, Saturday evening.¹¹

Civil and political institution. As a day set apart for rest and cessation from labor, Sunday has long been recognized as a civil¹² and political¹³ institution.

b. Origin

The observance of Sunday is among the first institutions of the Christian religion, and is an established custom more ancient than our common law or form of government.

Sunday is among the first and most sacred institutions of the Christian religion;¹⁴ the observance of Sunday is one of our established customs,¹⁵ and is more ancient than our common law or our form of government.¹⁶ The fourth commandment directs abstention from labor on the Sabbath, but the day there designated is the seventh day of the week, and the injunction has been deemed to apply to the Hebrews only.¹⁷ There is nothing in the New Testament relating to Sunday or the Sabbath;¹⁸ but, by common consent, the Christians at an early date substituted the first day of the week for the seventh, and have since observed it as a day of rest and worship in commemoration of the Resurrection.¹⁹

§ 2. Duration of Day

Except where a statute provides otherwise, Sunday is generally regarded as the natural day of twenty-four

1. La.—Schenck v. Schenck, 28 So. 302, 303, 52 La. Ann. 2102. 60 C.J. p 1026 note 1.

2. Mo.—State v. Chicago, B. & Q. R. Co., 143 S.W. 785, 239 Mo. 196.

3. Ga.—Weldon v. Colquitt, 62 Ga. 449, 451, 35 Am.R. 128. 60 C.J. p 1026 note 3.

4. D.C.—District of Columbia v. Robinson, 30 App.D.C. 283, 287, 12 Ann.Cas. 1094. 60 C.J. p 1026 note 4.

5. Mo.—State v. Chicago, etc., R. Co., 143 S.W. 785, 239 Mo. 196. 60 C.J. p 1026 note 5. Rest as purpose of statutes see *infra* § 3 b.

6. Ohio.—Bloom v. Richards, 2 Ohio St. 387, 405. 60 C.J. p 1026 note 6.

7. N.C.—State v. Drake, 64 N.C. 589, 591. 60 C.J. p 1026 note 7.

8. Ga.—Gunn v. State, 15 S.E. 458, 89 Ga. 341. 60 C.J. p 1026 note 8.

9. Ark.—Rosenbaum v. State, 199 S.W. 388, 131 Ark. 251, L.R.A.1918B 1109. 60 C.J. p 1026 note 9.

10. La.—State v. Duncan, 43 So. 283, 284, 118 La. 702, 10 L.R.A., N.S., 791, 11 Ann.Cas. 557.

11. Ky.—Cohen v. Webb, 192 S.W. 828, 829, 175 Ky. 1. Ohio.—Rosen v. State, 3 Ohio N.P., N.S., 276.

12. N.Y.—People v. Friedman, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed Friedman v. People of State of N. Y., 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345. 60 C.J. p 1027 note 14.

13. N.Y.—People v. Friedman, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed Friedman v. People of State of N. Y., 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345.

14. Ark.—Rosenbaum v. State, 199 S.W. 388, 131 Ark. 251, L.R.A.1918B 1109. 60 C.J. p 1026 note 10.

Sabbath-school service distinguished from divine service Pa.—Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. 42, 48, 32 Am.R. 417, 6 Wkly.N.C. 421 —Appeal of Gass, 73 Pa. 39, 46, 13 Am.R. 726.

15. Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

16. Ga.—Rogers v. State, *supra*.

17. N.C.—Rodman v. Robinson, 47 S.E. 19, 134 N.C. 503, 101 Am.S.R. 877, 65 L.R.A. 682. 60 C.J. p 1027 note 11.

18. N.Y.—People v. Poole, 89 N.Y.S. 773, 44 Misc. 118, 15 N.Y. Ann.Cas. 150, 18 N.Y.Cr. 407. 60 C.J. p 1027 note 12.

19. N.D.—State v. Barnes, 132 N.W. 215, 22 N.D. 18, 37 L.R.A., N.S., 114, Ann.Cas.1913E 930. 60 C.J. p 1027 note 13.

hours between midnight at the end of Saturday and midnight at the beginning of Monday.

In so far as the duration of Sunday is particularly limited or established by statute, it includes only the time falling within the limits thus declared;²⁰ but, in the absence of any such statute expressly or by necessary construction establishing a different rule, Sunday is the natural day²¹ of twenty-four hours²² existing between midnight at the end of Saturday and midnight at the beginning of Monday,²³ at least with respect to the extent of the day in connection with statutes prohibiting certain acts on Sunday which are lawful at other times.²⁴ There is some authority, however, recognizing a distinction between the duration of Sunday considered in that connection and its duration as dies non juridicus, on which judicial functions are not to be performed,²⁵ and holding that, for

the latter purpose, Sunday is confined to that part of the natural day falling between sunrise and sunset;²⁶ but elsewhere this distinction is disregarded, at least where the judicial act involved is one falling within the prohibition of a statute with respect to Sunday.²⁷

Duration of Sabbath. A statutory exception in favor of those keeping the seventh day as Sabbath, has been held not necessarily to refer to the natural day of Saturday, but to the day recognized and fixed for religious observance, such as the time from starlight on Friday evening until starlight on Saturday evening.²⁸

Evening of Lord's day. A reference in a statute to the evening of the Lord's day refers to Sunday evening, and not Saturday evening.²⁹

II. REGULATION AND ENFORCEMENT OF SUNDAY OBSERVANCE

A. REGULATIONS

§ 3. Constitutional and Statutory Provisions

- a. In general; history
- b. Object and purpose
- c. Constitutionality and validity
- d. Authority of municipality generally

a. In General; History

Constitutional and statutory regulation of Sunday observance is widespread and of ancient origin.

The observance of Sunday is recognized by constitutions and legislative enactments, both state and federal;³⁰ and Sunday prohibitory laws are said to have been enacted in all the states.³¹ Such laws are said to have a religious³² or divine³³ origin.

Sunday legislation is more than fifteen centuries old;³⁴ it originated in Rome in A. D. 321, when Constantine the Great passed an edict commanding all judges and inhabitants of cities to rest on

20. N.Y.—Harrison v. Wallis, 90 N. Y.S. 44, 44 Misc. 492.

60 C.J. p 1027 note 16.

21. Fla.—Gillooley v. Vaughn, 110 So. 653, 92 Fla. 943.

60 C.J. p 1027 note 17.

22. Tex.—Muckenfuss v. State, 116 S.W. 51, 52, 55 Tex.Cr. 229, 20 L. R.A., N.S., 783, 131 Am.S.R. 813, 16 Ann.Cas. 768.

60 C.J. p 1027 note 18.

23. Md.—Spann v. Gaither, 136 A. 41, 152 Md. 11, 50 A.L.R. 620.

60 C.J. p 1027 note 19.

24. Fla.—Gillooley v. Vaughn, 110 So. 653, 92 Fla. 943.

S.C.—Hiller v. English, 35 S.C.L. 486.

25. Fla.—Harrison v. Bay Shore Development Co., 111 So. 128, 92 Fla. 875.

60 C.J. p 1028 note 21.

26. Fla.—Barnes v. State, 67 So. 131, 68 Fla. 291.

60 C.J. p 1028 note 22.

Sunday as dies non juridicus generally see infra § 41.

27. N.Y.—People v. Mantel, 236 N. Y.S. 122, 134 Misc. 529.

60 C.J. p 1028 note 23.

28. Ky.—Cohen v. Webb, 192 S.W. 828, 175 Ky. 1.

60 C.J. p 1028 note 24.

Persons observing another day generally see infra § 12.

29. Mass.—Commonwealth v. Newton, 8 Pick. 234.

60 C.J. p 1028 note 25.

30. Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

31. Ky.—Strand Amusement Co. v. Commonwealth, 43 S.W.2d 321, 241 Ky. 48.

32. Ky.—City of Harlan v. Scott, 162 S.W.2d 8, 290 Ky. 585—Strand

Amusement Co. v. Commonwealth, 43 S.W.2d 321, 241 Ky. 48.

N.Y.—People v. Friedman, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed Friedman v. People of State of N. Y., 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345.

Civil and not religious regulation see infra subdivision b of this section.

Religious observance of the Sabbath Utah.—Broadbent v. Gibson, 140 P. 2d 939, 105 Utah 53.

33. Miss.—Paramount-Richards Theatres v. City of Hattiesburg, 49 So. 2d 574, 210 Miss. 271.

34. Mo.—Springfield v. Smith, 19 S. W.2d 1, 322 Mo. 1129.

60 C.J. p 1028 note 31.

Laws for the preservation of the Sabbath are older than the common law or the civil law and have been on the books for more than three thousand years.—Harrison v. McLeod, 194 So. 247, 141 Fla. 804.

the venerable day of the sun.³⁵ Sunday statutes were passed at an early date in England³⁶ and 29 Charles II c 7 has been made the basis of similar legislation in many of the states.³⁷ A few statutes regulating the observance of Sunday were enacted in the United States during the colonial period.³⁸

A statute providing a punishment for anyone who does any manner of labor, business, or work, except works of necessity or charity, on Sunday, at most makes illegal, if done on Sunday, what otherwise might be legal.³⁹

b. Object and Purpose

The object of Sunday laws is, in general, to enforce a cessation from labor on one day in seven, and not to impose the observance of Sunday as a religious duty.

The object and policy of laws designating Sunday as a day of rest and prohibiting the doing of

specified acts on that day are, in general, to enforce a cessation from labor on one day in seven⁴⁰ and to protect citizens in the enjoyment of repose and quiet on the day thus assigned,⁴¹ and therefore to promote the health, peace, good order,⁴² and morality⁴³ of society.

Such regulation is essentially civil and not religious,⁴⁴ and the statutes are not to be regarded, in the present day, as religious ordinances.⁴⁵ So, ordinarily, it is not the purpose of such laws to impose the observance of Sunday as a purely religious duty,⁴⁶ although instances exist where, taking the whole of the particular statute into consideration, it has been held to have as a primary object the prevention of the desecration of the Lord's day and not the enforcement of a day of rest.⁴⁷

In some instances, where statutes specifically single out particular acts or businesses for regula-

35. Mo.—State v. Malone, 192 S.W. 2d 68, 238 Mo.App. 939.

Pa.—Commonwealth v. Pedano, 33 Pa.Dist. & Co. 551, 20 Erie Co. 290, 1 Monroe L.R. 77, 30 Mun.L.R. 102. 60 C.J. p 1028 note 32.

36. Del.—Walsh v. State, 136 A. 160, 33 Del. 353, affirmed 139 A. 257, 33 Del. 514, 56 A.L.R. 810. 60 C.J. p 1029 note 33.

29 Chas. II c 7 p 412

Mo.—State v. Malone, 192 S.W.2d 68, 238 Mo.App. 939.

37. Ark.—Rosenbaum v. State, 199 S.W. 388, 131 Ark. 251, L.R.A.1918B 1109. 60 C.J. p 1029 note 34.

38. N.C.—Rodman v. Robinson, 47 S.E. 19, 134 N.C. 503, 101 Am.S.R. 877, 65 L.R.A. 682. 60 C.J. p 1029 note 35.

The first such legislation in this country was, perhaps, in the Virginia Colony in 1617.—State v. Malone, 192 S.W.2d 68, 238 Mo.App. 939—60 C.J. p 1029 note 35 [a].

History of legislation reviewed

(1) In Pennsylvania.—Commonwealth v. Pedano, 33 Pa.Dist. & Co. 551, 20 Erie Co. 290, 1 Monroe L.R. 77, 30 Mun.L.R. 102.

(2) In South Carolina.—Bishop v. Hanna, 63 S.E.2d 308, 218 S.C. 474.

39. Mass.—Barsky v. Hansen, 40 N.E.2d 12, 311 Mass. 14.

40. Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

Miss.—Paramount-Richards Theatres v. City of Hattiesburg, 49 So.2d 574, 210 Miss. 271.

Mo.—Corpus Juris quoted in State v. Malone, 192 S.W.2d 68, 71, 238 Mo.App. 939.

Neb.—Arrigo v. City of Lincoln, 48 N.W.2d 643, 154 Neb. 537.

Utah.—Broadbent v. Gibson, 140 P. 2d 939, 105 Utah 53.

Va.—Corpus Juris cited in Francisco v. Commonwealth, 23 S.E.2d 234, 237, 180 Va. 371.

60 C.J. p 1029 note 36.

Power of legislature see infra subdivision c of this section.

41. Iowa.—State v. Mead, 300 N.W. 523, 230 Iowa 1217.

Mo.—Corpus Juris quoted in State v. Malone, 192 S.W.2d 68, 71, 238 Mo.App. 939.

Tenn.—Baird v. State, 167 S.W.2d 332, 179 Tenn. 444.

Utah.—Broadbent v. Gibson, 140 P.2d 939, 105 Utah 53.

60 C.J. p 1029 note 37.

42. Colo.—Allen v. City of Colorado Springs, 75 P.2d 141, 101 Colo. 498.

Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

Miss.—Paramount-Richards Theatres v. City of Hattiesburg, 49 So.2d 574, 210 Miss. 271.

Mo.—Corpus Juris quoted in State v. Malone, 192 S.W.2d 68, 71, 238 Mo.App. 939.

Neb.—Arrigo v. City of Lincoln, 48 N.W.2d 643, 154 Neb. 537.

N.Y.—People v. Friedman, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed

Friedman v. People of State of N.Y., 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345.

Okl.—Ex parte Pappe, 201 P.2d 260, 88 Okl.Cr. 166.

60 C.J. p 1029 note 38.

"Their purpose is to protect society from itself."—Strand Amusement

Co. v. Commonwealth, 43 S.W.2d 321, 322, 241 Ky. 48.

43. Tenn.—Baird v. State, 167 S.W. 2d 332, 179 Tenn. 444.

44. U.S.—Brunswick-Balke-Collander Co. v. Evans, D.C.Or., 238 F. 991, appeal dismissed 39 S.Ct. 5, 248 U.S. 587, 63 L.Ed. 434.

Neb.—Arrigo v. City of Lincoln, 48 N.W.2d 643, 154 Neb. 537.

60 C.J. p 1032 note 50.

Effect of constitutional guaranties of religious freedom see Constitutional Law § 206 b.

45. Ky.—Strand Amusement Co. v. Commonwealth, 43 S.W.2d 321, 241 Ky. 48.

Utah.—Broadbent v. Gibson, 140 P. 2d 939, 105 Utah 53.

Va.—Corpus Juris cited in Francisco v. Commonwealth, 23 S.E.2d 234, 237, 180 Va. 371.

"The fact that the same day is also observed as a day of rest and devotion by the members of many religious organizations does not make such statute a religious regulation or duty."—State v. Malone, 192 S.W.2d 68, 70, 238 Mo.App. 939.

46. Ark.—McKeown v. State, 124 S.W.2d 19, 197 Ark. 454.

Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

Mo.—Corpus Juris quoted in State v. Malone, 192 S.W.2d 68, 71, 238 Mo.App. 939.

60 C.J. p 1030 note 39—43 C.J. p 436 note 89 [a].

Power of legislature see infra subdivision c of this section.

47. D.C.—District of Columbia v. Robinson, 30 App.D.C. 283, 12 Ann Cas. 1094.

60 C.J. p 1030 note 40.

tion, it has been held that their purpose is to define more certainly the application which the general Sunday laws are intended to have,⁴⁸ and again that the purpose is to provide an appropriate penalty for the particular offense.⁴⁹

Freedom of religious thought and worship is not a license to do on Sunday any act otherwise forbidden by law, nor may anyone circumvent the provisions of a Sunday statute under the guise of religious belief.⁵⁰

c. Constitutionality and Validity

Sunday regulations have generally been upheld as legitimate exercises of the police power.

The right of the state to pass a Sunday law is not open to question.⁵¹ The enactment of Sunday regulations is an exercise of the police power,⁵² and such regulations are constitutional in the same

manner and to the same extent as other legislation legitimately resting on that power;⁵³ but, while the state has the power to impose on the public the civil duty of observing one day out of seven to rest,⁵⁴ it is beyond its power to impose the observance of Sunday as a religious duty.⁵⁵

The fact that a Sunday law may not be appropriate to the conditions now existing, although it was appropriate to the conditions at the time of its passage, does not affect its validity.⁵⁶

d. Authority of Municipality Generally

Within the limits of state statutes, Sunday observance may be the subject of reasonable police regulations by municipalities.

The securing of the proper observance of Sunday may be the subject of reasonable police regulation by municipal corporations,⁵⁷ either under the general police power⁵⁸ or under an express or im-

48. U.S.—*Petit v. Minnesota*, Minn., 20 S.Ct. 666, 177 U.S. 164, 44 L.Ed. 716.

60 C.J. p 1030 note 41.

49. Mo.—*State v. Ambs*, 20 Mo. 214.

50. Iowa.—*State v. Mead*, 300 N.W. 523, 230 Iowa 1217.

51. La.—*State v. Trahan*, 36 So.2d 652, 214 La. 100.

52. Ga.—*Hicks v. City of Dublin*, 191 S.E. 659, 56 Ga.App. 63.

Ky.—*Strand Amusement Co. v. Commonwealth*, 43 S.W.2d 321, 241 Ky. 48.

Neb.—*Arrigo v. City of Lincoln*, 48 N.W.2d 643, 154 Neb. 537.

Okl.—*Ex parte Pappe*, 201 P.2d 260, 88 Okl.Cr. 166.

Utah.—*Gronlund v. Salt Lake City*, 194 P.2d 464, 113 Utah 284.

Va.—*Corpus Juris cited in Francisco v. Commonwealth*, 23 S.E.2d 234, 237, 180 Va. 371.

60 C.J. p 1030 note 45.

"Sunday prohibitory laws . . . are held constitutional not on religious grounds, but only upon the theory that the establishment of a compulsory day of rest is a legitimate exercise of the police power, and the inhibition is against laboring, or causing employees to engage in labor, on Sunday, not against the business itself."—*City of Harlan v. Scott*, 162 S.W.2d 8, 9, 290 Ky. 585.

53. Ga.—*Hicks v. City of Dublin*, 191 S.E. 659, 56 Ga.App. 63.

Idaho.—*State v. Cranston*, 85 P.2d 682, 59 Idaho 561.

Ky.—*Strand Amusement Co. v. Commonwealth*, 43 S.W.2d 321, 241 Ky. 48.

Mo.—*State v. Malone*, 192 S.W.2d 68, 238 Mo.App. 939.

N.Y.—*People v. Friedman*, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed *Friedman v. People of State of N.Y.*, 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345—*Neuendorff v. Duryea*, 6 Daly 276, 52 How.Pr. 267, affirmed 69 N.Y. 557, 25 Am.R. 235.

N.C.—*State v. Trantham*, 55 S.E.2d 198, 230 N.C. 641.

Pa.—*Commonwealth v. Engel*, 76 Pa. Dist. & Co. 521, affirmed *Commonwealth v. Albano*, 82 A.2d 682, 169 Pa.Super. 462.

Utah.—*Broadbent v. Gibson*, 140 P.2d 939, 105 Utah 53.

Va.—*Corpus Juris cited in Francisco v. Commonwealth*, 23 S.E.2d 234, 237, 180 Va. 371.

Wash.—*State v. Grabinski*, 206 P.2d 1022, 33 Wash.2d 603.

60 C.J. p 1031 note 46.

"It is universally held that the police power authorizes different regulations and restrictions as to the conduct of business on the Sabbath from that permissible on other days."—*Nickols v. North Kansas City*, 214 S.W.2d 710, 712, 358 Mo. 402.

Laws and ordinances requiring observance of the Sabbath have uniformly been upheld by the supreme court of Tennessee.—*Baird v. State*, 167 S.W.2d 332, 179 Tenn. 444.

Statutes prohibiting work and labor and the following of trades and occupations on Sunday, particularly the operation of picture shows, are constitutional.—*City of Harlan v. Scott*, 162 S.W.2d 8, 290 Ky. 585.

54. Okl.—*Ex parte Hodges*, 83 P.2d 201, 65 Okl.Cr. 69—*Ex parte Fergu-*

son, 70 P.2d 1094, 62 Okl.Cr. 145—*State v. Chesney*, 233 P. 236, 29 Okl.Cr. 251.

"There is practically no authority in opposition to the power of the legislature to provide for a cessation from labor. The time therefore is vested in the legislative discretion."—*Paramount-Richards Theatres v. City of Hattiesburg*, 49 So.2d 574, 578, 210 Miss. 271.

55. Okl.—*Ex parte Hodges*, 83 P.2d 201, 65 Okl.Cr. 69—*Ex parte Ferguson*, 70 P.2d 1094, 62 Okl.Cr. 145—*State v. Chesney*, 233 P. 236, 29 Okl.Cr. 251.

56. Ark.—*McKeown v. State*, 124 S.W.2d 19, 197 Ark. 454.

Pa.—*Commonwealth v. McQuaid*, 45 Pa. Dist. & Co. 700, 53 Dauph. Co. 105—*Commonwealth v. Pedano*, 33 Pa. Dist. & Co. 551, 20 Erie Co. 290, 1 Monroe L.R. 77, 30 Mun.L.R. 102.

57. Neb.—*Arrigo v. City of Lincoln*, 48 N.W.2d 643, 154 Neb. 537.

43 C.J. p 436 notes 88, 1.

Preservation of health; improvement of morals, etc.

Prohibition by ordinance of commercial pursuits on Sunday is valid where prohibition bears a reasonable relationship to preservation of health or tends to improve morals, peace, and good order of community as long as it also violates no constitutional provision and does not conflict with general state law.—*Gronlund v. Salt Lake City*, 194 P.2d 464, 113 Utah 284.

58. Ill.—*City of Clinton v. Wilson*, 101 N.E. 192, 257 Ill. 580.

plied grant of power for the purpose.⁵⁹ The general statutes of the state on this subject fix the limit and measure of municipal police power in this respect,⁶⁰ unless the charter expressly confers more.⁶¹ The grant of power to a city, by statute, to prohibit and suppress desecration of the Sabbath day is proper, since the proper body to define such desecration is the local authority in touch with the public sentiment of its community.⁶²

The municipality need not cover the entire field of the statute;⁶³ and an ordinance forbidding only a portion of the acts denounced by statute may be valid.⁶⁴

§ 4. Scope and Extent of Sunday Laws in General

In general, the illegality or prohibition of acts on Sunday arises only from statutes.

Although it has been said that the common law recognized the sanctity of the Lord's day,⁶⁵ at common law the observance of Sunday is a duty of imperfect obligation;⁶⁶ all prohibitions of or-

dinary business on the day come from statute,⁶⁷ and, aside from judicial transactions, all acts not otherwise unlawful and not prohibited by statute may be lawfully done.⁶⁸ The illegality of a given act must be determined by a statute forbidding it,⁶⁹ and the courts will not extend the requirements of Sunday observance on considerations of public policy to prohibit acts which are not forbidden by statute.⁷⁰

Where the statute inflicts a penalty for the doing of certain acts on Sunday, although the acts themselves are not expressly prohibited, it is unlawful to do such acts.⁷¹

However, without reference to Sunday legislation, acts done on that day to the annoyance or disturbance of others may constitute nuisances or disorderly conduct, even though they might not do so on week days, since the character of the day is such that the public peace and order are then more readily subject to being disturbed.⁷²

Acts outside prohibited hours. Acts done on Sunday are not unlawful when done at a time on that

Neb.—*Arrigo v. City of Lincoln*, 48 N.W.2d 643, 154 Neb. 537.
N.C.—*State v. Davis*, 89 S.E. 40, 171 N.C. 809, Ann.Cas.1918E 1168.
43 C.J. p 436 note 89.

General prohibition; necessity or charity

(1) A city, in exercise of its police power, may by general ordinance prohibit the carrying on within its limits of all businesses or occupations on Sunday except those of necessity or charity, on ground that thereby the peace, good order, good government, and welfare of its inhabitants will be promoted.

Colo.—*Allen v. City of Colorado Springs*, 75 P.2d 141, 101 Colo. 498.
Okl.—*Ex parte Johnson*, 141 P.2d 599, 77 Okl.Cr. 360.

(2) Necessity or charity generally see *infra* § 11.

59. Neb.—*State v. Somberg*, 204 N.W. 788, 113 Neb. 761.
N.C.—*State v. Davis*, 89 S.E. 40, 171 N.C. 809, Ann.Cas.1918E 1168.
Okl.—*Ex parte Johnson*, 201 P. 533, 20 Okl.Cr. 66.
43 C.J. p 436 note 90.

Particular municipalities

(1) The city council of Denver has power, under the constitution and the general welfare clauses of its charter, to legislate with respect to Sunday observance within the city.—*Rosenbaum v. City and County of Denver*, 81 P.2d 760, 102 Colo. 530.

(2) Comprehensive grant of police power to Baltimore was held sufficient to cover regulations with respect to Sunday observance; and a statute exempting Baltimore from operation of state law regulating Sunday observance was not objectionable as conveying authority which city was without power to exercise, and was held to authorize taking of special vote on regulatory ordinance simultaneously with primary election.—*Ness v. Ennis*, 160 A. 8, 162 Md. 529.

60. Ill.—*McPherson v. Chebanse*, 28 N.E. 454, 114 Ill. 46, 55 Am.R. 857.
Neb.—*Arrigo v. City of Lincoln*, 48 N.W.2d 643, 154 Neb. 537.
Utah.—*Gronlund v. Salt Lake City*, 194 P.2d 464, 113 Utah 284.
Ordinance inconsistent with statutes as omitting exceptions see *infra* § 10.

61. Mo.—*St. Louis v. Cafferata*, 24 Mo. 94.

62. La.—*City of Shreveport v. Harris*, 152 So. 330, 178 La. 685.

63. Fla.—*Gillooley v. Vaughn*, 110 So. 653, 92 Fla. 943—*Theisen v. McDavid*, 16 So. 321, 34 Fla. 440, 26 L.R.A. 234.

64. Fla.—*Theisen v. McDavid*, *supra*.
Ill.—*McPherson v. Chebanse*, 28 N.E. 454, 114 Ill. 46, 55 Am.R. 857.

65. Tenn.—*Graham v. State*, 183 S.W. 983, 134 Tenn. 285.

66. N.Y.—*Merritt v. Earle*, 29 N.Y. 115, 86 Am.D. 292.
60 C.J. p 1041 note 27.

67. Mo.—*State v. Chicago, etc., R. Co.*, 143 S.W. 785, 239 Mo. 196.
60 C.J. p 1041 note 28.

68. U.S.—*Shubert Theatrical Co. v. Rath*, C.C.A.N.Y., 271 F. 827.
60 C.J. p 1041 note 29.

69. Okl.—*State v. Smith*, 198 P. 879, 19 Okl.Cr. 184, followed in *Treese v. State*, 198 P. 889, 19 Okl.Cr. 211, *State v. House*, 198 P. 888, 19 Okl.Cr. 204, *Ramsey v. State*, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, and *Binkley v. State*, 198 P. 884, 885, 19 Okl.Cr. 199, 201.
60 C.J. p 1042 note 30.

70. Neb.—*Wirth v. Calhoun*, 89 N.W. 785, 64 Neb. 316.

71. U.S.—*Powhatan Steamboat Co. v. Appomattox R. Co., Va.*, 24 How. 247, 16 L.Ed. 682.
60 C.J. p 1042 note 32.

72. Pa.—*Commonwealth v. Sherman*, 14 Pa.Dist. & Co. 4.
60 C.J. p 1042 note 33.

Disturbance of public peace as element of Sabbath-breaking generally see *infra* § 8.
Operation of moving picture theater on Sunday as nuisance see *Nu-sances* § 30.

day different from that involved in statutes prohibiting conduct of such character, but they are unlawful only when done during a certain part of the day.⁷³

§ 5. — Work or Labor

The nature and extent of statutory prohibitions or restrictions of Sunday work or labor depend on the language of the particular statutes as variously construed by the courts.

The common law does not prohibit labor on Sunday;⁷⁴ but a statute by which the performance of work and labor on that day is forbidden, except work of necessity or charity, has been held constitutional,⁷⁵ as has a statute prohibiting the carrying on of certain work on the first day of the week;⁷⁶ and it has been broadly stated, of a particular Sunday law, that it prohibits work on that day.⁷⁷ Municipal corporations may, within reasonable limits, prohibit work or labor on Sunday.⁷⁸

Where the prohibition is not universal, as where there are permitted exceptions incorporated in the statute, all labor is not ipso facto illegal;⁷⁹ and such labor as is a necessary incident to the accomplishment of a lawful purpose is itself lawful.⁸⁰ The term "labor," as used in such statutes, is not coextensive with "business;"⁸¹ it extends, subject to the limitations and exceptions therein expressed, to work generally, as distinguished from the pursuit of business,⁸² and, conversely, does not include acts in the transaction of business which are not labor.⁸³

In applying the statutory language to particular activities, it has been held that by labor as therein used is meant physical exertion of a toilsome nature indulged in by mankind to acquire a sustenance;⁸⁴ but, according to other authority, a statutory prohibition on "laboring" inhibits every kind of labor, mental or physical, in any trade, calling, or business.⁸⁵ The conduct of an employer who keeps his employees at work on Sunday and personally conducts, oversees, and carries on his business, although he does not himself perform any manual tasks, has been held to be labor.⁸⁶ Physical exertion alone does not constitute labor within the meaning of the statute.⁸⁷

A prohibition of secular business or labor on Sunday is not to be restricted to the protection of servants and the prohibition of servile labor;⁸⁸ and "labor," within the prohibitions of the Sunday laws, is not confined to menial work.⁸⁹ Where the statute forbidding labor also prohibits other particular matters, such as the conducting of certain businesses, the prohibition of labor is not confined to labor in connection with the other matters prohibited, but includes labor in connection with any matter whatsoever as to which no exception is applicable;⁹⁰ but where an ordinance prohibits the carrying on of named occupations "or other trade requiring the exercise of manual labor," the quoted phrase can only refer back to the things specifically enumerated, and must be un-

73. Ga.—Hicks v. City of Dublin, 191 S.E. 659, 56 Ga.App. 63.

Miss.—Paramount-Richards Theatres v. City of Hattiesburg, 49 So.2d 574, 210 Miss. 271.
60 C.J. p 1042 note 34.

Motion picture exhibitions during specified hours see *infra* § 18 b.

74. Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.
60 C.J. p 1042 note 36.

75. U.S.—Broad-Grace Arcade Corporation v. Bright, D.C.Va., 48 F.2d 348, affirmed 52 S.Ct. 137, 284 U.S. 588, 76 L.Ed. 507.

76. Wash.—State v. Grabinski, 206 P.2d 1022, 33 Wash.2d 603.

77. Pa.—Marcus Bros. v. Director General of Railroads, 79 Pa.Super. 197.

78. W.Va.—State v. Wertz, 114 S.E. 242, 91 W.Va. 622, 29 A.L.R. 391.

Authority in charter

Such ordinance is authorized by charter empowering the city council

to pass ordinances to protect the health, property, lives, decency, morality, cleanliness, and good order of the city and its inhabitants.—State v. Wertz, *supra*.

79. Tex.—Texas Employers' Ins. Assoc. v. Henson, Civ.App., 31 S.W.2d 669.
60 C.J. p 1042 note 38.

80. Va.—Lakeside Inn Corp. v. Commonwealth, 114 S.E. 769, 134 Va. 696.
60 C.J. p 1042 note 39.

81. Ill.—Richmond v. Moore, 107 Ill. 429, 47 Am.R. 445.
60 C.J. p 1042 note 40.

82. Ga.—McCain v. State, 58 S.E. 550, 2 Ga.App. 389.

83. Ill.—Richmond v. Moore, 107 Ill. 429, 47 Am.R. 445.

Performance of duty by officer

In a criminal statute prohibiting "labor on Sunday," the term does not apply to an officer engaged in the performance of his official duties.—

Stephens v. Porter, 69 S.W. 423, 29 Tex.Civ.App. 556.

84. N.M.—Territory v. Davenport, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in Territory v. Hart, 124 P. 798, 17 N.M. 222.
60 C.J. p 1042 note 43.

85. Va.—Crook v. Commonwealth, 136 S.E. 565, 147 Va. 593, 50 A.L.R. 1043.

86. N.Y.—People v. Adler, 160 N.Y. S. 539, 174 App.Div. 301.

87. N.M.—Territory v. Davenport, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in Territory v. Hart, 124 P. 798, 17 N.M. 222.

88. Conn.—State v. Ryan, 69 A. 536, 80 Conn. 582.

89. Minn.—State v. Dean, 184 N.W. 275, 149 Minn. 410.
60 C.J. p 1043 note 50.

90. N.Y.—People ex rel. Briggs v. Owen, 155 N.Y.S. 1003, 92 Misc. 254, 34 N.Y.Cr. 80.

derstood to refer to things of the same class, or, at least, of the same general character.⁹¹

The element of compensation is immaterial in determining whether a particular activity is or is not within a prohibition of labor;⁹² it may be labor even though it is uncompensated, and conversely, although compensated, it may not be labor, depending altogether on the nature and character of the acts done.⁹³

Common labor, as used in such statutes, has been held to be incapable of exact definition.⁹⁴ According to some authorities, it signifies any labor that is manual, as distinguished from intellectual;⁹⁵ but there is other authority expressly rejecting this distinction,⁹⁶ or holding that the term comprises the transacting of the ordinary business affairs of life.⁹⁷ Skilled labor has been held not comprised within the term.⁹⁸ The term includes only such acts as may ordinarily be performed on other days in the pursuit of a lawful employment.⁹⁹

"Servile labor" has been held not to mean the same as "labor," "common labor," "secular labor," or "work,"¹ but to have a special meaning of menial labor or, as is sometimes said, such work with the hands as was formerly done by slave labor;² but under other authority, "servile labor" means "secular labor," at least in connection with exceptions

in favor of persons observing another day.³

Compelling labor of others. A statute forbidding persons to compel others to labor on Sunday has been held violated when such others actually do labor on Sunday in consequence of an option given them to rest either Saturday or Sunday, and labor on the other day.⁴

§ 6. — Business or Occupation

Laws prohibiting the carrying on of one's business, or the transaction of business, on Sunday, have been construed with respect to such matters as the contemplation of profit and the operation of a business through agents or employees.

At common law all business other than judicial proceedings can lawfully be transacted on Sunday.⁵ However, the carrying on of one's business or occupation, or the transaction of business on Sunday, is specifically prohibited in many jurisdictions by statute,⁶ and municipal corporations may regulate the conduct of business on Sunday.⁷

Under statutes prohibiting the carrying on of one's business or occupation, or the transaction of business, on Sunday, "worldly employment or business" has been held to comprehend only such acts as are in engaged in with a view to compensation or profit;⁸ but, according to other authority, a

91. N.J.—Kislingbury v. Treasurer of City of Plainfield, 160 A. 654, 10 N.J.Misc. 798.

92. N.M.—Territory v. Davenport, 124 P. 795, 17 N.M. 214, 14 L.R.A., N.S., 407, followed in Territory v. Hart, 124 P. 798, 17 N.M. 222.
Va.—Crook v. Commonwealth, 136 S. E. 565, 147 Va. 593, 50 A.L.R. 1043. 60 C.J. p 1043 note 47.

93. N.M.—Territory v. Davenport, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in Territory v. Hart, 124 P. 798, 17 N.M. 222.
Va.—Crook v. Commonwealth, 136 S. E. 565, 147 Va. 593, 50 A.L.R. 1043.

94. Ind.—Bryan v. Watson, 26 N.E. 666, 127 Ind. 42, 11 L.R.A. 63.

95. Ohio.—Bloom v. Richards, 2 Ohio St. 387, overruling Sellers v. Dugan, 18 Ohio 489—Kimmerline v. State, 5 Ohio N.P., N.S., 417.

96. Ind.—Bryan v. Watson, 26 N.E. 666, 127 Ind. 42, 11 L.R.A. 63.

97. Ind.—Reynolds v. Stevenson, 4 Ind. 619—Stellhorn v. Board of Com'rs of Allen County, 110 N.E. 89, 60 Ind.App. 14.

98. Neb.—State v. Somberg, 204 N. W. 788, 113 Neb. 761. 60 C.J. p 1043 note 56.

99. Ind.—State v. Conger, 14 Ind. 396.

1. Okl.—State v. Stout, 276 P. 795, 43 Okl.Cr. 19—State v. Smith, 198 P. 879, 19 Okl.Cr. 184, followed in Treese v. State, 198 P. 889, 19 Okl. Cr. 211, State v. House, 198 P. 888, 19 Okl.Cr. 204, Ramsey v. State, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, and Binkley v. State, 198 P. 884, 885, 19 Okl.Cr. 199, 201.

2. Okl.—State v. Stout, 276 P. 795, 43 Okl.Cr. 19—State v. Smith, 198 P. 879, 19 Okl.Cr. 184, followed in Treese v. State, 198 P. 889, 19 Okl. Cr. 211, State v. House, 198 P. 888, 19 Okl.Cr. 204, Ramsey v. State, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, and Binkley v. State, 198 P. 884, 885, 19 Okl.Cr. 199, 201.

3. Okl.—State v. Chesney, 233 P. 236, 29 Okl.Cr. 251—Krieger v. State, 160 P. 36, 12 Okl.Cr. 566. Persons observing another day generally see infra § 12.

4. Ala.—Hudgins v. State, 116 So. 306, 22 Ala.App. 403.

5. Minn.—Ward v. Ward, 77 N.W. 965, 75 Minn. 269. 60 C.J. p 1043 note 62.

Judicial proceedings on Sunday at common law see infra § 41. Sunday contracts at common law see infra § 27.

6. Pa.—Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.

7. Fla.—Theisen v. McDavid, 16 So. 321, 34 Fla. 440, 26 L.R.A. 234. 43 C.J. p 436 note 95.

8. Pa.—Commonwealth v. Hoover, 25 Pa.Super. 133.

"Home show"

(1) It is a violation of a statute prohibiting the performance of any worldly employment or business on Sunday to conduct on that day an exhibit termed a "home show," the object of which is to stimulate an interest in home purchasing, modernization, and improvements by commercial and educational exhibits and motion pictures; nor is it material whether an admission fee is charged. —Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.

(2) Motion pictures generally see infra § 18 b.

place may be one of "business" under statutes prohibiting the keeping open of places of "public business," although the transactions carried on there are not engaged in with a view to profit.⁹ "Avocation," as used in a Sunday statute, has been held to have the sense of vocation or calling,¹⁰ but includes only such acts as may ordinarily be performed on other days in the pursuit of a lawful employment.¹¹

A single act in the pursuit of a prohibited employment is a violation of a law of this character;¹² but the statute is not concerned with the proscription of any one or more distinct acts, but with the exercise of a business or employment, whether the act or acts which constitute such employment are one or many.¹³

Where the statutes forbid the carrying on of certain specified business on Sunday, the mere fact that acts are done as, and in pursuance of, a private business enterprise does not render them illegal, if the enterprise in question is not one of the kind dealt with by the statute¹⁴ or if the person so acting is not within the terms of the statute,¹⁵ but statutory exceptions as to certain businesses do not authorize the operation in connection with them of other businesses not within the designated exceptions.¹⁶ A general prohibition of worldly employment, labor, or business is not ordinarily to be limited to only such work, labor, or business as is servile in character,¹⁷ but comprehends any secular employment or business.¹⁸

Personal engagement; operation through others. A person may be guilty of carrying on his ordinary business on Sunday where he knows of and consents to its operation, even though he himself does not personally engage in any transactions, but merely operates the business through his servants, on that day;¹⁹ but a person cannot be held, for violation of prohibitions against following his ordinary avocation, when his business is carried on without his assent by an agent or employee.²⁰

§ 7. — Keeping Open Shop

a. In general

b. Persons who may commit offense

a. In General

Sunday closing laws have generally been upheld, although particular ordinances have been held invalid. Such laws have been construed with respect to such matters as what constitutes keeping open, establishments not included, effect of nontransaction of business, and keeping open an illegal business.

Where the opening or the keeping open of any, or of certain, establishments on Sunday for purposes of business is forbidden by statute or ordinance, the keeping open of any prohibited business not within any statutory exceptions is an infraction of the law,²¹ at least where persons are actually received and dealt with there in the way of business.²² General Sunday closing laws have been enacted in nearly every state,²³ and have uniformly been upheld as constitutional²⁴ and the terms of

9. La.—State v. Gelpi, 19 So. 468, 48 La. Ann. 520.

10. Ind.—Stellhorn v. Allen County, 110 N.E. 89, 60 Ind. App. 14.

11. Ind.—State v. Conger, 14 Ind. 396.

12. Ind.—Voglesong v. State, 9 Ind. 112.

60 C.J. p 1044 note 68.

Continuing or repeated acts as constituting single or separable offenses see infra § 19.

13. Pa.—Friedeborn v. Commonwealth, 6 A. 160, 113 Pa. 242, 57 Am.R. 464.

60 C.J. p 1044 note 69.

14. N.Y.—Eden Musee American Co. v. Bingham, 108 N.Y.S. 200, 58 Misc. 644, 22 N.Y.Cr. 34, reversed on other grounds 110 N.Y.S. 210, 125 App.Div. 780.

60 C.J. p 1044 note 70.

15. Tex.—Hanks v. State, 99 S.W. 1011, 50 Tex.Cr. 577.

60 C.J. p 1044 note 71.

16. N.Y.—Economopoulos v. Bingham, 109 N.Y.S. 728.

Pa.—Commonwealth v. Hengler, 15 Pa.Co. 222.

Exceptions as to furnishing food and refreshments see infra § 17.

17. Del.—Walsh v. State, 139 A. 257, 33 Del. 514, 56 A.L.R. 810.

18. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 290 Pa. 136, 53 A.L.R. 1027.

19. Ga.—Arnheiter v. State, 41 S.E. 989, 115 Ga. 572, 58 L.R.A. 392.

60 C.J. p 1044 note 73.

20. Ind.—Wetzler v. State, 18 Ind. 35.

21. Ga.—O'Neil v. State, 43 S.E. 248, 116 Ga. 839.

60 C.J. p 1044 note 78.

Buying and selling generally see infra § 15.

Tavern as "shop"

(1) A tavern at which alcoholic

beverages were served to customers for consumption on premises was a "shop" within the statute prohibiting persons from keeping shops open on the Lord's day.—Commonwealth v. Moriarty, 40 N.E.2d 307, 311 Mass. 116.

(2) Furnishing food or refreshments generally see infra § 17.

(3) Dealing in intoxicating liquors on Sunday generally see Intoxicating Liquors § 256.

22. N.H.—State v. Jaques, 40 A. 398, 69 N.H. 220.

23. Utah.—Broadbent v. Gibson, 140 P.2d 939, 105 Utah 53.

24. Ark.—City of Hot Springs v. Gray, 219 S.W.2d 930, 215 Ark. 243.

Idaho.—State v. Cranston, 85 P.2d 682, 59 Idaho 561.

Utah.—Broadbent v. Gibson, 140 P. 2d 939, 105 Utah 53—State v. Sopher, 71 P. 482, 25 Utah 318, 60 L.R.A. 468, 95 Am.S.R. 845.

one such statute have been held so plain and understandable that no judicial construction is required.²⁵ Such a statute has been held not a regulation based exclusively on religious considerations.²⁶

Ordinances requiring Sunday closing have been held clearly within the legislative authority of a municipality to enact,²⁷ and such an ordinance has been held valid,²⁸ and not unreasonable,²⁹ oppressive, or in derogation of common right;³⁰ ordinances of this nature, if not violative of the powers given to cities, should not be overruled or nullified by the courts, but their repeal must be by the city councils.³¹ On the other hand, particular ordinances have been held invalid as arbitrary and discriminatory,³² as violating a statute forbidding the keeping open of any store,³³ as contravening, and being inconsistent with, the general law with respect to Sabbathbreaking,³⁴ or as bearing no reasonable relationship to the objectives to be accomplished by ordinances pursuant to the legislative

grant of power to municipalities.³⁵

What constitutes keeping open generally. Statutes which, in terms, prohibit a keeping open merely mean, it is held, to prohibit a keeping open for purposes of traffic or business³⁶ rather than merely opening the doors or keeping them open.³⁷ There is a keeping open, within the statute, whenever the establishment is kept accessible to those wishing to enter for purposes of traffic, trade, or employment,³⁸ and it is immaterial whether or not a sale is made.³⁹ It is immaterial, save on the question of proof and as an index of intention, whether the doors of the building are kept open or closed⁴⁰ and whether entrance is gained through a front, side, or back door.⁴¹

Opening for purpose other than trade or traffic. At least unless there is some public policy operating against the particular character of business affected,⁴² the mere opening of an establishment re-

25. Ark.—City of Hot Springs v. Gray, 219 S.W.2d 930, 215 Ark. 243.

26. Ark.—McKeown v. State, 124 S.W.2d 19, 197 Ark. 454.

27. Ill.—City of Clinton v. Wilson, 101 N.E. 192, 257 Ill. 580.

Mich.—People v. Derose, 203 N.W. 95, 230 Mich. 180.

Mo.—Komen v. City of St. Louis, 289 S.W. 838, 316 Mo. 9.

Neb.—State v. Somborg, 204 N.W. 788, 113 Neb. 761.

N.J.—Schachter v. Hauenstein, 105 A. 13, 92 N.J.Law 104.

N.C.—State v. Trantham, 55 S.E.2d 198, 230 N.C. 641.

Statutory source of power

(1) The legislature has delegated to cities power to legislate by ordinance on subject of Sunday closing in any way not in conflict with state constitution or federal Constitution or general statutes on subject.—Ex parte Johnson, 141 P.2d 599, 77 Okl. Cr. 360.

(2) A statute empowering cities to regulate the police of the city or village and to pass and enforce all necessary police ordinances authorizes a city to pass comprehensive Sunday closing ordinances, the power being referable to the general welfare branch of police power.—City of Mt. Vernon v. Julian, 17 N.E.2d 52, 369 Ill. 447, 119 A.L.R. 747.

(3) Statute granting to municipalities power to pass ordinances and make all regulations, not repugnant to law, necessary for safety, preservation of health, prosperity, and

morals of city and inhabitants is sufficiently comprehensive to grant authority to pass a Sunday closing ordinance otherwise valid; welfare clauses providing in a general way that cities shall have such power generally include power to make Sunday closing regulations.—Gronlund v. Salt Lake City, 194 P.2d 464, 113 Utah 284.

(4) Police power as basis of Sunday legislation generally see supra § 3 c.

Failure to enforce conditions of proviso of such an ordinance, while it may serve to indict the police officers of the municipality, forms no basis for an attack on the constitutionality of the ordinance.—State v. Trantham, 55 S.E.2d 198, 230 N.C. 641.

28. N.J.—Schachter v. Hauenstein, 105 A. 13, 92 N.J.Law 104.

N.C.—State v. Burbage, 89 S.E. 795, 172 N.C. 876.

Butcher shop

Ordinance requiring Sunday closing of butcher shops, with exception of licensed poultry markets, held valid.—Mazzarelli v. City of Elizabeth, 164 A. 898, 11 N.J.Misc. 150.

29. N.C.—State v. Burbage, 89 S.E. 795, 172 N.C. 876.

Ordinance requiring closing of bakeries after 9 A. M. Sunday

Mo.—Komen v. City of St. Louis, 289 S.W. 838, 316 Mo. 9.

30. N.C.—State v. Burbage, 89 S.E. 795, 172 N.C. 876.

31. Okl.—Ex parte Johnson, 141 P. 2d 599, 77 Okl.Cr. 360.

32. Ill.—City of Mt. Vernon v. Julian, 17 N.E.2d 52, 369 Ill. 447, 119 A.L.R. 747.

Neb.—Arrigo v. City of Lincoln, 48 N.W.2d 643, 154 Neb. 537.

33. Ark.—City of Hot Springs v. Gray, 219 S.W.2d 930, 215 Ark. 243.

34. Okl.—Ex parte Hodges, 83 P.2d 201, 65 Okl.Cr. 69.

35. Utah.—Gronlund v. Salt Lake City, 194 P.2d 464, 113 Utah 284.

36. Me.—State v. Morin, 80 A. 751, 108 Me. 303.

60 C.J. p 1044 note 80.

37. Ala.—Jeebles v. State, 31 So 377, 131 Ala. 41.

60 C.J. p 1045 note 81.

38. Conn.—State v. Miller, 36 A. 795, 68 Conn. 373.

60 C.J. p 1045 notes 82-84.

39. Tex.—Timberlake v. State, 78 S.W.2d 599, 128 Tex.Cr. 63.

Shop open to give away wares

Tex.—Armstrong v. State, 84 S.W. 827, 47 Tex.Cr. 510.

60 C.J. p 1045 note 82 [a].

40. Mass.—Commonwealth v. Kirshen, 80 N.E. 2, 194 Mass. 151, 10 Ann.Cas. 948.

60 C.J. p 1045 note 83.

41. Ill.—Kroer v. People, 78 Ill. 294. 60 C.J. p 1045 note 84.

42. Ga.—Wright v. Forsyth, 43 S.E. 46, 116 Ga. 799.

60 C.J. p 1045 note 85.

quired to be kept closed or the entrance of the person in charge thereof is not of itself unlawful,⁴³ as where it is for purposes unconnected with any exercise of trade or traffic on Sunday;⁴⁴ and the establishment may even be opened and persons admitted to receive the goods or services ordinarily dispensed there, under some circumstances, without violating the requirement.⁴⁵

Nonadmittance of customers to place kept open for traffic. The nonadmittance of customers is not available, in evasion of the statute, where the ordinary trade or traffic of the establishment continues to be performed.⁴⁶

Engaging in traffic after opening for different purpose. For whatever purpose the place is opened, if members of the public are allowed to enter and after entrance the owner actually carries on the transactions usually conducted there, it is a keeping open within the statute.⁴⁷

Distinction between keeping open and acts in pursuit of traffic. Keeping open establishments for trade or traffic is separate and distinct from the pursuit of the trade or traffic which is ordinarily exercised in the establishments thus ordered closed,⁴⁸ and which may be exercised on Sundays in such a manner as not to violate the proscription on open shops without being unlawful by reason thereof;⁴⁹ it is the keeping open for traffic and not the performance of specific acts of business, such as the making of sales, which is forbidden.⁵⁰

Effect of transaction or nontransaction of business in shop; intent. The sale of goods or other

transaction of business therein is not necessary to the existence of the offense,⁵¹ and the offense is complete when there coexists with such physical opening of the establishment as is within the statute a readiness on the part of the proprietor to carry on business in his establishment.⁵² Such an intention is requisite, however,⁵³ and, if an establishment is opened and trade carried on without the knowledge or consent of those having the management and control, they are not liable.⁵⁴

Establishments not included in scope of statute. Where statutes forbid the opening or keeping open for purposes of business of certain classes of establishments only, the opening for such purpose of a shop of a nature not therein described is lawful.⁵⁵

Shops where more than one kind of trade or traffic is pursued. An establishment where more than one kind of goods or services is dealt in may ordinarily keep open for the supplying of any of them which the statute excepts or does not prohibit,⁵⁶ although there is authority to the contrary.⁵⁷ Nevertheless, it may not continue to supply such as do fall within the statutory prohibitions, and doing so is, at least to that extent, an unlawful keeping open, unprotected by the lawful transactions carried on at the same place.⁵⁸

Regular or usual course of business not essential. The business need not be pursued in the regular and usual manner if in fact the establishment is kept open for purposes of a prohibited traffic, trade, or employment.⁵⁹

Keeping open illegal business. The laws against

43. Ohio.—Daugherty v. Dennison, 12 Ohio Cir.Dec. 776, 11 Ohio Cir.Ct., N.S., 13, affirmed 54 N.E. 1111, 59 Ohio St. 593.
60 C.J. p 1045 notes 86-88.

44. Puerto Rico.—People v. Gonzalez, 35 Puerto Rico 511.
60 C.J. p 1045 note 87.

45. S.C.—City Council v. Talck, 37 S.C.L. 299.
60 C.J. p 1045 note 88.

46. D.C.—Sullivan v. District of Columbia, 20 App.D.C. 29.
60 C.J. p 1046 note 89.

47. Tex.—Morris v. State, 89 S.W. 832, 48 Tex.Cr. 562.
60 C.J. p 1046 note 90.

48. Tex.—Muckenfuss v. State, 116 S.W. 51, 55 Tex.Cr. 229, 20 L.R.A.,

N.S., 783, 131 Am.S.R. 813, 16 Ann. Cas. 768.
60 C.J. p 1046 note 91.

49. Ala.—Everett v. State, 111 So. 759, 22 Ala.App. 30.
60 C.J. p 1046 note 92.

50. Ala.—Ex parte Stollenwerck, 78 So. 454, 201 Ala. 392, mandate conformed to 78 So. 991, 16 Ala.App. 698.
60 C.J. p 1046 note 93.

51. Miss.—City of Pascagoula v. Henley, 153 So. 392, 169 Miss. 278.
Tex.—Timberlake v. State, 78 S.W.2d 599, 128 Tex.Cr. 63.
60 C.J. p 1046 note 94.

52. Ala.—Dixon v. State, 76 Ala. 89.
60 C.J. p 1046 note 95.

53. Mo.—State v. Crabtree, 27 Mo. 232.
60 C.J. p 1046 note 96.

54. Tex.—Whitcomb v. State, 17 S.W. 258, 30 Tex.App. 269.
60 C.J. p 1046 note 97.

55. Ala.—Sparrenberger v. State, 53 Ala. 481, 25 Am.R. 643.
60 C.J. p 1046 note 98.

56. Wis.—Wieden v. State, 124 N.W. 509, 141 Wis. 585.
60 C.J. p 1047 note 99.

57. N.C.—State v. Pulliam, 114 S.E. 394, 184 N.C. 681.

58. Tex.—Savage v. State, Cr.App., 93 S.W. 114.
60 C.J. p 1047 note 1.

59. Mass.—Commonwealth v. Kirshen, 80 N.E. 2, 194 Mass. 151, 10 Ann.Cas. 948.
60 C.J. p 1047 note 2.

keeping open are not limited in operation to legitimate establishments only, and hence the fact that the business as transacted was illegal under other statutes is no defense to a prosecution for Sabbathbreaking.⁶⁰

b. Persons Who May Commit Offense

Anyone having control as to closing or opening an establishment on Sunday is liable if he keeps it open; one having no such control is not liable unless made so by the statute.

With respect to the application of Sunday closing laws, the ownership of the establishment is immaterial;⁶¹ anyone having the direction and management of the enterprise and the control as to whether it shall or shall not be kept open is liable if he does keep it open.⁶² However, those who can in no respect be considered as having any control or management of the enterprise illegally kept open and operating on Sunday are not liable,⁶³ except where the statute is specifically extended to include them.⁶⁴

Partner. A member of a business partnership is liable in his individual capacity if he opens the establishment or engages in traffic therein on Sunday,⁶⁵ and this is true even though he is only a nominal partner.⁶⁶

§ 8. — Disturbance of Public

Whether the disturbance of others, or of the public generally, is an essential element of illegal acts committed on Sunday depends on the language of the controlling statute.

The disturbance of others, even by acts amounting to disorderly conduct, is not of itself violative of Sunday laws against business or employment, sports or diversions.⁶⁷ Acts prohibiting the exercise generally of work, business, or labor, or the engaging in worldly business or employment on Sunday are generally held not limited in their prohibitions to matters tending to affect or disturb others,⁶⁸ although some statutes have been so construed;⁶⁹ and acts prohibiting the keeping open of a shop forbid the carrying on of the business of the week either secretly or openly,⁷⁰ as do also acts specifically enumerating and prohibiting certain specific acts or matters.⁷¹ On the other hand, statutes which merely prohibit public selling, or offering, or exposing for sale, on Sunday are not designed to forbid business transactions which in no manner affect the rights of others who are observing the day⁷² and which are made without tending to violate the public order and solemnity of the day;⁷³ and a like result has been reached as to statutory prohibitions directed against public sports, exercises, or shows.⁷⁴

Where statutes expressly prohibit certain acts done on Sunday only where they are done to the disturbance of others,⁷⁵ or are confined by their terms to whoever disturbs the peace and good order of society by his conduct on Sunday,⁷⁶ or expressly declare as their object the prohibition of acts which are serious interruptions of the repose of the community,⁷⁷ only those acts are forbidden which fall within such categories. In at least one jurisdic-

60. Mass.—Commonwealth v. Trickey, 13 Allen 559—Commonwealth v. Harrison, 11 Gray 309.

61. Ala.—Cusimano v. State, 103 So. 241, 20 Ala.App. 502. 60 C.J. p 1047 notes 4, 5.

62. Mass.—Commonwealth v. Dale, 11 N.E. 534, 144 Mass. 363. 60 C.J. p 1047 note 5.

63. Ala.—Cusimano v. State, 103 So. 241, 20 Ala.App. 502. 60 C.J. p 1047 note 6.

Proprietor, and not clerk or employee, held referred to in statutory prohibition.—State v. Trahan, 36 So. 2d 652, 214 La. 100.

64. Tex.—Oliver v. State, 144 S.W. 604, 65 Tex.Cr. 150. 60 C.J. p 1047 note 7.

65. Ark.—Blahut v. State, 34 Ark. 447.

Tex.—Morris v. State, 89 S.W. 832, 48 Tex.Cr. 562.

Making of sales

If he was present when place of business was open for traffic, it is immaterial whether he personally made sales.—Timberlake v. State, 78 S.W.2d 599, 128 Tex.Cr. 63.

66. Ark.—Blahut v. State, 34 Ark. 447.

67. Pa.—Noftsker v. Commonwealth, 8 Pa.Dist. 572, 22 Pa.Co. 559. 60 C.J. p 1048 note 11.

Disturbance of peace on Sunday as disorderly conduct see supra § 4.

68. Iowa.—State v. Linsig, 159 N.W. 995, 178 Iowa 484. 60 C.J. p 1048 note 12.

69. Fla.—Hooks v. State, 50 So. 586, 58 Fla. 57. 60 C.J. p 1048 note 12 [b].

70. Mo.—State v. Crabtree, 27 Mo. 232. 60 C.J. p 1048 note 13.

71. Md.—Hiller v. State, 92 A. 842, 124 Md. 385.

72. Minn.—Ward v. Ward, 77 N.W. 965, 75 Minn. 269. 60 C.J. p 1048 note 15.

73. N.Y.—Boynton v. Page, 13 Wend. 425. 60 C.J. p 1048 note 16.

74. Minn.—Houck v. Ingles, 148 N.W. 100, 126 Minn. 257. N.D.—State v. Davis, 164 N.W. 698, 38 N.D. 68. 60 C.J. p 1048 note 17.

75. N.H.—Clough v. Shepherd, 31 N.H. 490—Varney v. French, 19 N.H. 233.

76. Ill.—Eden v. People, 43 N.E. 1108, 161 Ill. 296, 32 L.R.A. 659, 52 Am.S.R. 365. 60 C.J. p 1048 note 19.

77. N.Y.—William Fox Amusement Co. v. McClellan, 114 N.Y.S. 594, 62 Misc. 100. 60 C.J. p 1048 note 20.

tion it is held that a disturbance, within the meaning of this requirement, is any business which withdraws or distracts the attention of others from the appropriate observance of the day and turns it to other things,⁷⁸ regardless of whether the others thus affected assent or object to the performance of such business;⁷⁹ but elsewhere it has been held that no disturbance of the good order of society results where no disorder or interference with the religious rights of others is occasioned by the acts complained of.⁸⁰

Where the statute itself specifies particular acts which shall be regarded as disturbing the rest and repose of the day, the doing of any of the specified acts constitutes a disturbance, no matter how quietly the acts may be done.⁸¹

Presence of others. It has been held that a transaction may be to the disturbance of others although no one but the parties thereto were present;⁸² but a result to the contrary has been reached elsewhere under similar statutes.⁸³

Statutes prohibiting attendance at public meetings other than religious gatherings operate only against the spectators or auditors and have no application to the acts of those promoting or performing in such assemblies.⁸⁴

§ 9. — Acts Done in Exercise of Ordinary Calling

Acts repeated regularly in the course of trade, business, or labor are parts of the ordinary calling of one exercising such trade, business, or labor within a prohibition against pursuit of one's business or ordinary calling.

At common law the pursuit of one's ordinary calling on Sunday is not an offense;⁸⁵ and the fact that one engages in his usual calling on Sunday is not per se illegal,⁸⁶ but under some statutes the pursuit of one's business or the work of his ordinary calling, on Sunday, is prohibited.⁸⁷

When a statute is in terms addressed only to the performance of business in one's ordinary calling, acts not in the line of such usual employment are not forbidden.⁸⁸ Provided it is work of one's ordinary calling, it is immaterial that the work or business performed on Sunday is not at his usual place of business⁸⁹ or is not as active or constant as on week days.⁹⁰

Statutes directed against the performance of any worldly or secular business, employment, or labor whatsoever on Sunday are not confined to such business as is in the course of an ordinary calling;⁹¹ and a statute prohibiting the keeping open of a store is not limited to such persons as follow the calling of merchants or shopkeepers through the week, and does not affect their conduct in any manner different from that with respect to the conduct of others.⁹²

While a statute prohibiting "work, labor or business" on Sunday does not, it has been held, confine the prohibition to the doing of acts which constitute the customary business of the person doing them throughout the week,⁹³ nevertheless, the prohibition of the statute is confined to acts of a secular nature belonging to, or connected with, ordinary business or common worldly affairs of men generally, although they might not fall within the line of the daily business or occupation within which the particular person concerned is employed.⁹⁴

78. N.H.—Varney v. French, 19 N. H. 233.

60 C.J. p 1049 note 21.

79. N.H.—George v. George, 47 N.H. 27.

60 C.J. p 1049 note 22.

80. N.Y.—People v. Dennin, 35 Hun 327.

60 C.J. p 1049 note 23.

81. N.Y.—People v. Moses, 35 N.E. 499, 140 N.Y. 214—United Vaudeville Co. v. Heller, 108 N.Y.S. 789, 58 Misc. 16, 22 N.Y.Cr. 52.

82. N.H.—Thompson v. Williams, 58 N.H. 248.

83. Ill.—Richmond v. Moore, 107 Ill. 429, 47 Am.R. 445.

60 C.J. p 1049 note 25.

84. N.M.—Territory v. Davenport, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in Territory v. Hart, 124 P. 798, 17 N.M. 222.

85. Ga.—Southern Ry. Co. v. Wallis, 66 S.E. 370, 133 Ga. 553, 30 L.R.A., N.S., 401, 18 Ann.Cas. 67.

60 C.J. p 1049 note 28.

86. N.Y.—Eden Musee American Co. v. Bingham, 108 N.Y.S. 200, 58 Misc. 644, 22 N.Y.Cr. 34, reversed on other grounds 110 N.Y.S. 210, 125 App.Div. 780.

87. Ga.—Hayden v. Mitchell, 30 S.E. 287, 103 Ga. 446—Sawyer v. Car-gile, 72 Ga. 290—Blizzard v. Bliz-zard, 8 S.E.2d 679, 62 Ga.App. 244.

88. S.C.—Hellams v. Abercrombie, 15 S.C. 110, 40 Am.R. 684.

60 C.J. p 1049 note 30.

89. Ga.—McCain v. State, 58 S.E. 550, 2 Ga.App. 389.

60 C.J. p 1049 note 31.

90. Ga.—McCain v. State, supra.

91. Del.—Walsh v. State, 136 A. 160, 33 Del. 353, affirmed 139 A. 257, 33 Del. 514, 56 A.L.R. 810.

60 C.J. p 1049 note 33.

92. Ala.—Everett v. State, 111 So. 759, 22 Ala.App. 30.

60 C.J. p 1050 note 34.

93. Mass.—Bennett v. Brooks, 9 Al-len 118.

Mich.—Adams v. Hamell, 2 Dougl. 73, 43 Am.D. 455.

94. Mass.—Bennett v. Brooks, 9 Al-len 118.

60 C.J. p 1050 note 36.

and does not embrace acts, although of a secular or temporal character, which do not form a part of the ordinary and usual business of mankind generally, but which are of an exceptional and occasional character not incidental to the ordinary transactions which constitute the common business of everyday life.⁹⁵

Those acts which are repeated regularly in the course of trade, business, or labor are parts of the ordinary calling of one exercising such trade, business, or labor.⁹⁶

A statute prohibiting the "exercising of any of the common vocations of life" on Sunday, acts of real necessity or charity excepted, prohibits the transaction of the regular business of insurer.⁹⁷

Acts on one or more Sundays. An act done on one Sunday alone is not the pursuit of one's business or the work of his ordinary calling on Sunday,⁹⁸ and the pursuit of a particular business on a single Sunday only by one who has at no other time engaged in it is not, of course, engaging in his ordinary calling.⁹⁹

On the other hand, where acts are repeated on successive Sundays, they become a part of a person's business or the work of his ordinary calling;¹ and a business may be an ordinary calling of a person if he regularly engages in it on several Sundays, although it appears that regularly throughout the week he follows another occupation and it does not appear that he follows that for which he is convicted.²

The common-law offense of exercising a common vocation of life on Sunday is not committed until it is carried on to such an extent as to create a nuisance,³ and a single violation of a statute prescribing a penalty for exercising any of the common vocations of life makes the offender liable only for such penalty, and no criminal action can be predicated thereon.⁴

§ 10. — Exceptions in General

Exceptions to Sunday laws will be given effect according to their terms, and only as to prohibitions in connection with which they are stated.

A legislative body, in regulating Sunday observance, must be allowed a wide field of choice in determining what shall come within the class of permitted activities and what shall be excluded;⁵ so, in the exercise of its police power, the legislature has the authority to except certain businesses from the law under such conditions as it deems proper;⁶ but a statute which unreasonably discriminates between persons similarly situated is invalid.⁷ Where a statute empowers municipalities to pass such ordinances as are not inconsistent with the laws of the state, a Sunday ordinance omitting the exceptions provided for in the state Sunday statute is invalid;⁸ and an ordinance providing for exceptions to its operation is not valid unless the exceptions bear some reasonable relationship to the public health, safety, morals, or general welfare.⁹ A statute¹⁰ or ordinance¹¹ exempting certain businesses and occupations on the theory that they are works of necessity is unconstitutional unless an implied exception of all works

95. Mass.—Bennett v. Brooks, supra.

96. Ga.—Reed v. State, 46 S.E. 837, 119 Ga. 562.
60 C.J. p 1050 notes 38-40.

97. Tenn.—Simpkins v. Business Men's Assur. Co. of America, 215 S.W.2d 1, 31 Tenn.App. 306.

98. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166.

99. Ga.—Ellis v. State, 63 S.E. 588, 5 Ga.App. 615.
60 C.J. p 1050 note 42.

1. Ga.—Forehand v. Moody, 36 S.E. 321, 200 Ga. 166.

2. Ga.—Scandrett v. State, 52 S.E. 160, 124 Ga. 141.
60 C.J. p 1050 note 41.

3. Tenn.—Goff v. State, 209 S.W.2d 13, 186 Tenn. 212—State ex rel. Pitts v. Nashville Baseball Club, 154 S.W. 1151, 127 Tenn. 292, Ann. Cas.1914B 1243.

Succession or continuation of act

It is the succession or continuation of such act on divers Sundays that makes it a nuisance indictable as a common-law offense.—Goff v. State, 209 S.W.2d 13, 186 Tenn. 212.

4. Tenn.—Goff v. State, supra.

5. Md.—Ness v. Ennis, 160 A. 8, 162 Md. 529.

Businesses providing recreational activities

Utah.—Broadbent v. Gibson, 140 P.2d 939, 105 Utah 53.

6. La.—State v. Trahan, 36 So.2d 652, 214 La. 100.

7. Utah.—Broadbent v. Gibson, 140 P.2d 939, 105 Utah 53.

8. Ohio.—Canton v. Nist, 9 Ohio St. 439—Strauss v. Conneaut, 23 Ohio Cir.Ct. 320.

9. Ill.—City of Mt. Vernon v. Julian, 17 N.E.2d 52, 369 Ill. 447, 119 A.L.R. 747.

Scrutiny by courts

Relationship must be such as to bear the scrutiny of the courts on a review to determine its reasonableness.—City of Mt. Vernon v. Julian, supra.

Ordinance held invalid

Utah.—Gronlund v. Salt Lake City, 194 P.2d 464, 113 Utah 284.

10. Utah.—Broadbent v. Gibson, 140 P.2d 939, 105 Utah 53.

11. Utah.—Gronlund v. Salt Lake City, 194 P.2d 464, 113 Utah 284.

of necessity can be read into the statute or ordinance.

Whether an act done on Sunday comes within exceptions to the Sunday laws depends on the terms of the statute involved and the circumstances of the particular case;¹² if it does, it may be done on that day as lawfully as on any other.¹³

The enumeration of particular exceptions is conclusive against the existence of other exceptions.¹⁴ Exceptions stated in connection with some prohibitions, but not with others, are operative only as to those in connection with which they are stated, and the fact that a particular act might fall within the scope of such exceptions is immaterial as to the prohibitions with respect to which no exceptions appear.¹⁵

§ 11. — Necessity or Charity

- a. In general
- b. Necessity
- c. Charity

a. In General

Acts constituting works of necessity or charity, with-in exemptions from Sunday laws, cannot be classified, nor can any general rule be prescribed for determining them.

Exceptions to the operation of Sunday laws, in favor of works of necessity or charity allow the doing of all acts of necessity or charity, although of the character included in the general prohibition.¹⁶ The classification of acts which constitute works of necessity or charity, or the prescription of any general rule for their determination, is impossible.¹⁷ If a person has reasonable ground to

believe that a case of necessity or charity exists and honestly acts under that belief and in furtherance of such a purpose, although he may be deceived or mistaken in fact, his act is within the exception.¹⁸

The performance of an act gratuitously as an accommodation does not necessarily make it a work of necessity or charity.¹⁹

It is immaterial that a work is one of necessity or charity where the acts or matters done or performed are prohibited without the statement of any exception in favor of necessity or charity, and such a circumstance does not relieve the person acting from the operation of the prohibition.²⁰

Promoting attendance at unlawful place. It cannot be a work for necessity or charity to promote attendance at a place of public diversion where it is unlawful for anyone to be present.²¹

b. Necessity

"Necessity," as a basis for exemption from Sunday laws, cannot be precisely defined, but is determined according to the facts of each particular case; absolute or physical necessity is not required, but convenience or profit is insufficient.

Whether or not a particular matter is a work of necessity must be determined in view of the particular circumstances involved²² and is ordinarily a question of fact,²³ or, at most, a mixed question of law and fact,²⁴ rather than purely a question of law. What constitutes "necessity" in this connection is incapable of exact or accurate definition;²⁵ the term is elastic and relative, and should be construed with respect to the conditions under which people live.²⁶

12. Ind.—Ross v. State, 36 N.E. 167, 9 Ind.App. 35.

Pa.—Johnston v. Commonwealth, 22 Pa. 102.

13. La.—Schenck v. Schenck, 28 So. 302, 52 La. Ann. 2102.
60 C.J. p 1050 note 44.

14. Ky.—Capital Theatre Co. v. Commonwealth, 199 S.W. 1076, 178 Ky. 780.

15. Kan.—State v. Haining, 293 P. 952, 131 Kan. 854.
60 C.J. p 1050 note 46.

16. Pa.—Commonwealth v. Weidner, 4 Pa.Co. 437.

60 C.J. p 1050 note 47.

Particular acts or transactions as works of necessity or charity see *infra* §§ 13-18, 41-57.

17. Pa.—Johnston v. Commonwealth, 22 Pa. 102.

18. Conn.—Myers v. State, 1 Conn. 502.
60 C.J. p 1050 note 49.

19. Pa.—Commonwealth v. Williams, 1 Pearson 61.

20. Wis.—Stark v. Backus, 123 N.W. 98, 140 Wis. 557.
60 C.J. p 1051 note 54.

21. Conn.—State v. Ryan, 69 A. 536, 80 Conn. 582.

22. Ind.—Western Union Tel. Co. v. Yopst, 20 N.E. 222, 3 L.R.A. 224, 118 Ind. 248.
60 C.J. p 1051 note 55.

23. Va.—Pirkey v. Commonwealth, 114 S.E. 764, 134 Va. 713, 29 A.L.R. 1290.

60 C.J. p 1051 note 56.

24. Ind.—Mueller v. State, 76 Ind. 310, 40 Am.R. 245.
60 C.J. p 1051 note 57.

25. Va.—Francisco v. Commonwealth, 23 S.E.2d 234, 180 Va. 371.
60 C.J. p 1051 note 58.

26. Va.—Francisco v. Commonwealth, *supra*.

"Undoubtedly the word 'necessity' has a flexible meaning, broadening and narrowing according to the wants, needs, and customs of a particular community at a particular time."—Commonwealth v. McDonald, 32 Pa. Dist. & Co. 257, 263.

Generally speaking, the law regards as necessary that which the common sense of the country, in its ordinary modes of doing its business, regards as necessary.²⁷ It is not the intention of the law to impose onerous restrictions on, or add burdens to, the performance of any proper matter,²⁸ and, hence, necessity does not mean an absolute or physical necessity,²⁹ but rather a reasonable one;³⁰ nor is necessity limited to those cases of dangers to life, health, or property which are beyond human foresight or control,³¹ but a moral fitness or propriety of the work or labor done under the circumstances of the particular case is sufficient.³²

The necessity for the work must be real and urgent;³³ and the test is not whether it must be done at some time, but whether it must be done on Sunday.³⁴

Convenience, desirability, or profitability not criterion. Necessity in this connection is something more than that which is merely desirable.³⁵ The mere fact that the performance of a particular act or transaction on Sunday is a convenience,³⁶ or that its nonperformance will cause a degree of

inconvenience or discomfort,³⁷ or that it is more profitable so to act than to adopt some alternative method of transacting business,³⁸ is not sufficient to make such act a work of necessity.

Necessity arising through act or negligence of party acting. In order to be within the exceptions, the necessity must be one which is not of the party's own creation³⁹ and not the result of unreasonable negligence or indolence on his part.⁴⁰

Foreseeable or avoidable character of act; emergency. Generally speaking, it has been said, the necessity ought to be an unforeseen one⁴¹ or, if foreseen, such as could not reasonably have been provided against;⁴² and thus a necessity which could be avoided by changes in the facilities or manner of transacting business or labor without an unreasonable expenditure of time or money is not such necessity as comes within the exception.⁴³ However, it is not required that the necessity be absolutely unavoidable, but it is sufficient that it could not reasonably have been avoided.⁴⁴ "Works of necessity" include emergencies.⁴⁵

27. Pa.—Commonwealth v. McDonald, supra.
60 C.J. p 1052 note 59.

28. Tex.—Hennersdorf v. State, 8 S.W. 926, 25 Tex.App. 597, 8 Am. S.R. 448.
60 C.J. p 1052 note 60.

29. Va.—Corpus Juris cited in Francisco v. Commonwealth, 23 S.E.2d 234, 237, 180 Va. 371.
60 C.J. p 1052 note 61.

Physical, economic, or moral necessity

(1) A practical definition is that the "work of necessity" excepted from operation of statute is not merely one of absolute or physical necessity, not merely something required to furnish physical existence or safety of person or property, but embraces as well all work reasonably essential to the economic, social, or moral welfare of the people, viewed in light of the habits and customs of the age in which they live and of the community in which they reside.—Francisco v. Commonwealth, 23 S.E.2d 234, 238, 180 Va. 371.

(2) Term "necessity" means economic and moral necessity incident to particular trade or calling, rather than absolute unavoidable physical necessity.—Casualty Reciprocal Exchange v. Stephens, Tex.Com.App., 45 S.W.2d 143.

30. Ind.—Western Union Tel. Co. v.

Yopst, 20 N.E. 222, 118 Ind. 248, 3 L.R.A. 224.

31. Ind.—Edgerton v. State, 67 Ind. 588, 33 Am.R. 110.
60 C.J. p 1052 note 62.

32. Va.—Corpus Juris cited in Francisco v. Commonwealth, 23 S.E.2d 234, 237, 180 Va. 371.
60 C.J. p 1052 note 63.

33. Ky.—Capital Theater Co. v. Commonwealth, 199 S.W. 1076, 178 Ky. 780.
60 C.J. p 1053 note 65.

34. Pa.—Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.

35. Okl.—State v. Smith, 198 P. 879, 19 Okl.Cr. 184, followed in Treese v. State, 198 P. 889, 19 Okl.Cr. 211, State v. House, 198 P. 888, 19 Okl.Cr. 204, Ramsey v. State, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, and Binkley v. State, 198 P. 884, 885, 19 Okl.Cr. 199, 201.
60 C.J. p 1052 note 64.

"The elasticity [of the word 'necessity'] should not be extended so far as to cover that which is merely desirable and not reasonably essential."—Francisco v. Commonwealth, 23 S.E.2d 234, 238, 180 Va. 371.

36. Pa.—Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.
60 C.J. p 1053 note 66.

37. Minn.—State v. Dean, 184 N.W. 275, 149 Minn. 410.
60 C.J. p 1053 note 67.

38. Mass.—Commonwealth v. White, 77 N.E. 636, 190 Mass. 578, 5 L.R.A., N.S., 320.
60 C.J. p 1053 note 68.

Increased income for laborer

Fact that Sunday work is profitable and will result in an increased income for the laborer does not make out a case of necessity.—Stellhorn v. Board of Com'rs of Allen County, 110 N.E. 89, 60 Ind.App. 14.

39. Mo.—State v. Stuckey, 73 S.W. 735, 98 Mo.App. 664.
60 C.J. p 1054 note 69.

40. Mass.—Bucher v. Fitchburg R. Co., 131 Mass. 156, 41 Am.R. 216.
60 C.J. p 1054 note 70.

41. Ind.—Ungericht v. State, 21 N.E. 1082, 119 Ind. 379, 12 Am.S.R. 419.
60 C.J. p 1054 note 71.

42. Tex.—Grimes v. State, 200 S.W. 378, 82 Tex.Cr. 512.
60 C.J. p 1054 note 72.

43. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 803, 24 W.Va. 783, 49 Am.R. 290.
60 C.J. p 1054 note 73.

44. Pa.—Commonwealth v. Bobb, 17 Pa.Co. 350, 14 Pa.Co. 473.
60 C.J. p 1054 note 74.

45. Miss.—White's Lumber & Supply Co. v. Collins, 191 So. 105, 107, 186 Miss. 659, suggestion of error

Acts incidental to other acts which are lawful. The mere fact that labor is necessary, under the circumstances, for the accomplishment of a generally lawful purpose does not render it a necessity within the exception;⁴⁶ the purpose itself, as well as the work done to accomplish it, can be lawful on Sunday only when, under the circumstances, there is a pressing and present necessity for its accomplishment on that day.⁴⁷ However, where the primary purpose of the act is a necessity under the statute, the work properly incidental to its accomplishment, as well as the immediate act itself, is a necessity.⁴⁸ It is the exigencies of the object to be accomplished that determine, to a great extent, the permissibility of the means to be resorted to for that purpose;⁴⁹ and thus the necessity may grow out of, and be incidental to, the particular nature of the business involved.⁵⁰

Necessity as dependent on character of party benefited by performance. Some authorities have held that the necessity contemplated in the statute is the necessity of the person working, and not that of the person for whom the work is done;⁵¹ but this distinction has been rejected by others,⁵² and the rule has even been stated directly to the contrary that the necessity does not spring from the motives which induce the actor to perform his work or busi-

ness, but from the necessity of the person for whom it is performed.⁵³

A work of necessity, within the meaning of the statute, may be either that labor or business necessary to the person himself⁵⁴ or for the benefit of some other person affected by the necessity or emergency creating the condition,⁵⁵ or necessary to the community.⁵⁶

Acts to secure public safety. Any works required to secure the public safety are works of necessity.⁵⁷

Preservation or protection of property. Acts to preserve,⁵⁸ or to prevent a serious loss of,⁵⁹ property are within the exception. The rule is not limited to cases where the property is of great value,⁶⁰ although it does not extend to those where it is of insignificant value;⁶¹ the circumstances and wealth of the owner and the relative importance to him of the property are circumstances to be considered in determining the availability of the exception.⁶²

Legislative declarations as to necessity. Where the legislature itself has indicated a purpose to deal with any particular matter as a work of necessity, this legislative expression and definition of its character as such operates to require that the perform-

overruled 192 So. 312, 186 Miss. 659.

Assault held not in emergency

Where corporation's resident manager and general manager committed an assault in attempting, on Sunday, to compel corporation's debtor to execute a deed of trust, the relationship of employer and employee existed between corporation and managers, making corporation liable, although collection or settlement of debt was not a work of necessity and not an emergency.—*White's Lumber & Supply Co. v. Collins*, *supra*.

46. Tex.—*Ex parte Kennedy*, 58 S. W. 129, 42 Tex.Cr. 148, 51 L.R.A. 270.

60 C.J. p 1054 note 75.

47. Del.—*Walsh v. State*, 139 A. 257, 33 Del. 514, 56 A.L.R. 810.

60 C.J. p 1054 note 76.

48. Va.—*Lakeside Inn Corp. v. Commonwealth*, 114 S.E. 769, 134 Va. 696.

60 C.J. p 1054 note 77.

49. Ky.—*Commonwealth v. Louisville, etc., R. Co.*, 80 Ky. 291, 3 Ky. L. 788, 44 Am.R. 475.

60 C.J. p 1054 notes 78, 79.

50. Ky.—*Natural Gas Products Co. v. Thurman*, 265 S.W. 475, 205 Ky. 100.

60 C.J. p 1054 note 79.

51. Pa.—*Sparhawk v. Union Pass. R. Co.*, 54 Pa. 401.

60 C.J. p 1054 note 80.

52. Ky.—*Commonwealth v. Louisville, etc., R. Co.*, 80 Ky. 291, 3 Ky. L. 788, 44 Am.R. 475.

60 C.J. p 1054 note 81.

53. Ohio.—*Spaith v. State*, 10 Ohio Dec., Reprint, 639, 22 Cinc.L.Bul. 323.

54. Ky.—*McAfee v. Commonwealth*, 190 S.W. 671, 173 Ky. 83, L.R.A. 1917C 377.

60 C.J. p 1055 note 83.

55. Ga.—*Williams v. State*, 144 S.E. 745, 167 Ga. 160, 60 A.L.R. 747, answer to certified question conformed to 145 S.E. 483, 38 Ga.App. 694.

60 C.J. p 1055 note 84.

56. S.C.—*State v. James*, 62 S.E. 214, 81 S.C. 197, 199, 128 Am.S.R. 902, 18 L.R.A., N.S., 617, 16 Ann.Cas. 277.

60 C.J. p 1055 note 85.

57. Ill.—*Johnston v. People*, 31 Ill. 469.

60 C.J. p 1055 note 86.

Judicial proceedings to secure criminals see *infra* § 45.

Work of prison guard

Ky.—*Page v. O'Sullivan*, 169 S.W. 542, 543, 159 Ky. 703.

58. U.S.—*Powhatan Steamboat Co. v. Appomattox R. Co., Va.*, 24 How. 247, 16 L. Ed. 682.

60 C.J. p 1055 note 87.

59. Ind.—*Morris v. State*, 31 Ind. 189.

60 C.J. p 1055 note 88.

Loss through natural forces

It is not a necessity to reduce to possession unowned personality, even though a failure to act immediately may result in its being carried out of reach by natural forces.—*Commonwealth v. Sampson*, 97 Mass. 407—60 C.J. p 1055 note 92.

60. Ill.—*Johnson v. People*, 42 Ill. App. 594.

61. Ill.—*Johnson v. People*, *supra*.

62. Ill.—*Johnson v. People*, *supra*.

ance of such a matter be treated as matter of necessity.⁶³

"Daily necessity." Where the exception is of services of "daily necessity," the qualifying word "daily" limits the exception to such acts as are required to meet a daily need;⁶⁴ but, where the exception is of works of necessity generally, it is not essential that the acts done shall have been works of daily necessity.⁶⁵

c. Charity

Charity as a basis for exemption from Sunday laws is to be understood in its ordinary sense. Convenience to another, or the dedication of proceeds to charity, does not bring an act within the exemption.

The term "charity" is intended to be understood in its ordinary sense⁶⁶ and to denote something more than mere almsgiving.⁶⁷ It is active goodness,⁶⁸ and includes everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure.⁶⁹ Thus, ordinarily, the usual and necessary work connected with religious worship or reasonably incident thereto is work of charity.⁷⁰ However, a patriotic enterprise⁷¹ or an educational work⁷² is not necessarily a work of charity within the exception; nor are all acts done by corporations organized as "not for profit,"

even though their aims and purposes are purely altruistic.⁷³

To constitute an act of charity, the act done must itself be a charitable act, and the act of ascertaining whether a charity is needful is not sufficient.⁷⁴ Ordinarily, charity will not include the doing of an act for compensation or private gain.⁷⁵ In distinguishing what is done by way of charity from other acts, the motive, rather than the result, should be kept in view.⁷⁶ The mere fact that an act is a convenience to another does not render it a work of charity or mercy;⁷⁷ and not every gratuitous act done for another is an act of charity within the exceptions.⁷⁸

The word "charity," in this connection, means or connotes giving, and not receiving.⁷⁹ The dedication to charity of funds or proceeds raised by the transaction of prohibited acts or matters on Sunday is not of itself sufficient to bring such transactions within the exception of works of charity.⁸⁰

A negligent failure to perform an act of charity on a prior date does not affect the legality of its performance on Sunday.⁸¹

§ 12. — Persons Observing Another Day

Persons observing a day other than Sunday may perform such acts as are forbidden by Sunday laws only

63. Kan.—State v. O'Donnell, 225 P. 1078, 116 Kan. 182.
60 C.J. p 1055 note 93.

64. Ark.—Rosenbaum v. State, 199 S.W. 388, 131 Ark. 251, L.R.A.1918B 1109.

65. Mo.—State v. Stone, 15 Mo. 513.

66. Mo.—Burnett v. Western Union Tel. Co., 39 Mo.App. 599.

67. Mo.—Burnett v. Western Union Tel. Co., supra.
60 C.J. p 1056 note 97.

68. Iowa.—Ft. Madison First M. E. Church v. Donnell, 81 N.W. 171, 110 Iowa 5, 46 L.R.A. 858.
60 C.J. p 1056 note 98.

69. Pa.—Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.
60 C.J. p 1056 note 99.

70. Iowa.—Ft. Madison First M. E. Church v. Donnell, 81 N.W. 171, 110 Iowa 5, 46 L.R.A. 858.
60 C.J. p 1056 note 1.

71. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., 8 Pa. Dist. & Co. 77.

72. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., supra.

73. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., supra.
60 C.J. p 1056 note 5.

74. Mass.—Bucher v. Fitchburg, etc., R. Co., 131 Mass. 156, 41 Am.R. 216.

Pursuing ordinary calling; detached business

Within meaning of statute forbidding any person to pursue his business or work of his ordinary calling on the Lord's day, work of necessity or charity only excepted, the person himself must be engaged in an act which is itself charitable, or at least the enterprise for which he works must itself be engaged in acts which are themselves charitable, and a detached business, from which support for charitable enterprise is to be derived, is not exempt as a charitable enterprise; nor are the operators or employees of the detached business exempt.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

75. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., 8 Pa. Dist. & Co. 77.
60 C.J. p 1056 note 7.

76. Iowa.—Ft. Madison First M. E. Church v. Donnell, 81 N.W. 171, 110 Iowa 5, 46 L.R.A. 858.

77. Mo.—State v. Schatt, 107 S.W. 10, 128 Mo.App. 622.
60 C.J. p 1056 note 9.

78. Mass.—McGrath v. Merwin, 112 Mass. 467, 17 Am.R. 119.
60 C.J. p 1056 note 10.

79. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

80. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166—Thompson v. City of Atlanta, 172 S.E. 915, 178 Ga. 281, answers to certified questions conformed to 173 S.E. 193, 48 Ga.App. 674, transferred 168 S.E. 312, 176 Ga. 489.
60 C.J. p 1056 note 11.

81. Mo.—Burnett v. Western Union Tel. Co., 39 Mo.App. 599.
60 C.J. p 1056 note 12.

when and to the extent to which a statutory exemption in their favor exists.

Persons observing a day other than Sunday may not, in the absence of statutory exemption in their favor, perform such acts as are forbidden by Sunday laws,⁸² and a provision that such laws shall not be construed to prevent the due exercise of the rights of conscience on their part does not alter the rule.⁸³ However, valid exceptions in statutes or ordinances in favor of such persons enable them to perform any acts generally forbidden to be done on that day with respect to which they are particularly excepted, without committing a violation of the Sunday laws by such conduct.⁸⁴

Exemption from particular stated restrictions or prohibitions does not relieve such persons from compliance with other prohibitions to which the exemption is not expressed to extend;⁸⁵ and, where the exemption is qualified, the qualifications must be met before it is available in defense of such persons.⁸⁶ Exceptions in favor of those observing another day are not applicable to persons who believe that the seventh day is the Sabbath, but do not observe it as such,⁸⁷ or to business corporations, since they are incapable of having religious sentiments.⁸⁸

§ 13. Particular Acts or Transactions Permitted or Prohibited

a. Farmers

82. Ark.—*Scales v. State*, 1 S.W. 769, 46 Ark. 476, 58 Am.R. 768.
60 C.J. p 1056 note 13.

83. Ill.—*Foll v. People*, 66 Ill.App. 405.

84. Ky.—*Cohen v. Webb*, 192 S.W. 828, 175 Ky. 1.
60 C.J. p 1057 note 15.
Constitutionality as to guaranties of religious freedom see Constitutional Law § 206 b.

Statute or ordinance held valid
Ill.—*Springfield v. Richter*, 101 N.E. 192, 257 Ill. 578.
Neb.—*Leiberman v. State*, 42 N.W. 419, 26 Neb. 464, 18 Am.S.R. 791.
60 C.J. p 1033 note 52, p 1034 note 56 [e], p 1036 note 67 [a].

Statute or ordinance held invalid
La.—*Shreveport v. Levy*, 29 La.Ann. 671.

N.J.—*Kislingbury v. Treasurer of City of Plainfield*, 160 A. 654, 10 N.J.Misc. 798.

N.Y.—*People v. C. Klinck Packing Co.*, 108 N.E. 278, 214 N.Y. 121, Ann. Cas.1916D 1051—Anonymous, 12 Abb.N.Cas. 455.

Okl.—*Ex parte Ferguson*, 70 P.2d 1094, 62 Okl.Cr. 145.
60 C.J. p 1033 notes 52, 54.

Work on other day not illegal

The statute does not place Saturday work, on the part of persons who conscientiously observe Saturday as the Sabbath, in same category as Sunday work for other persons, or make Saturday work illegal for such persons, but merely exempts them from punishment for performing forbidden acts on Sunday.—*Kut v. Albers Super Markets*, 63 N.E.2d 218, 76 Ohio App. 51, affirmed 66 N.E.2d 643, 146 Ohio St. 522, appeal dismissed 67 S.Ct. 86, 329 U.S. 669, 91 L.Ed. 590, rehearing denied 67 S.Ct. 186, 329 U.S. 827, 91 L.Ed. 702.

85. Mass.—*Commonwealth v. Kirshen*, 80 N.E. 2, 194 Mass. 151, 10 Ann.Cas. 948.
60 C.J. p 1057 note 16.

Work or labor; selling

Thus statutes relieving such persons from the prohibitions as to work or labor, and confined thereto, do not exempt them from the general prohibition on public selling.

- b. Gasoline and motor services
- c. Making of contracts generally
- d. Manufacturing and similar industrial plants
- e. Newspapers
- f. Sales of real property
- g. Selling tickets or taking fees for admission
- h. Telegraph companies
- i. Tobacco, cigars, etc.
- j. Travel
- k. Water; light
- l. Other acts or transactions

a. Farmers

Various acts in connection with farming have been held works of necessity, while other acts have been regarded as prohibited by Sunday laws.

A farmer selling products of his farm at his farm on Sunday is not a merchant, grocer, or dealer in wares and merchandise, or a trader in any business, within a statute forbidding Sunday sales by such persons.⁸⁹

Various particular acts connected with the operation of a farm have been held, under all the circumstances, to constitute works of necessity,⁹⁰ as in the case of feeding animals⁹¹ and milking cows and disposing of the milk;⁹² but a contrary result

N.Y.—*People v. Friedman*, 96 N.E. 2d 184, 302 N.Y. 75, appeal dismissed *Friedman v. People of State of N. Y.*, 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345—*People v. Rudnick*, 20 N.Y.S.2d 996, 259 App.Div. 922.
Wash.—*State v. Grabinski*, 206 P.2d 1022, 33 Wash.2d 603.
60 C.J. p 1057 note 16 [a] (3), (4).

86. N.Y.—*People v. Adler*, 160 N.Y. S. 539, 174 App.Div. 301.
60 C.J. p 1057 note 17.

87. Neb.—*Liberman v. State*, 42 N.W. 419, 26 Neb. 464, 18 Am.S.R. 791.
60 C.J. p 1057 note 18.

88. W.Va.—*State v. Baltimore, etc.*, R. Co., 15 W.Va. 362, 36 Am.R. 803.

89. Tex.—*Hanks v. State*, 99 S.W. 1011, 50 Tex.Cr. 577.

90. Pa.—*Commonwealth v. Vaughn*, 18 Pa.Dist. 17, 35 Pa.Co. 609.
60 C.J. p 1065 note 51.

91. Ind.—*Edgerton v. State*, 67 Ind. 588, 33 Am.R. 110.

92. Kan.—*Topeka v. Hempstead*, 49 P. 87, 58 Kan. 328.

has been reached in particular circumstances, as to the gathering of crops.⁹³

Under statutes prohibiting hunting on Sunday, it has been held that a farmer may not on that day hunt on his own premises unprotected animals or birds which are damaging his crops.⁹⁴

b. Gasoline and Motor Services

The sale of gasoline and services in connection with motor vehicles have variously been held within the prohibitions of Sunday laws or within exceptions thereto.

The sale of gasoline is within the prohibition of statutes against the selling of goods, wares, or merchandise on Sunday.⁹⁵ According to some authorities, the sale of gasoline and similar motor supplies is a work of necessity or mercy within the Sunday laws,⁹⁶ and the seller may sell to the public generally;⁹⁷ but there is other authority holding that the sale of gasoline on Sunday is not a work of necessity, as a matter of law or in the absence of special emergency,⁹⁸ at least where by statute certain places are particularly excepted from the prohibitions, at which the purchase might have been made instead of being made at the place where it was in fact made.⁹⁹

An exception in favor of livery-stable keepers is inapplicable to persons selling oil or gasoline.¹

Automobile wrecker service. The operation of an automobile wrecker service on Sunday is, it has been held, a work of necessity.²

Repairmen. The redelivery on Sunday to the

owner of an automobile repaired on a week day is not forbidden by a prohibition of the pursuit on Sunday of one's ordinary calling;³ and, further, it seems that under the exception of works of necessity or charity, it might even be lawful to make repairs on that day in a clear case of emergency.⁴

Repair of premises of garage or service station on Sunday to enable the public to enter to procure gasoline and like goods is not a work of necessity.⁵

c. Making of Contracts Generally

The making of contracts on Sunday has been held within some prohibitions, such as that against business, but not within others, such as that against servile labor.

The making of contracts on Sunday is not prohibited by a statute forbidding servile laboring or working,⁶ or, as to contracts which are out of the usual line of one's employment, by statutes forbidding business in the exercise of one's ordinary calling,⁷ or, as to contracts privately made without disturbing others, by statutes forbidding labor which disturbs others.⁸ It has been held that the making of contracts on Sunday is not illegal under statutes respecting labor or "common labor,"⁹ but there is other authority holding that the making of ordinary contracts with respect to business and secular affairs is within the prohibitions of such a statute,¹⁰ although, even where such rule prevails, contracts not for private gain, but referring to the public morals and welfare, are held not to be prohibited.¹¹

The making of contracts is "business," however, within the purview of the Sunday laws;¹² and con-

93. Mass.—Commonwealth v. White, 77 N.E. 636, 190 Mass. 578, 5 L.R. A.N.S., 320.

60 C.J. p 1065 note 52 [a].

94. Ohio.—Walter v. State, 16 Ohio Cir.Ct., N.S., 523.

60 C.J. p 1065 note 53.

Hunting, shooting, or fishing generally see *infra* § 18 c. (1).

95. S.C.—Charleston Oil Co. v. Poulnot, 141 S.E. 454, 143 S.C. 283, 60 A.L.R. 750.

60 C.J. p 1070 note 14.

96. Ga.—Williams v. State, 144 S.E. 745, 167 Ga. 160, 60 A.L.R. 747, answer to certified question conformed to 145 S.E. 483, 38 Ga.App. 694.

60 C.J. p 1070 notes 15, 17.

97. Pa.—Commonwealth v. Minichello, 8 Pa.Dist. & Co. 198.

98. Vt.—Jacobs v. Clark, 28 A.2d 369, 112 Vt. 484.

60 C.J. p 1070 note 18.

99. Tex.—Grimes v. State, 200 S.W. 378, 82 Tex.Cr. 512.

1. Tex.—Johnson v. State, 246 S.W. 1033, 93 Tex.Cr. 204—Grimes v. State, 200 S.W. 378, 82 Tex.Cr. 512.

2. Miss.—Duke v. Mitchell, 122 So. 189, 153 Miss. 880.

3. N.C.—Maxton Auto Co. v. Rudd, 97 S.E. 477, 176 N.C. 497.

4. N.C.—Maxton Auto Co. v. Rudd, *supra*.

5. Miss.—Watkins v. City of Brookhaven, 99 So. 363, 134 Miss. 556.

6. N.Y.—Merritt v. Earle, 31 Barb. 38, affirmed 29 N.Y. 115, 86 Am.D. 292.

Effect of contracts and other written instruments executed on Sunday see *infra* § 27.

7. Tenn.—Amis v. Kyle, 10 Tenn. 31, 24 Am.D. 463.

60 C.J. p 1071 note 29.

Ordinary calling as element in offense generally see *supra* § 9.

8. Ill.—Richmond v. Moore, 107 Ill. 429, 47 Am.R. 445.

60 C.J. p 1071 note 30.

9. Mo.—Glover v. Cheatham, 19 Mo. App. 656.

60 C.J. p 1071 note 31.

10. U.S.—Hill v. Hite, Ark., 85 F. 268, 29 C.C.A. 549.

60 C.J. p 1071 note 32.

11. Ind.—Bryan v. Watson, 26 N.E. 666, 127 Ind. 42, 11 L.R.A. 63, overruling Catlett v. Sweetzer Station M. E. Church, 62 Ind. 365, 30 Am.R. 197.

12. Wis.—Howe v. Ballard, 89 N.W. 136, 113 Wis. 375.

60 C.J. p 1071 note 34.

tracts referring to, and in the course of, one's usual occupation are business of one's ordinary calling,¹³ even though that calling does not consist of, or regularly involve, the making of contracts such as the one involved.¹⁴ Further, where the making of a contract disturbs others, it is within the prohibition of business in one's secular calling to the disturbance of others.¹⁵

Negotiations between a creditor and his debtor, it has been held, are neither necessary nor charitable, in the absence of some emergency,¹⁶ nor are such transactions as the payment of obligations¹⁷ or the making of loans.¹⁸

Subscription contracts. The solicitation of subscriptions or the promise to make them, for objects of charity, is a work of charity, within the statutory exceptions, and hence such transactions are not unlawful.¹⁹

d. Manufacturing and Similar Industrial Plants

Repair work in manufacturing or similar establishments may be a work of necessity, as may Sunday operation where continuous operation is essential to efficiency.

Repair work in manufacturing or like industrial establishments may come within the exception of works of necessity.²⁰ Moreover, where the nature of the business is such that operation, in order to be reasonably efficient, must be continuous, that circumstance may make Sunday operation a work of necessity within the law;²¹ but, where whatever need there is for continuous operation could readi-

ly be obviated by the adoption of an alternative method of doing business, without unreasonable expense, the fact that continuous operation is essential to the methods of business actually employed, is not sufficient to make it a necessity within the exception.²²

e. Newspapers

Activities in connection with newspapers have been held forbidden under various Sunday statutes; but such business has also been held a work of necessity.

The publication, issue, or circulation of newspapers on Sunday has been held to come within statutory prohibitions against doing labor, business, or work,²³ or forbidding the engaging in worldly employment or business.²⁴ According to some authority, such business is not a work of necessity;²⁵ but there is authority to the contrary.²⁶ When expressly excepted from the Sunday laws, newspapers may appear on that day as they do on any other;²⁷ and, where the sale of newspapers is exempted, transportation and delivery thereof are necessarily included.²⁸

The selling of newspapers on Sunday has been held to be within the terms of statutes prohibiting the sale of goods, wares, and merchandise²⁹ to the disturbance of others,³⁰ or the engaging in worldly employment or business on Sunday;³¹ and it has also been held not to be a work of necessity;³² but, whether or not the selling thereof is a work of necessity or charity, keeping open shop for such sales is an offense under statutes forbidding keep-

13. Ga.—McAuliffe v. Vaughan, 70 S.E. 322, 135 Ga. 852, 33 L.R.A., N.S., 255, Ann.Cas.1912A 290.

14. Ga.—McAuliffe v. Vaughan, supra. 60 C.J. p 1071 note 36.

15. N.H.—State Capital Bank v. Thompson, 42 N.H. 369—Varney v. French, 19 N.H. 223.

16. Mass.—Stanton v. Metropolitan R. Co., 14 Allen 485. 60 C.J. p 1071 note 38.

17. Me.—Mace v. Putnam, 71 Me. 238.

18. Me.—Meader v. White, 66 Me. 90, 22 Am.R. 551.

19. Iowa.—Ft. Madison First M. E. Church v. Donnell, 81 N.W. 171, 110 Iowa 5, 46 L.R.A. 858. 60 C.J. p 1071 note 41.

20. Ark.—State v. Collett, 79 S.W. 791, 72 Ark. 167, 64 L.R.A. 204. 60 C.J. p 1071 note 42.

21. Ky.—Natural Gas Products Co. v. Thurman, 265 S.W. 475, 205 Ky. 100.

60 C.J. p 1072 note 43.

Operation of ice factory

Tex.—Casualty Reciprocal Exchange v. Stephens, Com.Pl., 45 S.W.2d 143.

60 C.J. p 1072 note 43 [b] (1).

22. Ark.—Wilson v. State, 187 S.W. 937, 125 Ark. 159.

60 C.J. p 1072 note 45.

23. Minn.—Handy v. St. Paul Globe Pub. Co., 42 N.W. 872, 41 Minn. 188, 16 Am.S.R. 695, 4 L.R.A. 466.

Wis.—Sentinel Co. v. A. D. Melselbach Motor Wagon Co., 128 N.W. 861, 144 Wis. 224, 32 L.R.A., N.S., 436, 140 Am.S.R. 1007.

24. Pa.—Commonwealth v. Houston, 14 Pa.Co. 395.

60 C.J. p 1073 note 61.

25. Minn.—Handy v. St. Paul Globe

Pub. Co., 42 N.W. 872, 41 Minn. 188, 16 Am.S.R. 695, 4 L.R.A. 466.

26. Kan.—State v. Needham, 4 P.2d 464, 134 Kan. 155, 82 A.L.R. 493. 60 C.J. p 1073 note 64.

27. La.—Schenck v. Schenck, 28 So. 302, 52 La. Ann. 2102.

28. Tex.—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused.

29. Pa.—Newcastle v. Treadwell, 35 Pa.Super. 30.

30. N.Y.—Smith v. Wilcox, 24 N.Y. 353, 82 Am.D. 302.

31. Pa.—Commonwealth v. Matthews, 25 A. 548, 152 Pa. 166, 18 L.R.A. 761. 60 C.J. p 1073 note 68.

32. N.Y.—Smith v. Wilcox, 24 N.Y. 353, 82 Am.D. 302.

Pa.—Commonwealth v. Matthews, 25 A. 548, 152 Pa. 166, 18 L.R.A. 761.

ing open and making no exceptions to the prohibition.³³

f. Sales of Real Property

Sales or purchases of real property have variously been held within or not within the prohibitions of Sunday laws.

A private selling or offering for sale of real estate, at least where made in such manner as not to disturb the public rest and order, has been held not prohibited by a statute intended to prohibit the sale of commodities or merchandise.³⁴

Purchase of real estate on Sunday has been held illegal within statutory provisions prohibiting business on that day,³⁵ but the purchase of a home has been held not a "worldly employment" within a prohibitory statute,³⁶ but a work of necessity within an exception.³⁷

g. Selling Tickets or Taking Fees for Admission

Selling tickets, or taking fees for admission, has variously been held within or not within the prohibitions of Sunday laws.

The selling of tickets to sports or entertainments on Sunday is secular or worldly business, employment, or labor within the Sunday laws,³⁸ at least where it is done in such a fashion as actually to disturb others in the observance of the day;³⁹ but has been held not to be "servile labor."⁴⁰ Such sales have also been held to be within prohibitions of public selling or offering for sale of goods, wares,

or merchandise,⁴¹ but, according to other authority, are not within a prohibition of "selling, offering, or exposing" commodities for sale.⁴²

The charging or taking of a required fee for admission is within the statutory prohibition of worldly employment or business,⁴³ even though the gathering for which such fee is required is a meeting for the conducting of religious services.⁴⁴ A seller of tickets for a place of amusement is liable under a statute directed against persons keeping open places of amusement on Sundays, or the agents or employees of such persons.⁴⁵

Selling tickets on Sunday for an entertainment on that day, at which it is unlawful for anyone to be present, is not a work of necessity or charity;⁴⁶ but taking tickets for a project justifiable as a work of necessity is itself matter of necessity within the exceptions.⁴⁷

h. Telegraph Companies

Telegraph companies have been held not allowed to transact a general business on Sunday, but may receive, transmit, and deliver messages referring to matters of necessity or charity.

Under statutes prohibiting labor, or servile labor or work, on Sunday, except for works of necessity or charity, or forbidding, subject to the same exception, the pursuit of one's usual avocation, or of work of one's ordinary calling, it is not per se unlawful to keep open on Sunday telegraph offices on established telegraph lines,⁴⁸ and transmit messages

33. Mass.—Commonwealth v. Dale, 11 N.E. 534, 144 Mass. 363.
60 C.J. p 1073 note 70.
Keeping open generally see *supra* § 7.

34. N.Y.—People v. Dunford, 100 N. E. 433, 205 N.Y. 17—Sayles v. Smith, 12 Wend. 57, 27 Am.D. 117.
Buying and selling generally see *infra* § 15.

35. Mass.—Hindenlang v. Mahon, 114 N.E. 684, 225 Mass. 445.

Agreement to purchase, with deposit
N.J.—Greene v. Birkmeyer, 73 A.2d 728, 8 N.J.Super. 217.

36. U.S.—Chadwick v. Stokes, C.C.A. Pa., 162 F.2d 132, 133, 172 A.L.R. 405.

37. U.S.—Chadwick v. Stokes, *supra*.

38. Kan.—Topeka v. Crawford, 96 P. 862, 78 Kan. 583, 17 L.R.A., N.S., 1156, 16 Ann.Cas. 403.
60 C.J. p 1073 note 78.

Sale of tickets for public conveyances see *infra* § 16 b.
Shows and entertainments on Sunday see *infra* § 18.

39. Conn.—State v. Ryan, 69 A. 536, 80 Conn. 582.

40. Okl.—State v. Smith, 198 P. 879, 19 Okl.Cr. 184, followed in Binkley v. State, 198 P. 884, 885, 19 Okl.Cr. 199, 201, Ramsey v. State, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, 426, State v. House, 198 P. 888, 19 Okl.Cr. 204, and Treese v. State, 198 P. 889, 19 Okl.Cr. 211.

41. Kan.—State v. Blair, 288 P. 729, 130 Kan. 863.
60 C.J. p 1074 note 81.

42. Okl.—Treese v. State, 198 P. 889, 19 Okl.Cr. 211—Binkley v. State, 198 P. 884, 885, 19 Okl.Cr. 199, 201.

43. Pa.—Commonwealth v. Weidner, 4 Pa.Co. 437.

44. Pa.—Commonwealth v. Weidner, *supra*.
60 C.J. p 1074 note 84.

45. Tex.—Oliver v. State, 144 S.W. 604, 65 Tex.Cr. 150.

46. Conn.—State v. Ryan, 69 A. 536, 80 Conn. 582.

47. Va.—Lakeside Inn Corporation v. Commonwealth, 114 S.E. 769, 134 Va. 696.

48. Ind.—Western Union Tel. Co. v. Yopst, 20 N.E. 222, 118 Ind. 248, 3 L.R.A. 224.

60 C.J. p 1082 note 26.

Duty of telegraph company:

To accept messages presented on Sunday see the C.J.S. title Telegraphs and Telephones § 136, also 62 C.J. p 141 note 80—p 142 note 82.

To deliver messages on Sunday see the C.J.S. title Telegraphs and Telephones § 146, also 62 C.J. p 153 notes 45–47.

To transmit messages on Sunday see the C.J.S. title Telegraphs and Telephones § 141, also 62 C.J. p 144 note 30—p 145 note 35.

over them.⁴⁹

While the telegraph company may receive, transmit, and deliver all messages referring to matters of necessity or charity,⁵⁰ not all telegraphy is a work of necessity as a matter of law,⁵¹ and telegraph companies, it has been held, may not transact on that day a general business as on other days.⁵² So, the transmittal of messages concerning ordinary business or social affairs has been prohibited.⁵³

Telegraph companies cannot, under statutes prohibiting Sunday labor, unless a case is brought within the statutory exceptions, employ Sunday as a day for establishing new lines,⁵⁴ or for putting in new offices on lines already established,⁵⁵ and the mere fact that it is desirable to do so on Sunday in order to lessen the hazard of accidents to trains depending on telegraph lines is not sufficient to show necessity where it does not appear that such trains could not be stopped on some other day long enough to accomplish the purpose without serious inconvenience or hindrance.⁵⁶

I. Tobacco, Cigars, Etc.

The sale of cigars or tobacco on Sunday, or keeping open shop for that purpose, has been held to come within various Sunday law prohibitions.

Sales of cigars or tobacco on Sunday are within statutes prohibiting business transactions,⁵⁷ engaging in worldly employment,⁵⁸ or offering or

exposing for sale goods, wares, or merchandise,⁵⁹ and within statutes forbidding the pursuit of business or work of one's ordinary calling,⁶⁰ or the doing or exercising by any merchant, tradesman, artificer, laborer, or other person of any worldly labor, business, or work of his ordinary calling,⁶¹ where such sale is in fact in pursuance of the work ordinarily engaged in by the seller. The keeping open of a cigar stand and selling cigars or tobacco therefrom, to ordinary boarders and customers on Sunday, by a hotel keeper, is forbidden by such statutes,⁶² and it is a violation of Sunday laws against keeping open shop to continue the operation of an establishment for the sale of such commodities.⁶³

The sale of such articles on Sunday,⁶⁴ even to habitual users thereof,⁶⁵ has been held not to be a work of necessity or charity, as a matter of law, at least where they are not sales by hotel keepers to traveling guests who have had no opportunity to supply themselves for the day;⁶⁶ nor, conversely, is the purchase of such articles within those exceptions.⁶⁷ Further, such commodities are not within an exception permitting the sale of provisions,⁶⁸ nor, although they may perhaps be medicinal and properly capable of sale as such, under some circumstances, are they drugs, within the exceptions of the Sunday laws;⁶⁹ and the mere statement of the seller, although a druggist, at the time of sale, that he was selling them as drugs does not

49. Ark.—Cleary v. State, 19 S.W. 313, 56 Ark. 124.

Ind.—Western Union Tel. Co. v. Yopst, 20 N.E. 222, 118 Ind. 248, 3 L.R.A. 224.

50. Ind.—Western Union Tel. Co. v. Pulling, 96 N.E. 967, 49 Ind.App. 172.

60 C.J. p 1083 note 31.

Reasonable necessity; notice

A telegraph company is prohibited from receiving messages on Sunday unless it appears that a reasonable necessity for sending message existed and company had notice of that necessity.

Ga.—Postal Telegraph-Cable Co. v. Kaler, 16 S.E.2d 77, 65 Ga.App. 641.
Ind.—Western Union Tel. Co. v. Yopst, 20 N.E. 222, 118 Ind. 248, 3 L.R.A. 224.

51. Ga.—Postal Telegraph-Cable Co. v. Kaler, 16 S.E.2d 77, 65 Ga.App. 641.
60 C.J. p 1082 note 28.

52. Ga.—Willingham v. Western Union Tel. Co., 18 S.E. 298, 91 Ga. 449.
60 C.J. p 1082 note 29.

53. N.Y.—Kiley v. Western Union Tel. Co., 39 Hun 158, affirmed 16 N.E. 75, 109 N.Y. 231.
60 C.J. p 1082 note 30.

54. Ark.—Cleary v. State, 19 S.W. 313, 56 Ark. 124.

55. Ark.—Cleary v. State, supra.

56. Ark.—Cleary v. State, supra.

57. Mass.—Commonwealth v. Goldsmith, 57 N.E. 212, 176 Mass. 104.

58. Pa.—Baker v. Commonwealth, 5 Pa.Co. 10.
60 C.J. p 1083 note 36.

59. Mo.—State v. Ohmer, 34 Mo.App. 115.
60 C.J. p 1083 note 37.

60. Ga.—Penniston v. Newnan, 45 S.E. 65, 117 Ga. 700.

61. S.C.—Oliveros v. Henderson, 106 S.E. 855, 116 S.C. 77.
60 C.J. p 1083 note 39.

62. Ind.—Mueller v. State, 76 Ind. 310, 40 Am.R. 245, overruling Car-

ver v. State, 69 Ind. 61, 35 Am.R. 205.

60 C.J. p 1083 note 42.

Keeping open generally see supra § 7.

63. Mass.—Commonwealth v. Marzynski, 21 N.E. 228, 149 Mass. 68.
60 C.J. p 1083 note 43.

64. Ky.—McAfee v. Commonwealth, 190 S.W. 671, 173 Ky. 83, L.R.A. 1917C 377.
60 C.J. p 1083 note 44.

65. Pa.—Baker v. Commonwealth, 5 Pa.Co. 10.
60 C.J. p 1083 note 45.

66. Ind.—Mueller v. State, 76 Ind. 310, 40 Am.R. 245.

67. Pa.—Commonwealth v. Hoover, 25 Pa.Super. 133.

68. Mo.—State v. Ohmer, 34 Mo.App. 115.

69. Mass.—Commonwealth v. Marzynski, 21 N.E. 228, 149 Mass. 68.
60 C.J. p 1084 note 49.

render the sale lawful.⁷⁰ It is not lawful to keep open shop for the purpose of making such sales within an exception, in the law against keeping establishments open, of those retailing drugs or medicines, where it does not appear that the articles sold in such establishment were intended as medicines or that the keeping open was to supply them for that purpose.⁷¹

It has been held that a restaurant keeper who keeps open in part for the purpose of supplying cigars or tobacco is, to the extent that the establishment is kept open for such purpose, guilty of violating statutes against keeping open shop.⁷²

j. Travel

Sunday travel is illegal only where made so by statute; travel for particular purposes has been held within or not within exceptions of acts of necessity or charity in statutes otherwise prohibiting Sunday travel.

Traveling on Sunday is illegal only in so far as it has been made so by statute, and travel not within any prohibition, or which is within the operation of some exception, is not forbidden.⁷³ Travel purely for pleasure⁷⁴ or for the purpose of visiting others⁷⁵ is not within a prohibition of work, labor, or business; nor is traveling to the dwelling of

another to make a social visit a "game, play, or recreation" within acts forbidding such activities;⁷⁶ nor is riding or walking, although purely for pleasure, forbidden by prohibitions of "sporting."⁷⁷

Where the statutory prohibitions do extend to the travel involved, but an exception is made in favor of acts of necessity or charity, whether traveling on Sunday is within the exceptions of the statutes is dependent, to a considerable degree, on its moral fitness and propriety.⁷⁸ One who has traveled for a permitted purpose remains within the exception while returning, even though he does not take the same or the shortest route back if, from the route actually taken, it appears that his purpose throughout remains only that of returning and not that of diverging for a different and unexpected purpose.⁷⁹ Although the travel may have in its inception a permitted object, if a person diverges from that object and pursues another, which is not within the exceptions, the traveling from the time of such divergence is within the prohibition of the statute.⁸⁰

k. Water; Light

The operation of water and light plants on Sunday,

70. Mass.—Commonwealth v. Goldsmith, 57 N.E. 212, 176 Mass. 104.

71. Mass.—Commonwealth v. Marzynski, 21 N.E. 228, 149 Mass. 68. 60 C.J. p 1084 note 51.

72. Mass.—Commonwealth v. Graham, 56 N.E. 829, 176 Mass. 5.

73. Me.—Buck v. Biddeford, 19 A. 912, 82 Me. 433. 60 C.J. p 1084 note 54.

Carriage or transportation of persons or property see *infra* § 16.

74. Ohio.—Nagle v. Brown, 37 Ohio St. 7.

75. N.H.—Corey v. Bath, 35 N.H. 530.

76. N.H.—Corey v. Bath, *supra*.

77. Ohio.—Nagle v. Brown, 37 Ohio St. 7.

78. Mass.—Smith v. Boston, etc., R. Co., 120 Mass. 490, 21 Am.R. 538. 60 C.J. p 1084 note 59.

Travel held within exceptions

(1) Going to, or returning from, funerals.—Davis v. Somerville, 128 Mass. 594, 35 Am.R. 399—Horne v. Meakin, 115 Mass. 326.

(2) Going to or from religious meetings.

Mass.—Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am.R. 720.

Pa.—Commonwealth v. Nesbit, 34 Pa. 398.

(3) Servant traveling for the purpose of preparing needful food for employer.—Crosman v. Lynn, 121 Mass. 301.

(4) Taking a visitor home on a wintry night.—Buck v. Biddeford, 19 A. 912, 82 Me. 433.

(5) Traveling in pursuance of a duty under a valid contract.—Commonwealth v. Knox, 6 Mass. 76.

(6) Traveling to visit one's parents.—Logan v. Mathews, 6 Pa. 417.

(7) Traveling to visit minor children.—McClary v. Lowell, 44 Vt. 116, 8 Am.R. 366—60 C.J. p 1084 note 65.

(8) Traveling to procure medicine.—Gorman v. Lowell, 117 Mass. 65.

(9) Traveling to visit sick friends.—Doyle v. Lynn, etc., R. Co., 118 Mass. 195, 19 Am.R. 431.

(10) Traveling to visit sick relatives.—Cronan v. Boston, 136 Mass. 384—60 C.J. p 1084 note 63.

(11) Walking or riding for purposes of exercise.—Sullivan v. Maine Cent. R. Co., 19 A. 169, 82 Me. 196, 8 L.R.A. 427—60 C.J. p 1084 note 60.

Travel held not within exceptions

(1) Accompanying another to the dwelling of a friend for a purely social visit.—Davis v. Somerville, 128 Mass. 594, 35 Am.R. 399—Stanton v. Metropolitan R. Co., 14 Allen, Mass., 485.

(2) Traveling purely for pleasure.—Gregg v. Wyman, 4 Cush., Mass., 322.

(3) Traveling for the purpose of obtaining one's mail.—Bucher v. Fitchburg R. Co., 131 Mass. 156, 41 Am.R. 216—60 C.J. p 1084 note 74.

(4) Traveling to ascertain whether a house is ready for occupancy.—Smith v. Boston, etc., R. Co., 120 Mass. 490, 21 Am.R. 538.

(5) Traveling to see employer to request a change of working hours.—Connolly v. Boston, 117 Mass. 64, 19 Am.R. 396.

(6) Traveling to supply a market with fresh meat on Monday.—Jones v. Andover, 10 Allen, Mass., 18—60 C.J. p 1085 note 78 [a].

79. Mass.—Davis v. Somerville, 128 Mass. 594, 35 Am.R. 399.

80. Mass.—Davis v. Somerville, *supra*. 60 C.J. p 1085 note 79.

and acts necessary or incident thereto, are lawful as works of necessity.

A statutory exception in favor of works of necessity permits the operation on Sunday of plants for the supply to the public of water⁸¹ and light,⁸² and, further, permits the performance of acts necessary to secure the purity of the public water supply,⁸³ and of acts done as incidents to the operation and supply of such facilities, in maintaining the plant in good condition.⁸⁴ On the other hand, it does not permit the performance by public service companies or their employees, not directly engaged in operation of the plant, of acts only remotely incidental to such operation, where some alternative means of doing business could be adopted without unreasonably burdening such companies.⁸⁵

I. Other Acts or Transactions

Various other acts or transactions have been held within or not within the prohibitions of Sunday laws or exceptions thereto.

In addition to the acts and transactions considered supra this section various other acts and transactions have been considered by the courts to determine whether they are in violation of Sunday laws or come within the exceptions to such laws.⁸⁶

Attorneys. Even though it is within the prohibitions of the statute for an attorney to engage in his professional activities generally on Sunday, there are some services that an attorney may lawfully perform on Sunday, where the law expressly authorizes certain suits and other legal matters to be done on that day,⁸⁷ or under the exceptions of works of necessity and charity.⁸⁸

Gaming. A general prohibition against gaming on Sunday embraces every species of gaming for money;⁸⁹ and "gaming" has been held to include not only gambling which is illegal under other acts, but all gambling on Sunday of whatsoever kind;⁹⁰ and thus playing and betting at cards have been held to come within the meaning of a statute prohibiting a housekeeper from suffering gaming on Sunday,⁹¹ and a specific prohibition of card playing, either for wager or amusement, renders it immaterial whether the game was for the one or the other, the gist of the offense being the playing of cards for whatever purpose.⁹²

Gaming is not within the purview of prohibitions on common labor or the exercise of one's usual avocation,⁹³ nor is private playing at cards or dice within those statutes forbidding public exhibitions and spectacles.⁹⁴

81. Ark.—Turner v. State, 107 S.W. 388, 85 Ark. 188.

82. Ark.—Turner v. State, supra. 60 C.J. p 1085 note 82.

83. Pa.—Commonwealth v. Peters, 19 Pa.Dist. 467. 60 C.J. p 1085 note 83.

84. Ark.—Turner v. State, 107 S.W. 388, 85 Ark. 188. 60 C.J. p 1085 note 84.

85. Ark.—Wilson v. State, 187 S.W. 937, 125 Ark. 159. 60 C.J. p 1085 note 85.

86. Amendment to by-law of beneficial association could be construed as "work of charity" or "work of necessity."—Singer v. Brith Achim Ben. Ass'n, 18 A.2d 131, 143 Pa. Super. 372.

Commercial exhibit intended to stimulate sales is not work of necessity.—Commonwealth v. McDonald, 32 Pa.Dist. & Co. 257.

Animals

(1) The taking up and impounding of animals on Sunday has been upheld as a work of necessity.—Wild v. Skinner, 23 Pick., Mass., 251—3 C.J. p 183 note 43.

(2) There is authority to the contrary.—Frost v. Hull, 4 N.H. 153—3 C.J. p 183 note 44.

Calling on householders, for the purpose of propagandizing religious views, however unwelcome such calling may be, does not constitute a desecration of the Sabbath or the disturbance of a private family within the statute.—State v. Mead, 300 N.W. 523, 230 Iowa 1217.

"Sabbath breaking" has been held to be distinguished by the terms of a particular statute from the offense of selling liquor on Sunday.—Seim v. State, 55 Md. 566, 39 Am.R. 419—State v. Popp, 45 Md. 432.

Slot machines

Statutes forbidding the showing forth or exposing to sale of any wares or goods, on Sunday, apply to slot machines automatically vending wares.—Cain v. Daly, 55 S.E. 110, 74 S.C. 480.

87. Miss.—Jones v. Brantley, 83 So. 802, 121 Miss. 721, 8 A.L.R. 1353.

88. Ga.—Few v. Gunter, 72 S.E. 720, 10 Ga.App. 100. 60 C.J. p 1057 note 22.

89. Tex.—Borders v. State, Cr., 66 S.W. 1102.

60 C.J. p 1069 note 7.

"Gaming" defined generally see Gaming § 1 d (1).

More rolling of dice, without betting, does not constitute offense.—Jackson v. State, 1 So.2d 601, 30 Ala. App. 114, certiorari denied 1 So.2d 602, 241 Ala. 141.

City limits

Under a statute prohibiting gaming for money within the limits of any city on Sunday, a person cannot be convicted for gaming at a residence outside the corporate limits, although the residence is on private ground adjacent to the city.—Borders v. State, Tex.Cr., 66 S.W. 1102.

90. Md.—State v. Fearson, 2 Md. 310.

91. Md.—State v. Fearson, supra. 60 C.J. p 1070 note 9.

92. Ark.—Stockden v. State, 18 Ark. 186.

93. Ind.—State v. Conger, 14 Ind. 396.

94. Miss.—Rucker v. State, 7 So. 223, 67 Miss. 328. 60 C.J. p 1070 note 13.

Licensed businesses. The mere fact that a license has been granted to do certain acts or carry on a certain business does not exempt one holding such license from the necessity of complying with Sunday laws, where the acts or business in question are of such nature as to fall within the prohibitions of such laws;⁹⁵ and this is true even where the license is one granted by the United States.⁹⁶

Mines and oil wells. The operation on Sunday of fans and pumps to keep a mine free from gas or water is not a necessity, within the exceptions of the statutes, if it would be possible, without undue expenditure of time or money, to accomplish that object by a different construction of the mines or by the adoption of improved appliances.⁹⁷ Sunday operation of oil wells, if their continuous operation is required to prevent serious and permanent injury thereto, may be a necessity within the exception,⁹⁸ but it is not so if the failure to work therein on Sunday causes no serious loss but a mere inconvenience or delay;⁹⁹ and if, by pumping a part only of the day, the threatened injury might be avoided, there is no such necessity, within the statute, as will permit of pumping throughout the whole of the day.¹

Conditions may arise or exist in connection with the drilling of oil wells, which will render legal the performance of Sunday work with relation thereto.²

Miscellaneous professional or skilled services. Healing the sick or employing a physician to do so is within the exceptions in favor of works of necessity or charity.³ The work or employment of an undertaker is a matter of necessity within the purview of the Sunday laws.⁴ The operation of a

photographer's studio has been held to be such work as is within a statute forbidding Sunday "labor."⁵

The giving of instruction to another on Sunday is not "labor," within the prohibition of a Sunday law.⁶

Services rendered a church as psalm reader, choir master, officiator at baptisms, and parochial teacher have been held valid as incident to the church's works of charity.⁷

Wills; disposition of property. The execution of a will has been held not to be "work, labor, or business" within the meaning of statutory prohibitions of such matters,⁸ nor is it forbidden under a statute prohibiting engaging in worldly business or employment on Sunday;⁹ and the drawing and execution of a will are not forbidden by statutory prohibitions of work, business, or labor of one's secular calling.¹⁰ It has, moreover, been suggested that the execution of a will might come within the exception of works of necessity or charity;¹¹ and the arrangements made by a dying man for the disposition of his property may well be found to come within the category of works of necessity.¹²

§ 14. — Barber Shops and Drug Stores

- a. Barber shops
- b. Drug stores

a. Barber Shops

Barbering, or keeping open a barber shop, is within some statutory prohibitions of Sunday activities, but not others. It may constitute a work of necessity or charity, but ordinarily is not such as a matter of law.

Barbering is within the meaning of general stat-

95. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 290 Pa. 136, 53 A.L.R. 1027.

60 C.J. p 1070 note 25.

96. Pa.—Commonwealth v. Rees, 10 Pa.Co. 545—Minock v. Commonwealth, 3 Phila. 347.

97. Ark.—Shipley v. State, 32 S.W. 489, 33 S.W. 107, 61 Ark. 216.

98. W.Va.—State v. McBee, 43 S.E. 121, 52 W.Va. 257, 60 L.R.A. 638.

99. Pa.—Commonwealth v. Funk, 9 Pa.Co. 277.

60 C.J. p 1072 note 51.

1. Pa.—Commonwealth v. Gillespie, 10 Pa.Co. 89.

2. Tex.—Maryland Casualty Co. v. Garrett, Civ.App., 18 S.W.2d 1102—Maryland Casualty Co. v. Marshall, Civ.App., 14 S.W.2d 337.

3. Pa.—Stagger's Estate, 8 Pa. Super. 260.

Vt.—Smith v. Watson, 14 Vt. 332.

4. Mass.—Carton v. Shea, 45 N.E.2d 826, 312 Mass. 634—Donovan v. McCarty, 30 N.E. 221, 155 Mass. 543.

N.Y.—McNamee v. McNamee, 9 N.Y. St. 720.

5. Minn.—State v. Dean, 184 N.W. 275, 149 Minn. 410.

6. N.Y.—Key System Institute v. Weissman, 191 N.Y.S. 320, 117 Misc. 295, 39 N.Y.Cr. 337, declining

to follow *Bilardeaux v. H. Bencke Lith. Co.*, 9 N.Y.S. 507, 16 Daly 78.

7. N.J.—Boruch v. SS. Peter & Paul's Orthodox Russian Church, 166 A. 723, 111 N.J.Law 116.

8. Mass.—Bennett v. Brooks, 9 Allen 118.

60 C.J. p 1085 note 86.

9. Pa.—Appeal of Beitenmans, 55 Pa. 183.

10. N.H.—George v. George, 47 N.H. 27.

11. Mass.—Bennett v. Brooks, 9 Allen 118.

12. N.H.—Lawrence v. Farwell, 163 A. 115, 86 N.H. 59.

utes prohibiting work, or labor, or common labor,¹³ the doing or exercising of the common avocations of life,¹⁴ or engagement in "worldly employment or business" on Sunday.¹⁵ Barbering is prohibited by statutes forbidding any person to pursue his business or the work of his ordinary calling;¹⁶ and the keeping of a barber shop open for business is within statutory prohibitions against keeping any save certain enumerated places of business open for the purpose of transacting business therein.¹⁷ Of course, where there is a valid special prohibition of barbering, acts in the pursuit of that trade are illegal.¹⁸

However, barbering is not unlawful under a statute prohibiting the opening of any place of business for the purpose of trade or sale of goods, wares, and merchandise,¹⁹ and the mere keeping open of a barber shop, without performing any labor therein, does not violate a law against Sabbath breaking by keeping open stores or dram shops.²⁰ The open and public exercise of the barber trade on Sunday, it has been held, does not constitute a public nuisance.²¹

Although, under some circumstances, barbering may constitute a work of necessity or charity,²² in the absence of special circumstances barbering or the keeping open of a barber shop is not ordinarily to be regarded as being so as a matter of law;²³ and, where specially prohibited either absolutely or except under described conditions, it is, to the extent of such legislative prohibitions, excluded from matters constituting works of necessity.²⁴

Authority of municipality. A statute empowering municipal governing bodies to regulate the open-

ing and closing of barbershops on Sundays has been held valid.²⁵

Where the legislature has failed to grant barbers the right to engage in business on Sunday, by statutes forbidding certain acts, with specified exceptions, on that day, cities are authorized, under their general powers of government, to prohibit such work on Sunday by ordinances equally applicable to all within the same class.²⁶

b. Drug Stores

The extent to which drug stores generally, or sales of goods therein, are within exceptions to the Sunday laws depends on the language of the exceptions.

The operation by a druggist of a drug store on Sunday is within prohibitions of the pursuit of work or business of one's ordinary calling²⁷ or of keeping open shop.²⁸ Exceptions in favor of works of charity or necessity do not extend to all sales of drugs or medicinal preparations, merely by reason of their character as such, and such sales, when otherwise prohibited, are permitted to be made under such exceptions only when they are in fact matters of necessity or charity, under the circumstances as they exist.²⁹ So, if the exception to a prohibition of keeping open shop is only of works of necessity or charity, a druggist may not open his store or keep it open even where his sole purpose in doing so is the sale of drugs;³⁰ he may, in cases of necessity or on matters of charity, enter for the purpose of supplying drugs or medicines, but it is an offense for him to keep open shop to engage in the traffic of drugs or medicines generally.³¹

13. Ky.—Gray v. Commonwealth, 188 S.W. 354, 171 Ky. 269, L.R.A. 1917B 93.
60 C.J. p 1057 note 24.

14. Tenn.—State v. Lorry, 7 Baxt. 95, 32 Am.R. 555.
60 C.J. p 1057 note 26.

15. Pa.—Commonwealth v. Waldman, 21 A. 248, 140 Pa. 89, 11 L.R.A. 563.
60 C.J. p 1057 note 27.

16. Ga.—McCain v. State, 58 S.E. 550, 2 Ga.App. 389.
60 C.J. p 1057 note 28.

17. Utah.—State v. Sopher, 71 P. 482, 25 Utah 318, 95 Am.S.R. 845, 60 L.R.A. 468.
60 C.J. p 1058 note 29.

18. Neb.—State v. Murray, 175 N.W. 666, 104 Neb. 51, 8 A.L.R. 563.
60 C.J. p 1058 note 30.

19. Wash.—State v. Krech, 38 P. 1001, 10 Wash. 166.

20. Ark.—State v. Frederick, 45 Ark. 347, 55 Am.R. 555.

21. Tenn.—State v. Lorry, 7 Baxt. 95, 32 Am.R. 555.

22. Mass.—Stone v. Graves, 13 N.E. 906, 145 Mass. 353.
60 C.J. p 1058 note 37.
Work of necessity or charity generally see supra § 11.

23. Okl.—Ex parte Johnson, 141 P. 2d 599, 77 Okl.Cr. 360.
60 C.J. p 1058 note 38.

24. Neb.—State v. Murray, 175 N.W. 666, 104 Neb. 51, 8 A.L.R. 563.

25. N.J.—Amodio v. Board of Commissioners of Town of West New York, 43 A.2d 889, 133 N.J.Law 220.

26. Okl.—Ex parte Johnson, 141 P. 2d 599, 77 Okl.Cr. 360.

27. Ga.—Penniston v. Newnan, 45 S.E. 65, 117 Ga. 700.

28. Me.—State v. Morin, 80 A. 751, 108 Me. 303.

29. Ga.—Penniston v. Newnan, 45 S.E. 65, 117 Ga. 700.

30. Me.—State v. Morin, 80 A. 751, 108 Me. 303.

31. Me.—State v. Morin, supra. 60 C.J. p 1065 note 36.
Shops where more than one kind of trade or traffic is pursued see supra § 7.

If, however, such a law excepts from its operation the sale of drugs, those who open shop for that purpose are not within its prohibition.³² If the exception in the statute is of druggists, without limitation as to the articles to be sold, the keeping open of drug stores is no offense.³³ In order for the exception to operate, the person acting must be a bona fide druggist and be bona fide engaged in keeping open a drug store,³⁴ but, if those facts exist, he is not limited to the sale of drugs but may lawfully sell articles of other descriptions from his stock in trade which he handles in connection with the drug store.³⁵ Where a statute prohibiting Sunday sales generally expressly excepts the sale of drugs and medicines, no offense arises from the selling of commodities capable of medicinal use for the purpose of being thus used.³⁶

An exception in favor of boarding houses, inns, and other houses of entertainment for sojourners and travelers does not operate as an exception of drug stores.³⁷

§ 15. — Buying and Selling Generally

Selling on Sunday has variously been held within or not within the prohibitions of Sunday laws, or exceptions thereto, according to the wording of the laws and the circumstances of the sale. Purchasing has been held not unlawful under some statutes.

Sales on Sunday were not prohibited at common law.³⁸ Statutes prohibiting public selling on Sunday,³⁹ or prohibiting such selling except in specified

cases,⁴⁰ have been held valid; and municipal corporations may be empowered to prohibit the sale of particular merchandise on that day.⁴¹

Statutes prohibiting public selling or offering or exposing for sale on Sunday refer only to such acts as are public in character,⁴² and private casual sales are not prohibited by such statutes,⁴³ at least where the sales made have no tendency to produce a violation of the public order and solemnity of the day.⁴⁴ On the other hand, a private casual sale has been held within a prohibition of public traffic;⁴⁵ and even private casual sales, at which no one else is present, have been held to be the exercise of business in one's secular calling to the disturbance of others.⁴⁶ Advertising in Sunday newspapers, coupled with the provision of a service, on Sunday, for taking telephoned orders to be filled on Monday from unascertained goods, does not constitute public selling, or offering for sale, on Sunday.⁴⁷

Statutes prohibiting the exercise of one's ordinary calling on Sunday do not forbid sales of a kind different from that in which the seller is customarily engaged,⁴⁸ but do apply to tradesmen who engage in selling their ordinary wares on that day;⁴⁹ and selling may be within the prohibition of a statute forbidding the pursuit of one's usual avocation.⁵⁰ It has been held that casual private sales on Sunday do not constitute labor;⁵¹ but the contrary has been held as to engaging on that day in the business of selling.⁵² There is even some au-

32. Ga.—Penniston v. Newnan, 45 S.E. 65, 117 Ga. 700.

33. Ala.—Ex parte Stollenwerck, 78 So. 454, 456, 201 Ala. 392, mandate conformed to 78 So. 991, 16 Ala. App. 698.

34. Ala.—Ex parte Stollenwerck, supra. 60 C.J. p 1065 note 40.

35. Ala.—Ex parte Stollenwerck, supra.

36. Tex.—Watson v. State, 79 S.W. 31, 46 Tex.Cr. 138. 60 C.J. p 1065 note 42.

37. Pa.—Splane v. Commonwealth, 12 A. 431, 9 Pa.Cas. 201, followed in Commonwealth v. Ryan, 15 Pa. Co. 223.

38. Pa.—Commonwealth v. Dffenbaugh, 26 Pa.Co. 65. 60 C.J. p 1059 note 40. Keeping open shop see supra § 7. Sale on Sunday as nuisance see Nuisances § 75 d.

39. Mo.—State v. Malone, 192 S.W. 2d 68, 238 Mo.App. 939.

Valid exercise of police power Mo.—State v. Malone, supra.

40. N.Y.—People v. Friedman, 96 N.E.2d 184, 302 N.Y. 75, appeal dismissed Friedman v. People of State of N. Y., 71 S.Ct. 623, 341 U.S. 907, 95 L.Ed. 1345.

41. N.J.—Sherman v. Paterson, 82 A. 889, 82 N.J.Law 345.

Municipal prohibition of sale of necessities on Sunday held not contrary to statutes.—Komen v. City of St. Louis, 289 S.W. 838, 316 Mo. 9.

42. Minn.—Ward v. Ward, 77 N.W. 965, 75 Minn. 269. 60 C.J. p 1059 note 41.

43. N.Y.—Batsford v. Every, 44 Barb. 618. 60 C.J. p 1059 note 42.

44. Minn.—Ward v. Ward, 77 N.W. 965, 75 Minn. 269. N.Y.—Boynton v. Page, 13 Wend. 425.

45. Okl.—Helm v. Briley, 87 P. 595, 17 Okl. 314.

46. N.H.—Thompson v. Williams, 58 N.H. 248.

47. N.Y.—People v. Gimbel Bros., 115 N.Y.S.2d 857, 202 Misc. 229.

48. Tenn.—Amis v. Kyle, 10 Tenn. 31, 24 Am.D. 463. 60 C.J. p 1059 note 45.

49. Ga.—Arnheiter v. State, 41 S.E. 989, 115 Ga. 572, 58 L.R.A. 392. 60 C.J. p 1059 note 47.

50. Ind.—State v. Saurbaugh, 23 N. E. 720, 122 Ind. 208.

51. Neb.—Horacek v. Keebler, 5 Neb. 355.

Tex.—Benson v. State, 85 S.W. 800, 47 Tex.Cr. 609.

52. W.Va.—State v. Wertz, 114 S.E. 242, 91 W.Va. 622, 29 A.L.R. 391. 60 C.J. p 1059 note 50.

thority to the effect that buying and selling, or merchandising, comes within the language of regulations regarding "common labor;"⁵³ but according to other authority that term is exclusive of labor which is skilled by reason of connection with trade or commerce, and hence of sales by shopkeepers;⁵⁴ and similarly, it is held, whatever may be the meaning of "servile labor," it does not include the conduct of a dealer engaged in selling his wares.⁵⁵

A single sale from a store does not of itself constitute a violation of statutes against keeping open,⁵⁶ although, when coupled with the general requisites of such an offense, as discussed *supra* § 7, it is unlawful under such statutes.⁵⁷ Selling on Sunday is within statutory prohibitions on worldly employment or business,⁵⁸ and, of course, where the statute directly forbids the sale, barter, or disposition of goods, wares, or merchandise on Sunday, any sale of the designated articles on that day is against the law.⁵⁹

Work of necessity or mercy, within the statutory exceptions, may consist of a sale of property,⁶⁰ even though the purchase is for the purpose of resale;⁶¹ but the language of a statute may be such that necessity is not made a defense for the sale of personal property.⁶² It is not a necessity to buy anything on Sunday which by the exercise of proper care might be purchased the day before,⁶³ and sales, to be a matter of necessity, must be of things of which reasonable foresight would not require the purchase on some prior day.⁶⁴

Donation to charity of the proceeds from prohibited sales does not make the sales themselves matter of charity, within the exceptions.⁶⁵

Purchases. Casual purchases on Sunday for con-

sumption are not worldly employment or business, within the statutory prohibition,⁶⁶ the purchaser not being particeps criminis to the offense committed by the seller in making the sale,⁶⁷ even though the person purchasing is an agent employed by an organization to secure evidence to be used in prosecutions under the Sunday laws.⁶⁸ Nor do statutes forbidding selling on that day include within their prohibitions the act of purchasing, or render it unlawful to buy;⁶⁹ further, statutes prohibiting the exercise of one's ordinary calling do not render it unlawful to purchase, when the purchases made are not a part of or ordinary incident to the purchaser's calling.⁷⁰

Religious booklets. The distribution of religious booklets and the occasional receipt of small sums therefor, by members of a religious group, do not constitute "selling property," where the alleged sales are merely incidental and collateral to the main object of preaching and publicizing the doctrines of the order, and booklets were given free to those not desiring to contribute.⁷¹

Exposing for sale, within a statutory prohibition, consists of keeping and showing for the purpose of selling, or placing in view with the purpose and intention of selling.⁷²

§ 16. — Carriage or Transportation of Persons or Property

- a. In general
- b. Services incident to traveling or transportation

a. In General

Apart from specific statutory prohibitions or exceptions, the carriage or transportation of persons or prop-

53. Ind.—*Elitel v. State*, 33 Ind. 201. Ohio.—*Cincinnati v. Rice*, 15 Ohio 225.

54. Neb.—*State v. Somberg*, 204 N.W. 788, 113 Neb. 761.

55. Minn.—*State v. Weiss*, 105 N.W. 1127, 97 Minn. 125.

56. Ala.—*Dixon v. State*, 76 Ala. 89. 60 C.J. p 1059 note 56.

57. Ala.—*Dixon v. State*, *supra*—*Snider v. People*, 59 Ala. 64.

58. Ala.—*O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am.D. 336. Pa.—*Friedeborn v. Commonwealth*, 6 A. 160, 113 Pa. 242, 57 Am.R. 464.

59. Miss.—*Gulfport v. Stratakos*, 43 So. 812, 90 Miss. 489, 13 Ann.Cas. 855.

60 C.J. p 1059 note 60.

60. U.S.—*Chadwick v. Stokes*, C.C.A. Pa., 162 F.2d 132, 172 A.L.R. 407. Purchase of home see *supra* § 13 f.

61. Pa.—*Commonwealth v. Linaugh*, 13 Pa.Dist. 486, 30 Pa.Co. 466.

62. Wash.—*State v. Grabinski*, 206 P.2d 1022, 33 Wash.2d 603.

63. Ohio.—*Schlichte v. State*, 8 Ohio N.P., N.S., 265.

64. Ohio.—*Schlichte v. State*, *supra*.

65. S.C.—*Oliveros v. Henderson*, 106 S.E. 855, 116 S.C. 77.

66. Pa.—*Commonwealth v. Hoover*, 25 Pa.Super. 133.

67. Pa.—*Commonwealth v. Hoover*, *supra*.

68. Pa.—*Commonwealth v. Hoover*, *supra*.

69. Ark.—*Armour & Co. v. Rose*, 36 S.W.2d 70, 183 Ark. 413.

70. N.C.—*Melvin v. Easley*, 52 N.C. 356.

71. Iowa.—*State v. Mead*, 300 N.W. 523, 230 Iowa 1217.

72. Mo.—*State v. Hogan*, 252 S.W. 90, 212 Mo.App. 473.

erty on Sunday has commonly been held to be within general exceptions of works of necessity.

The operation of railroads or other public conveyances on Sunday has been held in particular cases to be within statutory prohibitions of labor,⁷³ worldly employment or business,⁷⁴ and compelling servants to labor;⁷⁵ and the operation of streetcars on Sunday, with the ordinary noise incident thereto, if it has a tendency to disturb any persons in the rest and repose of the day, has been held a breach of the peace.⁷⁶ While the applicability of the exception of necessity or charity has been held to depend on the purpose and nature of the travel or transportation in the particular case,⁷⁷ according to other authority, the exception in favor of works of necessity is held to permit the operation generally on Sunday of railroads,⁷⁸ street railroads,⁷⁹ or ferry boats,⁸⁰ the carrier being without any duty to inquire as to the character or purpose of the travel or transportation in order to be brought within this exception,⁸¹ the operation of which is, in this instance, utterly independent of such considerations.⁸² Transportation merely for pleasure, without any element of business, health, religion, or charity, such as the transportation of a purely pleasure excursion by boat or train, is not within such exceptions,⁸³ although even such transportation has been held within statutory exceptions in favor of the general Sunday operation of steam railroads.⁸⁴

An express statutory declaration on the matter

controls, so that where the operation of trains or other public conveyances is made an express exception to the general Sunday prohibitions, the carriers specified may lawfully operate on that day;⁸⁵ but where a specific prohibition of such operation exists, as, for instance, where the running of freight or excursion trains on Sunday is prohibited, it is in violation of law to operate such transportation agencies as are thus dealt with.⁸⁶

Permission or approval by railroad. Where the operation of trains falls within the statutory prohibitions, without being embraced by any of the statutory exceptions, the permission or approval of the railroad company is an essential ingredient of the offense;⁸⁷ express direction or approval of such operation, however, is not essential.⁸⁸ If the operation is by an authorized agent acting within the scope of his authority, the doing of the act, even though willfully, is sufficient to give rise to a suspicion of assent which, if corroborated by a showing of repeated acts of the same character, amply shows the assent of the company,⁸⁹ but such operation on a single occasion, especially if it is in violation of the express command of the company, does not make out the requisite assent.⁹⁰ However, the fact that the company has issued general orders to its employees not to run trains on Sunday, without also showing that in the particular instance the rules were violated without the sanction of the officer indicted, is not conclusive against the existence of assent or approval.⁹¹

73. Ark.—Barefield v. State, 107 S. W. 393, 85 Ark. 134.

Mass.—Day v. Highland St. R. Co., 135 Mass. 113, 44 Am.R. 447.

Delivery of foodstuffs to consumers see *infra* § 17.

Prohibition of Sunday operation or delivery as interference with interstate commerce see Commerce § 63 b.

Requirement of railroad service on Sundays see Railroads § 418 b (1). Travel see *supra* § 13 j.

74. Pa.—Sparhawk v. Union Pass. R. Co., 54 Pa. 401. 60 C.J. p 1060 note 75 [a] (1).

75. Ark.—Barefield v. State, 107 S. W. 393, 85 Ark. 134.

76. Pa.—Commonwealth v. Jeandell, 2 Grant 506, 3 Phila. 509.

77. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 803, 24 W.Va. 783, 49 Am.R. 290. 60 C.J. p 1061 note 80.

78. Ky.—Commonwealth v. Louisville, etc., R. Co., 12 Ky.L. 505. 60 C.J. p 1061 note 81.

79. Pa.—Commonwealth v. Prison Warden, 11 Pa.Dist. 45. 60 C.J. p 1061 note 82.

80. N.Y.—Carroll v. Staten Island R. Co., 58 N.Y. 126, 7 Am.R. 221.

81. Ky.—Commonwealth v. Louisville, etc., R. Co., 80 Ky. 291, 3 Ky. L. 788, 44 Am.R. 475. 60 C.J. p 1061 note 84.

82. Mo.—State v. Chicago, etc., R. Co., 143 S.W. 785, 239 Mo. 196. 60 C.J. p 1061 note 85.

83. Ind.—Dugan v. State, 25 N.E. 171, 125 Ind. 130, 9 L.R.A. 321. 60 C.J. p 1061 note 86.

84. Ky.—Louisville, etc., R. Co. v. Commonwealth, 30 S.W. 878, 17 Ky.L. 223.

85. W.Va.—State v. Norfolk, etc., R. Co., 10 S.E. 813, 33 W.Va. 440. 60 C.J. p 1061 note 89.

86. N.C.—State v. Atlantic Coast Line R. Co., 62 S.E. 755, 149 N.C. 470. 60 C.J. p 1061 note 90.

Transportation of commodities

Transportation of general commodities, including gasoline, in interstate commerce, by motor truck or trailer, between certain hours on Sunday, held, under statutes, unlawful in absence of emergency.—Commonwealth v. Crosby, Mass., 106 N.E. 2d 538.

87. N.C.—State v. Atlantic Coast Line R. Co., 62 S.E. 755, 149 N.C. 470. 60 C.J. p 1062 note 91.

88. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 803, 24 W.Va. 783, 49 Am.R. 290.

89. W.Va.—State v. Baltimore, etc., R. Co., *supra*.

90. W.Va.—State v. Baltimore, etc., R. Co., *supra*. 60 C.J. p 1062 note 94.

91. Ga.—Heard v. State, 17 S.E. 857, 92 Ga. 477. 60 C.J. p 1062 note 95.

Carrying persons traveling on necessary or charitable missions, as to religious services,⁹² or to visit the sick,⁹³ or other lawful necessary travel⁹⁴ is permitted under the exceptions of necessity or charity, and it is in fact doubtful whether, disregarding the exceptions, carriage to religious meetings is "worldly employment or business" at all, in the sense in which the statute prohibits such matters.⁹⁵

Other instances of transportation have been considered and held to be⁹⁶ or not to be⁹⁷ works of necessity or charity.

b. Services Incident to Traveling or Transportation

Various particular acts and services incident to the provision of facilities for travel or transportation have been held works of necessity within exceptions of Sunday statutes; other such acts or services have been held not within such exception.

Where travel or transportation on Sunday is legal any acts necessary in rendering such transportation available to members of the public are works of necessity,⁹⁸ although such acts are worldly employment or business within the statute.⁹⁹ Persons engaged in such work are not bound to inquire whether the travel is of the class permitted, nor is their freedom from liability dependent on the legality of the character of the travel in any particular case;¹ nor does an exemption by statute from the duty of furnishing such facilities on Sunday render them liable if, notwithstanding such

exemption, they nevertheless attend to such business.²

These principles have been applied to lock keepers of canals,³ ticket sellers,⁴ and streetcar motormen,⁵ and to the inspection and repair of railroad cars,⁶ the repair of property essential to the lawful Sunday operation of trains,⁷ the coaling of locomotives employed in the transportation of livestock,⁸ and the switching of trains in the yards to prevent traffic congestion.⁹ Similarly, acts in the construction or maintenance of a transportation system which cannot be performed on week days without a disarrangement of schedule and consequent endangering of life and property have been held works of necessity,¹⁰ as have acts in pursuance of the duty of maintaining railroad premises or tracks in a safe condition,¹¹ or of protecting and preserving property delivered for carriage.¹²

Where, however, the acts involved are the services of persons employed by the several members of the public in their use of such transportation facilities, serving as agents of such persons and not of those furnishing the facilities, their conduct is within the prohibitions of such laws if the travel or transportation does not in fact come within the class permitted on Sunday and no particular ground of necessity exists;¹³ if there is some exigency requiring the immediate performance of the service, it is thereby rendered necessary and is no offense.¹⁴ Further, although done by persons em-

92. Pa.—Commonwealth v. Nesbit, 34 Pa. 398.

93. Mass.—Cronan v. Boston, 136 Mass. 384.

94. Mass.—Crosman v. Lynn, 121 Mass. 301.
Travel generally see supra § 13 j.

95. Pa.—Commonwealth v. Nesbit, 34 Pa. 398.

96. *Carrying mail*
Mass.—Commonwealth v. Knox, 6 Mass. 76.

Conveying prisoner to jail
Mich.—Fisher v. Kyle, 27 Mich. 454.

97. *Moving threshing machine*
Mo.—State v. Stuckey, 73 S.W. 735, 98 Mo.App. 664.
60 C.J. p 1062 note 3.

Moving household goods of another
N.H.—Williams v. Hastings, 59 N.H. 373.

Collection of laundry
N.H.—State v. Lavoie, 97 A. 566, 78 N.H. 99.

98. Ga.—Kellam v. State, 67 S.E. 683, 7 Ga.App. 575.

60 C.J. p 1063 notes 9, 11.
Compelling seamen to labor on Sundays see Seamen § 44.
Travel generally see supra § 13 j.

99. Pa.—Commonwealth v. Robb, 3 Pa.Dist. 701, 14 Pa.Co. 473, 17 Pa. Co. 350.

1. Pa.—Murray v. Commonwealth, 24 Pa. 270.
60 C.J. p 1063 note 12.

2. Pa.—Murray v. Commonwealth, supra.
60 C.J. p 1063 note 13.

3. N.Y.—People v. Lyons, 5 Hun 643.
Pa.—Murray v. Commonwealth, 24 Pa. 270.

4. Pa.—Commonwealth v. Fuller, 4 Pa.Co. 429.

5. Pa.—Commonwealth v. Prison Warden, 11 Pa.Dist. 45.

6. Pa.—Commonwealth v. Robb, 3 Pa.Dist. 701, 14 Pa.Co. 473, 17 Pa. Co. 350.
60 C.J. p 1063 note 17.

7. Ga.—Kellam v. State, 67 S.E. 683, 7 Ga.App. 575.
60 C.J. p 1063 note 18.

8. Pa.—Commonwealth v. Conway, 2 Leg.Chron. 329.

9. Ga.—Williamson v. State, 71 S.E. 509, 9 Ga.App. 442.

10. Ind.—Yonoski v. State, 79 Ind. 393, 41 Am.R. 614.
60 C.J. p 1063 note 21.

11. Pa.—Commonwealth v. Pfahler, 44 Pa.Co. 5.
60 C.J. p 1063 note 22.

12. U.S.—Powhatan Steamboat Co. v. Appomattox R. Co. Co., Va., 24 How. 247, 16 L.Ed. 682.
60 C.J. p 1064 note 23.

13. Pa.—Scully v. Commonwealth, 35 Pa. 511.
60 C.J. p 1064 note 24.

14. Mass.—Perkins v. O'Mahoney, 131 Mass. 546.
60 C.J. p 1064 note 25.

ployed by the person furnishing the facilities, acts are within the prohibitions of such statutes if the supplying or operation on Sunday of the particular facilities involved is illegal under the circumstances as they exist.¹⁵ Such employees, moreover, may be within statutory prohibitions on travel, while performing their services, their conduct in traveling being incidental only to their act in laboring, however, and being illegal to the extent that the labor they are performing is a violation of the Sunday laws.¹⁶

Even where particular acts in furtherance of travel are specifically prohibited, except in cases of necessity or charity, the prohibition on furnishing such facilities is not absolute, and such an act, if it falls within the exceptions, is permissible.¹⁷

Repairing highway or driveway. Repairing of public highways on Sunday, so as to prevent danger to the public, is a work of necessity;¹⁸ but it has been held that the repaving of a city street by one under contract to do so, but not on Sunday, and not acting at the instance of any official is not a necessity if the failure to act thus would not be in fact detrimental to the public.¹⁹

Repair of a private driveway into a place of business is not a work of necessity.²⁰

Services incidental to the carriage of mail and essential to the regular operation of that service have been held to be within the exception of necessity.²¹

§ 17. — Furnishing Food or Refreshments

The furnishing of food or refreshments is within the prohibitions of various Sunday laws; but it may be removed from such prohibition by the operation of statute or ordinance.

The furnishing of food or refreshments is within the prohibition of various Sunday laws.²² However, isolated sales are not, it has been held, within a prohibition of labor.²³ Where a valid statute or ordinance exists specifically prohibiting or permitting the operation of a designated class of establishments or of business, or the sale of designated foodstuffs, its terms are controlling.²⁴

Where exceptions are made in favor of the sale of food, or meals, or certain designated articles and refreshments, refreshments not included in the exceptions may not be sold.²⁵ An exception permitting the dressing of meat or victuals in specified places has been held not to extend to the selling

15. Ind.—Dugan v. State, 25 N.E. 171, 125 Ind. 130, 9 L.R.A. 321. 60 C.J. p 1064 note 26.

16. Mass.—Day v. Highland St. R. Co., 135 Mass. 113, 44 Am.R. 447. 60 C.J. p 1064 note 27.

17. Conn.—Myers v. State, 1 Conn. 502. 60 C.J. p 1064 note 28.

18. Mass.—Flagg v. Millbury, 4 Cush. 243. 60 C.J. p 1064 note 29.

19. N.Y.—People v. Lynch, 141 N.Y. S. 728, 156 App.Div. 601, 29 N.Y.Cr. 544.

20. Miss.—Watkins v. Brookhaven, 99 So. 363, 134 Miss. 556.

21. Tex.—Nelson v. State, 8 S.W. 927, 25 Tex.App. 599. 60 C.J. p 1064 note 31.

22. Pa.—Splane v. Commonwealth, 12 A. 431, 9 Pa.Cas. 201. 66 C.J. p 1066 notes 55-63, 65. Duty of innkeepers to receive guests on Sunday see Innkeepers § 9 b.

Beer

(1) Beer is within meaning of Sunday law providing penalty for retailing any "goods, wares and merchan-

dise."—McKeown v. State, 124 S.W. 2d 19, 20, 197 Ark. 454.

(2) Act of selling beer on Sunday constituted a violation of the Sabbath law.—People v. Waldman, 26 N.Y.S.2d 707, 261 App.Div. 1001, affirmed 38 N.E.2d 223, 237 N.Y. 550.

(3) Dealing in intoxicating liquors on Sunday generally see Intoxicating Liquors § 256.

23. Tex.—Benson v. State, 85 S.W. 800, 47 Tex.Cr. 609. 60 C.J. p 1066 note 64.

24. Neb.—State v. Somberg, 204 N.W. 788, 113 Neb. 761. 60 C.J. p 1066 note 66.

Power of municipality

A charter provision conferring power on council of city to regulate trades and business was a general rather than a specific power, with respect to validity of ordinance prohibiting Sunday sale of meats and foods.—Lo Tempio v. City of Niagara Falls, 2 N.Y.S.2d 103, 166 Misc. 338.

Ordinance held valid

Cal.—Justesen's Food Stores v. City of Tulare, 84 P.2d 140, 12 Cal.2d 324.—Dorsa v. Board of Sup'rs of Santa Clara County, 72 P.2d 912, 23 Cal.App.2d 217.

Mich.—People v. Derosé, 203 N.W. 95, 230 Mich. 180.

Absence of prohibition in state law

Fact that state law does not forbid selling of vegetables and produce on Sunday is not guaranty of right to do so even though forbidden by other valid laws and ordinances.—City of Shreveport v. Harris, 152 So. 330, 178 La. 685.

Sale between certain hours prohibited

Ordinance prohibiting sale of groceries between certain hours on Sundays held valid as against claim that it violated the vice and immorality statute; fact that ordinance did not include all hours of the day and all merchandise did not render it invalid or make lawful the sale of groceries before the first time of day mentioned.—Richman v. Board of Com'rs of City of Newark, 4 A.2d 501, 122 N.J.Law 180.

25. N.Y.—Quinlan v. Conlin, 34 N.Y. S. 952, 13 Misc. 568. 60 C.J. p 1067 note 67.

"Non-intoxicating refreshments,"

in the particular context, have been held to refer only to liquids and not to apply to cheese, bread, and butter.—State v. Cranston, 85 P.2d 682, 59 Idaho 561.

of intoxicating liquor in such places,²⁶ or of refreshments of any sort in places not in the classes specified by the statute;²⁷ but such an exception permits articles of food generally to be prepared and procured in the designated classes of places on Sundays,²⁸ and this has been held as to a wide variety of articles of food.²⁹ An exception permitting the sale of food includes animal food;³⁰ but an exception as to "farmers' markets" does not include a feed store selling to farmers.³¹ An exception of "confectionery" is not limited to candies;³² and an exception permitting the sale of "cooked and prepared foods" includes canned foods.³³

Work of necessity or charity. The furnishing of food or refreshments is not always, as a matter of law, a work of necessity or charity.³⁴ Keeping a grocery³⁵ or confectionery³⁶ store open on Sunday for the general transaction of business is not a work of necessity, whatever might be the rule with respect to particular sales of groceries, and this is so despite the fact that prepared foods for immediate consumption are incidentally sold in connection with the operation of such establishment.³⁷

Further, a statutory exception in favor of the sale of necessities does not permit the keeping open of a refreshment business, where a statute prohibits the opening of establishments for the reception of company;³⁸ but under a statute prohibiting the keeping open of groceries, but providing that it shall not be construed to prevent the sale of any provisions, keeping open a grocery for the purpose of selling provisions only is no offense.³⁹ Even if itself permitted on Sunday, the sale of refreshments cannot be used as a device to evade other Sunday laws and to permit the doing of acts generally prohibited on that day.⁴⁰

Restaurant or innkeepers. The preparation or furnishing by keepers of inns, restaurants, and the like, of food or refreshments to be consumed on the premises is a work of necessity within the statutory exceptions,⁴¹ and, according to some authority, this is so regardless of whether the purchasers are regular boarders or mere casual customers.⁴² There is authority to the effect that refreshments must be sold as a part of, or incident to, a meal and not separately in order to come within the exception,⁴³ and even authority holding that

26. Pa.—Omit v. Commonwealth, 21 Pa. 426.

27. Pa.—Splane v. Commonwealth, 12 A. 431, 9 Pa.Cas. 201, followed in Commonwealth v. Ryan, 15 Pa. Co. 223.

60 C.J. p 1067 note 70.

28. Pa.—Commonwealth v. Breitinger, 40 Pa.Co. 617.

60 C.J. p 1067 note 71.

29. Pa.—Commonwealth v. Barnhart, 40 Pa.Co. 37.

60 C.J. p 1067 note 72.

30. N.Y.—People v. Shiffrin, 94 N.E. 2d 724, 725, 301 N.Y. 445.

31. N.Y.—People v. Shiffrin, 101 N.Y. S.2d 613, 616, 198 Misc. 348, reversed on other grounds 94 N.E.2d 724, 301 N.Y. 445.

32. N.Y.—People v. Kent, 296 N.Y.S. 972, 974, 163 Misc. 887.

33. N.Y.—People v. Wolen, 291 N.Y. S. 665, 666, 161 Misc. 286.

Discrimination between delicatessens and other stores, in the right to sell canned foods, is remediable only by the legislature, and not by judicial construction of quoted phrase.—People v. Wolen, *supra*.

34. Pa.—Commonwealth v. Pedano, 33 Pa.Dist. & Co. 551, 20 Erie Co. 290, 30 Mun.L.R. 102.

60 C.J. p 1067 note 74.

Delivery of foodstuffs see *infra* this section.

Furnishing of particular items held not necessary

(1) Beer.—McKeown v. State, 124 S.W.2d 19, 197 Ark. 454.

(2) Fresh bread and bakery products.—Shaka v. State, 16 Ohio N.P., N.S., 554.

(3) Fresh meat.—State v. James, 62 S.E. 214, 81 S.C. 197, 128 Am.S.R. 902, 18 L.R.A., N.S., 617, 16 Ann.Cas. 277—60 C.J. p 1068 note 81.

(4) Fruit.—Gulfport v. Stratakis, 43 So. 812, 90 Miss. 489, 13 Ann.Cas. 855—60 C.J. p 1068 note 76.

(5) Ice.—State v. James, 62 S.E. 214, 8 S.C. 197, 128 Am.S.R. 902, 18 L.R.A., N.S., 617, 16 Ann.Cas. 277—60 C.J. p 1068 note 75.

(6) Ice cream.—Oliveros v. Henderson, 106 S.E. 855, 116 S.C. 77—60 C.J. p 1068 note 79.

(7) Milk.—Commonwealth v. Martin, 7 Pa.Co. 154.

(8) Soft drinks.—McAfee v. Commonwealth, 190 S.W. 671, 173 Ky. 83, L.R.A.1917C 377—60 C.J. p 1068 note 78.

35. Mo.—State v. Hogan, 252 S.W. 90, 212 Mo.App. 473.

60 C.J. p 1068 note 83.

Keeping open on Sunday generally see *supra* § 7.

36. Ky.—McAfee v. Commonwealth, 190 S.W. 671, 173 Ky. 83, L.R.A. 1917C 377.

Vt.—State v. Corologos, 143 A. 284, 101 Vt. 300, 59 A.L.R. 1541.

37. Ky.—McAfee v. Commonwealth, 190 S.W. 671, 173 Ky. 83, L.R.A. 1917C 377.

38. N.H.—State v. Jacques, 40 A. 398, 69 N.H. 220.

39. Kan.—State v. O'Donnell, 225 P. 1078, 116 Kan. 182.

60 C.J. p 1068 note 87.

40. N.Y.—Economopoulos v. Bingham, 109 N.Y.S. 728.

60 C.J. p 1068 note 88.

41. Tenn.—Baird v. State, 167 S.W. 2d 332, 179 Tenn. 444.

60 C.J. p 1068 note 91.

42. Pa.—Commonwealth v. Breitinger, 40 Pa.Co. 617.

43. Pa.—Commonwealth v. Hengler, 15 Pa.Co. 222.

60 C.J. p 1069 note 94.

Sale of beer as incident to serving of meals held valid.—Baird v. State, 167 S.W.2d 332, 179 Tenn. 444.

a restaurant keeper can dispense, by virtue of an exception in favor of those keeping hotels or restaurants, only such food or refreshments as he is authorized to sell by reason of his restaurant license.⁴⁴

A statute expressly prohibiting the sale of "drinks" makes it unlawful for restaurant keepers to sell on Sunday soft drinks and like beverages, even as an incident to a meal.⁴⁵ One who takes out a restaurant license merely as a blind in order to conduct his real business of selling beer is not immune from prosecution for following his usual vocation on Sunday.⁴⁶ Consumption of the food or refreshments on the premises is not ordinarily sufficient of itself to avoid the terms of the law where the act of supplying it is prohibited;⁴⁷ and it has been held that, although hotel and restaurant keepers may sell foods or refreshments to be consumed on the premises as incident to their general employment without violating the law, sales for consumption elsewhere are outside the scope of the hotel or restaurant businesses, and hence unlawful.⁴⁸ It has also been held that exemptions in favor of hotel or restaurant keepers are not personal exemptions but are intended to exempt the articles sold rather than the sellers, and that the sale of food for consumption on the premises, even though not by a restaurant or hotel keeper, is no offense.⁴⁹

Keeper of fruit stand is a shopkeeper, within the meaning of a statute forbidding merchants or shopkeepers to keep store open on Sunday.⁵⁰

Delivery of foodstuffs. The exception of works of necessity has been held to authorize a dairyman to deliver milk to his customers on Sunday.⁵¹

but not to permit the delivery of bread, by bakers, outside of their premises,⁵² even though such deliveries are confined to common victuallers who, within statutory exceptions, are permitted to operate on Sundays.⁵³ Exceptions permitting the sale of particular foodstuffs have been held not permissive of their delivery,⁵⁴ and vice versa.⁵⁵

A park authority has been held to have exclusive jurisdiction with respect to the sale of food and beverages in public parks on the Christian Sabbath.⁵⁶

§ 18. — Sports and Entertainments

- a. In general
- b. Moving pictures
- c. Outdoor sports and amusements

a. In General

Whether or not particular sports, amusements, or entertainments, or the operation of enterprises or establishments devoted thereto, will be held lawful on Sunday depends on the language of the applicable statutes.

Any entertainments and pastimes may be lawfully operated on Sunday which are not prohibited either in positive terms or by necessary implication, at least if they are not in their nature unlawful, immoral, or dangerous to public health or safety;⁵⁷ but amusements salutary or harmless in themselves, of a public character and attracting crowds of persons, may not comport with the order necessary to the due observance of the Sabbath.⁵⁸ "Games" and "contests," as used in a statute regulating the holding of Sunday games and contests, are very broad generic terms,⁵⁹ and should be given ordinary and usual signification.⁶⁰

44. Va.—*Ellis v. Town of Covington*, 94 S.E. 154, 122 Va. 821. 60 C.J. p 1067 note 68.

45. N.C.—*State v. Weddington*, 125 S.E. 257, 188 N.C. 643, 37 A.L.R. 573.

46. Tenn.—*Baird v. State*, 167 S.W. 2d 332, 179 Tenn. 444.

47. Pa.—*New Castle v. Cummings*, 36 Pa.Super. 443. 60 C.J. p 1069 note 95.

48. Mass.—*Commonwealth v. Meckel*, 108 N.E. 917, 918, 221 Mass. 70. 60 C.J. p 1069 note 97.

49. Tex.—*Saleh v. State*, 239 S.W. 207, 91 Tex.Cr. 316, 21 A.L.R. 752. 60 C.J. p 1069 note 98.

50. Miss.—*Gulfport v. Stratakis*, 43

So. 812, 90 Miss. 489, 13 Ann.Cas. 855.

51. Kan.—*Topeka v. Hempstead*, 49 P. 87, 58 Kan. 328. 60 C.J. p 1069 note 2.

52. Mass.—*Commonwealth v. McCarthy*, 138 N.E. 335, 244 Mass. 484.

53. Mass.—*Commonwealth v. McCarthy*, supra. 60 C.J. p 1069 note 4.

54. Mass.—*Commonwealth v. McCarthy*, supra. 60 C.J. p 1069 note 5.

55. Pa.—*Commonwealth v. Martin*, 7 Pa.Co. 154. 60 C.J. p 1069 note 6.

56. N.J.—*Hill v. Borough of Collingswood*, 88 A.2d 506, 9 N.J. 369.

57. Idaho.—*Ex parte Hull*, 110 P. 256, 18 Idaho 475, 30 L.R.A., N.S., 465.

60 C.J. p 1074 note 92. Selling tickets on Sunday see supra § 13 g.

Regulation of theaters and shows generally see the C.J.S. title Theaters and Shows §§ 3-16, also 62 C. J. p 843-p 852 note 88.

58. N.Y.—*Neuendorf v. Duryea*, 6 Daly 276, 52 How.Pr. 267, affirmed 69 N.Y. 557, 25 Am.R. 235.

Prohibitory act held valid

N.Y.—*People v. Hoym*, 20 How.Pr. 76.

59. Ga.—*Worley v. State*, 54 S.E.2d 439, 79 Ga.App. 594.

60. Ga.—*Worley v. State*, supra.

Stage exhibitions and performances and the like have been held not to be within prohibitions of common labor;⁶¹ but the operation and management of a place of entertainment, such as a theater, on Sunday, has been held to be within a prohibition of Sunday labor, at least as to a manager personally directing such operation on that day,⁶² or other persons actually performing labor involved in connection with the presentation of any performance or entertainment,⁶³ or with furnishing facilities for the exercise of any pastime;⁶⁴ and the giving of shows and entertainments, if done within one's ordinary calling, comes within a statutory provision against engaging in one's usual avocation.⁶⁵ Moreover, causing employees to assist in the operation of an entertainment enterprise may be within the prohibition of compelling labor.⁶⁶ Similarly, the operation of an amusement enterprise for gain on Sunday is within a prohibition of the conduct of "work or business,"⁶⁷ or of engaging in worldly employment or business.⁶⁸ However, it has been held that the operation of a place of entertainment, even for gain, is not prohibited as a business where the statute specifically forbids certain businesses but does not include that particular kind of entertainment.⁶⁹

Statutes prohibiting the keeping open of places where sports or games of chance are carried on do not forbid or punish the use of sports or games on Sunday,⁷⁰ but they do make it unlawful to keep open places devoted to sports falling within the prohibition of the statute;⁷¹ and, similarly, statutes prohibiting the keeping open of a store, shop, or

other place of business make it an offense for the manager of a theater to keep it open for business on Sunday.⁷² Under statutes of such character, however, it is the keeping open which is an offense, and the performances or exhibitions given in a place thus kept open are not offenses.⁷³

Statutes directed against sporting, playing, rioting, hunting, fishing, shooting, or the like on Sunday are properly to be confined, it has been held, to outdoor diversions, so that the giving of, or performing in, indoor spectacles, games, and entertainments is not prohibited under statutes of such a nature.⁷⁴ In order that the operation of any place of amusement may be prohibited under a statute operating against places of public entertainment or amusement to which admission is charged, it is required that a fee for admission be charged.⁷⁵ Statutes confined to those disturbing the public peace or good order of society do not prohibit the giving of theatrical performances, at a place removed from family dwellings, and in a manner not repugnant to public peace and order;⁷⁶ nor are shows so conducted as not seriously to interrupt the repose and religious liberty of the community within a statute forbidding public shows.⁷⁷

Under statutes prohibiting some or all stage performances on Sundays, every performance comprehended within the terms of the statute and not otherwise excepted is forbidden, either under its particular designation⁷⁸ or by necessary implication;⁷⁹ and every performer therein is a violator of the Sunday laws.⁸⁰ A statute making it unlawful to keep open or maintain a theater on Sun-

61. Neb.—Wirth v. Calhoun, 89 N. W. 785, 64 Neb. 316.
60 C.J. p 1074 note 93.

62. Kan.—State v. Kelly, 284 P. 363, 129 Kan. 849.
60 C.J. p 1074 note 94.

63. Ill.—Clinton v. Wilson, 101 N. E. 192, 257 Ill. 580.
N.Y.—Moore v. Owen, 109 N.Y.S. 585, 58 Misc. 332, 22 N.Y.Cr. 58.

64. Tex.—Ex parte Axson, 141 S. W. 793, 63 Tex.Cr. 627, 40 L.R.A., N.S., 179, Ann.Cas.1913B 794.
60 C.J. p 1074 note 96.

65. Ind.—Ross v. State, 36 N.E. 167, 9 Ind.App. 35.

66. Ky.—Capital Theater Co. v. Commonwealth, 199 S.W. 1076, 178 Ky. 780.

67. Ky.—Capital Theater Co. v. Commonwealth, supra.

68. N.J.—State v. Rosenberg, Sup. 115 A. 203.
60 C.J. p 1075 note 1.

69. N.Y.—William Fox Amusement Co. v. McClellan, 114 N.Y.S. 594, 62 Misc. 100.

70. Conn.—State v. Miller, 36 A. 795, 68 Conn. 373.
Keeping open generally see supra § 7.

71. Conn.—State v. Miller, supra.
60 C.J. p 1075 note 4.

72. Neb.—Dillard v. State, 175 N.W. 668, 104 Neb. 209.
60 C.J. p 1075 note 5.

73. Tex.—Muckenfuss v. State, 116 S.W. 51, 55 Tex.Cr. 229, 20 L.R.A., N.S., 783, 131 Am.S.R. 813, 16 Ann. Cas. 768.

74. Minn.—State v. Chamberlain, 127 N.W. 444, 112 Minn. 52, 30 L.R.A., N.S., 335, 21 Ann.Cas. 679.

N.Y.—People v. Lynch, 108 N.Y.S. 209.

60 C.J. p 1075 note 8.
Moving pictures see *infra* subdivision b of this section.

75. Tex.—Ex parte Jacobson, 115 S. W. 1193, 55 Tex.Cr. 237.
60 C.J. p 1075 note 11.

76. Ill.—A. H. Woods Production Co. v. Chicago, C. & L. R. Co., 147 Ill. App. 568.

77. Minn.—Houck v. Ingles, 148 N. W. 100, 126 Minn. 257.

78. Tenn.—Consolidated Enterprises v. State, 263 S.W. 74, 150 Tenn. 148.
60 C.J. p 1075 note 14.

79. N.Y.—Matter of Hammerstein, 108 N.Y.S. 197, 57 Misc. 52.
60 C.J. p 1076 note 15.

80. N.Y.—Matter of Hammerstein, supra.
60 C.J. p 1076 note 16.

day is not directed toward the act of keeping open or maintaining the building called a "theater," but refers rather to the class of entertainment therein, or in some other manner, furnished.⁸¹

Exception; religious or charitable society. An exception in favor of entertainments by a religious or charitable society, the proceeds of which are to be devoted to a religious or charitable purpose, permits the exhibition on Sunday of any performance not otherwise improper by such a society for such a purpose,⁸² without rendering those in charge liable as Sabbathbreakers;⁸³ and the exception is applicable even though only the net proceeds, after deducting expenses, are to be applied to charitable or religious purposes.⁸⁴

Prohibition by cities. Where a statute only impliedly, and not expressly, permits theaters and shows to be open on Sunday, it is within the power of cities to pass ordinances prohibiting Sunday shows, and such ordinances are not in conflict with the statutes⁸⁵ or with the public policy of the state,⁸⁶ and are reasonable.⁸⁷ Prohibition of Sunday shows has been held a valid exercise of a city's police power;⁸⁸ an ordinance of this nature has been held not to conflict with a particular penal statute;⁸⁹ and, while a city's statutory authority to license shows for purposes of regulation does not carry with it the power to prohibit, the prohibition of shows on Sunday is only regulation, and not total prohibition.⁹⁰ On the other hand, such an ordinance has been held void as a special law.⁹¹ A municipality, under the general welfare clause of its charter,

may provide that pool rooms conducted for public entertainment shall not be kept open on Sundays.⁹²

Concerts. Under a statute prohibiting concerts on the Lord's day except sacred music on the evening of the day, any concert at any time in the daytime of Sunday is prohibited.⁹³ Concerts, at least those consisting of secular music played by professional musicians, are within a prohibition of unnecessary labor.⁹⁴

Dancing. The legality of conduct in connection with dancing or dance halls is determined from the terms of the governing statute.⁹⁵ Dancing, not for the purpose of an exhibition or performance, but purely for the private amusement of the dancers, in quarters to which the public is not admitted or fees collected, has been held not forbidden by statutes prohibiting dances conducted as entertainments of the stage;⁹⁶ and operating a dance hall is not within statutes against "servile labor."⁹⁷

It has been held that a municipal corporation may forbid dancing on Sunday,⁹⁸ but it has also been held that, in the absence of express legislative authority, a municipality has no power to declare public dancing on Sunday unlawful.⁹⁹

Penny arcade. The operation of a penny arcade on Sunday is prohibited, it has been held, under a statute forbidding merchants, billiard table or ten-pin alley keepers, or other dealers to keep open on Sunday;¹ but it is legal under statutes prohibiting

81. Mont.—State v. Penny, 111 P. 727, 42 Mont. 118, 31 L.R.A., N.S., 1155.

82. Mass.—Commonwealth v. Alexander, 70 N.E. 1017, 185 Mass. 551, 60 C.J. p 1076 note 18.

83. Mass.—Commonwealth v. Alexander, supra. 60 C.J. p 1076 note 19.

84. Mass.—Commonwealth v. Alexander, supra.

85. Wash.—Ex parte Ferguson, 141 P. 322, 80 Wash. 102.

86. Wash.—Ex parte Ferguson, supra.

Reason for rule

Under such statute, there is no state public policy preventing a municipality from prohibiting Sunday shows, since the policy of the state is to be drawn from express statutory provisions and not from mat-

ters implied.—Ex parte Ferguson, supra.

87. Wash.—Ex parte Ferguson, supra.

Fact that ordinance was passed over mayor's veto does not show that it is either unreasonable or was enacted in bad faith.—Ex parte Ferguson, supra.

88. Wash.—Ex parte Ferguson, supra.

89. N.Y.—City of New York v. Alhambra Theater Co., 121 N.Y.S. 3, 136 App.Div. 509, affirmed 95 N.E. 1125, 202 N.Y. 528.

90. Wash.—Ex parte Ferguson, 141 P. 322, 80 Wash. 102.

91. Mo.—City of Springfield v. Smith, 19 S.W.2d 1, 322 Mo. 1129.

92. Ga.—Purvis v. City of Ocilla, 102 S.E. 241, 149 Ga. 771.

93. Mass.—Stewart v. Thayer, 47 N.

E. 420, 168 Mass. 519, 60 Am.S.R. 407.

94. Mo.—Bernard v. Luppig, 32 Mo. 341.

95. Mont.—Ex parte Klune, 240 P. 286, 74 Mont. 332. 60 C.J. p 1078 note 56.

96. N.Y.—Matter of Allen, 70 N.Y.S. 1017, 34 Misc. 698, 15 N.Y.Cr. 453. 60 C.J. p 1078 note 57.

97. Okl.—State v. Stout, 276 P. 795, 43 Okl.Cr. 19.

98. Wis.—Corpus Juris quoted in Stetzer v. Chippewa County, 273 N.W. 525, 529, 225 Wis. 125.

99. N.Y.—Hitchcock v. Foote, 246 N.Y.S. 554, 140 Misc. 554, disapproving Conley v. Buffalo, 65 Misc. 102, 119 N.Y.S. 88—Geyer v. Buck, 175 N.Y.S. 613.

1. Ga.—Fitchtenberg v. Atlanta, 54 S.E. 933, 126 Ga. 62.

shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises or shows.²

b. Moving Pictures

- (1) In general
- (2) Referendum; election

(1) In General

Apart from laws expressly authorizing or prohibiting moving pictures on Sunday, the construction of various Sunday statutes as to the legality of such exhibitions is not uniform. They have generally been held not works of necessity or charity.

The exhibition of moving pictures has been held within the application of acts forbidding generally the giving on Sunday of theatrical representations or performances,³ the exhibition of "plays of any kind,"⁴ the keeping open of places of public amusement, which are defined as "circuses, theatres, variety theatres and such other amusements as are exhibited and for which an admission fee is charged,"⁵ or the operation of theaters,⁶ playhouses,⁷ or shows.⁸ Also, to the same extent and in the same manner as other places of entertainment generally, moving picture houses have been held subject to statutory provisions with respect to "labor,"⁹ or "business,"¹⁰ or keeping open places of business.¹¹ Likewise,

managing a moving picture theater conducted for gain has been held to be engaging in worldly business or employment,¹² and a Sunday exhibition of movies for the purpose of gain has been held to be the carrying on of a trade or calling.¹³

There is other authority, however, holding that such exhibitions are not within statutory prohibitions of theatres,¹⁴ playhouses,¹⁵ or labor,¹⁶ servile labor,¹⁷ or trade requiring the exercise of manual labor;¹⁸ and moving pictures are not within the prohibitions of statutes forbidding entertainments of the stage,¹⁹ or the operation of billiard rooms, ball or pin alleys, baseball grounds, or other places of amusement.²⁰

The authorities are in conflict as to whether such exhibitions are prohibited under statutes forbidding "shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercise or shows," some holding them not to be included within the prohibitions where they are exhibited indoors.²¹ Moving pictures, when so exhibited as not to disturb the repose or religious liberty of the community, are not forbidden by prohibitions of public shows.²² If the Sunday laws expressly authorize the exhibition, such conduct is lawful,²³ and,

2. N.Y.—People v. Flynn, 108 N.Y.S. 208.

3. Ohio.—Richards v. State, 143 N.E. 714, 110 Ohio St. 311.
60 C.J. p 1076 note 21.

Regulation of moving pictures generally see the C.J.S. title Theaters and Shows § 3, also 62 C.J. p 844 note 53—p 845 note 63.

4. Miss.—Crawford v. City of Pascagoula, 85 So. 181, 123 Miss. 131.

5. Tex.—Zucarro v. State, 197 S.W. 982, 82 Tex.Cr. 1, L.R.A.1918B 354.
60 C.J. p 1076 note 23.

6. La.—City of West Monroe v. Newell, 111 So. 889, 163 La. 409.
60 C.J. p 1076 note 24.

7. Idaho.—Ex parte Bossner, 110 P. 502, 18 Idaho 519.

8. Idaho.—Ex parte Bossner, supra.
N.Y.—Moore v. Owen, 109 N.Y.S. 585, 58 Misc. 332, 22 N.Y.Cr. 58.

9. Ill.—Clinton v. Wilson, 101 N.E. 192, 257 Ill. 580.
Kan.—State v. Kelly, 284 P. 363, 129 Kan. 849.

10. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166.
60 C.J. p 1077 note 29.

11. Neb.—Dillard v. State, 175 N.W. 668, 104 Neb. 209.

12. N.J.—Rosenberg v. Arrowsmith, 89 A. 524, 82 N.J.Eq. 570.
60 C.J. p 1077 note 32.

13. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166.

14. Mont.—State v. Penny, 111 P. 727, 42 Mont. 118, 31 L.R.A., N.S., 1155.

15. Mont.—State v. Penny, supra.

16. N.M.—State v. Hardwick, 1 P. 2d 974, 35 N.M. 387.
60 C.J. p 1076 note 28 [b].
Work or labor generally see supra § 5.

17. Okl.—State v. Smith, 198 P. 879, 19 Okl.Cr. 184, followed in Binkley v. State, 198 P. 884, 885, 19 Okl. Cr. 199, 201, Ramsey v. State, 198 P. 886, 887, 888, 19 Okl.Cr. 206, 207, 209, 426, State v. House, 198 P. 888, 19 Okl.Cr. 204, and Treese v. State, 198 P. 889, 19 Okl.Cr. 211.

18. N.J.—Kislingbury v. Treasurer of City of Plainfield, 160 A. 654, 10 N.J.Misc. 798.

19. N.Y.—Keith, etc., Amusement Co. v. Bingham, 108 N.Y.S. 205, revers-

ed on other grounds 110 N.Y.S. 219, 125 App.Div. 791.
60 C.J. p 1077 note 38.

20. Ill.—Clinton v. Wilson, 101 N.E. 192, 257 Ill. 580.

Rule of ejusdem generis applied
Ill.—Clinton v. Wilson, supra.

21. Minn.—State v. Chamberlain, 127 N.W. 444, 112 Minn. 52, 30 L.R.A., N.S., 335, 21 Ann.Cas. 679.

In New York

(1) Motion pictures have been held included, at least where public attendance is invited and an admission fee charged.—Symphony Theater Co. v. Ely, 176 N.Y.S. 52, 187 App.Div. 757—60 C.J. p 1077 note 41.

(2) However, in a number of decisions they were held not so included.—People v. Hemleb, 111 N.Y.S. 690, 127 App.Div. 356, 22 N.Y.Cr. 511—60 C.J. p 1077 note 40.

22. Minn.—Houck v. Ingles, 148 N. W. 100, 126 Minn. 257.

23. N.Y.—Wertheimer v. Schwab, 210 N.Y.S. 312, 124 Misc. 822.

In Kentucky

(1) While laws prohibiting the operation of moving picture shows on Sunday are constitutional, under the 1934 amendment to Ky.St. § 131, the

on the other hand, where they expressly prohibit moving pictures, their exhibition is unlawful;²⁴ or such exhibition may, by the terms of the statute or ordinance, be permitted only during specified hours.²⁵ If the exhibition is itself unlawful, it is not made otherwise by the fact that it is given in connection with, or as an incident to, another business whose operation on Sunday is permitted under an express exception.²⁶ Even though the prohibition of the statute is absolute, and not confined to exhibitions given for purposes of gain, the fact that an exhibition is of that character tends rather to aggravate than to diminish the offense.²⁷

The operation of a moving picture theater on Sunday as a nuisance is discussed in Nuisances § 30.

Admission fee. There is authority to the effect that, where the circumstance of an admission fee is an element in the offense, the operation of the statute cannot be evaded by resorting to a device or subterfuge by which admission is in reality collected, although in form not as such.²⁸

Work of necessity or charity. The operation of a moving picture show is not a work of necessity, charity, or comfort, within the exceptions to the

operation of such shows is not to be construed as work, labor, trade, business, or calling, within the meaning of the Sunday closing law; a municipal ordinance prohibiting such operation is invalid as counter to the statute; and an ordinance requiring shows of this nature to close at six P. M. on Sundays is arbitrary and unreasonable.—*City of Harlan v. Scott*, 162 S.W.2d 8, 290 Ky. 585.

(2) Prior to the amendment, the operation of such shows on Sunday was held unlawful as in violation of the statute.—*Strand Amusement Co. v. City of Owensboro*, 47 S.W.2d 710, 242 Ky. 772—*Strand Amusement Co. v. Commonwealth*, 43 S.W.2d 321, 241 Ky. 48—*Capital Theater Co. v. Commonwealth*, 199 S.W. 1076, 178 Ky. 780.

(3) The Sunday law applied only to operators of picture shows, and not to spectators; neither common nor statutory law forbids attending picture shows on Sunday in orderly, peaceful, manner, any prohibition to that effect being unconstitutional.—*Commonwealth v. Phoenix Amusement Co.*, 44 S.W.2d 830, 241 Ky. 678.

24. Fla.—*Gillooley v. Vaughn*, 110 So. 653, 92 Fla. 943.
60 C.J. p 1077 note 44.

Authority of municipality; ordinance

(1) A municipality cannot, without express legislative authority, by ordinance enforce Sunday closing of moving picture shows.—*People ex rel. Kieley v. Lent*, 152 N.Y.S. 18, 166 App.Div. 550, 33 N.Y.Cr. 90, affirmed 109 N.E. 1088, 215 N.Y. 626—*Klinger v. Ryan*, 153 N.Y.S. 937, 91 Misc. 71, 33 N.Y.Cr. 382—60 C.J. p 1077 note 40 [a].

(2) Prohibitory ordinance held valid.
Ga.—*Thompson v. City of Atlanta*, 173 S.E. 193, 48 Ga.App. 674.
Okla.—*Ex parte Johnson*, 201 P. 533, 20 Okla.Cr. 66.

(3) Prohibitory ordinance held within power of city and not in conflict with state law.—*Blackledge v. Jones*, 41 P.2d 649, 170 Okl. 563.

(4) In the exercise of the discretion delegated to village councils by statute, they may ordain that there shall be no public exhibitions of moving pictures within the village on Sundays; such an ordinance is not aimed to secure the observance of the Sabbath day, but to regulate the business, and is not in conflict with the general law or public policy of the state.—*Power v. Nordstrom*, 184 N.W. 967, 150 Minn. 228, 18 A.L.R. 733.

(5) An ordinance prohibiting the giving of moving picture shows on Sunday was held not an unreasonable exercise of the power to regulate such shows, in view of the gathering of crowds and the consequent necessity of police protection, the disturbance of the quiet of other members of the community, and the fact that the observance of Sunday is one of our established customs.—*City of Ames v. Gerbracht*, 189 N.W. 729, 194 Iowa 267.

25. Miss.—*Paramount-Richards Theatres v. City of Hattiesburg*, 49 So. 2d 574, 210 Miss. 271.

Ordinance held reasonable or valid

Ga.—*Hicks v. City of Dublin*, 191 S.E. 659, 56 Ga.App. 63.
N.J.—*General Theatrical Corporation of New Jersey v. Borough of Vineland*, 170 A. 241, 12 N.J.Misc. 155.

Ordinance held not void as conflicting with statute providing that municipal corporation, in absence of express legislative authority, cannot punish for an offense against criminal laws of state.—*Hicks v. City of Dublin*, 191 S.E. 659, 56 Ga.App. 63.

The words "engage in," as used in such a statute, connote "to take part in" or "to be occupied or employed

in."—*Commonwealth v. Albano*, 82 A. 2d 682, 684, 169 Pa.Super. 462.

Persons within prohibition

(1) Manager and employees all held liable for illegal operation of show after specified time.—*Paramount-Richards Theatres v. City of Hattiesburg*, 49 So.2d 574, 210 Miss. 271.

(2) The word "person" in such statute includes "employees," and the words "person" and "agent" in the provision imposing penalty on any such "person" or "agent" of corporation or partnership responsible for illegal exhibition includes all persons who in some manner participate, aid, or do any act in aid of the exhibition, whether engaged in a proprietary or managerial capacity or in merely ministerial duties as agents or employees, hence, the statute applies to the cashier and projectionist at a theater, notwithstanding it is operated by a partnership, and employees, as well as the owner, are subject to the fine provided for by the statute.—*Commonwealth v. Albano*, 82 A.2d 682, 169 Pa.Super. 462.

(3) Where exhibitions are repeatedly held on Sunday under circumstances from which it is apparent that there is a concert of design and definite collusion between the parties, all parties involved are subject to prosecution, even though some did not actively participate in every detail of the illegal act.—*Commonwealth v. Engel*, 76 Pa.Dist. & Co. 521, affirmed *Commonwealth v. Albano*, 82 A.2d 682, 169 Pa.Super. 462.

26. N.Y.—*Economopoulos v. Bingham*, 109 N.Y.S. 728.

27. Ky.—*Capital Theater Co. v. Commonwealth*, 199 S.W. 1076, 178 Ky. 780.

28. Tex.—*McLeod v. State*, 180 S.W. 117, 77 Tex.Cr. 365, L.R.A.1916B 1124.
60 C.J. p 1078 note 49.

Sunday laws,²⁹ and this has been held to be true even though part of the proceeds of the performances on that day is to be donated to charity.³⁰ Likewise, employees of a motion picture theater, doing on Sunday the same work, for the same pay, as on other days, have been held not to be engaged in work of charity, so as to be exempt from prosecution for pursuing the work of their ordinary calling on Sunday, even though the net proceeds of the day's performances go to charity;³¹ but the contrary has also been held.³²

Religious pictures. Since a "moving picture show," in the sense of Sunday enactments, is a place where motion pictures are exhibited for the purpose of amusement and entertainment, the prohibition does not extend to religious moving pictures which are used in connection with, and as a part of, religious services without any element or purpose of amusement or entertainment;³³ but the prohibition of a particular statute has been held to extend to the exhibition of a motion picture depicting scenes from the life of Christ.³⁴

Tax on admissions. An ordinance imposing a tax on admissions to motion picture theaters on Sunday, none being imposed on weekday admissions, is unreasonable.³⁵

(2) Referendum; Election

Referendum or election proceedings on the question of Sunday moving pictures must conform to the requirements of such proceedings generally.

A statute providing for a referendum by the electors of any municipality on the question of the exhibition of motion pictures on Sunday is governed by general principles of statutory construction.³⁶ Under governing statutes, it has been held that such a referendum may not be held within five years of a like referendum;³⁷ and a city whose charter permits initiative and referendum may hold a referendum on the question, under a statute permitting such showing if authorized by a majority of the "legislative council."³⁸ Where a statute vesting in the common council of a municipality the power to decide the question of Sunday motion pictures gives the council no authority to submit the question to the electorate, a resolution of the common council providing for such election is void and without effect,³⁹ and a referendum in such circumstances may be unconstitutional.⁴⁰

All the safeguards which the law has placed around nomination petitions to insure their genuineness have also been placed around petitions for this purpose;⁴¹ so, the signatures to the required petition must be appropriately verified.⁴² A peti-

29. Ga.—Forehand v. Moody, 36 S. E.2d 321, 200 Ga. 166—Thompson v. City of Atlanta, 172 S.E. 915, 178 Ga. 281, answers to certified questions conformed to 173 S.E. 193, 48 Ga.App. 674.
60 C.J. p 1078 note 51.

30. Ga.—Forehand v. Moody, 36 S.E. 2d 321, 200 Ga. 166—Woods v. State, 185 S.E. 920, 53 Ga.App. 384—Thompson v. City of Atlanta, 172 S.E. 915, 178 Ga. 281, answers to certified questions conformed to 173 S.E. 193, 48 Ga.App. 674.
60 C.J. p 1078 note 52.

31. Ga.—Rogers v. State, 4 S.E.2d 918, 60 Ga.App. 722.

32. Va.—Williams v. Commonwealth, 20 S.E.2d 493, 179 Va. 741.

33. Idaho.—State v. Morris, 155 P. 296, 28 Idaho 599, L.R.A.1916D 573.

34. Tex.—Ex parte Lingenfelter, 142 S.W. 555, 64 Tex.Cr. 30, Ann.Cas. 1914C 765.
60 C.J. p 1076 note 23 [b].

35. N.J.—General Theatrical Corporation of New Jersey v. Borough of Vineland, 170 A. 241, 112 N.J. Misc. 155.

Ordinance not justified by Vice and Immorality Act

N.J.—General Theatrical Corporation of New Jersey v. Borough of Vineland, 170 A. 241, 112 N.J. Misc. 155.

36. Pa.—In re Contest of Sunday Movie Petition, Com.Pl., 57 Dauph. Co. 146.

Municipal ordinances under initiative and referendum laws generally see Municipal Corporations §§ 449-461.

Sections of election code applicable
Pa.—In re Contest of Sunday Movie Petition, supra.

37. Pa.—Commonwealth ex rel. v. Rankin, 28 Pa. Dist. & Co. 547.

38. Tenn.—Bean v. City of Knoxville, 175 S.W.2d 954, 180 Tenn. 448.

Reason for rule

The statute uses the quoted words as meaning legislative authority as it may be exercised in municipalities in accordance with the provisions of their respective charters.—Bean v. City of Knoxville, supra.

39. N.Y.—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695

—Reycroft v. City of Binghamton, 245 N.Y.S. 375, 138 Misc. 257.

40. N.Y.—Reycroft v. City of Binghamton, supra.

41. Pa.—In re Sunday Movie Petition, 44 A.2d 46, 352 Pa. 635—In re Sunday Motion Picture Exhibitions in Harrisburg, Objections to Petitions to Obtain Referendum, Com.Pl., 59 Dauph. Co. 53—Mitchell v. White, Com.Pl., 28 West. Co. 15.

42. Pa.—In re Sunday Movie Petition, 44 A.2d 46, 352 Pa. 635.

Petitions held insufficient

(1) For lack of sufficient affidavits.—In re Sunday Movie Petition, supra—In re Contest of Sunday Movie Petition, Pa. Com.Pl., 57 Dauph. Co. 146—Mitchell v. White, Pa. Com.Pl., 28 West. Co. 15.

(2) Where they contained several thousand names of alleged electors with no proof attached that alleged electors were in existence and residing at addresses given or that signatures were genuine.—In re Sunday Movie Petition, supra.

tion for such referendum has, in particular circumstances, been held filed in time, valid despite failure to number the sheets consecutively as required by law, certified according to law, validly and properly circulated during the period prescribed by law for the circulation of nomination petitions, and in compliance with the law with respect to the addresses given by the signers.⁴³ A petition seeking to set aside a referendum petition of this nature will be dismissed where the objections are not specifically set forth and are not filed within the time required by law.⁴⁴

A referendum election for this purpose is invalid and ineffective where the voters of a voting precinct had no opportunity to vote, because of the oversight of officials, particularly where there is a sufficient number of voters in that precinct to have changed the result.⁴⁵

Attack on validity; fraud. A proceeding in equity has been held the proper method of attacking the validity of the referendum or election.⁴⁶ Where it is conceded that no fraud was committed at the election, it will not be declared void on the ground that the carelessness of election officers made fraud possible.⁴⁷ Similarly, in the absence of any charge of fraud, inability to locate, or explain the loss of, several ballots does not invalidate the election, even though that number of votes would have been sufficient to change the result.⁴⁸

c. Outdoor Sports and Amusements

(1) In general

(2) Baseball

(1) In General

The legality or illegality of outdoor sports and amusements on Sunday is determined by the language of the controlling statutes, and is affected by such factors as their commercial character.

Outdoor games and pastimes, conducted in an orderly fashion not calculated to disturb the rest or devotion of others, are not prohibited by provisions forbidding persons to practice on Sunday any unlawful sports or diversion,⁴⁹ or to engage in public sports, shows, and exercises.⁵⁰ A prohibition of public sports, games, or shows excludes from its operation those which are of a purely private character.⁵¹ Statutes prohibiting horse racing, cock-fighting, card playing, or games of any kind on Sunday are confined in operation to games which, like those named, are primarily games of chance, having a distinct immoral tendency, and do not prohibit athletic sports or exercises on that day.⁵²

Statutes prohibiting worldly employment and business on Sundays have been held prohibitory of commercialized athletic contests and expositions,⁵³ and of the operation of fairs and expositions, to which admission is charged,⁵⁴ even though, as an incident to their daily opening, religious services are held on the grounds;⁵⁵ in like manner, the amusements and recreations within the exposition grounds are unlawful.⁵⁶ It has been declared, by way of dictum, that philanthropic and public projects, such as parks and concerts, not otherwise violative of Sunday laws, are not rendered so by the collection of admission fees to meet the expense of such projects.⁵⁷

Under governing statute, a city of the third class

43. Pa.—In re Sunday Motion Pictures Referendum in Blakely Borough, Com.Pl., 49 Lack.Jur. 105.

Omission of sheet numbers cured by amendment

Pa.—In re Sunday Motion Pictures Referendum in Blakely Borough, *supra*.

44. Pa.—In re Sunday Motion Picture Exhibitions in Harrisburg, Objections to Petitions to Obtain Referendum, Com.Pl., 59 Dauph.Co. 53.

45. Pa.—McGreevy v. County Com'rs, 42 Pa.Dist. & Co. 143, 21 Wash.Co. 80.

46. Pa.—McGreevy v. County Com'rs, *supra*—Mitchell v. White, Com.Pl., 28 West.Co. 15.

Injunction

N.Y.—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695.

Pa.—McGreevy v. County Com'rs, 42 Pa.Dist. & Co. 143, 21 Wash.Co. 80.

Referendum declared invalid and void

Pa.—Mitchell v. White, Com.Pl., 28 West.Co. 15.

47. Pa.—Winograd v. Coombs, 20 A. 2d 315, 342 Pa. 268.

48. Pa.—In re Sunday Motion Picture Referendum in Carmichaels, 34 Pa.Dist. & Co. 687.

49. Pa.—Commonwealth v. Smith, 28 Pa.Dist. 638.
60 C.J. p 1078 note 61.

50. N.Y.—People v. Roach, 114 N.Y. S. 742, 61 Misc. 42.
60 C.J. p 1079 note 62.

51. Okl.—Cheeves v. State, 114 P. 1125, 5 Okl.Cr. 361.
60 C.J. p 1079 note 63.

52. Kan.—State v. Prather, 100 P. 57, 79 Kan. 513, 21 L.R.A., N.S., 23, 181 Am.S.R. 339.
60 C.J. p 1079 note 64.

53. Del.—Walsh v. State, 136 A. 160, 33 Del. 353, affirmed 139 A. 257, 33 Del. 514, 56 A.L.R. 810.
60 C.J. p 1079 note 65.

54. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., 8 Pa. Dist. & Co. 77.
60 C.J. p 1079 note 66.

55. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., *supra*.

56. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., *supra*.

57. Pa.—Commonwealth v. Sherman, 14 Pa.Dist. & Co. 4.

has been held authorized to enact an ordinance prohibiting the conducting of an amusement park on Sunday;⁵⁸ and an ordinance prohibiting the operation of a merry-go-round on Sunday has been held valid under the general welfare, or police power, clause contained in a statute and a statute empowering a municipality to pass ordinances to prevent and suppress breaches of the peace and disorderly assemblages.⁵⁹

Suspension of prohibition by municipality. A statute prohibiting baseball or football games during certain hours on Sunday, but authorizing the electors of any municipality, by election, to determine whether the prohibition shall be suspended in such municipality, is constitutional.⁶⁰

Aërial exhibitions. An exhibition of aviation as a spectacle at an amusement park on Sunday has been held to be within a prohibition of labor;⁶¹ and so has a balloon ascension conducted in like manner.⁶²

Hunting, shooting, or fishing. In the absence of a statutory prohibition applicable thereto, fishing on Sunday is not unlawful.⁶³ Under statutes by which hunting, shooting, or fishing on Sunday is

expressly designated as an offense, the very performance of the act itself, and not the character or result of the act, is the matter comprehended.⁶⁴ The language and purpose of such statutes are to forbid all shooting, hunting, or fishing, as the case may be, on Sunday, save such as comes within exceptions applicable thereto.⁶⁵ Such an operation has been given to statutes prohibiting hunting, fishing, shooting, "or other public" sports, exercises, etc.;⁶⁶ but it is held that, under such statutes, the enumerated acts must themselves be public before their commission is an offense, and that private hunting, shooting, etc., are not forbidden.⁶⁷ Within a statute prohibiting willful or wanton shooting, the shooting must be of that character, and the mere fact that it was not actually in defense of person or property is not such as to make it unlawful.⁶⁸

Miscellaneous contests, sports, or exercises. The same principles as those set out in connection with ball games, as discussed *infra* subdivision c (2) of this section, have been announced and applied to a variety of other outdoor sports, games, or exercises, such as lawn tennis,⁶⁹ bathing,⁷⁰ riding,⁷¹ football,⁷² golf,⁷³ bicycle or motor cycle races in a velodrome,⁷⁴ automobile races,⁷⁵ or other exhibi-

58. Pa.—Bothwell v. City of York, 140 A. 130, 291 Pa. 363.

59. N.J.—Schumacker v. Little Falls Tp., 108 A. 113, 92 N.J.Law 106.

60. Pa.—Young v. Fetterolf, 182 A. 676, 320 Pa. 289.
Baseball generally see *infra* subdivision c (2) of this section.
Football generally see *infra* this subdivision.

61. Kan.—Ewing v. Halsey, 272 P. 187, 127 Kan. 86.

62. N.Y.—Brunnett v. Clark, Sheld. 500.

63. Wash.—Nelson v. Pyramid Harbor Packing Co., 30 P. 1096, 4 Wash. 689.

64. N.Y.—People v. Moses, 35 N.E. 499, 140 N.Y. 214.
60 C.J. p 1082 note 18.

Statute as game law and not Sunday law

Statute prohibiting hunting and shooting on Sunday, is a game law looking to the protection of game, and not a Sunday law to enforce proper observance of the day.—State v. Gillette, 120 A. 567, 98 Conn. 702.

Killing crop-destroying animals

(1) Hunting by farmer of crop-destroying birds and animals, not

protected by statute, on his own land, has been held prohibited under such a statute, at least where by another statute the right to destroy protected animals found damage feasant is accorded "except on Sunday."—Walter v. State, 16 Ohio Cir.Ct. N.S., 523.

(2) Statute, prohibiting shooting and hunting on Sunday is entirely harmonious with a law allowing owners of land to shoot or otherwise kill certain quadrupeds and birds when destroying crops on their land, since such acts cannot be considered hunting.—State v. Gillette, 120 A. 567, 98 Conn. 702.

65. Pa.—Commonwealth v. Rothermal, 30 Pa.Co. 145.
60 C.J. p 1082 note 19.

Violation of statute held shown

Conn.—State v. Gillette, 120 A. 567, 98 Conn. 702.

Use of implement for defense of person or property cannot be regarded as act in violation of statute.—State v. Gillette, *supra*.

66. N.Y.—People v. Moses, 35 N.E. 499, 140 N.Y. 214, 11 N.Y.Cr. 8.

67. N.D.—State v. Davis, 164 N.W. 698, 38 N.D. 68.

68. Ga.—Manning v. State, 64 S.E. 710, 6 Ga.App. 240.
60 C.J. p 1082 note 22.

69. Pa.—Commonwealth v. Smith, 28 Pa.Dist. 638.

70. Va.—Lakeside Inn Corp. v. Commonwealth, 114 S.E. 769, 134 Va. 696.
60 C.J. p 1081 note 7.

71. Ark.—Kreider v. State, 147 S.W. 449, 103 Ark. 438.
60 C.J. p 1081 note 8.
Riding or walking for exercise as traveling see *supra* § 13 j.

72. Del.—Walsh v. State, 139 A. 257, 33 Del. 514, 56 A.L.R. 810.
60 C.J. p 1081 note 9.

73. S.C.—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347.
60 C.J. p 1081 note 10.

74. N.Y.—Velodrome Co. v. Stengel, 155 N.Y.S. 575, 91 Misc. 580, 33 N.Y. Cr.R. 513.

75. Races held prohibited, although statute prohibiting public sports or pastimes on Sunday did not specifically mention such races.—Bishop v. Hanna, 63 S.E.2d 308, 218 S.C. 474.

Race legal as "game or contest"

(1) An automobile race is a "game or contest" within statute legalizing

tions of racing and general athletics.⁷⁶

Under a statute extending only to acts or matters tending to the disturbance of the day, athletic exercises conducted without any disturbance in a private place have been held not unlawful;⁷⁷ but this decision has been criticized.⁷⁸

(2) Baseball

Sunday baseball has been held legal under some laws and illegal under others; its legality is affected by such factors as whether a charge is made for admission.

Where there are statutory provisions dealing in terms with Sunday baseball, as, for instance, prohibiting it wholly or to some extent, the legality and consequences of the act are determined by the provisions of such legislation.⁷⁹ Although Sunday baseball is per se an offense under some statutes,⁸⁰ it is not, under the statutes of most jurisdictions, unlawful of itself.⁸¹ Where every indictable misdemeanor is regarded as a breach of the peace, the playing of baseball on Sunday in such manner as to violate the laws on Sunday observance is a breach of the peace;⁸² but elsewhere, unless accompanied by some actual disturbance of the peace and good

order of the day, it is held not to constitute disorderly conduct or a breach of the peace.⁸³

According to some authority, participation in a baseball game as player or manager has been held not to be within statutory prohibitions of labor, even though the game is one to which the public is invited and for which a fee is charged,⁸⁴ or within a prohibition of "attending" a public meeting;⁸⁵ but, according to other authority, the engaging in a game of baseball by an umpire⁸⁶ or a professional player⁸⁷ is "laboring" at a "trade or calling," within the terms of a Sunday law forbidding such conduct.

If conducted for profit by corporations or others organized for that purpose or participated in by players to whom playing is a regular occupation, baseball games are unlawful under laws prohibiting engagement in worldly business or employment of one's ordinary calling on Sundays;⁸⁸ but, under such statutes, amateur or semiprofessional baseball games, carried on at such places as will not interfere with Sunday rest or worship, without the charging of admission or other commercialization of the sport, have been held not unlawful,⁸⁹ al-

athletic events, games, and contests on Sunday under permit from municipality or county.—*Brown v. Akin*, 56 S.E.2d 277, 206 Ga. 153—*Brown v. Akin*, 57 S.E.2d 242, 80 Ga.App. 712.

(2) The statute prohibiting person from pursuing his business or work of his ordinary calling on Lord's day except in cases of work of necessity or charity is not repealed by act permitting holding of athletic events, games, contests and showing of motion pictures on Sunday, but statutes should be construed in pari materia, and as thus construed the act merely restricts types of business provided for in the statute; so, one whose ordinary calling was operation of automobile race track could operate his track on Sunday.—*Worley v. State*, 54 S.E.2d 439, 79 Ga.App. 594.

76. N.Y.—*Koelble v. Woods*, 159 N.Y.S. 704, 96 Misc. 63.
60 C.J. p 1081 note 12.

77. N.Y.—*People v. Dennin*, 35 Hun 327, 3 N.Y.Cr. 127.
60 C.J. p 1081 note 14.
Disturbance to public as element in Sabbathbreaking see *supra* § 8.

78. N.Y.—*Koelble v. Woods*, 159 N.Y.S. 704, 96 Misc. 63.

79. Ind.—*Carr v. State*, 93 N.E. 1071, 175 Ind. 241, 32 L.R.A., N.S., 1190.
60 C.J. p 1081 note 2.

80. N.J.—*Baird v. Board of Recreation Com'rs of Village of South Orange*, 154 A. 204, 108 N.J.Eq. 91, reversed on other grounds 160 A. 537, 110 N.J.Eq. 603.
60 C.J. p 1079 note 73.

Playing ball on Sunday as nuisance see *Nuisances* § 28.

81. Tex.—*Ex parte Roquemore*, 131 S.W. 1101, 60 Tex.Cr. 282, 32 L.R.A., N.S., 1186.
60 C.J. p 1079 note 74.

Statute as to government forts or bases

Where the federal Selective Training and Service Act had been passed before general assembly enacted statute providing that for two years it should be lawful to exhibit publicly, and to engage in, athletic sports from and after 2 P. M. on Sunday in counties wherein United States government has established and maintains army forts, naval or marine bases, an army "fort" includes an army "air base," but where government was in possession of land obtained as site for such base, construction of base was about sixty to seventy-five per cent completed, and there were no army planes, officers, men, or equipment of Army Air Corps on the site, the base was not "established and maintained" within statute, and, therefore, permanent injunc-

tion restraining sheriff and deputies from interfering with Sunday baseball would not be granted.—*Greenville Baseball v. Bearden*, 20 S.E.2d 813, 200 S.C. 363.

82. Ohio.—*Ex parte Carroll*, 9 Ohio Dec., Reprint, 261, 12 Cinc.L.Bul. 9.

83. Mich.—*Yerkes v. Smith*, 122 N.W. 223, 157 Mich. 557.

60 C.J. p 1079 note 75 [a] (2).

84. N.M.—*Territory v. Davenport*, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in *Territory v. Hart*, 124 P. 798, 17 N.M. 222.

85. N.M.—*Territory v. Davenport*, 124 P. 795, 17 N.M. 214, 41 L.R.A., N.S., 407, followed in *Territory v. Hart*, 124 P. 798, 17 N.M. 222.

86. Va.—*Crook v. Commonwealth*, 136 S.E. 565, 147 Va. 593, 50 A.L.R. 1043.

87. Va.—*Crook v. Commonwealth*, *supra*.
60 C.J. p 1080 note 81.

88. Pa.—*Commonwealth v. American Baseball Club of Philadelphia*, 138 A. 497, 290 Pa. 136, 53 A.L.R. 1027 —*Commonwealth v. Sherman*, 14 Pa.Dist. & Co. 4.

89. Pa.—*Commonwealth v. Sherman*, *supra*.

though there is authority to the contrary.⁹⁰ Public professional baseball has been held illegal under statutes prohibiting being present on Sunday at any "dancing or public diversion, show, or entertainment," or taking part in "any sport, game or play."⁹¹

Under prohibitions of public sports, exercises, and shows, the game is not illegal unless played in such a manner as to interrupt the repose and religious liberty of the community,⁹² and has been held not to be unlawful where no admission is charged and no invitation to attend extended to the public,⁹³ even though it is played in a place where it is possible for members of the public to witness it;⁹⁴ but, under such statutes, baseball games on Sunday, to which the public is invited and for which an admission fee is charged, are unlawful;⁹⁵ and there is authority to the effect that an invitation to the public, even without the requirement of an admission fee, renders the game unlawful,⁹⁶ at least where it is conducted for gain.⁹⁷ The fact that the proceeds are to be donated to charity does not, it has been held, make the game any the less unlawful.⁹⁸

Baseball playing has been held not to be included within Sunday laws directed to a prohibition of games of chance or similar immoral tendency on Sunday,⁹⁹ or the keeping open of places of "public amusement," when that term is defined elsewhere in the statute as "circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged."¹ Pub-

lic baseball is included as a game within the operation of general provisions applying to the "public exhibition of any entertainment, play, opera, circus, animals, gymnastics, game, or dance or dances, or vaudeville performance" on Sunday;² and games by professional players to which the public is invited are within a prohibition of "unlawful" games, sports, or diversions, although no admission is charged and no excessive noise or disturbance results.³

Where the collection of fees for admission is not made an essential element in the offense by statute, the playing of a baseball game may be a violation of the Sunday laws, even though the public is admitted free of charge to the game.⁴ Where the collection of an admission fee is a material circumstance to the existence of the offense, the operation of the law may not be evaded by collecting such a fee in an indirect fashion,⁵ and there is authority holding even a solicitation of voluntary contributions from spectators sufficient for this purpose;⁶ but elsewhere, unless it is a mere subterfuge for an admission fee, the taking up of a voluntary collection from the spectators in an orderly manner is held insufficient to render the game unlawful.⁷

Necessity or charity. Whether a particular baseball game is within exceptions of necessity or charity, so expressed as to extend to the prohibition under which such games are forbidden, is to be determined by the circumstances under which it was played.⁸

90. Pa.—Commonwealth v. Rapp, 23 Pa. Dist. 145.

91. Wis.—Kremsreiter v. Boddenhagen, 1173 N.W. 295, 169 Wis. 515.

92. N.Y.—People v. Hesterberg, 89 N.Y.S. 498, 43 Misc. 510, 18 N.Y. Cr. 403.
60 C.J. p 1080 note 84.

93. N.Y.—People v. Roach, 114 N.Y. S. 742, 61 Misc. 42.
60 C.J. p 1080 note 85.

94. N.Y.—Ontario Field Club v. McAdoo, 107 N.Y.S. 295, 56 Misc. 285.
Okl.—Cheeves v. State, 114 P. 1125, 5 Okl. Cr. 361.

95. N.Y.—Brighton Athletic Club v. McAdoo, 94 N.Y.S. 391, 47 Misc. 432.
60 C.J. p 1080 note 87.

96. N.Y.—Greater Newburgh Amusement Co. v. Sayer, 142 N.Y.S. 69, 81 Misc. 307.
60 C.J. p 1080 note 88.

97. N.Y.—People v. Demerest, 107 N.Y.S. 549, 56 Misc. 287.

98. N.Y.—People v. Ebbets, 172 N.Y. S. 599, 36 N.Y. Cr. 117.

99. Kan.—State v. Prather, 100 P. 57, 79 Kan. 513, 21 L.R.A., N.S., 23, 131 Am.S.R. 339.
60 C.J. p 1080 note 92.

1. Tex.—Ex parte Roquemore, 131 S.W. 1101, 60 Tex. Cr. 282, 32 L.R.A., N.S., 1186.

2. D.C.—Siddons v. Edmonston, 42 App.D.C. 459.

3. Pa.—Commonwealth v. Coleman, 60 Pa. Super. 380.

4. Md.—Hiller v. State, 92 A. 842, 124 Md. 385.
60 C.J. p 1080 notes 88, 95, 97.

5. N.Y.—Ontario Field Club v. McAdoo, 107 N.Y.S. 295, 56 Misc. 285.
60 C.J. p 1080 note 98.

6. N.Y.—People v. Demerest, 107 N.Y.S. 549, 56 Misc. 287.

7. Pa.—Commonwealth v. Sherman, 14 Pa. Dist. & Co. 4.

8. Va.—Crook v. Commonwealth, 136 S.E. 565, 147 Va. 593, 50 A.L.R. 1043.
60 C.J. p 1081 note 4.

B. ENFORCEMENT OF REGULATIONS

§ 19. Prosecutions for Violation of Criminal Statutes

Prosecutions for the violation of Sunday laws are governed by the provisions of the particular statutes and by the laws applicable to trial of other offenses generally which are of a similar character.

Prosecutions for violation of the Sunday laws are triable in such manner⁹ and before such courts¹⁰ as those laws specifically provide or as are proper to the trial of other offenses generally which are similar in character to those resulting from Sunday violations. The performance of one act may constitute an offense against a state and another offense against a municipality, and be separately punishable under either aspect.¹¹ Acts done on Sunday must, in order to sustain a criminal prosecution and be subjects of indictment, be made criminal by statute since Sabbath breaking is no offense at common law.¹² Prosecutions cannot be founded on statutes purely permissive in terms.¹³

Under the terms of the particular statute the performance of successive or repeated acts on Sunday may constitute a single offense,¹⁴ while under other statutes each act may be a separate offense.¹⁵ However, if a series of acts, although capable of constituting a series of offenses, is considered and treated by the state as but one offense, defendant cannot complain, at least where he is not prejudiced thereby.¹⁶ Violations on successive Sundays constitute separate and distinct violations rather than a continuing offense.¹⁷

It is no defense to a prosecution under a Sunday law that defendant was ignorant of the law,¹⁸ particularly where defendant has been prosecuted for previous violations,¹⁹ or that the authorities have, in the past, failed to enforce it against other violators.²⁰

§ 20. — Complaint, Indictment, or Information

- a. In general
- b. Issues, proof, and variance

a. In General

The complaint, indictment, or information must be in proper form and must state the facts which constitute the offense with sufficient certainty reasonably to apprise the defendant of the exact nature of the accusation.

The rules applicable to the sufficiency of indictments, informations, or complaints generally have been applied in connection with offenses against the Sunday laws, both as regards the formal requisites thereof²¹ and the statement of the offense sought to be charged.²² The indictment, information, or complaint must embrace all the elements of the offense as defined by the statute under which the prosecution is brought and the decisions construing it, or it will be deemed insufficient;²³ it should state the facts which constitute the offense with sufficient certainty reasonably to apprise defendant of the exact nature of the accusation;²⁴ and it

9. Va.—Pirkey v. Commonwealth, 114 S.E. 764, 134 Va. 713, 29 A.L.R. 1290.
60 C.J. p 1085 note 91.

10. Ga.—Hood v. Von Glahn, 14 S.E. 564, 88 Ga. 405.
60 C.J. p 1085 note 92.

11. Ga.—Hood v. Von Glahn, *supra*.

12. N.C.—State v. Brooksbank, 28 N.C. 73.
60 C.J. p 1086 note 96.

13. Puerto Rico.—People v. Paratze, 22 Puerto Rico 35.
60 C.J. p 1086 note 2.

14. Tex.—Muckenfuss v. State, 116 S.W. 51, 55 Tex.Cr. 229, 20 L.R.A., N.S., 783, 131 Am.S.R. 813, 16 Ann. Cas. 768.
60 C.J. p 1086 note 3 [a] (2).

15. La.—State v. Heard, 31 So. 384, 107 La. 60.
60 C.J. p 1086 note 3 [a] (1).

16. Ga.—Westfall v. State, 62 S.E. 558, 4 Ga.App. 834.
60 C.J. p 1086 note 4.

17. Pa.—Commonwealth v. Engel, 76 Pa.Dist. & Co. 521, affirmed Commonwealth v. Albano, 82 A.2d 682, 169 Pa.Super. 462—Commonwealth v. Dattola, Quar.Sess., 22 West.L.J. 123.

18. Pa.—Commonwealth v. Engel, 76 Pa.Dist. & Co. 521, affirmed Commonwealth v. Albano, 82 A.2d 682, 169 Pa.Super. 462.

19. Pa.—Commonwealth v. Engel, 76 Pa.Dist. & Co. 521, affirmed Commonwealth v. Albano, 82 A.2d 682, 169 Pa.Super. 462.

20. Fla.—Stocks v. Lee, 198 So. 211, 144 Fla. 627.

21. Ohio.—Oberer v. State, 28 Ohio Cir.Ct. 620.
60 C.J. p 1086 note 6.

Time for making information
Pa.—Commonwealth v. Dattola, Quar. Sess., 22 West.L.J. 123.

22. Ind.—Ross v. State, 36 N.E. 167, 9 Ind.App. 35.
60 C.J. p 1086 note 7.

Allegations held sufficient
Ky.—Commonwealth v. Phoenix Amusement Co., 44 S.W.2d 830, 241 Ky. 678.
60 C.J. p 1086 note 7 [a].

23. N.Y.—People v. Hesterberg, 89 N.Y.S. 498, 43 Misc. 510, 18 N.Y.Cr. 403.
60 C.J. p 1087 note 8.

24. Tex.—Mosely v. State, 18 Tex. App. 311.
60 C.J. p 1087 note 9.

must be sufficiently certain that, in case of conviction, the court may determine what punishment should be imposed.²⁵ However, the statement of facts sufficient to show the gist of the offense is all that is required, and attending facts and circumstances, which are not essential ingredients of the offense, need not be alleged,²⁶ although there is some authority holding it insufficient merely to allege all the elements of the offense and requiring further that a description of the offense, that is, the facts of the transaction, should be given.²⁷ It is not a fatal objection to an indictment, information, or complaint that it sets out the offense with more particularity than is necessary.²⁸

Where the violation of a Sunday law becomes an offense only when it is repeated on a sufficient number of Sundays to become a common-law nuisance, the information must allege the commission of the act not only on a particular Sunday but on a succession of Sundays.²⁹ Affidavits which are void will not support a prosecution,³⁰ but a mere formal clerical defect will not have such effect.³¹

Date or time. While it must be affirmatively alleged that the act complained of was performed on a Sunday,³² the particular Sunday is not important, provided it is within the statute of limitations.³³ It is not sufficient to allege that the acts were committed "on or about" a named date, although such date is on a Sunday,³⁴ unless it is directly and definitely charged that the acts were done on Sunday.³⁵

An indictment is sufficient which alleges the commission of the offense on Sunday, but which fails to state the date;³⁶ and it has been held that an allegation that acts were done on Sunday is sufficient, even though it further designates a date which did not in fact come on a Sunday;³⁷ but according to other authority an indictment referring specifically to a date which did not fall on Sunday is bad.³⁸ An indictment naming the day of the month and year but not alleging that it was Sunday has been held good at least where it further alleges that defendant on that day performed certain acts on Sunday, as the court will take judicial notice that the date named was Sunday;³⁹ but there is other authority reaching a contrary result, at least where the indictment does not anywhere in its language expressly mention Sunday.⁴⁰

Place. The place where the alleged offense was committed must be set out in the indictment, information, or complaint so as to render the venue ascertainable.⁴¹

Intent. According to some authority an indictment for keeping open a store or shop on Sunday must aver a criminal intent or purpose;⁴² but there is authority to the contrary.⁴³

Charging language of statute. Generally, an indictment which charges the offense in the language of the statute is sufficient;⁴⁴ it is not essential to use the precise language, provided the sub-

25. Mass.—Commonwealth v. Maxwell, 19 Mass. 138.
60 C.J. p 1087 note 10.

26. Cal.—People v. Maguire, 26 Cal. 635.
60 C.J. p 1087 note 11.

27. Tex.—Shook v. State, 8 S.W. 329, 25 Tex.App. 345.
60 C.J. p 1087 note 12.

28. Kan.—State v. Nesbit, 54 P. 326, 8 Kan.App. 104.

29. Tenn.—Goff v. State, 209 S.W.2d 13, 186 Tenn. 212.

A presentment charging that defendant on a particular Sunday unlawfully engaged in his usual vocation of operating a poolroom, without alleging that prohibited act was committed on divers Sundays or to the extent of becoming a nuisance, failed to charge offense either under statute or at common law.—Goff v. State, *supra*.

30. Ala.—Roberson v. State, 190 So. 109, 28 Ala.App. 579.

31. Ind.—Ross v. State, 36 N.E. 167, 9 Ind.App. 35.

32. Md.—Ruble v. State, 11 A.2d 455, 177 Md. 600.
60 C.J. p 1087 note 14.

33. N.C.—State v. Seaboard Air Line R. Co., 62 S.E. 1088, 149 N.C. 508.
60 C.J. p 1088 note 15.

34. Ind.—State v. Land, 42 Ind. 311.
Md.—Ruble v. State, 11 A.2d 455, 177 Md. 600.

35. Kan.—State v. Nesbit, 54 P. 326, 8 Kan.App. 104.
Md.—Ruble v. State, 11 A.2d 455, 177 Md. 600.

36. Kan.—Topeka v. Crawford, 96 P. 862, 78 Kan. 583, 17 L.R.A.N.S., 1156, 16 Ann.Cas. 403.
W.Va.—State v. Knight, 1 S.E. 569, 29 W.Va. 340.

37. N.Y.—People v. Ball, 42 Barb. 324.
60 C.J. p 1088 note 17.

38. Ark.—Robinson v. State, 38 Ark. 548.
Ga.—Werner v. State, 51 Ga. 426.

39. Wash.—State v. Bergfeldt, 83 P. 177, 41 Wash. 234, error dismissed 28 S.Ct. 764, 210 U.S. 438, 52 L.Ed. 1138.

40. Ind.—Gilbert v. State, 81 Ind. 565.

41. Ohio.—Goldsmith v. State, 13 Ohio Cir.Ct., N.S., 148, 32 Ohio Cir. Ct. 160.
60 C.J. p 1088 note 21.

42. Ohio.—Goldsmith v. State, *supra*.
60 C.J. p 1088 note 22.

43. Ark.—Brittin v. State, 10 Ark. 299.
60 C.J. p 1088 note 23.

44. Kan.—State v. Weldy, 215 P. 1005, 113 Kan. 734.
Tenn.—Baird v. State, 167 S.W.2d 332, 179 Tenn. 444.
60 C.J. p 1088 note 25.

stance of it is embraced in the words used.⁴⁵ Where the acts alleged to have been done could have been for a lawful purpose, it is not sufficient to charge in the language of the statute without alleging the purpose for which the acts were done.⁴⁶

Negating exceptions. It is generally held that exceptions appearing in the enacting part of the statute and forming part of the description of the offense must ordinarily be negated by particular allegations,⁴⁷ but that need not be done as to exceptions appearing elsewhere, as in a proviso to the statute, or the like;⁴⁸ but, according to other authority, a negative averment to the matter of an exception in a statute, however stated, is not requisite unless such matter enters into and becomes a part of the description of the offense, or a qualification of the language defining or creating it;⁴⁹ but, if it is so related to the offense, the exception must be negated.⁵⁰ An allegation negating an exception which is not required to be negated has been held to be mere surplusage.⁵¹

b. Issues, Proof, and Variance

In a prosecution for violation of the Sunday laws, the proof must correspond with the allegations of the indictment.

In general the proof must correspond with the allegations of the indictment.⁵² A real variance must exist between the allegations and the proof in order to give rise to any rights based on the theory of a variance,⁵³ and the variance, in order to be fatal, must be material.⁵⁴ A variance between pleading and proof on an allegation which is mere surplusage is not fatal.⁵⁵ The proof need not be as broad as the charge in the indictment, provided a distinct violation of the law is shown.⁵⁶ An

offer, by defendant, of proof of intended matter of defense may be properly rejected where the evidence, if received, would not tend to establish a defense.⁵⁷ Affirmative testimony as to the commission of the act charged has been held to control over negative testimony as to defendant's general habits on Sunday.⁵⁸ Proof by the state that defendant was not a regular druggist is sufficient to take defendant out of the protection of an exception as to sales by regular druggists, on written prescriptions by a physician for medical purposes, without any testimony relative to prescriptions.⁵⁹

Time. The state is not limited in its proof to a particular date, but may show a violation of the law on any Sunday preceding the finding of the indictment and within the statute of limitations,⁶⁰ and a variance between the date charged and the one proved is immaterial.⁶¹

§ 21. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

All facts material to the existence of the offense charged must be proved beyond a reasonable doubt by the state.

Subject to statutory provisions respecting the effect of an absence of evidence, the state is required to prove beyond a reasonable doubt all the facts material to the existence of the offense charged;⁶² but facts properly inferable from those proved need not be established by direct evidence.⁶³ That which must be stated in the indictment as

45. Ark.—Kreider v. State, 147 S.W. 449, 103 Ark. 438.

60 C.J. p 1088 note 26.

46. Mass.—Commonwealth v. Collins, 2 Cush. 556.

47. Ky.—Commonwealth v. Hagan, 181 S.W. 184, 167 Ky. 619.

60 C.J. p 1088 note 27.

48. Kan.—State v. O'Donnell, 225 P. 1078, 116 Kan. 182.

60 C.J. p 1089 note 28.

49. Ga.—Seale v. State, 49 S.E. 740, 121 Ga. 741, error dismissed 26 S. Ct. 763, 201 U.S. 642, 50 L.Ed. 902.

Ohio.—Billigheimer v. State, 32 Ohio St. 435.

50. Ga.—Brown v. State, 143 S.E. 439, 38 Ga.App. 209.

60 C.J. p 1089 note 30.

51. Ga.—Seale v. State, 49 S.E. 740, 121 Ga. 741, error dismissed 26 S. Ct. 763, 201 U.S. 642, 50 L.Ed. 902.

Mass.—Commonwealth v. Dextra, 8 N.E. 756, 143 Mass. 28.

52. Ga.—McNealy v. State, 21 S.E. 581, 94 Ga. 592.

60 C.J. p 1089 note 39.

53. Ind.—Foltz v. State, 33 Ind. 215.

60 C.J. p 1089 note 40.

54. N.C.—State v. Seaboard Air Line R. Co., 62 S.E. 1088, 149 N.C. 508.

55. Mo.—State v. Keelar, 53 Mo.App. 32.

56. Mass.—Commonwealth v. Joselyn, 97 Mass. 411.

57. Tenn.—Parker v. State, 1 S.W. 202, 84 Tenn. 476.

60 C.J. p 1089 note 44.

58. Tex.—Elsner v. State, 30 Tex 524.

59. Ohio.—Kubach v. State, 1 Ohio N.P., N.S., 405.

60. Ga.—Seale v. State, 49 S.E. 740, 121 Ga. 741, error dismissed 26 S. Ct. 763, 201 U.S. 642, 50 L.Ed. 902.

60 C.J. p 1090 note 47.

61. N.C.—State v. Seaboard Air Line R. Co., 62 S.E. 1088, 149 N.C. 508.

60 C.J. p 1090 note 48.

62. Va.—Pettit v. City of Roanoke, 33 S.E.2d 633, 183 Va. 816.

60 C.J. p 1090 note 50.

63. Wash.—State v. Grabinski, 206 P.2d 1022, 33 Wash.2d 603.

60 C.J. p 1090 note 51.

part of or a necessary description of a Sunday violation must be proved by the prosecutor,⁶⁴ and only that;⁶⁵ and hence, when the state makes out a prima facie case by showing performance on Sunday of prohibited acts, not apparently within the exceptions, the burden of going forward to show that the acts were in fact within the statutory exceptions then rests on defendant.⁶⁶

On proof of the matters charged, it is held, the law presumes a criminal intent,⁶⁷ and the burden is then cast on defendant to show that the act comes within the exception to the statute.⁶⁸ Where permitting the doing of certain acts on Sunday is an essential element of the offense, the state must show such permission.⁶⁹ Where a principal is sought to be made criminally liable for the act of his agent, either knowledge of, or assent to, the act, on his part, must be shown,⁷⁰ or such an habitual recurrence of the act that his assent is implied;⁷¹ and, of course, it must be shown that the persons acting were in fact defendant's agents.⁷²

It may be presumed that a son, attending to trade in his father's establishment on Sunday, is acting as his father's agent for the purpose.⁷³ When defendant is shown to have been the manager of an entertainment project up to a short time before the giving of the Sunday performance alleged as an offense, in the absence of any evidence to the contrary it may be presumed that he was the manager of such entertainment at the time of the performance.⁷⁴ There is no presumption that the noise caused by the operation of a reaper on Sunday is a disturbance to others.⁷⁵ Where defendant is charged with Sunday opening, the state need not prove a sale, in order to establish existence of the

offense.⁷⁶ It has been held that the state is not required to prove allegations made by it which constitute mere surplusage,⁷⁷ although it has been held that, if matters not required to be alleged are in fact alleged by the state, they must then be proved just as other matters in issue.⁷⁸

b. Admissibility

Any competent, relevant, and material evidence is admissible on the part of the prosecution to show the commission of the offense, and on the part of defendant to show his innocence of the charge.

The rules with respect to the admissibility of evidence in criminal cases generally apply to criminal prosecutions for violation of the Sunday laws;⁷⁹ any testimony tending to show acts of control and management is admissible on the issue of whether defendant was in charge of an establishment so as to be liable for keeping open on Sunday.⁸⁰ Testimony concerning defendant's purpose in keeping open,⁸¹ or his statements at the time of sale,⁸² is properly excluded when it has no tendency to bring his acts within the protection of the statute. Evidence regarding the circumstances and needs of the traveling public is not admissible on the question of necessity, where the offense charged is the performance of a specific act for a specific person not a member of the class to which the evidence relates.⁸³

Where the charge is for playing in a game on Sunday where an admission fee is charged, evidence of the payment of a fee to see the game by one or more persons is competent proof that a fee was charged, although other persons saw the game for nothing.⁸⁴ Evidence that the grand jury, which indicted defendant, failed to find bills against oth-

64. Ark.—Cleary v. State, 19 S.W. 313, 56 Ark. 124.
60 C.J. p 1090 note 52.

65. Ind.—State v. Hogreiver, 53 N.E. 921, 152 Ind. 652, 45 L.R.A. 504.
60 C.J. p 1090 note 53.

66. Ark.—Rhodes v. City of Hope, 286 S.W. 877, 171 Ark. 754, 47 A.L.R. 1104.
60 C.J. p 1090 note 54.

67. Ark.—Shover v. State, 10 Ark. 259.

68. Ark.—Shover v. State, supra.

69. N.C.—State v. Atlantic Coast Line R. Co., 62 S.E. 755, 149 N.C. 470.

70. Ind.—Wetzler v. State, 18 Ind. 35.

71. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 803.

72. Mass.—Commonwealth v. Mason, 12 Allen 185.

73. Tex.—Elsner v. State, 30 Tex. 524.

74. N.Y.—People v. Kingston, 139 N.Y.S. 649, 27 N.Y.Cr. 184.

75. Ill.—Johnson v. People, 42 Ill. App. 594.

76. Tex.—Griffith v. State, 89 S.W. 832, 48 Tex.Cr. 575.

77. Ga.—Seale v. State, 49 S.E. 740, 121 Ga. 741, error dismissed 26 S.Ct. 763, 201 U.S. 642, 50 L.Ed. 902.
Mo.—State v. Kellar, 53 Mo.App. 32.

78. Ark.—State v. Anderson, 30 Ark. 131.

60 C.J. p 1091 note 66.

79. Tex.—Timberlake v. State, 78 S.W.2d 599, 128 Tex.Cr. 63.

Va.—Pettit v. City of Roanoke, 33 S.E.2d 633, 183 Va. 816—Francisco v. Commonwealth, 23 S.E.2d 234, 180 Va. 371.

60 C.J. p 1091 note 68.

80. Ala.—Cusimano v. State, 103 So. 241, 20 Ala.App. 502.

81. Mass.—Commonwealth v. Starr, 11 N.E. 533, 144 Mass. 359.

82. Mass.—Commonwealth v. Goldsmith, 57 N.E. 212, 176 Mass. 104.

83. Mo.—State v. Schatt, 107 S.W. 10, 128 Mo.App. 622.

84. Ind.—Heigert v. State, 75 N.E. 850, 37 Ind.App. 398.

ers for violating the Sunday laws,⁸⁵ or that the operation of other acts or enterprises of a similar character is allowed to continue on Sunday without molestation,⁸⁶ is properly excluded.

Evidence may be admitted in prosecutions for Sunday violation, although it has previously been employed on another prosecution for a different offense arising out of the same act.⁸⁷ Other persons present at the time of the alleged offense, and who witnessed it, are competent witnesses to prove the fact, whether or not they were connected with the same work, and may be called by the state for that purpose, although they were jointly engaged with defendant in the same transaction.⁸⁸

c. Weight and Sufficiency

The rules as to weight and sufficiency of evidence in criminal cases generally apply to criminal prosecutions for violation of Sunday laws.

The general rules as to the weight and sufficiency of evidence in criminal cases apply to criminal prosecutions for violation of Sunday laws.⁸⁹ In a prosecution for creating a nuisance by nonobscure of Sunday, it need not be shown that any person was actually disturbed, but it is sufficient that the acts complained of be shown to have been done in a public manner and open to observation by the public.⁹⁰

§ 22. — Trial and Review

Prosecutions for violation of Sunday laws are governed by the rules applicable to the trial of criminal cases generally; and in a jury trial questions of fact are for the jury.

The rules applicable to the trial of criminal cases generally have been applied in criminal prosecutions for violation of the Sunday laws with respect to the formation of the jury,⁹¹ the entry of a plea of not guilty where defendant stands mute,⁹² the order of proof,⁹³ and the judgment or verdict and conviction.⁹⁴ Statutes prescribing a particular method of trial of criminal offenses in the court in which the prosecution is commenced must be complied with.⁹⁵ Where the offense charged is that of keeping open store, the fact that several sales may have been made does not render applicable the doctrine of election.⁹⁶ A preliminary inquiry, by the state, addressed to one of the witnesses, as to whether he was present at a place on a particular Sunday, has been held insufficient to constitute an election confining the state to that Sunday.⁹⁷

Functions of court and jury. Save where constitutional provisions prescribe some other rule,⁹⁸ or where prosecutions for Sunday offenses are not triable by jury, the function of the court is to declare the law,⁹⁹ and that of the jury to determine the facts, under proper instructions from the court.¹ Ordinarily, such questions as defendant's

85. Tex.—Smith v. State, 90 S.W. 37, 48 Tex.Cr. 509.

86. Wash.—State v. Grabinski, 206 P.2d 1022, 33 Wash.2d 603. 60 C.J. p 1092 note 75.

87. Mass.—Commonwealth v. Harrison, 11 Gray 308.

88. Ga.—Williamson v. State, 71 S. E. 509, 9 Ga.App. 442.

89. Evidence held sufficient

(1) To sustain conviction of violation of ordinance prohibiting the showing of motion pictures and operation of motion picture machines on Sunday except between hours of 1 and 2 o'clock in the afternoon.—Hicks v. City of Dublin, 191 S.E. 659, 56 Ga.App. 63.

(2) To sustain conviction of violation of a city ordinance prohibiting any person from keeping a store or place of business open on Sundays after 8 A. M.—State v. Thorne, 198 S.E. 632, 214 N.C. 825.

(3) To support conviction of owner and operator of a restaurant in that he permitted public dancing on his premises on Sunday.—Common-

wealth v. Covert, 88 Pittsb.Leg.J.Pa., 233, 31 Mun.L.R. 205.

(4) To support conviction of following defendant's usual vocation on Sunday by operating a beer parlor.—Baird v. State, 167 S.W.2d 332, 179 Tenn. 444.

(5) To support conviction of violating Sunday Law, where defendant rendered merchandise in store for taxation and was there in person keeping place open and conducting business on Sunday morning.—Timberlake v. State, 78 S.W.2d 599, 128 Tex.Cr. 63.

(6) Other evidence see 60 C.J. p 1092 note 79 [b].

Evidence held insufficient

To sustain convictions of gaming on Sunday.—Roberson v. State, 190 So. 109, 28 Ala.App. 579—60 C.J. p 1092 note 79 [a].

90. Tenn.—Parker v. State, 1 S.W. 202, 84 Tenn. 476.

91. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 303. 60 C.J. p 1092 note 82 [a].

92. Ohio.—Billigheimer v. State, 32 Ohio St. 435.

60 C.J. p 1092 note 82 [b].

93. Ind.—Ross v. State, 36 N.E. 167, 9 Ind.App. 35.

60 C.J. p 1092 note 82 [b].

94. Ohio.—Oberer v. State, 28 Ohio Cir.Ct. 620.

60 C.J. p 1092 note 82 [c].

95. N.Y.—Erbe v. Monteverde, 35 N. Y.S. 102, 13 Misc. 404.

60 C.J. p 1093 note 83.

96. Ala.—Snider v. State, 59 Ala. 64.

97. Conn.—State v. Brunner, 46 Conn. 328.

98. Ind.—McCarthy v. State, 56 Ind. 203.

60 C.J. p 1093 note 86.

99. Ky.—Commonwealth v. London, 149 S.W. 852, 149 Ky. 372.

Va.—Pettit v. City of Roanoke, 33 S. E.2d 633, 183 Va. 816.

60 C.J. p 1093 note 88.

1. Va.—Lakeside Inn Corporation v. Commonwealth, 114 S.E. 769, 134 Va. 696.

60 C.J. p 1093 note 89.

intent,² the nature or character of the place kept open,³ whether a particular Sunday transaction constituted a sale,⁴ whether the acts done were work of defendant's ordinary calling,⁵ and whether an admission fee was charged are for the jury.⁶

It is also a question for the jury whether the act was, under the circumstances of the case, one of necessity or charity within the meaning of the statutory exception;⁷ but sometimes the evidence respecting the circumstances under which the act was committed may be such that a determination by the court of whether it was matter of necessity or charity is proper.⁸ The credibility of the witnesses is a matter for the jury.⁹ The general affirmative charge in behalf of the state should never be given where there is any evidence on which a verdict of acquittal could be based or where the facts in evidence pointing to quiet rest in inference only.¹⁰

Instructions. The court should instruct the jury as to the offense¹¹ and defendant is entitled to have a proper charge given respecting the burden of proof,¹² the respective functions of court and jury,¹³ the nonreligious character and purpose of

the statute,¹⁴ the necessity of intent,¹⁵ and the meaning of necessity, within the statute.¹⁶ Not only should the charge state correctly the elements of the offense, but it is also essential that proper instruction be given with respect to matters of defense.¹⁷

An instruction which, in connection with the evidence, could have no tendency to mislead the jury is not bad because it is not stated as definitely as it might have been.¹⁸ Also it is not error to refuse to give a correct, but irrelevant charge,¹⁹ or instructions which, although technically accurate, are inadequate on a consideration of the whole case and which would tend to mislead the jury,²⁰ or instructions which are inaccurate,²¹ or instructions whose substance is comprised within instructions which are given.²²

The court should not submit to the jury all the phases of the statute, but should restrict them to the consideration of the one charged in the indictment;²³ and further, it is proper for the instructions to be limited to that charge of the indictment which there is evidence to sustain.²⁴ Although parts of the instructions, considered independent-

2. Ala.—Snider v. State, 59 Ala. 64. Mo.—State v. Crabtree, 27 Mo. 232.

3. Ala.—Whittaker v. State, 88 So. 188, 17 Ala.App. 624.

Md.—Callan v. State, 144 A. 350, 156 Md. 459.

4. Ark.—Bennett v. Sale, 13 Ark. 694.

5. Ga.—Kent v. State, 82 S.E. 762, 15 Ga.App. 210.

6. Ind.—Heigert v. State, 75 N.E. 850, 37 Ind.App. 398.

7. Va.—Pettit v. City of Roanoke, 33 S.E.2d 633, 183 Va. 816—Francisco v. Commonwealth, 23 S.E.2d 234, 180 Va. 371. 60 C.J. p 1093 note 95.

8. Mo.—State v. Coffee, 35 S.W.2d 969, 225 Mo.App. 373. 60 C.J. p 1093 note 96.

9. Tex.—Hall v. State, 55 S.W. 173, 41 Tex.Cr. 423.

10. Ala.—Whittaker v. State, 88 So. 188, 17 Ala.App. 624. 60 C.J. p 1093 note 98.

11. Ga.—Manning v. State, 64 S.E. 710, 6 Ga.App. 240. 60 C.J. p 1093 note 99.

Instruction held proper

In trial for following defendant's usual vocation on Sunday by operating beer parlor, court's charge to ju-

ry that statute creating offense of exercising common vocations of life on Sunday, except for acts of real necessity or charity, does not apply to operation of restaurant and that defendant would be entitled to acquittal, if jury found that he was operating a restaurant, not a beer parlor, on Sunday, fairly presented issue whether defendant was operating bona fide restaurant or beer parlor on Sunday.—Baird v. State, 167 S.W.2d 332, 179 Tenn. 444.

Instruction held erroneous

In prosecution for gaming on Sunday, instruction that, if two or more persons play a game of shooting dice on Sunday, that constitutes gaming within meaning of statute whether they bet money on the game or not was error, and the error was prejudicial requiring reversal of conviction.—Jackson v. State, 1 So.2d 601, 30 Ala.App. 114, certiorari denied 1 So.2d 602, 241 Ala. 141.

12. N.C.—State v. Atlantic Coast Line R. Co., 62 S.E. 755, 149 N.C. 470. 60 C.J. p 1093 note 1.

13. Ind.—McCarthy v. State, 56 Ind. 203.

14. Va.—Lakeside Inn Corporation v. Commonwealth, 114 S.E. 769, 134 Va. 696.

15. N.C.—State v. Atlantic Coast Line R. Co., 62 S.E. 755, 149 N.C. 470. 60 C.J. p 1093 note 4.

16. Va.—Francisco v. Commonwealth, 23 S.E.2d 234, 180 Va. 371.—Lakeside Inn Corporation v. Commonwealth, 114 S.E. 769, 134 Va. 696.

17. Va.—Francisco v. Commonwealth, 23 S.E.2d 234, 180 Va. 371. 60 C.J. p 1093 note 6.

18. W.Va.—State v. Baltimore, etc., R. Co., 15 W.Va. 362, 36 Am.R. 803. 60 C.J. p 1093 note 7.

19. Ark.—Kreider v. State, 147 S.W. 449, 103 Ark. 438. 60 C.J. p 1094 note 8.

20. Tex.—Whitcomb v. State, 17 S.W. 258, 30 Tex.App. 269. 60 C.J. p 1094 note 9.

21. Tenn.—Baird v. State, 167 S.W. 2d 332, 179 Tenn. 444.

22. Mass.—Commonwealth v. Harrison, 11 Gray 308. 60 C.J. p 1094 note 10.

23. Tex.—Brockman v. State, Cr., 28 S.W.2d 820, 115 Tex.Cr. 353. 60 C.J. p 1094 note 11.

24. Mo.—State v. Coffee, 35 S.W.2d 969, 225 Mo.App. 373.

ly, are inconsistent, if, nevertheless, taken as a whole the instructions are consistent, no objection can be taken thereto.²⁵ Modification by the court of requested instructions so as to make them conform to the circumstances shown by the evidence is proper.²⁶

Appeal and error. The rules relative to appeal and error in criminal cases generally are applicable to criminal prosecutions for violation of Sunday laws.²⁷ Action of the trial court quashing an indictment for Sunday violation is to be sustained if there is any good or sufficient cause for it, although the reason for such action is not made to appear.²⁸ Similarly, where the bill of exceptions raises no matter of error with respect to the conviction, the appellate court will not search the record for error, violation of the Sunday laws being a mere misdemeanor.²⁹

§ 23. Actions and Proceedings under Penal Statutes

Where the statutes so provide, enforcement of Sunday laws may be by action for the recovery of a penalty for violation of their provisions.

The mode of enforcement established by some of the Sunday laws is by an action for the recovery

of a penalty for violation of their provisions; and under some statutes repeated acts on the same Sunday constitute a single offense subjecting the violator to a single penalty,³⁰ but under others each act or transaction constitutes a separate offense.³¹ The provisions of the particular statute generally will determine who may be liable for the penalty or forfeiture,³² the amount of the penalty recoverable,³³ and the disposition of fines collected.³⁴

Proceedings to enforce liability. Under the statutory provisions, construed and applied in the same manner as other penal statutes, which govern proceedings to enforce liability, the courts have rendered various decisions regarding the availability of other remedies,³⁵ whether the proceedings are civil or criminal,³⁶ whether the offender is liable to criminal prosecution and the penalty,³⁷ the time for prosecution,³⁸ whether offenders may be proceeded against jointly or separately,³⁹ joinder and election of causes of action,⁴⁰ the form, requisites, and sufficiency of the complaint, declaration, or petition,⁴¹ the pleading of defenses,⁴² and variance.⁴³

Likewise decisions have been rendered on questions of evidence,⁴⁴ trial,⁴⁵ judgment,⁴⁶ review,⁴⁷ and costs.⁴⁸

25. Me.—State v. Morin, 80 A. 751, 108 Me. 303.
60 C.J. p 1094 note 13.

26. Mo.—State v. Coffee, 35 S.W.2d 969, 225 Mo.App. 373.

27. Ga.—Seale v. State, 49 S.E. 740, 121 Ga. 741, error dismissed 26 S.Ct. 763, 201 U.S. 642, 50 L.Ed. 902.
60 C.J. p 1094 note 16.

28. Ind.—State v. Land, 42 Ind. 311.

29. Tex.—Day v. State, 17 S.W. 262, 21 Tex.App. 213.
60 C.J. p 1094 note 18.

30. Pa.—Friedeborn v. Commonwealth, 6 A. 160, 113 Pa. 242, 2 Montg.Co. 149, 57 Am.R. 464.
60 C.J. p 1095 note 24 [a] (1).

31. Ky.—Commonwealth v. Bowling Green Athletic Assoc., 268 S.W. 1088, 207 Ky. 170.
60 C.J. p 1095 note 24 [a] (2).

32. Va.—Puckett v. Commonwealth, 57 S.E. 591, 107 Va. 844.
60 C.J. p 1095 note 24 [b].

33. Ky.—Commonwealth v. Bowling

Green Athletic Assoc., 268 S.W. 1088, 207 Ky. 170.
60 C.J. p 1095 note 24 [c].

34. Pa.—In re Fines, 36 Pa.Co. 697.
60 C.J. p 1095 note 24 [d].

35. Mich.—People v. Dixon, 154 N.W. 1, 188 Mich. 307, Ann.Cas.1918B 385.
60 C.J. p 1095 note 25 [a], [t].

36. Va.—Wells v. Commonwealth, 57 S.E. 588, 107 Va. 834.
60 C.J. p 1095 note 25 [b].

37. N.Y.—New York v. Williams, 96 N.Y.S. 237, 48 Misc. 77.
60 C.J. p 1095 note 25 [c].

38. Pa.—Commonwealth v. Keithan, 1 Mon. 368.
60 C.J. p 1095 note 25 [d].

39. Pa.—Lewis v. Commonwealth, 3 Pa.Dist. & Co. 549.
60 C.J. p 1095 note 25 [f].

40. Ky.—Commonwealth v. Bowling Green Athletic Ass'n, 268 S.W. 1088, 207 Ky. 170.
60 C.J. p 1095 note 25 [g].

41. Ky.—Louisville, etc., R. Co. v. Commonwealth, 17 S.W. 274, 92 Ky. 114, 13 Ky.L. 439.
60 C.J. p 1095 note 25 [e].

42. Mass.—Crippen v. Byron, 4 Gray 314.
60 C.J. p 1095 note 25 [h].

43. Mass.—Megowan v. Commonwealth, 2 Metc. 3.
60 C.J. p 1095 note 25 [i].

44. Pa.—Commonwealth v. Dffenbaugh, 26 Pa.Co. 65.
60 C.J. p 1095 note 25 [j]—[l].

45. Ky.—Capital Theater Co. v. Commonwealth, 199 S.W. 1076, 178 Ky. 780.
60 C.J. p 1095 note 25 [m].

46. N.J.—State v. Marinelli, 42 A. 1077, 62 N.J.Law 739.
60 C.J. p 1095 note 25 [n]—[q].

47. Ky.—Commonwealth v. Bowling Green Athletic Assoc., 268 S.W. 1088, 207 Ky. 170.
60 C.J. p 1095 note 25 [r].

48. Pa.—Commonwealth v. Shipley, 18 Pa.Dist. 133.
60 C.J. p 1095 note 25 [s].

III. CIVIL EFFECT OF SUNDAY REGULATIONS ON PRIVATE ACTS AND TRANSACTIONS

A. RIGHTS AND OBLIGATIONS ARISING FROM PRIVATE TRANSACTIONS

§ 24. What Law Governs

As a general rule the validity of a contract or transaction executed on Sunday will be determined by the law of the place where it was made.

As the enforcement of a contract executed on Sunday is not contrary to public policy or good morals, the general rule that a contract valid where made is valid everywhere obtains, and the contract will be enforced in a state other than the one in which it was made where it is not shown by proper proof that it violates the statutes of the state where made,⁴⁹ and all the more so where it appears that it is valid in such state.⁵⁰ When it is shown to violate the statutes of the state where made, it will not be enforced by the courts of other states.⁵¹ Further, the courts of one state will not enforce a contract, although made in another state, if its formation involved illegally doing acts on Sunday, essential to the existence of the contract, in the state where action is brought.⁵²

As the Sunday laws of a state have no extraterritorial force, the courts of one state will enforce a contract made within its borders, calling for or contemplating the performance of acts or transactions on Sunday not in that state permitted on that day, but which contemplates performance wholly in another state, where such performance is not shown to violate the law of such other state, as such contract is good at common law;⁵³ but, where a part of the performance was to have taken place in the state in which suit is brought, in which the acts to be done in that connection are illegal, the contract will not be enforced, regardless of the laws of other states in which the remainder of the performance was to have been done;⁵⁴ and a promissory note illegally given in return for an illegal

sale and delivery of goods, the whole transaction being on Sunday, cannot be purged of the illegality and rendered enforceable by a stipulation for payment in another state.⁵⁵ The validity of the delivery on Sunday in another state of an assigned instrument is to be sustained where such transaction is not shown to be illegal in the state where delivery was made.⁵⁶

Ratification. The permissibility and sufficiency of a ratification to validate a Sunday transaction have been held to be matters to be governed by the law of that state whose laws govern the initial legality and validity of the transaction.⁵⁷

§ 25. Validity of Negotiations or Consummation on Sunday

The validity of negotiations for contracts or of contracts formed and consummated on Sunday are discussed infra §§ 26-29.

Examine Pocket Parts for later cases.

§ 26. — Negotiations for Contracts and Preliminary Transactions

Generally contracts or transactions consummated on a secular day are not invalidated by the fact that negotiations or matters preliminary to their consummation have taken place on a Sunday.

A contract whose formation is consummated on a subsequent weekday is not invalidated by reason of the fact that matters preliminary to its formation have taken place on a Sunday. Thus, written contracts arising on the signature and delivery of the writing are not void where the signature is on Sunday but the delivery not until a later weekday;⁵⁸ so a bond, made operative by signing and

49. Ala.—*J. R. Watkins Co. v. Hill*, 108 So. 244, 214 Ala. 507. 60 C.J. p 1098 note 33.

50. Miss.—*Stamps v. Frost*, 164 So. 584, 174 Miss. 325. 60 C.J. p 1098 note 34.

Where tenants of Mississippi farm brought replevin for produce seized under distress for rent which, under lease, was to consist of certain cotton to be delivered at landlord's residence in Tennessee, and contended that lease was Sunday contract, and it appeared that terms thereof were agreed on in Tennessee, Sunday stat-

ute of Tennessee, rather than that of Mississippi, was held applicable and the lease held valid.—*Stamps v. Frost*, supra.

51. Mass.—*Hazard v. Day*, 14 Allen 487, 92 Am.D. 790. 60 C.J. p 1098 note 35.

52. Mich.—*International Textbook Co. v. Ohl*, 111 N.W. 768, 150 Mich. 131, 121 Am.S.R. 612, 13 L.R.A., N.S., 1157.

53. Mo.—*Said v. Stromberg*, 55 Mo. App. 438. 60 C.J. p 1098 note 37.

54. U.S.—*Gauthier v. Cole*, C.C. Mich., 17 F. 716.

55. Mich.—*Arbuckle v. Reaume*, 55 N.W. 808, 96 Mich. 243.

56. Mich.—*Steere v. Trebilcock*, 66 N.W. 342, 108 Mich. 464.

57. N.H.—*Lovell v. Boston, etc., R. Co.*, 78 A. 621, 75 N.H. 568, 34 L.R.A., N.S., 67.

58. Ala.—*Corpus Juris cited in Jemison v. Howell*, 161 So. 806, 807, 230 Ala. 423, 99 A.L.R. 1511.

filing, is not void where the signing is on Sunday but the filing not until a subsequent weekday;⁵⁹ and a release, it has been held, is not a Sunday contract where, although it was signed on that day, the consideration was not paid until a subsequent secular day,⁶⁰ although there is authority to the contrary.⁶¹

Similarly, where acceptance is by letter, a letter written on Sunday but not posted or otherwise communicated until a later weekday is valid as an acceptance;⁶² and, if it is stipulated in the negotiations that a contract shall not arise until acceptance and approval of an instrument by the obligee, the fact that it is mailed on Sunday does not affect its validity if it is not accepted and approved until a later weekday.⁶³ Where the act on Sunday of an agent, purporting to be an acceptance, is ratified on another day by the principal, the circumstances being such that the contract is consummated by the ratification rather than by the prior purported acceptance, the contract is valid.⁶⁴

The mere carrying on of negotiations on Sunday will not invalidate a contract completed on a secular day, the final consummation of the contract on Sunday being necessary to bring it within the prohibition of the Sunday statutes.⁶⁵ However, there is

some authority in support of the rule that it is not only agreements completed on Sunday which are void, but that, where certain acts involved in the making of a contract are unlawfully done on that day, whose valid performance is essential to the existence of any contract, the illegality and consequent nullity of those requisite steps toward the formation of a contract render the whole agreement unenforceable.⁶⁶ Tender of pilot's service made on Sunday as a basis for claim for compulsory payment of pilotage has been held valid under a state Sunday statute.⁶⁷

§ 27. — Formation and Consummation of Contracts

- a. In general
- b. Contracts in writing
- c. Limitations of rule

a. In General

Contracts or transactions entered into or executed on Sunday are invalid and unenforceable only when they come within the terms of a statute prohibiting such acts on Sunday.

In the absence of statute contracts or undertakings entered into on Sunday are as valid as those made on any other day.⁶⁸ However, they are ren-

Wis.—City Motor Co. v. Schultz, 242 N.W. 491, 208 Wis. 219. 60 C.J. p 1099 note 43.

Lease

Signing of lease on Sunday does not affect its validity, where its delivery is on secular day.—City Motor Co. v. Schultz, *supra*.

Guaranty

Iowa.—Simmons v. Simmons, 246 N.W. 597, 215 Iowa 654.

Mich.—Jackson City Bank & Trust Co. v. Sternburg, 274 N.W. 806, 281 Mich. 313, 112 A.L.R. 1195. 60 C.J. p 1099 note 43 [a].

Promissory note

Mass.—Merchants' Discount Co. v. Simon, 193 N.E. 561, 289 Mass. 62. 60 C.J. p 1099 note 43 [b].

59. Mich.—Hall v. Parker, 37 Mich. 590, 26 Am.R. 540.

60. Ky.—Ross v. Oliver Bros. & Honeycutt, 153 S.W. 756, 152 Ky. 437.

61. N.J.—Hamilton v. Standard Metal Co., 79 A. 1031, 81 N.J.Law 247.

62. Ga.—Bryant v. Booze, 55 Ga. 438.

63. Ala.—Scharnagel v. Furst, 112 So. 102, 215 Ala. 528.

Miss.—Schulze Baking Co. v. Goodson, 119 So. 353. 60 C.J. p 1099 note 47.

64. N.J.—Burr v. Nivison, 72 A. 72, 75 N.J.Eq. 241, 138 Am.S.R. 554, 20 Ann.Cas. 35. 60 C.J. p 1099 note 48.

65. Mass.—Maher v. Haycock, 18 N.E.2d 348, 301 Mass. 594.

Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corp., 264 N.W. 868, 274 Mich. 470.

N.H.—Lawrence v. Farwell, 163 A. 115, 86 N.H. 59. 60 C.J. p 1100 note 50.

Explanation

Acts performed on weekday are subject to explanation by reference to conversation which took place on Sunday.—Lawrence v. Farwell, *supra*.

Contract to pay commissions

(1) Where contract to pay commissions did not arise until broker produced purchaser who was ready, able, and willing to purchase property, which event did not occur on Sunday, fact that broker and defendant discussed the matter of sale of property on Sunday did not render undertaking to pay commission to broker on production of purchaser illegal.—

Isenberg v. Williams, 27 N.E.2d 726, 306 Mass. 86—Maher v. Haycock, 18 N.E.2d 348, 301 Mass. 594.

(2) One entitled to be paid for a completed performance, as distinguished from work, labor, or services by the day, is not barred from recovery merely because he performed on Sunday one item in a long course of preliminaries placing him in a position finally to furnish the completed performance on a secular day.—Maher v. Haycock, *supra*.

Settlement of liability

Where original understanding in respect to settlement of liability of officer of association was made on Sunday, the offer of securities in settlement of his liability and their acceptance by association on subsequent secular day constituted valid contract.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corp., 264 N.W. 868, 274 Mich. 470.

66. Mich.—International Textbook Co. v. Ohl, 111 N.W. 768, 150 Mich. 131, 121 Am.S.R. 612, 13 L.R.A.N.S., 1157.

60 C.J. p 1100 note 51.

67. Mass.—Perkins v. O'Mahoney, 131 Mass. 546.

68. U.S.—Mutual Benefit Health &

dered unenforceable in many jurisdictions by reason of statutory provisions.⁶⁹ Thus, where the statutes explicitly declare that all or certain contracts or undertakings entered into on Sunday shall be void, any transaction falling within the terms of the statute is without effect.⁷⁰

Moreover, even though the statutes do not expressly declare Sunday contracts or undertakings to be void, if the parties, in entering into such contracts or undertakings generally, or in entering into the particular contract or agreement involved, on Sunday, perform acts which fall within the prohibitions of penal or criminal statutes regulating the observance of the day, such contracts or undertakings are void for the same reasons and to the same extent as other contracts generally whose making is tainted with illegality.⁷¹ Thus, the act of contracting being illegal, the resultant engagements or undertakings are invalid, where the Sunday statutes prohibit public traffic,⁷² or engaging in worldly employment or business,⁷³ or in any other case where they in terms mention business generally as the thing, or one of the things, prohibited,⁷⁴ or, according to some authorities, where they prohibit labor or laboring.⁷⁵

Where the prohibition is more limited but the formation of the contract or undertaking falls in fact, within the offense as limited, the engagement is similarly incapable of enforcement, as where both prohibition and transaction concern work,

labor, or business of one's ordinary calling,⁷⁶ or where the prohibition deals with, and the transaction consists of, acts causing or constituting a disturbance.⁷⁷ A Sunday contract for, or the consideration for which is, the sale of property on that day, is invalid under provisions prohibiting the purchase and sale, or the disposition, of property;⁷⁸ and it has been held, under a statute prohibiting keeping open a store or selling or disposing of wares or merchandise, that the seller is in *pari delicto* with the buyer, and the whole sale illegal and incapable of serving as a basis for the enforcement of liability.⁷⁹

However, the doctrine that contracts made on Sunday are void depends alone on statutory enactments,⁸⁰ and, except as such enactments extend to impair their validity, contracts made on Sunday are no less valid and enforceable than those made on other days.⁸¹ Thus a contract executed on Sunday is on the same footing as one made on any other day where the prohibitions expressed in the statute are so restricted or qualified as not to render its making illegal,⁸² as where the prohibition is, but the contract is not, with reference to work or business of one's usual or ordinary calling or vocation,⁸³ or where the prohibition is only of acts done so as to disturb the peace and good order of society and the contract is made privately without creating any disturbance,⁸⁴ or where the prohibition is of servile⁸⁵ or common⁸⁶ labor, or,

Accident Ass'n v. Kennedy, C.C.A. Ala., 140 F.2d 24, stating Florida rule.

La.—Provost v. Harrison, 16 So.2d 892, 205 La. 21.
60 C.J. p 1100 note 53.

69. Miss.—Ware v. Martin, 49 So.2d 832, 210 Miss. 500.

70. Ala.—Eddins v. Galloway Coal Co., 87 So. 557, 205 Ala. 361.
60 C.J. p 1101 note 55.

71. U.S.—Thompson v. Weems, C.C. A.Miss., 111 F.2d 566.

Mass.—Bauer v. Bond & Goodwin, 188 N.E. 708, 285 Mass. 117.

Miss.—Armstrong v. Shell, 26 So.2d 344, 200 Miss. 7.
60 C.J. p 1101 note 56.

72. Okl.—Helm v. Briley, 87 P. 595, 17 Okl. 314.

73. N.J.—Spiccia v. Paterson Silk Throwing Co., 23 A.2d 251, 127 N.J. Law 509, affirmed 28 A.2d 120, 129 N.J.Law 100—Greene v. Birkmeyer, 73 A.2d 728, 8 N.J.Super. 217—

Heckel v. Burtchaell, 72 A.2d 794, 7 N.J.Super. 203.

60 C.J. p 1102 note 58.

74. Ky.—Hofgesang v. Silver, 3 S. W.2d 185, 223 Ky. 101.

60 C.J. p 1102 note 59.

75. Ind.—Rogers v. Western Union Tel. Co., 78 Ind. 169, 41 Am.R. 558.
60 C.J. p 1102 note 60.

76. Ga.—Cook v. Blain, 162 S.E. 658, 44 Ga.App. 691.
60 C.J. p 1102 note 62.

77. N.H.—Thompson v. Williams, 58 N.H. 248.
60 C.J. p 1103 note 63.

78. Miss.—Kountz v. Price, 40 Miss. 341.
60 C.J. p 1103 note 64.

79. Miss.—Grapico Bottling Co. v. Ennis, 106 So. 97, 140 Miss. 502, 44 A.L.R. 124.

80. Ky.—Bertram v. Morgan, 191 S. W. 317, 173 Ky. 655, L.R.A.1917D 445.

60 C.J. p 1103 note 66.

81. Ga.—Southern R. Co. v. Wallis, 66 S.E. 370, 133 Ga. 553, 30 L.R.A., N.S., 401, 18 Ann.Cas. 67.

60 C.J. p 1103 note 67.

82. U.S.—Mutual Benefit Health & Accident Ass'n v. Kennedy, C.C.A. Ala., 140 F.2d 24, stating Florida rule.

60 C.J. p 1103 note 68.

83. Ga.—Dorough v. Equitable Mortg. Co., 45 S.E. 22, 118 Ga. 178.

60 C.J. p 1103 note 69.

84. Ill.—Prout v. Hoy Oil Co., 105 N.E. 26, 263 Ill. 54.

60 C.J. p 1104 note 70.

85. N.Y.—Merritt v. Earle, 29 N.Y. 115, 86 Am.D. 292.

60 C.J. p 1104 note 71.

86. Neb.—Fitzgerald v. Andrews, 17 N.W. 370, 15 Neb. 52.

60 C.J. p 1104 note 72.

according to the rule in some jurisdictions, of work⁸⁷ or labor.⁸⁸

So, also, where the Sunday laws confine the operation of their prohibitions to a specified part of the day, contracts made on Sunday at some other time are not void;⁸⁹ and prohibitions expressed with respect to designated business do not render void contracts not made in the course of any included business.⁹⁰

Private casual sales agreements are not void under statutes forbidding public selling, or exposing or offering for sale.⁹¹ Similarly, where a contract or undertaking falls within exceptions specified in a statute, its validity is not impaired by its having been made on Sunday, as where it comes within exceptions in favor of matters of necessity⁹² or charity,⁹³ or of persons observing a day other than Sunday as the Sabbath.⁹⁴

Negotiations or incidental transactions on weekdays. Although negotiations or preliminary transactions have taken place on prior weekdays, if the actual formation or consummation of the contract is on a Sunday, it is in no better position than if the whole of the transaction were on Sunday.⁹⁵ Similarly, if the contract involved is in fact fully consummated on a Sunday, but its nature is such that it has no vitality or operative effect until certain other acts, performed on a weekday, are done, the latter circumstance is insufficient to operate as

a postponement of the completion of the contract and thus to render the agreement enforceable.⁹⁶

b. Contracts in Writing

To the extent that the statute prohibits it, a contract in writing executed on Sunday is invalid, even though dated as though made on a secular day.

Where a written instrument embodies and comprises the agreement or undertaking, it is not effective as a contract or engagement, where it has been completely executed on a Sunday, if, under the statutes, contracts generally or the particular kind of contract involved cannot be validly made on Sunday;⁹⁷ and this is true, even though the writing is dated as though made on a secular day;⁹⁸ but a writing dated Monday has been held valid where it contains nothing to show that it was executed or effective prior to such date.⁹⁹

Where otherwise void by operation of the statute, a writing is not rendered valid by reason of the fact that the transaction serving as its basis, or in satisfaction or settlement of which it is made, occurred and was completed on a prior secular day;¹ nevertheless, the rights arising out of such prior transaction are not impaired by the acts done on Sunday but remain as though such acts had not taken place.² However, the validity and effect of such instruments are not impaired by reason of their execution on Sunday if contracts and undertakings generally, of like tenor and made under like cir-

87. Mo.—Glitzke v. Ginsberg, 258 S.W. 1004.

60 C.J. p 1104 note 73.

88. Mo.—Glitzke v. Ginsberg, supra. 60 C.J. p 1104 note 74.

89. R.I.—Brown v. Browning, 7 A. 403, 15 R.I. 422, 2 Am.S.R. 908.

60 C.J. p 1104 note 75.

90. Tex.—Republic Ins. Co. v. Poole, Civ.App., 257 S.W. 624.

60 C.J. p 1104 note 76.

91. Minn.—Ward v. Ward, 77 N.W. 965, 75 Minn. 269.

60 C.J. p 1104 note 77.

92. U.S.—Chadwick v. Stokes, C.C.A. Pa., 162 F.2d 132, 172 A.L.R. 405.

60 C.J. p 1104 note 79.

93. Ga.—Few v. Gunter, 72 S.E. 720, 10 Ga.App. 100.

60 C.J. p 1104 note 80.

94. Ind.—Heavenridge v. Mondy, 34 Ind. 28.

60 C.J. p 1105 note 81.

95. Okl.—Corpus Juris quoted in

Harris v. Cooper, 225 P.2d 820, 822, 203 Okl. 678.

60 C.J. p 1105 note 82.

Realty transactions

Where negotiations for a contract for sale of realty were consummated by execution and delivery of contract on Sunday, the written contract, being invalid for being executed on Sunday, was equally invalid as a memorandum under statute of frauds, and, therefore, sale was voidable at election of vendor.—Harris v. Cooper, 225 P.2d 820, 203 Okl. 678.

96. Me.—Plaisted v. Palmer, 63 Me. 576.

60 C.J. p 1105 note 83.

97. U.S.—Thompson v. Weems, C.C. A.Miss., 111 F.2d 566.

Ark.—Ark-La Electric Co-op. v. Randall, 169 S.W.2d 874, 205 Ark. 646

—Motors Securities Co. v. Duck, 130 S.W.2d 3, 198 Ark. 647.

60 C.J. p 1105 note 84.

Check

Ala.—Gooch v. State, 31 So.2d 776,

249 Ala. 477, 174 A.L.R. 1297, conforming to answer to certified question, 31 So.2d 779, 33 Ala.App. 221. 60 C.J. p 1105 note 84 [d].

A deed of an easement executed and delivered on Sunday is "void," unless subsequently ratified on weekday.—Ark-La Electric Co-op. v. Randall, 169 S.W.2d 874, 205 Ark. 646.

A written agreement for the sale of corporate stock was invalid where executed on Sunday.—Ryan v. Gilbert, 71 N.E.2d 219, 320 Mass. 682, 170 A.L.R. 241.

98. Mich.—Goldberg v. Mitchell, 34 N.W.2d 515, 322 Mich. 662.

60 C.J. p 1106 note 85.

99. Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636.

1. Ark.—Edwards v. Probst, 38 Ark. 661.

60 C.J. p 1106 note 86.

2. Mass.—Di Ausilio v. Stavropoulos, 147 N.E. 346, 252 Mass. 69.

60 C.J. p 1106 note 87.

cumstances, would be enforceable although entered into on Sunday.³

c. Limitations of Rule

The invalidity of Sunday contracts or undertakings may be limited to cases where the contract or undertaking is executory, and may depend on whether the parties are in *pari delicto* or on whether the act done was actually done on a Sunday.

According to some authority, the invalidity of Sunday contracts or undertakings is limited to those which are executory, and it is held that, while such contracts are void,⁴ a contract neither void at common law, nor expressly avoided by any statute, and which has been fully executed, binds the parties in so far as the execution affects their actual position, although it was made on Sunday;⁵ and thus a contract made and performed on the same Sunday, although illegal and incapable as serving as the basis of any further rights, will nevertheless not be disregarded at the instance of either party thereto, since, both being in *pari delicto*, neither will be relieved by the court from the position in which he finds himself.⁶ On the other hand, it has been held, in a few jurisdictions, that the question whether the contract is executory or executed is immaterial.⁷

Where a Sunday contract is wholly or partly executed on one side only, the promise of the other party remaining wholly executory, the latter's power to retain the whole benefit of his illegal conduct and to cast the whole detriment, without any recourse, contractual or otherwise, on the person who has performed depends on the nature of the performance whereof he has had the benefit;⁸ Thus, where money or property has been transferred on Sunday as the subject matter of such a contract, there is no enforceable right, whether on a

contract express or implied or in any other manner, to secure a return of what has been so delivered or of its value;⁹ on the other hand, where, pursuant to such a Sunday contract, labor or services are performed on subsequent weekdays,¹⁰ or property has been taken over and employed by the lessee under an invalid Sunday lease,¹¹ there is authority to the effect that recovery can be had for the reasonable value of the benefits actually received, not by any reference to the invalid agreement, but through the implication of a different agreement to pay the reasonable worth of what has been received.

Executed authority to act as special agent. It has been held that authorizing or directing another, on Sunday, to perform the physical act of delivering to the obligee a writing otherwise fully executed is sufficient to permit of the enforceability of the instrument after actual delivery on another day;¹² but there is other authority to the contrary,¹³ at least in the absence of ratification of the authority on a weekday.¹⁴ However, the possession by one joint obligor being the possession of both, a delivery by such a party, on a weekday, of a Sunday instrument is not subject to attack on the ground of a lack of authority to deliver.¹⁵ If the authority attempted to be thus conferred is not so limited, but is an authority to negotiate and contract as agent in behalf of another, it is illegal and invalid in the same manner as any other Sunday transaction, and the principal is not bound by the acts of an agent thus authorized.¹⁶

Parties must be in pari delicto. In view of the basis of the unenforceability of illegal contracts in the principle, *Ex dolo malo non oritur actio*, a party to a Sunday contract who is not in *pari delicto* with the other party may, as in the case of

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| <p>3. Fla.—Greenblatt v. McCall, 64 So. 748, 67 Fla. 165.
60 C.J. p 1106 note 88.</p> <p>4. Okl.—Canning v. Bennett, 245 P. 2d 1149, 206 Okl. 675.
60 C.J. p 1107 note 90.</p> <p>5. N.H.—Harriman v. Bunker, 106 A. 499, 79 N.H. 127.
60 C.J. p 1107 note 91.</p> <p>6. Okl.—Corpus Juris quoted in Canning v. Bennett, 245 P.2d 1149, 1155, 206 Okl. 675.
60 C.J. p 1107 note 92.</p> <p>7. Ky.—Bertram v. Morgan, 191 S. W. 317, 173 Ky. 655, L.R.A.1917D 445.
60 C.J. p 1108 note 93.</p> | <p>8. Mich.—Rott v. Goldman, 210 N. W. 335, 236 Mich. 261.
60 C.J. p 1108 note 94.</p> <p>9. Del.—Terry v. Platt, 40 A. 243, 17 Del. 185.
60 C.J. p 1108 note 95.</p> <p>10. Wis.—Gist v. Johnson-Carey Co., 147 N.W. 1079, 158 Wis. 188, Ann. Cas.1916E 460.
60 C.J. p 1108 note 96.</p> <p>11. Mass.—Stebbins v. Peck, 8 Gray 553.
60 C.J. p 1108 note 97.</p> <p>12. Ga.—Bryant v. Booze, 55 Ga. 438.
60 C.J. p 1108 note 99.</p> | <p>13. Mich.—Beman v. Wessels, 19 N.W. 179, 53 Mich. 549.
Wis.—De Forth v. Wisconsin, etc., R. Co., 9 N.W. 17, 52 Wis. 320, 38 Am. R. 737.</p> <p>14. Wis.—De Forth v. Wisconsin, etc., R. Co., supra.
60 C.J. p 1109 note 2.</p> <p>15. Ill.—King v. Fleming, 72 Ill. 21, 22 Am.R. 131.
60 C.J. p 1109 note 3.</p> <p>16. Mass.—Kryzminski v. Callahan, 100 N.E. 335, 213 Mass. 207, 43 L.R.A., N.S., 140.
60 C.J. p 1109 note 4.</p> |
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other legal contracts generally, enforce the agreement or rights dependent thereon, even though its making on Sunday involves the doing of such acts and matters as to render it unenforceable at the behest of the other party;¹⁷ and before the contract will be declared void, it must appear that the party seeking to enforce it had some voluntary agency in consummating it on that day.¹⁸ This limitation does not prevail, however, where the statute in terms provides that Sunday contracts shall be void.¹⁹

Reality of Sunday formation. Of course, where the validity of a contract or undertaking is attacked on the ground that it has been entered into on Sunday, its formation must actually have occurred on that day;²⁰ and, if the contract has been really consummated on a weekday, it is not open to objection as a Sunday contract.²¹

§ 28. — Miscellaneous Transactions

The validity of various private acts or transactions on Sunday has been considered by the courts and sustained or denied under the particular statutory provisions.

17. Mich.—Hathaway v. Porter Royalty Pool, 295 N.W. 571, 296 Mich. 90, 138 A.L.R. 955, amended 299 N.W. 451, 296 Mich. 733, 138 A.L.R. 967.
 Miss.—Armstrong v. Shell, 26 So.2d 344, 200 Miss. 7.
 60 C.J. p 1109 note 7.

Joint adventure agreement

Where landowners in certain area entered into joint adventure agreement for pooling of oil royalties, even if certain landowners signed agreements on Sunday, agreements were enforceable against such owners where promoters and other signers of like contracts were ignorant of fact that any of contracts had been signed on Sunday.—Hathaway v. Porter Royalty Pool, 295 N.W. 571, 296 Mich. 90, 138 A.L.R. 955, amended 299 N.W. 451, 296 Mich. 733, 138 A.L.R. 967.

18. Iowa.—Kilby v. Fitzpatrick, 187 N.W. 580, 193 Iowa 714.
 60 C.J. p 1109 note 8.

19. Ala.—Anderson v. Bellinger, 6 So. 82, 87 Ala. 334, 13 Am.S.R. 46, 4 L.R.A. 680.

20. Ala.—Phoenix Ins. Co. v. Boul-den, 11 So. 774, 96 Ala. 609.
 60 C.J. p 1109 note 10.

21. Miss.—Ware v. Martin, 49 So.2d 832, 210 Miss. 500.
 60 C.J. p 1110 note 11.

22. Ala.—Carroll v. Carroll, 183 So. 857, 236 Ala. 556.
 60 C.J. p 1110 note 15.

23. Mich.—In re Ferguson's Estate, 295 N.W. 318, 295 Mich. 576.
 60 C.J. p 1110 note 16.

Will not a contract or present devise

A will executed on Sunday does not violate the Sunday observance statutes, since it is not a "contract" or a "present devise" but is an expression of desire consonant with due observance of the day.—In re Ferguson's Estate, *supra*.

24. Ind.—Riley v. Butler, 36 Ind. 51.

25. Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328.
 60 C.J. p 1110 note 20.

Deed held invalid

- Ala.—Herren v. Beck, *supra*.
 60 C.J. p 1110 note 20 [a].

26. Minn.—Hanchett v. Jordan, 45 N.W. 617, 43 Minn. 149.
 Pa.—In re McWreath's Estate, Orph., 19 Wash.Co. 186.

27. Iowa.—Wilson v. Calhoun, 151 N.W. 1087, 170 Iowa 111.
 60 C.J. p 1110 note 22.

28. Mass.—Donovan v. McCarty, 30 N.E. 221, 155 Mass. 543.

On principles analogous to those announced with respect to contracts, the validity of various other private acts and transactions on Sunday, not coming within the scope of statutory restrictions or prohibitions affecting the day or otherwise unlawful, has been sustained. Thus it is held that gifts, executed and completed on Sunday, are in general valid and operative;²² wills do not come within the meaning and intent of the Sunday statutes and have been held to be valid, although executed on the Sabbath;²³ and representations made on a Sunday are capable of serving as the basis of an estoppel.²⁴

Likewise, on principles analogous to those on which the validity of Sunday contracts is determined, and in accordance with the results reached in cases of that character, the courts in the various jurisdictions have sustained or denied the validity of deeds²⁵ or assignments,²⁶ including trust deeds²⁷ or assignments in trust,²⁸ and of taxpayers' petitions,²⁹ acknowledgements,³⁰ and Sunday rescission of preëxisting contracts.³¹

29. Wis.—De Forth v. Wisconsin, etc., R. Co., 9 N.W. 17, 52 Wis. 320, 38 Am.R. 737.
 60 C.J. p 1110 note 24.

30. Ala.—Corpus Juris cited in Jemison v. Howell, 161 So. 806, 809, 230 Ala. 423, 99 A.L.R. 1511.
 60 C.J. p 1110 note 25—37 C.J. p 1099 notes 67-71.

As affecting statute of limitations

(1) In some jurisdictions an acknowledgment made on Sunday will remove the bar of the statute of limitations.—Ayres v. Bane, 39 Iowa 518—37 C.J. p 1099 notes 67-69.

(2) In other jurisdictions it has been held to be of no avail.—Bumgardner v. Taylor, 28 Ala. 687.

31. Miss.—Smith v. Mills, 24 So.2d 864, 199 Miss. 367.
 N.Y.—Pomeranz v. More, 63 N.Y.S. 2d 111, 187 Misc. 383.
 60 C.J. p 1110 note 26.

The action of corporate directors at a meeting on Sunday, the validity of which was contested by general manager, in terminating the employment of general manager and of secretary, was void and the manager was not estopped to question the validity of the rescission of his employment at a meeting held on Sunday because occasional other meetings had been held on Sunday.—Smith v. Mills, 24 So.2d 864, 199 Miss. 367.

Reinstatement on Sunday of a member in a benefit society has been held valid and binding;³² as has the recall of a proposed policy on Sunday;³³ and an insurance policy issued on a secular day and becoming effective on Sunday is not illegal;³⁴ but an attempt on Sunday to change the beneficiary of a policy has been held invalid as an attempt to transact business.³⁵

Delivery of an assigned chose in action on Sunday is a valid delivery to effectuate the assignment where there is no statute adversely affecting it,³⁶ as is delivery of a release.³⁷ Similarly, delivery on a Sunday of a deed prepared and executed, save for delivery, on another day has been held valid;³⁸ an executed delivery of possession on Sunday operates to confer on the transferee a possession sufficient to sustain a possessory lien;³⁹ and a delivery of personalty pursuant and as an incident to a preëxisting contract of bailment is a sufficient delivery to require of the bailee the care ordinarily incident to that relation.⁴⁰ A delivery on Sunday, if the doing of the acts involved is illegal, has been held an insufficient delivery to take a contract out of the statute of frauds.⁴¹ A delivery of money in escrow by one proposing to purchase property being but a step in the negotiations and not a final transaction in itself, the proposed purchaser, in the event no contract is consummated, may recover back the money, although the delivery was on a Sunday.⁴²

Incomplete transaction. Where a portion of a transaction takes place on Sunday, but it is not completed on that day so as to become effective,

it is not vitiated by the illegal, and perhaps punishable, acts of those concerned in it.⁴³ Conversely, a transaction actually consummated on Sunday may be illegal and invalid, even though a part of the transaction took place at some other time.⁴⁴

Performance of obligation by payment or otherwise. Although performance on Sunday of a valid contract will not be treated as a nullity, even though it involves the doing of acts prohibited by statute,⁴⁵ such performance will not be given an independently affirmative effect beyond mere performance;⁴⁶ but, where the acts in performance of the contract are not within the scope of the Sunday laws, such a performance on that day is as permissible and legal as performance on any other day.⁴⁷ There is no right to demand the performance on Sunday of a contract when such performance involves the doing of acts prohibited by Sunday regulations, and no rights can be founded on such a demand;⁴⁸ but, when the performance involves only acts which may lawfully be done on that day, under the prevailing statutes, the right to such performance is the same as on any other day, and a failure or refusal to perform is attended with the same consequences.⁴⁹ The payment on Sunday of a preëxisting debt discharges it, if the creditor retains the money paid.⁵⁰ Payment or performance incident to a valid existing contract, voluntarily given and accepted on that day, does not impair the rights of the parties under their preëxisting agreement;⁵¹ and a Sunday sales contract, otherwise valid, is not rendered void by payment on Sunday of the price of the goods sold.⁵²

32. Mo.—Frame v. Sovereign Camp, W. O. W., 67 Mo.App. 127.

33. Mich.—New York Lumber, etc., Co. v. People's Fire Ins. Co., 55 N.W. 434, 96 Mich. 20.

34. Mass.—American Mut. Liability Ins. Co. v. Condon, 183 N.E. 106, 280 Mass. 517.

35. U.S.—Thompson v. Weems, C.C. A.Miss., 111 F.2d 566.

36. Mich.—Steere v. Trebilcock, 66 N.W. 342, 108 Mich. 464.

37. R.I.—Allen v. Gardiner, 7 R.I. 22.

38. Pa.—Shuman v. Shuman, 27 Pa. 90.

39. N.D.—Rosenbaum v. Hayes, 86 N.W. 973, 10 N.D. 311.

40. N.J.—Carter v. Allenhurst, 125 A. 117, 100 N.J.Law 138, 34 A.L.R. 759.

41. N.H.—Ash v. Aldrich, 39 A. 442, 67 N.H. 581.
60 C.J. p 1111 note 33.

42. N.J.—Van Scoten v. Lindsley, 137 A. 580, 5 N.J.Misc. 545.

43. Wis.—Farwell v. Webster, 37 N.W. 437, 71 Wis. 485.
60 C.J. p 1111 note 35.

44. Minn.—Hanchett v. Jordan, 45 N.W. 617, 43 Minn. 149.
60 C.J. p 1111 note 36.

45. Ga.—Ellis v. Hammond, 57 Ga. 179.

Mass.—Horn v. Dorchester Mut. Fire Ins. Co., 85 N.E. 853, 199 Mass. 534.

46. Mass.—Horn v. Dorchester Mut. Fire Ins. Co., supra.
60 C.J. p 1111 note 38.

47. Tenn.—Amis v. Kyle, 2 Yerg. 31, 24 Am.D. 463.

48. Pa.—Corpus Juris quoted in Schindel v. Oswald Motor Co., 27 Pa.Dist. & Co. 239, 241, 20 West. L.J. 259.
60 C.J. p 1111 note 40.

49. Wash.—Nelson v. Pyramid Harbor Packing Co., 30 P. 1096, 4 Wash. 689.
60 C.J. p 1112 note 41.

50. Miss.—Campbell v. Davis, 47 So. 546, 94 Miss. 164, 19 Ann.Cas. 239.
60 C.J. p 1112 note 42.

51. Miss.—Bowers v. Jones, 86 So. 711, 124 Miss. 57.
60 C.J. p 1112 note 43.

52. Neb.—Horacek v. Keebler, 5 Neb. 355.

A part payment made on Sunday will not take a debt out of the operation of the statute of limitations.⁵³

Giving of notice. There is considerable authority to the effect that a notice given on Sunday is void and does not change or affect the rights of the parties,⁵⁴ even though the notice is received without objection;⁵⁵ however, there is other authority recognizing the validity of notice given on that day,⁵⁶ at least where the party to whom such notice is given accepts and acts on it,⁵⁷ or where such person so conducts himself as to induce the person giving notice to refrain from acting on a subsequent day, whereby the latter might have saved himself from loss.⁵⁸

Acts of benevolent or religious societies. The proceedings and transactions of benevolent⁵⁹ or religious⁶⁰ societies as such performed on Sunday are valid. The rule has no application to societies not of a religious or charitable nature.⁶¹

§ 29. — Competency as Evidence of Sunday Admissions, Entries, or Statements

Generally, an admission or statement made, or a conversation had, on Sunday is admissible evidence.

As the mere telling of the truth on the Sabbath is not forbidden, an admission or statement made

on Sunday is competent evidence, as it relates to a previously incurred liability,⁶² or as part of the *res gestæ* for the purpose of explaining the relations and conduct of the parties;⁶³ and a conversation had on a Sunday is competent for the purpose of explaining later conversations or conduct showing their meaning,⁶⁴ or of showing that a party to a subsequent transaction on a weekday was vested with notice or knowledge of outstanding rights and interests.⁶⁵ However, a book account dated on Sunday is ordinarily not competent,⁶⁶ at least where it is not shown that the transactions recorded in fact took place on another day;⁶⁷ but, where the entries relate to matters of necessity, a different result has been reached.⁶⁸

§ 30. Rescission of Sunday Contracts

While it has been held that an illegal Sunday contract may be rescinded, generally no aid or relief will be granted either party to such a contract.

There is some authority to the effect that a contract illegally made on Sunday may be rescinded under the rules applicable to the rescission of contracts generally;⁶⁹ elsewhere it is held that, although there can be no rescission as there is no agreement whatever to be rescinded, nevertheless a party to a Sunday transaction can subsequently claim and obtain a restoration to the position in fact occupied by him prior to the attempted transaction.⁷⁰ However, by the weight of authority, as

53. Ga.—Dennis v. Sharman, 31 Ga. 607.

37 C.J. p 1172 note 21.

54. N.J.—Cannon v. Ryan, 8 A. 293, 49 N.J.Law 314.

60 C.J. p 1112 note 46.

55. Pa.—Rheem v. Carlisle Deposit Bank, 76 Pa. 132.

60 C.J. p 1112 note 47.

56. N.Y.—Pomeranz v. More, 63 N. Y.S.2d 111, 187 Misc. 383.

60 C.J. p 1112 note 48.

Tex.—Hewitt v. First Nat. Bank, 252 S.W. 161, 113 Tex. 100.

60 C.J. p 1112 note 48.

Notice of termination of tenancy

(1) Where a lease contains a clause allowing cancellation by notice in writing, the notice to terminate is not a court proceeding, but operates merely to terminate a contract, and such notice could be given on Sunday.—Pomeranz v. More, 63 N.Y.S.2d 111, 187 Misc. 383.

(2) A statutory thirty-day notice of termination of tenancy in the city of New York, to be served in the

same manner in which a precept in summary proceedings may be served, was void where served on Sunday.—Di Perna v. Black, 62 N.Y.S.2d 69, 187 Misc. 437.

57. Conn.—Lake v. Hurd, 38 Conn. 536.

Wis.—Allen v. Murray, 57 N.W. 979, 87 Wis. 41.

58. Tex.—Hewitt v. First Nat. Bank, 252 S.W. 161, 113 Tex. 100.

60 C.J. p 1113 note 50.

59. N.J.—Ghidella v. Union of Mutual Help Among the Population of Italian Language, 102 A. 664, 91 N.J.Law 324.

60 C.J. p 1113 note 51.

60. Conn.—Arthur v. Norfield Parish Cong. Church Soc., 49 A. 241, 73 Conn. 718.

61. Mich.—Lansing Turnverein Soc. v. Carter, 39 N.W. 851, 71 Mich. 608.

60 C.J. p 1113 note 54.

62. Conn.—Beardsley v. Hall, 36 Conn. 270, 4 Am.R. 74.

60 C.J. p 1113 note 55.

63. Ala.—Stewart v. Harbin, 90 So. 496, 206 Ala. 484.

60 C.J. p 1113 note 56.

64. Mass.—Silver v. Graves, 95 N.E. 948, 210 Mass. 26.

60 C.J. p 1113 note 57.

65. Mich.—Smith v. Bye, 74 N.W. 302, 116 Mich. 84.

66. Pa.—Estate of Walton, 4 Kulp 487.

67. Mass.—Bustin v. Rogers, 11 Cush. 346.

68. Pa.—Estate of Stagger, 8 Pa. Super. 260.

69. Okl.—Harris v. Cooper, 225 P.2d 826, 203 Okl. 678.

60 C.J. p 1113 note 63.

70. Mich.—Bradt v. Amsden, 238 N. W. 184, 255 Mich. 310.

Tenn.—Palmer Bros. v. Havens, 193 S.W.2d 91, 29 Tenn.App. 8.

60 C.J. p 1113 note 64.

Amounts recoverable

With respect to assignee's estoppel to rescind Sunday assignment of mortgage and recover amount paid,

the parties are in *pari delicto*, the court will refuse its aid to either, and, at least where the contract or conveyance is executed, neither party may withdraw from the agreement so as to restore himself to his preëxisting position nor rescind and recover back property or money which has been passed to the other.⁷¹ Nevertheless, if the party seeking to abrogate such transaction was at the time of the making of the contract under a disability such that he was incapable of contracting, the right to avoid the transaction springing from that disability and to recover back the property affected is not destroyed by reason of the time when the acts were done.⁷²

§ 31. Ratification or Renewal of Sunday Acts or Contracts

Authorities are divided on whether illegal Sunday contracts or transactions may be ratified or renewed. Where they may be ratified, this may be done in the same manner as other contracts or transactions are ratified.

There is some authority holding that illegal Sunday contracts are void to such an extent that they are incapable of subsequent ratification by the parties.⁷³ According to other authority, however, they are not viewed as being tainted with any general illegality, but, being illegal only as to the time in which they are entered into, they are capable of being made valid by affirmation and ratification on a subsequent day.⁷⁴ However, even though a Sunday contract is considered incapable of ratification, it is generally held that there is nothing to prevent

the parties from making, on a subsequent date, another contract, having, in part or in whole, the same terms and substance,⁷⁵ and that the consideration emanating from the tainted contract is sufficient to form the foundation for a new express promise on which recovery may be had.⁷⁶

According to some authorities, while acts done on a subsequent weekday which are merely incidental to the Sunday transaction will not save the undertaking from the condemnation of the statute,⁷⁷ and all the elements essential to the formation of a contract must concur before a subsequent new contract with respect to the Sunday transaction will be recognized and enforced,⁷⁸ no particular formality is necessary for the purpose of forming such a new contract;⁷⁹ and, if the conduct of the parties is such that a contract or undertaking can in fact be implied therefrom under the ordinary rules with respect to the implication of contracts, it is sufficient to make out a new and valid engagement despite the prior invalid Sunday transaction;⁸⁰ but according to other authority nothing short of a subsequent express promise is sufficient for that purpose.⁸¹

Moreover, where the statute specifically declares that Sunday contracts shall be void, it has been held that they are a nullity to such an extent that they are incapable of affording a valid consideration for a subsequent express promise to pay or perform the obligations attempted to be created by them, such promise being unenforceable;⁸² and

assignee acquired no title by purchasing property on foreclosure requested by assignor, but held record title for latter and was properly allowed expense of foreclosure requested by assignor and payments for taxes and insurance.—*Bradt v. Amsden*, 238 N.W. 184, 255 Mich. 310.

71. Mass.—*Ryan v. Gilbert*, 71 N.E. 2d 219, 320 Mass. 682, 170 A.L.R. 241.

N.J.—*Greene v. Birkmeyer*, 73 A.2d 728, 8 N.J.Super. 217.
60 C.J. p 1113 note 65.

72. Miss.—*Black v. McMurtry*, 56 Miss. 217, 31 Am.R. 357.

73. Mich.—*Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corp.*, 264 N.W. 868, 274 Mich. 470.
60 C.J. p 1114 note 68.

Parol ratification

A written contract for purchase of corporate stock, which was invalid because executed on Sunday, could not thereafter be ratified or adopted by parol and still retain its character

as a written agreement, particularly where terms were materially modified.—*Ryan v. Gilbert*, 71 N.E.2d 219, 320 Mass. 682, 170 A.L.R. 241.

74. Okl.—*Harris v. Cooper*, 225 P.2d 820, 203 Okl. 678.
60 C.J. p 1114 note 69.

No new consideration is essential, it has been held, to effectuate such a ratification.—*W. F. Moody & Co. v. Boyle Gin Co.*, 177 So. 654, 180 Miss. 523—60 C.J. p 1114 note 69 [c].

75. Mich.—*Catsman v. Mack International Motor Truck Corporation of New York*, 254 N.W. 199, 266 Mich. 542.

N.J.—*Spiccia v. Paterson Silk Throwing Co.*, 23 A.2d 251, 127 N.J.Law 509, affirmed 28 A.2d 120, 129 N.J.Law 100—*Heckel v. Burtchaell*, 72 A.2d 794, 7 N.J.Super. 203.
60 C.J. p 1115 note 71.

76. N.J.—*Rosenblum v. Schachner*, 87 A. 99, 84 N.J.Law 525.
60 C.J. p 1115 note 72.

77. Mich.—*Berston v. Gilbert*, 147 N.W. 496, 180 Mich. 638.
60 C.J. p 1115 note 73.

78. Mich.—*Acme Electrical Illustrating, etc., Co. v. Van Derbeck*, 86 N.W. 786, 127 Mich. 341, 89 Am.S.R. 476.
60 C.J. p 1115 note 74.

79. Mass.—*O'Brien v. Shea*, 95 N.E. 99, 208 Mass. 528, Ann.Cas.1912A 1030.
60 C.J. p 1115 note 75.

80. Wis.—*King v. Graef*, 117 N.W. 1058, 136 Wis. 548, 128 Am.S.R. 1101, 20 L.R.A., N.S., 86.
60 C.J. p 1115 note 76.

81. N.J.—*Reeves v. Butcher*, 31 N.J.Law 224.
60 C.J. p 1116 note 77.

82. Ala.—*Wadsworth v. Dunnam*, 23 So. 699, 117 Ala. 661.
60 C.J. p 1116 note 78.

in a few jurisdictions a like result has been reached even where the statute merely made the contract illegal and not expressly void.⁸³

Sufficiency of ratification. In those jurisdictions where a ratification of a Sunday contract is sustained, a contract is held to be ratified by complying with its terms;⁸⁴ by directing the other party to the agreement to proceed under it;⁸⁵ by making and accepting a delivery of the property⁸⁶ or money involved;⁸⁷ by retaining and using property delivered on Sunday;⁸⁸ by partial payments,⁸⁹ at least where the property sold is retained;⁹⁰ by an express promise to pay or perform,⁹¹ especially when coupled with a retention of property sold;⁹² by a transfer of the property received under a Sunday contract;⁹³ by the giving or delivery of a note⁹⁴ or a receipt,⁹⁵ or by procuring the signature of another as surety to a Sunday note;⁹⁶ by a refusal to restore goods or money delivered under the agreement on subsequent demand;⁹⁷ by bringing suit on the Sunday transaction;⁹⁸ by the collection of a check;⁹⁹ and by demanding payment.¹

According to some authority, it has even been held that failure to repudiate or delay in repu-

diating a Sunday contract may alone be sufficient to constitute a ratification;² but in order that it may have such effect, the delay must be for an unreasonable period of time and a shorter delay is insufficient for the purpose.³ The contract is not ratified by a simple request to forbear suit,⁴ by retaining a payment⁵ even after a demand for its return,⁶ or by a declaration of an intention to pay, which is supported by no consideration,⁷ or which is made to third persons, strangers to the agreement.⁸ Any act of one party, not known or assented to by the other, is insufficient as a ratification;⁹ a ratification requires some conduct, manifesting recognition of the agreement, on the part of the party against whom ratification is urged or an agent duly authorized to express the principal's assent.¹⁰

Applications to transactions other than contracts. On the same principles and to the same extent as the above rules with respect to ratification have been applied to contracts entered into on Sunday, the existence of the power and the sufficiency of its exercise have been determined in cases involving the enforceability of other transactions consummated on that day, such as the execution of a deed,¹¹

63. Me.—Tillock v. Webb, 56 Me. 100.
60 C.J. p 1116 note 79.

84. N.J.—Spiccia v. Paterson Silk Throwing Co., 23 A.2d 251, 127 N.J. Law 509, affirmed 28 A.2d 120, 129 N.J. Law 100.

Okl.—Smith v. Hawkins, 102 P.2d 865, 187 Okl. 330.
60 C.J. p 1116 note 80.

85. Ky.—Hofgesang v. Silver, 23 S.W.2d 945, 947, 232 Ky. 503, 68 A.L.R. 1481.
60 C.J. p 1116 note 81.

86. Iowa.—P. J. Bowlin Liquor Co. v. Brandenburg, 106 N.W. 497, 130 Iowa 220.

60 C.J. p 1116 note 82.

87. Ark.—McKinney v. Demby, 44 Ark. 74.

Ind.T.—J. B. Bostic Co. v. Eggleston, 104 S.W. 566, 7 Ind.T. 134.

88. Ark.—McElhannon v. Coffman, 292 S.W. 393, 173 Ark. 60.

89. Ga.—McAuliffe v. Vaughan, 70 S. E. 322, 135 Ga. 852, 33 L.R.A., N.S., 255, Ann.Cas.1912A 290.
60 C.J. p 1116 note 84.

90. R.I.—Sayles v. Wellman, 10 R. I. 465.

Vt.—Sumner v. Jones, 24 Vt. 317.

60 C.J. p 1117 note 85.

91. Ind.—Williamson v. Brandenburg, 32 N.E. 1022, 6 Ind.App. 97.
60 C.J. p 1117 note 86.

92. Ind.—Williamson v. Brandenburg, supra.
60 C.J. p 1117 note 87.

93. Vt.—Corey v. Boynton, 72 A. 987, 82 Vt. 257.

94. Ill.—King v. Fleming, 72 Ill. 21, 22 Am.R. 131.
60 C.J. p 1117 note 89.

95. Mo.—Wilson v. Milligan, 75 Mo. 41.

96. Ga.—Young v. Dublin Fertilizer Works, 85 S.E. 941, 16 Ga.App. 651.

97. Vt.—Adams v. Gay, 19 Vt. 358.

98. Vt.—Corey v. Boynton, 72 A. 987, 82 Vt. 257.

99. Okl.—Sullivan v. Sykes, 243 P. 722, 114 Okl. 87.
60 C.J. p 1117 note 94.

1. Ark.—McKinney v. Demby, 44 Ark. 74.

2. Ark.—McElhannon v. Coffman, 292 S.W. 393, 173 Ark. 60.
60 C.J. p 1117 note 96.

3. Ark.—New York Life Ins. Co. v. Mason, 235 S.W. 422, 151 Ark. 135, 19 A.L.R. 618.

4. Ind.—Parker v. Pitts, 73 Ind. 597, 38 Am.R. 155.

5. Ind.—Rogers v. Western Union Tel. Co., 78 Ind. 169, 41 Am.R. 558.

6. Ind.—Perkins v. Jones, 26 Ind. 499.

7. Ind.—Catlett v. Sweetser Station M. E. Church, 62 Ind. 365, 30 Am. R. 197.

8. Ind.—Catlett v. Sweetser Station M. E. Church, supra.

9. Ga.—Calhoun v. Phillips, 13 S.E. 593, 87 Ga. 482.

10. N.H.—Lovell v. Boston & M. R. Co., 78 A. 621, 75 N.H. 568, 34 L.R. A., N.S., 67.

Knowledge

The fact that vendor did not know assignment of purchaser's interest was made on Sunday at time vendor made statement that contract was no longer in effect because of default in payment and when vendor filed pleading, which did not assert invalidity, precluded conclusions that vendor had affirmed the assignment by such acts.—Nygren v. Potocek, 54 A.2d 258, 133 Conn. 649.

11. Ark.—Burnette v. Elsesser, 22 S. W.2d 386, 180 Ark. 750.

60 C.J. p 1117 note 10.

acknowledgment,¹² assignment,¹³ and power of attorney.¹⁴

§ 32. Contracts Contemplating or Requiring Sunday Performance

Whether a contract calling for or contemplating the performance on Sunday of acts not in themselves illegal is invalid depends on the terms of the particular Sunday law and of the contract itself.

All acts save judicial transactions being legally performable on Sunday at common law, a contract calling for or contemplating performance on Sunday of any acts not in themselves unlawful and not within the scope of the Sunday regulations, if any, is valid;¹⁵ but a contract, made at any time, requiring or contemplating the performance on Sunday of acts coming within the prohibitions and outside the exceptions of applicable Sunday enactments, is a contract with an unlawful object and hence void.¹⁶

Where the contract calls for Sunday acts which may or may not be illegal, depending on the manner of performance, it will not be assumed that any violation of law was intended, and the contract will not be held invalid solely by reason of the terms relative to Sunday performance;¹⁷ and, similarly, it has been held that, where the legality of performance depends on the place of performance, the contract will not be held illegal where it does not clearly require that the acts on Sunday be done in a place where they would be illegal.¹⁸

Even though the acts to be performed come within the prohibitions of the statute, the contract, in order to be void, must imperatively require the acts to be performed on Sunday;¹⁹ and it must call for a complete, rather than a merely partial, performance on that day;²⁰ but a contract calling for performance of continuing services, part of which is required to be done on Sundays as on other days, has been held to be illegal and void as a whole if the nature of the contract is such that it is entire and not divisible.²¹ If, notwithstanding the unenforceability of contracts calling for Sunday performance, a party, in pursuance of such agreement, enters into a particular relationship with the other party on Sunday, the liabilities arising from such relationship may be capable of enforcement;²² so, too, payments made in consideration of actual illegal performance pursuant to such a contract cannot be recovered back, but the parties, being in *pari delicto*, will be left where they have placed themselves.²³

Where the contract does not require performance on Sunday, but simply names Sunday as a means of estimating the compensation, it is valid.²⁴ Furthermore, a contract fixing a date falling on Sunday as the time for performance is not bad if it is such as the law construes as calling for performance on the preceding or following day,²⁵ and generally, in such case, the contract is performable on the next business day.²⁶ Contracting for interest to commence running on a Sunday does not render an agreement illegal.²⁷ The Sunday law has been

12. N.J.—Bowen v. Pursel, 134 A. 665, 100 N.J.Eq. 319.
60 C.J. p 1117 note 11.

13. U.S.—Tennent-Stribling Shoe Co. v. Roper, Miss., 94 F. 739, 36 C.C.A. 455.

14. N.J.—Garibaldi Building & Loan Ass'n of Atlantic City v. Garibaldi League No. 1 of Atlantic City, 162 A. 419, 111 N.J.Eq. 365.

15. N.J.—Hill v. Borough of Collingswood, 88 A.2d 506, 9 N.J. 369.
—Tosti v. Giamis, 170 A. 244, 112 N.J.Law 222.

Tex.—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused.
60 C.J. p 1118 note 14.

16. Vt.—Jacobs v. Clark, 28 A.2d 369, 112 Vt. 484.
60 C.J. p 1118 note 15.

Provision in quitclaim deed requiring grantees to keep filling station on premises open for certain hours

on Sunday for the sale of the grantor's gasoline and petroleum products was void under statute providing that a person shall not between twelve o'clock Saturday night and twelve o'clock the following Sunday night exercise any secular business or employment, except works of "necessity" and charity.—Jacobs v. Clark, *supra*.

17. U.S.—Lackawanna Pants Mfg. Co. v. Wiseman, C.C.A.Mich., 133 F.2d 482.

60 C.J. p 1118 note 16.

18. Pa.—Zenatello v. Hammerstein, 79 A. 922, 231 Pa. 56.

60 C.J. p 1118 note 17.

19. Iowa.—Alfree v. Gates, 47 N.W. 993, 82 Iowa 19.

60 C.J. p 1118 note 18.

20. N.Y.—Merritt v. Earle, 29 N.Y. 115, 86 Am.D. 292.

60 C.J. p 1119 note 19.

21. Minn.—Handy v. St. Paul Globe

Pub. Co., 42 N.W. 872, 41 Minn. 188, 16 Am.S.R. 695, 4 L.R.A. 466.
60 C.J. p 1119 note 20.

22. U.S.—Powhatan Steamboat Co. v. Appomattox R. Co., Va., 24 How. 247, 16 L.Ed. 682.

Mo.—Guinn v. Wabash, etc., R. Co., 20 Mo.App. 453.

23. S.D.—Calkins v. Seabury-Calkins Consol. Min. Co., 58 N.W. 797, 5 S.D. 299.

24. Wis.—Lippert v. Garrick Theatre Co., 129 N.W. 409, 144 Wis. 413.

60 C.J. p 1119 note 23.

25. N.J.—Connelly v. Ward, 123 A. 149, 2 N.J.Misc. 44.

26. N.J.—McConnell v. Beach Realty Co., 27 A.2d 195, 128 N.J.Law 493, affirmed 36 A.2d 604, 131 N.J.Law 325.

27. N.H.—Marshall v. Russell, 44 N.H. 509.

held no excuse for not keeping a watchman in an insured building according to the terms of the policy.²⁸

Ratification. According to some authority a contract, invalid because it requires or contemplates unlawful performance on Sunday, is incapable of ratification,²⁹ even after a change has been made in the statute so as to permit the acts contracted for to be done on the Sabbath,³⁰ although a totally new contract referring to the same subject matter may then be made.³¹ There is other authority, however, holding that a subsequent express promise to pay for services performed on that day is sufficiently supported by consideration to admit of the enforcement of such promise as a new contract.³²

§ 33. Rights of Third Persons

The illegality of Sunday transactions will not affect third persons whose rights were acquired in good faith and without knowledge or notice of the illegality.

An indorsee or holder in due course of a negotiable instrument,³³ or an assignee of a contract or undertaking,³⁴ made on Sunday, taking without notice of that fact or of circumstances to put him on inquiry has been held unaffected by its illegality and entitled to enforce it according to its terms, at least where the obligor has acted to mislead him as to its character as by misdating;³⁵ and, under like circumstances, a bona fide purchaser of property transferred to a prior party in the chain of title under a conveyance executed on Sunday takes a title unaffected by the illegality of that transaction.³⁶ However, the defense of illegality is available against an assignee or indorsee not a holder in good faith or a bona fide purchaser to the same extent as against the original promisee.³⁷

Similar rules apply where the illegal transaction consists of a Sunday indorsement instead of original execution on Sunday.³⁸ Even a subsequent taker with full knowledge of the circumstances has as good a position as the party to the illegal transaction under whom he holds.³⁹

Third persons cannot disregard a delivery or transfer executed pursuant to a Sunday transaction or have it set aside merely because the transaction was illegal under the Sunday acts;⁴⁰ nor can they object to the sufficiency of instruments executed and delivered on that day⁴¹ or escape liability, for injuries to property so delivered, arising on grounds having no relation to the contract.⁴² An indorsement of a negotiable instrument on Sunday is so far available to the promisee therein, however, that he can take advantage of its illegality to limit the indorsee's rights to such as belong to a mere holder without indorsement.⁴³ Where, although the contract was void, plaintiff continued to perform until the other party was unable to perform, and the rights of a third party have intervened, plaintiff may not recover money paid under the contract.⁴⁴

Contracts contemplating Sunday performance. Moreover, to the same extent as is the fact of the consummation of contracts on Sunday, the circumstance that they contemplate or require performance on the Sabbath of acts forbidden by the Sunday laws is unavailable to aid or relieve third persons who are strangers to the agreement.⁴⁵

§ 34. Actions

Actions on Sunday contracts and transactions are discussed *infra* §§ 35-38.

Examine Pocket Parts for later cases.

28. Conn.—Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am.D. 309.

29. Minn.—Handy v. St. Paul Globe Pub. Co., 42 N.W. 872, 41 Minn. 188, 16 Am.S.R. 695, 4 L.R.A. 466. 60 C.J. p 1119 note 27.

30. Minn.—Handy v. St. Paul Globe Pub. Co., *supra*.

31. Minn.—Handy v. St. Paul Globe Pub. Co., *supra*.

32. N.J.—Telfer v. Lambert, 75 A. 779, 79 N.J.Law 299.

33. U.S.—Myers v. Kessler, N.J., 142 F. 730, 74 C.C.A. 62. 60 C.J. p 1119 note 31.

34. Iowa.—Johns v. Bailey, 45 Iowa 241. 60 C.J. p 1120 note 32.

35. Ala.—Moseley v. Selma Nat. Bank, 57 So. 91, 3 Ala.App. 614. 60 C.J. p 1120 note 33.

36. Ind.—Love v. Wells, 25 Ind. 503, 87 Am.D. 375.

Mass.—Mann v. United Motor Boston Co., 116 N.E. 239, 226 Mass. 495.

37. Ga.—Ball v. Powers, 62 Ga. 757. 60 C.J. p 1120 note 35.

38. Conn.—Greathead v. Walton, 40 Conn. 226. 60 C.J. p 1120 note 36.

39. N.H.—Smith v. Foster, 41 N.H. 215. 60 C.J. p 1120 note 37.

40. Okl.—Wilson's v. Jackson, 263 P. 107, 128 Okl. 299. 60 C.J. p 1120 note 38.

41. Me.—Richardson v. Kimball, 28 Me. 463. 60 C.J. p 1121 note 39.

42. Me.—Bryant v. Biddeford, 39 Me. 193. 60 C.J. p 1121 note 40.

43. Me.—Benson v. Drake, 55 Me. 555.

44. Ala.—Lunsford v. First Nat. Bank, 141 So. 673, 224 Ala. 679.

45. Me.—Bryant v. Biddeford, 39 Me. 193. 60 C.J. p 1121 note 43.

§ 35. — Right of Action and Defenses

- a. Right of action
- b. Defenses

a. Right of Action

A right of action on a Sunday contract or transaction depends on whether the contract or transaction is valid, the courts generally refusing to grant enforcement of, or relief from, contracts or transactions violative of the Sunday laws.

If neither the acts and transactions done on Sunday nor the Sunday performance constituting the subject of the contract is such as to render the transaction illegal at its inception, or if the Sunday conduct involved in its formation has been sufficiently renewed or ratified on another day to establish an obligation between the parties, the contract or transaction is not tainted with illegality and is enforceable in the same manner and to the same extent as a contract or transaction on any other day.⁴⁶ However, a result to the contrary is reached where contracts or transactions, illegal at their inception and not established by any subsequent action of the parties, are concerned, at least where the situation is not complicated by questions of total execution of the contract or transaction or of the rights of third persons, and it has frequently been declared by the courts that no action can be maintained in a court of law or equity for the enforcement of, or relief from, such contracts and transactions,⁴⁷ although there are some instances in which courts of equity have taken cognizance of

them as a basis of rights.⁴⁸ The courts will neither enforce nor give damages for breach of such void contracts.⁴⁹

It has been said that whether a claim not directly on, but connected with, an illegal Sunday transaction can be maintained in a court of law depends on whether plaintiff must bring in the illegal transaction to aid him in making out his case;⁵⁰ but it is not really material that plaintiff should be the one who discloses the transaction and, if the illegality lies directly in the course of events which give rise to the suit, and is inseparably connected with the cause of action, whichever of the parties may or must disclose it to support his position is of no consequence;⁵¹ if, in any case, plaintiff must rely on the unlawful agreement or transaction to support his case, he must fail,⁵² but if he can show a complete cause of action without reliance on the illegal transaction, although that may incidentally appear and even may be important as explanatory of other facts in the case, the illegality does not impair his right of recovery.⁵³

By virtue of these rules, one cannot ordinarily, disregarding the special contract made on Sunday, or in contemplation of Sunday performance, sue and recover on an implied promise with respect to the same subject matter,⁵⁴ although there are some apparent exceptions to the rule;⁵⁵ an action is not maintainable on a warranty made during the course of an illegal sale or exchange of property on Sunday,⁵⁶ although there is authority to the contrary;⁵⁷ neither is an action maintainable

46. W.Va.—*Wooldridge v. Wooldridge*, 72 S.E. 654, 69 W.Va. 554, Ann.Cas.1913B 653.
60 C.J. p 1121 notes 44 [a], 46.

47. Ala.—*Herren v. Beck*, 164 So. 904, 231 Ala. 328.
60 C.J. p 1121 notes 44 [b], 48.

48. Wis.—*Blakesley v. Johnson*, 13 Wis. 530.
60 C.J. p 1122 note 49.

49. Kan.—*Ewing v. Halsey*, 272 P. 187, 127 Kan. 86.
60 C.J. p 1122 note 50.

50. Mich.—*Catsman v. Mack International Motor Truck Corporation of New York*, 254 N.W. 199, 266 Mich. 542.
60 C.J. p 1122 note 52.

51. Mass.—*Myers v. Meinrath*, 101 Mass. 366, 8 Am.R. 368.
60 C.J. p 1122 note 53.

52. Mass.—*Ryan v. Gilbert*, 71 N.E.

2d 219, 320 Mass. 682, 170 A.L.R. 241.
60 C.J. p 1123 note 54.

Payment on Sunday

Where payment on account of purchase price of corporate stock was made on Sunday, payment was illegal and was unavailable to take subsequent oral agreement for purchase of stock out of the statute of frauds.—*Ryan v. Gilbert*, supra.

53. Tex.—*United Employers Casualty Co. v. Curry*, Civ.App., 152 S.W. 2d 862.
60 C.J. p 1123 note 55.

Recovery held not barred

(1) Chattel mortgages covering trucks, executed on secular day and, operating to convey title, were valid and enforceable, irrespective of contract of sale allegedly executed on Sunday.—*Catsman v. Mack International Motor Truck Corporation of New York*, 254 N.W. 199, 266 Mich. 542.

(2) Parties who were denied right to have deed declared void because executed on Sunday on ground that equity will help neither party to such a transaction could share in partition of land for which deed was given where in such proceeding they would not claim under deed, and it would not be necessary evidence of their title.—*Herren v. Beck*, 164 So. 904, 231 Ala. 328.

54. Wis.—*Troewert v. Decker*, 8 N. W. 26, 51 Wis. 46, 36 Am.S.R. 808.
60 C.J. p 1123 note 56.

55. Ala.—*Rosenbush Feed Co. v. Garrison*, 37 So.2d 106, 251 Ala. 245.
60 C.J. p 1123 note 57.

56. Miss.—*Johnston v. Swift & Co. of Illinois*, 191 So. 423, 186 Miss. 803.
60 C.J. p 1123 note 58.

57. Tex.—*Jacob E. Decker & Sons v. Capps*, Civ.App., 144 S.W.2d 404,

for damages resulting from fraudulent representation made during such a transaction.⁵⁸

Bailment. With respect to an action for conversion, or for damages, based on injury to property illegally hired or otherwise bailed to another on Sunday, or for illegal use on Sunday, by using the property beyond the time fixed for the bailment⁵⁹ or by otherwise exceeding the terms of bailment,⁶⁰ there is authority holding that the action may be maintained, as it rests in tort, independent of the contract of hiring or bailment. However, it has been held that such an action, based on violation by the bailee of his duty of care while acting within the scope of the bailment, is not sustainable;⁶¹ but there is other authority to the contrary.⁶²

Injury of the bailee from defects in the property bailed affords a right of recovery where a statute exists conferring such a right⁶³ or where the property is bailed for a lawful purpose, as, for instance, one coming within statutory exceptions in favor of matters of necessity or charity;⁶⁴ and there is authority holding that, where property is hired together with the services of a servant of the bailor to operate such property, the bailee may recover for injuries sustained by the negligence of such servant, although the hiring on Sunday and the Sunday operation whereby injury resulted were both illegal.⁶⁵

b. Defenses

Actual illegality may be set up as a defense in a proper case; and generally the defendant must, especially under statutes so providing, restore the consideration in order to use the defense of illegality.

Where a particular contract or transaction sued on is actually illegal, because of the time of making

or of contemplated performance being on Sunday, that illegality, at least in cases arising between the parties thereto and where the contract is executory may, in the absence of a sufficient renewal, ratification, or estoppel, be set up as a defense.⁶⁶ Further, the fact that the contract has been so far executed that defendant has received and holds money or property delivered under the agreement does not destroy the availability of the defense, since the defense of illegality prevails, not as a protection to defendant, but as a disability in plaintiff.⁶⁷

Where Sunday is not in fact the time of making or of contemplated performance,⁶⁸ or where, being so, the contract is nevertheless not illegal,⁶⁹ or where there is a valid subsequent renewal, ratification, or estoppel establishing a binding obligation,⁷⁰ the fact that the contract or transaction was made or contemplates performance on Sunday affords no defense against enforcement; and an illegal Sunday contract cannot be set up as a defense to an otherwise well grounded cause of action existing independently of the Sunday transaction.⁷¹

Restoration of consideration or benefit. Under the statutes of some jurisdictions, a person who receives a valuable consideration for a contract made on Sunday is not permitted to defend an action on the contract on the ground that it was so made until he restores the consideration;⁷² and, in a few jurisdictions, a like rule has been reached without reference to any statute specifically so providing.⁷³ Where such a rule exists defendant must in fact make restoration in order to use the defense of invalidity, the operation of the rule not being defeated by the fact that the consideration is of such nature that it cannot be restored,⁷⁴ or

affirmed 164 S.W.2d 828, 139 Tex. 609, 142 A.L.R. 1479.

58. Conn.—Grant v. McGrath, 15 A. 370, 56 Conn. 333.
60 C.J. p 1123 note 59.

59. Ark.—Stewart v. Davis, 31 Ark. 518.
Me.—Morton v. Gloster, 46 Me. 520.

60. Wis.—Matta v. Katsoulas, 212 N. W. 261, 192 Wis. 212, 50 A.L.R. 291.
60 C.J. p 1123 note 61.

61. Me.—Wheelden v. Lyford, 24 A. 793, 84 Me. 114.
60 C.J. p 1124 note 63.

62. Ky.—Hinkel & Edelen v. Pruitt, 151 S.W. 43, 151 Ky. 34, L.R.A. 1915F 644.
60 C.J. p 1124 note 64.

63. Me.—Knights v. Brown, 45 A. 827, 93 Me. 557.

64. Mass.—Horne v. Meakin, 115 Mass. 326.

65. Wis.—Gerretson v. Rambler Garage Co., 136 N.W. 186, 149 Wis. 528, 40 L.R.A., N.S., 457.

66. Ky.—Hofgesang v. Silver, 3 S. W.2d 185, 223 Ky. 101.
60 C.J. p 1124 note 68.

67. Ind.—Rogers v. Western Union Tel. Co., 78 Ind. 169, 41 Am.R. 558.
60 C.J. p 1124 note 69.

68. Iowa.—Boland v. Kistler, 60 N.W. 632, 92 Iowa 369.
60 C.J. p 1124 note 70.

69. Ala.—Western Union Tel. Co. v. Wilson, 9 So. 414, 95 Ala. 32, 50 Am.S.R. 23.
60 C.J. p 1124 note 71.

70. Ga.—Meriwether v. Smith, 44 Ga. 541.
60 C.J. p 1124 note 72.

71. Ala.—Williams v. Armstrong, 30 So. 553, 130 Ala. 389.
60 C.J. p 1124 note 74.

72. Conn.—Nygren v. Potocek, 54 A. 2d 258, 133 Conn. 649.
Me.—Baxter v. Macgowan, 167 A. 77, 132 Me. 33.
60 C.J. p 1124 note 75.

73. Ky.—Griffith's Adm'x v. Miller, 149 S.W.2d 11, 285 Ky. 675.
60 C.J. p 1125 note 76.

74. Me.—Wheelden v. Lyford, 24 A. 793, 84 Me. 114.
60 C.J. p 1125 note 77.

that defendant cannot safely and profitably make restoration.⁷⁵ Such a statute applies only where the action is based on a contract made on Sunday and consideration has been received by defendant in respect of it.⁷⁶

The statutory provisions do not apply to implied contracts to pay for services illegally performed on Sunday, no restoration of the value received being necessary in such case;⁷⁷ and this is true as to actions against a bailee under a Sunday bailment for failure to exercise proper care.⁷⁸

§ 36. — Pleadings

- a. In general
- b. Issues, proof, and variance

a. In General

The rules of pleading in civil actions apply in actions on contracts or transactions made on Sunday. The manner of pleading the defense of illegality under Sunday laws is determined by the statutes and decisions of the particular state.

Subject to the rules of pleading in civil actions generally, under the statutes and decisions of some jurisdictions, the defense of illegality under the Sunday laws must be specifically pleaded or notice of it given,⁷⁹ and it cannot be proved under a general denial,⁸⁰ or a plea of non est factum;⁸¹ but under other statutes it is held that the defense

need not be specially pleaded,⁸² but may be raised under a plea of the general issue and without any specification of defense with respect to it.⁸³ In a partition suit the issue of the validity of a deed executed on Sunday may be made by answer, a cross bill not being necessary.⁸⁴

Particularity. Where a special pleading of illegality is required, it has been held that the facts showing a violation of the Sunday law must be stated as fully as is required in framing an indictment for such a violation.⁸⁵ The allegations of the pleading cannot be extended by inference, however probable.⁸⁶ Thus, where the notice or knowledge of one party is essential to the illegality of his contract, and its consequent unenforceability, that fact must be pleaded by the party seeking to defeat recovery;⁸⁷ and an averment that an instrument whose legal effect arises on delivery was signed on Sunday is not sufficient, where there is no allegation of the time of delivery.⁸⁸ It has, however, been held sufficient to allege the date of the making of an instrument in defense, without stating that the day was Sunday.⁸⁹

The pleading should consist of a statement of the facts rather than of the legal conclusions to be drawn from them;⁹⁰ and hence it has been held that an allegation that an instrument was "executed" on Sunday without stating what acts were done is too indefinite;⁹¹ and so is an averment that an

75. Me.—Wentworth v. Woodside, 8 A. 763, 79 Me. 156.

76. Conn.—Nygren v. Potocek, 54 A. 2d 253, 133 Conn. 649.

Action by assignee of purchaser

Where assignment of purchaser's interest in bond for deed was executed on Sunday, vendor could defend against assignee's action for specific performance on ground that assignment was made on Sunday, without paying to assignee amounts which vendor had received from purchaser, and the assignee, in equity, had no right to demand that vendor, as condition of claiming that assignment was void, should pay to assignee amounts which vendor had received from purchaser.—Nygren v. Potocek, supra.

77. Me.—Carson v. Calhoun, 64 A. 338, 101 Me. 456.

78. Me.—Wheelden v. Lyford, 24 A. 793, 84 Me. 114.

79. Iowa.—Passcuzzi v. Pierce, 227 N.W. 409, 208 Iowa 1389. 60 C.J. p 1125 note 84.

Pleading by plaintiff

In a replevin action to recover property seized under distress for rent under a lease, plaintiff undertaking to allege in detail grounds relied on must set out whole case, and must not omit material part thereof, such as contention that Sunday statute invalidated the lease.—Stamps v. Frost, 164 So. 584, 174 Miss. 325.

80. Tex.—Blackwell v. General Motors Acceptance Corporation, Civ. App., 54 S.W.2d 251. 60 C.J. p 1125 note 85.

81. Pa.—Fox v. Mensch, 3 Watts & S. 444.

82. Ark.—New York Life Ins. Co. v. Mason, 235 S.W. 422, 151 Ark. 135, 19 A.L.R. 618. 60 C.J. p 1125 note 87.

Plea or objection to evidence

In replevin action against defendant who claimed right to possession under oral contract, alleged invalidity of contract as having been negotiated and concluded on Sunday could be invoked either by plea or objec-

tion to the evidence when offered.—Armstrong v. Shell, 26 So.2d 344, 200 Miss. 7.

83. Mass.—Hulet v. Stratton, 5 Cush. 539. 60 C.J. p 1125 note 88.

84. Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328.

85. Ky.—Ray v. Catlett, 12 B.Mon. 532. 60 C.J. p 1125 note 90.

86. Ky.—Ray v. Catlett, supra. 60 C.J. p 1126 note 91.

87. Ky.—Powers v. Brooks, 7 Ky.L. 204.

88. Ky.—Hofer v. McClung, 68 S.W. 438, 24 Ky.L. 355.

89. Minn.—Finney v. Callendar, 8 Minn. 41.

90. Iowa.—Rule v. Carey, 159 N.W. 699, 178 Iowa 184.

91. Pa.—Stevens v. Hallock, 7 Kulp 260.

instrument sued on "is illegal,"⁹² but an allegation that the instrument was "executed" on Sunday has been held sufficient,⁹³ and an allegation that a contract was made and signed on Sunday has also been held sufficient, being equivalent to an allegation that it was executed.⁹⁴

Pleading facts within exceptions to Sunday laws.

In an action for breach of a contract falling within the prohibitions of the Sunday laws, it has been held that plaintiff must, by his pleadings, bring the transaction within the statutory exceptions, in order to state a cause of action;⁹⁵ but a different rule prevails where by statute it is provided that the illegality shall be no defense, in actions for damages, to anyone voluntarily acting on that day, the burden being on defendant in such case to allege that there was no voluntary illegal conduct on his part.⁹⁶

A person asserting the invalidity of a particular transaction need not allege that the contract or transaction involved was not within the exceptions.⁹⁷ If plaintiff, in his pleading, undertakes to set up and avoid the defense of illegality under the Sunday laws, the matter pleaded in avoidance must sufficiently refute the illegality or he will not have stated a cause of action.⁹⁸

Replication or reply. A replication to a defense of illegal Sunday execution, admitting that the con-

tract was made on Sunday but alleging payment on Monday, without intimation that the contract was made at any other time, has been held an admission of the defense of illegal Sunday execution.⁹⁹ In some jurisdictions by statute a renewal or ratification, or an estoppel, is not pleadable by way of reply or replication;¹ but, where such pleading is available and the facts pleaded are sufficient to make out an enforceable ratification or renewal, the reply is good.² An allegation of ratification is not inconsistent with a denial of invalidity of the contract, so as to prevent reliance on both.³

Demurrer. According to some authority, the validity of a contract, which appears to have been executed on Sunday, cannot be attacked by demurrer, but only by plea or answer;⁴ but there is other authority holding that a pleading showing on its face that the pleader relies on an unenforceable contract or transaction made or to be performed on Sunday is subject to attack by demurrer.⁵ Conversely, a defense based on the doing of acts on Sunday is subject to demurrer where the acts alleged are not, under the circumstances, sufficient to invalidate the transaction,⁶ although a result to the contrary has been reached where the acts alleged are sufficient for that purpose;⁷ further, the defense of illegality has been held subject to demurrer where the pleading does not show restoration of the consideration, under statutes making restoration a condition to the employment of such defense.⁸

92. Iowa.—Rule v. Carey, 159 N.W. 699, 178 Iowa 184.

93. Ky.—Hofgesang v. Silver, 3 S.W.2d 185, 223 Ky. 101.

94. Ind.—W. T. Rawleigh Co. v. Snider, 194 N.E. 356, 207 Ind. 686.

Answer held sufficient

Answer which alleged that contract sued on was made and signed by defendants on Sunday was sufficient as against objection that answer did not allege that contract was either delivered to, or accepted by, plaintiff on Sunday, since allegation that contract was made was equivalent to allegation that contract was executed, and word "executed" included delivery, and the answer stated a defense, notwithstanding that it did not deny that contract was accepted by plaintiff on Jan. 12, which was not Sunday, since answer was sufficient to allege contract was executed on Sunday and not on day named in complaint.—W. T. Rawleigh Co. v. Snider, *supra*.

95. Ga.—Willingham v. Western Union Tel. Co., 18 S.E. 298, 91 Ga. 449

—Postal Telegraph-Cable Co. v. Kaler, 16 S.E.2d 77, 65 Ga.App. 641. 60 C.J. p 1126 note 99.

96. Mo.—Bassett v. Western Union Tel. Co., 48 Mo.App. 566.

97. Ind.—Krauss v. Weaver, 130 N.E. 800, 191 Ind. 133. 60 C.J. p 1126 note 2.

98. Ind.—Western Union Tel. Co. v. Yopst, 20 N.E. 222, 11 N.E. 16, 118 Ind. 248, 3 L.R.A. 224—Western Union Tel. Co. v. Henley, 54 N.E. 775, 23 Ind.App. 14.

99. Conn.—Grant v. McGrath, 15 A. 370, 56 Conn. 333.

1. Ark.—Tucker v. West, 29 Ark. 386.

2. Ind.—Williamson v. Brandenburg, 32 N.E. 1022, 6 Ind.App. 97. Ky.—Hofgesang v. Silver, 23 S.W.2d 945, 232 Ky. 503, 68 A.L.R. 1481.

3. Ky.—Hofgesang v. Silver, *supra*.

4. Ind.—Western Union Telegraph Co. v. Fulling, 96 N.E. 967, 49 Ind. App. 172. 60 C.J. p 1126 note 9.

5. Ga.—Willingham v. Western Union Tel. Co., 18 S.E. 298, 91 Ga. 449. 60 C.J. p 1126 note 10.

Telegrams

In action for damages resulting from delay in transmission of telegram which related to purchase of beans by plaintiff's agent and which it was alleged should have been delivered on Sunday morning, petition was not demurrable on ground that telegraph company was not required to deliver telegram on Sunday, where it appears on the face of the message that transmission of such telegram was a work of necessity within exception to general prohibition of Sunday work, but the rule is otherwise if it does not so appear.—Postal Telegraph-Cable Co. v. Kaler, 16 S.E.2d 77, 65 Ga.App. 641.

6. Ala.—J. R. Watkins Co. v. Hill, 108 So. 244, 214 Ala. 507. 60 C.J. p 1126 note 11.

7. Ala.—Wadsworth v. Dunnam, 23 So. 699, 117 Ala. 661. Ind.—Davis v. Barger, 57 Ind. 54.

8. Conn.—Wetherell v. Hollister, 48 A. 826, 73 Conn. 622.

A pleading relying on a contract which requires work to be performed on Sunday has been held not subject to demurrer where it does not appear but that the work required to be done comes within exceptions to the Sunday regulations.⁹ It has been held, in at least one jurisdiction, that, where some items of an account are for illegal Sunday work and others for work on weekdays, demurrer to the Sunday items must be special and not general.¹⁰ The rule that a demurrer searches the record and attacks the first error in pleading has been held applicable in such actions, so as to render plaintiff's demurrer to the plea operative against his complaint stating a cause of action based on a contract illegal under the Sunday laws.¹¹ Demurrer to several paragraphs of a pleading jointly, being subject to be defeated if any of the paragraphs demurred to is sufficient, is properly overruled where one paragraph of a reply demurred to properly sets forth a valid ratification or renewal on a secular day.¹²

Amendment. Amendment of a defense, after the evidence is in, to include a plea of Sunday execution has been held properly refused, under a statute providing that the court may allow amendments in the furtherance of justice, especially where such amendment would allege facts in direct contradiction of defendant's testimony.¹³

b. Issues, Proof, and Variance

There is a conflict of authority as to whether the fact that a contract is void by operation of the Sunday laws can be taken into consideration where the issue is not raised by the pleadings.

According to some authority, where the issue is not raised by the pleadings, the fact that a contract is of such a nature as to be void by operation of the Sunday laws cannot be taken into consideration;¹⁴ hence, where there is no sufficient allega-

tion in the pleadings that a contract or transaction dated on another day is such as to be rendered illegal by operation of the Sunday laws, evidence on that point is not relevant,¹⁵ and, even where the fact appears from the testimony, such fact must be disregarded if not warranted by the allegations.¹⁶

There is other authority holding that, in order that an illegal Sunday contract may be treated as unenforceable, no allegation of illegality need be made by the pleadings, the court being bound to give effect to the statute, although the issue is not raised by the parties.¹⁷ Elsewhere it has been held that, in the absence of a sufficient pleading of the illegality, there is no compulsion on the trial judge to recognize the question of illegality under the Sunday laws as being in the case, and his refusal to do so will be accepted as final,¹⁸ but that, at least where plaintiff's own testimony shows illegal execution on Sunday, the court has the discretion to declare the contract void, even though no issue with respect thereto is raised by the pleadings.¹⁹

A plea of nonassumpsit has been held sufficient to raise an issue of a renewal of a contract by a promise to pay on a subsequent secular day.²⁰ Where the statutes with respect to pleading render a reply or replication unavailable, matters properly pleadable at common law by reply may be testified to without any allegations concerning them in the pleadings.²¹ Where the specification of plaintiff's claim is limited to a statement of a cause of action, illegal and unenforceable by virtue of the Sunday laws, he is not entitled to a recovery on some different theory which has not been pleaded.²² It is immaterial whether or not the parties intended a violation of the Sunday laws by acts required by contract to be done on that day, and a refusal to submit a special issue to the jury relative to such intention is proper.²³

9. Tex.—Maryland Casualty Co. v. Garrett, Civ.App., 18 S.W.2d 1102.

10. Ga.—Bernhardt v. Federal Terra Cotta Co., 101 S.E. 588, 24 Ga.App. 635.

11. N.Y.—Albera v. Sciarretti, 131 N.Y.S. 889, 72 Misc. 496.

12. Ind.—Williamson v. Brandenburg, 32 N.E. 1022, 6 Ind.App. 97.

13. Iowa.—Chlein v. Kabat, 33 N.W. 771, 72 Iowa 291.

14. Mass.—Barsky v. Hansen, 40 N.

E.2d 12, 311 Mass. 14—Smith v. Miles, 5 N.E.2d 12, 296 Mass. 126. 60 C.J. p 1127 note 23.

15. Iowa.—Lee v. Lee, 50 N.W. 33, 83 Iowa 565. 60 C.J. p 1127 note 24.

16. Minn.—Finley v. Quirk, 9 Minn. 194, 86 Am.D. 93.

17. Minn.—Handy v. St. Paul Globe Pub. Co., 42 N.W. 872, 41 Minn. 188, 16 Am.S.R. 695, 4 L.R.A. 466.

18. Mass.—Barsky v. Hansen, 40 N.E.2d 12, 311 Mass. 14. 60 C.J. p 1127 note 27.

19. Mass.—Cardoze v. Swift, 113 Mass. 250.

20. Ala.—Shippey v. Eastwood, 9 Ala. 198.

21. Ark.—Tucker v. West, 29 Ark. 386.

22. Me.—Carson v. Calhoun, 64 A. 838, 101 Me. 456.

Pa.—Kepner v. Keefer, 6 Watts 231, 31 Am.D. 460.

23. Tex.—Texas Employers' Ins. Assoc. v. Henson, Civ.App., 31 S.W.2d 669.

§ 37. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

While an instrument dated on a Sunday will be presumed to have been delivered on that date, the party who seeks to have an act or instrument declared invalid under the Sunday laws has the burden of proving that it comes within the terms of the statutory prohibitions.

Subject to the rules of evidence applicable to civil actions generally, the party who desires to have an act or instrument declared invalid because entered into on Sunday has been held to have the burden of showing that it comes within the terms of the statutory prohibitions.²⁴ In order to sustain the burden of showing that the instrument or transaction comes within the statute defendant must show, by a fair preponderance of the evidence, that the instrument was fully executed or the transaction completed on Sunday, as the court will not assume that it was.²⁵ It has been held that an instrument dated on Sunday is to be presumed to have been delivered on that date, and the burden is on the party asserting its validity to show that it was in fact executed on a day other than Sunday;²⁶ and, conversely, an instrument dated on a weekday is presumed to have been delivered on that day, and the party asserting Sunday execution has the burden of proving it;²⁷ but, according to other authority, even though dated on Sunday, the presumption of validity is strong enough that the note will be presumed to have been delivered on a weekday in the absence of evidence to the contrary.²⁸

Where defendant voluntarily, although unneces-

sarily, pleads that the transactions claimed to be invalid because performed on Sunday were not within exceptions to Sunday regulations, it has been held that he thereby assumes the burden of proving that fact.²⁹ According to some authority it has been held that it will not be presumed, where nothing appears to that effect, that a particular transaction sued on was outside of the exceptions specified in the statute,³⁰ or that it was consummated on Sunday so as to make it a Sunday contract or transaction;³¹ but other authority exists holding that it is not to be presumed that a contract or transaction fell within the scope of the exceptions.³²

There has been held to be no presumption that an indorsee of a Sunday note took it without notice of the illegal transaction.³³ It will be presumed where a contract contemplating Sunday performance is silent as to the place of performance that it contemplates performance in the place where it is made;³⁴ but, where the language of the contract is sufficient to sustain it, a presumption exists that the contract is to be performed where the contemplated Sunday acts are legal.³⁵ A statutory presumption in favor of validity is overcome when the party suing on a Sunday transaction by the allegations of his petition causes the invalidity to appear.³⁶ No inference that a written instrument contemplated or required illegal Sunday performance arises from a condition in such instrument whereby it may be avoided in the event of stricter local enforcement of the Sunday laws.³⁷

b. Admissibility

The rules governing admissibility of evidence in civil actions generally apply in actions on contracts or transactions claimed to be illegal under Sunday laws.

24. Mich.—Phillips v. Phillips, 47 N. W. 110, 83 Mich. 259.
60 C.J. p 1128 note 38.

25. Ind.—Conrad v. Kinzie, 4 N.E. 863, 105 Ind. 281.
60 C.J. p 1128 note 40.

26. Ala.—C. D. Chapman & Co. v. Cullifer, 120 So. 297, 23 Ala.App. 31.
60 C.J. p 1128 note 41.

27. Ala.—Corpus Juris cited in Jemison v. Howell, 161 So. 806, 807, 230 Ala. 423, 99 A.L.R. 1511.
Mich.—Goldberg v. Mitchell, 34 N.W. 2d 515, 322 Mich. 662.
60 C.J. p 1128 note 42.

Delivery

Where note and mortgage were

signed by mortgagor and wife on Sunday but such instruments, together with acknowledgment, bore date of secular day and there was no proof that they were not delivered on a secular day, instruments could not be deemed invalid under Sunday statute.—Jemison v. Howell, 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511.

28. Mass.—Banca Italiana Di Sconto v. Columbia Counter Co., 148 N.E. 105, 252 Mass. 552.

29. Ind.—Krauss v. Weaver, 130 N. E. 800, 191 Ind. 133.

30. Tex.—Texas Employers' Ins. Ass'n v. Henson, Civ.App., 31 S. W.2d 669.

60 C.J. p 1128 note 45.

31. Pa.—Toll v. Crimean, 13 Montg. Co. 33.

60 C.J. p 1128 note 46.

32. Ga.—Western Union Tel. Co. v. Hutcheson, 18 S.E. 297, 91 Ga. 252.
60 C.J. p 1128 note 47.

33. N.H.—Allen v. Deming, 14 N.H. 133, 40 Am.D. 179.

34. N.Y.—Albera v. Sciaretti, 131 N. Y.S. 889, 72 Misc. 496.

35. Pa.—Zenatello v. Hammerstein, 79 A. 922, 231 Pa. 56.

36. Me.—Bar Harbor First Nat. Bank v. Kingsley, 24 A. 794, 84 Me. 111.

37. Ill.—Hoefeld v. Ozello, 213 Ill. App. 152, affirmed 125 N.E. 5, 290 Ill. 147.

The rules with respect to the admissibility of evidence in civil actions generally, and more particularly the rules with reference to the admissibility of evidence of illegality of contracts, are applicable to actions on Sunday contracts or transactions claimed to be illegal under the Sunday laws.³⁸ As between the original parties, evidence is admissible to show that an instrument, although purporting to be of a different date, was executed on Sunday,³⁹ and vice versa.⁴⁰ Where evidence is admitted with respect to transactions on Sunday but later is withdrawn by the court from the consideration of the jury in determining whether a cause of action exists, the admission of such evidence affords no basis for complaint.⁴¹

c. Weight and Sufficiency

The weight and sufficiency of evidence to show illegality or validity of acts or transactions on a Sunday are governed by the general rules of evidence in civil actions.

The rules governing the weight and sufficiency of evidence in civil actions generally apply to actions on contracts and transactions asserted to be unenforceable by operation of the Sunday laws.⁴² Clear proof of violation of the Sunday laws must be produced by the party charged with the burden of establishing the invalidity of the transaction.⁴³ Matters capable of proof should be shown by satisfactory evidence and not left to mere inference.⁴⁴ Where the complaint alleges and the pleading admits delivery of an instrument on a secular day, the state of the pleadings renders it necessary that

the proof of Sunday execution, if that is claimed, be so clear as to leave no room for doubt.⁴⁵

§ 38. — Trial, Judgment and Review

In actions involving contracts executed or to be performed on Sunday, questions of fact ordinarily are for the jury under proper instructions by the court.

In the same manner and to the same extent as in other civil actions, in actions on or involving Sunday contracts or transactions or contracts contemplating Sunday performance, questions of law are ordinarily for the court and questions of fact for the jury.⁴⁶ For instance, it has been held to be within the province of the jury to determine whether transactions were closed on Sunday,⁴⁷ whether the subsequent conduct of the parties sufficiently makes out a ratification⁴⁸ or new contract,⁴⁹ and whether a person to whom an instrument was delivered on Sunday was plaintiff's or defendant's agent.⁵⁰

As in other cases, where the question of the existence of an offense involves the determination of whether particular acts done on Sunday constitute matter of necessity or charity, its determination is ordinarily a question of fact for the jury,⁵¹ but may be a question of law for the court.⁵² The weight of the evidence is for the jury and not for the court.⁵³ Where there is evidence tending to show a renewal or ratification on a subsequent day sufficient to cause the existence of an enforceable obligation, it is improper to nonsuit plaintiff.⁵⁴

38. Ala.—Hauerwas v. Goodloe, 13 So. 567, 101 Ala. 162. 60 C.J. p 1128 note 55.

39. Ala.—Burns v. Moore, 76 Ala. 339, 52 Am.R. 332.

Me.—Cumberland Bank v. Mayberry, 48 Me. 198.

40. Mass.—American Mut. Liability Ins. Co. v. Condon, 183 N.E. 106, 280 Mass. 517. 60 C.J. p 1129 note 57.

41. Mich.—Wheeler v. Jenison, 79 N. W. 643, 120 Mich. 422.

42. Miss.—Campbell v. State Highway Commission, 54 So.2d 654, 215 Miss. 437. 60 C.J. p 1129 note 61.

Evidence held sufficient

(1) To show that contract for the sale of real estate dated Nov. 25, 1945, was signed on a Sunday.—Goldberg v. Mitchell, 34 N.W.2d 515, 322 Mich. 662.

(2) To sustain finding that right of way easement, executed by landowner on Sunday, was not ratified on week day, rendering easement "void."—Ark-La Electric Co-op. v. Randall, 169 S.W.2d 874, 205 Ark. 646.

(3) To sustain finding against defendant's claim that note, although dated on a Monday, was nevertheless negotiated on Sunday.—Goodson v. Prothro, 168 S.W.2d 1113, 205 Ark. XIX.

(4) Other evidence see 60 C.J. p 1129 note 61 [b].

43. N.Y.—Eberle v. Mehrbach, 55 N. Y. 682.

44. N.Y.—Miller v. Roessler, 4 E.D. Smith 234.

45. Wis.—Zielica v. Worzalla, 156 N. W. 623, 162 Wis. 603.

46. N.H.—Thompson v. Williams, 58 N.H. 248. 60 C.J. p 1129 note 67 [a].

47. Miss.—Stamps v. Frost, 164 So. 584, 174 Miss. 325. 60 C.J. p 1130 note 68.

48. Miss.—W. F. Moody & Co. v. Boyle Gin Co., 177 So. 654, 180 Miss. 523. 60 C.J. p 1130 note 69.

49. Mich.—Winfield v. Dodge, 7 N. W. 906, 45 Mich. 355, 40 Am.R. 476.

50. Conn.—Cameron v. Peck, 37 Conn. 555.

51. Ga.—Postal Telegraph-Cable Co. v. Kaler, 16 S.E.2d 77, 65 Ga.App. 641. 60 C.J. p 1130 note 73.

52. Ala.—Burns v. Moore, 76 Ala. 339, 52 Am.R. 332. 60 C.J. p 1130 note 74.

53. Tenn.—Cook v. Carmichael, 3 Tenn.Civ.A. 477. 60 C.J. p 1130 note 75.

54. Ga.—Smith Motor Car Co. v. Goddard, 156 S.E. 724, 42 Ga.App. 560.

Similarly, the propriety and correctness of instructions are to be determined by the rules generally applicable to civil cases.⁵⁵ An instruction that no recovery may be had on Sunday agreements is justified by evidence tending to prove that the agreement in question was made on Sunday.⁵⁶ If an instruction, considered as a whole, is correct, the fact that certain isolated parts, withdrawn from the context, misstate the law is not fatal,⁵⁷ particularly where such misstatement is by inference only and under the facts developed could have no possible misleading tendency.⁵⁸

Although they are correct in the abstract, if instructions as given, under the particular facts, tend to mislead the jury and to prejudice one of the parties to the suit, it is improper to give them;⁵⁹ and a refusal to give such instructions, when requested, is proper.⁶⁰ Where the evidence is in conflict on the issue of illegality, the general affirmative charge should not be given;⁶¹ but an instruction to disregard testimony of Sunday execution, unsupported by the pleadings, has been held proper.⁶² If the court undertakes to instruct with respect to Sunday laws, although the issue is not raised by the pleadings, it must instruct completely

and correctly concerning the effect of such laws.^{62½} An instruction with respect to the invalidity of Sunday contracts is erroneous where it omits to instruct with reference to an issue of ratification or renewal which has been properly and sufficiently raised.⁶³

A general verdict of the jury against defendant is a sufficient finding that the particular contract involved was within the exceptions stated in the Sunday laws, that issue having been properly raised by the pleadings.⁶⁴ A finding that an insurance policy was mailed on Saturday does not require a conclusion that it was issued on Sunday.⁶⁵

Special verdict, being found for defendant on the issue of illegal Sunday execution, goes to defeat the whole action and renders it unnecessary that any findings be made with respect to other defenses submitted.⁶⁶

Motion to modify judgment. Where the matter of illegality because of the Sunday laws is raised for the first time by a motion to modify the judgment, after the time to move for a new trial has gone by, the court is not obliged to reopen the case so as to let in the defense.⁶⁷

B. INJURIES RECEIVED OR INFLICTED ON SUNDAY

§ 39. Resultant Rights and Liabilities

Generally, one who is injured or damaged while violating a Sunday law is not barred from recovery by such illegal conduct.

By the great weight of authority, it is held that a person injured or damaged while violating a Sunday law is not barred from recovery by such illegal conduct on his part, since such violation is

not the efficient or proximate cause of the injury, or an essential element of the cause of action, and the time when the injury was inflicted is only incident to, and not the foundation of, the action.⁶⁸ However, in a few jurisdictions, it has been held that no liability attaches for injuries to person or property received by one who is violating the Sabbath laws, and as a consequence of his conduct, since his own illegal act necessarily contributes to

55. Ky.—Hofgesang v. Silver, 25 S. W.2d 945, 232 Ky. 503, 68 A.L.R. 1481.

60 C.J. p 1130 note 77.

56. Minn.—Hanchett v. Jordan, 45 N.W. 617, 43 Minn. 149.

57. Ind.—Conrad v. Kinzie, 4 N.E. 863, 105 Ind. 281.

58. Neb.—Pope v. Linn, 50 Me. 83—Horacek v. Keebler, 5 Neb. 355. 60 C.J. p 1130 note 80.

59. Miss.—Foster v. Wooten, 7 So. 501, 67 Miss. 540. 60 C.J. p 1130 note 81.

60. Mass.—Shepley v. Henry Siegel Co., 88 N.E. 1095, 203 Mass. 43.

61. Ala.—J. R. Watkins Co. v. Pace, 101 So. 758, 212 Ala. 63. 60 C.J. p 1130 note 83.

62. Iowa.—Reich v. Bolch, 27 N.W. 507, 68 Iowa 526.

62½. Mass.—Kryzminski v. Callahan, 100 N.E. 335, 213 Mass. 207, 43 L.R.A., N.S., 140.

63. Ky.—Lee v. Harper, 6 Ky.Op. 416.

64. Ind.—Western Union Telegraph Co. v. Fulling, 96 N.E. 967, 49 Ind. App. 172.

65. Mass.—American Mut. Liability Ins. Co. v. Condon, 183 N.E. 106, 280 Mass. 517.

66. Ark.—Tucker v. West, 29 Ark. 386.

67. Kan.—Mosing v. Bankers' Oil Co., 212 P. 115, 112 Kan. 575.

68. Ga.—Simowitz v. Register, 3 S. E.2d 231, 60 Ga.App. 180.

Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.

Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803 —Whitley v. Holmes, 144 So. 48, 164 Miss. 423.

60 C.J. p 1131 note 98.

Traveler on Sunday

N.H.—Wentworth v. Jefferson, 60 N. H. 158. 29 C.J. p 697 note 13.

the injury;⁶⁹ but, at least in some of the jurisdictions where this rule was formerly followed, it has since been superseded by positive statutory enactment providing otherwise;⁷⁰ and, even in the absence of such statute, the illegal conduct did not prevent recovery for injuries which the act being done had no tendency to produce, and as to which it was a mere condition and not a contributory cause.⁷¹

Under the majority rule, the existence of a contract between plaintiff and defendant, in pursuance of which plaintiff's illegal acts were being done, does not prevent a recovery for defendant's breach of duty causing injury independently of the contract;⁷² furthermore, persons jointly engaged in a violation of the Sunday laws are not prevented by their joint unlawful enterprise from recovering from those with whom they are acting where the other elements for recovery exist.⁷³ In some jurisdictions, where the majority rule prevails, it has been held that a person engaged in employment or other conduct on the Sabbath, in violation of a statute, is not liable for injuries inflicted by him without other fault or negligence on his part;⁷⁴ but, under the minority rule, a result to the contrary has been reached,⁷⁵ and this is true in some jurisdictions which follow the majority rule with respect to its effect as a defense.⁷⁶ Where the action engaged in, at the time of injury, by the person injured or inflicting the injury is not unlawful under the Sunday statutes, the rights and liabilities arising therefrom are not different from those in the case of a similar injury on any other day, and the time of the injury is immaterial.⁷⁷

Clause in insurance policy. It has been held that a person injured while engaging in unlawful conduct, such as traveling or hunting on the Sabbath, cannot recover on an accident insurance policy, which expressly excepts from its operation injuries resulting from, or effected by, a violation of law;⁷⁸ but, according to other authority, such a clause does not limit recovery for injuries resulting in the course of Sunday law violations, but is designed to comprehend only acts which will avoid the risk if done at any time;⁷⁹ and if the act done is within the exceptions to the Sunday regulations, so as to be no violation, its performance is no objection to recovery.⁸⁰

Effect on other defenses. The status of persons occupying such a relationship to a common employer that they would be considered fellow servants, so as to make the fellow servant doctrine applicable as a defense, on a weekday, is not altered and their relationship and the availability of the defense are the same, although at the time of injury they are engaged in doing for the common employer acts illegal under the Sunday statutes.⁸¹ It has been held that a contractual limitation of liability is valid where the acts performed on Sunday are not in violation of the Sunday laws.⁸²

Sunday law as justification for failure to act. Where a defense is grounded on plaintiff's inaction, the defense, if otherwise sufficient, is not avoided by the fact that action, in order to have prevented the loss, would have required the doing of acts on Sunday, at least where the action, if done, would

69. Me.—Cratty v. Bangor, 57 Me. 423, 2 Am.R. 56.
60 C.J. p 1132 note 99.

Injury to traveler

Me.—Cratty v. Bangor, 57 Me. 423, 2 Am.R. 56.
29 C.J. p 697 note 15.

70. Mass.—Hall v. Smith, 185 N.E. 850, 283 Mass. 166.
60 C.J. p 1132 note 1.

Injury to traveler

Mass.—Hall v. Smith, supra.

71. Mass.—Wallace v. Merrimack River Nav., etc., Co., 134 Mass. 95, 45 Am.R. 301.
60 C.J. p 1133 note 2.

72. Ga.—Hughes v. Atlanta Steel Co., 71 S.E. 728, 136 Ga. 511, 36 L.R.A., N.S., 547, Ann.Cas.1912C 394.
60 C.J. p 1133 note 4.

73. Ga.—Hughes v. Atlanta Steel Co., supra.
60 C.J. p 1133 note 5.

74. U.S.—Morris v. Chicago, etc., R. Co., C.C.Iowa, 26 F. 22.
Iowa.—Tingle v. Chicago, etc., R. Co., 14 N.W. 320, 60 Iowa 333.

75. Mass.—Hyde Park v. Gay, 120 Mass. 589.
60 C.J. p 1133 note 7.

76. Vt.—White v. Levarn, 108 A. 564, 93 Vt. 218.
60 C.J. p 1134 note 8.

Assault by employee

The statute prohibiting ordinary employment on Sunday does not prevent manager or general manager of corporation from being an employee on Sunday with respect to employer's liability for assault.—White's Lumber & Supply Co. v. Collins, 191 So. 105, 186 Miss. 659, suggestion of er-

ror overruled 192 So. 312, 186 Miss. 659.

77. Mich.—Sharp v. Evergreen Tp., 35 N.W. 67, 67 Mich. 443.
60 C.J. p 1134 note 9.

78. Vt.—Duran v. Standard L., etc., Ins. Co., 22 A. 530, 63 Vt. 437, 25 Am.S.R. 773, 13 L.R.A. 637.

79. Iowa.—Matthes v. Imperial Accident Assoc., 81 N.W. 484, 110 Iowa 223.

80. Iowa.—Matthes v. Imperial Accident Assoc., supra.
Me.—Eaton v. Atlas Accident Ins. Co., 36 A. 1048, 89 Me. 570.
60 C.J. p 1134 note 12.

81. Tex.—Houston, etc., R. Co. v. Rider, 62 Tex. 267.
60 C.J. p 1134 note 13.

82. N.Y.—Shelton v. Merchants' Dispatch Transp. Co., 59 N.Y. 258, 48 How.Pr. 257.

not have required any violation of the Sunday laws.⁸³

§ 40. Actions

The general rules governing actions for injury or damage apply in actions for injuries or damage received or inflicted on Sunday.

As in other civil actions, where the complaint for injuries received on a Sunday sets out a cause of action a general demurrer thereto will not be sustained.⁸⁴

In jurisdictions holding the illegality of plaintiff's conduct in violation of a Sunday law a sufficient defense, it has been held that the defense need not be specially raised but is available under a general denial of a petition alleging that plaintiff was in the exercise of due care when injured.⁸⁵ Where a violation of the Sunday statute precludes a person from recovering for injuries received on that day, there is authority holding that the burden of proof is on him to show that the work in which he was engaged was a work of necessity or charity,⁸⁶ and numerous decisions exist holding the evidence in particular cases to be sufficient⁸⁷ or insufficient⁸⁸ for that purpose.

According to other authority, however, where defendant seeks to defend on the ground that plaintiff was, at the time of the injury, engaged in illegal conduct, the fact that the conduct in question was illegal must be affirmatively established by the party asserting it in defense.⁸⁹ The question of whether plaintiff was engaged in an act of necessity or charity, when it becomes an issue in actions

of this nature, is ordinarily for the jury to determine;⁹⁰ but, where there is no evidence sufficient to warrant a finding that the circumstances make out a case of necessity or charity, the matter should be determined by the court and the instructions framed accordingly.⁹¹ Similarly, it is for the jury to determine, when material, at what hour of the day the injury occurred.⁹²

In jurisdictions where the illegality defeats the action, refusal to instruct on the matter, where the issue is properly raised by the pleadings and the evidence, is error;⁹³ but the contrary is true in jurisdictions where that circumstance is insufficient as a defense;⁹⁴ and the trial court should not submit to the jury the question whether the unlawful working on Sunday was the proximate cause of the injury, but should instruct it that it constitutes no defense.⁹⁵

In states where the majority rule, of the immateriality of the Sunday violation as a defense to actions for injuries, is followed, pleas or answers relying on such matter as a defense have been held subject to demurrer;⁹⁶ and, where such violation is not of itself sufficient to create liability for injuries, a petition relying on it as the sole basis of recovery is demurrable.⁹⁷ Where even illegal Sunday conduct is not a matter of defense, the question whether the particular acts being engaged in at the time of the injury were within the exceptions of the Sunday laws is immaterial.⁹⁸

What law governs. The question of the effect of illegal Sunday action at the time of injury is to be governed by the law of the place where the injury occurred.⁹⁹

83. N.Y.—*Jones v. Norwich, etc., Transp. Co.*, 50 Barb. 193. 60 C.J. p 1134 note 16.

84. Ga.—*Simowitz v. Register*, 3 S. E.2d 231, 60 Ga.App. 180.

85. Mass.—*Jones v. Andover*, 10 Allen 18.

86. Me.—*Hinckley v. Penobscot*, 42 Me. 89.

Mass.—*Bosworth v. Swansey*, 10 Metc. 363, 43 Am.D. 441.

87. Me.—*Cleveland v. Bangor*, 32 A. 892, 87 Me. 259, 47 Am.S.R. 326. 60 C.J. p 1135 note 19.

88. Mass.—*Read v. Boston, etc., R. Co.*, 4 N.E. 227, 140 Mass. 199. 60 C.J. p 1135 note 20.

89. N.Y.—*Landers v. Staten Island R. Co.*, 13 Abb.Pr.N.S., 338, reversed on other grounds 53 N.Y. 450, 14 Abb.Pr.N.S., 346.

90. Me.—*Sullivan v. Maine Central R. Co.*, 19 A. 169, 82 Me. 196. 60 C.J. p 1135 note 22.

91. Mass.—*Day v. Highland St. R. Co.*, 135 Mass. 113, 46 Am.R. 447. 60 C.J. p 1135 note 23.

92. Me.—*Bryant v. Biddeford*, 39 Me. 193.

93. Mass.—*Lyons v. Desotelle*, 124 Mass. 387.

94. Mich.—*Van Auken v. Chicago, etc., R. Co.*, 55 N.W. 971, 96 Mich. 307, 22 L.R.A. 33.

95. Vt.—*Hoadley v. International Paper Co.*, 47 A. 169, 72 Vt. 79.

96. Iowa.—*Gross v. Miller*, 61 N.W. 385, 93 Iowa 72, 26 L.R.A. 605.

Vt.—*Boyden v. Fitchburg, R. Co.*, 39 A. 771, 70 Vt. 125.

97. Iowa.—*Tingle v. Chicago, etc., R. Co.*, 14 N.W. 320, 60 Iowa 333.

98. N.J.—*Delaware, etc., R. Co. v. Trautwein*, 19 A. 178, 52 N.J.Law 169, 19 Am.S.R. 442, 7 L.R.A. 435. 60 C.J. p 1135 note 30.

99. N.H.—*Beacham v. Portsmouth Bridge*, 40 A. 1066, 68 N.H. 382, 73 Am.S.R. 607. 60 C.J. p 1135 note 31.

IV. JUDICIAL AND OFFICIAL ACTS AND PROCEEDINGS

§ 41. In General

It is a generally recognized rule that at common law Sunday is dies non juridicus; hence, no judicial act or proceeding could be done or had on that day; in some jurisdictions statutes have reaffirmed the common-law rule in whole or in part.

Although it has been held that common law arising from usage in contradistinction to derivation from the English common-law system does not make Sunday a nonjudicial day,¹ it is the generally recognized rule that at common law Sunday is dies non juridicus,² and that, hence, no judicial act or proceeding could be done or had on that day.³ However, the prohibition of the common law extends only to judicial acts, and not to acts performed in a cause which were ministerial in their nature.⁴ In several jurisdictions statutes have been passed which reaffirm the common-law rule, in whole or in part,⁵ but exceptions to the rule have been established by statute and limitations by common law, so that the rule can no longer be universally accepted without qualification, discussed infra §§ 42-55.

Effect on term. Whether or not a term fixed for a period the last day of which falls on Sunday includes the final Sunday within the term is treated

in Courts § 151 b, and the question whether intervening Sundays are to be included in computations relative to the time of the term of court is discussed in the C.J.S. title Time § 14, also 62 C.J. p 1009 notes 3, 4.

§ 42. Civil Process

- a. In general
- b. Service

a. In General

In the absence of permissive statute it is generally held that the issuance of process on Sunday is void, although there is some authority to the contrary. Generally a process returnable on Sunday is void.

There is some authority holding that, although the award of judicial writs is a judicial act, void if done on Sunday, the issuing of original process is merely ministerial and valid in the absence of a statutory provision forbidding it,⁶ but there is more numerous authority holding the issuance of process to be a judicial act, and, hence, of such a character that its being done on Sunday is void at common law.⁷ Where the rule forbidding and avoiding issuance of process on Sunday has been affirmed or adopted by statute, process within the terms of

1. Ohio.—State v. McElhinney, 100 N.E.2d 733, 88 Ohio App. 431.

Judicial proceedings and acts not void

As a general rule judicial proceedings and judicial acts performed on Sunday are not void, but such acts may be voidable where they violate statutory prohibitions against performance of common labor on Sunday or which would outrage customs of community.—State v. McElhinney, supra.

2. Ala.—Shade v. Shade, 39 So.2d 785, 252 Ala. 134—Jemison v. Howell, 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511.

Ga.—Hayden v. Mitchell, 30 S.E. 287, 103 Ga. 446—Blizzard v. Blizzard, 8 S.E.2d 679, 62 Ga.App. 244.

Hawaii.—Peabody v. Paakaua, 24 Hawaii 250.

Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.

Pa.—Corpus Juris cited in City of New Castle v. Casacchia, 58 Pa. Dist. & Co. 184, 187, 5 Lawrence L.J. 224, 95 Pittsb.Leg.J. 56.

Tex.—Texas State Board of Dental Examiners v. Fieldsmith, Civ.App.,

242 S.W.2d 213, error refused no reversible error.

W.Va.—Corpus Juris cited in Means v. Kidd, 67 S.E.2d 740, 744—Corpus Juris cited in State ex rel. Staley v. Hereford, 45 S.E.2d 738, 740, 131 W.Va. 84.

60 C.J. p 1135 note 33.

Sunday prohibition reached only the courts at common law.—Jemison v. Howard, 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511—Reid v. State, 53 Ala. 402, 25 Am.R. 627.

3. Hawaii.—Peabody v. Paakaua, 24 Hawaii 250.

Pa.—Corpus Juris cited in City of New Castle v. Casacchia, 58 Pa. Dist. & Co. 184, 187, 5 Lawrence L.J. 224, 95 Pittsb.Leg.J. 56.

Tex.—Price v. State, Cr., 252 S.W.2d 167—Guerrera v. State, 125 S.W.2d 595, 136 Tex.Cr. 411—Bloss v. State, 75 S.W.2d 694, 127 Tex.Cr. 216.

W.Va.—Corpus Juris cited in Means v. Kidd, 67 S.E.2d 740, 744—Corpus Juris cited in State ex rel. Staley v. Hereford, 45 S.E.2d 738, 740, 131 W.Va. 84.

60 C.J. p 1136 note 34.

4. Ala.—Shade v. Shade, 39 So.2d 785, 252 Ala. 134.

Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.

Pa.—Corpus Juris cited in City of New Castle v. Casacchia, 58 Pa. Dist. & Co. 184, 187, 5 Lawrence L.J. 224, 95 Pittsb.Leg.J. 56.

Tex.—Texas State Board of Dental Examiners v. Fieldsmith, Civ.App., 242 S.W.2d 213, error refused no reversible error.

60 C.J. p 1137 note 35.

5. N.Y.—People v. Ramsey, 217 N.Y.S. 799, 128 Misc. 39.

60 C.J. p 1137 notes 36, 37 [a].

Power of legislature

(1) The legislature has the power of declaring Sunday to be dies juridicus.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408—Langabier v. Fairbury, etc., R. Co., 64 Ill. 243, 16 Am.R. 550—60 C.J. p 1137 note 37 [b].

6. N.H.—Clough v. Shepherd, 31 N.H. 490.

60 C.J. p 1137 note 40.

7. N.Y.—Van Vechten v. Paddock, 12 Johns. 178, 7 Am.D. 303.

60 C.J. p 1137 note 41.

the prohibitions when issued on that day is a nullity.⁸ Express exceptions in statutes forbidding service of process on Sunday have been held not alone applicable to service of process but are equally exceptions to the common-law rule forbidding issuance of process on Sunday.⁹ Since, as a general rule, courts may not sit on Sunday, a process or notice returnable on that day is void, and no proceedings may be had thereon.¹⁰

Injunction. A writ of injunction may issue on Sunday in cases of urgent necessity notwithstanding the general invalidity of process issued on that day.¹¹ Where statutes specifically authorize the granting of writs of injunction on Sunday under certain conditions, it is for the judge before whom application is made to determine the sufficiency of the facts and the affidavit to bring the case within the statutory conditions.¹²

Arrest. An arrest in a civil cause made on Sun-

day was good at common law,¹³ but has been held bad under statutes forbidding the service on Sunday of the process on which the arrest is based,¹⁴ and in jurisdictions adopting as a part of their common law the doctrine that such service is void,¹⁵ and, of course, where statutes specifically prohibit and avoid arrest on that day.¹⁶

b. Service

Generally the service of process on Sunday is valid in the absence of statutes forbidding such service.

The service of process has been held to be a merely ministerial act, being thus of such a character that Sunday service is not affected by the common-law status of Sunday as a nonjudicial day.¹⁷ Under the statutes of many jurisdictions, however, the service of process on Sunday is specially forbidden,¹⁸ and such service as is within the scope of their provisions is of course illegal and void.¹⁹ Moreover, in other jurisdictions, the pro-

8. Tenn.—Helm v. Rodgers, 5 Humphr. 105.

9. Ala.—Haynes v. Sledge, 2 Port. 530, 27 Am.D. 665.

10. Fla.—Corpus Juris cited in Brooks v. Miami Bank & Trust Co., 155 So. 157, 160, 115 Fla. 141. 60 C.J. p 1139 note 56.

In absence of contrary statutory provisions, law does not contemplate that judicial process, writs, or notices be made returnable on Sundays, since Sunday is nonjudicial day.—Brooks v. Miami Bank & Trust Co., 155 So. 157, 115 Fla. 141.

In New York

(1) It has been held that process or notice bad for that reason is so utterly void that it is incapable of amendment.—Taft v. Delsener, 25 N.Y.S.2d 582, 175 Misc. 894—State Bank v. Spence, 76 N.Y.S. 984, 37 Misc. 854.

(2) However, it has been held that, while it is irregular to make any process returnable on Sunday, this is a mere technical objection; and, in an ordinary case, the court would permit an amendment of the process to promote the purposes of justice.—Boyd v. Vanderkemp, 1 Barb. Ch. 273.

11. Ill.—Langabier v. Fairbury, etc., R. Co., 64 Ill. 243, 16 Am.R. 550.

12. Ill.—People v. McWeeney, 102 N.E. 233, 259 Ill. 161, Ann.Cas.1916B 34.

13. Ohio.—Hastings v. Columbus, 42 Ohio St. 585.

14. N.J.—Van Bueren v. Board of Com'rs of City of Wildwood, 153 A. 260, 9 N.J.Misc. 187. 60 C.J. p 1139 note 61.

15. Alaska.—Valentine v. Roberts, 1 Alaska 536.

16. N.C.—White v. Morris, 12 S.E. 80, 107 N.C. 92.

17. Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.

W.Va.—Corpus Juris cited in State ex rel. Staley v. Hereford, 45 S.E. 2d 738, 740, 131 W.Va. 84. 60 C.J. p 1138 note 46.

Summons and complaint

Cal.—Strange v. Coryell, 40 P.2d 289, 3 Cal.App.2d 635.

18. Okl.—Jean v. State, 6 P.2d 1075, 53 Okl.Cr. 34.

W.Va.—Means v. Kidd, 67 S.E.2d 740. 60 C.J. p 1138 note 48.

Delivery of "citation" to sheriff on Sunday for service on defendant is no part of the service of process and does not invalidate the proceedings, under statutes prohibitory of Sunday service.—Martin v. Hawkins, Tex.Civ. App., 238 S.W. 991.

19. N.Y.—Taft v. Delsener, 25 N.Y.S.2d 582, 175 Misc. 894.

N.C.—Mintz v. Frink, 6 S.E.2d 804, 217 N.C. 101.

Pa.—Vichosky v. Boucher, 60 A.2d 381, 162 Pa.Super. 598.

Tex.—Bostwick v. Allen, Civ.App., 189 S.W.2d 448.

W.Va.—Corpus Juris cited in State

ex rel. Staley v. Hereford, 45 S.E.2d 738, 740, 131 W.Va. 84. 60 C.J. p 1138 note 48.

Service of writ of ne exeat

N.J.—Jewett v. Bowman, 27 N.J.Eq. 275.

Jurisdiction

Where affidavit of service of summons showed that summons was served on a Sunday, service was void and could not give jurisdiction to the court.—Taft v. Delsener, 25 N.Y.S.2d 582, 175 Misc. 894.

In Montana

(1) Under statute providing that no court must be open, nor must any judicial business be transacted, on Sunday with certain exceptions, but injunctions, writs of prohibition, and habeas corpus may be issued and served on any day, it has been assumed that the personal service of other process than that named was forbidden as the transaction of judicial business, and, as case involved service by publication, the court stated that it would be pointless to discuss validity of personal service of process on Sunday under either common law or statutes and decisions cited, or to express an opinion whether personal service of process is judicial or merely a ministerial act or business.—State ex rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County, 99 P.2d 211, 213, 110 Mont. 61.

(2) With respect to the law prior to the enactment of such statute, the court stated: "Prior to that time personal service of process on Sunday

visions of the general Sunday laws, relative to acts and transactions generally without specific reference to the service of process, have been held extensive enough to include such service within their prohibitions so as to avoid it;²⁰ but elsewhere statutes of a similar character have been held not to include it within the scope of their provisions, so that the time of service does not impair its legality and validity;²¹ and, of course, where statutes adopt and reaffirm the rule of the common law, Sunday service of process or summons is legal.²² Some of the statutes forbidding the service of process on Sunday, either directly or as included in the general Sunday regulations, make exceptions to permit service in certain cases of urgent necessity;²³ and service of process in the cases specified is valid, although made on Sunday;²⁴ but service in cases of urgent necessity is regarded no differently from that in other cases generally where the statute specially referring, or the general statute held applica-

ble, to service of civil process makes no exceptions under which the service can be brought.²⁵ Where a statutory prohibition on Sunday service embraces only a part of the day, service at any time on Sunday which is not so included is valid to the same extent as though made on any other day.²⁶ Statutes limiting or taking away merely the power of arrest on Sunday do not affect the service of civil process on that day.²⁷

§ 43. — Attachment; Garnishment; Bail Process

Unless authorized by statute a writ of attachment cannot issue or levy be made on Sunday where the issuance or levy is a judicial act. Garnishment proceedings may fall within a statutory exception with respect to attachment proceedings.

Unless authorized by statute²⁸ a writ of attachment cannot issue or levy be made on Sunday where the issuance or levy is a judicial act.²⁹ Where prop-

had been held void in Montana under the common law, as the transaction of judicial business, *Hausworth v. Sullivan*, 9 P. 798, 6 Mont. 203. Later, by way of dictum in *Burke v. Inter-State, S. & L. Ass'n*, 64 P. 879, 25 Mont. 315, 87 Am.S.R. 416, and in *State ex rel. Hay v. Alderson*, 142 P. 210, 49 Mont. 387, Ann.Cas.1916B 39, service of process on Sunday was spoken of as voidable rather than void.—*State ex rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County*, supra—60 C.J. p 1138 note 48 [g].

(3) However, publication of summons on Sunday was held not judicial act or business under such statute, as discussed *infra* § 47.

20. Ga.—*Blizzard v. Blizzard*, 8 S.E. 2d 679, 62 Ga.App. 244. 60 C.J. p 1138 note 49.

21. Ohio.—*Hastings v. Columbus*, 42 Ohio St. 585. 60 C.J. p 1139 note 50.

22. Ohio.—*Stapleton v. Reynolds*, 5 Ohio Dec., Reprint, 374, 5 Am.L. Rec. 242.

Statutory authorization

A summons may be served on Sunday under authority of the statute providing that summons may be served at any time on or before return day mentioned therein and of supreme court rule using same language; and a presumption exists that the legislature and supreme court were aware of the distinction between what constituted judicial acts, which could not be performed on Sunday, and ministerial acts

which could be performed on Sunday when statutes and rules as to service of summons were being drawn up, and such statutes and rules cannot have read into them an exception not contained in the statute, and not recognized at common law.—*Pedersen v. Logan Square State & Savings Bank*, 36 N.E.2d 732, 377 Ill. 408.

23. Ark.—*Waldron Mfg. Corp. v. Kincannon*, 124 S.W.2d 968, 197 Ark. 804. 60 C.J. p 1139 note 52.

24. Ky.—*Chaney v. Stacy*, 57 S.W. 2d 530, 247 Ky. 520. 60 C.J. p 1139 note 52.

Requisites

Under statute authorizing service of process on Sunday, only on showing of belief that process cannot be executed after such holiday, legislature intended to permit service of process on Sunday only on showing that process cannot be had anywhere within state after such Sunday.—*Waldron Mfg. Corp. v. Kincannon*, 124 S.W.2d 968, 197 Ark. 804.

Affidavit respecting necessity

(1) Affidavit by plaintiff's attorney stating belief that service could not be had on defendant in southern district of Logan County on any other day was insufficient under statute to authorize service of summons on Sunday on belief that service could not be had thereafter, since it did not show that service could not be had elsewhere in the state.—*Waldron Mfg. Corp. v. Kincannon*, supra.

(2) Other affidavits see 60 C.J. p 1139 note 52 [a].

Evidence held sufficient

Evidence on motion to quash was held sufficient to show that service of summons on Sunday was authorized on ground of belief that process could not be executed thereafter.—*Chaney v. Stacy*, 57 S.W.2d 530, 247 Ky. 520.

25. Ala.—*Cotton v. Huey*, 4 Ala. 56. 60 C.J. p 1139 note 53.

26. Conn.—*Fox v. Abel*, 2 Conn. 541.

27. Ohio.—*Hastings v. Columbus*, 42 Ohio St. 585—*Stapleton v. Reynolds*, 5 Ohio Dec., Reprint, 374, 5 Am.L.Rec. 242.

28. Ga.—*Sloan v. Smith*, 116 S.E. 200, 29 Ga.App. 591. 6 C.J. p 179 note 29.

Requisites of affidavit

(1) Where existing facts authorized issuance of attachment on Sunday under statute, but required affidavit was not made, the omission could be supplied by amendment of the affidavit under statutory provisions.—*Sloan v. Smith*, supra.

(2) Other affidavits see 6 C.J. p 179 note 29 [a].

29. Kan.—*Morris v. Shew*, 29 Kan. 661.

Okl.—*Atoka Milling Co. v. Groomer*, 268 P. 208, 131 Okl. 58—*Emert v. Groomer*, 268 P. 204, 131 Okl. 174. 6 C.J. p 179 note 30.

Completion of levy on Sunday

Under the Vermont statute which prohibits the service of process between the setting of the sun on Saturday and midnight on Sunday, it has been held that, if the service is

erty has been wrongfully taken into possession of an officer under an attachment on Sunday, levies by him of other writs on the following Monday on the property while still in his possession are not absolutely void.³⁰ Where a statute makes an exception with respect to attachment proceedings on Sunday, it has been held that garnishment proceedings may fall within the exception.³¹ Bail trover process may not be executed on Sunday,³² and the execution of such process on Sunday is not authorized by an affidavit which adds nothing to the essential averment of the affidavit required by statute for bail trover generally.³³ The arrest of the principal by the surety in a bail bond given in a civil case may be made on a Sunday.³⁴

§ 44. — Execution or Final Process

There is conflicting authority as to the validity of the service or execution of final process on Sunday.

Final process, it has been held, is included within the prohibitions of statutes forbidding service or execution of process as fully as are original and mesne processes.³⁵ On the other hand, it has been held that a statute providing that no civil suit shall be instituted nor process be had in any suit on Sunday does not preclude the service of mesne or final process.³⁶ Further, although a statute prohibits the service of writs or other process on Sunday it has been held inapplicable to a

case wherein property may be so frequently and swiftly moved from place to place as to evade enforcement of the law.³⁷ The return of an execution on Sunday is void.³⁸

§ 45. Criminal Process

At common law and also commonly under the Sunday statutes, warrants may issue and arrests or other appropriate execution be made on Sunday, as for treason, felony, and breach of the peace.

Although statutes with respect to issuance or service on Sunday of civil process have no application to the issuance and execution of warrants;³⁹ at common law and also commonly under the Sunday statutes, warrants may issue⁴⁰ and arrests or other appropriate execution be made on Sunday.⁴¹ In some jurisdictions, however, the issuance or service of a warrant on the Sabbath is forbidden and declared void by statute,⁴² but exception is frequently made in their provisions of cases of treason, felony, and breach of the peace, and warrants or arrests coming within the terms of such exceptions are in no way adversely affected by the statutes.⁴³ The phrase "treason, felony, and breach of the peace" has been interpreted to include all criminal or indictable offenses,⁴⁴ and, under such an interpretation, breach of the peace is not limited to an offense causing or tending to cause a public disturbance.⁴⁵ However, under a similar statute, it has been held that in order to constitute a breach

begun before sunset on Saturday evening, it may be completed afterward, the statute referring merely to the commencement of the service. — *Fifield v. Wooster*, 21 Vt. 215.

30. Kan.—*Blair v. Shew*, 24 Kan. 280.

31. Tex.—*Schow v. Gatesville City National Bank*, Civ.App., 40 S.W. 166.

32. Ga.—*Chafin v. Tumlin*, 93 S.E. 50, 20 Ga.App. 433.

33. Ga.—*Chafin v. Tumlin*, *supra*.

34. Pa.—*Broome v. Hurst*, 4 Yeates 123.
6 C.J. p 942 note 45.

35. N.C.—*Bland v. Whitfield*, 46 N.C. 122.

36. Tex.—*Houston Oil Co. of Texas v. Randolph*, Com.App., 251 S.W. 794, 28 A.L.R. 926.

37. N.C.—*Cowles v. Brittain*, 9 N.C. 204.
60 C.J. p 1140 note 71.

38. Mich.—*Peck v. Cavell*, 16 Mich. 9.

39. Me.—*State v. Conwell*, 51 A. 873, 96 Me. 172, 90 Am.S.R. 333.
60 C.J. p 1141 note 88.

40. Tex.—*Corpus Juris* cited in *Bloss v. State*, 75 S.W.2d 694, 695, 127 Tex.Cr. 216.
60 C.J. p 1140 note 73.

41. N.Y.—*People v. Hewett*, 40 N.Y. S.2d 869, 181 Misc. 1041.

Tex.—*Corpus Juris* cited in *Bloss v. State*, 75 S.W.2d 694, 695, 127 Tex.Cr. 216.
60 C.J. p 1140 note 74.
Arrest on Sunday generally see Arrest § 12.

42. D.C.—*Edwards v. District of Columbia*, Mun.App., 68 A.2d 286.
Pa.—*Commonwealth v. Johns*, 64 Pa. Dist. & Co. 35—*Commonwealth v. Beerson*, 49 Pa.Dist. & Co. 609, 32 Del.Co. 84—*Commonwealth v. McQuaid*, 45 Pa.Dist. & Co. 700, 53 Dauph.Co. 105—*Commonwealth v. Fannasy*, 30 Pa.Dist. & Co. 410, 44 Dauph.Co. 301.
60 C.J. p 1140 note 76.

43. D.C.—*Edwards v. District of Columbia*, Mun.App., 68 A.2d 286.
Pa.—*Commonwealth v. Johns*, 64 Pa. Dist. & Co. 35—*Commonwealth v. Beerson*, 49 Pa.Dist. & Co. 609, 32 Del.Co. 84—*Commonwealth v. McQuaid*, 45 Pa.Dist. & Co. 700, 53 Dauph.Co. 105—*Commonwealth v. Fannasy*, 30 Pa.Dist. & Co. 410, 44 Dauph.Co. 301.
60 C.J. p 1140 note 78.

44. D.C.—*Edwards v. District of Columbia*, Mun.App., 68 A.2d 286.
60 C.J. p 1140 note 78 [a] (1), (2).

Selling of alcoholic beverages

Keeping for sale or the selling of alcoholic beverages, without first having obtained a license to do so, was a "breach of the peace" within meaning of statute providing that no person or persons, on the Lord's day, shall serve or execute, or cause to be served, any writ, process, warrant, order, judgment, or decree except in cases of treason, felony, or "breach of the peace."—*Edwards v. District of Columbia*, *supra*.

45. D.C.—*Edwards v. District of Columbia*, *supra*.

of the peace there must be some violation of public order, disturbance of public tranquility, or some act or conduct inciting to violence or tending to provoke or incite others to break the peace,⁴⁶ and, under such an interpretation, the statute does not permit the issuance and service of a warrant for a mere misdemeanor not involving a breach of the peace.⁴⁷

Under statutes particularly authorizing and providing for issuance of warrants or arrests on Sunday, such action is valid.⁴⁸ Further, although speaking only of the execution of process as by arrest, such statutes or exceptions are sufficient to authorize the issuance of warrants for the same offenses as those for which arrest is authorized.⁴⁹

§ 46. — Search Warrants

At common law and also commonly under the Sunday statutes, a search warrant may issue and be executed on Sunday.

At common law and also commonly under the Sunday statutes, a search warrant may issue⁵⁰ and be executed⁵¹ on Sunday.⁵² However, under a

statute prohibiting the issuance of a warrant except in cases of treason, felony, and breach of the peace, it has been held that a search warrant may be issued and executed only where the warrant comes within the terms of the exceptions,⁵³ and, in a case not involving treason or a felony, or in the absence of a breach of the peace, the service of a search warrant on Sunday is illegal and void.⁵⁴

§ 47. Notices and Publications

- a. Notices
- b. Publications

a. Notices

The validity or invalidity of a notice which has been signed or served on Sunday, or which calls for the performance of an act on Sunday, depends on the circumstances and law applicable to the particular case.

The validity or invalidity of a notice which has been signed or served on Sunday, or which calls for the performance of an act on Sunday, depends on the circumstances and law applicable to the particular case.⁵⁵ Thus, the service of an ap-

46. Pa.—Commonwealth v. Fannasy, 30 Pa. Dist. & Co. 410, 44 Dauph. Co. 301.

Offenses included

(1) Assault and battery.—Commonwealth v. Johns, 64 Pa. Dist. & Co. 35.

(2) Other offenses see 60 C.J. p 1140 note 78 [a] (3), (4).

Evidence in aid of warrant to show that there has been in fact a breach of peace, although none is alleged in the warrant, has been held not to be properly receivable to sustain the arrest, since warrant and arrest, where that element is not made to appear, are absolutely void.—Commonwealth v. De Puyter, 16 Pa. Co. 589.

47. Pa.—Commonwealth v. Fannasy, 30 Pa. Dist. & Co. 410, 44 Dauph. Co. 301.—Commonwealth v. Prison Superintendent, 5 Pa. Dist. 635.—Commonwealth v. Freeman, Quar. Sess., 32 Luz. Leg. Reg. 157.—Commonwealth v. Maurer, Quar. Sess., 6 Sch. Reg. 317.

48. Mich.—People v. Kramer, 195 N.W. 802, 225 Mich. 35. 60 C.J. p 1141 note 79.

49. Ind.—State v. Douglass, 69 Ind. 544. 60 C.J. p 1141 note 80.

50. Miss.—Winborn v. State, 56 So.

2d 46, 213 Miss. 99.—Armstrong v. State, 15 So. 2d 438, 195 Miss. 300. Tex.—Bloss v. State, 75 S.W. 2d 694, 127 Tex. Cr. 216. 60 C.J. p 1141 note 87.

"Whenever" construed statute authorizing issuance by magistrate of warrant to search for and seize property "whenever" written sworn complaint is made authorizes issuance of search warrant on Sunday, as "whenever" is an adverb of time meaning at whatever time.—Bloss v. State, 75 S.W. 2d 694, 127 Tex. Cr. 216.

51. D.C.—Edwards v. District of Columbia, Mun. App., 68 A. 2d 286. Mass.—Wright v. Dressel, 3 N.E. 6, 140 Mass. 147. Tex.—Corpus Juris cited in Bloss v. State, 75 S.W. 2d 694, 695, 127 Tex. Cr. 216.

52. In Oklahoma

(1) Under statute peace officer to whom a search warrant is directed may make a search on Sunday.—White v. State, 165 P. 2d 151, 81 Okl. Cr. 399.

(2) Under prior law a search warrant had been held within a statutory prohibition of Sunday service of legal process, and, if it was sought to bring the case within an exception thereto, circumstances had to appear in the affidavit and warrant.—Jean v. State, 6 P. 2d 1075, 53 Okl. Cr. 34—60 C.J. p 1141 note 89.

53. Pa.—Commonwealth v. McQuaid, 45 Pa. Dist. & Co. 700, 53 Dauph. Co. 105.

54. Pa.—Commonwealth v. McQuaid, supra.

Gambling devices

Where record indicated that search warrant was obtained to search certain premises for gambling devices, that the warrant was executed at an early morning hour on Sunday, that premises consisted of a room in rear of storeroom, and it is stipulated that there was no noise audible to anyone outside the closed door of the room where such gambling devices were seized, it was held that there was no breach of the peace.—Commonwealth v. McQuaid, supra.

55. Ind.—Vogel v. Chappell, 6 N.E. 2d 953, 211 Ind. 310. Iowa.—Lyman v. Walker, 185 N.W. 607, 192 Iowa 982.—State v. Ryan, 85 N.W. 812, 113 Iowa 536. Mo.—Thomas v. City of St. Joseph, App., 231 S.W. 63. N.J.—Taylor v. Thomas, 2 N.J. Eq. 106.

N.Y.—Sayles v. Smith, 12 Wend. 57, 27 Am. D. 117.—Field v. Park, 20 Johns. 140.

N.C.—Sloan v. Williford, 25 N.C. 307. Legality of assignments served on Sunday see Assignments § 74. Service on Sunday of notice to terminate lease under contract and under statute see supra § 28.

publication for the appointment of a receiver pendente lite has been held not invalid because served on Sunday,⁵⁶ and it has been held that the notice of a hearing, served on a weekday, is good, although it has been dated on Sunday;⁵⁷ and, similarly, a notice that a certain witness, not named in the indictment, will be examined at the trial has been held good, where not prohibited by statute, although given on Sunday, being a ministerial act.⁵⁸ The proceeding to effect a statutory foreclosure of a mortgage, not being a judicial proceeding, has been held not to be invalidated by the fact that the day appointed for the sale in the published notice is a Sunday, particularly if such sale could lawfully be made on that day.⁵⁹ Despite statutory prohibitions of service or execution of any writ, process, warrant, or order on Sunday, notice of injury may be effectively given to a municipality on Sunday, at least where that is not the last day of the time appointed for the giving of notice, such notice not being legal process.⁶⁰ On the other hand, it has been held that, under statutory prohibitions affecting Sunday service or execution of process, orders, and the like, the service on Sunday of notice of a motion,⁶¹ or of a statutory notice which is required to be served in the same manner as a precept in summary proceedings,⁶² is irregular and void; and the same result has been reached as to a notice to take a deposition on Sunday, even though no special prohibition by common law or statute is applicable.⁶³ Where a statute respecting service of notice of redemption from tax sales provides for service in the same manner as an original notice, Sunday service is bad when made in such manner that original notice, served in the same way, would be bad.⁶⁴

b. Publications

The publication of a summons or other legal notice on Sunday is valid in the absence of statutes prohibiting the service of process on Sunday, and, even where Sunday publication is void under the statutes, publication on that day of a notice which in nature has none of the attributes of process may be valid.

Where, by force of prevailing statutes, service of process on Sunday is illegal, the publication, in whole or in part, of a summons or other legal notice in a newspaper published on Sunday is invalid,⁶⁵ except where the statutes provide otherwise;⁶⁶ but, where there is no statute rendering unlawful the service on Sunday of civil process, and no such rule has been adopted as a part of the local common law, a contrary result is reached.⁶⁷ However, even where Sunday publication is void under the statutes, publication on that day of a notice which in nature has none of the attributes of process may be valid.⁶⁸

Excuse for nonpublication. A notice required to be published each day for a week need not be published on Sunday.⁶⁹

§ 48. Bail and Other Bonds and Recognizances

Generally a bail bond or recognizance entered into on Sunday, for the purpose of securing the release of a person in custody and his appearance for trial, is valid, although there is a conflict of authority as to the validity of other bonds and recognizances.

A bail bond or recognizance entered into on Sunday, for the purpose of securing the release of a person in custody and his appearance for trial, is valid,⁷⁰ the entering into such bond being a min-

56. Ind.—Vogel v. Chappell, 6 N.E. 2d 953, 211 Ind. 310.

57. N.J.—Taylor v. Thomas, 2 N.J. Eq. 106.

58. Iowa.—State v. Ryan, 85 N.W. 812, 113 Iowa 536.

59. N.Y.—Sayles v. Smith, 12 Wend. 57, 27 Am.D. 117.

60. Mo.—Thomas v. City of St. Joseph, App., 231 S.W. 63.

61. N.Y.—Field v. Park, 20 Johns. 140.

62. N.Y.—Di Perna v. Black, 62 N. Y.S.2d 69, 187 Misc. 437.

63. N.C.—Sloan v. Williford, 25 N. C. 307.

64. Iowa.—Lyman v. Walker, 185 N.W. 607, 192 Iowa 982.

65. Ky.—King v. Katterjohn, 236 S. W. 250, 193 Ky. 359.

60 C.J. p 1142 note 1—50 C.J. p 539 note 30.

66. W.Va.—McDannald v. Willmoth, 97 S.E. 132, 82 W.Va. 719.

60 C.J. p 1142 note 2.

67. Iowa.—Nixon v. Burlington, 115 N.W. 239, 141 Iowa 316, 18 Ann.Cas. 1037.

60 C.J. p 1142 note 3.

Publication of summons

(1) The publication of a newspaper as part of the process of service by publication is not a "judicial act" or "judicial business" so as to invalidate publication of summons on Sunday under statute providing that no court must be open nor any "judicial business" transacted on Sunday, with certain exceptions.—State ex

rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County, 99 P.2d 211, 110 Mont. 61.

(2) A publication of summons on four successive Sundays is a sufficient publication within requirement that publication be once a week for four successive weeks.—State ex rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County, supra.

68. Mich.—Black ex rel. Trahair v. Landel Metropolitan Dist., 28 N.W. 2d 270, 318 Mich. 376.

60 C.J. p 1142 note 4.

69. N.Y.—Matter of Excelsior Fire Ins. Co., 16 Abb.Pr. 8, reversed on other grounds 38 Barb. 297, 16 Abb.Pr. 11.

70. Pa.—Commonwealth v. Skula, 41

isterial, rather than judicial, act, and hence not void at common law,⁷¹ and, further, constituting matter of necessity or charity, and hence being permitted by the Sunday statutes.⁷² Moreover, it has been held that statutory authorization to execute process or warrant on Sunday extends to authorize giving of bail in cases as to which such extension is authorized.⁷³ Under statutes authorizing holding court and conducting trials on Sunday, recognizances and appearance bonds executed on that day have been held valid.⁷⁴

In some jurisdictions the rule of the validity of Sunday bonds has been extended to undertakings on appeal and appeal bonds;⁷⁵ but other authority holds such bonds, executed on Sunday, invalid for the same reason and to the same extent as other contracts made on Sunday.⁷⁶ It has been held that a bond given on Sunday in pursuance of the execution of a writ or process on that day, if that execution is a nullity, should be canceled.⁷⁷

Although there is authority to the contrary,⁷⁸ it has been held that a supersedeas bond signed on Sunday but not delivered until a subsequent secular day is valid and binding;⁷⁹ and the same has been held as to replevin bonds.⁸⁰ However, it has been held that a replevin bond actually executed on Sunday is invalidated by provisions in the general Sunday observance laws which render Sunday contracts illegal.⁸¹

§ 49. Filing Pleadings and Other Papers

The filing of pleadings and other papers on Sun-

day has been held valid under various statutory provisions.

The filing of pleadings and other papers on Sunday has been held valid under various statutory provisions.⁸² Thus, there is authority to the effect that the filing of a complaint and its reception by the clerk are ministerial acts, and are not void when done on Sunday, under statutes prohibiting the opening of courts and the transaction of judicial business.⁸³ Neither is an information void because it was filed on Sunday under a statute prohibiting only the commencement of civil suits,⁸⁴ or forbidding arrests on Sunday, save for treason, felony, or breach of the peace, where the information charges an offense of the character excepted;⁸⁵ and an indictment presented and filed on a weekday is not invalidated by the fact that it is dated as having been drawn on a Sunday.⁸⁶ The mere filing of an affidavit and bond on Sunday does not come within the meaning of a statute prohibiting the issuance of process,⁸⁷ and the filing of papers ancillary to, or in the progress of, an already instituted suit is not within a statutory prohibition of the commencement of a civil suit on Sunday.⁸⁸ An affidavit dated on Sunday but actually made on another day has been held valid.⁸⁹

§ 50. Taking of Depositions

Generally depositions should not be taken on Sunday.

Generally depositions should not be taken on Sunday,⁹⁰ and it has been held that a deposition taken on Sunday must be rejected, regardless of whether the day is dies non juridicus.⁹¹ Likewise, it has

Pa. Dist. & Co. 309, 43 Lack. Jur. 85, 33 Mun. L.R. 63.
60 C.J. p 1142 note 6.

71. U.S.—De Orozco v. U. S., Tex., 237 F. 1008, 1013, 151 C.C.A. 70.
60 C.J. p 1142 note 7.

72. N.J.—*Corpus Juris* cited in *Ballentine v. Ballentine*, 199 A. 423, 424, 123 N.J. Eq. 577.
60 C.J. p 1142 note 8.

73. Ind.—*King v. Strain*, 6 Blackf. 447.
Tex.—*Lindsay v. State*, 46 S.W. 1045, 39 Tex. Cr. 468.

74. Ind.—*State v. Douglass*, 69 Ind. 544.
60 C.J. p 1142 note 10.

75. Nev.—*State v. California Min. Co.*, 13 Nev. 203.

76. Me.—*State v. Suhur*, 33 Me. 539.
60 C.J. p 1143 note 13.

77. N.J.—*Jewett v. Bowman*, 27 N.J. Eq. 275.

78. Me.—*State v. Suhur*, 33 Me. 539.

79. Ala.—*Babcock v. Carter*, 23 So. 487, 117 Ala. 575, 67 Am. S.R. 193.

80. Ky.—*Prather v. Harlan*, 6 Bush 185.

81. Ind.—*Link v. Clemmons*, 7 Blackf. 479.

82. Pa.—*Commonwealth v. Geibel*, 13 Pa. Dist. & Co. 115.
Tex.—*Stinson v. State*, 5 Tex. App. 31.
60 C.J. p 1143 notes 18, 24.

83. Idaho.—*Havens v. Stiles*, 67 P. 919, 8 Idaho 250, 101 Am. S.R. 195, 56 L.R.A. 736.
60 C.J. p 1143 note 18.

84. Tex.—*Stinson v. State*, 5 Tex. App. 31.

85. Pa.—*Commonwealth v. Geibel*, 13 Pa. Dist. & Co. 115.

86. Or.—*State v. Norton*, 17 P. 744, 16 Or. 105.

87. Tex.—*Schow v. Gatesville City Nat. Bank*, Civ. App., 40 S.W. 166.

88. Tex.—*Hanover Fire Ins. Co. v. Shrader*, 32 S.W. 872, 33 S.W. 112, 89 Tex. 35, 59 Am. S.R. 25, 30 L.R.A. 498—*Schow v. Gatesville City Nat. Bank*, Civ. App., 40 S.W. 166.

89. Miss.—*Farrand Co. v. Huston*, 69 So. 997, 110 Miss. 40.

90. Kan.—*Leach v. Leach*, 27 P. 131, 46 Kan. 724.
18 C.J. p 675 note 45.
Time of taking of depositions generally see *Depositions* § 60.

91. N.C.—*Sloan v. Williford*, 25 N.C. 307.

been held that the adjournment of the taking of depositions from Saturday to Sunday and from Sunday to Monday is, at least in the absence of some special necessity, without authority of law, and a deposition on the latter day will be suppressed.⁹²

§ 51. Holding Court

As a general rule, in the absence of a permissive statute, a judge or magistrate has no authority to hold court or conduct a trial on Sunday, or deliver a charge to the jury on that day; but deliberation by the jury on Sunday is not illegal and the delivery and acceptance of a verdict are permitted on Sunday.

Although there is authority to the contrary,⁹³ in the absence of a permissive statute, a judge or magistrate has no authority to hold court or conduct a trial on Sunday;⁹⁴ but even where a trial is conducted on Sunday, it has been held that the court does not thereby lose jurisdiction of the cause.⁹⁵ Where a permissive statute exists, the right to hold court is determined by the statute, and, such conduct being authorized, the trial and proceedings had with respect thereto are valid.⁹⁶ Under a statute providing that a court shall not be opened, or any business transacted on Sunday, except to receive a verdict or discharge a jury and for re-

ceipt by a court of special sessions of a plea of guilty and the pronouncement of sentence thereon in any case in which such court shall have jurisdiction, and further providing that this provision does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or in a criminal case, to arrest, commit, or discharge a person charged with an offense, the court cannot try and convict a person on Sunday.⁹⁷ However, under such statute, a court sitting as a court of special sessions and having jurisdiction can receive a plea of guilty,⁹⁸ and pronounce sentence thereon, as discussed *infra* § 53, since arraignment, plea of guilty, and sentence do not constitute a trial within the statute.⁹⁹

Personal liability of justice. A justice of the peace who in good faith and without malice illegally sits on Sunday and proceeds with the hearing of a matter over which he has jurisdiction both of the person and the subject matter is not liable personally, even though his acts were erroneous and of no effect, since he is acting judicially in holding court.¹

Charging jury. Delivery of the charge to the jury on Sunday has been held to be a judicial act and void,² as has completion of a charge the de-

92. U.S.—Kirkpatrick v. Baltimore, etc., R. Co., C.C.Ohio, 14 F.Cas.No. 7,847.

93. Ohio.—State v. McElhinney, 100 N.E.2d 273, 88 Ohio App. 431.

Voidable proceedings

Under the common law of Ohio, judicial proceedings and judicial acts performed on Sunday are not void, but such acts may be voidable as constituting abuse of discretion on part of trial court if they unnecessarily require full functioning of court in trial of jury case and necessitate attendance of court officers and laborers in connection with place of trial such as might violate statutory prohibitions against performance of common labor on Sunday or which would outrage customs of community.—State v. McElhinney, *supra*.

94. Pa.—Commonwealth v. Johns, 64 Pa.Dist. & Co. 35—City of New Castle v. Casacchia, 58 Pa.Dist. & Co. 184, 5 Lawrence L.J. 224, 95 Pittsb.Leg.J. 56—Commonwealth v. Skula, 41 Pa.Dist. & Co. 309, 43 Lack.Jur. 85, 33 Mun.L.R. 63. 60 C.J. p 1143 note 28.

Waiver of prohibition of holding court on Sunday see *infra* § 56.

95. N.Y.—People v. Luhrs, 29 N.Y.S. 789, 79 Hun 415, 9 N.Y.Cr. 266.

96. Ill.—People v. Berof, 7 N.E.2d 919, 290 Ill.App. 1, affirmed 11 N.E. 2d 936, 367 Ill. 454. 60 C.J. p 1144 note 30.

97. N.Y.—People ex rel. Meyer v. Warden of Nassau County Jail, 199 N.E. 647, 269 N.Y. 426—People v. Citarelli, 286 N.Y.S. 734, 247 App. Div. 53—People v. Jackson, 77 N.Y. S.2d 478, 191 Misc. 457—People v. Wells, 276 N.Y.S. 543, 153 Misc. 730—People v. Cash, 42 N.Y.S.2d 620.

98. N.Y.—People v. Williams, 99 N. Y.S.2d 672, 198 Misc. 621—People v. Jackson, 77 N.Y.S.2d 478, 191 Misc. 457—People v. Cash, 42 N.Y. S.2d 620.

Prior to statutory amendment, some confusion existed as just what a court could or could not do on Sunday. Despite the diversity of opinion on the part of the courts, the prevailing opinions were more or less in accord that the acts of a court of special sessions in arraigning defendant and accepting plea of guilty and imposing sentence on Sunday were void.—People v. Jackson, 77 N. Y.S.2d 478, 191 Misc. 457.

99. N.Y.—People v. Jackson, *supra*, criticizing People v. Hewett, 40 N. Y.S.2d 869, as expanding the meaning of trial.

Purpose of statute

As the purpose of the statute is to preserve the peace and while doing so to accord to persons who might otherwise be injured by longer detention an opportunity to be heard at once, and in a proper case set at liberty, power is given by this statute to inquire into the detention, and, if nothing further is needed, to dispose of the case, although a protracted trial is not authorized.—People ex rel. Price v. Warden of New York State Reformatory for Women, 76 N.Y.S. 728, 73 App.Div. 174—People v. Jackson, 77 N.Y.S.2d 478, 191 Misc. 457.

1. N.Y.—Kraft v. De Verneuil, 94 N.Y.S. 230, 105 App.Div. 43.

Civil liability for judicial acts of:

Judges see Judges § 63.

Justices of peace see Justices of the Peace § 19.

2. Tex.—Guerrera v. State, 125 S.W. 2d 595, 136 Tex.Cr. 411. 60 C.J. p 1144 note 33.

Expiration of term

Charging jury on Sunday in murder prosecution could not be justified on ground that term of court expired on that day and a term of court began in another county in same judicial district on following day, where court could have extended

livery of which was commenced on Saturday night.³ An exception has been made, however, of the case of a judge instructing a jury who have not agreed and who request further instructions from the court in the course of their deliberation on Sunday;⁴ and further it has been held that, during the course of Sunday deliberation by the jury, the court may call them back and give instructions designed to correct a supposed error in the charge originally given.⁵

Deliberation by jury. Deliberation of the jury throughout, or for some part of, Sunday is not illegal, since such deliberation by them is not a judicial act,⁶ even in cases where they are judges of the law as well as of the facts.⁷

Delivery and acceptance of verdict. In regard to the delivery and reception of verdicts, it is well established, both at common law and by statute, and in both civil and criminal cases, that a verdict may be delivered, received, and entered on Sunday,⁸ the result being grounded on the fact that it is a mere ministerial act, not within common-law or statutory prohibitions as to judicial proceedings on Sunday,⁹ and that the rendition or receiving of a verdict is a work of charity or necessity within the statutory exceptions.¹⁰ It has also been held that the action of the jury in agreeing on a verdict and sealing it up on Sunday does not invalidate the verdict delivered on Monday.¹¹

Where a term of court expires by its legal limitation on Saturday, a verdict received on Sunday is invalid;¹² but, where the term has been continued or extended by proper court order so as to embrace Sunday, the verdict is good.¹³ A general verdict is not nullified by the fact that the

court has submitted special interrogatories to the jury on Sunday, and has received their answer to such interrogatories with the general verdict on that day, where the interrogatories were with respect to the same state of facts as that on which the general verdict was returned, but were not designed for use in the same case and had no relation to the trial or verdict therein.¹⁴

Continuations and adjournments. The continuing of a cause from Saturday to Monday so as to retain jurisdiction of the pending case does not constitute a keeping open of the court on Sunday.¹⁵ When, by mistake, a hearing is set for Sunday, the meeting of the court on that day, and its adjournment over until the next day without performance of any business other than the mere adjournment has been held not to invalidate the proceedings but to be a mere nullity.¹⁶ After verdict received on Sunday, the court may adjourn until a later day for further proceedings thereon, without invalidating the proceedings.¹⁷

Adjournment of court to Sunday in violation of a statute requiring adjournment on Saturday to some other day than Sunday deprives the court of jurisdiction and renders its judgment absolutely void,¹⁸ although it has been held lawful for a court to adjourn to Sunday for the purpose of receiving a verdict.¹⁹ Even where holding court on Sunday is held not forbidden by common law or statute, where there is a long standing usage or practice of the courts to the same effect, it has been held proper to adjourn from Saturday to Monday, even though the statute authorizes only an adjournment "from day to day."²⁰ Where a term of court expires of its legal limitation on Saturday, the power to continue to hold court on Sunday is subject to

term until case was disposed of.—*Guerrera v. State*, supra.

3. Mo.—*State v. Green*, 37 Mo. 466. 60 C.J. p 1144 note 34.

4. Ind.—*Jones v. Johnson*, 61 Ind. 257.

N.C.—*State v. McGimsey*, 80 N.C. 377, 30 Am.R. 90.

5. Dak.—*People v. Odell*, 46 N.W. 601, 1 Dak. 197.

6. Mo.—*State v. Wilson*, 26 S.W. 357, 121 Mo. 434. 60 C.J. p 1144 note 37.

7. Ill.—*Baxter v. People*, 8 Ill. 368.

8. Ky.—*Harlan v. Commonwealth*, 68 S.W.2d 443, 253 Ky. 1.

Tex.—*Price v. State*, Cr., 252 S.W.2d 167.

60 C.J. p 1144 note 40. Acquittal on Sunday constituting former jeopardy see Criminal Law § 268.

9. Vt.—*Adams v. Cook*, 100 A. 42, 91 Vt. 281.

60 C.J. p 1145 note 41.

10. N.C.—*Taylor v. Ervin*, 25 S.E. 875, 119 N.C. 274.

60 C.J. p 1145 note 42.

11. Me.—*True v. Plumley*, 36 Me. 466.

12. Ala.—*Nabors v. State*, 6 Ala. 200.

60 C.J. p 1145 note 44.

13. Ala.—*Athens v. Miller*, 66 So. 702, 190 Ala. 82.

14. U.S.—*Stone v. U. S.*, Wash., 17 S.Ct. 778, 167 U.S. 178, 42 L.Ed. 127.

15. N.Y.—*Vanderwerker v. People*, 5 Wend. 530.

16. Ga.—*Cheeseborough v. Van Ness*, 12 Ga. 380.

17. Nev.—*State v. Kuhl*, 175 P. 190, 42 Nev. 185, 3 A.L.R. 1694. 60 C.J. p 1146 note 53.

18. N.Y.—*People v. Cash*, 42 N.Y.S. 2d 620.

19. Mo.—*State v. Wilson*, 26 S.W. 357, 121 Mo. 434.

20. N.C.—*State v. Howard*, 82 N.C. 623.

the general rules regarding the effect of the expiration of the term.²¹

§ 52. — Discharge of Jury

Generally the court may, on Sunday, adjudicate the fact that the jury cannot agree and discharge them, and a discharge of the jury on verdict delivered and received on Sunday is valid.

While it has been held that, no such power having been given by statute, the court is powerless to discharge a jury on Sunday save after their agreement on a verdict or in case of some immediate necessity,²² it is more generally held that the court may, on Sunday, adjudicate the fact that the jury cannot agree and discharge them;²³ but the power may be exercised only when the elements essential to such discharge at any other time are present.²⁴ Of course, discharge of the jury on verdict delivered and received on a Sunday is valid.²⁵

§ 53. Judgment, Order, or Decree, and Proceedings for Review

Generally, in the absence of a permissive statute, the rendition of a judgment, order, or decree being a judicial act, it is void when done on Sunday.

Although there is authority to the contrary,²⁶ as the rendition of a judgment, order, or decree is a judicial act, it is, in the absence of statute, void when done on Sunday.²⁷ Statutes directing the court or justice of the peace to render judgment immediately or forthwith establish an exception, according to some authority, in cases where the verdict is received on Sunday, and allow the immediate rendition of judgment on such verdict;²⁸ but there is other authority to the contrary.²⁹ Even when the judgment on a Sunday verdict is rendered on the same day, although it is void, it does not vitiate the verdict;³⁰ nor is it effective to prevent entry of judgment for another and different amount on a later weekday.³¹

Where a verdict is rendered on Sunday, it will be presumed, in the absence of anything to the contrary in the record, that the judgment on the verdict was rendered on a subsequent day.³² Although it has been stated by some authorities that the court may on Sunday receive or make a motion or order touching the verdict,³³ it has been held elsewhere that the decision of motions by the court is a judicial act and hence void when done on Sunday;³⁴ and Sunday entry by the clerk of an order granting a

21. Ala.—Nabors v. State, 6 Ala. 200.

Continuance of proceedings beyond term see Courts § 153.

22. Or.—Ex parte Tice, 49 P. 1038, 32 Or. 179.

60 C.J. p 1145 note 47.

23. Ala.—Curry v. State, 82 So. 489, 203 Ala. 239.

60 C.J. p 1145 note 48.

24. N.C.—State v. McGimsey, 80 N. C. 377, 30 Am.R. 90.

25. Ala.—Reid v. State, 53 Ala. 402, 25 Am.R. 627.

60 C.J. p 1146 note 50.

26. Judgment entered on plea of guilty

That portion of common law of England which made Sunday a non-judicial day did not become part of common law of Ohio, and judgment entered on plea of guilty made on Sunday was not, in absence of statutory prohibition, void.—State v. McElhinney, 100 N.E.2d 273, 88 Ohio App. 431.

27. Ala.—Corpus Juris quoted in Shade v. Shade, 39 So.2d 785, 252 Ala. 134.

Alaska.—In re Dalton, 8 Alaska 338. Mo.—Thompson v. Sanders, 70 S.W. 2d 1051, 334 Mo. 1100.

Tex.—Texas State Board of Dental Examiners v. Fieldsmith, Civ.App., 242 S.W.2d 213, error refused no reversible error—Skeen v. Foster, Civ.App., 78 S.W.2d 1041—Price v. State, Cr., 252 S.W.2d 167—Guerrera v. State, 125 S.W.2d 595, 136 Tex. Cr. 411—Bloss v. State, 75 S.W.2d 694, 127 Tex. Cr. 216. 60 C.J. p 1146 note 57.

Receiving a plea of guilty and entering judgment thereon on Sunday has been held to be void as a judicial act.—Devault v. Sampson, 221 P. 284, 114 Kan. 913.

Signing decision

Fact that judge signed decision on Sunday did not invalidate judgment, since legal judgment was clerk's entry, made on Friday.—Board of Sup'rs of Apache County v. Udall, 1 P.2d 343, 38 Ariz. 497.

Quasi-judicial proceeding

Judgment rendered on Sunday in a quasi-judicial proceeding is void.—Texas State Board of Dental Examiners v. Fieldsmith, Tex. Civ.App., 242 S.W.2d 213, error refused no reversible error.

Void on face

Where record showed that divorce decree from which appeal was prosecuted was rendered and filed on par-

ticular date, court would take judicial notice that such date was Sunday and that decree was, therefore, void on its face.—Shade v. Shade, 39 So.2d 785, 252 Ala. 134.

28. Neb.—Thompson v. Church, 13 N.W. 626, 13 Neb. 287.

60 C.J. p 1147 note 58.

Finding of emergency justifying judgment on Sunday under statute is nugatory where statute has been repealed.—In re Dalton, 8 Alaska 338.

29. N.Y.—Allen v. Godfrey, 44 N.Y. 433.

30. Tex.—Shearman v. State, 1 Tex. App. 215, 28 Am.R. 402.

60 C.J. p 1147 note 60.

31. N.Y.—Allen v. Godfrey, 44 N.Y. 433.

32. Ala.—Simmons v. State, 29 So. 929, 129 Ala. 41.

Tex.—Moore v. State, 96 S.W. 321, 49 Tex. 499.

33. Ind.—McCorkle v. State, 14 Ind. 39.

Nev.—State v. Kuhl, 175 P. 190, 42 Nev. 185, 3 A.L.R. 1694. 60 C.J. p 1147 note 63.

34. Ill.—Baxter v. People, 8 Ill. 368. 60 C.J. p 1147 note 64.

motion for a new trial, which order was actually made on Sunday, has been held a judicial act and void,³⁵ even though the order was for an entry nunc pro tunc, and the entry was accordingly made as of another day.³⁶

Where a statute provides that a court shall not be opened, or any business be transacted on Sunday, except to receive a verdict or discharge a jury and for receipt by a court of special sessions of a plea of guilty and the pronouncement of sentence thereon in any case in which such court shall have jurisdiction, and further provides that this provision does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or in a criminal case, to arrest, commit, or discharge a person charged with an offense, the pronouncement of a sentence on Sunday after the trial of a contested case is void,³⁷ although a committing magistrate, when it is necessary to preserve the peace, in a criminal case may arrest, commit, or discharge accused on Sunday,³⁸ and a court having the jurisdiction of a court of special sessions may accept plea of guilty and pronounce sentence.³⁹

Spreading of judgment on the records by the clerk is a ministerial, not a judicial, act, and is not void because performed on Sunday,⁴⁰ and this is true, even though it is held that the clerk's action is a necessary preliminary to the existence of any judgment.⁴¹

Taxation of costs, made on Sunday, is a nullity.⁴²

Proceedings for review. It has been held that an appeal may be taken on Sunday,⁴³ and that an application for a writ of error may be lawfully filed on Sunday,⁴⁴ but there is other authority to the effect that, in the absence of a showing of necessity, a bill of exceptions is void when signed on Sunday,⁴⁵ and it has been held that a record on appeal cannot be filed with the clerk on Sunday.⁴⁶ A clerk of court is not bound to take appeals on Sunday when not required to by statute.⁴⁷ An appeal or writ of error cannot be made returnable on Sunday and to make it so avoids it.⁴⁸ Service on Sunday on a justice of the peace of certiorari is void under a statute prohibiting service or execution of civil process on that day, although the justice's fees were not paid until a subsequent secular day.⁴⁹

35. Cal.—*Jackson v. Dolan*, 208 P. 315, 58 Cal.App. 372.

36. Cal.—*Jackson v. Dolan*, *supra*.

37. N.Y.—*People ex rel. Meyer v. Warden of Nassau County*, 199 N. E. 647, 269 N.Y. 426—*People v. Citarelli*, 286 N.Y.S. 734, 247 App. Div. 53.

38. N.Y.—*People v. Hewett*, 40 N.Y. S.2d 869.

39. N.Y.—*People v. Williams*, 99 N.Y.S.2d 672, 198 Misc. 621—*People v. Jackson*, 77 N.Y.S.2d 478, 191 Misc. 457—*People v. Cash*, 42 N.Y. S.2d 620, criticizing *People v. Hewett*, 40 N.Y.S.2d 869, as possibly overlooking the statutory amendment authorizing the court of special sessions to accept a plea of guilty and pronounce sentence thereon.

Prior law

(1) Prior statutory authority to arrest, commit, or discharge on Sunday in certain cases was held not to confer any power to convict or sentence on that day, even on a plea of guilty.—*People v. Kaplan*, 217 N.Y.S. 763, 217 App.Div. 252—60 C.J. p 1147 note 67.

(2) It has been held that such power did not arise from prior statute permitting the exercise of jurisdiction where it is necessary to pre-

serve the peace.—*People v. Frost*, 241 N.Y.S. 749, 136 Misc. 40—*People v. Mantei*, 236 N.Y.S. 122, 134 Misc. 529.

40. Iowa.—*Puckett v. Guenther*, 120 N.W. 123, 142 Iowa 35, 134 Am.S.R. 402.

41. Iowa.—*Puckett v. Guenther*, *supra*.

42. N.Y.—*Allen v. Godfrey*, 44 N.Y. 433.

43. Pa.—*Commonwealth v. Skula*, 41 Pa. Dist. & Co. 309, 43 Lack.Jur. 85, 33 Mun.L.R. 63.

44. Tex.—*Hanover Fire Ins. Co. v. Shraeder*, 32 S.W. 872, 33 S.W. 112, 89 Tex. 35, 59 Am.S.R. 25, 30 L.R.A. 498.

60 C.J. p 1147 note 73.

Appeal bond or undertaking executed on Sunday see § 48.

45. Ind.—*Roberts v. Farmers', etc., Bank*, 36 N.E. 128, 136 Ind. 154.

Bill of exceptions

(1) Where counsel for plaintiff in error served copy of bill of exceptions on defendant in error on Sunday, service was void.—*Blizzard v. Blizzard*, 8 S.E.2d 679, 68 Ga.App. 244.

(2) However, as an acknowledgment of a bill of exceptions, under

some statutes, waives all defects as to time or manner of service unless the right to object is expressly reserved, in the absence of such an express reservation, a bill will not be dismissed because service thereof was acknowledged on a day which the court judicially knew was Sunday.—*Town of Bartow v. Smith*, 132 S.E. 103, 35 Ga.App. 57.

46. Ky.—*Shaver v. Sparks*, 126 S.W. 2d 1110, 277 Ky. 581.

47. Ill.—*Russell v. Pickering*, 17 Ill. 31.

Tex.—*Hanover Fire Ins. Co. v. Shraeder*, 32 S.W. 872, 33 S.W. 112, 89 Tex. 35, 59 Am.S.R. 25, 30 L.R.A. 498.

48. Fla.—*Brooks v. Miami Bank & Trust Co.*, 155 So. 157, 115 Fla. 141—*Harrison v. Bay Shore Development Co.*, 111 So. 128, 92 Fla. 875.

Statute requiring writs of error, or entries of appeal in chancery, to be made returnable to day more than thirty days and not more than ninety days from date of writ or from filing of entry of appeal was held not to intend that writ of error or entry of appeal be made returnable on a Sunday.—*Brooks v. Miami Bank & Trust Co.*, 155 So. 157, 115 Fla. 141.

49. Mich.—*Anderson v. Birce*, 3 Mich. 280.

§ 54. Arbitration and Award

There is a conflict of authority with respect to the validity of making and publishing an award on Sunday.

Although the making and publishing of an award have been considered a judicial act and hence void when done on Sunday,⁵⁰ it has also been regarded as more in the nature of a contract and not within the prohibition of judicial business.⁵¹ Where considered as judicial in nature, however, an award may be valid when not really published until a weekday, even though some of the proceedings were had on Sunday,⁵² although it has been held not to be, despite the lawful publication, if sessions are held and witnesses required to attend on Sunday over the objections of either of the parties to the arbitration.⁵³

§ 55. Miscellaneous Matters of Judicial or Official Nature

The performance of various miscellaneous matters of a judicial or official nature on Sunday has been considered by the courts and has been held prohibited or not prohibited depending on the terms of the statutes and the circumstances of the particular case.

The performance of various miscellaneous matters of a judicial or official nature on Sunday has been considered by the courts and has been held prohibited⁵⁴ or not prohibited⁵⁵ depending on the circumstances and law applicable to the particular case. Thus, it has been held, under a statute forbidding common labor of one's usual avocation, that Sunday work by an assessor incidental to the assessment of taxes is incapable of serving as the basis for a claim for compensation, being within the prohibition,⁵⁶ and not being, in the absence of

exceptional circumstances, a work of necessity;⁵⁷ and it has been held that the goods of a tenant are privileged on Sunday from seizure for rent, and that hence a landlord cannot lawfully distrain on that day;⁵⁸ and that the impounding of swine running at large on Sunday by a hogreeve is work or business of a secular calling, within the Sunday laws.⁵⁹

However, it has been held that statutory prohibitions of labor or common labor on Sunday have no application to the acts of public officers in the performance of their official duties,⁶⁰ and that statutory prohibitions on the exercise of a "common avocation" on Sunday do not apply to acts performed in the line of official duty by a governor⁶¹ or by members of the legislature.⁶² Where the statutes forbid service of process on Sunday, the sheriff is not bound to keep his office open to receive orders to serve, and any such order given on that day is a nullity.⁶³ The summoning on Sunday by the sheriff of jurors for a special venire has been held not objectionable where the only acts which are prohibited and void on that day are judicial acts, the conduct of the sheriff being merely ministerial in nature.⁶⁴ According to some authority, a coroner's inquest is ministerial in nature and valid.⁶⁵ In the absence of statutory prohibition, the commissioner of the general land office, it has been held, is not forbidden to keep his office open or to perform his official duties on Sunday;⁶⁶ and an application to purchase lands is not void because received and filed on Sunday, but is as valid as though all transactions occurred on a weekday.⁶⁷ It has been held that there is nothing unlawful in the registration of voters' names

50. N.Y.—Brody v. Owen, 18 N.Y.S. 2d 28, 259 App.Div. 720.

60 C.J. p 1148 note 78.

51. Vt.—Blood v. Bates, 31 Vt. 147. 60 C.J. p 1148 note 79.

52. Mo.—Karapschinsky v. Rothbaum, 163 S.W. 290, 177 Mo.App. 91.

60 C.J. p 1148 note 80.

53. N.Y.—In re Picker, 114 N.Y.S. 289, 130 App.Div. 88, 1 N.Y.Civ. Proc.N.S., 132.

54. Discharge of teacher

Action of school board, relative to the discharge of a teacher, when taken on Sunday, has been held a nullity.—Ansorge v. City of Green Bay, 224 N.W. 119, 198 Wis. 320.

State board

Reception of evidence and determination of facts by state board of

dental examiners on charge of unprofessional conduct in practice of dentistry involved discretion and was a quasi-judicial act, which made setting and hearing on Sunday void acts.—Texas State Board of Dental Examiners v. Fieldsmith, Tex.Civ. App., 242 S.W.2d 213, error refused no reversible error.

55. Persons acting in aid of an officer in making arrests on Sunday, at the officer's request, are not subject to any liability for so doing, whatever the legality of the officer's conduct in making the arrest on that day.—Keith v. Tuttle, 28 Me. 326.

56. Ind.—Stellhorn v. Board of Com'rs of Allen County, 110 N.E. 89, 60 Ind.App. 14.

57. Ind.—Stellhorn v. Board of Com'rs of Allen County, supra.

58. Pa.—Mayfield v. White, 1 Browne 241.

59. N.H.—Frost v. Hull, 4 N.H. 153.

60. Tex.—Woods v. Terrell, 285 S.W. 293, 115 Tex. 569.

60 C.J. p 1148 note 82.

61. Tenn.—Cooper v. Nolan, 19 S.W. 2d 274, 159 Tenn. 379.

62. Tenn.—Cooper v. Nolan, supra.

63. Pa.—Appeal of Stern, 64 Pa. 447. 60 C.J. p 1148 note 85.

64. Idaho.—State v. Gilbert, 69 P. 62, 8 Idaho 346.

65. Md.—Blaney v. State, 21 A. 547, 74 Md. 153.

66. Tex.—Stephens v. Porter, 69 S.W. 423, 29 Tex.Civ.App. 556.

67. Tex.—Stephens v. Porter, supra.

on a Sunday,⁶⁸ and that absentee votes voted on Sunday were held not illegal as being in violation of the spirit of statutes prohibiting the doing of certain acts on Sunday.⁶⁹

Work of necessity. A district attorney has been held entitled to recover extra compensation for services performed on Sunday, the necessity of which is certified in the manner required by statute for the recovery of extra compensation by such officials.⁷⁰ Even if within the statutory prohibitions, the work of prison guards on Sunday is legal as a work of necessity within the statutory exceptions.⁷¹

§ 56. Proceedings to Assert Defects; Waiver of Defects

Where jurisdiction is alleged to be lacking by reason of the acts having been performed on a Sunday, the question may be raised by plea in abatement or other appropriate manner. There is a conflict of authority as to whether the defect or irregularity may be waived.

Where jurisdiction is lacking by reason of the process being void for issuance or service on Sunday, the question may be raised in any manner appropriate for the submission of the question of want of jurisdiction generally.⁷² Thus, where it appears on its face that process has been issued on Sunday, it has been stated that that will justify its being quashed;⁷³ advantage may be taken of such a defect, it has been held, by a plea in abatement;⁷⁴ but, where it bears the appearance of

having been issued on another day, it has been held that, issuance being a judicial act, the court has no jurisdiction to compel the person issuing it to amend it to express the true date, or grant a motion to quash pursuant to such amendment.⁷⁵ A plea, alleging defective process, by virtue of the general Sunday observance laws, must allege facts sufficient to bring the acts relative to process within those laws, in order to be sustainable;⁷⁶ further, no intendment will be taken in favor of a plea in abatement based on the defective service, but every reasonable intendment will be made in favor of the regularity and sufficiency of the proceedings.⁷⁷ It has been held that, where issuance or service of process on Sunday is set up by plea, the existence of circumstances bringing it within applicable exceptions or otherwise justifying the Sunday action may be pleaded to support it by replication.⁷⁸

It has been held that the objection cannot be raised for the first time on appeal,⁷⁹ but that the irregularity is waived by appearance and going to trial without objection.⁸⁰ A general notice of retainer of an attorney is not an appearance, so as to amount to a waiver of the right to object to the Sunday proceedings.⁸¹ The right to question the legality of an arrest has been held waived by giving bail,⁸² and the right to question the propriety of holding a magistrate's court is waived by pleading guilty and paying a fine.⁸³ On the other hand, it has been held that the irregularity cannot be waived.⁸⁴ The defect being destruc-

68. S.C.—State v. Schnierle, 39 S.C. L. 299.

69. Tex.—Clark v. Stubbs, Civ.App., 131 S.W.2d 663.

70. Tex.—Woods v. Terrell, 285 S. W. 293, 115 Tex. 569.

71. Ky.—Page v. O'Sullivan, 169 S. W. 542, 159 Ky. 703.

72. N.Y.—Scott Shoe Mach. Co. v. Dancel, 71 N.Y.S. 263, 63 App.Div. 172.
60 C.J. p 1149 note 1.

73. Ala.—Matthews v. Ansley, 31 Ala. 20.

Pa.—Commonwealth v. Mihavetz, 3 Pa.Dist. & Co. 829.

Quashing indictment

(1) Indictment will be quashed where warrant or search warrant is served on Sunday where such service is not within exceptions of statute prohibiting such service.—Commonwealth v. McQuaid, 45 Pa.Dist. & Co. 700, 53 Dauph.Co. 105—Common-

wealth v. Fannasy, 30 Pa.Dist. & Co. 410, 44 Dauph.Co. 301.

(2) Quashing indictment generally for irregularities in preliminary proceedings see Indictments and Informations § 206 a.

74. Ala.—Haynes v. Sledge, 2 Port. 530, 27 Am.D. 665.
60 C.J. p 1149 note 3.

75. Ala.—Matthews v. Ansley, 31 Ala. 20.

76. N.H.—Clough v. Shepherd, 31 N.H. 490.
60 C.J. p 1149 note 6.

77. Vt.—Pearson v. French, 9 Vt. 349.
60 C.J. p 1149 note 7.

78. Ala.—Haynes v. Sledge, 2 Port. 530, 27 Am.D. 665.

79. Kan.—Venable v. Ebenezer Baptist Church, 25 Kan. 177.
60 C.J. p 1149 note 8.

80. N.C.—White v. Morris, 12 S.E. 80, 107 N.C. 92.
60 C.J. p 1149 note 9.

81. N.Y.—Vanderpoel v. Wright, 1 Cow. 209.

82. Pa.—Commonwealth v. Beerson, 49 Pa.Dist. & Co. 609, 32 Del.Co. 84 —Commonwealth v. Googesky, 34 Pa.Co. 197.

Questioning legality of arrest by motion to quash indictment after giving bail see Indictments and Informations § 206 a.

83. Pa.—Commonwealth v. Johns, 64 Pa.Dist. & Co. 35.

84. N.Y.—Brody v. Owen, 18 N.Y.S. 2d 28, 259 App.Div. 720—People v. Wells, 276 N.Y.S. 543, 153 Misc. 730.
60 C.J. p 1149 note 11.

In Alaska

(1) It has been held that the service of an order of arrest in a civil action on Sunday is void, and is not waived by appearance and giving

tive of jurisdiction, refusal of the court to dismiss the action for illegality of Sunday process does not preclude the courts of another state from independent consideration and determination of the validity and effect of the Sunday process.⁸⁵

In criminal cases it has been held that the irregularity may be inquired into on certiorari where the irregularity forms a part of the record, at least under special statutory certiorari authorizing the specification of such error.⁸⁶ It has been held that prohibition is a proper way to raise the issue of invalid Sunday service of a summons.⁸⁷ In some cases the defect arising through proceedings having been had on Sunday has been considered and relief afforded on habeas corpus;⁸⁸ and it has been held that erroneously holding court on Sunday may be taken advantage of by appeal,⁸⁹ as may rendition of judgment on Sunday.⁹⁰

The burden of proof that publication was so made on Sunday as to be invalid is on the party asserting that fact;⁹¹ and, where a judgment is objected to as having been rendered on Sunday, the presumption favoring the validity of judgment requires that, in order for it to be held void, the evidence must clearly establish without doubt that it was so rendered.⁹² Where the record shows that the trial was fully completed on Saturday, defendant cannot attack the proceedings, without seeking a correction of the record, by an assertion that proceedings were had on Sunday.⁹³

An appeal made returnable on Sunday is subject to a motion to dismiss.⁹⁴

§ 57. Proceedings on Saturday against Persons Observing Seventh Day

By statute it is an offense maliciously to procure service of process on Saturday, or to serve process returnable on Saturday, or maliciously to procure adjournment of a cause to Saturday, where the adverse party is one who observes that day as a day of worship.

By statute it has been made an offense maliciously to procure the service of process on Saturday, or to serve process returnable on Saturday, or maliciously to procure adjournment of a cause to Saturday, where the adverse party is one who observes that day as a day of worship;⁹⁵ where the statute is violated, the process illegally served or returnable on that day is void;⁹⁶ but, in order that it be so, the element of malice must be present, and, in the absence of such element, the act done is no offense, and the process served or returnable on Saturday is valid.⁹⁷ Further, no act done on Saturday in the course of a judicial proceeding against a person observing that day as a day of worship is void unless it falls within the prohibitions of the statute dealing with the immunities of such persons.⁹⁸ In the absence of statute, a witness refusing to be sworn on Saturday, on the ground that it is his Sabbath, has been held subject to a fine.⁹⁹

SUNDAY SCHOOL. The term "Sunday school" ordinarily is applied to a place for religious instruction operated in conjunction with a church, as stated in Schools and School Districts § 1. The term is also treated in the title Religious Societies,

and for specific references see the index to that title.

SUNDRY. Divers; more than one or two; sep-

bond for appearance.—Valentine v. Roberts, 1 Alaska 536.

(2) However, where accused pleaded guilty and voluntarily paid the fine on Sunday, it was held that the voluntary payment of the fine rendered the case moot.—In re Dalton, 8 Alaska 338.

85. N.Y.—People v. Dewey, 50 N.Y. S. 1013, 23 Misc. 267.

86. N.Y.—Pulling v. People, 8 Barb. 384.

87. Wash.—State v. Superior Court of Skamania County, 257 P. 837, 144 Wash. 44.

88. Or.—Ex parte Tice, 49 P. 1038, 32 Or. 179.
60 C.J. p 1150 note 19.

89. N.Y.—People v. Luhrs, 29 N.Y.S. 789, 79 Hun 415, 9 N.Y.Cr. 266.

90. Wash.—Fox v. Nachtsheim, 29 P. 140, 3 Wash. 684.

91. N.Y.—Harrison v. Wallis, 90 N.Y.S. 44, 44 Misc. 492.

92. Iowa.—Bishop v. Carter, 29 Iowa 165.
60 C.J. p 1150 note 23.

93. Fla.—Hanley v. State, 39 So. 149, 50 Fla. 82.

94. Fla.—Harrison v. Bay Shore

Development Co., 111 So. 128, 92 Fla. 875.

95. N.Y.—Martin v. Goldstein, 46 N.Y.S. 961, 20 App.Div. 203—Marks v. Wilson, 11 Abb.Pr. 87.

96. N.Y.—Martin v. Goldstein, 46 N.Y.S. 961, 20 App.Div. 203.

97. N.Y.—Martin v. Goldstein, supra—Marks v. Wilson, 11 Abb.Pr. 87.

98. N.Y.—Maxson v. Annas, 1 Den., N.Y., 204.
60 C.J. p 1150 note 30.

99. U.S.—Stansbury v. Marks, Pa., 2 Dall. 213, 1 L.Ed. 353.

arate; several; various.¹ It has been held synonymous with "many" see 55 C.J.S. p 707 note 21, and "several" see 80 C.J.S. p 128 note 39.

"Sundries" means miscellanies or various items which may be considered together without being separately specified or identified.²

SUNSET. The descent of the upper limb of the sun below the horizon in the evening.³ What constitutes "sunset" within the meaning of regulations proscribing the time when hunting is permitted is treated in Game § 10 d.

SUNSTROKE. The word "sunstroke" is defined in standard dictionaries and encyclopedias,⁴ and is a popular term for insolation or heat stroke.⁵

Sunstroke is marked by prostration, a high temperature of the skin, convulsions, and coma,⁶ and is a combination of a group of phenomena compris-

ing the incidence of the sun's rays, the reaction of the central nervous system, the engorgement of the blood vessels of the brain, and other physical effects.⁷

The chief factor in sunstroke is the presence of great heat,⁸ and sunstroke is due to exposure to intense external heat,⁹ and is frequently precipitated by exposure to the direct rays of the sun¹⁰ or to the direct or indirect rays of a tropical sun.¹¹

While the heat to which there is exposure may be from the sun, it may also be from other causes,¹² and the same effect may be produced by heat which is not of solar origin,¹³ and sunstroke may result from exposure to any excessive heat,¹⁴ such as that of an engine room.¹⁵

As a general rule there is associated with the heat factor physical exertion¹⁶ and marked humidity.¹⁷ It is sometimes stated that sunstroke results from a combination of heat and physical exertion,¹⁸ that is,

1. Ark.—Hammond v. State, 293 S. W. 714, 717, 173 Ark. 674.
"Divers and sundry" see 27 C.J.S. p 506 note 31.

2. N.Y.—People v. Bernstein, 261 N. Y.S. 381, 384, 237 App.Div. 270.

3. Century D.

Scientific calculation

Although "sunset" is a definite period of time at any given locality, what that time is can be known only from scientific calculations, which very few persons are capable of making. It is not precisely the same on any two days in succession, nor is it exactly the same at any two points distant apart in the state on the same day.—People v. Bishop, 111 Ill. 124, 135, 53 Am.R. 605.

4. Tenn.—Milstead v. Kaylor, 212 S.W.2d 610, 613, 186 Tenn. 642.

5. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 546, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 70 Okl. 187, L.R.A.1918F 1007.

Two main types, heat exhaustion and heat stroke.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

Two forms may be distinguished, one of sudden collapse without pyrexia (heat exhaustion); the other with very marked pyrexia (thermic fever).—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

More properly called heat stroke.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

6. Tenn.—T. J. Moss Tie Co. v. Rollins, 235 S.W.2d 585, 586, 191 Tenn. 577.

7. N.J.—Lower v. Metropolitan Life Ins. Co., 163 A. 233, 234, 10 N.J. Misc. 1236.

8. Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

9. Ind.—Cunningham v. Warner Gear Co., 198 N.E. 808, 811, 101 Ind.App. 220.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.
Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1019, 58 Utah 622, 17 A.L.R. 1183.

The theory that sunstroke is due to the actinic rays of the sun rather than to heat is no longer tenable.—Doyle v. City of Saginaw, 243 N.W. 27, 29, 258 Mich. 467.

10. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

11. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.
60 C.J. p 1151 note 19 [a] (3).

12. Ind.—Cunningham v. Warner Gear Co., 198 N.E. 808, 811, 101 Ind.App. 220.

Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

13. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.
69 C.J. p 1151 note 19 [a].

The common notion that sunstroke comes like a stroke of lightning from a piercing ray of the sun is utterly at fault.

U.S.—Dozier v. Fidelity & Casualty Co. of New York, C.C.Mo., 46 F. 446, 448, 13 L.R.A. 114.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.
Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

14. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

15. S.C.—Goethe v. New York Ins. Co., supra.
60 C.J. p 1151 note 19 [a] (3).

16. Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

17. Minn.—State v. District Court, Ramsey County, supra.
S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

18. Ind.—Cunningham v. Warner Gear Co., 198 N.E. 808, 811, 101 Ind. App. 220.

Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

exposure to heat during fatigue,¹⁹ and a high degree of humidity of the atmosphere is one of the most important features since this hinders free evaporation from the body.²⁰

While it may be conceded²¹ that technically²² and strictly speaking²³ sunstroke is a disease²⁴ rather than an accident,²⁵ and thus not embraced within the words "bodily injury,"²⁶ it nevertheless is not regarded as a disease in the popular mind,²⁷ but as a bodily injury and an accident.²⁸ In common understanding it is considered to be a kind of violent

personal injury from the very idea of sudden external force carried by the word,²⁹ and the suddenness of its approach and its catastrophic nature have caused it to be classified as an accident.³⁰

The term "sunstroke" is variously defined as meaning a condition of the body produced by great heat;³¹ a condition caused by exposure to the sun which is often fatal;³² a condition resulting from exposure to the heat of the sun or to heat from other sources;³³ certain pathological conditions re-

Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

19. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A., N.S., 609, 118 Am.S.R. 308.

20. Ind.—Cunningham v. Warner Gear Co., 198 N.E. 808, 811, 101 Ind.App. 220.

Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A., N.S., 609, 118 Am.S.R. 308.

Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

21. N.Y.—Gallagher v. Fidelity & Casualty Co. of New York, 148 N.Y.S. 1016, 1019, 163 App.Div. 556.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

22. N.Y.—Gallagher v. Fidelity & Casualty Co. of New York, 148 N.Y.S. 1016, 1019, 163 App.Div. 556. 60 C.J. p 1151 note 14 [b].

23. N.Y.—Lurye v. Stern Bros. Department Store, 9 N.E.2d 828, 829, 275 N.Y. 182—Connelly v. Hunt Furniture Co., 147 N.E. 366, 368, 240 N.Y. 83, 39 A.L.R. 867.

24. N.Y.—Lurye v. Stern Bros. Department Store, 9 N.E.2d 828, 829, 275 N.Y. 182—Connelly v. Hunt Furniture Co., 147 N.E. 366, 368, 240 N.Y. 83, 39 A.L.R. 867—Gallagher v. Fidelity & Casualty Co. of New York, 148 N.Y.S. 1016, 1019, 163 App.Div. 556.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1019, 58 Utah 622, 17 A.L.R. 1183.

The medical books describe sunstroke as a disease and every standard encyclopedia does the same.—Richards v. Standard Acc. Ins. Co., supra.

An old disease

Sunstroke is an old disease; Osler mentions that two instances are on record in the Bible, and many of the ancients describe it very well, confounding the severer forms with apoplexy.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.

25. N.Y.—Gallagher v. Fidelity & Casualty Co. of New York, 148 N.Y.S. 1016, 1019, 163 App.Div. 556. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199. Utah.—Richards v. Standard Acc. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

Not accidental

"In Sinclair v. Maritime Pass. Ins. Co., 3 El. & El. 478, 121 Eng. Reprint, 521, it is held that sunstroke is a disease proceeding from natural causes, and not accidental. In the opinion it is said 'The disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom.'"

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199. Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1019, 58 Utah 622, 17 A.L.R. 1183.

26. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

27. N.Y.—Gallagher v. Fidelity & Casualty Co. of New York, 148 N.Y.S. 1016, 1019, 163 App.Div. 556. Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 454, 70 Okl. 187, L.R.A.1918F 1007.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199. Tex.—Bryant v. Continental Casualty Co., 182 S.W. 673, 674, 107 Tex. 582, L.R.A.1916E 945, Ann.Cas.1918A 517.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

28. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

29. Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 454, 70 Okl. 187, L.R.A.1918F 1007.

S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 455, 183 S.C. 199.

Tex.—Bryant v. Continental Casualty Co., 182 S.W. 673, 674, 107 Tex. 582, L.R.A.1916E 945, Ann.Cas. 1918A 517.

Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1020, 58 Utah 622, 17 A.L.R. 1183.

30. N.Y.—Lurye v. Stern Bros. Department Store, 9 N.E.2d 828, 829, 275 N.Y. 182—Connelly v. Hunt Furniture Co., 147 N.E. 366, 368, 240 N.Y. 83, 39 A.L.R. 867.

Sunstroke is a casualty the cause of which is not well understood and happens unexpectedly under circumstances where ordinarily a sunstroke will not occur, so that it may be said to be an unusual event not according to the usual course of things and not to be ordinarily expected; it therefore comes within the meaning of the term "accidental" as used in its popular sense.—U. S. Fidelity & Guaranty Co. v. Hofinger, 45 S.W.2d 866, 867, 185 Ark. 50.

31. Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

32. Tenn.—T. J. Moss Tie Co. v. Rollins, 235 S.W.2d 585, 586, 191 Tenn. 577.

33. Kan.—Continental Casualty Co.

sulting from exposure to solar or artificial heat;³⁴ the effect produced upon the body by exposure to intense heat, whether from the sun, from furnaces, or from the atmosphere;³⁵ the effects produced upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air;³⁶ a sudden prostration resulting from exposure to excessive heat, regardless of the source from which the heat emanates;³⁷ acute prostration from excessive heat of weather;³⁸ prostration due to exposure to intense external heat.³⁹

It is also defined as meaning an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays⁴⁰ or to overheated air;⁴¹ a sudden cerebral disturbance, often with apoplectic symptoms, due to exposure to excessive heat, generally that of the sun;⁴² an affection, often fatal, due to exposure to the sun or excessive heat and marked by sudden prostration, with symptoms like those of apoplexy;⁴³ any affection produced by the action of the sun on some part of the body, especially a sudden prostration of the physical powers, with symptoms resembling those of apoplexy, occasioned by exposure to excessive heat and often terminating fatally;⁴⁴ fever due to excessive heat, but most commonly to exposure to the direct heat of the sun;⁴⁵ heat stroke, especially from direct sun rays.⁴⁶

"Sunstroke" has been held synonymous with "heat

prostration" see 39 C.J.S. p 877 note 40, and it has been held synonymous with, and has also been distinguished from, "heatstroke" see 39 C.J.S. p 877 notes 38, 39.

The word "sunstroke" as employed in insurance policies is treated in Insurance §§ 787, 938 d (10), and as compensable under compensation acts in the C.J.S. title Workmen's Compensation Acts § 187, also 71 C.J. p 623 note 29—p 625 note 55.

SUPER. The origin of the English word "super" is the same Latin word,⁴⁷ and it is defined as meaning over; above;⁴⁸ over and above;⁴⁹ beyond;⁵⁰ higher, as in quantity, quality, or degree; more than, as in superessential, supernatural, or superstandard.⁵¹

SUPERANNUATED. Impaired or disabled through old age.⁵²

SUPERCARGO. A "supercargo" is defined in Shipping § 171 to be a person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

SUPERFICIES. In one sense the word "superficies" means nothing more than the mere vestimenta

v. Johnson, 85 P. 545, 546, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 70 Okl. 187, L.R.A.1918F 1007.

34. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 546, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

35. Kan.—Continental Casualty Co. v. Johnson, supra.
Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 70 Okl. 187, L.R.A.1918F 1007.

36. S.C.—Goethe v. New York Life Ins. Co., 190 S.E. 451, 454, 183 S.C. 199.
Utah.—Richards v. Standard Acc. Ins. Co., 200 P. 1017, 1019, 58 Utah 622, 17 A.L.R. 1183.
60 C.J. p 1151 note 20.

37. Minn.—Mather v. London Guarantee & Accident Co., 145 N.W. 963, 125 Minn. 186.
Neb.—Herbert v. State, 246 N.W. 454, 124 Neb. 312.

38. Ill.—Supreme Lodge O. M. P. v. Gelbke, 100 Ill.App. 190, 196.

Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

39. Ind.—Cunningham v. Warner Gear Co., 198 N.E. 808, 811, 101 Ind.App. 220.
60 C.J. p 1151 note 23.

40. N.J.—Lower v. Metropolitan Life Ins. Co., 163 A. 233, 234, 10 N.J.Misc. 1236.
60 C.J. p 1151 note 16.

41. N.J.—Lower v. Metropolitan Life Ins. Co., supra.

42. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

43. Minn.—State v. District Court, Ramsey County, 164 N.W. 916, 138 Minn. 250, L.R.A.1918F 918.

44. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.

45. Kan.—Continental Casualty Co. v. Johnson, supra.

Okl.—Continental Casualty Co. v. Clark, 173 P. 453, 70 Okl. 187, L.R.A.1918F 1007.

46. Kan.—Continental Casualty Co. v. Johnson, 85 P. 545, 546, 74 Kan. 129, 6 L.R.A.,N.S., 609, 118 Am.S.R. 308.
60 C.J. p 1151 note 26.

47. Cal.—Fricke v. Braden, 130 P.2d 727, 729, 55 Cal.App.2d 266.

48. Cal.—Fricke v. Braden, supra.
Ind.—Ex parte France, 95 N.E. 515, 518, 176 Ind. 72.

49. Cal.—Fricke v. Braden, 130 P.2d 727, 729, 55 Cal.App.2d 266.

50. Ind.—Ex parte France, 95 N.E. 515, 518, 176 Ind. 72.

51. Cal.—Fricke v. Braden, 130 P.2d 727, 729, 55 Cal.App.2d 266.
"Super market" see 55 C.J.S. p 801 note 31.

52. Wis.—Hood v. Dorer, 82 N.W. 546, 548, 107 Wis. 149.
60 C.J. p 1151 note 27.

terræ; the top of the earth and whatever is upon the face thereof.⁵³

In the civil law, the word "superficies" means the alienation by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved.⁵⁴ In the civil law the term also means a building or erection.⁵⁵

SUPER FIDEM CHARTARUM, MORTUIS TESTIBUS, ERIT AD PATRIAM DE NECESSITATE RECURRENDUM. See 60 C.J. p 1151 note 30.

SUPERFLUA. As the first word of maxims to which there have been no recent applications see 60 C.J. p 1152 notes 31, 32.

SUPERFLUOUS. Useless; unnecessary; ineffectual.⁵⁶

SUPERINTEND. The term "superintend" is de-

rived from the Latin "superintendo," "super" meaning over and "intendo" meaning to direct one's attention to.⁵⁷ It is defined as meaning to have or exercise the charge and oversight of;⁵⁸ to have charge and direction of;⁵⁹ to oversee;⁶⁰ to oversee with power of direction;⁶¹ to direct the course and oversee the details of;⁶² to regulate with authority;⁶³ to regulate the conduct and progress of;⁶⁴ to overlook;⁶⁵ to manage;⁶⁶ to supervise.⁶⁷ It has been held synonymous with "supervise."⁶⁸

SUPERINTENDENCE. The word "superintendence," in common and ordinary acceptance, and according to lexicographers, imports little more than oversight and direction,⁶⁹ and the exercise of some authority or control over the person or thing subjected to oversight.⁷⁰ It is defined as meaning the act of superintending;⁷¹ care and oversight for the purpose of direction, and with authority to direct;⁷² oversight;⁷³ superior care;⁷⁴ direction;⁷⁵ control;⁷⁶ inspection.⁷⁷

53. Mont.—Superior Coal Co. v. Musselshell County, 41 P.2d 14, 21, 98 Mont. 501.
"Surface" similarly defined see the C.J.S. definition Surface post.

54. Black L.D.

55. Black L.D.

56. Ga.—City of Atlanta v. Hudgins, 19 S.E.2d 508, 513, 193 Ga. 618.

57. Ala.—Dantzler v. De Bardeleben Coal, etc., Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

60 C.J. p 1152 note 34 [a].

58. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., supra.

N.D.—State ex rel. Johnson v. Broderick, 27 N.W.2d 849, 858, 75 N.D. 340.

Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.

Phrases

(1) "Superintending control" see 18 C.J.S. p 32 note 51.

(2) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 1152 notes 42, 43, 45.

59. Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.
60 C.J. p 1152 note 35.

61. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.

61. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

N.D.—State ex rel. Johnson v. Broderick, 27 N.W.2d 849, 858, 75 N.D. 340.

Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.

62. Ala.—Dantzler v. De Bardeleben Coal, etc., Co., 14 So. 10, 13, 101 Ala. 309, 22 L.R.A. 361.

Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.

63. Ala.—Dantzler v. De Bardeleben Coal, etc., Co., 14 So. 10, 13, 101 Ala. 309, 22 L.R.A. 361.

60 C.J. p 1152 note 40.

64. Ind.—Booth v. State, 100 N.E. 563, 565, 179 Ind. 405, L.R.A.1915B 420, Ann.Cas.1915D 987—McGregor v. State ex rel. Ballard, 68 N.E. 315, 31 Ind.App. 483.

65. Ala.—Dantzler v. De Bardeleben Coal, etc., Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

Tex.—Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, 900, 111 Tex. 477.

66. Tex.—Burrell Engineering & Construction Co. v. Grisier, supra.
60 C.J. p 1152 note 36.

67. N.D.—State ex rel. Johnson v. Broderick, 27 N.W.2d 849, 858, 75 N.D. 340.

60 C.J. p 1152 note 41.

68. Ga.—New York L. Ins. Co. v. Rhodes, 60 S.E. 828, 830, 4 Ga.App. 25.

Its sense is very like that of "supervise."—Board of Education of City of Minneapolis v. Sand, 34 N.W. 2d 689, 694, 227 Minn. 202.

69. N.Y.—Hurley v. Olcott, 119 N.Y. S. 430, 435, 134 App.Div. 631.

70. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 13, 101 Ala. 309, 22 L.R.A. 361.

71. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., supra.

Ill.—Ure v. Ure, 56 N.E. 1087, 185 Ill. 216.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1152 note 54—p 1153 note 63.

72. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

Ill.—Ure v. Ure, 56 N.E. 1087, 185 Ill. 216.

73. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

N.C.—Moffitt v. Asheville, 9 S.E. 695, 698, 103 N.C. 237, 14 Am.S.R. 810.

74. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

75. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., supra.

76. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., supra.

Ill.—Ure v. Ure, 56 N.E. 1087, 185 Ill. 216.

77. Ala.—Dantzler v. De Bardeleben

It has been held to be synonymous with "care" see 12 C.J.S. p 1144 note 7.3, and "guidance."⁷⁸

SUPERINTENDENT. The term "superintendent" is derived from the Latin "super" and "intendere" meaning to oversee.⁷⁹ It suggests the idea of one who superintends or of one who has general authority,⁸⁰ one who stands in relation to the particular work in the same relation that the master would stand if he were personally present,⁸¹ and implies, *ex vi termini*, not mere momentary usurpation, but a regular and recognized authority.⁸²

In its ordinary acceptation,⁸³ the word "superintendent" is defined as meaning one who superintends;⁸⁴ one who has the oversight and charge of something, with the power of direction;⁸⁵ a director; an overseer.⁸⁶

"Superintendent" has been held equivalent to, or synonymous with, "inspector" see 44 C.J.S. p 407 note 1, "manager" see 55 C.J.S. p 3 note 48.1, "overseer" see 67 C.J.S. p 545 note 21, and "super-

visor."⁸⁷ It has been held equivalent to, and has also been distinguished from, "boss" see 11 C.J.S. p 530 note 18.

SUPERIOR. Higher in dignity, quality, or excellence;⁸⁸ belonging to a higher grade.⁸⁹

SUPERNUMERARY. A person or thing in excess of the necessary or customary number.⁹⁰

SUPERPHOSPHATE. A fertilizer prepared by treating ground bones, bone black, or phosphoric with sulphuric acid, whereby a portion of the insoluble phosphoric acid is rendered soluble in water.⁹¹

SUPERScription. An upper or outer inscription, as a title or direction; especially, an address on a letter.⁹² It has been held synonymous with "address" see 1 C.J.S. p 1460 note 61.

SUPERSEDE. The word "supersede" is defined as meaning to make void⁹³ or useless;⁹⁴ to make void, inefficacious, or useless;⁹⁵ to make void, useless,

Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

N.C.—Moffitt v. City of Asheville, 9 S.E. 695, 698, 103 N.C. 237, 14 Am. S.R. 810.

78. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 12, 101 Ala. 309, 22 L.R.A. 361.

79. N.Y.—People v. Steele, 2 Barb. 397, 409, 1 Edm.Sel.Cas. 505, 6 N.Y. Leg.Obs. 54.

80. N.Y.—Abrahamson v. General Supply & Construction Co., 98 N.Y. S. 596, 598, 112 App.Div. 318.

81. N.Y.—Abrahamson v. General Supply & Construction Co., *supra*.

82. Ky.—Calvert v. Commonwealth, 5 B.Mon. 264, 265.

83. Ind.—Salem v. McClintock, 46 N.E. 39, 40, 16 Ind.App. 656, 59 Am.S.R. 330.

84. Ind.—Indiana Fibre Products Co. v. Cyclone Mfg. Co., 143 N.E. 169, 171, 81 Ind.App. 682. 60 C.J. p 1153 note 66.

Phrases employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1153 notes 68–78.

85. Nev.—Facalaris v. Eureka, etc., R. Co., 1 P. 835, 836, 18 Nev. 155, 51 Am.R. 737. 60 C.J. p 1153 note 67.

Similarly defined

One who has the oversight and charge of some place, etc.—Boone v.

Mrs. Maurer's Bakery, La.App., 170 So. 246, 249.

86. Ind.—Lafayette v. James, 92 Ind. 240, 244, 47 Am.R. 140—Salem v. McClintock, 46 N.E. 39, 40, 16 Ind.App. 656, 59 Am.S.R. 330.

Kan.—St. Louis & S. F. Ry. Co. v. De Ford, 16 P. 442, 443, 38 Kan. 299.

87. La.—Boone v. Mrs. Maurer's Bakery, App., 170 So. 246, 249.

88. Ala.—Gilman v. Jones, 5 So. 785, 790, 87 Ala. 691, 4 L.R.A. 113. 60 C.J. p 1153 note 84.

Phrases

(1) "Superior court" defined see Courts § 7, and other references in title index.

(2) "Superior force" see 36 C.J.S. p 1139 notes 44, 45.

(3) "Superior judges" see the title index to Judges.

(4) "Superior servant rule" see the title index to Master and Servant, *sub verbo* "Fellow servants."

(5) "Superior vena cava" is a large vein emptying into the heart and immediately adjacent thereto and which returns the venous blood to the heart from the head, neck, and upper limbs.—Glanton v. Shafto, 41 A.2d 200, 201, 132 N.J.Law 474.

(6) Other phrases as to which more recent adjudications have not been found see 60 C.J. p 1153 notes 81, 82, p 1154 notes 86–92.

89. Ill.—People ex rel. McCoy v. McCahey, 15 N.E.2d 988, 993, 296 Ill.App. 310.

90. New Standard D. "Supernumerary judge" defined see Judges § 2 (a) (1).

At the time of the American Revolution, a regiment broken up and consolidated was spoken of as "reduced," and officers who were thereby thrown out and became unattached were designated as "supernumeraries."—Williams v. U. S., Ct.Cl., 11 S.Ct. 43, 48, 137 U.S. 113, 127, 34 L. Ed. 590, 20 Ct.Cl. 619—60 C.J. p 1154 note 94.

91. Ky.—Goodman v. Beard, 93 S.W. 666, 667, 29 Ky.L. 544.

"Fertilizer" defined see 36 C.J.S. p 732 note 12.

92. New Standard D. Superscription in connection with depositions see Depositions § 78.

93. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.

94. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

95. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

Mont.—Dick v. King, 236 P. 1093, 1095, 73 Mont. 456.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

or unnecessary by superior power, or by coming in the place of;⁹⁶ to make unnecessary or superfluous;⁹⁷ to set aside;⁹⁸ to annul;⁹⁹ to repeal;¹ to suspend;² to stay;³ to overrule;⁴ to obliterate;⁵ to neutralize.⁶

"Supersede" is further defined as meaning to supplant,⁷ as to supersede one official with another;⁸ to replace,⁹ displace,¹⁰ or set aside¹¹ and put another in the place of;¹² to take the place

of¹³ by reason of superior worth, appropriateness, efficiency, or right.¹⁴

"Superseded," the past participle of "supersede,"¹⁵ has been construed in the sense of repealed¹⁶ or obliterated.¹⁷ It has been distinguished from "suspended."¹⁸

"Superseding," is the present participle of "supersede."¹⁹

96. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.
Tex.—Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337, 339.

Similarly expressed

To make void, inefficacious, or useless by superior power, or by coming in the place of.—Taylor v. New York Telephone Co., 160 N.Y.S. 865, 866, 97 Misc. 160.

97. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

Similarly defined

(1) To render unnecessary.—Taylor v. New York Telephone Co., 160 N.Y.S. 865, 866, 97 Misc. 160.

(2) To render obsolete.—Hale v. Dolly Varden Lumber Co., Cal.App., 230 P.2d 841, 846.

98. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.
60 C.J. p 1154 note 2.

Similarly defined

To cause to be set aside; to cause to be abandoned.—Hale v. Dolly Varden Lumber Co., Cal.App., 230 P.2d 841, 846.

99. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

N.Y.—People ex rel. Traino v. Slattery, 38 N.Y.S.2d 553, 556, 179 Misc. 206.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.

60 C.J. p 1154 note 98.

1. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

2. N.Y.—People ex rel. Traino v. Slattery, 38 N.Y.S.2d 553, 556, 179 Misc. 206.

Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.
60 C.J. p 1154 note 4.

3. N.Y.—People ex rel. Traino v. Slattery, 38 N.Y.S.2d 553, 556, 179 Misc. 206.

60 C.J. p 1154 note 3.

4. Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.

5. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

To obviate

Va.—Capell v. Capell, 178 S.E. 894, 895, 164 Va. 45.

6. Va.—Capell v. Capell, supra.

7. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Tex.—Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337, 339.

8. La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

9. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.

10. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Mont.—Dick v. King, 236 P. 1093, 1095, 73 Mont. 456.

Tex.—Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337, 339.

11. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

La.—Kemp v. Stanley, 15 So. 1, 8, 204 La. 110.

N.Y.—People ex rel. Traino v. Slattery, 38 N.Y.S.2d 553, 556, 179 Misc. 206.

Tex.—Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337, 339.

12. Cal.—Hale v. Dolly Varden Lumber Co., App., 230 P.2d 841, 846.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Tex.—Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337, 339.

13. N.Y.—People ex rel. Traino v. Slattery, 38 N.Y.S.2d 553, 556, 179 Misc. 206—People v. Formiscio, 39 N.Y.S.2d 149, 156.

14. N.Y.—People v. Formiscio, supra.

Primary meaning

N.Y.—People v. Formiscio, supra.

15. Webster New Int.D.

"Superseded" defined in military sense see Militia § 11 b.

16. N.Y.—Cleveland v. City of Wastertown, 165 N.Y.S. 305, 315, 99 Misc. 66.

17. U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 163.

18. Mo.—State v. Melvin, 66 S.W. 534, 536, 166 Mo. 565.

19. Webster New Int.D.

"Superseding cause" within law of negligence generally see Negligence § 111 b.

SUPERSEDEAS

This Title includes express suspension, by writ or other mandate or order of court, of enforcement of judgments or orders, or of execution of writs or other process, or of other judicial proceedings; nature and scope of the remedy in general; grounds therefor and defenses thereto; to and against whom and as to what judgments, writs, etc., supersedeas is allowed; jurisdiction over and proceedings to obtain supersedeas; issuance of writs, orders, etc., of supersedeas, and proceedings thereon; operation, effect, and enforcement thereof; review of proceedings; and costs in such proceedings.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition, and nature and scope of remedy—p 890
- 2. Jurisdiction and authority to grant supersedeas—p 891
- 3. What may be superseded—p 892
- 4. Proceedings to obtain—p 894
- 5. Order, writ, and service thereof—p 895
- 6. Waiver of irregularity in issuance or return—p 896
- 7. Discharging, quashing, or vacating writ—p 896
- 8. Operation and effect—p 896
- 9. Violation of writ—p 897
- 10. Bonds—p 897
- 11. Appeal and error—p 898
- 12. Costs—p 898

See also descriptive word index in the back of this Volume

§ 1. Definition, and Nature and Scope of Remedy

Supersedeas, which is a writ commanding a stay of proceedings, such as the execution of a judgment, is in the nature of a substitute for a bill in equity, and will be issued only where other remedies are not available.

Supersedeas or, more accurately, a writ of supersedeas is a writ which contains a command to stay some ordinary proceedings at law,¹ and is technically a writ to suspend the execution of a judgment.² While originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might

come into his hands,³ in modern times the term is often used synonymously with a "stay of proceedings;"⁴ and by an extension of the term it has come to be used as a designation of the effect of any proceeding or act in a cause, which, of its own force, causes a suspension or stay of proceedings.⁵

Supersedeas as a stay of proceedings in an inferior court pending the review of a cause is discussed generally in Appeal and Error §§ 625-679; and a stay, quashing, vacation, and other relief against execution generally is considered in Executions §§ 139-164.

Nature of remedy. A proceeding by supersedeas is not a proceeding at common law in the

1. Ill.—*Perteet v. People*, 70 Ill. 171.
Okl.—*Corpus Juris cited in International Chiropractic Congress v. Johnston*, 50 P.2d 1115, 1116, 174 Okl. 567.
60 C.J. p 1155 note 1.

2. Tenn.—*Marley v. Ross*, 1 Heisk. 769.
3. Or.—*State v. Small*, 90 P. 1110, 1111, 49 Or. 595.
60 C.J. p 1156 note 2.

4. N.M.—*Sena v. District Court of Fourth Judicial Dist.*, 240 P. 202, 30 N.M. 505.
60 C.J. p 1156 note 3.
5. Cal.—*Dulin v. Pacific Wood, etc., Co.*, 33 P. 123, 98 Cal. 304.

strict sense of that term.⁶ The writ and the proceeding on which it is founded are regarded as in the nature of a substitute for a bill in equity,⁷ where the matter of discharge set forth in the petition does not appear in the record.⁸ It has been said to be a substitute for the writ of audita querela,⁹ and that the same rules which govern the one must regulate the other, with but slight exceptions.¹⁰ The remedy is usually regarded as injunctive or prohibitive in character, and not corrective;¹¹ and it will not function as a writ of certiorari or a writ of mandamus.¹²

While a supersedeas is in one sense a continuation of the original suit,¹³ in another sense it is the commencement of a new suit, and it is generally so regarded.¹⁴ It is not the process by which the suit is prosecuted, but is collateral to the suit.¹⁵

Scope of remedy. The province of a writ of supersedeas is to prevent an abuse of the process of the court.¹⁶ It has been variously stated that its proper office and function are merely to stay proceedings;¹⁷ and that its object and purpose are to suspend the efficacy of a judgment or decree.¹⁸ The writ cannot operate as an injunction against any of the parties to an action,¹⁹ and, when allowable, is only granted in cases of necessity.²⁰

and will not be issued where other remedies are available.²¹ It is, like other original writs, to be made use of only in those cases where some unusual situation is presented which cannot well be handled otherwise;²² since if it were to issue in every case where an appeal is pending and where appellant might possibly suffer injury due to the lapse of time or other reason, its use would become well nigh universal.²³

In a proceeding for a supersedeas, that which forms the ground for relief must rest on facts accruing subsequent to the decree,²⁴ such as satisfaction;²⁵ or, if it relates to antecedent facts, it must show fraud in the decree,²⁶ or want of jurisdiction in the court, apparent on the face of the record,²⁷ or a denial of the relation which authorizes execution.²⁸

§ 2. Jurisdiction and Authority to Grant Supersedeas

A court ordinarily has authority to supersede its own executions; but whether supersedeas may be issued by an appellate court, or by a judge in vacation or at chambers, generally depends on constitutional or statutory provisions.

A court has authority, under its general powers, to supersede its own executions in a proper case,

6. Ala.—Mobile Branch Bank v. Coleman, 20 Ala. 140.

7. Ala.—Ex parte Brickell, 86 So. 1, 204 Ala. 441.
60 C.J. p 1156 note 8.

8. Ala.—Ex parte Brickell, supra.
60 C.J. p 1156 note 9.

9. Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595.
60 C.J. p 1156 note 6.
Audita querela see 7 C.J.S. p 1278 et seq.

10. Ala.—Mobile Branch Bank v. Coleman, 20 Ala. 140—Campbell v. Byers, 60 So. 737, 6 Ala.App. 292.

11. Cal.—Craig v. Stansbury, 174 P. 404, 37 Cal.App. 668.
Nev.—Kress v. Corey, 189 P.2d 352, 65 Nev. 1.

12. Nev.—Kress v. Corey, supra.

13. W.Va.—Nadenbousch v. Sharer, 2 W.Va. 285.

14. Ala.—Pearsall v. McCartney, 28 Ala. 110.
60 C.J. p 1156 note 12.

15. Tenn.—Weiss v. McCanless, 140 S.W.2d 409, 411, 176 Tenn. 222.

16. Ala.—Jesse French Piano, etc.,

Co. v. Bradley, 39 So. 47, 143 Ala. 530.

60 C.J. p 1156 note 13.

17. Tenn.—McKee v. Board of Elections, 116 S.W.2d 1033, 1038, 173 Tenn. 180, rehearing denied 117 S.W.2d 755, 173 Tenn. 276.

18. Ill.—Gumberts v. East Oak St. Hotel Co., 88 N.E.2d 883, 404 Ill. 386.

Maintenance of status quo

The purpose of the writ is to maintain the status quo that existed before the entry of the judgment to which it is directed.—Solorza v. Park Water Co., 183 P.2d 275, 80 Cal.App.2d 809.

Stay of execution

(1) The most common function of a writ of supersedeas is to stop the execution of a judgment at law or a decree in equity.—Marby v. Ross, 1 Heisk, Tenn., 769.

(2) Its purpose is to enable the court, or one of its judges, to stay the execution of an order or decree of the chancery court which, in advance of the final hearing, undertakes to deprive the litigant of money or property.—Hammond v. Rawls, 211 S.W.2d 170, 186 Tenn. 427—Blake v.

Dodge, 76 Tenn. 465—City of Chattanooga v. State of Georgia, 3 Tenn. App. 42.

19. Cal.—Wood v. Board of Fire Com'rs of City of Los Angeles, 195 P. 739, 50 Cal.App. 593.

20. N.C.—McArthur v. Land & Lumber Co., 80 S.E. 403, 164 N.C. 383.
60 C.J. p 1156 note 15.

21. Ky.—Tracy v. Elizabethtown L. & B. S. R. Co., 12 Ky.Op. 587.

22. Cal.—Bogart v. Board of Medical Examiners, 221 P.2d 168, 99 Cal. App.2d 170.

23. Cal.—Bogart v. Board of Medical Examiners, supra.

24. Ala.—Huett v. Nevins, 50 So.2d 160, 255 Ala. 37—Merrill v. Travis, 26 So.2d 258, 248 Ala. 42.
60 C.J. p 1156 note 17.

25. Ala.—Merrill v. Travis, supra.
60 C.J. p 1156 note 18.

26. Ala.—Merrill v. Travis, supra.
60 C.J. p 1156 note 19.

27. Ala.—Merrill v. Travis, supra.
60 C.J. p 1156 note 20.

28. Ala.—Ex parte Brickell, 86 So. 1, 204 Ala. 441.
60 C.J. p 1156 note 21.

especially when it has general jurisdiction of the subject,²⁹ and the ground for jurisdiction to award the writ is the power and duty of the courts to prevent the abuse of their process when an improper or unjust use is attempted to be made of it.³⁰ It has been held that a court which has general appellate and revisory jurisdiction over inferior tribunals may exercise such power by supersedeas where no appeal or writ of error lies for the correction of judgments of such inferior tribunals.³¹ However, notwithstanding constitutional or statutory provisions authorizing the supreme court or a judge thereof to issue supersedeas, an application for a supersedeas of execution issuing on a judgment from the court below must first be made to that court, and refused by it, before the supreme court will hear such application;³² and, where an error in a default judgment is one which might be reversed in an appellate court, no supersedeas will be allowed until after motion to the lower court or judge has been made and overruled.³³ In any event, an inferior court judge has no power or jurisdiction to grant an order for supersedeas to the judgments or decrees of the supreme court.³⁴

A proceeding in supersedeas should be granted out of the court where the record on which it is procured remains, or be returnable in the same court;³⁵ it cannot be granted out of any court returnable in the same court, where the record on which it is returnable is not there,³⁶ and, if the record is not brought into the court where the writ is sued, there should be judgment against plaintiff.³⁷ How-

ever under a statute providing that a party may apply to any judge of the court for an order of supersedeas, it has been held that an application may be made to a judge of one district although the action is triable elsewhere.³⁸

Whether in any case the writ of supersedeas should issue lies in the sound discretion of the court.³⁹

In vacation or at chambers. In the absence of statutory authority, a judge cannot, in vacation or at chambers, issue writs of supersedeas staying an execution on a judgment,⁴⁰ staying proceedings on a peremptory mandamus,⁴¹ or staying all actions against one who has taken possession of lands in a condemnation proceeding.⁴² However, authority is sometimes conferred by the constitution⁴³ or by statute⁴⁴ on the supreme court, or any judge thereof, either in term or vacation to issue writs of supersedeas. Where authorized by statute, a judge may, in vacation, issue writs of supersedeas staying proceedings⁴⁵ under a judgment or an execution,⁴⁶ or staying proceedings under a previous order appointing a receiver.⁴⁷

§ 3. What May Be Superseded

Supersedeas is most frequently used to suspend executions improperly issued or where an improper or unjust use is attempted to be made of them. The writ cannot issue to supersede interlocutory orders or decrees except in so far as authorized by statute.

The writ of supersedeas is perhaps most frequently used to suspend and quash executions,⁴⁸

29. Ala.—Payne v. Thompson, 48 Ala. 535—Lockhart v. McElroy, 4 Ala. 572.

Authority to allow stay pending appeal see Appeal and Error § 634.

30. Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595. 60 C.J. p 1157 note 24.

31. Tenn.—State v. Bockman, 201 S. W. 741, 139 Tenn. 422.

Authority of supreme court to grant supersedeas to interlocutory order or decree see *infra* § 3.

32. Ark.—Hoffer v. State, 16 Ark. 214—Ex parte Bixley, 13 Ark. 286.

33. Va.—Davis v. Commonwealth, 16 Gratt. 134, 57 Va. 134.

34. Tenn.—Dibrell v. Eastland, 3 Yerg. 507.

35. Ala.—Payne v. Thompson, 48 Ala. 535.

Miss.—Wynne v. Illinois Cent. R. Co.,

66 So. 410, 105 Miss. 786, 108 Miss. 376.

36. Ala.—Payne v. Thompson, 48 Ala. 535. 60 C.J. p 1157 note 40.

37. Ala.—Payne v. Thompson, *supra*.

38. N.Y.—Wells v. Jones, 2 Abb.Pr. 20.

39. Cal.—Back v. Hook, 225 P.2d 1005, 101 Cal.App.2d 656. Discretion of court or judge to issue supersedeas on appeal generally see Appeal and Error § 635.

Interlocutory judgment

Ga.—Pope v. U. S. Fidelity & Guaranty Co., 20 S.E.2d 13, 193 Ga. 769.

Discretion held not abused

Ga.—Pope v. U. S. Fidelity & Guaranty Co., *supra*.

40. N.J.—Chadwick v. Reeder, 19 N. J.Law 156.

41. N.Y.—People v. Steele, 1 Edm. Sel.Cas. 568.

42. Cal.—Loomis v. Andrews, 49 Cal. 239.

43. Ark.—Ex parte Caldwell, 5 Ark. 390. 60 C.J. p 1157 note 29.

44. Va.—Cheshire v. Atkinson, 1 Hen. & M. 210, 11 Va. 210. 60 C.J. p 1157 note 30.

45. N.Y.—Sales v. Woodin, 8 How. Pr. 349. 60 C.J. p 1157 note 35.

46. Ill.—Bonnell v. Neely, 43 Ill. 288. 60 C.J. p 1157 note 36.

47. Wis.—State v. Taylor, 19 Wis. 566.

48. Ala.—Ex parte Pearl Roller Mill Co., 45 So. 423, 154 Ala. 232. Judgments or orders which may be superseded or stayed pending appeal see Appeal and Error § 632.

either when they are improperly issued⁴⁹ or where an unjust or improper use is attempted to be made of them,⁵⁰ as, for example, where a judgment on which execution is issued has been satisfied.⁵¹ The writ generally will lie in all cases where a writ of audita querela would lie at common law.⁵² Under some statutes it has been held that the use of the writ is confined to judgments and decrees in civil actions.⁵³ Supersedeas may not be used as a remedy against persons acting independently of a court and without the aid of its process.⁵⁴ After the denial of a motion for change of venue on the ground that an impartial jury could not be obtained in the county in which the crime was committed, supersedeas is properly denied.⁵⁵ Supersedeas will lie to stay proceedings pending the determination of an appeal containing issues which will become res adjudicata.⁵⁶

Interlocutory orders or decrees. Where a statute authorizes the supreme court to allow a supersedeas from a final judgment of an inferior court, no supersedeas can issue to an interlocutory order or decree.⁵⁷ However, under some statutes power is conferred on the supreme court, in term, and any of the judges, in vacation, to grant writs of su-

persedeas to interlocutory orders and decrees, as in the case of final decrees.⁵⁸ Under such statutes it has been held that the supreme court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced,⁵⁹ and are in fieri.⁶⁰

On the other hand, it has been held under such statutes that the court has no power, in this mode, to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character,⁶¹ or such as are intended to impound and protect property,⁶² or such as have been executed,⁶³ or the fiat of a chancellor awarding extraordinary process,⁶⁴ or an order appointing a receiver for the protection of property pendente lite.⁶⁵ However, where a receiver should not have been appointed at all, or until the issues were settled which justified his appointment, the order may be superseded,⁶⁶ as may also the void appointment of an administrator pendente lite.⁶⁷ In fact it has been said that the writ of supersedeas is the only remedy available to obtain a review of an interlocutory order, making a temporary appointment of

49. Ala.—Thompson v. Lassiter, 6 So. 33, 86 Ala. 536.
60 C.J. p 1157 note 45.

50. Ala.—Lockhart v. McElroy, 4 Ala. 572.
60 C.J. p 1158 note 46.

51. Ala.—Thompson v. Lassiter, 6 So. 33, 86 Ala. 536.
60 C.J. p 1158 note 47.

52. Ala.—Thompson v. Lassiter, supra.
60 C.J. p 1158 note 49.

Judgments and executions subject to review by writ of audita querela see Audita Querela § 2.

53. Md.—Backus v. State, 85 A. 501, 118 Md. 536.

54. Cal.—Lapique v. Kelley, 228 P. 356, 68 Cal.App. 5.
60 C.J. p 1158 note 64.

55. Ga.—Etchison v. State, 2 S.E.2d 673, 59 Ga.App. 876.

56. Cal.—Field v. Hughes, App., 16 P.2d 160.

Suit to compel satisfaction of judgment

Writ of supersedeas would be granted to stay suit to compel minor's insurer to satisfy judgment procured against minor without appointment of guardian pending appeal from order refusing to vacate judgment.—Field v. Hughes, supra.

57. Miss.—Wynne v. Illinois Cent. R. Co., 66 So. 410, 105 Miss. 786, 108 Miss. 376.

60 C.J. p 1158 note 51.

58. Tenn.—Gwynne v. Memphis Appeal-Avalanche Co., 30 S.W. 23, 93 Tenn. 603.

60 C.J. p 1158 note 52.

59. Tenn.—Weiss v. McCanless, 140 S.W.2d 409, 176 Tenn. 222—City of Chattanooga v. State of Georgia, 3 Tenn.App. 42.

60 C.J. p 1158 note 53.

Order held affirmative

The court of appeals would assume jurisdiction of petition for writs of certiorari and supersedeas to supersede order of county judge appointing administrator pendente lite and order of circuit judge denying issuance of writs of certiorari and supersedeas, on the theory that if the county judge enter a void order, which he is attempting to execute, and the circuit judge to whom the case is first appealable fails to supersede it, his order denying relief is as affirmative as the county judge's in that it authorizes the enforcement of a void order.—Lewis v. Burrow, 127 S.W.2d 795, 23 Tenn.App. 145.

60. Tenn.—Weiss v. McCanless, 140 S.W.2d 409, 176 Tenn. 222.
60 C.J. p 1158 note 54.

61. Tenn.—Weiss v. McCanless, supra.
60 C.J. p 1158 note 55.

62. Tenn.—Weiss v. McCanless, supra.

63. Tenn.—Weiss v. McCanless, supra.

60 C.J. p 1158 note 56.

64. Tenn.—Baird v. Cumberland, etc., Turnpike Co., 1 Lea 394.

60 C.J. p 1158 note 59.

65. Tenn.—Trougher v. Akin, 73 S. W. 118, 109 Tenn. 451.

60 C.J. p 1158 note 57.

66. Tenn.—Downing v. Dunlap Coal, etc., Co., 24 S.W. 122, 93 Tenn. 221.

60 C.J. p 1158 note 58.

67. Tenn.—Lewis v. Burrow, 127 S. W.2d 795, 23 Tenn.App. 145.

Appointment held void

The appointment of administrator pendente lite was void and would be superseded, where appointment was made solely on ground that will was in contest, and it was not charged or proved that executor was disqualified or unfit or that anyone was contesting the right to administer.—Lewis v. Burrow, supra.

an administrator, where the court was acting illegally or in excess of its jurisdiction.⁶⁸ It has been held that a petition which seeks a writ of supersedeas and a writ of certiorari will lie as to an injunction which was beyond the power and jurisdiction of a court to issue;⁶⁹ and the fact that the issuing court failed to rule on the motion to dissolve the injunction for a lengthy period is not sufficient to defeat petitioner's right.⁷⁰ Where statutes creating a court of appeals provide that the supreme court can reach a case properly brought to the intermediate court only by certiorari, and only then after final decree of that court, it has been held that the supreme court cannot issue a supersedeas to an interlocutory order of the court of appeals.⁷¹

§ 4. Proceedings to Obtain

Rules of court as to an application for a supersedeas must be complied with, when applicable. There must be a sufficient petition in the nature of a declaration or statement of facts; and the court may inquire into the relevant facts.

The rules of court as to filing an application for a supersedeas must be complied with, when applicable.⁷² A petition for a supersedeas is sometimes regarded as in the nature of a declaration⁷³ or statement of facts,⁷⁴ and, as such, it may be pleaded or demurred to;⁷⁵ but the same strictness in plead-

ing is not required as in an ordinary bill in equity,⁷⁶ even though, as discussed supra § 1, the writ and the proceeding may be regarded as in the nature of a bill in equity. However, the material allegations of a petition for supersedeas are required to be proved in order to authorize a judgment for petitioners thereon.⁷⁷

It has been held that the petition may ask relief in more than one cause,⁷⁸ that the pleadings must be made in the names of the parties,⁷⁹ and that the application should be addressed to the court and not to one of its members.⁸⁰ A petition for a supersedeas to prevent the sale of exempt property under execution must set forth under oath that petitioner is a resident of the state,⁸¹ and must contain a description of all his property real and personal.⁸²

Verification. It is not required that the petition presented should be verified by the oath of the person in whose name, and on whose behalf, it is filed;⁸³ any person who knows the matters set forth in the petition to be true may verify it.⁸⁴

Amendment. Since a petition is in the nature of a declaration, it may be amended by leave of court,⁸⁵ on demurrer sustained,⁸⁶ provided the amendment does not make an entirely different case.⁸⁷

68. Tenn.—Lewis v. Burrow, supra.

The terms "acting illegally" or in "excess of jurisdiction" within rule that writ of supersedeas is available to obtain review where court is acting illegally or in excess of jurisdiction mean the same thing, and "excess of jurisdiction," as distinguished from "absence of jurisdiction," means that an act, although within general powers of tribunal, is not authorized, because conditions which alone authorize exercise of general power in respect of it are wanting.—Lewis v. Burrow, supra.

69. Tenn.—Hagan v. Henry, 76 S.W.2d 994, 168 Tenn. 223, distinguishing Howell v. Thompson, 170 S.W. 253, 130 Tenn. 311.

70. Tenn.—Hagan v. Henry, 76 S.W.2d 994, 168 Tenn. 223.

71. Tenn.—First Nat. Bank v. Planters' Nat. Bank of Clarksdale, Miss., 12 S.W.2d 528, 158 Tenn. 50—Walker v. Lemma, 167 S.W. 474, 129 Tenn. 444.

72. Ind.—Northern Indiana R. Co. v. Michigan Cent. R. Co., 2 Ind. 670, 80 C.J. p 1159 note 74.

73. Ala.—Pearsall v. McCartney, 28 Ala. 110.

60 C.J. p 1159 note 69. Application for stay pending appeal, notice thereof, and proceedings thereon see Appeal and Error § 637.

74. Ala.—Powell v. Washington, 15 Ala. 803—Shearer v. Boyd, 10 Ala. 279.

75. Ala.—Pearsall v. McCartney, 28 Ala. 110.
60 C.J. p 1159 note 71.

76. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.
60 C.J. p 1159 note 72.

77. Ala.—Thorn v. First Nat. Bank, 146 So. 75, 25 Ala.App. 315.

Petition to supersede forfeiture judgment

Allegation, in petition to supersede forfeiture judgment, that sureties paid amount of replevin bond to obligee, who released all his claim, was held material, and required to be proved to authorize judgment for petitioners.—Thorn v. First Nat. Bank, supra.

78. Ala.—Jones v. Welch, 15 Ala. 306.

60 C.J. p 1159 note 75.

79. Ala.—Edwards v. Lewis, 16 Ala. 813.

80. Me.—Haskell v. Hazard, 33 Me. 585.

81. Ark.—May v. Hutson, 15 S.W. 606, 54 Ark. 226.
60 C.J. p 1159 note 78.

82. Ark.—May v. Hutson, supra—Brown v. Peters, 13 S.W. 729, 53 Ark. 182.

83. Ala.—Mobile Branch Bank v. Coleman, 20 Ala. 140.

84. Ala.—Mobile Branch Bank v. Coleman, supra.
60 C.J. p 1159 note 81.

85. Me.—Haskell v. Hazard, 33 Me. 585.

86. Ala.—Pearsall v. McCartney, 28 Ala. 110.
Ark.—May v. Hutson, 15 S.W. 606, 54 Ark. 226.

87. Ala.—Pearsall v. McCartney, 28 Ala. 110.

Parties. An assignee of a judgment is a proper defendant to a petition for supersedeas of an execution issuing thereon.⁸⁸ Defendant in a judgment, who applies for a supersedeas, is plaintiff in the proceeding subsequently had on his petition for a supersedeas.⁸⁹

Notice. Plaintiff in execution is not entitled to notice of the filing of an application in vacation,⁹⁰ although he is entitled to notice of the hearing in term time.⁹¹

Hearing. In accordance with the rule that that which forms the ground for relief, in a supersedeas proceeding to annul an execution, must rest on facts accruing subsequent to the judgment or decree, discussed supra § 1, the court may inquire into matters operating in equitable satisfaction of the judgment.⁹² Where a petition is filed to set aside and suspend a sheriff's return of forfeiture of a bond and to set aside execution thereon, it has been held not to be error to permit the sheriff to testify that he made no second levies on certain property,⁹³ and to testify as to what he really did in the premises as to levy and attachment.⁹⁴ Where an issue is formed on the facts set forth in a petition for a supersedeas of an execution, it may properly be submitted to a jury for decision,⁹⁵ and should then be tried as other issues of fact submitted in ordinary cases and under the same rules of evidence.⁹⁶ Plaintiff in the supersedeas proceeding is entitled to open and conclude the argument.⁹⁷ Since, as discussed infra § 8, a supersedeas to an interlocutory decree does not operate as an appeal

or writ of error so as to bring the cause into the appellate court for review, whether a lower court was in error in granting a supersedeas is not a matter for consideration by a higher court on an application to supersede the lower court's supersedeas.⁹⁸

§ 5. Order, Writ, and Service Thereof

The writ of supersedeas, which is to be distinguished from the order therefor, must follow the substantial requirements of the statute, including statutory requisites as to the time of issuance.

The order for a supersedeas is not a supersedeas of itself;⁹⁹ it is but the declaration of the judge that it is fit under the circumstances that a supersedeas should issue;¹ and it may be recalled by him at any time before it is complied with, if on consideration he deems it improper or improvident.² The supersedeas must follow the substantial requirements of the statute,³ and should conform to the order for its issuance.⁴ The writ is not addressed to a sheriff or other officer to be served on him who holds the process, the action of which is to be suspended,⁵ but is directed to the officer who holds the process,⁶ informing him that the execution or other mandate has been superseded,⁷ and it may be served by anyone.⁸ In giving notice of a supersedeas, it has been held that the sheriff must pursue the mode required by statute for giving notice on replevy bonds.⁹

Time of issuance. Where it is provided by statute that no writ of supersedeas should be issued

88. Ala.—Eslava v. Farley, 72 Ala. 214.

89. Ala.—Pearsall v. McCartney, 28 Ala. 110.

90. Ala.—Ex parte Pearl Roller Mill Co., 45 So. 423, 154 Ala. 232.

91. Ala.—Ex parte Pearl Roller Mill Co., supra.

92. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420.

93. Ala.—Fleming v. Moore, 105 So. 679, 213 Ala. 592.

94. Ala.—Fleming v. Moore, supra. 60 C.J. p 1159 note 92.

95. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420. 60 C.J. p 1159 note 93.

96. Ala.—Bower v. Saltmarsh, 19 Ala. 274.

97. Ala.—Pearsall v. McCartney, 28 Ala. 110.

98. Tenn.—Weiss v. McCanless, 140 S.W.2d 409, 176 Tenn. 222.

Superseding commissioner's action

Whether circuit judge was in error in granting supersedeas to supersede the action of the commissioner of finance and taxation in revoking a retail liquor dealer's license was not a matter for consideration by the supreme court on application to supersede the circuit judge's supersedeas. —Weiss v. McCanless, supra.

99. Va.—Anderson v. Lively, 6 Leigh 77, 33 Va. 77.

60 C.J. p 1160 note 96. When writ takes effect see infra § 8.

1. S.C.—Corpus Juris quoted in City of Spartanburg v. Belk's Department Store of Clinton, 20 S.E.2d 157, 167, 199 S.C. 458. 60 C.J. p 1160 note 97.

2. S.C.—Corpus Juris quoted in City of Spartanburg v. Belk's Department Store of Clinton, 20 S.E.2d 157, 167, 199 S.C. 458. 60 C.J. p 1160 note 98.

3. Md.—Backus v. State, 85 A. 501, 118 Md. 536.

4. Ark.—Ex parte Woods, 3 Ark. 532.

5. Ala.—Welch v. Jones, 11 Ala. 660. Mass.—Keith v. Perlis, 121 N.E. 108, 231 Mass. 409.

6. Ala.—Welch v. Jones, 11 Ala. 660. Mass.—Keith v. Perlis, 121 N.E. 108, 231 Mass. 409.

7. Ala.—Welch v. Jones, 11 Ala. 660. Mass.—Keith v. Perlis, 121 N.E. 108, 231 Mass. 409.

8. Ala.—Welch v. Jones, 11 Ala. 660. Mass.—Keith v. Perlis, 121 N.E. 108, 231 Mass. 409.

9. Va.—Mackey v. Fuqua, 2 Call 496, 6 Va. 496.

after a certain period from the time a judgment shall be made final, if a supersedeas is not given within the time limited by the statute, the right to the remedy is lost;¹⁰ and if given thereafter, it is ineffective.¹¹ Under such a statute it has been held that the order awarding the writ was the commencement of the proceedings on the supersedeas,¹² and that, if the order was within the period, although the bond was not given until after the expiration of the period, so that the writ could not issue until after that lapse of time, on the execution of the bond the writ might issue.¹³ However, where both the order awarding the supersedeas and the supersedeas bond were made shortly after the judgment, it has been held that a writ awarded after the lapse of twelve years was improvidently issued,¹⁴ even though there was no clerk of court at the time the order was made, where such vacancy did not continue during the statutory period.¹⁵

§ 6. Waiver of Irregularity in Issuance or Return

Irregularity in the issue and return of a writ of supersedeas is waived by appearance and answer to the application for the writ.

Where, on a hearing in term time, on an application for a writ of supersedeas, a plaintiff in execution appeared and filed an answer and demanded a jury trial, it has been held that, by so doing, he waived any irregularity in the issue and return of the writ.¹⁶

§ 7. Discharging, Quashing, or Vacating Writ

A writ of supersedeas will be quashed where there is

a substantial variance between it and the order for its issuance, where it embraces several judgments, or where it was otherwise improperly issued.

A writ of supersedeas will be quashed where there is a substantial variance between the supersedeas and the order for its issuance,¹⁷ or where the supersedeas embraces several judgments even though between the same parties and on claims of a like nature,¹⁸ although it has been held that a writ of supersedeas which embraces two separate executions is not a nullity.¹⁹ So, too, a supersedeas issued improvidently or without warrant of law will be quashed or vacated on motion,²⁰ as will a writ granted on an ex parte application,²¹ or one granted by an inferior court to a judgment of the supreme court.²² A motion to discharge a supersedeas suspending an interlocutory order will not be granted, however, where the proper parties in interest are not properly before the court and the cause is not ready for hearing.²³

Discharge by lapse of time. A writ of supersedeas granted to stay proceedings until the next term of court is discharged at the end of the next term,²⁴ and an order of the court discharging it during that term has been held not erroneous.²⁵

§ 8. Operation and Effect

A supersedeas suspends the efficacy of a judgment, but does not annul the judgment itself. It has no retroactive operation, and what is lawfully done before the writ takes effect is valid and must stand.

A supersedeas suspends the efficacy of a judgment,²⁶ but does not, like a reversal, annul the judgment itself.²⁷ Its object and effect are to stay fu-

10. Va.—Anderson v. Lively, 6 Leigh 77, 33 Va. 77.

11. Va.—Anderson v. Lively, supra.

12. Va.—Anderson v. Lively, supra—Overstreet v. Marshall, 3 Call 192, 7 Va. 192.

13. Va.—Overstreet v. Marshall, supra.

14. Va.—Anderson v. Lively, 6 Leigh 77, 33 Va. 77.

60 C.J. p 1160 note 13.

15. Va.—Anderson v. Lively, supra.

16. Ala.—Ex parte Pearl Roller Mill Co., 45 So. 423, 154 Ala. 232.

17. Ark.—Ex parte Woods, 3 Ark. 532.

60 C.J. p 1160 note 17.

Modifying or vacating supersedeas or stay pending appeal see Appeal and Error §§ 658-661.

18. Va.—Ayres v. Lewellin, 3 Leigh 609, 30 Va. 609.

19. Ala.—Jones v. Welch, 15 Ala. 306.

20. Va.—Anderson v. Lively, 6 Leigh 77, 33 Va. 77.

W.Va.—Baltimore, etc., R. Co. v. Annon, 18 W.Va. 393.

21. Ark.—Farrelly v. Cross, 10 Ark. 197.

22. Tenn.—Dibrell v. Eastland, 3 Yerg. 507.

23. Tenn.—Richmond v. Yates, 3 Baxt. 204.

60 C.J. p 1160 note 23.

24. Tenn.—Benton v. Engleman, Cooke 496.

25. Tenn.—Benton v. Engleman, supra.

26. Ill.—Gumberts v. East Oak St. Hotel Co., 88 N.E.2d 883, 404 Ill. 386.

Tenn.—Lewis v. Burrow, 127 S.W.2d 795, 23 Tenn.App. 145.

60 C.J. p 1161 note 27.

Operation and effect of supersedeas or stay pending appeal or writ of error see Appeal and Error §§ 662-674.

Stay of proceedings as suspending running of period of limitations see Limitation of Actions §§ 251-254. Restraining or controlling effect of supersedeas by injunction see Injunctions § 44.

27. Cal.—Solorza v. Park Water Co., 183 P.2d 275, 80 Cal.App.2d 809.

Ill.—Gumberts v. East Oak St. Hotel Co., 88 N.E.2d 883, 404 Ill. 386. Tenn.—Lewis v. Burrow, 127 S.W.2d 795, 23 Tenn.App. 145.

ture proceedings,²⁸ and not to undo what is already done.²⁹ It has no retroactive operation,³⁰ so as to deprive a judgment of its force and authority from the beginning,³¹ but only suspends the judgment after and while it is itself effectual.³² Hence, whatever is lawfully done under the judgment before the supersedeas takes effect is valid and must stand,³³ but anything done afterward is unauthorized by the judgment, and must be set aside.³⁴

The supersedeas prevents the enforcement of a judgment or decree by process of the court,³⁵ and, when ordered and issued to an officer by proper authority, he is bound to obey it;³⁶ and, if he holds property in his custody under an attachment, the supersedeas operates to release the property, and authorizes the officer to return it to the debtor,³⁷ without requiring a bond that it shall be forthcoming at the end of the suit,³⁸ although the writ is sued out in forma pauperis.³⁹

Effect as to interlocutory decrees. A supersedeas to an interlocutory decree, where allowable, does not operate as an appeal or writ of error so as to bring the cause into the appellate court for review,⁴⁰ the cause remains in the court below,⁴¹ and the effect of the writ is merely to suspend the decree until the final hearing.⁴²

Time of taking effect. Since an order for a supersedeas is not a supersedeas of itself, as discussed supra § 5, the order has no effect until the writ issues.⁴³ The supersedeas takes effect not at the moment when it is issued,⁴⁴ but when the proper evidence of its existence has been furnished,⁴⁵ or when the officer who holds the process superseded has actual notice of it.⁴⁶

§ 9. Violation of Writ

Certain actions taken after supersedeas have been held not a violation of the writ, which would be a contempt.

A suit brought by a curator of an estate to secure instructions as to his duties, the object being to preserve the estate pending litigation, has been held not a violation of a supersedeas order in a proceeding involving the estate.⁴⁷ A violation of a supersedeas is a contempt, as discussed in Contempt § 16.

§ 10. Bonds

A bond or undertaking is ordinarily required to be given in order to obtain a supersedeas.

Under some statutes a bond or undertaking is required to be given in order to obtain a supersedeas,⁴⁸ which bond, if the supersedeas is set aside,

Tex.—*Corpus Juris* cited in *Thompson v. Haney*, Civ.App., 191 S.W.2d 491, 494.

60 C.J. p 1161 note 28.

28. Ill.—*First Nat. Bank of Jonesboro v. Road District No. 8*, 58 N.E.2d 884, 886, 389 Ill. 156.

60 C.J. p 1161 note 29.

29. Ill.—*People v. David*, 159 N.E. 263, 328 Ill. 230.

60 C.J. p 1161 note 30.

30. Ky.—*Gardner v. Continental Ins. Co.*, 101 S.W. 911, 31 Ky.L. 69.

60 C.J. p 1161 note 31.

Revival of dissolved injunction

A supersedeas cannot function to effect a revival or reinstatement of a temporary, prohibitive injunction, once dissolved.—*Kress v. Corey*, 189 P.2d 352, 65 Nev. 1.

31. Ky.—*Gardner v. Continental Ins. Co.*, 101 S.W. 911, 31 Ky.L. 69.

60 C.J. p 1161 note 32.

32. Ky.—*Gardner v. Continental Ins. Co.*, supra.

60 C.J. p 1161 note 33.

33. Ky.—*Gardner v. Continental Ins. Co.*, supra.

60 C.J. p 1161 note 34.

34. Ky.—*Gardner v. Continental Ins. Co.*, supra.

60 C.J. p 1161 note 35.

35. Cal.—*Solorza v. Park Water Co.*, 183 P.2d 275, 80 Cal.App.2d 809.

Ga.—*Town of Fairburn v. Brantley*, 130 S.E. 67, 161 Ga. 199.

N.M.—*Gumberts v. East Oak St. Hotel Co.*, 88 N.E.2d 883, 404 Ill. 386.

Tenn.—*Weiss v. McCannless*, 140 S.W. 2d 409, 176 Tenn. 222.

36. Miss.—*Williams v. Stewart*, 20 Miss. 533.

Tenn.—*McCamy v. Lawson*, 3 Head 256.

37. Tenn.—*Fry v. Manlove*, 1 Baxt. 256, 25 Am.R. 775—*McCamy v. Lawson*, 3 Head 256.

38. Tenn.—*McCamy v. Lawson*, supra.

39. Tenn.—*McCamy v. Lawson*, supra.

40. Tenn.—*Weiss v. McCannless*, 140 S.W.2d 409, 176 Tenn. 222—*Lewis v. Burrow*, 127 S.W.2d 795, 23 Tenn. App. 145.

60 C.J. p 1161 note 42.

41. Tenn.—*Lewis v. Burrow*, supra.

60 C.J. p 1161 note 43.

42. Tenn.—*Lewis v. Burrow*, supra.

60 C.J. p 1161 note 44.

43. Ark.—*Farris v. State*, 33 Ark. 70.

60 C.J. p 1161 note 47.

Commencement and continuance of supersedeas or stay pending appeal or writ of error see Appeal and Error § 663.

44. Ky.—*Runyon v. Bennett*, 4 Dana 598, 29 Am.D. 431.

45. Ky.—*Runyon v. Bennett*, supra.

46. Ky.—*Runyon v. Bennett*, supra.

Mass.—*Keith v. Perlis*, 121 N.E. 108, 231 Mass. 555.

47. Va.—*Gooch v. Old Dominion Trust Co.*, 92 S.E. 846, 121 Va. 29.

48. Ga.—*Abney v. Harris*, 65 S.E.2d 905, 208 Ga. 184.

Requirements with respect to bond in granting supersedeas pending appeal see Appeal and Error §§ 643-657.

Grant without bond held error

Ga.—*Abney v. Harris*, supra.

is given the force and effect of a judgment.⁴⁹ However, where execution issues improvidently, it has been held that the court will issue a supersedeas without recognizance;⁵⁰ and, where a supersedeas was allowed without requiring a bond when one should have been required, and the cause was docketed without objection, it has been held that the supersedeas will not be dismissed on motion made after the lapse of several years from the time of awarding it.⁵¹ A statute granting the right to proceed on a pauper's oath has been held to apply to writs of supersedeas in lieu of an appeal, so that on a proper showing a supersedeas may be had on the pauper's oath without a bond.⁵²

The supersedeas bond will not, of itself, operate to supersede a judgment;⁵³ and it will be presumed that the court approved the bond and security before ordering a supersedeas to issue.⁵⁴ Although the condition of a bond does not conform to the statute, if the bond was effectual to delay the collection of the execution, it has been held that the bond becomes absolute on the discharge of the supersedeas,⁵⁵ and may be prosecuted as an obligation at common law;⁵⁶ and, where the parties stay execution by illegal proceedings, neither the principal nor the surety will be allowed to avoid responsibility by reason of their illegal act.⁵⁷

Actions on bonds. Rules governing actions on bonds and the amount of recovery therein generally, discussed in Bonds §§ 99-133, have been applied in actions on supersedeas bonds.⁵⁸ It has

been held that a petition on a bond must allege that a supersedeas was issued⁵⁹ by the proper officer,⁶⁰ although it has also been held that it is no ground for demurrer to a declaration on such a bond that it does not aver the issuance⁶¹ and return⁶² of the supersedeas, and that any defects in the bond are matters of defense on issue.⁶³ It has further been held unnecessary to set forth the judgment and execution in consequence of which the writ was sued out where the bond narrates the judgment.⁶⁴ A petition is demurrable where it does not allege that the judgment has not been paid;⁶⁵ but an averment that the writ was discharged and that defendant in execution has not paid the judgment, interest, and damages whereby the bond became forfeited has been held to be a sufficient averment of damages.⁶⁶ Money judgments may sometimes be authorized on supersedeas bonds.⁶⁷

§ 11. Appeal and Error

Review of the discretionary action of the trial court with respect to granting a supersedeas or stay pending appeal, or fixing the terms and conditions of a bond for such supersedeas, is discussed in Appeal and Error § 1635.

Examine Pocket Parts for later cases.

§ 12. Costs

On determination of a supersedeas proceeding costs are due to the successful party as in other suits.

49. Ala.—Lockhart v. McElroy, 4 Ala. 572.

Tex.—Corpus Juris cited in Harrison v. Barngrover, Civ.App., 118 S.W. 2d 415, 418.

60 C.J. p 1162 note 56.

50. Ark.—Ex parte Smith, 4 Ark. 601.

60 C.J. p 1162 note 57.

51. Va.—Pugh v. Jones, 6 Leigh 299, 33 Va. 299.

52. Tenn.—Hewell v. Cherry, 158 S.W.2d 370, 25 Tenn.App. 420.

53. Ky.—Hoskins v. Southern Nat. Bank, 73 S.W. 786, 24 Ky.L. 2250. 60 C.J. p 1162 note 59.

54. Mass.—Keith v. Perlis, 121 N.E. 108, 231 Mass. 409.

55. Ala.—Hester v. Keith, 1 Ala. 316.

Okl.—Corpus Juris quoted in Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 10, 180 Okl. 37—Corpus Juris quoted in State ex rel.

Horton v. Fidelity & Deposit Co. of Maryland, 66 P.2d 85, 88, 179 Okl. 437.

56. Ala.—Hester v. Keith, 1 Ala. 316. Okl.—Corpus Juris quoted in Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 10, 180 Okl. 37—Corpus Juris quoted in State ex rel. Horton v. Fidelity & Deposit Co. of Maryland, 66 P.2d 85, 88, 179 Okl. 437.

57. Ky.—Spooner v. Best's Exr., 10 Ky.Op. 486.

Okl.—Corpus Juris quoted in Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 10, 180 Okl. 37—Corpus Juris quoted in State ex rel. Horton v. Fidelity & Deposit Co. of Maryland, 66 P.2d 85, 88, 179 Okl. 437.

58. Ky.—Green v. Winston, 1 Ky.Op. 347.

Attorney's fees

Where a bond does not embrace attorney's fees, none can be recovered

in a suit on the bond.—Green v. Winston, supra.

59. Ky.—Hoskins v. Southern Nat. Bank, 73 S.W. 786, 24 Ky.L. 2250. 60 C.J. p 1162 note 66.

60. Ky.—Jones v. Green, 12 Bush 127.

61. Miss.—Harper v. Montgomery, 19 Miss. 611.

62. Miss.—Harper v. Montgomery, supra.

63. Miss.—Harper v. Montgomery, supra.

64. Miss.—Harper v. Montgomery, supra.

65. Okl.—McClain v. Starr, 150 P. 666, 50 Okl. 738.

66. Miss.—Harper v. Montgomery, 19 Miss. 611.

67. Ala.—Randall v. Wadsworth, 31 So. 555, 130 Ala. 633. 60 C.J. p 1162 note 74.

Since a petition in supersedeas is regarded as the commencement of a suit, as discussed supra § 1, on its determination costs are due to the successful party, in the same manner as in any other suit.⁶⁸ As the assignee of a judgment is a proper

defendant to a petition for a supersedeas of an execution issuing thereon, as discussed supra § 4, when he comes in voluntarily as a party and is unsuccessful in resisting the supersedeas, costs may be awarded against him.⁶⁹

SUPERSESSSION. Act or an instance of superseding, or state of being superseded; supersedure; removal and replacement.¹ It has been distinguished from "assistance" see 7 C.J.S. p 1 note 6.

SUPERSTITIOUS. Of, pertaining to, proceeding from, characterized by, or manifesting, superstition; addicted to, or swayed by, superstition.² It is stated in Charities § 18 that no religious observances can be deemed as a matter of law, superstitious, and thus gifts are not prohibited as superstitious if they are for the observance of any ceremonial, the efficacy of which is recognized by the church of which the donor is a member.

SUPERSTRUCTURE. In railroad terminology, the roadbed with whatever has been constructed upon it, as stated in Railroads § 1 j.

SUPERVENE. To come or happen as something additional, unlooked for, or extraneous; to occur with reference or relation to something else; to be added to or follow closely.³

SUPERVISE. To oversee;⁴ to oversee for direction;⁵ to oversee, with power of direction;⁶ to have oversight of;⁷ to exercise supervision over;⁸ to superintend;⁹ to direct;¹⁰ to superintend and direct;¹¹ to have charge of, with authority to direct or regulate.¹²

"Supervise" is further defined as meaning to inspect;¹³ and, more specifically, to inspect with authority;¹⁴ to inspect and direct the work of others.¹⁵

It has been said that the word "supervise" definitely relates to the acts of others, and not to the acts of the person supervising,¹⁶ and does not mean do-

68. Ala.—Shearer v. Boyd, 10 Ala. 279.

69. Ala.—Eslava v. Farley, 72 Ala. 214.

1. Webster New Int.D.

2. Webster New Int.D.

3. Webster New Int.D.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1163 notes 13-15.

4. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.

Ga.—New York L. Ins. Co. v. Rhodes, 60 S.E. 828, 831, 4 Ga.App. 25.

Mass.—Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

N.Y.—Rosenstrauch v. Reavy, 21 N.Y.S.2d 358, 361, 174 Misc. 446.

Phrases employing the term "supervise" and as to which more recent adjudications have not been found see 60 C.J. p 1163 notes 26, 27.

5. La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Neb.—Lowe v. Chicago Lumber Co. of Omaha, 283 N.W. 841, 844, 135 Neb. 735.

Pa.—Swartley v. Harris, 40 A.2d 409, 410, 351 Pa. 116.
60 G.J. p 1163 note 22.

6. Minn.—Egner v. States Realty Co., 26 N.W.2d 464, 471, 223 Minn. 365, 170 A.L.R. 500.

Tex.—Von Rosenberg v. Lovett, Civ. App., 173 S.W. 508, 513.

7. Mass.—Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

To have general oversight over
Iowa.—State v. Manning, 259 N.W. 213, 221, 220 Iowa 525.

8. La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

9. Iowa.—State v. Manning, 259 N.W. 213, 220 Iowa 525.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Neb.—Lowe v. Chicago Lumber Co. of Omaha, 283 N.W. 841, 844, 135 Neb. 735.

Pa.—Swartley v. Harris, 40 A.2d 409, 410, 351 Pa. 116.
60 C.J. p 1163 note 23.

Similarly defined

To superintend the execution of or performance of (a thing), or the movements or work of (a person).—
Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

10. Iowa.—State v. Chicago, M. &

St. P. Ry. Co., 130 N.W. 802, 804, 152 Iowa 317.

11. N.Y.—Cafferty v. Southern Tier Pub. Co., 123 N.E. 76, 77, 226 N.Y. 87.

12. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.
60 C.J. p 1163 note 18.

To exercise authority

N.Y.—Rosenstrauch v. Reavy, 21 N.Y.S.2d 358, 361, 174 Misc. 446.

To be able to direct

N.Y.—Rosenstrauch v. Reavy, supra.

13. Iowa.—State v. Manning, 259 N.W. 213, 221, 220 Iowa 525.
60 C.J. p 1163 note 19.

14. La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Mass.—Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

Neb.—Lowe v. Chicago Lumber Co. of Omaha, 283 N.W. 841, 844, 135 Neb. 735.

Pa.—Swartley v. Harris, 40 A.2d 409, 410, 351 Pa. 116.
60 C.J. p 1163 note 20.

15. Mass.—Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

16. Minn.—Egner v. States Realty Co., 26 N.W.2d 464, 471, 223 Minn. 365, 170 A.L.R. 500.

ing the work in detail, but rather, to see that the work is done,¹⁷ and the term connotes not only knowledge, but also executive capacity.¹⁸

As employed with reference to a profession, the word "supervise" is said to be big enough to fit the ordinary orbit of professional administration,¹⁹ and would include making rules pertaining to professional conduct.²⁰

"Supervise" has been held synonymous with "control" see 18 C.J.S. p 33 note 64, and "superintend" see ante p 887 note 68.

Supervising. The word "supervising" is elastic in its nature,²¹ and when it is used with reference to a business its meaning depends in a measure on the character of the business in question²² and also on the general manner in which it is regulated.²³ The term fairly excludes the idea of general or constant manual labor,²⁴ but it does not mean "not working."²⁵ On the contrary, it signifies work

rather than idleness, and is naturally understood to mean taking part in the work,²⁶ and thus it is unreasonable to assume that a person engaged in "supervising" should at all times refrain from any active or demonstrative regulation.²⁷

"Supervised" is the past participle of "super-vise."²⁸

SUPERVISION. The word "supervision" is not of precise import and when not limited by the context is broad enough to cover more than one subject.²⁹ It implies oversight and direction,³⁰ and does not necessarily exclude the doing of all manual labor, but may properly include the taking of an active part in the work.³¹

"Supervision" is defined as meaning the act of overseeing³² or supervising;³³ having general oversight of, especially as an officer vested with authority;³⁴ inspection;³⁵ oversight;³⁶ superintendence.³⁷

17. Minn.—Egner v. States Realty Co., supra.

Tex.—Von Rosenberg v. Lovett, Civ. App., 173 S.W. 508, 514.

18. N.Y.—Rosenstrauch v. Reavy, 21 N.Y.S.2d 358, 361, 174 Misc. 446.

19. N.Y.—Finlay Straus, Inc. v. University of N. Y., 59 N.Y.S.2d 429, 430, 186 Misc. 242.

20. N.Y.—Finlay Straus, Inc. v. University of the State of New York, 62 N.Y.S.2d 892, 893, 270 App. Div. 1060.

21. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.

Phrases

(1) "Supervising work" is consistent with actually assisting with the work in hand.—Borovicka v. Bankers Indemnity Ins. Co., 6 N.E.2d 531, 533, 289 Ill.App. 51.

(2) Other phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1163 notes 34-37.

22. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.

Ill.—Borovicka v. Bankers Indemnity Ins. Co., 6 N.E.2d 531, 533, 289 Ill. App. 51.

23. Ill.—Borovicka v. Bankers Indemnity Ins. Co., supra.

24. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.

25. Wis.—Schmidt v. American Mut.

Acc. Assoc., 71 N.W. 601, 602, 96 Wis. 304.

26. Wis.—Schmidt v. American Mut. Acc. Assoc., supra.

27. U.S.—Business Men's Assur. Co. of America v. Campbell, C.C.A. Neb., 6 F.2d 540, 544.

28. Webster New Int.D.

Phrase employing "supervised" and of which more recent adjudications have not been found see 60 C.J. p 1163 note 28.

29. Md.—Catalano v. Bopst, 170 A. 562, 567, 166 Md. 91.

30. Cal.—McCarthy v. Board of Supervisors of Merced County, 115 P. 458, 459, 15 Cal.App. 576.

Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

31. Wis.—Peterson v. Time Indemnity Co., 140 N.W. 286, 287, 152 Wis. 562.

General supervision implies more than a mere power to advise and suggest.—Great Northern R. Co. v. Snohomish County, 93 P. 924, 927, 48 Wash. 478—60 C.J. p 1164 note 49.

32. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 34, 378 Ill. 506.

Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

60 C.J. p 1164 note 39.

Phrases

(1) "Supervision of a farm" see 35 C.J.S. p 746 note 57.

(2) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1164 notes 51-68.

33. Alaska.—Brace v. Solner, 1 Alaska 361, 367.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

Similarly defined

(1) Act or occupation of supervising.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

(2) The act of one who supervises.—Fluet v. McCabe, 12 N.E.2d 89, 93, 299 Mass. 173.

34. Alaska.—Brace v. Solner, 1 Alaska 361, 367.

Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

35. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 34, 378 Ill. 506.

La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

60 C.J. p 1164 note 42.

36. Neb.—Corpus Juris quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

Or.—Way v. Patton, 241 P.2d 895, 900, 195 Or. 36.

60 C.J. p 1164 note 43.

37. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 34, 378 Ill. 506.

As used with reference to courts, the word "supervision" commonly denotes the jurisdiction of a higher court over an inferior court, especially when referring to the actions of the latter in probate matters.³⁸

"Supervision" has been held synonymous with, and has also been distinguished from, "control" see 18 C.J.S. p 29 note 49, p 30 note 54, and has been distinguished from "regulation" see 76 C.J.S. p 616 note 22.1.

SUPERVISOR. One who supervises; an inspector; an overseer; a superintendent;³⁹ one having authority over others.⁴⁰ It has been said that the term necessarily implies agency of some kind.⁴¹

The term "supervisor" has been held synonymous with "superintendent" see ante p 888 note 87.

The amendment to the National Labor Relations Act providing that the term "employee" shall not include any individual employed as a supervisor is treated in Master and Servant § 28(12).

SUPERVISORY. Of or pertaining to supervision; supervising.⁴² With respect to the judicial review of adjudications the term has been distinguished from "appellate" see 6 C.J.S. p 72 note 12.

Neb.—**Corpus Juris** quoted in Application of Tyler, 283 N.W. 512, 514, 135 Neb. 667.

60 C.J. p 1164 note 44.

38. Alaska.—In re McIntyre, 1 Alaska 73, 79.

39. Ga.—New York L. Ins. Co. v. Rhodes, 60 S.E. 828, 830, 4 Ga.App. 25.

40. N.Y.—Cafferty v. Southern Tier Pub. Co., 123 N.E. 76, 77, 226 N.Y. 87.

41. Ga.—New York L. Ins. Co. v. Rhodes, 60 S.E. 828, 830, 4 Ga.App. 25.

42. Webster New Int.D.

Phrases

(1) "Supervisory control," a phrase commonly used to designate the jurisdiction of a higher court over an inferior one, especially when referring to the actions of the latter in probate matters.—In re McIntyre, 1 Alaska 73, 79.

(2) "Supervisory jurisdiction" see title index to Courts.

43. Black L.D.

Requirement that inquest be held "super visum corporis" in order to be valid see Coroners § 21.

44. La.—Kemp v. Stanley, 15 So.2d 1, 8, 204 La. 110.

45. Ala.—Pettus v. Dudley Bar Co., 118 So. 153, 154, 218 Ala. 163.

46. Ohio.—State v. Healy, App., 95 N.E.2d 244, 250—State v. Wyandot County, 16 Ohio Cir.Ct. 218, 221, 9 Ohio Cir.Dec. 90.

Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

Phrases employing "supplement" as a noun and of which more recent adjudications have not been found see 60 C.J. p 1165 notes 91–93, 96.

47. Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

48. Ohio.—State v. Healy, App., 95 N.E.2d 244, 250.
60 C.J. p 1165 note 85.

Similarly defined

Something added that supplies a deficiency.—Penaat v. Terwilliger, Cal.App., 136 P.2d 642, 643.

49. Ohio.—State v. Healy, App., 95 N.E.2d 244, 250—State v. Wyandot County, 16 Ohio Cir.Ct. 218, 221, 9 Ohio Cir.Dec. 90.

SUPER VISUM CORPORIS. Literally, "upon view of the body."⁴³

SUPPLANT. To overthrow, destroy, undermine, or force away, especially in order to put a substitute in place of.⁴⁴

SUPPLEMENT. The term "supplement" has several significations.⁴⁵

As a noun, it is defined as meaning that which supplies a deficiency⁴⁶ or meets a want;⁴⁷ that which fills up, completes, or makes an addition to something already organized, arranged or set apart;⁴⁸ a part added to or a continuation of;⁴⁹ a store; a supply.⁵⁰ It is also defined as meaning a supplying by addition of what is wanting,⁵¹ and this is said to be its ordinary meaning.⁵²

The term as a noun is applied specifically to an addition to a publication,⁵³ to a part added to, or issued as a continuation of, a book or paper, to make good its deficiencies, correct its errors,⁵⁴ or provide special features not ordinarily included.⁵⁵ In a newspaper a supplement is often a separate sheet.⁵⁶

The noun "supplement" has been held synonymous with "appendix" see 6 C.J.S. p 73 note 56, "circular"

50. Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

51. Neb.—Swanson v. State, 271 N.W. 264, 268, 132 Neb. 82.
60 C.J. p 1165 note 84.

52. Neb.—Swanson v. State, supra. N.J.—Jersey City v. Borst, 101 A. 1033, 90 N.J.Law 454—Rahway Sav. Inst. v. Rahway, 20 A. 756, 757, 53 N.J.Law 48.

53. Cal.—Penaat v. Terwilliger, App., 136 P.2d 642, 643.

54. Cal.—Penaat v. Terwilliger, supra. Mont.—State v. Bowker, 205 P. 961, 964, 63 Mont. 1.

Similarly defined

Something added to a book or paper to make good its deficiencies or correct its errors.—Lancaster Intelligencer v. Lancaster County, 9 Pa. Dist. 392, 394.

55. Cal.—Penaat v. Terwilliger, App., 136 P.2d 642, 643.

56. Cal.—Penaat v. Terwilliger, supra.

see 14 C.J.S. p 1121 note 25, and "handbill" see 39 C.J.S. p 769 note 37. It has been distinguished from "amendment" see 3 C.J.S. p 1043 note 42, and has been held equivalent to, and has also been distinguished from, "amendatory" see 3 C.J.S. p 1041 notes 90, 97.

As a verb, the word "supplement" is defined as meaning to add to,⁵⁷ to fill up by additions;⁵⁸ to fill the deficiencies of.⁵⁹

SUPPLEMENTAL. The term "supplemental" is defined generally as meaning having the nature of or forming a supplement;⁶⁰ serving to supply what is lacking;⁶¹ that which is added to a thing to complete it;⁶² that which supplies a deficiency or meets a want;⁶³ something added to supply defects in the thing to which it is added, or in aid of which it is made;⁶⁴ supplementary;⁶⁵ additional.⁶⁶

As applied to an act, the word "supplemental" signifies something additional, something added to supply what is wanting;⁶⁷ and is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original.⁶⁸

As applied to statutes, a supplemental act is one

designed to improve an existing statute by adding something thereto without changing the original text, as stated in Statutes § 243.

"Supplemental" has been distinguished from "amended" and "altered, amended, and repealed" see 3 C.J.S. p 1040 notes 58, 60. It has been held equivalent to, and has also been distinguished from, "ancillary" see 3 C.J.S. p 1066 notes 43, 44.

SUPPLEMENTARY. Added as a supplement; being, or serving as, a supplement;⁶⁹ added to supply what is wanted;⁷⁰ additional.⁷¹

SUPPLETORY OATH. See Oaths and Affirmations § 2.

SUPPLICAVIT. In English law, a writ issuing out of the king's bench or chancery for taking sureties of the peace. It is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity.⁷²

SUPPLY or SUPPLIES. The word "supply" is derived from "sub," meaning under, and "plere," to fill,⁷³ and has a well-defined and understood meaning,⁷⁴ and it is not a technical term and has not

57. Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

60 C.J. p 1165 note 97.

58. Ohio.—Miller v. Miller, 21 Ohio Cir.Ct., N.S., 181, 185.

60 C.J. p 1165 note 98.

59. N.Y.—People ex rel. Astor Trust Co. v. State Tax Commission, 160 N.Y.S. 854, 858, 174 App.Div. 320.

60. U.S.—Texas & Pac. Motor Transport Co. v. U. S., D.C.Tex., 87 F. Supp. 107, 112.

Phrases

(1) "Supplemental bill" see Equity §§ 425-431.

(2) "Supplemental pleadings" generally see Admiralty § 125, Pleading §§ 326-336, and the title index to Federal Courts.

(3) Other phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1166 notes 11-17.

61. Mont.—State v. Bowker, 205 P. 961, 964, 63 Mont. 1.

N.Y.—People ex rel. Astor Trust Co. v. State Tax Commission, 160 N.Y. S. 854, 858, 174 App.Div. 320.

62. Ind.—State v. Day, 123 N.E. 402, 403, 189 Ind. 243.

60 C.J. p 1166 note 8.

63. U.S.—Loomis v. Runge, Tex., 66 F. 856, 859, 14 C.C.A. 148.

64. Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

Supplying a defect in something that precedes

Ohio.—Miller v. Miller, 21 Ohio Cir. Ct., N.S., 181, 185.

65. N.Y.—People ex rel. Astor Trust Co. v. State Tax Commission, 160 N.Y.S. 854, 858, 174 App.Div. 320.

66. U.S.—Texas & Pac. Motor Transport Co. v. U. S., D.C.Tex., 87 F. Supp. 107, 112.

67. Ind.—Lost Creek School Tp., Vigo County, v. York, 21 N.E.2d 58, 60, 215 Ind. 636, 127 A.L.R. 1287—McCleary v. Babcock, 82 N.E. 453, 455, 169 Ind. 228.

Ohio.—State v. Healy, App., 95 N.E. 2d 244, 250.

68. Ind.—Lost Creek School Tp., Vigo County, v. York, 21 N.E.2d 58, 60, 215 Ind. 636, 127 A.L.R. 1287.

Neb.—Swanson v. State, 271 N.W. 264, 268, 132 Neb. 82.

Ohio.—State v. Healy, App., 95 N.E. 2d 244, 250—Board of Education of Terrace Park v. Guckenberger, Com.Pl., 100 N.E.2d 304, 308.

60 C.J. p 1166 note 10.

69. Neb.—Swanson v. State, 271 N.W. 264, 268, 132 Neb. 82.

Phrases

(1) "Supplementary proceedings" see Executions §§ 345-402.

(2) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1166 notes 20, 21.

70. Pa.—Lancaster Intelligencer v. Lancaster County, 9 Pa.Dist. 392, 394.

71. Neb.—Swanson v. State, 271 N.W. 264, 268, 132 Neb. 82.

72. Black L.D.

73. Pa.—In re Hazle Tp., 6 Kulp 491, 493.

74. Ky.—Century Indemnity Co. of Chicago, Ill., v. Shunk Mfg. Co., 68 S.W.2d 772, 773, 253 Ky. 50.

Not one well-known meaning

It cannot be said that there is one well-known meaning of the word which must be adopted on all occasions, but the meaning must be governed by the circumstances and the context in which it is used.—Attorney General v. Southport Corporation, [1923] 1 Ch. 548, 556—60 C.J. p 1169 note 33.

acquired a peculiar meaning in the law.⁷⁵

As a noun, the word "supply" is generally⁷⁶ and chiefly⁷⁷ used in the plural, while the noun "supplies" is usually defined in the singular,⁷⁸ and the same definitions are commonly given for both the singular and plural forms.⁷⁹

In their more general signification, the words "supply" and "supplies," as applied to material objects, embrace anything required or furnished to meet a need,⁸⁰ and relate to those articles necessary for enabling an existing entity to function properly,⁸¹ and in this sense are defined as meaning that which is⁸² or can be⁸³ supplied; that which supplies a want;⁸⁴ anything yielded or afforded to meet a want;⁸⁵ available aggregate of things needed or demanded⁸⁶ in amount sufficient for a given use or purpose;⁸⁷ sufficiency of things for use or want;⁸⁸ sufficiency for use or need;⁸⁹ an amount

sufficient for a given use or purpose;⁹⁰ and also as the act of furnishing with what is wanted.⁹¹

The terms are further defined as meaning a quantity of something supplied or on hand;⁹² a quantity of something furnished or on hand;⁹³ necessities collected and held for distribution and use;⁹⁴ means of provision or relief;⁹⁵ stores;⁹⁶ a stock.⁹⁷

In what is sometimes referred to as their "restricted" sense the words "supply" and "supplies" ordinarily are understood to mean any substance that is consumed with its use,⁹⁸ and where articles are totally used up in the usual and ordinary performance of a contract, so that nothing remains in excess of normal salvage, they lose their identity as tools, appliances, implements, and machinery and are included within the broader definition of "supplies."⁹⁹

75. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

76. Pa.—In re Hazle Tp., 6 Kulp 491, 493.

77. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

78. Mont.—Northern Pac. Ry. Co. v. Sanders County, supra.

79. Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217.

Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

80. Okl.—Minnehoma Oil Co. v. Ross, 252 P. 9, 10, 123 Okl. 120. Or.—Grants Pass Trust Co. v. Enterprise Mine Co., 113 P. 859, 58 Or. 174, 34 L.R.A., N.S., 395.

81. N.Y.—Smull v. Delaney, 25 N.Y. S.2d 387, 394, 175 Misc. 795.

82. Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217. 60 C.J. p 1166 notes 26, 27.

Phrases employing the noun "supply" or "supplies" and of which more recent adjudications have not been found see 60 C.J. p 1168 note 91—p 1169 note 22.

83. Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217. 60 C.J. p 1166 note 26.

84. Ill.—People v. Pullman's Palace Car Co., 51 N.E. 664, 674, 175 Ill. 125, 64 L.R.A. 366. 60 C.J. p 1167 note 28.

85. Tex.—Clayton v. Bridgeport Mach. Co., Civ.App., 33 S.W.2d 787, 789.

60 C.J. p 1167 note 30.

86. N.Y.—Fuller v. Schrenk, 68 N.Y. S. 781, 784, 58 App.Div. 222.

60 C.J. p 1167 note 37.

87. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

88. N.Y.—Fuller v. Schrenk, 68 N.Y. S. 781, 784, 58 App.Div. 222.

60 C.J. p 1167 note 33.

Such things as are used to meet a want

Pa.—Riebe v. Walton, 5 Pa.Dist. 555, 559, 18 Pa.Co. 289.

89. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

Sufficient for use or need

Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217.

90. N.Y.—Fuller v. Schrenk, 68 N.Y. S. 781, 784, 58 App.Div. 222. 60 C.J. p 1167 note 29.

91. Pa.—In re Hazle Tp., 6 Kulp 491, 493.

Tex.—Clayton v. Bridgeport Mach. Co., Civ.App., 33 S.W.2d 787, 789.

92. Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217.

Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

93. N.Y.—Fuller v. Schrenk, 68 N.Y. S. 781, 784, 58 App.Div. 222.

94. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

Va.—Boston Blower Co. v. Carman Lumber Co., 26 S.E. 390, 391, 94 Va. 94.

95. Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

96. Mont.—Northern Pac. Ry. Co. v. Sanders County, supra.

Similarly defined

(1) Accumulated stores reserved for distribution.

Cal.—Bricker v. Rollins & Jarecki, 173 P. 592, 593, 178 Cal. 347.

Mont.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

(2) Such stores of food, etc., as are kept on hand for daily use.—Conner v. Littlefield, 15 S.W. 217, 218, 79 Tex. 76.

(3) The food, and the like, which meets the daily necessities of an army or other large body of men.—People v. Pullman's Palace Car Co., 51 N.E. 664, 674, 175 Ill. 125, 64 L.R.A. 366.

(4) A store.—Northern Pac. Ry. Co. v. Sanders County, 214 P. 596, 599, 66 Mont. 608.

97. Mont.—Northern Pac. Ry. Co. v. Sanders County, supra.

98. Okl.—Minnehoma Oil Co. v. Ross, 252 P. 9, 10, 123 Okl. 120. 60 C.J. p 1167 note 49.

99. Cal.—A. L. Young Mach. Co. v. Cupps, 297 P. 538, 540.

Ky.—Corpus Juris quoted in Century Indemnity Co. of Chicago, Ill., v.

The terms "supply" and "supplies" are commonly employed in the restricted sense in connection with building and construction contracts, and when so used are generally held to include things other than labor¹ which are furnished for, and used directly in the carrying on of, the work,² and are entirely consumed thereby,³ but which do not enter into, and become a physical part of, the finished structure.⁴

When used in connection with dealings between a farm landlord and his tenant, "supplies" has a well-defined and definite meaning, and means supplies for the well-being of the tenant's family and to make the crop during the term of tenancy.⁵

A very specific use of the word "supply" is to signify a substitute,⁶ and the plain and usual meaning of the word in this sense is one who supplies a place or serves instead of another,⁷ specifically, a clergyman who occupies a pulpit temporarily.⁸

The ordinary meaning of the words "supply" and

"supplies" in their general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery.⁹ Ordinarily the terms include articles such as pencils, paper, rubber bands, blanks, and ink,¹⁰ as well as powder, dynamite fuses, and caps,¹¹ but do not include accounts receivable,¹² cash,¹³ insurance policies,¹⁴ or investments.¹⁵ For other particular applications of the terms see 60 C.J. p 1167 note 51—p 1168 note 90.

The noun "supplies" has been distinguished from "equipment" see 30 C.J.S. p 296 note 23, and "materials" see 57 C.J.S. p 450 note 46.

As a verb, the word "supply" is defined as meaning to furnish;¹⁶ to provide;¹⁷ to furnish or provide;¹⁸ to furnish with what is wanted;¹⁹ to make

Shunk Mfg. Co., 68 S.W.2d 772, 253 Ky. 50.

1. Wash.—Hurley-Mason Co. v. American Bonding Co., 140 P. 575, 577, 79 Wash. 564, L.R.A.1915B 1131, Ann.Cas.1916A 948.

2. Cal.—People's Nat. Bank v. Southern Surety Co., 288 P. 827, 828, 105 Cal.App. 731.

Ky.—Century Indemnity Co. of Chicago, Ill., v. Shunk Mfg. Co., 68 S.W.2d 772, 774, 253 Ky. 50.

Wash.—United States Fidelity & Guaranty Co. v. Feenaughty Machinery Co., 85 P.2d 1085, 1089, 197 Wash. 569—Western Clinic & Hospital Ass'n v. Gabriel Const. Co., 12 P.2d 417, 418, 168 Wash. 411—National Surety Co. v. Bratnober Lumber Co., 122 P. 337, 343, 67 Wash. 601.

Similarly stated

Supplies relates to something used directly in the carrying on of the work, something in addition to it.—Smull v. Delaney, 25 N.Y.S.2d 387, 394, 175 Misc. 795.

3. Cal.—People's Nat. Bank v. Southern Surety Co., 288 P. 827, 828, 105 Cal.App. 731.

Ky.—Century Indemnity Co. of Chicago, Ill., v. Shunk Mfg. Co., 68 S.W.2d 772, 774, 253 Ky. 50.

N.M.—Anderson v. United States Fidelity & Guaranty Co., 104 P.2d 906, 908, 44 N.M. 483, 129 A.L.R. 1084.

Wash.—United States Fidelity & Guaranty Co. v. Feenaughty Machinery Co., 85 P.2d 1085, 1089, 197 Wash. 569—Western Clinic & Hospital Ass'n v. Gabriel Const. Co.,

12 P.2d 417, 418, 168 Wash. 411—Hurley-Mason Co. v. American Bonding Co., 140 P. 575, 577, 79 Wash. 564, L.R.A.1915B 1131, Ann.Cas.1916A 948—National Surety Co. v. Bratnober Lumber Co., 122 P. 337, 343, 67 Wash. 601.

4. Wash.—United States Fidelity & Guaranty Co. v. Feenaughty Machinery Co., 85 P.2d 1085, 1089, 197 Wash. 569—Hurley-Mason Co. v. American Bonding Co., 140 P. 575, 577, 79 Wash. 564, L.R.A.1915B 1131, Ann.Cas.1916A 948—National Surety Co. v. Bratnober Lumber Co., 122 P. 337, 343, 67 Wash. 601.

5. Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 714, 26 Ala.App. 136.

In its general acceptance, when applied to supplies furnished a tenant on land used for farming purposes, the term comprehends almost anything necessary for the tenant in order to enable him to make the crop.—Strickland v. Stiles, 33 S.E. 85, 86, 107 Ga. 308.

6. Pa.—Commonwealth ex rel. Hetrick v. School Dist. of City of Sunbury, 6 A.2d 279, 281, 335 Pa. 6.

7. Pa.—Commonwealth ex rel. Hetrick v. School Dist. of City of Sunbury, supra.

8. Pa.—Commonwealth ex rel. Hetrick v. School Dist. of City of Sunbury, supra.

9. Cal.—A. L. Young Machinery Co. v. Cupps, 297 P. 538, 539—Bricker v. Rollins & Jarecki, 173 P. 592, 594, 178 Cal. 286.

10. S.D.—Dewell v. Hughes County, 66 N.W. 1079, 1080, 8 S.D. 452.

11. Cal.—Bricker v. Rollins, 173 P. 592, 594, 178 Cal. 347.

Ky.—Carson v. Shelton, 107 S.W. 793, 128 Ky. 248, 32 Ky.L. 1083, 15 L.R.A.N.S., 509.

12. N.Y.—In re Morrison's Will, 60 N.Y.S.2d 18, 20, 270 App.Div. 318.

13. N.Y.—In re Morrison's Will, supra.

14. Mont.—Miller Ins. Agency v. Porter, 20 P.2d 643, 646, 93 Mont. 587.

N.M.—Anderson v. United States Fidelity & Guaranty Co., 104 P.2d 906, 908, 44 N.M. 483, 129 A.L.R. 1084.

15. N.Y.—In re Morrison's Will, 60 N.Y.S.2d 18, 20, 270 App.Div. 318.

16. Ga.—Citizens Loan & Sec. Co. v. Trust Co. of Ga., 53 S.E.2d 179, 181, 79 Ga.App. 184.

N.J.—National Fire Proofing Co. v. Daly, 74 A. 152, 155, 76 N.J.Eq. 35.

Phrases employing the verb "supply" in its various forms and of which more recent adjudications have not been found see 60 C.J. p 1169 notes 34—39.

17. Pa.—Reading v. Shepp, 2 Pa. Dist. 137, 140.

60 C.J. p 1169 note 28.

18. Fla.—Fulghum v. State, 109 So. 644, 646, 92 Fla. 662.

60 C.J. p 1169 note 24.

19. Pa.—Commonwealth ex rel. v. Cloud, 19 Pa.Dist. 299, 300.

provision for.²⁰ It is also defined as meaning to serve instead of; to take the place of.²¹

In a restricted sense, the term "supply" means to supply some person other than oneself,²² and its underlying idea is that the thing supplied is something belonging to the supplier and not to the person supplied.²³

"Supplied" has been distinguished from "issued" see 48 C.J.S. p 778 note 16.

The supply of various utilities to consumers is treated in appropriate titles of this work, specific reference being made to Electricity §§ 24-28, Gas §§ 18-27, and Steam §§ 4-10. Public and municipal water supply is treated in the C.J.S. title Waters §§ 226-313, also 67 C.J. p 1118 note 30-p 1286 note 97.

In the law of liens the word "supplies" is discussed in *Mechanics' Liens* §§ 48, 209, and references to the term are made in the title index to *Maritime Liens*.

For other particular applications and specific uses of the term consult the *Descriptive-Word Index*.

SUPPORT. The word "support" is derived from the Latin "subportare,"²⁴ and, as is indicated by the definitions as well as the derivation, implies sustaining from beneath,²⁵ and it includes the idea of bearing weight.²⁶

As a noun, "support" is defined generally to mean one who or that which supports; supporting means, agency, medium, proof, etc.; a prop.²⁷

As a verb, "to support" is defined generally as meaning to maintain;²⁸ to provide for;²⁹ to hold in an existing state or condition;³⁰ to uphold;³¹ to sustain;³² to bear by being under.³³

The verb "to support" is further defined as meaning to carry on;³⁴ to enable to continue;³⁵ to keep from failing;³⁶ to supply funds for the means of continuing;³⁷ and it also means to defend;³⁸ to uphold by aid or countenance;³⁹ to vindicate.⁴⁰

"Supported" is the past participle of the verb "to support,"⁴¹ and it has been said that it is defined as meaning to verify or to substantiate.⁴² It has been held to be equivalent to "sustained."⁴³

The right of the legislature of a state to make appropriations operative and effective without a refer-

Tex.—Clayton v. Bridgeport Mach. Co., Civ.App., 33 S.W.2d 787, 789.

Similarly defined

To give or furnish something that is wanted.—Attorney General v. Southport Corporation, 91 L.J.Ch. 755—60 C.J. p 1169 note 26.

20. Pa.—Reading v. Shepp, 2 Pa. Dist. 137, 140.

21. Pa.—Reading v. Shepp, *supra*.

22. Eng.—Attorney General v. Southport Corporation, [1923] 1 Ch. 548, 558.
60 C.J. p 1169 note 31.

23. Austr.—Symes v. Stewart, 28 Austr.C.L.R. 386, 389.

24. U.S.—General Electric Co. v. Garrett Coal Co., C.C.Pa., 141 F. 124, 125.

25. U.S.—General Electric Co. v. Garrett Coal Co., *supra*.

26. U.S.—Hatch Storage Battery Co. v. Electric Storage Battery Co., Mass., 100 F. 975, 981, 41 C.C.A. 133.

27. Webster New Int.D.

As used in a patent claim the word "supports" has been held not to mean posts of a guardrail structure see Patents § 105 b.

Right to lateral support see *Adjoining Landowners* §§ 4-7.

28. Ill.—People ex rel. Bergan v. New York Cent. R. Co., 64 N.E.2d 895, 901, 392 Ill. 525.
60 C.J. p 1170 note 53.

29. Wash.—State v. Clausen, 148 P. 28, 32, 85 Wash. 260.
60 C.J. p 1170 note 54.

30. Tex.—Love v. Rockwall Independent School District, Civ.App., 194 S.W. 659, 661.

31. D.C.—Rudolph v. United States ex rel. Rock, 6 F.2d 487, 489, 55 App.D.C. 362, 40 A.L.R. 1043.
Or.—Young v. Edmunson, 204 P. 619, 620, 103 Or. 243.

To uphold or sustain

S.C.—State v. Stokes, 130 S.E. 337, 339, 133 S.C. 67.

32. Fla.—In re Opinion of Justices, 13 Fla. 687, 689.

Okl.—Board of Com'rs of Logan County v. State, 254 P. 710, 711, 122 Okl. 268.

33. U.S.—General Electric Co. v. Garrett Coal Co., C.C.Pa., 141 F. 124, 125.

Okl.—Board of Com'rs of Logan County v. State, 254 P. 710, 711, 122 Okl. 268.

To keep from falling

The word "support" is used by the student, and understood in common phraseology, as covering "to keep

from falling" and other kindred expressions.—Hatch Storage Battery Co. v. Electric Storage Battery Co., Mass., 100 F. 975, 981, 41 C.C.A. 133.

34. Wash.—State v. Clausen, 148 P. 28, 32, 85 Wash. 260.
60 C.J. p 1170 note 49.

35. Okl.—Board of Com'rs of Logan County v. State, 254 P. 710, 711, 122 Okl. 268.
60 C.J. p 1170 note 50.

36. S.C.—State v. Stokes, 130 S.E. 337, 339, 133 S.C. 67.

37. Fla.—In re Opinion of Justices, 13 Fla. 687, 689.

Okl.—Board of Com'rs of Logan County v. State, 254 P. 710, 711, 122 Okl. 268.

38. U.S.—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

39. U.S.—U. S. v. Schulze, *supra*.
Tex.—Westerman v. Mims, 227 S.W. 178, 180, 111 Tex. 29.

40. U.S.—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

41. Webster New Int.D.

42. Mo.—State v. Lock, 259 S.W. 116, 120, 302 Mo. 400.

43. Ind.—Johnson v. Allispaugh, 107 N.E. 686, 688, 58 Ind.App. 83.

endum where the appropriations are necessary for the support of the government is treated in Statutes § 121.

Support of persons. As applied to persons the word "support" is a general term,⁴⁴ of broad signification,⁴⁵ and, like most words, it has a variety of meanings.⁴⁶ It is not a word of art, but, rather, a word which has a relative meaning,⁴⁷ and its meaning is necessarily flexible.⁴⁸ It is deemed to be a word of general welfare,⁴⁹ and imports the welfare of the body.⁵⁰

As a noun, the word "support," as used with respect to persons, means maintenance;⁵¹ subsis-

tence;⁵² sustenance;⁵³ the supply of necessities;⁵⁴ a livelihood;⁵⁵ a living;⁵⁶ a source or means of living;⁵⁷ that which furnishes a livelihood to a person or family;⁵⁸ articles for the sustenance of a family;⁵⁹ income sufficient for the support of a family;⁶⁰ income used as a means of living.⁶¹

The word "support" includes food,⁶² clothing,⁶³ and shelter,⁶⁴ and it includes such a supply of food, clothing, and housing as is suitable to the condition in life and is commensurate with ability.⁶⁵ However, in its ordinary signification the word "support" does not merely include board,⁶⁶ and is not limited to food,⁶⁷ clothing,⁶⁸ and shelter⁶⁹ or habitation.⁷⁰

44. Ala.—Heartsill v. Thompson, 16 So.2d 507, 510, 245 Ala. 215.

45. Nev.—Lake v. Bender, 7 P. 74, 78, 18 Nev. 361.

N.H.—*Corpus Juris* cited in Indian Head National Bank v. Theriault, 84 A.2d 828, 829, 97 N.H. 212.

46. N.J.—State v. Such, 21 A. 852, 853, 53 N.J.Law 351.

N.C.—Board of Com'rs for Caldwell County v. Sidney Spitzer & Co., 91 S.E. 707, 708, 173 N.C. 147.

As used in statutes and legal documents, the word "support" may have a varying meaning.—Paquin v. Westervelt, 106 A. 766, 767, 93 Conn. 513.

"One of the illustrative examples of its use, given by Webster, is to support a student at college."—State v. Such, 21 A. 852, 853, 53 N.J.Law 351.

47. Conn.—Cromwell v. Converse, 143 A. 416, 421, 108 Conn. 412, 61 A.L.R. 663.

60 C.J. p 1173 note 26.

Significance depends on circumstances of each case

N.H.—*Corpus Juris* cited in Indian Head National Bank v. Theriault, 84 A.2d 828, 829, 97 N.H. 212.

48. Ind.—Reath v. State ex rel. Johnson, 44 N.E. 808, 809, 16 Ind. App. 146.

60 C.J. p 1171 note 83.

No fixed and rigid meaning

N.H.—*Corpus Juris* cited in Indian Head National Bank v. Theriault, 84 A.2d 828, 829, 97 N.H. 212.

49. N.Y.—In re Wells' Will, 300 N.Y.S. 1075, 1078, 165 Misc. 385.

50. N.Y.—In re Wells' Will, supra.

51. N.C.—State v. Clark, 66 S.E.2d 669, 671, 234 N.C. 192.

60 C.J. p 1171 note 70.

52. Cal.—Great Western Power Co.

v. Industrial Accident Commission, 218 P. 1009, 1014, 191 Cal. 424.

60 C.J. p 1171 note 71.

Sustentation

Pa.—Winthrop Co. v. Clinton, 46 A. 435, 436, 196 Pa. 472, 79 Am.S.R. 729.

53. Conn.—Ferrigno v. Keasbey, 106 A. 445, 447, 93 Conn. 445.

60 C.J. p 1171 note 72.

54. N.Y.—Dravecko v. Richard, 196 N.E. 17, 18, 267 N.Y. 180—Application of Kaufman, 70 N.Y.S.2d 736, 737, 272 App.Div. 323—Boller v. Crider, 31 N.Y.S.2d 987, 989.

55. Pa.—Winthrop Co. v. Clinton, 46 A. 435, 436, 196 Pa. 472, 476, 79 Am.S.R. 729.

Similarly defined

Necessaries of life and means of livelihood.—Snyder v. Lane, W.Va., 65 S.E.2d 483, 487.

56. Cal.—Great Western Power Co. of California v. Industrial Accident Commission of California, 218 P. 1009, 1014, 191 Cal. 424.

Pa.—Winthrop Co. v. Clinton, 46 A. 435, 436, 196 Pa. 472, 79 Am.S.R. 729.

57. Cal.—Great Western Power Co. v. Industrial Accident Commission, 218 P. 1009, 1014, 191 Cal. 424.

58. Cal.—Great Western Power Co. v. Industrial Accident Commission, supra.

59. Pa.—Winthrop Co. v. Clinton, 46 A. 435, 436, 196 Pa. 472, 79 Am.S.R. 729.

60 C.J. p 1171 note 75.

60. N.C.—Wall v. Williams, 93 N.C. 327, 330, 53 Am.R. 458.

61. Ala.—Ex parte Sloss-Sheffield Steel & Iron Co., 101 So. 608, 609, 212 Ala. 3.

62. Ky.—*Corpus Juris* cited in Huff-

man v. Chasteen, 209 S.W.2d 705, 708, 307 Ky. 1.

N.Y.—Harrison v. Jackson, 108 N.Y. S.2d 111, 114, 202 Misc. 19.

W.Va.—Snyder v. Lane, 65 S.E.2d 483, 487.

60 C.J. p 1171 notes 66–78.

63. Ky.—*Corpus Juris* cited in Huffman v. Chasteen, 209 S.W.2d 705, 708, 307 Ky. 1.

N.Y.—Harrison v. Jackson, 108 N.Y. S.2d 111, 114, 202 Misc. 19.

W.Va.—Snyder v. Lane, 65 S.E.2d 483, 487.

60 C.J. p 1171 notes 66–78.

64. Ky.—*Corpus Juris* cited in Huffman v. Chasteen, 209 S.W.2d 705, 708, 307 Ky. 1.

N.Y.—Harrison v. Jackson, 108 N.Y. S.2d 111, 114, 202 Misc. 19.

W.Va.—Snyder v. Lane, 65 S.E.2d 483, 487.

60 C.J. p 1171 note 88.

A place in which to live

N.C.—Board of Com'rs for Caldwell County v. Sidney Spitzer & Co., 91 S.E. 707, 708, 173 N.C. 147.

60 C.J. p 1171 note 89.

65. N.C.—State v. Clark, 66 S.E.2d 669, 671, 234 N.C. 192.

66. Mass.—Gould v. Lawrence, 35 N.E. 462, 463, 160 Mass. 232.

67. N.Y.—Dravecko v. Richard, 196 N.E. 17, 18, 267 N.Y. 180—Boller v. Crider, 31 N.Y.S.2d 987, 989.

N.C.—Wall v. Williams, 93 N.C. 327, 53 Am.R. 458.

W.Va.—Snyder v. Lane, 65 S.E.2d 483, 487.

68. N.Y.—Dravecko v. Richard, 196 N.E. 17, 18, 267 N.Y. 180—Boller v. Crider, 31 N.Y.S.2d 987, 989.

W.Va.—Snyder v. Lane, 65 S.E.2d 483, 487.

69. W.Va.—Snyder v. Lane, supra.

70. N.Y.—Dravecko v. Richard, 196 N.E. 17, 18, 267 N.Y. 180—Boller v. Crider, 31 N.Y.S.2d 987, 989.

While it includes everything necessary to proper maintenance,⁷¹ it includes something more than the bare necessities of life;⁷² it involves the comforts of life as well,⁷³ and it takes in everything, necessities and luxuries, which a person in a certain situation is entitled to have and enjoy;⁷⁴ and it may include all such means of living as would enable a person to live in a style and condition and with a degree of comfort suitable and becoming to his station in life.⁷⁵ It therefore follows that anything requisite to the housing, feeding, clothing, health, proper recreation, vacation, or traveling expense is proper,⁷⁶ keeping in view the social family relationship and the quantum of the income.⁷⁷ The term may include the building of a home, although not necessarily,⁷⁸ and it has been said that the building of a house, either in whole or in part, cannot be considered a part of the support of the person who is to occupy it.⁷⁹ The duty to support does not, as a general proposition, require that an education be provided,⁸⁰ although a parent's duty to support a child may require that an education be provided, as discussed generally in Parent and Child § 15, and, in connection with divorce statutes and decrees, in Divorce § 319 h. The word "support" has been held to include medical treatment⁸¹ and care;⁸² medical assistance reasonably required for the preservation of health;⁸³ and in some cases to include medicines and medical services as necessities,⁸⁴ but the term is not always given such a broad signification.⁸⁵ It also includes dental care.⁸⁶

"Support" applies only to means of subsistence

during life;⁸⁷ thus funeral expenses are not within the meaning of the word,⁸⁸ and it has been held that the term does not include an allowance for the payment of life insurance premiums.⁸⁹

As a verb, "support," as used with respect to persons, is defined as meaning to furnish with funds or means for maintenance;⁹⁰ to give means of livelihood to.⁹¹

Because of his status a person may be entitled to receive support either from another person or from the federal, state, or municipal government, and this right to support is frequently imposed by statute, although in some instances it exists under the common law, and in some instances the failure of a person to provide the support that is required of him will render him liable to criminal prosecution.

A woman who has the status of a wife is entitled to be supported by her husband, this obligation being imposed both by the common law and by statute, as stated in Husband and Wife § 15. However, a man who has the status of a husband is not, except where statutes so provide, entitled to support from his wife, as stated in Husband and Wife § 16. For other references to the rights, duties, and incidents of support as between spouses see the index to the title Husband and Wife.

An infant or minor child, because of his status as such, is entitled to support from his parents, and, similarly, a parent, because of his status as such, in many jurisdictions, is entitled in a proper case to

71. Mass.—Gould v. Lawrence, 35 N.E. 462, 463, 160 Mass. 232.

Meeting incidental needs

N.Y.—Harrison v. Jackson, 108 N.Y.S.2d 111, 114, 202 Misc. 19.

72. Pa.—Richardson's Estate, 6 Pa. Dist. & Co. 785, 788.

Tex.—Lumbermen's Reciprocal Ass'n v. Warner, Com.App., 245 S.W. 664, 665.
60 C.J. p 1173 note 25.

73. Pa.—Richardson's Estate, 6 Pa. Dist. & Co. 785, 788.

74. Ohio.—Corpus Juris cited in Frye v. Burk, 12 P.2d 152, 158, 57 Ohio App. 99.
60 C.J. p 1172 note 93.

75. Del.—Benjamin F. Shaw Co. v. Palmatory, 105 A. 417, 419, 30 Del. 197.
60 C.J. p 1172 note 92.

76. N.Y.—In re Wells' Will, 300 N.Y.S. 1075, 1078, 165 Misc. 385—

In re Vanderbilt's Estate, 223 N.Y.S. 314, 316, 129 Misc. 605.

77. N.Y.—In re Wells' Will, 300 N.Y.S. 1075, 1078, 165 Misc. 385.

Diminutive gifts

"The irregular and infrequent bestowal of comparatively diminutive gifts cannot properly be regarded as support of a family."—Gregg v. Brickley, 59 N.E. 1072, 1073, 27 Ind. App. 154.

78. N.C.—Board of Com'rs for Caldwell County v. Sidney Spitzer & Co., 91 S.E. 707, 708, 173 N.C. 147.

79. Mich.—Morford v. Dieffenbacker, 20 N.W. 600, 608, 54 Mich. 593.

80. N.Y.—In re Wells' Will, 300 N.Y.S. 1075, 1079, 165 Misc. 385.
60 C.J. p 1173 note 24.

81. Vt.—Morse v. Powers, 45 Vt. 300, 302.
60 C.J. p 1171 note 91.

82. N.Y.—Harrison v. Jackson, 108 N.Y.S.2d 111, 114, 202 Misc. 19.

83. N.C.—State v. Clark, 66 S.E.2d 669, 671, 234 N.C. 192.

84. Kan.—Grant v. Dabney, 19 Kan. 388, 389, 27 Am.R. 125.

85. Kan.—Grant v. Dabney, supra. 60 C.J. p 1171 note 91.

86. N.Y.—Harrison v. Jackson, 108 N.Y.S.2d 111, 114, 202 Misc. 19.

87. Pa.—Estate of Richardson, 6 Pa. Dist. & Co. 785, 789.

88. Pa.—Estate of Richardson, supra.

89. N.Y.—Rooney v. Wiener, 263 N.Y.S. 222, 225, 147 Misc. 48—In re Vanderbilt's Estate, 223 N.Y.S. 314, 316, 129 Misc. 605.

90. Wash.—State v. Clausen, 148 P. 28, 32, 85 Wash. 260.
60 C.J. p 1172 note 21.

91. N.Y.—In re Neil's Estate, 191 N.Y.S. 362, 366, 117 Misc. 498.

support from his child or children. The right of a child to support from his parents, and of a parent to support from his children is treated in Parent and Child, and for specific references see the index to that title. Provision by the state for support of infants where the parents lack ability is discussed in Infants §§ 9, 10. The support of spouses and of children is frequently treated in connection with separations and divorce, and for specific references in these connections see the index to the title Divorce.

A person who occupies a particular status such as an apprentice, a convict, an Indian, a pauper, or a ward may be entitled because of such status to be supported, and for the treatment of the right of support of such persons see the indexes to the titles Apprentices, Convicts, Indians, Paupers, and Guardian and Ward. Infant bastards and insane persons may also be entitled to support and for specific references see the index to Bastards and Insane Persons.

A person may enter into a contract to provide support for another person and in this connection see the indexes to the titles Contracts and Deeds.

For other reference to support of persons see the Descriptive-Word Index.

Comparisons and distinctions. The noun "support" has been held to be synonymous with "maintenance" see 54 C.J.S. p 905 note 42, and "subsistence" see ante p 761 note 31, and has been distinguished from "benefit" see 10 C.J.S. p 339 note 84, and "education" see 28 C.J.S. p 833 note 78.

As a verb, "support" has been held to be synony-

mous with, or equivalent to, "defend" see 26 C.J.S. p 671 note 20, and "maintain" see 54 C.J.S. p 903 note 82, and practically synonymous with "favor" see 35 C.J.S. p 756 note 34. It has been held not synonymous with "care" see 12 C.J.S. p 1144 note 11, and has been distinguished from "educate" see 28 C.J.S. p 832 note 56.

Phrases employing the word "support" are set out in the note.⁹²

SUPPOSE. To believe;⁹³ to expect;⁹⁴ to receive as true;⁹⁵ also to imagine;⁹⁶ to think.⁹⁷ In common speech, the term is frequently used as an expression of the speaker's enlightened opinion,⁹⁸ although it is more apt for the expression of conjecture.⁹⁹

"Suppose" has been held synonymous with "believe" see 10 C.J.S. p 239 note 96, and "deem" see 26 C.J.S. p 660 note 26. While "assume" and "suppose" are sometimes used interchangeably in the framing of hypothetical questions, "assume" is more commonly used and the two words are not generally synonymous, see 7 C.J.S. p 105 note 27.2.

"Supposed," the past participle of "suppose,"¹ has been held synonymous with "alleged" see 3 C.J.S. p 885 note 76, and "understood."²

SUPPOSITION. A conjecture based on the possibility that a thing could have happened;³ a presumption based on the theory that the thing or occurrence in question could have existed or happened;⁴ an idea or a notion founded on the probability that a thing may have occurred, but without proof that it did occur;⁵ what is not known to be true; not

92. Phrases

(1) "Maintenance and support" see 54 C.J.S. p 905 note 44.

(2) "Support of the family" distinguished from "for the joint benefit of both" see 10 C.J.S. p 340 note 14.

(3) Other phrases employing the word and of which more recent adjudications have not been found see 60 C.J. p 1170 notes 63, 64, p 1172 notes 6-18, p 1173 notes 27-31, 37, 39-43, 47, p 1174 note 48.

93. Mo.—State v. Brock, 280 S.W. 48, 49.
60 C.J. p 1174 note 50.

94. Wis.—Beach v. Bird, etc., Lumber Co., 116 N.W. 245, 247, 135 Wis. 550.

95. Ill.—Parker v. Enslow, 102 Ill. 272, 277, 40 Am.R. 588.

96. Ill.—Parker v. Enslow, supra.

97. Mo.—State v. Brock, 280 S.W. 48, 49.
60 C.J. p 1174 note 55.

98. Ala.—Council v. Mayhew, 55 So. 314, 317, 172 Ala. 295.
Cal.—Schwenger v. Gaither, 198 P.2d 108, 109, 87 Cal.App.2d 913.

99. Ala.—Council v. Mayhew, 55 So. 314, 317, 172 Ala. 295.

1. Webster New Int.D.

Phrases employing "supposed" and of which there have been no recent adjudications see 60 C.J. p 1174 notes 62-70.

2. Conn.—Cole v. Fowler, 36 A. 807, 809, 68 Conn. 450.

3. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Humphrey's Adm'r, 136 S.W.2d 537, 542, 281 Ky. 432—Mitch-

ell's Adm'r v. Harlan Central Coal Co., 93 S.W.2d 347, 348, 263 Ky. 702—City of Ludlow v. Albers, 69 S.W.2d 1051, 1055, 253 Ky. 525—Park Circuit & Realty Co. v. Ringo's Guardian, 46 S.W.2d 106, 109, 242 Ky. 255.

Mo.—Draper v. Louisville & N. R. Co., 156 S.W.2d 626, 630, 348 Mo. 886.
60 C.J. p 1174 note 72.

4. Ky.—Hurt's Adm'r v. Louisville & N. R. Co., 183 S.W.2d 628, 629, 298 Ky. 617.

5. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Humphrey's Adm'r, 136 S.W.2d 537, 542, 281 Ky. 432—Mitchell's Adm'r v. Harlan Central Coal Co., 93 S.W.2d 347, 348, 263 Ky. 702—City of Ludlow v. Albers, 69 S.W.2d 1051, 1055, 253 Ky. 525—Park Circuit & Realty Co. v.

proved.⁶

The term "supposition" has been held synonymous with "belief" see 10 C.J.S. p 237 note 43, and "hypothesis" see 42 C.J.S. p 370 note 1, and has been distinguished from "inference" see 43 C.J.S. p 375 note 49.

The admissibility in evidence of suppositions is discussed generally in Evidence § 450.

SUPPRESS. The plain and ordinary meaning⁷ of the word "suppress" is to crush;⁸ to put down;⁹ to put down or put an end to by force;¹⁰ to overpower;¹¹ to subdue;¹² to quell;¹³ to repress;¹⁴ to stamp out;¹⁵ to destroy.¹⁶

"Suppress" also means to prevent;¹⁷ to prohibit;¹⁸ to put a stop to when actually existing.¹⁹

It never means to license or sanction.²⁰

The term "suppress" has been compared with, or distinguished from, "abate" see 1 C.J.S. p 19 note 10, "regulate" see 76 C.J.S. p 615 note 80, and "restrain" see 77 C.J.S. p 324 note 34. It has been held synonymous with, and has also been distinguished from, "prohibit" see 73 C.J.S. p 6 note 90, p 7 note 94.

SUPPRESSION. The act of suppressing, or the state of being suppressed; a forcible putting or

keeping down; repression; restraint.²¹ The term has been held synonymous with "concealment" see 15 C.J.S. p 795 note 23, and "evasion" see 31 C.J.S. p 471 note 85, and it has been distinguished from "regulation" see 76 C.J.S. p 616 note 22.

References to the term "suppression" in connection with evidence in actions generally are made in the title indexes to Criminal Law and Evidence. Matters relating to the suppression of depositions are referred to in the title index to Depositions. The suppression of testimony as constituting contempt is treated in Contempt § 31.

It is stated in Patents § 155 that the nonuse of a patent and suppression of the patented article will not render the patent void or affect the rights of the patentee.

SUPPRESSIO VERI. A suppression of facts which one party is under a legal or equitable obligation to communicate, and with respect to which he cannot be innocently silent, because the other has a right not merely in foro conscientiae, but juris et de jure, to know;²² withholding the truth when it should be uttered.²³ It is a negative act of fraud,²⁴ as distinguished from "suggestio falsi" which is an affirmative fraudulent act, as stated ante p 779 note 97.

SUPRA. A Latin term meaning above; upon. This

Ringo's Guardian, 46 S.W.2d 106, 109, 242 Ky. 255.

Mo.—Draper v. Louisville & N. R. Co., 156 S.W.2d 626, 630, 348 Mo. 886.

60 C.J. p 1174 note 73.

6. Wash.—State v. Harras, 65 P. 774, 775, 25 Wash. 416.

7. Wash.—State ex rel. Hamilton v. Martin, 23 P.2d 1, 5, 173 Wash. 249.

8. Wash.—State ex rel. Hamilton v. Martin, supra.
60 C.J. p 1174 note 77.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1175 notes 93-2.

9. La.—State v. Mustachia, 94 So. 408, 409, 152 La. 821.
Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

10. Wis.—Ogden v. Madison, supra.

Similarly defined

(1) To put down by force.—State ex rel. Hamilton v. Martin, 23 P.2d 1, 3, 5, 173 Wash. 249.

(2) To end by force.—State v. Mustachia, 94 So. 408, 409, 152 La. 821.

11. Mich.—Timm v. Common Council of Village of Caledonia Station, 112 N.W. 942, 149 Mich. 323.

Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

To overpower and crush

Wis.—Ogden v. Madison, supra.

To overwhelm

Wis.—Ogden v. Madison, supra.

12. Wash.—State ex rel. Hamilton v. Martin, 23 P.2d 1, 3, 173 Wash. 249.
60 C.J. p 1175 note 91.

13. Mich.—Timm v. Common Council of Village of Caledonia, 112 N.W. 942, 149 Mich. 323.

Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

14. Wis.—Ogden v. Madison, supra.

15. Mich.—Timm v. Common Council of Village of Caledonia Station, 112 N.W. 942, 149 Mich. 323.

Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

16. Wis.—Ogden v. Madison, supra.

17. Wash.—State ex rel. Hamilton v. Martin, 23 P.2d 1, 3, 173 Wash. 249.

Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

18. La.—State v. Mustachia, 94 So. 408, 409, 152 La. 821.

19. Wis.—Ogden v. Madison, 87 N.W. 568, 569, 111 Wis. 413, 55 L.R.A. 506.

20. Wis.—Ogden v. Madison, supra.

21. New Standard D.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1175 notes 4-7.

22. Ala.—Terrell v. Kirksey, 14 Ala. 209, 212—Juzan v. Toulmin, 9 Ala. 662, 684, 44 Am.D. 448.

23. N.J.—Turney v. Avery, 113 A. 710, 92 N.J.Eq. 473.

24. W.Va.—Newman v. Kay, 49 S.E. 926, 930, 57 W.Va. 98, 68 L.R.A. 908.

word occurring by itself in a book refers the reader to a previous part of the book, like "ante."²⁵

SUPREME. A term derived from "super,"²⁶ and defined as meaning highest in power or authority; holding the highest place, as in government.²⁷

As used in connection with, or with respect to, courts, the word has a well-understood and settled meaning,²⁸ and is the designation usually prescribed by law for the highest court of the state or nation,²⁹ that is, highest in the sense of final or last resort.³⁰

The federal Constitution with its amendments is the supreme law of the land, and the constitution of a state is the supreme law within the realm and sphere of its authority, as stated in Constitutional Law § 3.

SUPT. As an abbreviation for "superintendent," see 1 C.J.S. p 276 note 5.

SUPUESTO. A Spanish term which is said not to be synonymous with "fraudulent."³¹

SURCHARGE. The term "surcharge" is defined generally as meaning a burden greater than the ordinary one, or greater than can well be borne; an excessive burden, load, or charge.³² The word is also employed to signify the penalty exacted against a fiduciary for failure to exercise common prudence, common skill, and common caution in the perform-

ance of his duty,³³ and in this sense is treated in the C.J.S. titles Executors and Administrators §§ 472, 863, Receivers §§ 374, 378, 380, and Trusts §§ 400, 417, also 65 C.J. p 921 notes 96-98, p 943 notes 79-84. Surcharging an account stated is discussed in Account Stated § 57.

SURE. While there are many shades of meaning given to the word "sure" in the dictionaries,³⁴ its primary meaning is assured in mind; confident beyond doubt; knowing, believing, trusting, or the like, with certainty; unquestioning;³⁵ and it is therefore a state of mind.³⁶ The term has been held synonymous with "indubitable" see 42 C.J.S. p 1370 note 32.

SURETY. As a legal term, the word "surety" is defined in Principal and Surety § 2 in a broad sense as one who becomes responsible for the debt, default, or miscarriage of another; and, in a narrower sense, as a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance.

The word "surety" is employed in a sense, still more general, as meaning security;³⁷ safety; certainty; indubitableness.³⁸

Phrases employing the term are set out in the note.³⁹

25. Black L.D.

"Acceptance for honor or supra protest" of bills of exchange see Bills and Notes § 185.

26. Ind.—Ex parte France, 95 N.E. 515, 518, 176 Ind. 72.

"Super" defined see ante p 886 notes 47-51.

27. New Standard D.

Phrases

(1) "Supreme power" see 72 C.J. S. p 399 note 94.

(2) Other phrase as to which more recent adjudications have not been found see 60 C.J. p 1176 note 18.

28. Ind.—Ex parte France, 95 N.E. 515, 518, 176 Ind. 72.

Supreme court of the United States see Federal Courts §§ 191-281. State supreme courts see the index to the title Courts.

29. Ind.—Ex parte France, 95 N.E. 515, 518, 176 Ind. 72.

Supreme courts are those which possess the highest and controlling jurisdiction.—Ex parte France, supra.

30. W.Va.—Koonce v. Doolittle, 37 S.E. 644, 645, 48 W.Va. 592. 60 C.J. p 1175 note 16.

31. Philippine.—U. S. v. Pineda, 37 Philippine 456, 465.

As employed in a statute relating to druggists Philippine.—U. S. v. Pineda, supra.

32. New Standard D.

33. Pa.—In re Miller's Estate, 26 A. 2d 320, 321, 345 Pa. 91.

It is imposed to compensate beneficiaries for loss caused by the fiduciary's want of care.—In re Miller's Estate, supra.

34. Ohio.—Hill v. Union Gas & Electric Co., 200 N.E. 199, 201, 51 Ohio App. 144.

35. Ohio.—Hill v. Union Gas & Electric Co., supra.

Phrase employing the term and of which more recent adjudications have not been found see 60 C.J. p 1176 note 23.

36. Ohio.—Hill v. Union Gas & Electric Co., 200 N.E. 199, 201, 51 Ohio App. 144.

37. Iowa.—Pitkins v. Boyd, 4 Greene 255, 259.

Similarly defined

(1) Security against loss or damage.—Pitkins v. Boyd, supra.

(2) Security for payment.—Pitkins v. Boyd, supra.

38. Iowa.—Pitkins v. Boyd, supra.

39. Phrases

(1) "Common surety" defined see Principal and Surety § 391.

(2) "Supplemental surety" defined see Principal and Surety § 386.

(3) "Surety companies" see Principal and Surety §§ 391-400.

(4) "Surety insurance" synonymous with "guaranty insurance" see Insurance § 16.

(5) "Surety of the peace" as preventive justice taken against a party who threatens future misbehavior see Breach of the Peace §§ 17-26.

SURETYSHIP. In law, suretyship is a lending of credit to aid a principal who has insufficient credit of his own, and is a direct contract to pay the principal's debt or perform his obligation in case of his default, as stated in Principal and Surety § 1. The distinctions between suretyship and other relations are pointed out in Principal and Surety § 10.

SURFACE. There is no generally accepted definition of the word "surface,"⁴⁰ and even the courts do not agree on a definition of the term,⁴¹ but in each case the meaning must be ascertained from the context in which the term is employed.⁴²

As defined by lexicographers, the word "surface" means the exterior or outside of an object or body; the outermost or uppermost boundary; the face or faces of a three-dimensioned thing; a plane of a solid;⁴³ and in its geometrical sense the term signifies a plane.⁴⁴

As commonly used, however, the word "surface" indicates some degree of thickness,⁴⁵ and as employed with reference to the earth it *prima facie* means nothing more than the *vestimenta terræ*,⁴⁶ that is, the top of the earth and whatever is upon the face thereof,⁴⁷ or the superficial part of the land.⁴⁸

"Surface" is said to be the antithesis of "framework" see 37 C.J.S. p 140 note 9.

In mining terminology the word "surface" means that part of the earth or geologic section lying over the minerals, as stated in Mines and Minerals § 3 g.

SURGEON. Defined see Physicians and Surgeons § 1.

SURGERY. Defined see Physicians and Surgeons § 1.

SURGICAL. Of or pertaining to surgery or surgeons.⁴⁹

SURNAME. See the title index to Names.

SURPLUS. It has been said that the word "surplus" necessarily takes concrete significance from the context,⁵⁰ and that general definitions, while accurate for the purposes of the discussion of a particular subject matter, may not be applicable to some other case.⁵¹ Basically, "surplus" means what is not needed or is left over;⁵² and the ordinary meaning⁵³ of the term as found in the standard

40. Mont.—Superior Coal Co. v. Musselshell County, 41 P.2d 14, 21, 98 Mont. 501.

"Surfacing" said to be a technical term among civil engineers.—Snell v. Cottingham, 72 Ill. 161, 167.

41. Mont.—Superior Coal Co. v. Musselshell County, 41 P.2d 14, 21, 98 Mont. 501.

42. Mont.—Superior Coal Co. v. Musselshell County, *supra*.

43. Webster New Int.D.

Phrases

(1) "Surface estates" see title index to Mines and Minerals.

(2) "Surface owner" see title index to Mines and Minerals.

(3) "Surface waters" defined and discussed generally see the C.J.S. title Waters §§ 112-128, also 67 C.J. p 862 note 21-p 901 note 8; control and distribution thereof by municipal corporations see Municipal Corporations § 883; in connection with railroads see Railroads §§ 186, 187.

(4) Other phrases employing the word "surface" in its various forms and of which more recent adjudications have not been found see 60 C.J. p 1176 notes 31-37.

44. Mass.—Sullivan v. Boston & A. R. R., 96 N.E. 347, 349, 210 Mass. 229.

45. Mass.—Sullivan v. Boston & A. R. R., *supra*.

46. Mont.—Superior Coal Co. v. Musselshell County, 41 P.2d 14, 21, 98 Mont. 501.

"Superficies" similarly defined see ante p 887 note 53.

47. Mont.—Superior Coal Co. v. Musselshell County, *supra*.

48. Mont.—Superior Coal Co. v. Musselshell County, *supra*.

In using the word "surface," the layman in casual conversation, as well as the judge in a considered opinion, ordinarily refers merely to the superficial part of land.

Mont.—Superior Coal Co. v. Musselshell County, *supra*.

W.Va.—Drummond v. White Oak Fuel Co., 140 S.E. 57, 58, 104 W.Va. 368, 56 A.L.R. 303.

49. New Standard D.

Phrases

(1) "Surgical aid" see Physicians and Surgeons § 1.

(2) "Surgical instruments" within tariff act see Customs Duties § 34.

(3) "Surgical operation" see Physicians and Surgeons § 1.

50. Mich.—Lawrence v. American Surety Co. of New York, 249 N.W. 3, 9, 263 Mich. 586, 88 A.L.R. 535.

Confined to the context in which used

"We are indebted to the diligence of counsel for relator for a large number of citations of cases in which 'surplus' is defined. We have read all these cases with interest, but, it must be confessed, with little profit. In each instance the word as used in the case cited is obviously, and usually expressly, confined to the particular context in which it is used, and to the subject-matter under discussion."—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

51. U.S.—Douglas v. Edwards, C.C. A.N.Y., 298 F. 229, 240.

52. Mich.—Lawrence v. American Surety Co. of New York, 249 N.W. 3, 9, 263 Mich. 586, 88 A.L.R. 535.

53. Mo.—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

Common phraseology

U.S.—Harder v. Irwin, D.C.N.Y., 285 F. 402, 409.

lexicons⁵⁴ and various decisions⁵⁵ is that which remains when use or need is satisfied;⁵⁶ the excess;⁵⁷ the overplus.⁵⁸

The word "surplus" is further defined as meaning the remainder of a thing;⁵⁹ the residue;⁶⁰ what is left after all proper and legitimate deductions are made;⁶¹ that which remains⁶² or is left⁶³ when use is satisfied, or the excess beyond what is prescribed⁶⁴ or wanted⁶⁵ in law; and, more specifically, the net assets over and above the liabilities;⁶⁶ the amount of the residue of the assets after the liabilities have been deducted.⁶⁷

Frequently the word "surplus" is used with refer-

ence to a fund, and as so used is generally understood to mean either a fund which is no longer needed⁶⁸ or that which is left from a fund which has been appropriated for a particular purpose.⁶⁹ In a generally accepted commercial sense it usually applies to funds remaining on hand after fixed charges or liabilities have been deducted,⁷⁰ and funds not necessary to be kept on hand in cash for immediate use or ordinary demands may be called "surplus."⁷¹

The word "surplus" is commonly employed in corporate financing⁷² and in corporate accounting,⁷³ and as so used has acquired a fixed meaning.⁷⁴ The term may be employed to designate an account on the corporate books,⁷⁵ representing the net assets

54. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

Mo.—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

55. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

56. U.S.—Harder v. Irwin, D.C.N.Y., 285 F. 402, 409.

Mo.—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

57. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

Mo.—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

58. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

60 C.J. p 1177 note 54.

Excess or overplus

U.S.—Harder v. Irwin, D.C.N.Y., 285 F. 402, 409.

Iowa.—Sexton v. C. L. Percival Co., 177 N.W. 83, 86, 189 Iowa 586.

59. Kan.—State v. Butler County, 94 P. 1004, 1007, 77 Kan. 527.

60 C.J. p 1177 note 55.

60. Kan.—State v. Butler County, supra.

Okl.—Boviard Supply Co. v. American Nat. Bank, 253 P. 92, 94, 123 Okl. 245.

61. N.Y.—Pettibone v. Thomson, 130 N.Y.S. 284, 289, 72 Misc. 486.

62. N.J.—State v. Parker, 35 N.J. Law 575, 577.

Okl.—Boviard Supply Co. v. American Nat. Bank, 253 P. 92, 94, 123 Okl. 245.

63. Ohio.—Tax Commission of Ohio v. Clark, 151 N.E. 780, 781, 20 Ohio App. 166.

64. Ohio.—Tax Commission of Ohio v. Clark, supra.

60 C.J. p 1177 note 58.

65. N.J.—State v. Parker, 35 N.J. Law 575, 577.

Okl.—Boviard Supply Co. v. American Nat. Bank, 253 P. 92, 94, 123 Okl. 245.

66. N.Y.—People ex rel. v. Purdy, 146 N.Y.S. 646, 161 App.Div. 541, 543.

60 C.J. p 1177 note 57.

Similarly defined

(1) The excess of assets over liabilities.—Puerto Rico Coal Co. v. Domenech, C.C.A. Puerto Rico, 41 F.2d 183, 185.

(2) "The entire overplus of assets over liabilities."—Leather Manufacturers' Nat. Bank v. Treat, C.C.N.Y., 116 F. 774, 775.

67. Mo.—State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S.W. 721, 722, 282 Mo. 213.

68. Mass.—Smith v. Cotting, 120 N. E. 177, 181, 231 Mass. 42.

69. Kan.—State v. Butler County, 94 P. 1004, 1007, 77 Kan. 527.

N.Y.—In re Jones' Estate, 134 N.Y.S. 859, 862, 75 Misc. 47.

Similarly defined

(1) "That which remains of the fund appropriated for a particular purpose."—Boviard Supply Co. v. American Nat. Bank, 253 P. 92, 94, 123 Okl. 245.

(2) "That which is left of a fund after the use of a sufficiency to satisfy the purposes for which the fund was set apart."—Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 11 S. W.2d 119, 122, 227 Ky. 297.

70. Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S.W.2d 650, 651.

71. Mich.—Lawrence v. American Surety Co. of New York, 249 N.W. 3, 9, 263 Mich. 586, 88 A.L.R. 535.

72. U.S.—Winkelman v. General Motors Corporation, D.C.N.Y., 44 F. Supp. 960, 996—Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., D.C.Mich., 7 F. Supp. 511, 516.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 288 N.Y. 280.

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S. W.2d 650, 651.

60 C.J. p 1178 note 71.

73. U.S.—Willcuts v. Milton Dairy Co., Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247—Winkelman v. General Motors Corporation, D.C. N.Y., 44 F.Supp. 960, 996—Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., D.C. Mich., 7 F.Supp. 511, 516.

Mass.—Commissioner of Corporations and Taxation v. Filoon, 38 N.E.2d 693, 703, 704, 310 Mass. 374.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S. W.2d 650, 651.

60 C.J. p 1178 note 71.

Textbooks on accounting recognize the distinction between the common significance and the technical understanding of the word "surplus."—Harder v. Irwin, D.C.N.Y., 285 F. 402, 409.

74. U.S.—Phillips v. U. S., D.C.Pa., 12 F.2d 598, 600.

75. U.S.—Willcuts v. Milton Dairy Co., Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247—Winkelman v. General Motors Corporation, D.C. N.Y., 44 F.Supp. 960, 996—Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., D.C. Mich., 7 F.Supp. 511, 516.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

of the corporation in excess of all liabilities, including capital stock;⁷⁶ or it may be employed to denote an excess in the aggregate value of all the assets of a corporation over the sum of all its liabilities, including capital stock;⁷⁷ the value of all the corporation's assets after its liabilities, including its capital stock, have been deducted.⁷⁸ As distinguished from the capital stock of a corporation, surplus is the excess of net assets over the face value of the shares.⁷⁹ A surplus is not a concrete, primary fact, but is a conclusion of fact, to be ascertained by the comparison of a corporation's assets with the amount of its capital stock,⁸⁰ and it is a prerequisite to the existence of a surplus that the net assets of the corporation exceed the capital stock.⁸¹

A surplus may be "paid-in," as where the stock is issued at a price above par,⁸² or "earned," as where it is derived from undistributed profits,⁸³ and it may, among other things, represent the increase in valuation of land or other assets made on a revaluation of the company's fixed property,⁸⁴ that is, increases resulting from a revaluation of fixed assets.⁸⁵

As applied to financial structures the word "surplus" has a reasonably definite and recognized meaning,⁸⁶ and has a technical and well-defined meaning in the business or profession of banking,⁸⁷ and in banking terminology is descriptive of net earnings, income, and money from whatever source de-

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S. W.2d 650, 651.

60 C.J. p 1178 note 71.

Surplus account

U.S.—Phillips v. U. S., D.C.Pa., 12 F. 2d 598, 600.

76. U.S.—Winkelman v. General Motors Corporation, D.C.N.Y., 44 F. Supp. 960, 996—Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., D.C.Mich., 7 F.Supp. 511, 516.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

60 C.J. p 1178 note 72.

77. Mass.—Commissioner of Corporations and Taxation v. Filoon, 38 N.E.2d 693, 703, 704, 310 Mass. 374. S.D.—McCannon v. Lusk-Mitchell Newspapers, 292 N.W. 82, 83, 67 S. D. 291.

60 C.J. p 1178 notes 67, 80.

Similarly expressed

(1) Surplus is the excess of the assets of a corporation over its liabilities, including its capital.—Aldrew Oil & Gas Co. v. Alexander, C.C. A.Okla., 70 F.2d 160.

(2) That which remains after expenses and dividends.

U.S.—Harder v. Irwin, D.C.N.Y., 285 F. 402, 409.

La.—Marks v. American Brewing Co., 52 So. 983, 985, 126 La. 666.

(3) What remains after making provision for liabilities of every kind, leaving capital stock out of consideration.—Insurance Co. of North America v. McCoach, Pa., 224 F. 657, 659, 140 C.C.A. 167.

(4) The accumulation of the company of moneys or property in excess of par value of the stock issued by it.—People ex rel. McClure Publications v. Purdy, 146 N.Y.S. 646, 647, 161 App.Div. 541—60 C.J. p 1178 note 69.

(5) The property of a corporation in excess of the sum limited for its capital in its charter.—Small v. Sullivan, 157 N.E. 261, 263, 245 N.Y. 343.

(6) "Surplus" means book overage of a going concern, the overage of assets exceeding liabilities and capital; it is the amount remaining after paying the capital investment and liabilities in full and not necessarily on liquidation.—Hayman v. Morris, 36 N. Y.S.2d 756, 769.

Statute generally expressive of common meaning

Where a taxation statute defined the word "surplus" to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital, it was stated that such definition was not different from the common understanding except in designating paid-up capital as a basis of its computation instead of book or actual value.—Appeal of Hoskins Mfg. Co., 259 N.W. 334, 270 Mich. 592.

78. Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S.W.2d 650, 651.

79. Iowa.—Sexton v. C. L. Percival Co., 177 N.W. 83, 86, 189 Iowa 586.

In financial statements

As used in financial statements of corporations, "surplus" ordinarily indicates its accumulated earnings or profits, whether in money or otherwise, as distinguished from the par value of its capital stock.—Sexton v. C. L. Percival Co., supra.

80. N.Y.—People ex rel. McClure Publications v. Purdy, 146 N.Y.S. 646, 648, 161 App.Div. 541.

81. U.S.—Willcuts v. Milton Dairy Co., Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247.

Mass.—Commissioner of Corporations and Taxation v. Filoon, 38 N.E.2d 693, 703, 704, 310 Mass. 374.

82. U.S.—Willcuts v. Milton Dairy Co., Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247—Edwards v. Douglas, N.Y., 46 S.Ct. 85, 88, 269 U.S. 204, 70 L.Ed. 235—Winkelman v. General Motors Corporation, D. C.N.Y., 44 F.Supp. 960, 996.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S.W.2d 650, 651.

83. U.S.—Willcuts v. Milton Dairy Co., Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247—Edwards v. Douglas, N.Y., 46 S.Ct. 85, 88, 269 U.S. 204, 70 L.Ed. 235—Winkelman v. General Motors Corporation, D. C.N.Y., 44 F.Supp. 960, 996.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S. W.2d 650, 651.

84. U.S.—Edwards v. Douglas, N.Y., 46 S.Ct. 85, 88, 269 U.S. 204, 70 L. Ed. 235—Winkelman v. General Motors Corporation, D.C.N.Y., 44 F. Supp. 960, 996.

N.Y.—Randall v. Bailey, 43 N.E.2d 43, 48, 49, 288 N.Y. 280.

Tex.—United North & South Development Co. v. Heath, Civ.App., 78 S. W.2d 650, 652.

Similarly expressed

Often a surplus arises from the increased value of the property of the corporation.—Sexton v. C. L. Percival Co., 177 N.W. 83, 86, 189 Iowa 586.

85. N.Y.—Randall v. Bailey, 23 N.Y. S.2d 173, 183.

86. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

87. La.—State ex rel. Payne v. Exchange Bank of Natchitoches, 84 So. 481, 482, 147 La. 25.

rived,⁸⁸ and in its ordinary sense it indicates the amount left over after setting aside sufficient of the assets of a banker to meet his obligations;⁸⁹ the excess in the aggregate value of all the assets of the bank over the sum of its liabilities, including capital stock.⁹⁰

The courts have given what they have characterized as a simple and elementary explanation of the way in which a surplus is created by a financial institution such as a bank or loan company,⁹¹ and have said that such an institution does not distribute all the profits among the stockholders, but retains some of them, and the fund so created is designated a "surplus."⁹² A surplus may also be created at the time a corporation or financial institution is formed,⁹³ and it is quite usual when organization takes place for the stockholders to contribute, in addition to the share capital or nominal capital stock, a fund which is known as surplus.⁹⁴ It is also quite usual for the directors or managers of

such institutions to set apart and add to this fund from time to time some part of the accumulated profits of the business in excess of dividend requirements.⁹⁵ The fund produced in these ways is what is known as "surplus,"⁹⁶ and thus, when employed technically in the nomenclature of banks and bankers, the term "surplus" means the fund which has been permanently set apart as such, having been either paid in originally by the stockholders for that purpose or transferred from the undivided profits account.⁹⁷

Surplus is the property of the bank,⁹⁸ and is not capital stock,⁹⁹ but, like capital stock, it constitutes the working capital of the bank.¹

The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged so that at all times the capital may be kept unimpaired,² and is created for the purpose of meeting unforeseen contingencies and unusual losses,³ and ordinarily a surplus may be used to absorb

88. Mass.—Smith v. Cotting, 120 N. E. 177, 181, 231 Mass. 42.

89. U.S.—Leather Mfrs' Nat. Bank v. Treat, C.C.N.Y., 116 F. 774, 776. 60 C.J. p 1179 note 97.

90. Miss.—Board of Sup'rs, Jefferson County v. Jefferson County Bank of Fayette, 156 So. 599, 600, 171 Miss. 50.

91. Kan.—First Nat. Bank v. Moon, 170 P. 33, 35, 102 Kan. 334, L.R.A. 1918C 986.

92. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

Kan.—First Nat. Bank v. Moon, 170 P. 33, 35, 102 Kan. 334, L.R.A.1918C 986.

93. U.S.—Leather Mfrs' Nat. Bank v. Treat, N.Y., 128 F. 262, 263, 264, 62 C.C.A. 644.

Cal.—Mulcahy v. Hibernia Savings & Loan Soc., 77 P. 910, 912, 913, 144 Cal. 219.

N.Y.—Reynolds v. Bank of Mt. Vernon, 39 N.Y.S. 623, 626, 6 App.Div. 62.

94. U.S.—Leather Mfrs' Nat. Bank v. Treat, N.Y., 128 F. 262, 263, 264, 62 C.C.A. 644.

Cal.—Mulcahy v. Hibernia Savings & Loan Soc., 77 P. 910, 912, 913, 144 Cal. 219.

N.Y.—Reynolds v. Bank of Mt. Vernon, 39 N.Y.S. 623, 626, 6 App.Div. 62.

Similarly expressed

"It is not unusual in organizing corporations to create a surplus by exacting payments in excess of the

par value of shares."—Sexton v. C. L. Percival Co., 177 N.W. 83, 86, 189 Iowa 586.

95. U.S.—Leather Mfrs' Nat. Bank v. Treat, N.Y., 128 F. 262, 264, 62 C.C.A. 644.

96. U.S.—Leather Mfrs' Nat. Bank v. Treat, supra.

97. La.—State ex rel. Payne v. Exchange Bank of Natchitoches, 84 So. 481, 482, 147 La. 25.

As liability of bank to stockholders

"The item designated as 'surplus' represents permanent surplus or a liability that is carried permanently on the books and is rarely ever decreased or increased except by necessity, in case of a loss to the bank, or in case of an increase by reason of a new declaration of a permanent fund to be carried under that designation."

Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 925, 26 Cal.2d 545.

Ill.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N. E. 165, 172, 312 Ill. 396.

98. U.S.—Bank of Commerce v. Tennessee, Tenn., 16 S.Ct. 456, 461, 161 U.S. 134, 40 L.Ed. 645.

Kan.—First Nat. Bank v. Moon, 170 P. 33, 35, 102 Kan. 334, L.R.A.1918C 986.

99. U.S.—Bank of Commerce v. Tennessee, Tenn., 16 S.Ct. 456, 461, 161 U.S. 134, 40 L.Ed. 645.

Kan.—First Nat. Bank v. Moon, 170 P. 33, 35, 102 Kan. 334, L.R.A.1918C 986.

1. N.D.—Sarles v. Scandinavian American Bank, 156 N.W. 556, 557, 33 N.D. 40.

2. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

N.C.—Pullen v. Corporation Commission, 68 S.E. 155, 161, 152 N.C. 548.

To avoid receivership and loss of corporate life

"The propriety of accumulating some surplus is too palpable to require extended discussion. When the capital stock of a bank is impaired, the deficiency must be made good by an assessment on the stockholders; and, in case the deficiency is not made good within 60 days, proceedings may be instituted against it, as in the case of insolvent corporations. Hence, if such a corporation should divide all its profits and accumulate no surplus, any business loss would subject it to the hazard of a receivership and the loss of its corporate life."

Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 925, 26 Cal.2d 545—Mulcahy v. Hibernia Savings & Loan Soc., 77 P. 910, 912, 913, 144 Cal. 219.

N.Y.—Reynolds v. Bank of Mt. Vernon, 39 N.Y.S. 623, 626, 6 App.Div. 62.

3. Cal.—First Indus. Loan Co. of Cal. v. Daugherty, 159 P.2d 921, 924, 26 Cal.2d 545.

Kan.—First Nat. Bank v. Moon, 170 P. 33, 35, 102 Kan. 334, L.R.A.1918C 986.

at least extraordinary losses.⁴ A surplus which is used to absorb extraordinary losses serves probably the most important purpose for which it was created,⁵ and absolutely to forbid its use for such purpose tends to destroy in large part its typical usefulness, to impair the solvency of the corporation, or at least its status as a going concern, during periods of abnormal losses, and to impede the normal conduct of its business.⁶

It is generally recognized that banks and other financial institutions have a right to create a surplus,⁷ and it has been said that some of the banks which stand the highest in the commercial world have accumulated so much of their profits that their surplus is from ten to thirty times the amount of their capital stock, and their conduct in creating such a surplus is not regarded as illegal.⁸

The words "surplus" and "undivided profits" are sometimes used to indicate the same concept,⁹ and are expressions describing the amount of the residue of the assets after the liabilities have been deducted,¹⁰ although they relate to no particular kind of property.¹¹ While undivided profits may be surplus in the sense that both are constituents of capital,¹² and undivided profits are sometimes to be

considered a part of surplus until the declaration of a dividend,¹³ undivided profits are not surplus in the commonly accepted sense,¹⁴ and do not come within the correct definition of the term "surplus,"¹⁵ and in the nomenclature of bankers "surplus" does not include undivided profits.¹⁶ There is, in fact, a sharp distinction between undivided profits and surplus,¹⁷ surplus being such part of the excess in the value of the corporate assets as is treated by the corporation as part of its permanent capital, usually carried on the books in a separate "surplus account," while the term "undivided profits" designates such part of the excess as consists of profits which have neither been distributed as dividends nor carried to the surplus account,¹⁸ and thus, in a technical sense, no profits become undivided profits or surplus until they have been set aside at the end of an accounting period and allocated to certain funds known to accountants and bookkeepers as "undivided profits and surplus."¹⁹

As used with reference to estates the word "surplus" means the residue after the debts and legacies are paid;²⁰ what remains of the estate after payment of funeral expenses, charges of administration, and debts.²¹

A fund for protection of depositors

N.D.—*Sarles v. Scandinavian American Bank*, 156 N.W. 556, 557, 33 N.D. 40.

4. Cal.—*First Indus. Loan Co. of Cal. v. Daugherty*, 159 P.2d 921, 924, 26 Cal.2d 545.

5. Cal.—*First Indus. Loan Co. of Cal. v. Daugherty*, *supra*.

6. Cal.—*First Indus. Loan Co. of Cal. v. Daugherty*, *supra*.

7. Cal.—*First Indus. Loan Co. of Cal. v. Daugherty*, *supra*—*Mulcahy v. Hibernia Savings & Loan Soc.*, 77 P. 910, 912, 913, 144 Cal. 219.

N.Y.—*Reynolds v. Bank of Mt. Vernon*, 39 N.Y.S. 623, 626, 6 App.Div. 62.

Right of bank to accumulate surplus before declaring dividend on stock see *Banks and Banking* § 65.

8. Cal.—*Mulcahy v. Hibernia Savings & Loan Soc.*, 77 P. 910, 912, 913, 144 Cal. 219.

N.Y.—*Reynolds v. Bank of Mt. Vernon*, 39 N.Y.S. 623, 626, 6 App.Div. 62.

9. U.S.—*Douglas v. Edwards*, C.C.A. N.Y., 298 F. 229, 241—*Anderson v. Farmers' Loan & Trust Co.*, N.Y., 241 F. 322, 326, 154 C.C.A. 202.

Mass.—*Smith v. Cotting*, 120 N.E. 177, 181, 231 Mass. 42, 60 C.J. p 1178 note 80.

10. U.S.—*Douglas v. Edwards*, C.C.A. N.Y., 298 F. 229, 241—*Anderson v. Farmers' Loan & Trust Co.*, N.Y., 241 F. 322, 326, 154 C.C.A. 202.

11. U.S.—*Douglas v. Edwards*, C.C.A. N.Y., 298 F. 229, 241—*Anderson v. Farmers' Loan & Trust Co.*, N.Y., 241 F. 322, 326, 154 C.C.A. 202.

12. U.S.—*Leather Manufacturers' Nat. Bank v. Treat*, N.Y., 128 F. 262, 263, 62 C.C.A. 644.

13. N.Y.—*O'Connor v. Bankers Trust Co.*, 289 N.Y.S. 252, 276, 159 Misc. 920.

Grouped under general heading "surplus"

Some banks do not carry the items "surplus" and "undivided profits" in separate accounts, but group them both under the general heading of "surplus."—*O'Connor v. Bankers Trust Co.*, *supra*.

14. U.S.—*Leather Manufacturers' Nat. Bank v. Treat*, N.Y., 128 F. 262, 263, 62 C.C.A. 644.

15. U.S.—*Leather Manufacturers' Nat. Bank v. Treat*, *supra*.

16. U.S.—*Leather Manufacturers' Nat. Bank v. Treat*, *supra*.

17. N.D.—*Sarles v. Scandinavian American Bank*, 156 N.W. 556, 557, 33 N.D. 40.

Undistributed profits

"There is a distinction well known in corporate bookkeeping between surplus and undistributed profits."—*Peake v. Thomas*, 300 S.W. 885, 886, 222 Ky. 405.

18. U.S.—*Willcuts v. Milton Dairy Co.*, Minn., 48 S.Ct. 71, 72, 275 U.S. 215, 72 L.Ed. 247.

Ky.—*Peake v. Thomas*, 300 S.W. 885, 886, 222 Ky. 405.

19. U.S.—*Harder v. Irwin*, D.C.N.Y., 285 F. 402, 409.

Similarly expressed

Undivided profits do not become a part of the surplus until they have been assigned to it by some formal act of the institution.—*Leather Manufacturers' Nat. Bank v. Treat*, N.Y., 128 F. 262, 264, 62 C.C.A. 644.

20. N.J.—*State v. Parker*, 35 N.J. Law 575, 577.

Okl.—*Boviard Supply Co. v. American Nat. Bank*, 253 P. 92, 94, 123 Okl. 245.

21. W.Va.—*Kennedy's Adm'r v. Kennedy*, 125 S.E. 337, 338, 97 W.Va. 491.

"Surplus" has been held to be equivalent to, or synonymous with, "net earnings" see 28 C.J.S. p 612 note 97, "net profits" see 66 C.J.S. p 9 note 60, and "residue" see 77 C.J.S. p 311 note 63. It has been compared with, or distinguished from, "capital" see 12 C.J.S. p 1124 note 1.

The word "surplus" is employed in various connections throughout this work, particular reference being made to the indexes to the titles Banks and Banking, Corporations, Insurance, and Internal Revenue. The term is defined in connection with trust funds generally in the C.J.S. title Trusts § 352. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Surplus water or waters. The usual flow of a stream over and above prescriptive and appurtenant rights to the flow;²² water which remains in any stream or body of water after all those who are first entitled to the use of its waters have been fully supplied, and there is still some water remaining unclaimed and unappropriated.²³ As used by water-right lawyers, the term means simply water which is flowing in the stream in addition to what may be termed "adjudicated water."²⁴

"Surplus water" also may mean water running off from ground which has been irrigated;²⁵ water not consumed by the process of irrigation;²⁶ waste water.²⁷

The right of the state or of a canal company to dispose of surplus water is treated in Canals § 34. Secondary and successive appropriations of surplus water are discussed in the C.J.S. title Waters § 185, also 67 C.J. p 1014 note 85—p 1015 note 96.

Other phrases employing the word "surplus" are set out in the note.²⁸

SURPLUSAGE. It has been said that surplusage is where there is something in excess,²⁹ and in law it means matter in any instrument foreign to the purpose;³⁰ matter in any instrument which is not necessary to its meaning but does not affect its validity;³¹ whatever is extraneous, impertinent, superfluous, or unnecessary.³² In procedure "surplusage" means matter which is not necessary or relevant to the case, and which may be rejected.³³

The word "surplusage" has been held to be synonymous with "rest" see 77 C.J.S. p 321 note 80, and has been compared with, or distinguished from, "residue" see 77 C.J.S. p 311 note 64.

"Surplusage" is defined, with reference to pleading in criminal cases, in Indictments and Informations § 155, and with reference to pleading in civil actions in Pleading § 36. See also the indexes to the titles Criminal Law and Judgments, and for other specific references consult the Descriptive-Word Index.

SURPRISE. The term "surprise" is defined generally as meaning the act of taking unawares; sudden confusion or perplexity.³⁴

In private transactions "surprise" is an undue advantage taken of a party under circumstances which mislead, confuse, or disturb the just results of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning.³⁵

In a legal sense, the word "surprise" is used to denote some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against;³⁶

22. U.S.—Hawaii v. Gay, C.C.A.Hawaii, 52 F.2d 356.

23. Mont.—Custer v. Missoula Public Serv. Co., 6 P.2d 131, 133, 91 Mont. 136.

24. Mont.—Custer v. Missoula Public Service Co., supra—Quigley v. McIntosh, 290 P. 266, 268, 88 Mont. 103.

25. Wyo.—Binning v. Miller, 102 P. 2d 54, 60, 55 Wyo. 451.
60 C.J. p 1180 note 37.

26. Ariz.—Wedgworth v. Wedgworth, 181 P. 952, 954, 20 Ariz. 518.
Wyo.—Binning v. Miller, 102 P.2d 54, 60, 55 Wyo. 451.

27. Ariz.—Wedgworth v. Wedgworth, 181 P. 952, 954, 20 Ariz. 518.

28. Phrases

(1) "Surplus earnings" see 28 C.J. S. p 613 note 19.

(2) "Surplus income" see 42 C.J. S. p 537 note 63.

(3) "Surplus profits" see 73 C.J.S. p 5 note 69.

(4) Additional phrases employing the word "surplus" and of which more recent adjudications have not been found see 60 C.J. p 1177 notes 63–65, p 1179 notes 89–95, 3–p 1180 note 12, p 1181 notes 42–57.

29. Okl.—Wood v. State, 107 P. 937, 942, 3 Okl.Cr. 553.

30. Utah.—In re Wolcott's Estate, 180 P. 169, 170, 54 Utah 165, 4 A.L. R. 727.
60 C.J. p 1181 note 60.

31. Miss.—Adams v. Capital State Bank, 20 So. 881, 882, 74 Miss. 307.

32. Okl.—Wood v. State, 107 P. 937, 942, 3 Okl.Cr. 553.
60 C.J. p 1181 note 62.

33. Miss.—Adams v. Capital State Bank, 20 So. 881, 882, 74 Miss. 307, 314.

34. Ind.—Davis v. Steuben School Tp., 50 N.E. 1, 5, 19 Ind.App. 694.

Phrase employing the term and of which more recent adjudications have not been found see 60 C.J. p 1182 note 71.

35. Tenn.—Turley v. Taylor, 6 Baxt. 376, 390.

36. Cal.—Kauffman v. De Mutlis, 189 P.2d 271, 273, 31 Cal.2d 429—Mc-

an unforeseen disappointment in some reasonable expectation, against which ordinary prudence would not have afforded protection;³⁷ not merely inevitable casualty, or the act of Providence, or what is termed "vis major," or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party.³⁸

"Surprise" has been held to be interchangeable with "accident" and practically synonymous therewith, see 1 C.J.S. p 432 notes 55.3, 55.4. It has been distinguished from "excusable neglect" see 33 C.J.S. p 116 note 67.

A party to a civil proceeding who, because of surprise, has been prejudiced in his rights may be entitled to certain forms of relief. Thus surprise which has caused prejudice may be a sufficient reason for a continuance of a civil action, as stated in Continuances §§ 65-70. Surprise may be such that it will permit the opening, vacating, or setting aside of a judgment or decree, as stated in Judgments §§ 280 c, 286 b, and Equity § 631 c. Ordinarily a judgment entered by consent will not be set aside because of surprise, as stated in Judgments § 330 b. In civil proceedings surprise may be sufficient ground for granting a motion for a new trial, and this subject is discussed in New Trial §§ 78-100.

A person accused of crime, like a party to a civil proceeding, may be entitled to relief from surprise which works to his prejudice and prevents a fair trial. Thus an accused who is surprised by some unexpected occurrence or by the introduction of unexpected testimony which, by reasonable diligence, he could not have anticipated, may be entitled to a continuance or postponement, as stated in Criminal Law § 498. Similarly, where, notwithstanding the exercise of due diligence, an accused is

prevented through surprise from having a fair trial, a new trial will be granted him, as stated in Criminal Law § 1431. As a general rule surprise is not regarded as sufficient ground for the writ of error coram nobis, or the statutory equivalent thereof, as discussed in Criminal Law § 1606 b (4).

Surprise as ground for setting aside sales of property under judicial process is treated in Executions §§ 230, 234, Judicial Sales §§ 57, 59 b, and Mortgages § 750 d, e (2).

It is stated in the C.J.S. title Witnesses § 477, also 70 C.J. p 793 note 41-p 795 note 44, that the general rule that a party cannot impeach a witness whom he has introduced in a civil or in a criminal case is subject to exception in cases of entrapment, hostility, or surprise. Where the testimony of a witness constitutes surprise or entrapment of the party calling the witness, the party so deceived ordinarily may be permitted to discredit or impeach the witness by showing prior contradictory or inconsistent statements, as discussed in Witnesses § 578, also 70 C.J. p 1028 note 27-p 1045 note 98.

SURREBUTTER. See Pleading § 210.

SURREJOINDER. Generally see Pleading § 210; in action on bond see Bonds § 215.

SURRENDER. The word "surrender," which may be extended by construction,³⁹ presupposes the possession or ownership of the thing to be surrendered.⁴⁰ While it has been said that the term carries with it something more than a bare delivery,⁴¹ and indicates a transfer of title as well as of possession,⁴² it has also been stated that the word "surrender" does not express or in any way suggest the transaction of a sale and delivery,⁴³ but instead involves the idea of yielding or of delivering in response to a demand.⁴⁴ While the term does not

Guire v. Drew, 23 P. 312, 313, 83 Cal. 225—Baratti v. Baratti, 242 P. 2d 22, 24, 109 Cal.App.2d 917—Jennings v. American President Lines, 143 P.2d 349, 356, 61 Cal.App.2d 417—Miller v. Lee, 125 P.2d 627, 631, 52 Cal.App.2d 10—Porter v. Anderson, 113 P. 345, 350, 14 Cal.App. 716.

Similarly stated

(1) A detrimental condition or situation wherein a party is placed unexpectedly, and against which ordinary prudence would not have guarded.—State ex rel. Hartley v. Innes, 118 S.W. 1168, 1170, 137 Mo.App. 420.

(2) That situation in which a par-

ty is unexpectedly placed, without any default of his own, which will be injurious to his interest.—Gidionsen v. Union Depot R. Co., 31 S.W. 800, 802, 129 Mo. 392, 401.

37. Mo.—Fretwell v. Laffoon, 77 Mo. 26, 28.
60 C.J. p 1182 note 68.

38. Mo.—Fretwell v. Laffoon, 77 Mo. 26, 27—Connally v. Pehle, 79 S.W. 1006, 1009, 105 Mo.App. 407.

39. R.I.—Clark v. Wilson, 14 R.I. 13.

40. Va.—Brown v. Gibson, 59 S.E. 384, 385, 107 Va. 383.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1183 note 82, p 1184 notes 10-14.

41. U.S.—Evans v. U. S., Pa., 14 S.Ct. 934, 937, 153 U.S. 584, 38 L.Ed. 830.

42. Mass.—Watkins v. Simplex Time Recorder Co., 55 N.E.2d 203, 207, 316 Mass. 217.
60 C.J. p 1183 note 97.

43. N.Y.—Tompkins County v. Ingersoll, 81 N.Y.S. 242, 244, 81 App. Div. 344.

44. N.Y.—Tompkins County v. Ingersoll, supra.

exclude compelled action, but, to the contrary, generally implies such action,⁴⁵ it may also denote voluntary action,⁴⁶ and where it is unqualified and generic it has been held to embrace both meanings.⁴⁷

As a noun, the term "surrender" is defined as meaning the relinquishment of a thing or a property right thereto to another.⁴⁸ It has been compared with, or distinguished from, "abandonment" see Abandonment § 2 b (2), "assignment" see Assignment § 2 b (13), "cancellation" see 12 C.J.S. p 938 note 59, and "merger" see 57 C.J.S. p 1068 note 59.

As a verb, the word "surrender" is defined as meaning to yield;⁴⁹ to yield to the power⁵⁰ or possession⁵¹ of another; to resign;⁵² to yield or resign in favor of another;⁵³ to cease to hold or claim.⁵⁴ It is also defined as meaning to give back;⁵⁵ to relinquish;⁵⁶ to give up;⁵⁷ to relinquish or give up;⁵⁸ to give or deliver up possession of (anything) upon compulsion or demand;⁵⁹ to render or deliver up;⁶⁰ to restore.⁶¹ It has been said that "surrender" does not mean in any sense to vacate or locate.⁶²

The verb "surrender" has been held synonymous with "alienate" see 3 C.J.S. p 516 note 68.1, and

"forfeit" see 37 C.J.S. p 2 note 74, and has been distinguished from "delegate" see 26 C.J.S. p 688 note 36.2, "produce" see 72 C.J.S. p 1209 note 25, and "retain" see 77 C.J.S. p 328 note 18.

"Surrendered" is the past participle of the verb "surrender,"⁶³ and it has been said that the word carries with it something more than a bare delivery and indicates a transfer of title as well as of possession.⁶⁴ It has been distinguished from "canceled" see 12 C.J.S. p 937 note 33.

The term "surrender" as employed in connection with policies of insurance is treated in Insurance §§ 454-460. For other particular applications and specific uses of the word consult the Descriptive-Word Index.

In conveyancing. Surrender was a recognized mode of conveyance at common law,⁶⁵ and in its technical sense it refers to the transfer of an estate,⁶⁶ and in its technical sense and as a term of conveyancing it is defined as a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them;⁶⁷ the giving up of an

45. U.S.—Keppel v. Tiffin Sav. Bank, 25 S.Ct. 443, 445, 197 U.S. 356, 49 L.Ed. 790.

60 C.J. p 1183 note 5.

46. U.S.—Keppel v. Tiffin Sav. Bank, supra.

60 C.J. p 1183 note 6.

47. U.S.—Keppel v. Tiffin Sav. Bank, supra.

48. Ky.—Justice v. Burgess, 52 S.W.2d 720, 723, 244 Ky. 774.

49. Ga.—Perkins v. Terrell, 58 S.E. 133, 135, 1 Ga.App. 250.

Mont.—Anderson v. Commercial Credit Co., 101 P.2d 367, 369, 110 Mont. 333.

60 C.J. p 1183 note 95.

To cancel or yield up

Ind.—Wells v. Vermont Life Ins. Co., 63 N.E. 578, 28 Ind.App. 620.

50. Ga.—Perkins v. Terrell, 58 S.E. 133, 135, 1 Ga.App. 250.

Mont.—Anderson v. Commercial Credit Co., 101 P.2d 367, 369, 110 Mont. 333.

51. Mont.—Anderson v. Commercial Credit Co., supra.

Similarly defined

To yield possession of to another upon compulsion or demand, or under pressure of a superior force.—

Keppel v. Tiffin Sav. Bank, 25 S.Ct. 443, 445, 197 U.S. 356, 49 L.Ed. 790.

52. Utah.—Gappmayer v. Wilkenson, 177 P. 763, 765, 53 Utah 236.

53. La.—Corpus Juris cited in Mouldoux v. Maestri, 2 So.2d 11, 15, 16, 197 La. 525.

Utah.—Gappmayer v. Wilkenson, 177 P. 763, 765, 53 Utah 236.

54. Utah.—Gappmayer v. Wilkenson, supra.

55. Pa.—In re Emlen's Estate, 4 A. 2d 143, 145, 333 Pa. 238.

56. La.—Corpus Juris cited in Mouldoux v. Maestri, 2 So.2d 11, 15, 16, 197 La. 525.

60 C.J. p 1183 note 88.

57. La.—Corpus Juris cited in Mouldoux v. Maestri, 2 So.2d 11, 15, 16, 197 La. 525.

Mont.—Anderson v. Commercial Credit Co., 101 P.2d 367, 369, 110 Mont. 333.

60 C.J. p 1183 note 85.

To give up or make over

Mo.—Kessler v. Claves, 125 S.W. 799, 801, 147 Mo.App. 88.

58. R.I.—Clark v. Wilson, 14 R.I. 13.

It means nothing more, unless the meaning is extended by construction.
—Clark v. Wilson, supra.

59. Ga.—Perkins v. Terrell, 58 S.E. 133, 135, 1 Ga.App. 250.

Mont.—Anderson v. Commercial Credit Co., 101 P.2d 367, 369, 110 Mont. 333.

60. Ga.—Perkins v. Terrell, 58 S.E. 133, 135, 1 Ga.App. 250.

Mont.—Anderson v. Commercial Credit Co., 101 P.2d 367, 369, 110 Mont. 333.

60 C.J. p 1183 note 95.

61. Pa.—In re Emlen's Estate, 4 A. 2d 143, 145, 333 Pa. 238.

62. Ohio.—Megruer v. Putnam County, 15 Ohio Cir.Ct. 242, 244, 8 Ohio Cir.Dec. 262.

63. Webster New Int.D.

64. Mo.—Kessler v. Claves, 125 S.W. 799, 801, 147 Mo.App. 88.

60 C.J. p 1183 note 9.

65. Kan.—Kimberlin v. Hicks, 94 P.2d 335, 339, 150 Kan. 449.

66. Kan.—Kimberlin v. Hicks, supra.

67. Ark.—Hayes v. Goldman, 72 S.W. 563, 564, 71 Ark. 251.

Ill.—Brewer v. National Union Bldg. Ass'n, 46 N.E. 752, 753, 166 Ill. 221.

estate to the person who has it in reversion or remainder, so as to merge it in the larger estate.⁶⁸

This technical meaning of the word has been somewhat obscured by its frequent use in a nontechnical sense,⁶⁹ the term being employed in its nontechnical sense in connection with the landlord-tenant relationship and treated in this sense in Landlord and Tenant §§ 120-129. For other references to the treatment of the term "surrender" with reference to the landlord-tenant relationship consult the title index to Landlord and Tenant.

The word "surrender" is defined in its technical sense in Deeds § 6 as the yielding up of an estate for life or years to the reversioner or remainderman, and in Estates § 65 a (4) as a yielding up of the life estate to the person having the next immediate estate in reversion or remainder, the lesser estate thereby becoming merged in the greater by mutual agreement.

SURREPTIO. A term in the civil law, defined by the civilians thus: Surreptio est cum per falsam rei narrationem aliquod extorquetur.⁷⁰

SURREPTITIOUS. Falsely crept in; obtained by falsehood, fraud or stealth, by suppression or concealment of facts, fraudulently obtained.⁷¹

SURREPTITIOUSLY. In a surreptitious manner; by stealth; in an underhand way.⁷² It has been distinguished from "unjustly."⁷³

SURROGATE. In some states "surrogate" is the name given to the judge or judicial officer who has the administration of probate matters, guardianships, etc., as stated in Judges § 2 f. The surrogate's court as a judicial tribunal is treated in Courts § 11. For other references see the index to the title Courts. Surrogate's courts are treated in other titles of this work under the general heading "Pro-

bate" or "Probate courts."

SURROGATUM CAPIT NATURAM REI SURROGATÆ. See 60 C.J. p 1184 note 31.

SURROUND. To inclose on all sides; to encompass; as, a wall surrounds the city.⁷⁴

SURTAX. An additional tax.⁷⁵ The term is commonly employed in connection with federal income taxation, and for specific references see the index to the title Internal Revenue.

SUR TOUTE LA PROFONDEUR QUI POURRA S'Y TROUVER. A description in a private land grant made by the French government, meaning "with all the depth that may be found," and interpreted as extending the grant back to a certain bayou.⁷⁶

SURVEILLANCE. Oversight, superintendence, supervision.⁷⁷ The term is employed in connection with the offense of escape and is treated in Escape §§ 4, 20.

SURVEY. The word "survey" has several significations,⁷⁸ and in a very general sense it means an attentive or particular view.⁷⁹

As applied to a vessel, a "survey" is a statement of the present condition of the vessel,⁸⁰ and in marine insurance the term has this meaning as stated in Insurance § 49, and as used in this sense see Insurance §§ 948, 951, 1084; and see Shipping § 8.

In fire insurance terminology the word "survey" may signify an application for such insurance, or it may denote a description of the property contained in such application as stated in Insurance § 232 b. See also Insurance § 301.

Kan.—Kimberlin v. Hicks, 94 P.2d 335, 339, 150 Kan. 449.

N.M.—Elliott v. Gentry, 60 P.2d 203, 206, 40 N.M. 358.

N.Y.—Schieffelin v. Carpenter, 15 Wend. 400, 404—Springstein v. Schermerhorn, 12 Johns. 357, 361.

Or.—Roberts Inv. Co. v. Hardie Mfg. Co., 19 P.2d 429, 431, 142 Or. 179.

Utah.—Gappmayer v. Wilkenson, 177 P. 763, 765, 53 Utah 236.

68. Pa.—In re Emlen's Estate, 4 A. 2d 143, 145, 333 Pa. 238.

69. Kan.—Kimberlin v. Hicks, 94 P. 2d 335, 339, 150 Kan. 449.

70. Eng.—Case of Bath, 3 Ch.Cas. 55, 74, 22 Reprint 963.

60 C.J. p 1184 note 15.

71. U.S.—Eastman v. New York, N.Y., 134 F. 844, 852, 69 C.C.A. 628. Surreptitious use of invention as affecting right to patent see Patents § 78 c.

72. Century D.

73. D.C.—Yates v. Huson, 8 App. D.C. 93, 98, 99.

74. U.S.—In re Creveling, Cust. & Pat.App., 61 F.2d 862, 863.

75. New Standard D.

76. La.—State v. Bowie Lumber Co., 87 So. 302, 309, 148 La. 581.

77. Cal.—People v. Howard, 8 P.2d 176, 179, 120 Cal.App. 45.

60 C.J. p 1184 note 34.

78. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.

79. Del.—Fulton v. Dover, supra.

80. U.S.—Chicago S. S. Lines v. U. S. Lloyds, C.C.A.III., 12 F.2d 733, 737.

Admissibility of survey in evidence in admiralty proceedings see Admiralty § 139 e.

The word "survey" is frequently used with reference to land, and in this connection it may signify an examination of land with a design to ascertain the condition, quantity, or value;⁸¹ but the term is more commonly employed to indicate the measurement of land,⁸² and when so used it means the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries.⁸³ "Survey" may be used in this sense to indicate a chart or plat;⁸⁴ a measured plan or draft containing a written statement of the courses, distances, and quantity of land;⁸⁵ a measured plan and description of any portion of country, or of a road or line through it;⁸⁶ and it may apply to a map, plat, or chart exhibiting the result of an actual examination of the surface of the ground as well as to the examination itself.⁸⁷

However, the word "survey" does not necessarily mean a plat of land made by a surveyor as such,⁸⁸ and neither does it necessarily mean a paper containing a statement of the courses, distances, and quantity of land.⁸⁹ In this connection the word "survey" is treated in Boundaries, reference being made to the index to that title, and the term is also treated in Highways §§ 68, 70 b, 91, 94 d, and Public Lands §§ 28-35. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

As a verb, the term "survey" is defined as meaning to inspect or take a view of; to view with attention; to view with a scrutinizing eye;⁹⁰ to examine;⁹¹ to examine and ascertain the state of;⁹² to examine with reference to condition, situation, and value;⁹³ also, to determine the boundaries, extent, position, etc.;⁹⁴ to ascertain the corners, boundaries, and divisions, with distances and directions, but not necessarily to compute areas included within defined boundaries;⁹⁵ to measure, as land.⁹⁶

Phrases employing the term in its various forms are set out in the note.⁹⁷

Surveying. While the word "surveying" in a very general sense means the act or occupation of making surveys,⁹⁸ the term is more specifically employed to denote that branch of applied mathematics which teaches the art of determining the area of any portion of the earth's surface, the lengths and directions of the boundary lines, the contour of the surface, etc.,⁹⁹ and in this sense is defined as meaning the operation of finding and delineating the contour, dimensions, position, topography, etc., as of any part of the earth's surface, whether land or water,¹ by the preparation of a measured plan or description of any area or other portion of the country, or of a road or line through it.² It has been said that carrying a chain or holding a pole or a rod, while necessary to surveying, is not surveying.³

81. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.

82. N.Y.—Corporation of Frederick Scholes v. Theodore Ficke Warehouses, 210 N.Y.S. 341, 343, 213 App.Div. 259.

83. U.S.—Winter v. U. S., D.C.Ark., 30 F.Cas.No.17,895, Hempst. 344, 371.
60 C.J. p 1185 note 45.

In relation to the location of proprietary rights

The word "survey" means a description in words or figures of the lands located.—Pattee v. Stevens, 1 N.J.Eq. 369, 385, 22 Am.D. 526—60 C.J. p 1186 notes 58-61. Proprietary grants see Public Lands §§ 277, 278.

84. Mo.—Hahn v. Cotton, 37 S.W. 919, 920, 136 Mo. 216.

85. Pa.—People's Trust Co. of Lancaster v. Consumers' Ice & Coal Co., 128 A. 723, 725, 283 Pa. 76.

86. Cal.—Severance v. Ball, 268 P. 1068, 1069, 93 Cal.App. 56.

87. Mo.—Hahn v. Cotton, 37 S.W. 919, 920, 136 Mo. 216.

88. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.

Map or profile

The word "survey" does not necessarily, ex vi termini, mean a map or profile; they are sometimes used as convertible terms, but not always.—Pattee v. Stevens, 1 N.J.Eq. 369, 385, 22 Am.D. 526—60 C.J. p 1185 note 50.

89. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.

90. Del.—Fulton v. Dover, supra.

91. Del.—Fulton v. Dover, supra.

92. Ariz.—Oglesby v. Chandler, 288 P. 1034, 1038, 37 Ariz. 1.

93. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.
60 C.J. p 1187 note 85.

94. N.Y.—Howe's Cave Lime, etc., Co. v. Howe's Cave Assoc., 34 N.Y. S. 848, 851, 88 Hun 554.

95. Iowa.—Keer v. Fee, 161 N.W. 545, 547, 179 Iowa 1097.

96. Del.—Fulton v. Dover, 6 A. 633, 638, 6 Del.Ch. 1.

97. Phrases

(1) "Cost survey" and "established cost survey" see 20 C.J.S. p 244 note 17.1.

(2) "Surveyed line" distinguished from "calculated line" see 12 C.J.S. p 881 note 47.

(3) "Survey measurement" distinguished from "conversion method" see 18 C.J.S. p 42 note 82.

(4) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1186 notes 71, 72, p 1187 notes 73-79, 89, 95, 96.

98. Cal.—Severance v. Ball, 268 P. 1068, 1069, 1070, 93 Cal.App. 56.

99. Cal.—Severance v. Ball, supra. Fla.—State ex rel. Landis v. Ward, 158 So. 273, 275, 117 Fla. 585.

1. Cal.—Severance v. Ball, 268 P. 1068, 1069, 93 Cal.App. 56. Fla.—State ex rel. Landis v. Ward, 158 So. 273, 275, 117 Fla. 585.

2. Fla.—State ex rel. Landis v. Ward, supra.

3. Cal.—Severance v. Ball, 268 P. 1068, 1070, 93 Cal.App. 56.

SURVEYOR. The term "surveyor" is defined generally as meaning one who examines a thing for the purpose of ascertaining its condition, quality, or character; an inspector;⁴ it is treated in this sense in Customs Duties § 83 and Insurance § 951 c (2).

The word "surveyor" is used in a more specific sense to denote one who ascertains the area of any portion of the earth's surface, the lengths and directions of the boundary lines, the contour of the surface, etc., or performs the duties necessary to their ascertainment,⁵ and in this sense is discussed in Boundaries §§ 107, 116 c, 121, Highways §§ 55-63, Private Roads § 8, and Public Lands §§ 29, 173, 304.

Surveyor's transit. A term applied in engineering to a portable instrument of the theodolite kind, designed for measuring both horizontal and vertical angles. It is provided with horizontal and vertical circles, one or two levels, and a compass, and is mounted on a tripod-stand.⁶

SURVIVABILITY. The noun form of the adjective "survivable."⁷ The term is employed in the general rule stated in Abatement and Revival § 132 that "assignability and survivability of causes of action are convertible terms."

SURVIVAL. The act of surviving; a living beyond the term of existence of another person or thing or the happening of a specified event.⁸

The survival of actions following the death of a party is treated generally in Abatement and Revival

§§ 114-186. The general rule that causes of action for divorce do not survive the death of either party is discussed in Divorce § 100.

The right to recover damages for death caused by wrongful act is wholly statutory, and statutes which confer this right fall into two groups: The first consists of statutes patterned upon Lord Campbell's Act, creating a new cause of action in the designated person or persons. The second consists of statutes which provide for the survival of the cause of action which deceased would have had, had he not died; and statutes which are of this second group are sometimes called "survival statutes," and are treated in Death § 16.

SURVIVE. The word "survive" is a verb,⁹ and it may be used either transitively or intransitively.¹⁰

In its transitive form¹¹ "to survive" means to live beyond the life or existence of;¹² to outlive, that is, to be alive at the time of a particular event or the death of a particular person, which event or person the other is to survive;¹³ and this is said to be the primary meaning of the word.¹⁴ "Survive," in its transitive sense, is further defined as meaning to live longer than¹⁵ some other individual;¹⁶ to exist in force or operation beyond any period specified;¹⁷ to remain in life after the death of another, or after a particular date or the happening of a particular event;¹⁸ to continue to live beyond a specified period, event, or condition;¹⁹ to continue to live or exist beyond the life or existence of;²⁰ to outlive;²¹ to outlast;²² to outlast the end

4. New Standard D.

5. Cal.—Severance v. Ball, 268 P. 1068, 1069, 93 Cal.App. 56. 60 C.J. p 1187 note 98.

Similarly defined

A "surveyor" is one who is qualified to ascertain and does ascertain the facts necessary to a correct survey, or who, by reason of practical experience with respect to such matters, is able to perform the duties necessary to the ascertainment of the facts essential to a correct survey.—State ex rel. Landis v. Ward, 158 So. 273, 275, 117 Fla. 585.

6. U.S.—Lietz Co. v. U. S., 11 Ct. Cust.App. 426, 428.

7. Webster New Int.D.

8. New Standard D.

9. W.Va.—Hereford v. Meek, 52 S.E. 2d 740, 747, 132 W.Va. 373.

10. Tex.—McGrede v. McGrede, Civ. App., 200 S.W.2d 638, 641.

11. Tex.—McGrede v. McGrede, supra.

W.Va.—Hereford v. Meek, 52 S.E.2d 740, 747, 132 W.Va. 373.

12. Tex.—Corpus Juris quoted in McGrede v. McGrede, Civ.App., 200 S.W.2d 638, 640.

W.Va.—Hereford v. Meek, 52 S.E.2d 740, 747, 132 W.Va. 373. 60 C.J. p 1188 note 13.

13. N.J.—Supp v. Second Nat. Bank & Trust Co., 130 A. 549, 552, 98 N.J. Eq. 242.

Tex.—Corpus Juris quoted in McGrede v. McGrede, Civ.App., 200 S.W.2d 638, 640.

14. Tex.—McGrede v. McGrede, supra.

15. Ill.—Waugh v. Poirion, 42 N.E.2d 138, 140, 315 Ill.App. 78.

Tex.—McGrede v. McGrede, Civ.App., 200 S.W.2d 638, 641.

W.Va.—Hereford v. Meek, 52 S.E.2d 740, 747, 132 W.Va. 373.

16. Ill.—Cary v. Slead, 77 N.E. 234, 235, 220 Ill. 508.

17. La.—Thompson v. New Orleans Ry. & Light Co., 83 So. 19, 20, 145 La. 805.

18. Md.—Hill v. Safe Deposit & Trust Co., 60 A. 446, 447, 101 Md. 60, 4 Ann.Cas. 577.

19. Ill.—Cary v. Slead, 77 N.E. 234, 235, 220 Ill. 508.

La.—Thompson v. New Orleans Ry. & Light Co., 83 So. 19, 20, 145 La. 805.

20. W.Va.—Hereford v. Meek, 52 S.E.2d 740, 747, 132 W.Va. 373. 60 C.J. p 1188 note 10.

21. Tex.—McGrede v. McGrede, Civ. App., 200 S.W.2d 638, 641. W.Va.—Hereford v. Meek, 52 S.E.2d 740, 747, 132 W.Va. 373. 60 C.J. p 1188 note 19.

22. N.J.—Supp v. Second Nat. Bank & Trust Co., 130 A. 549, 552, 98 N.J.Eq. 242.

of;²³ as, to survive a person, a disaster, or one's period of usefulness.²⁴

In its intransitive sense,²⁵ the verb "survive" means to remain alive,²⁶ and this is said to be the common and usual meaning of the word when used in this sense.²⁷

The verb "survive" is further defined as meaning to live after;²⁸ to live beyond;²⁹ to live longer;³⁰ to live on after passing through;³¹ to live through in spite of.³²

As commonly used in its strict sense, the word "survive" applies to persons,³³ but in legal phraseology it is frequently employed with reference to the continued existence of corporations or institutions;³⁴ and in its popular signification it may mean overliving a specified individual, living beyond a specified event, or it may mean still living, or living at some designated period of time.³⁵

Surviving. The word "surviving" may be used

as the present participle of the verb "survive"³⁶ or it may be used as a descriptive adjective.³⁷ It means existing;³⁸ existent;³⁹ remaining alive;⁴⁰ and it also means outliving another.⁴¹

SURVIVOR. It has been said that "survivor" is a relative term,⁴² and that it is dependent on the context for its meaning,⁴³ but the term should receive its normal meaning having reference to the context of the instrument wherein it is used.⁴⁴

The word "survivor" is defined as meaning one who outlives another;⁴⁵ one of two or more persons who lives after the other or others have deceased;⁴⁶ and this is said to be the ordinary as well as the legal signification of the term.⁴⁷ "Survivor" is further defined as meaning one who survives another;⁴⁸ one who outlives another person or lives beyond some happening event;⁴⁹ one who survives or outlives another person, a time, an event, or thing;⁵⁰ one who continues to live after the death of those who comprised his group;⁵¹ the longest

Tex.—McGrede v. McGrede, Civ.App., 200 S.W.2d 638, 641.

23. W.Va.—Hereford v. Meek, 52 S. E.2d 740, 747, 132 W.Va. 373.

24. W.Va.—Hereford v. Meek, supra.

25. Tex.—McGrede v. McGrede, Civ. App., 200 S.W.2d 638, 641.

26. Tex.—McGrede v. McGrede, supra.
60 C.J. p 1188 note 31.

27. Tex.—McGrede v. McGrede, supra.

28. R.I.—Bailey v. Brown, 36 A. 581, 586, 19 R.I. 669.
60 C.J. p 1188 note 25.

29. Wis.—In re Rosecrantz's Estate, 198 N.W. 728, 729, 183 Wis. 643, 35 A.L.R. 139.

30. Wis.—In re Rosecrantz's Estate, supra.

31. La.—Thompson v. New Orleans Ry. & Light Co., 83 So. 19, 20, 145 La. 805.

32. La.—Thompson v. New Orleans Ry. & Light Co., supra.

33. N.Y.—In re Lydig's Estate, 260 N.Y.S. 147, 149, 145 Misc. 321.

34. N.Y.—In re Lydig's Estate, supra.

Corporations may survive as well as individuals

N.Y.—In re Lydig's Estate, supra.

35. Miss.—Jordan v. Roach, 32 Miss. 481, 613.
60 C.J. p 1188 note 8.

36. Webster New Int.D.

37. Pa.—In re Laughlin's Estate, 9 A.2d 383, 386, 336 Pa. 529.

Adjective

Iowa.—Borden v. World War II Service Compensation Board, 54 N.W.2d 496, 501.

38. Mo.—State v. Bird, 162 S.W. 119, 124, 253 Mo. 569.

39. Iowa.—Borden v. World War II Service Compensation Board, 54 N.W.2d 496, 501.

40. Iowa.—Borden v. World War II Service Compensation Board, supra.

Pa.—In re Laughlin's Estate, 9 A.2d 383, 385, 336 Pa. 529.
60 C.J. p 1189 note 39.

Phrases

(1) "Surviving partner" see Partnership § 1 b (2).

(2) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1189 notes 43–53.

41. Iowa.—Borden v. World War II Service Compensation Board, 54 N.W.2d 496, 501.

42. N.J.—In re Hampson's Estate, 134 A. 284, 285.
60 C.J. p 1189 note 55.

43. N.J.—In re Hampson's Estate, supra.
60 C.J. p 1189 note 56.

44. Ill.—Pure Oil Co. v. Bayler, 58 N.E.2d 26, 30, 388 Ill. 331.

45. Ill.—Pure Oil Co. v. Bayler, supra.

Mo.—Corpus Juris quoted in Finch v. Edwards, 198 S.W.2d 665, 671, 239 Mo.App. 788.

N.Y.—In re Conklin's Estate, 20 N.Y. S.2d 59, 62, 259 App.Div. 432.
60 C.J. p 1189 note 60.

One who outlives others

Md.—Ridgely v. Ridgely, 128 A. 131, 132, 147 Md. 419.
Miss.—Armstrong v. Thomas, 72 So. 1006, 1007, 112 Miss. 272.

46. Mo.—Corpus Juris quoted in Finch v. Edwards, 198 S.W.2d 665, 671, 239 Mo.App. 788.
60 C.J. p 1189 note 61.

Similarly defined

One of two or more persons who lives after the death of the other or others.—In re Conklin's Estate, 20 N.Y.S.2d 59, 62, 259 App.Div. 432.

47. Mo.—Corpus Juris quoted in Finch v. Edwards, 198 S.W.2d 665, 671, 239 Mo.App. 788.
60 C.J. p 1189 note 60.

48. N.Y.—In re Conklin's Estate, 20 N.Y.S.2d 59, 62, 259 App.Div. 432.
Tex.—McGrede v. McGrede, Civ.App., 200 S.W.2d 638, 641.

49. N.J.—Clark v. Freeman, 188 A. 493, 495, 121 N.J. 35—Hudson Trust Co. v. De Malignon, 53 A.2d 337, 338, 140 N.J.Eq. 167.

50. Wis.—In re Rosecrantz's Estate, 198 N.W. 728, 729, 183 Wis. 643, 35 A.L.R. 139.

51. Md.—Ross v. Safe Deposit & Trust Co. of Baltimore, 176 A. 483, 486, 168 Md. 65.

liver of two or more persons.⁵²

In a legal sense a "survivor" is the longest liver of two joint tenants, or any two persons joined in the right of a thing;⁵³ he that remains alive after the other be dead.⁵⁴

The common meaning of "survivor" implies two lives running together,⁵⁵ and the term presupposes the contemporaneous existence of one who continues to live and another who ceases to live, since one cannot outlive another unless he was in being during the life of the one whom he is said to outlive.⁵⁶ Thus the use of the word by way of designation is to indicate a person who has lived after the death of another⁵⁷ or a person who at a given time is still in life.⁵⁸

Survivors. Broadly speaking, the word "survivors" includes all persons who may outlive another;⁵⁹ and, in common parlance, it is universally applied only to members of a class of persons.⁶⁰ It has been said that the term "survivors" is in itself a trap and should never be used without careful consideration for it may be and frequently is construed as meaning "others."⁶¹

The rule restricting the competency of parties and interested persons to be witnesses in actions by or against representatives, survivors, or successors in title or interest of persons deceased or incompetent is treated in the C.J.S. title Witnesses §§ 132-251, also 70 C.J. p 206 note 26-p 376 note 37.

SURVIVORSHIP. Where a person becomes entitled to property by reason of his having survived

another person who had an interest in it.⁶² It has been said that the most familiar example of survivorship is in the case of joint tenants, the rule being that on the death of one of two joint tenants the whole property passes to the survivor.⁶³ This rule is treated, with respect to estates in joint tenancy, in Joint Tenancy § 1 b. See also the C.J.S. title Trusts §§ 236-238, also 65 C.J. p 635 note 1-p 639 note 58.

Presumption and evidence as to survivorship as between persons who perish in a common disaster is discussed in Death §§ 11, 12.

Words of survivorship are frequently employed in testamentary dispositions of property, and the construction which will be placed on such words when used to designate beneficiaries and their shares is discussed in the C.J.S. title Wills § 695, also 69 C.J. p 270 note 7-p 272 note 24.

SUSCEPTIBLE. Capable of being influenced; easily brought under a specified power or influence; yielding or succumbing readily; usually with "of" or "to."⁶⁴ It has been held synonymous with "capable" see 12 C.J.S. p 1115 note 24, and has been distinguished from "possible" see 72 C.J.S. p 245 note 22.

SUSPECT. The term "suspect," which is not technical,⁶⁵ is defined as meaning to imagine to exist; have some, although insufficient, grounds for inferring; also to have a vague notion of the existence of, without adequate proof; mistrust; sur-

52. Ill.—*Waugh v. Polron*, 42 N.E. 2d 138, 140, 315 Ill.App. 78.
N.Y.—*In re Conklin's Estate*, 20 N.Y. S.2d 59, 62, 259 App.Div. 432.

Similarly expressed

"Survivor" means longest liver of two or more persons mentioned.—*Holt v. Miller*, Ohio App., 33 N.E.2d 19, 21.

53. Ill.—*Waugh v. Polron*, 42 N.E. 2d 138, 141, 315 Ill.App. 78.
N.Y.—*Corpus Juris* quoted in *In re Conklin's Estate*, 20 N.Y.S.2d 59, 62, 259 App.Div. 432.
Pa.—*In re Barr*, 2 Pa. 428, 431, 45 Am.D. 608.

54. Ill.—*Waugh v. Polron*, 42 N.E. 2d 138, 141, 315 Ill.App. 78.
N.Y.—*Corpus Juris* quoted in *In re Conklin's Estate*, 20 N.Y.S.2d 59, 62, 259 App.Div. 432.
Pa.—*In re Barr*, 2 Pa. 428, 431, 45 Am.D. 608.

55. Eng.—*In re Delany*, 39 Sol.J. 468.

56. Tex.—*McGrede v. McGrede*, Civ. App., 200 S.W.2d 638, 641.

By the survivor of two persons ordinarily is meant the one who lives after the other has died.—*Clark v. Freeman*, 188 A. 493, 495, 121 N.J. 35.

57. Conn.—*State Bank & Trust Co. v. Nolan*, 130 A. 483, 486, 103 Conn. 308.

58. Conn.—*State Bank & Trust Co. v. Nolan*, *supra*.

59. N.J.—*In re Hampson's Estate*, 134 A. 284, 285.

Wis.—*Koerts v. Grand Lodge O. H. S.*, 97 N.W. 163, 164, 119 Wis. 520.

Phrases employing the word "survivors" and of which more recent adjudications have not been found see 60 C.J. p 1190 notes 72, 73.

60. N.J.—*In re Hampson's Estate*, 134 A. 284, 285.
60 C.J. p 1189 note 71.

61. Ill.—*Waugh v. Polron*, 42 N.E. 2d 138, 140, 315 Ill.App. 78.

62. N.Y.—*In re Conklin's Estate*, 20 N.Y.S.2d 59, 62, 259 App.Div. 432.

63. N.Y.—*In re Conklin's Estate*, *supra*.

64. New Standard D.

Phrases

(1) "Susceptible of ascertainment" distinguished from "capable of ascertainment" see 12 C.J.S. p 1115 note 25.

(2) Other phrase employing the term and of which more recent adjudications have not been found see 60 C.J. p 1190 note 80.

65. Mass.—*Commonwealth v. Lottery Tickets*, 5 Cush. 369, 373.

mise.⁶⁶ It has been distinguished from "believe" see 10 C.J.S. p 239 note 4.

"Suspected" is the past participle of "suspect,"⁶⁷ and in its usual and ordinary signification need not involve knowledge or belief or likelihood.⁶⁸

SUSPEND. While the word "suspend" has many and divers meanings,⁶⁹ ordinarily it implies a temporary cessation,⁷⁰ a temporary stop for a time,⁷¹ and conveys the thought of causing to cease for a time an effect which has already been operative,⁷² and in its natural signification imports that which is not permanent, as distinguished from that which is permanent.⁷³

In the sense of temporary cessation the word "suspend" is variously defined as meaning to cease⁷⁴ or to cause to cease⁷⁵ temporarily; to cause to cease for a time;⁷⁶ to stop temporarily;⁷⁷ to discontinue temporarily with an expectation or purpose of resumption;⁷⁸ to cause to withdraw temporarily from any privilege.⁷⁹

The word "suspend" is further defined as meaning to postpone;⁸⁰ to stay;⁸¹ to delay;⁸² to stay and delay;⁸³ to hold in abeyance;⁸⁴ to withhold;⁸⁵ it may also mean to interrupt;⁸⁶ to hinder.⁸⁷

"Suspend" may indicate the idea of holding in a state of indecision, and in this sense is defined as meaning to hold in a state of indecision or indeter-

66. New Standard D.

Phrase employing the term and of which more recent adjudications have not been found see 60 C.J. p 1190 note 84.

67. Webster New Int.D.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1190 notes 86-88.

68. Kan.—Cheek v. Missouri, K. & T. Ry. Co., 131 P. 617, 624, 89 Kan. 247.
60 C.J. p 1190 note 85.

69. Neb.—Moore v. State, 251 N.W. 117, 118, 125 Neb. 565.

70. Mo.—Corpus Juris quoted in Leibson v. Henry, 204 S.W.2d 310, 314, 356 Mo. 953.
60 C.J. p 1191 note 5.

71. U.S.—In re Trans-Tex Oil Corp., D.C.Tex., 85 F.Supp. 299, 300.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Shannon, 100 S.W. 138, 145, 10 Tex. 379, 10 L.R.A., N.S., 68.

72. Cal.—Gartner v. Roth, 157 P.2d 361, 363, 26 Cal.2d 184.

73. Mo.—Corpus Juris quoted in Leibson v. Henry, 204 S.W.2d 310, 314, 356 Mo. 953.
60 C.J. p 1191 note 6.

74. U.S.—Enright v. U. S., Ct.Cl., 54 F.2d 182, 187.
Minn.—Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.

Similarly defined

To cease temporarily from operation or activity.—U. S. v. Felder, D.C. N.Y., 13 F.2d 527, 528.

75. Minn.—Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.

Phrases employing the word "suspend" and of which more recent adjudications have not been found see 60 C.J. p 1191 note 13-p 1192 note 15.

76. U.S.—Mankowski v. U. S., C.C. A.Ala., 148 F.2d 143, 145.
Cal.—Graybar Elec. Co. v. Lovinger, 185 P.2d 370, 371, 81 Cal.App.2d 936 —Derrick v. City of Vallejo, 40 P.2d 949, 951, 4 Cal.App.2d 25.
Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.
60 C.J. p 1190 note 91.

Similarly defined

(1) To cause to cease for a time from operation or effect.
U.S.—U. S. v. Felder, D.C.N.Y., 13 F.2d 527, 528.
Ark.—Vaughan v. City of Searcy, 135 S.W.2d 319, 321, 199 Ark. 555.

(2) To cause to cease for a while.
Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
W.Va.—Robinson v. Kistler, 59 S.E. 505, 507, 62 W.Va. 489.

77. Cal.—Reynolds v. State Board of Equalization, 174 P.2d 4, 29 Cal. 2d 137.

78. U.S.—Mankowski v. U. S., C.C. A.Ala., 148 F.2d 143, 145.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.

79. Iowa.—Gibbons v. Sioux City, 45 N.W.2d 842, 845, 242 Iowa 160.

80. Pa.—Bishop v. Bacon, 196 A. 918, 921, 130 Pa.Super. 240.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.

81. U.S.—Mankowski v. U. S., C.C.A. Ala., 148 F.2d 143, 145.

Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.
60 C.J. p 1191 note 1.

82. U.S.—Mankowski v. U. S., C.C.A. Ala., 148 F.2d 143, 145.
Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Neb.—Moore v. State, 251 N.W. 117, 118, 125 Neb. 565.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.
60 C.J. p 1190 note 93.

83. Va.—Virginia F. & M. Ins. Co. v. Aiken, 82 Va. 424, 428.

84. Cal.—Reynolds v. State Board of Equalization, 174 P.2d 4, 29 Cal. 2d 137.

85. Neb.—Moore v. State, 251 N.W. 117, 118, 125 Neb. 565.

86. U.S.—Mankowski v. U. S., C.C. A.Ala., 148 F.2d 143, 145.
Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.
60 C.J. p 1191 note 98.

To intermit

Va.—Virginia F. & M. Ins. Co. v. Aiken, 82 Va. 424, 428.

87. U.S.—Mankowski v. U. S., C.C.A. Ala., 148 F.2d 143, 145.
Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.

Similarly defined

(1) To hinder from proceeding.—Towles v. Travelers Ins. Co., 137 S.W. 2d 1110, 1111, 282 Ky. 147—60 C.J. p 1190 note 95.

(2) To hinder the proceedings for a time.—Virginia F. & M. Ins. Co. v. Aiken, 82 Va. 424, 428.

mination;⁸⁸ to hold in an undetermined or undecided stage, awaiting fuller information;⁸⁹ to hold undetermined;⁹⁰ and it may mean to withhold for a time on certain conditions.⁹¹

The connection in which the word "suspend" is used may give it a stronger meaning than that which is not permanent,⁹² and thus it may imply a termination,⁹³ and it may mean to discontinue⁹⁴ or dispense with.⁹⁵

In connection with employment, "suspend" may refer to a permanent discharge from employment,⁹⁶ or it may mean to remove, either temporarily or permanently, from employment.⁹⁷

"Suspend" has been held synonymous with "dismiss" see 27 C.J.S. p 151 note 81, and "dispense" see 27 C.J.S. p 344 note 33, and has been distinguished from "postpone" see 72 C.J.S. p 394 notes 9, 10, and "vacate."⁹⁸

References applicable to the term "suspend" have been made to various titles throughout this work in the definition "suspension" post.

"Suspending" is the present participle of "suspend."⁹⁹

"Suspended." The word "suspended" has been defined and interpreted both judicially and as a matter of common usage, and there is no ambiguity or uncertainty in its meaning,¹ and in its common and general usage² it means temporarily inactive³ or inoperative;⁴ held in abeyance;⁵ temporarily debarred;⁶ arrested; interrupted; stopped for a time.⁷

It has been distinguished from "forfeited" see 37 C.J.S. p 3 note 79, "revoked" see 77 C.J.S. p 363 note 47, "superseded" see ante p 889 note 18, and "terminated."⁸

SUSPENSE. The state of having the mind suspended; the condition of mental uncertainty, usually as accompanied by apprehension or anxiety; indetermination; indecision.⁹

In law, when a rent, profit a prendre, and the like, are, in consequence of the unity of possession of the rent, etc., of the land out of which they is-

88. N.Y.—In re Muser's Estate, 203 N.Y.S. 619, 621, 122 Misc. 164.

89. Iowa.—Hild v. Polk County, Iowa, 49 N.W.2d 206, 208, 242 Iowa 1354.

90. U.S.—Kriebel v. U. S., C.C.A. Ill., 10 F.2d 762, 764.

91. U.S.—U. S. v. Felder, D.C.N.Y., 13 F.2d 527, 528.

92. Mo.—Corpus Juris quoted in Leibson v. Henry, 204 S.W.2d 310, 314, 356 Mo. 953.
60 C.J. p 1191 note 7.

93. Mo.—Corpus Juris quoted in Leibson v. Henry, 204 S.W.2d 310, 314, 356 Mo. 953.
60 C.J. p 1191 note 8.

94. U.S.—Reeside v. U. S., Ct.Cl., 75 U.S. 38, 19 L.Ed. 318.

Tex.—Phelps v. Connellee, Civ.App., 278 S.W. 939, 941.

95. Tex.—Phelps v. Connellee, supra.

96. Tex.—Phelps v. Connellee, supra.
60 C.J. p 1191 note 12.

97. Iowa.—Markey v. Pickley, 132 N.W. 883, 885, 152 Iowa 508.

Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.

98. Wis.—State ex rel. Currie v. McCready, 297 N.W. 771, 772, 238 Wis. 142.

60 C.J. p 1191 note 1 [a].

99. Webster New Int.D.

Phrases employing "suspending" and of which more recent adjudications have not been found see 60 C.J. p 1192 notes 21, 22.

1. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809.

2. U.S.—U. S. v. Showalter, supra—United States v. Markowitz, D.C. Cal., 34 F.Supp. 827, 830—Olds & Whipple v. U. S., Ct.Cl., 22 F.Supp. 809, 819.

Cal.—Graybar Elec. Co. v. Lovinger, 185 P.2d 370, 371, 81 Cal.App.2d 936.

3. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809.

Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Okl.—Wisener v. Burrell, 118 P. 999, 1001, 28 Okl. 546, 34 L.R.A., N.S., 755, Ann.Cas.1912D 356.

Phrases employing the term "suspended" and of which more recent adjudications have not been found see 60 C.J. p 1192 notes 18–20.

4. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809—U. S. v. Markowitz, D.C. Cal., 34 F.Supp. 827, 830—Olds & Whipple v. U. S., Ct. Cl., 22 F.Supp. 809, 819.
Cal.—Graybar Elec. Co. v. Lovinger, 185 P.2d 370, 371, 81 Cal.App.2d 936.

Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Okl.—Wisener v. Burrell, 118 P. 999, 1001, 28 Okl. 546, 34 L.R.A., N.S., 755.

5. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809—U. S. v. Markowitz, D.C. Cal., 34 F.Supp. 827, 830—Olds & Whipple v. U. S., Ct.Cl., 22 F.Supp. 809, 819.

Cal.—Graybar Elec. Co. v. Lovinger, 185 P.2d 370, 371, 81 Cal.App.2d 936.
Ky.—Towles v. Travelers Ins. Co., 137 S.W.2d 1110, 1111, 282 Ky. 147.
Okl.—Wisener v. Burrell, 118 P. 999, 1001, 28 Okl. 546, 34 L.R.A., N.S., 755.

Tenn.—Blevins v. Pearson Hardwood Flooring Co., 144 S.W.2d 781, 783, 176 Tenn. 606.

6. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809.

7. U.S.—U. S. v. Showalter, D.C. Cal., 103 F.Supp. 806, 809—U. S. v. Markowitz, D.C. Cal., 34 F.Supp. 827, 830—Olds & Whipple v. U. S., Ct. Cl., 22 F.Supp. 809, 819.

Cal.—Graybar Elec. Co. v. Lovinger, 185 P.2d 370, 371, 81 Cal.App.2d 936.

8. Tenn.—Blevins v. Pearson Hardwood Flooring Co., 144 S.W.2d 781, 783, 176 Tenn. 606.
62 C.J. p 733 note 55.

9. New Standard D.

use, not in esse for a time, they are said to be in suspense, *tunc dormiunt*; but they may be revived or awakened.¹⁰

SUSPENSION. The word "suspension" is ordinarily¹¹ defined as meaning a temporary stop;¹² a temporary stop of a right;¹³ a temporary delay, interruption, or cessation;¹⁴ the ceasing or causing something to cease from operation temporarily;¹⁵ intermission; stay.¹⁶

It is also employed to indicate the temporary cutting off or debarring of one from the privileges of an institution¹⁷ or the temporary forced withdrawal from the exercise of office, powers, prerogatives, or privileges as a member.¹⁸

As applied to commercial institutions,¹⁹ such as banks,²⁰ the term "suspension" conveys the meaning of insolvency²¹ or business failure,²² and signifies stoppage of payment or failure to meet obligations and engagements.²³ In this sense the term is well understood by business men as meaning a failure to pay from an inability to do so.²⁴

Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time;²⁵ a partial extinguishment for a time, as contrasted with a complete extinguishment, where the right is absolutely dead.²⁶

The term "suspension" has been held equivalent to, or synonymous with, "dismissal" see 27 C.J.S. p 151 note 97, and "extinguishment" see 35 C.J.S. p 294 note 41.

It has been compared with, or distinguished from "discharge" see 26 C.J.S. p 1330 note 42, "dismissal" see 27 C.J.S. p 151 note 98, "expulsion" see 35 C.J.S. p 286 note 83, "extinguishment" see 35 C.J.S. p 294 note 42, and "revocation" see 77 C.J.S. p 362 note 29.

Suspension from membership in an organization such as an association or society is treated in various titles throughout this work, particular reference being made to Associations § 25, Clubs § 17, Exchanges § 7, Physicians and Surgeons § 80, and Religious Societies § 14. Suspension of pupils from schools is treated with reference to private schools in Schools and School Districts § 11, and with reference to public schools in §§ 503-505. See also § 453. Suspension of teachers is treated in § 203, and of a school from a school district in § 83.

The phrase "suspension from office" is defined in Officers § 58, and that section deals with the suspension of public or governmental officers generally. The suspension of governmental officers, as well as governmental employees and agents, is a subject which is treated in a number of other titles through-

10. Black L.D.

11. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Clark, 191 S.E. 732, 733, 211 N.C. 693.

12. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Clark, supra.

Phrases

(1) "Suspension of arms" distinguished from "armistice" see 6 C.J.S. p 342 note 58.

(2) "Suspension of sentence" defined see Criminal Law § 1571.

(3) "Suspension of the policy" not synonymous with "cancellation of the policy" see 12 C.J.S. p 938 note 70.

(4) Other phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1193 notes 54, 55.

13. N.Y.—In re Muser's Estate, 203 N.Y.S. 619, 621, 22 Misc. 164. 60 C.J. p 1192 note 33.

14. Cal.—Lotts v. Board of Park Com'rs of City of Los Angeles, 57 P.2d 215, 219, 13 Cal.App.2d 625.

N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Clark, 191 S.E. 732, 733, 211 N.C. 693.

Similarly defined

(1) A temporary cessation.—Appeal of McAuley, 77 Pa. 397, 418.

(2) A temporary interruption or cessation of labor.—Lethbridge v. New York, 15 N.Y.S. 562, 59 N.Y. Super. 486—60 C.J. p 1193 note 42.

(3) Delay.—Appeal of McAuley, supra.

15. N.Y.—In re Muser's Estate, 203 N.Y.S. 619, 621, 22 Misc. 164.

16. Pa.—Appeal of McAuley, 77 Pa. 397, 418.

17. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 639, 88 Fla. 510.

18. Utah.—In re Oliver, 89 P.2d 229, 233, 97 Utah 1.

19. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Clark, 191 S.E. 732, 733, 211 N.C. 693.

20. S.D.—Estelline v. Calef, 234 N. W. 597, 598, 57 S.D. 592.

21. S.D.—Estelline v. Calef, supra.

22. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Clark, 191 S.E. 732, 733, 211 N.C. 693.

23. S.D.—Estelline v. Calef, 234 N. W. 597, 598, 57 S.D. 592.

Permanent stoppage not necessarily implied

Eng.—Crook v. Morley, [1891] A.C. 316, 319. 60 C.J. p 1193 note 48.

24. U.S.—In re Wolf, D.C.Nev., 30 F.Cas.No.17,923, 4 Sawy. 168, 169, 17 Nat.Bankr.Reg. 423. 60 C.J. p 1193 note 47.

25. R.I.—Dyer v. Dyer, 23 A. 910, 911, 17 R.I. 547. 60 C.J. p 1193 note 50.

Similarly defined

A partial extinguishment which takes place only where the rent, or other profit a prendre issuing out of the land, comes to him who has possession of the same land for a time only.—Burton v. Barclay, 7 Bing. 744, 759, 5 M. & P. 785, 20 E.C.L. 331, 131 Reprint 288.

26. N.Y.—In re Muser's Estate, 203 N.Y.S. 619, 621, 22 Misc. 164.

out this work. The suspension of federal officers, agents, and employees is treated in the C.J.S. title United States §§ 62, 63, also 65 C.J. p 1296 note 64—p 1298 note 23. The suspension of state officers, employees, and agents is discussed generally in States § 78, and suspension of county officers, employees, and agents in Counties § 108. For references to the treatment of suspension of municipal officers, agents, and employees see the index to the title Municipal Corporations. Suspension is also treated, with reference to particular officers, in other titles throughout this work, and in this connection see Clerks of Court § 88, District and Prosecuting Attorneys § 7, Judges § 26 a, Justices of the Peace § 9, Notaries § 4 b, and Sheriffs and Constables § 9.

The suspension of licenses is discussed generally in Licenses § 43 b. The title Motor Vehicles deals with the various kinds of licenses required in connection with automobiles and similar vehicles, and for reference to the treatment of suspension of such licenses see the index to Motor Vehicles. Suspension of licenses issued in connection with the operation of aircraft is treated in Aerial Navigation § 16. The suspension of licenses and certificates of mariners is discussed in Shipping § 6, of pilots see Pilots § 4 d. Permits or licenses which may be required to engage in any of the various forms of the liquor business are generally subject to suspension, and for specific references in this connection see the index to the title Intoxicating Liquors. A license may be required to carry on the business of keeping an inn, hotel, or similar establishment, and the suspension of such licenses is discussed in Innskeepers § 6 c.

The suspension of the right, license, or certificate to practice architecture is treated in Architects § 5, and to practice law in Attorney and Client §§ 17-41. The suspension of the right to practice medicine, dentistry, and similar healing arts is dis-

cussed in Physicians and Surgeons §§ 16-18.

The suspension of the right to pursue a remedy is treated generally in Actions § 7, the suspension of the writ of habeas corpus is discussed in Habeas Corpus §§ 123, 124. Suspension of statutes of limitations see the index to the title Limitations of Actions. Suspension of interest is treated in Interest §§ 48-62; suspension of parole is discussed in Pardons § 23; the suspension of the exercise of a power is treated in Powers § 15.

For other particular applications and specific uses of the word "suspension" see the various title indexes and consult the Descriptive-Word Index.

SUSPENSIVE. Tending to suspend or keep in suspense; uncertain; doubtful; as, a suspensive inquiry.²⁷

SUSPENSORY. Having the function of sustaining or suspending, suspensorial.²⁸ "Suspensory" distinguished from "jock strap" see 48 C.J.S. p 796 note 57.

SUSPICION. The act of suspecting²⁹ or the state of being suspected;³⁰ the imagination, generally of something ill;³¹ the imagination of the existence of something without proof, or upon very slight evidence, or upon no evidence at all;³² the apprehension of something without proof or upon slight evidence;³³ the imagination or apprehension of the existence of something without proof, or upon very slight evidence or upon no evidence;³⁴ distrust; mistrust; doubt.³⁵

Suspicion requires no real foundation for its existence³⁶ and may be upon very slight grounds,³⁷ since the essence of a suspicion is that it is without known facts to support it.³⁸ While suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof,³⁹ it

27. New Standard D.

Phrases

(1) "Suspensive appeal" consult the title index to Appeal and Error.

(2) "Suspensive condition" see Contracts § 340.

28. New Standard D.

29. U.S.—U. S. v. Green, D.C.N.Y., 136 F. 618, 628.

Ga.—McCalla v. State, 66 Ga. 346, 348.

Phrase employing the term and of which more recent adjudications

have not been found see 60 C.J. p 1194 note 73.

30. Ga.—McCalla v. State, 66 Ga. 346, 348.

31. Ga.—McCalla v. State, *supra*.

32. Cal.—Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 431, 138 Cal.App. 418.

Tex.—Gulf, etc., R. Co. v. Shieder, 30 S.W. 902, 905, 88 Tex. 152, 28 L.R.A. 538.

33. Mo.—State v. Hall, 285 S.W. 1009, 1011—State v. Dildine, App., 269 S.W. 653, 654.

34. U.S.—United States v. Green, D.C.N.Y., 136 F. 618, 628.

35. Ga.—McCalla v. State, 66 Ga. 346, 348.

36. Cal.—Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 431, 138 Cal.App. 418.

37. R.I.—Humes v. Taber, 1 R.I. 464, 470.

38. N.Y.—Kinston Cotton Mills v. Kuhne, 113 N.Y.S. 779, 784, 129 App.Div. 250.

39. S.C.—Burton v. McNeill, 13 S.E.

is weaker⁴⁰ and imports a less degree of certainty⁴¹ than belief.

The term "suspicion" has been compared with, or distinguished from, "belief" see 10 C.J.S. p 238 note 51, and "knowledge" see 51 C.J.S. p 467 note 8.

The authority of peace officers and private persons to arrest on mere suspicion without a warrant is treated in Arrest § 6 b, c, § 8 b, c; sufficiency of a search warrant issued on suspicion is considered in Searches and Seizures § 74. The actionable quality of words calculated to induce suspicion of the commission of a crime is discussed in Libel and Slander § 12. It is stated in Fraudulent Conveyances §§ 7 b, 128, that suspicion of fraud is not sufficient to impart notice of it, and that mere suspicion is insufficient to charge the buyer with the fraud of the seller.

SUSPICIOUS. Open or liable to suspicion; such as to arouse suspicion or mistrust; questionable; as, suspicious circumstances.⁴²

Sus. person. As an abbreviated term for "suspicious person" see 1 C.J.S. p 276 note 5.

SUSTAIN. The word "sustain" is susceptible of several constructions.⁴³ It is defined as meaning to

carry on or to maintain,⁴⁴ and this is said to be the general meaning of the term.⁴⁵ It is also defined as meaning to prove; to establish by evidence.⁴⁶

It has been held synonymous with "conserve" see 15 C.J.S. p 984 note 18.1, and "warrant,"⁴⁷ and has been distinguished from "accrue" see 1 C.J.S. p 760 note 66, and "carry" see 13 C.J.S. p 1764 note 18.

"Sustaining" is the present participle of "sustain."⁴⁸

"Sustained" is the past participle of "sustain"⁴⁹ and has been distinguished from "maintained" see 54 C.J.S. p 903 note 96.

SUSTENANCE. That which supports life; food; victuals; provisions.⁵⁰ It has been held to mean that necessary food and drink which is sufficient to support life and maintain health,⁵¹ and to include shelter.⁵² The term has been distinguished from "medicine" see 57 C.J.S. p 1043 note 45.

SUSTRAJO. A Spanish word which has been used as the equivalent of "stole."⁵³

SUTLER. A small trader, who follows an army, and who is licensed to sell goods, especially edibles, to the soldiers.⁵⁴

2d 10, 11, 196 S.C. 250, 133 A.L.R. 603.

Wis.—Scaffido v. State, 254 N.W. 651, 652, 215 Wis. 389.
60 C.J. p 1194 note 70.

40. Cal.—Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 431, 138 Cal.App. 418.

Ga.—Giddens v. Mirk, 4 Ga. 364, 370.

It would be a contradiction of terms to say in effect that suspicion is a conclusion or condition of mind which results from a consideration of pertinent facts and circumstances by a man of ordinary care and prudence.—Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 431, 138 Cal.App. 418.

41. R.I.—Humes v. Taber, 1 R.I. 464, 470.

42. Webster New Int.D.

Phrases

(1) "Suspicious person" see 70 C.J.S. p 689 note 86.

(2) Other phrase employing the term and as to which more recent adjudications have not been found see 60 C.J. p 1194 note 77.

43. Okl.—George v. Connecticut Fire Ins. Co., 201 P. 510, 512, 84 Okl. 172, 23 A.L.R. 80.

44. Okl.—George v. Connecticut Fire Ins. Co., supra.

Phrases employing the word "sustain" and of which more recent adjudications have not been found see 60 C.J. p 1195 notes 84, 85.

45. Okl.—George v. Connecticut Fire Ins. Co., 201 P. 510, 512, 84 Okl. 172, 23 A.L.R. 80.

46. Ill.—Chicago v. Fields, 139 Ill. App. 250, 251.

47. Cal.—Work v. Whittington, 214 P. 474, 61 Cal.App. 302.
60 C.J. p 1195 note 80.

48. Webster New Int.D.

Phrases

(1) "Sustaining program" as used in radio broadcasting see Telegraphs and Telephones § 290.

(2) Other phrase employing the term and of which more recent adjudications have not been found see 60 C.J. p 1195 note 91.

49. Webster New Int.D.

Phrases

(1) "Sustained by," "sustained by means of," "sustained in consequence

of," "sustained through," as synonymous with "due to" see 28 C.J.S. p 578 note 99.

(2) Other phrases employing the term "sustained" and of which more recent adjudications have not been found see 60 C.J. p 1195 notes 87-90.

50. Ga.—Justice v. State, 42 S.E. 1013, 1014, 116 Ga. 605, 59 L.R.A. 601.

51. Ga.—Justice v. State, supra.

52. Ohio.—State ex rel. Mastracci v. Rose, 74 N.E.2d 654, 79 Ohio App. 556.

53. Puerto Rico.—People v. Santiago, 16 Puerto Rico 446, 464.
60 C.J. p 1195 note 99.

54. U.S.—Keane v. U. S., C.C.A.Va., 272 F. 577, 582.
60 C.J. p 1195 note 1.

A Civil War sutler was a small merchant who by permission of the military authorities accompanied troops in the field and carried a stock of goods in the nature of confections, cigars, tobacco, etc.; he was not a soldier, but was a civilian camp follower.—Dudzick v. Lewis, 133 S.W. 2d 496, 497, 175 Tenn. 246.

SUUM. As the first word of maxims of which there have been no recent applications see 60 C.J. p 1195 notes 2, 3.

S. W. As an abbreviation for "southwest" see 1 C.J.S. p 276 note 5.

SWAB. One of various utensils consisting essentially of a soft absorbent substance on the end of a handle, used for cleansing, etc.⁵⁵

SWAGE. To shape metal with, or as with, a swage or swage-block.⁵⁶

SWALE. A piece of low marshy ground, as in a rolling prairie, commonly wet at seasons.⁵⁷

SWALLOW. To take through the gullet, or esophagus, into the stomach; to receive into the body through the mouth and throat.⁵⁸

SWAMP. Wet, spongy land; soft low ground saturated with water but not usually covered by it; marshy ground away from the seashore.⁵⁹

SWAMPER. In general, one who clears a swamp.⁶⁰ More specifically, in construction work as applied to iron workers, an operator of a winch.⁶¹

SWAP. As synonymous with "exchange" see Exchange of Property § 1 b.

SWATCHES. Sample pieces of cloth from which garments are to be made.⁶²

SWAY. To be bent by weight or influence; to lean; incline; veer; as, the ball sways to the right; opinion sways to his side.⁶³ It has been held synonymous with "influence" see 43 C.J.S. p 378 note 1.2.

SWEAR. In general, to affirm or utter a solemn declaration, with an appeal to God for the truth of what is affirmed.⁶⁴ In law, to take oath; to give evidence or state on oath or legal equivalent, as, on affirmation; as, to swear to a fact, against a party.⁶⁵

It is also defined as meaning to use profane or blasphemous language; especially, to use the name of God or sacred things in imprecation, cursing, etc.⁶⁶

Sworn. Legally, "sworn to."⁶⁷ The term is frequently used interchangeably with "verified,"⁶⁸ and it has been distinguished from "elected" see 28 C.J.S. p 1052 note 78.

Phrases employing various forms of the term are set out in the note.⁶⁹

SWEAT. The substance which is formed in the sweat glands before it appears on the surface of the skin.⁷⁰ The terms "sweat" and "perspiration," al-

55. New Standard D.
Swab as a mining term see Mines and Minerals § 3 h.

56. New Standard D.

Swaging

U.S.—Bellavance v. Frank Morrow Co., C.C.A.R.I., 140 F.2d 419, 421, 422.

57. New Standard D.

Swale as a watercourse see the C.J. S. title Waters § 4, also 67 C.J. p 679 note 75 [a].

58. Webster New Int.D.

"Swallow up" synonymous with "consume" see 16 C.J.S. p 1520 note 75.

59. Or.—Campbell v. Walker, 2 P.2d 912, 914, 137 Or. 375.

"Swamp land" defined see Property § 7 d (2) (e).

60. New Standard D.

61. La.—Nesom v. Caldwell & McCann, App., 48 So.2d 713.

"Buck swamper" as a logging term see Logs and Logging § 1 i.

62. Mo.—U. S. Fashion & Sample

Book Co. v. Montrose Cloak & Suit Co., 218 S.W. 867.

60 C.J. p 1196 note 19.

63. Webster New Int.D.

64. Webster New Int.D.

65. N.Y.—In re Merritt's Estate, 65 N.Y.S.2d 206, 207, 187 Misc. 889.

66. Webster New Int.D.

67. Mass.—Commonwealth v. Bennett, 7 Allen 533, 534.

68. Iowa.—Francesconi v. Independent School Dist. of Wall Lake, 214 N.W. 882, 885, 204 Iowa 307.

69. **Phrases**

(1) "False swearing" defined see Perjury § 1 b, and references in title index.

(2) "Sworn pleading" defined see Pleading § 343.

(3) "Sworn to" implies that the subscriber shall have declared upon oath the truth of the statement to which his name is subscribed.—Indiana Quarries Co. v. Simms, 165 S.W. 422, 423, 158 Ky. 415.

(4) "To swear an oath" defined see Oaths and Affirmations § 2.

(5) "To swear to a petition" defined see Pleading § 343.

(6) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1196 notes 25, 26, 29, 31, 38-40, p 1197 notes 41-47.

70. U.S.—Carter Products v. Federal Trade Commission, C.A.7, 186 F. 2d 821, 823.

Phrases employing the term and of which more recent adjudications have not been found see 60 C.J. p 1197 notes 49, 50.

Sweat glands

(1) One of the tubular coil-glands in the corium and subcutaneous connective tissue, secreting sweat; glandula sudoripara.—Stedman Med. D.

(2) They are located beneath the surface of the skin, each having an opening or duct at the surface of the skin, referred to as the mouth of the sweat gland.—Carter Products v. Federal Trade Commission, supra.

though often used interchangeably, are not identical and do not define or describe the same thing, as stated in 70 C.J.S. p 692 note 35.52.

The admissibility in evidence of confessions obtained in violation of anti-sweating statutes is discussed in Criminal Law §§ 817 c, d (3), 826.

SWEATSHOP. The term has been judicially defined as meaning a place where employees are required to work to an extent hardly endurable.⁷¹ It has been said that, in the public mind, the word imputes unsavory and illegal business practices.⁷²

SWEEP. A term which is used to designate an appliance, in the nature of an oar, used for steering and managing a raft in its navigation.⁷³

SWEEPSTAKES or SWEEPSTAKE. A race publicly declared open to all complying with its conditions, for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated; and, if an additional sum of money, cup, plate, or other reward is offered to the winner, the race is still a sweepstakes whatever may be the name given to such addition.⁷⁴

SWEET. Agreeable to the sense of taste; having a flavor or taste of or like that of sugar or honey; having a fresh or mild taste, as opposed either to salt or to sour or rancid.⁷⁵ It has been said that in the natural meaning of the word "sweetened" there is no implication of any particular percentage of sugar.⁷⁶

SWEETMEAT. The word "sweetmeat" is broad in

meaning,⁷⁷ and is variously defined as a sweet thing to eat;⁷⁸ a confection, jelly, preserve, or other sweet food or dainty;⁷⁹ any food rich in sugar, as cake, candy, sweet pastry, etc.;⁸⁰ a candied or crystallized fruit;⁸¹ a fruit preserved with sugar;⁸² a confection; a candy.⁸³

"Sweetmeat" has been held synonymous with "candy" see 12 C.J.S. p 1111 note 40, and has been distinguished from "comfit" see 15 C.J.S. p 243 note 26.

SWEINMOTE. As a particular English court see Courts § 11.

SWELL. The term is defined generally as meaning the act, process, or effect of swelling; expansion; dilatation; increase of number or dimensions; augmentation of force, rate, intensity, or volume.⁸⁴

The word "swells," as applied to canned goods, refers to defective cans, the defect sometimes being in the can itself and sometimes in the manner in which the contents are packed.⁸⁵ It refers primarily to cans whose ends are forced outward by the gases engendered by fermentation, but in the meaning of the trade includes all cans whose contents are sour.⁸⁶

SWIFT. Moving with celerity or comparatively high velocity; rapid; quick; speedy.⁸⁷

The term is also applied in a technical sense to the mechanism which effects the winding of raw silk.⁸⁸

SWIM. To effect or accomplish by natural means a propulsion in, through, or over water.⁸⁹

71. Mo.—Masters v. Sun Mfg. Co., 165 S.W.2d 701, 703, 237 Mo.App. 240.

Phrases

(1) "Sweatshop methods" are those under which employees are required to work to an extent hardly endurable.—Cleaning & Dyeing Ass'n v. Sterling Cleaners & Dyers, 2 N.E.2d 149, 160, 285 Ill.App. 336.

(2) "Sweatshop occupation" within minimum wage scale statutes see Master and Servant § 151 (1).

72. Mo.—Masters v. Sun Mfg. Co., 165 S.W.2d 701, 704, 237 Mo.App. 240.

73. U.S.—The Mary, D.C.Ala., 123 F. 609, 611.

74. U.S.—Stone v. Clay, Ill., 61 F. 889, 890, 10 C.C.A. 147, 60 C.J. p 1197 note 54.

75. New Standard D.

Phrases

(1) "Sweet cider" generally see 14 C.J.S. p 1119 notes 82, 83; see also Intoxicating Liquors § 13.

(2) "Sweet cordial" see Intoxicating Liquors § 13.

76. U.S.—United States v. Nesbitt Fruit Products, C.C.A.La., 96 F.2d 972, 973.

77. U.S.—Delapenha v. U. S., 1 Ct. Cust.App. 113, 114.

78. U.S.—Delapenha v. U. S., supra. Sweetmeats as subject to tariff see Customs Duties § 38.

79. U.S.—Benneche & Bro. v. U. S., 11 Ct.Cust.App. 127, 129. N.Y.—People v. Kent, 296 N.Y.S. 972, 975, 163 Misc. 887.

80. N.Y.—People v. Kent, supra.

81. N.Y.—People v. Kent, supra.

82. U.S.—Levy v. Robertson, C.C.N.Y., 38 F. 714, 715.

83. N.Y.—People v. Kent, 296 N.Y.S. 972, 975, 163 Misc. 887.

84. New Standard D.

85. Ill.—Eau Claire Canning Co. v. Western Brokerage Co., 73 N.E. 430, 440, 213 Ill. 561.

86. U.S.—Sleeper v. Wood, Mass., 60 F. 888, 889, 9 C.C.A. 289.

87. New Standard D.

88. U.S.—Klots v. U. S., N.Y., 139 F. 606, 607, 71 C.C.A. 590.

89. New Standard D.

Swimming pool. A pool, especially an artificial pool or tank in a gymnasium, adapted for swimming.⁹⁰

SWINDLE. To cheat; to impose upon the credulity of mankind and thereby to defraud the unwary by false pretenses and fictitious assumptions;⁹¹ to trick and cheat another of his possessions by falsehood, cunning, or conniving scheme.⁹²

Swindled. Tricked or outwitted.⁹³

Swindling. Cheating and defrauding grossly, with deliberate artifice.⁹⁴ It has been said that the word is vague and indefinite,⁹⁵ and of no legal or technical meaning.⁹⁶ The term commonly implies that there has been recourse to petty and mean artifices for obtaining money, which may or may not be strictly illegal,⁹⁷ and thus does not necessarily import a crime.⁹⁸

SWINDLER. The word "swindler" is of Germanic origin.⁹⁹ It is variously defined as meaning a cheat;¹ a rogue; a sharper;² one who lives by cheating; one who defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice.³ While the word implies a high degree of moral depravity and its essence is fraud,⁴ it does not with certainty import an indictable offense,⁵ nor does it necessarily mean one who obtains money or goods under false pretenses.⁶

SWINE. Any hoofed animal of the hog kind; a hog.⁷ It has been held synonymous with the term "hog" see 40 C.J.S. p 405 note 21.

Swine as subject to distraint for trespass see

Animals § 190 d; as subject to municipal regulation see Municipal Corporations § 213.

SWIPE. To give a strong blow or swipe to; strike with full swing of the arm.⁸

The term is employed in slang as meaning to pluck, to snatch, to steal; to take with a swipe or sweep; steal by snatching.⁹

SWISS MUSLINS. See 64 C.J.S. p 1080 note 16.

SWITCH. As a noun the word "switch" is variously defined as meaning a small flexible twig or rod, especially when used for chastising; a tress of human or false hair, fastened at one end, used by women in hairdressing; a mechanism for shifting a moving body in another direction or performing some analogous operation.¹⁰

As a verb the word "switch" is defined as meaning to shift from one track to another, as a car or train; shunt; figuratively, to change or shift, as a course of conduct.¹¹

The word "switch" is defined as an electrical device generally in Electricity § 1 b, and as a device employed in telephone installations in the C.J.S. title Telephones and Telegraphs § 4, also 60 C.J. p 1199 note 2.

As employed in railroad terminology the word "switch," both as a noun and as a verb, and the participial form "switching," and various phrases such as "derail switch," "drop switch," etc., are defined generally in Railroads § 1 n. The term "switch yard" is defined in Railroads § 1 h. The words

90. Okl.—Combined Mut. Cas. Co. v. Metheny, 223 P.2d 532, 535, 203 Okl. 522.

91. N.Y.—Chase v. Whitlock, 3 Hill 139, 140.

92. Colo.—McBride v. People, 248 P. 2d 725, 728.

93. Eng.—Saville v. Jardine, 2 H.Bl. 531, 532.

94. Ala.—Wyatt v. Ayres, 2 Port. 157, 161.

95. Ind.—Hall v. Rogers, 2 Blackf. 429, 430.
60 C.J. p 1198 note 75.

96. Ala.—Cunningham v. Baker, 16 So. 68, 71, 104 Ala. 160, 53 Am.S.R. 27.

97. Ala.—Cunningham v. Baker, supra.
60 C.J. p 1198 note 79.

98. Ind.—Hall v. Rogers, 2 Blackf. 429, 430.

60 C.J. p 1198 note 80.
"Swindling" as criminal offense see title index to False Pretenses.

99. N.Y.—Chase v. Whitlock, 3 Hill 139, 140.
60 C.J. p 1198 note 82.

1. Mass.—Stevenson v. Hayden, 2 Mass. 406, 408.
60 C.J. p 1198 note 83.

2. N.Y.—Chase v. Whitlock, 3 Hill 139, 140.

3. N.Y.—Chase v. Whitlock, supra.

4. U.S.—Forrest v. Hanson, 9 F.Cas. No.4,943, 1 Cranch C.C. 63.
"Swindler" as actionable term within law of defamation see Libel and Slander §§ 18, 50.

5. Mass.—Stevenson v. Hayden, 2 Mass. 406, 408.

6. Wis.—Weil v. Altenhofen, 26 Wis. 708, 711.

7. U.S.—Vita Food Products, Inc., v. U. S., 24 C.C.P.A., Customs, 248, 254.

"Swine" is the original generic term for "hog" and "shoat."—State v. Godet, 29 N.C. 210, 211.

8. New Standard D.

9. Iowa.—State v. Lee, 70 N.W. 594, 595, 101 Iowa 389.
60 C.J. p 1198 note 94.

10. New Standard D.

11. Ind.—Pennsylvania Co. v. Mosher, 94 N.E. 1033, 1036, 47 Ind.App. 556.

"switch" and "switching," as used in railroad terminology, are also employed in other connections throughout this work. Thus, in Master and Servant § 228 b (2) (b) it is stated that the requirement in the Federal Safety Appliance Act, 45 U.S.C.A. § 1, of power or train brakes such that the engineer can control the speed of the train without requiring brakemen to use the common hand brake for the purpose does not apply to switching operations in railroad yards and terminals. For other references to the terms "switch" and "switching" in connection with the master and servant relationship see the index to the title Master and Servant. The right of a carrier to "switching charges," or to charge for "switching services," is discussed in Carriers § 314.

SWIVEL. Something used in or on another body so as to turn round in or upon it.¹²

SWORDS. As subject to tariff regulations see Customs Duties § 34.

SYCOPHANT. Derived from Greek words meaning "fig informer."¹³

SYLLABI; SYLLABUS. See Courts §§ 197, 224.

SYLVA CÆDUA. A Latin term employed in the ecclesiastical law to mean wood of any kind which was kept on purpose to be cut, and which, being cut, grew again from the stump or root.¹⁴

SYMBOL. An object chosen to typify or represent some idea or quality in something else, because of a resemblance in one or more of their characteristics or associations; a representation; an emblem; a type.¹⁵ A symbol may constitute a valid trademark, as stated in the C.J.S. title Trade-Marks, Trade-Names, and Unfair Competition § 50, also 63 C.J. p 360 note 97—p 361 note 9.

SYMBOLIC; SYMBOLICAL. Of or pertaining to a symbol or symbols; serving as a sign; emblematic.¹⁶

SYMMETRY. A due proportion of the several parts of a body to each other; adaptation of the form or dimensions of the several parts of a thing to each other; conformance; congruity; consistency; correspondence or similarity of form, dimensions or parts on opposite sides of an axis, center, or a dividing plane; harmonious relation of parts.¹⁷

SYMPATHETIC. Pertaining to, resulting from, or attended by sympathy; expressive of sympathy; having like feelings with another or others; susceptible of sympathy; sympathizing.¹⁸

SYMPATHIZERS. In Missouri, during and shortly after the Civil War, a word of new and peculiar signification in common speech signifying a class of adherents to the Confederate cause who were not openly in arms, but secretly coöperated with the Confederates in various ways, giving aid and comfort on occasion.¹⁹

SYMPATHOMIMETIC AMINE. A substance which stimulates the peripheral parts of the sympathetic nervous system.²⁰

SYMPHONY. Music designed to be interpreted by instruments alone.²¹

SYMPOSIUM. A conference at which a particular topic is discussed and various opinions gathered.²²

SYMPTOM. Defined generally, the word "symptom" means that which serves to point out the existence of something else; any sign, token, or indication.²³

In medical terminology, "symptom" means any morbid phenomenon or departure from the normal in

12. N.Y.—Denise v. Swett, 22 N.Y.S. 950, 953, 68 Hun 188, 292.
"Swivel cars" see 67 C.J.S. p 3 note 65.

13. Cal.—People ex rel. Ellert v. Cogswell, 45 P. 270, 271, 113 Cal. 129, 35 L.R.A. 269.
60 C.J. p 1201 note 67.

14. Black L.D.
60 C.J. p 1202 notes 70–72.

15. New Standard D.

16. New Standard D.
Symbolical delivery see 26 C.J.S. p 698 note 63.

17. Idaho.—Maxwell v. City of Buhl, 236 P. 122, 123, 40 Idaho 644.

18. New Standard D.

Phrases

(1) "Sympathetic nervous system" see 66 C.J.S. p 6 note 5.

(2) "Sympathetic strike" see ante p 545 note 6.

19. Mo.—State v. Woodson, 41 Mo. 227, 234.

20. U.S.—Smith, Kline & French Laboratories v. Clark & Clark, D. C.N.J., 62 F.Supp. 971, 975.

"Examples of this action are con-

striction of the blood vessels, increased rate and force of the heart beat, a rise in blood pressure, dilation of the pupils of the eye, relaxation of the bronchial muscles, a rise in blood sugar, increased metabolic rate, decreased activity of the gastrointestinal tract of the stomach and intestines."—Smith, Kline & French Laboratories v. Clark & Clark, supra.

21. U.S.—Case of Mikado, C.C.N.Y., 25 F. 183, 187, 23 Blatchf. 347.

22. Ariz.—Utah Const. Co. v. Berg, 205 P.2d 367, 871, 68 Ariz. 285.

23. New Standard D.

function, appearance, or sensation, experienced by the patient and indicative of disease.²⁴

"Symptom" has been distinguished from "disease" see 27 C.J.S. p 144 note 91.

SYMPTOMATOLOGY. Defined see Physicians and Surgeons § 1.

SYNALLAGMATIC CONTRACT. See Contracts § 10. See also Partnership § 1 a (1).

SYNCHRONISM. The word "synchronism" is sometimes used to mean the coordinating of motion timing in at least two independent machines so that they may operate at the same speed through the governing of a master speed means,²⁵ and thus two things may be said to be operating in synchronism, not merely when they operate simultaneously, but also when their cycles of operation bear a timed relation to each other.²⁶

SYNCHRONIZATION. The act of synchronizing, or the state of being synchronized; a bringing into coincidence in time; a keeping time; the state of being synchronous; simultaneous occurrence of different events; synchronism.²⁷

As an electrical term, "synchronization" is defined in Electricity § 1; and as a broadcasting term signifying the operation of two radio broadcasting stations simultaneously upon the same frequency and with identical programs see the C.J.S. title Telegraphs and Telephones § 290.

SYNCHRONIZE. To make coincident in time or

contemporaneous; assign the same date to; to make agree in keeping time or speed; regulate, as a clock, by means of a synchronizer, or the speed of separate movements by any device which brings them into unison.²⁸

SYNCROTAX. A tax on the basis of gross receipts in lieu of all other state taxes, as stated in Taxation § 3.

SYNDIC. In the civil law, a word which probably corresponds very nearly to "assignee" under the common law.²⁹

SYNDICALISM. See Insurrection and Sedition §§ 1 c, 2 b.

SYNDICATE. A word of business and not of legal art,³⁰ employed widely in the dialect of finance,³¹ describing an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested;³² an association of persons for the purpose of carrying out some enterprise or scheme requiring considerable capital.³³ The word "syndicate" signifies an organization formed for some temporary purpose,³⁴ and it is sometimes applied to a business trust.³⁵

It has been said that syndicates have only comparatively recently been brought into notice as subjects of legal consideration,³⁶ and that they came into English use contemporaneously with the term "promoter."³⁷

24. Stedman Med.D.

Phrases

(1) "Objective symptoms" see 67 C.J.S. p 12 notes 42-47.

(2) "Subjective symptoms" see ante p 557 notes 21-24.

25. U.S.—Application of Nichols, 171 F.2d 300, 301, 36 C.C.P.A., Patents, 759.

26. U.S.—Diamond Power Specialty Corporation v. Bayer, C.C.A.Mo., 13 F.2d 337, 342.

27. New Standard D.

28. New Standard D.

"Synchronized shifting" as applied to automobiles see Motor Vehicles § 8.

29. Ala.—Mobile, etc., R. Co. v. Whitney, 39 Ala. 468, 471.

Under the common law in England, the agent of a corporation aggregate to whom letters testamentary or of administration might be issued in order to evade the technical difficulty occasioned by the inability of the corporation to take the necessary oath was called a "syndic."—Minnesota L. & T. Co. v. Besbe, 41 N.W. 232, 233, 40 Minn. 7, 2 L.R.A. 418.

30. Mich.—Corpus Juris cited in Hathaway v. Porter Royalty Pool, 295 N.W. 571, 575, 296 Mich. 90, 138 A.L.R. 955.
Pa.—Jackson v. Clemson, 156 A. 540, 542, 103 Pa.Super. 39.
60 C.J. p 1203 note 2.

31. Mass.—Minot v. Furroughs, 112 N.E. 620, 623, 223 Mass. 595.
Mich.—Corpus Juris cited in Hathaway v. Porter Royalty Pool, 295 N.W. 571, 575, 296 Mich. 90, 138 A.L.R. 955.

32. Mich.—Corpus Juris cited in Hathaway v. Porter Royalty Pool, 295 N.W. 571, 575, 296 Mich. 90, 138 A.L.R. 955.
Pa.—Jackson v. Clemson, 156 A. 540, 542, 103 Pa.Super. 39.
60 C.J. p 1203 note 5.

33. Ill.—Daytona Gables Dev. Co. v. Glen Flora Inv. Co., 178 N.E. 107, 114, 345 Ill. 371.

34. U.S.—Gates v. Megargel, C.C.A. N.Y., 266 F. 811, 817.

35. Va.—Ashworth v. Hagan Estates, 181 S.E. 331, 332, 165 Va. 151.

36. Mich.—Hathaway v. Porter Royalty Pool, 295 N.W. 571, 575, 296 Mich. 90, 138 A.L.R. 955.

37. U.S.—Gates v. Megargel, C.C.A. N.Y., 266 F. 811, 817.
60 C.J. p 1203 note 3.

In connection with an "underwriting agreement," a syndicate is an association of persons with a community of interest in the fund raised for the purpose of carrying on the particular undertaking.³⁸

It is stated in Joint Ventures § 1 a that a syndicate is regarded as somewhat like a joint adventure, and is merely a joint adventure. On the other hand, it is stated in Partnership § 20 c (1) that a syndicate is no more than a loose form of partnership, and falls within the rules applicable to partnerships. In Corporations § 13 it is said that a syndicate has been held not to be a corporation. Federal taxation provisions relative to syndicates are treated in Internal Revenue, and for specific references in this connection see the index to that title.

Syndicating consists in gathering materials suitable for newspaper publication from writers and artists and distributing them at regular intervals, in the form of matrices, to newspapers throughout the country for publication on the same day.³⁹

SYNDROME. The word "syndrome" is defined generally as meaning concurrence; a set of concurrent things.⁴⁰

In medical terminology, "syndrome" means a group of signs and symptoms which occur together and characterize a disease;⁴¹ a group of symptoms⁴² occurring together;⁴³ symptom group; symptom complex.⁴⁴ The word "syndrome" denotes the aggregate symptoms of a disease.⁴⁵

SYNOD. See Religious Societies § 1 g.

SYNONYMOUS. Conveying the same, or approximately the same, meaning;⁴⁶ expressing the same, or nearly the same, idea.⁴⁷

Synonymous words are words expressing the same thing, or conveying the same or approximately the same idea.⁴⁸

SYNOPSIS. A brief or partial statement; less than the whole; an epitome.⁴⁹ As applied to the record of a case, "synopsis" is a further abridgment than a substantial statement.⁵⁰

"Synopsis" has been held to be synonymous with "summary" see ante p 789 note 73.

SYNOVITIS. Inflammation of a synovial membrane,⁵¹ especially that of a joint, arthromeningitis;

38. Mass.—Minot v. Burroughs, 112 N.E. 620, 623, 223 Mass. 595.

In an underwriting agreement

(1) The subscribers are referred to as forming a "syndicate," and the venture is referred to as a "syndicate."—Minot v. Burroughs, supra.

(2) "Syndicate managers" as the promoters in an underwriting agreement see 55 C.J.S. p 3 note 52.

Underwriting syndicate

The underwriting syndicate in question "was simply an association of those who furnished the money to make the purchase with an agreement that the managers should have full control of the venture and divide the proceeds or assets among the members of the association in proportion to their financial interests. So far as concerned each other, their relations and rights were analogous to those of copartners."—Minot v. Burroughs, supra.

39. N.Y.—Star Co. v. Wheeler Syndicate, 155 N.Y.S. 782, 784, 91 Misc. 640.

40. N.J.—State v. Gooze, 81 A.2d 811, 815, 14 N.J.Super. 277.

41. N.J.—State v. Gooze, supra.

Similarly defined

"Syndrome" means a number of symptoms or signs which, occurring

together, cause disease.—Commonwealth Life Ins. Co. v. Wood, Okl., 242 P.2d 446, 447, 206 Okl. 203.

Particular forms of syndrome

(1) Meniere's Syndrome is the term applied to a disturbance in equilibrium, and it usually is the result of a malfunction of three semi-circular canals in the inner ear and is a disturbance in their function at that particular time and it demonstrates itself by acts of dizziness, disturbance in the gait, and the like.—State v. Gooze, 81 A.2d 811, 814, 14 N.J.Super. 277.

(2) "Parkinson's Syndrome" see Paralysis 67 C.J.S. p 557 note 34.

(3) "Stokes-Adams syndrome" is a form of heart ailment.—Mutual Life Ins. Co. of New York v. Davis, C.C.A. La., 142 F.2d 332, 333.

(4) "Sturge Weber syndrome" is one in which a vascular abnormality or birthmark appears on the face and also on the brain covering the brain itself.—Olson v. Chicago Transit Authority, 104 N.E.2d 542, 546, 346 Ill. App. 47.

(5) "Traumatic head syndrome" is a group of concurrent symptoms following concussion or injury to the brain among which are dizziness, fatigue-ability, headache, ringing in the ears and irritability.—The Samovar, D.C.Cal., 72 F.Supp. 574, 590.

42. U.S.—Mutual Life Ins. Co. of New York v. Davis, C.C.A.La., 142 F.2d 332, 333.

Or.—Kern v. Pullen, 6 P.2d 224, 227, 138 Or. 222.

43. U.S.—Mutual Life Ins. Co. of New York v. Davis, C.C.A.La., 142 F.2d 332, 333.

44. Or.—Kern v. Pullen, 6 P.2d 224, 227, 138 Or. 222.

Similarly expressed

Complex of symptoms in a disease.—Kern v. Pullen, supra.

45. Or.—Kern v. Pullen, supra.

46. Neb.—Hoffine v. Ewings, 84 N.W. 93, 95, 60 Neb. 729.

47. Pa.—McCarthy v. Dunlevy-Franklin Co., 121 A. 409, 410, 277 Pa. 467.

48. Miss.—Fritz v. Williams, 16 So. 359, 360.

49. Kan.—Barker v. Barker, 22 P. 1000, 1001, 43 Kan. 91.

Defined as a verb

"Synopsis" means to abridge; to cut short, diminish, reduce.—Barker v. Barker, supra.

50. Kan.—Barker v. Barker, supra.

51. Stedman Med.D.

N.C.—Henry v. A. C. Lawrence Leather Co., 66 S.E.2d 693, 695, 234 N.C. 126.

in general, when unqualified the same as arthritis.⁵² It is sometimes referred to as primary inflammation of the joints.⁵³ The causes of synovitis are contusion, sprains, twists, and overuse,⁵⁴ and trauma without infection is the usual cause in civil life.⁵⁵

SYNTHESIS. The putting together of different substances, elements, or parts into a new form; a constructing of something new out of existing materials, either physical or mental; composition.⁵⁶

SYPHILIS. A venereal⁵⁷ disease.⁵⁸

SYRINGE. A kind of pump.⁵⁹

SYRIAN. Members of the Syrian race as eligible to naturalization see Aliens § 124.

SYRUP. See Sirup 80 C.J.S. p 1309 notes 38-49.

SYSTEM. An aggregation or assemblage of objects united by some form of regular interaction or interdependence;⁶⁰ an assemblage of facts, or of principles and conclusions, scientifically arranged or disposed according to certain mutual relations, so as to form a complete whole;⁶¹ a natural combination, or organization of part to part;⁶² an or-

derly combination or arrangement, as of particulars, parts or elements, into a whole, especially, such combination according to some rational principle;⁶³ a group of divers units so combined by nature or art as to form an integral whole, and to function, operate, or move in unison and, often, in obedience to some form of control;⁶⁴ any complexure or combination of many things acting together;⁶⁵ any methodic arrangement of parts;⁶⁶ a plan or scheme according to which things are connected or combined into a whole;⁶⁷ a scheme which reduces many things to regular dependence or cooperation; a scheme which unites many things in order.⁶⁸

The word "system" imports a unity of purpose as well as an entirety of operation,⁶⁹ and the general signification of the term is plan, arrangement, or method,⁷⁰ as distinguished from sporadic, haphazard, and disconnected acts having no tendency to constitute a complete and homogeneous whole.⁷¹

Among the recognized synonyms of "system" are "manner" see 55 C.J.S. p 664 note 35.1, "method" see 57 C.J.S. p 1076 note 74.1, and "mode" see 58 C.J.S. p 839 note 35, although it has been said that while none of these words, when discriminately used, means precisely the same as "system" yet the

Inflammation of a synovial membrane which forms the protective sheath that encloses the tendon see the C.J.S. definition Tendosynovitis post.

Disease of synovial membrane

It involves one or more joints, characterized by aching pain, local elevation of temperature, a tendency to redness and swelling, rendering use of the joints difficult and distressing.—Blackman v. U. S. Casualty Co., 103 S.W. 784, 787, 788, 117 Tenn. 578.

52. Stedman Med.D.

53. N.Y.—Proctor v. Sword Line, Inc., 83 N.Y.S.2d 288, 296.

54. N.Y.—Proctor v. Sword Line, Inc., supra.

55. N.Y.—Proctor v. Sword Line, Inc., supra.

56. New Standard D.

"Most words are syntheses, that is, the result of conclusions which have been drawn. We analyze to synthesize. We synthesize to analyze again."—U. S. v. New York Great A. & Pacific Tea Co., C.C.A.Tex., 137 F.2d 459, 463—May v. George A. Rheman Co., D.C.Ga., 51 F.Supp. 426, 429.

57. La.—Jones v. Washington Nat. Ins. Co., App., 2 So.2d 696, 698. "Venereal disease" as a collective term for gonorrhea, chancroid, and syphilis see the C.J.S. definition Venereal.

58. La.—Jones v. Washington Nat. Ins. Co., supra. Tex.—Urrutia v. Patino, Civ.App., 297 S.W. 512, 514.

"Paresis" as the last stage of syphilis see Insane Persons § 2 d. "Wasserman test" as a blood test in common use by the medical profession to ascertain whether a patient is afflicted with syphilis see the C.J.S. definition Wasserman Test.

59. U.S.—Tagliabue v. Sondermann, C.C.N.Y., 67 F. 551, 552.

60. Pa.—Duplex Electric Co. v. Simons, 156 A. 617, 618, 102 Pa.Super. 97. Wash.—Elliott v. City of Leavenworth, 85 P.2d 1053, 1056, 197 Wash. 427.

Phrases

(1) "Commercial system" as a method of testing the value of sugar by a polariscope see Customs Duties § 36.

(2) Other phrases employing the word "system" and of which more

recent adjudications have not been found see 60 C.J. p 1206 notes 97-17.

61. Ind.—State ex rel. Warren v. Ogan, 63 N.E. 227, 228, 159 Ind. 119.

62. Pa.—Duplex Electric Co. v. Simons, 156 A. 617, 618, 102 Pa.Super. 97.

63. Neb.—State v. Kistler, 227 N.W. 319, 320, 119 Neb. 89.

64. Wash.—Elliott v. City of Leavenworth, 85 P.2d 1053, 1056, 197 Wash. 427.

65. D.C.—In re Kemper, MacArthur Pat.Cas. 1, 19.

66. Neb.—State v. Kistler, 227 N.W. 319, 320, 119 Neb. 89.

67. Ind.—State ex rel. Warren v. Ogan, 63 N.E. 227, 228, 159 Ind. 119.

68. D.C.—In re Kemper, MacArthur Pat.Cas. 1, 9.

69. Okl.—Board of Education of City of Ardmore v. State, 109 P. 563, 565, 26 Okl. 366.

70. Fla.—Enterprise v. State, 10 So. 740, 746, 29 Fla. 128. 60 C.J. p 1205 note 91.

71. Neb.—State v. Kistler, 227 N.W. 319, 320, 119 Neb. 89.

meanings are near enough alike so that the employment of "system" as a substitute for any of them is quite natural, where entire accuracy is not expected.⁷²

"System" has been compared with, or distinguished from, "art" see 6 C.J.S. p 772 note 20, "design" see 26 C.J.S. p 1238 note 82, and "plan" see 70 C.J.S. p 1099 note 51.

The competency of evidence of crimes other than that charged when such evidence tends to establish a common scheme, plan, system, design, or course of conduct is treated in Criminal Law § 688.

SYSTEMATIC. An adjective, the meaning of which may be obtained from the definition of the noun "system."⁷³ "Casual" has been held to be an antonym see 14 C.J.S. p 27 note 14.

SYSTEMATICALLY. In common parlance, to do a thing systematically is to do it by a certain method previously adopted as tending to accomplish the desired result.⁷⁴

SZECHUANS. China goat skins; a high grade of China skin.⁷⁵

T. The twentieth letter of the English alphabet.⁷⁶ The letter occurs in various abbreviations, see Abbreviations 1 C.J.S. p 276 note 5.

TABLE. As a noun, the word "table," in one sense means an article of furniture having a smooth flat top fixed on legs;⁷⁷ in another sense, a synopsis or condensed statement.⁷⁸

As a verb, "to table" means to postpone for discussion at a future time, or for an indefinite period; to lay on the table.⁷⁹

Phrases employing the word "table" are set out in the note.⁸⁰

TABLEAU OF DISTRIBUTION. In Louisiana, a list of creditors of an insolvent estate, stating to what each is entitled.⁸¹

TABLET. A flattish cake of compressed or molded solid matter, such as arsenic or soap.⁸²

TABULAR. Pertaining to a table or tabulated form.⁸³

TABULATE. To collect or arrange in lines or columns; to formulate tabularly; to put into a synoptical list or schedule; to put or form into table, or tables.⁸⁴ "Tabulate" has been compared with, or distinguished from, "canvass" see 12 C.J.S. p 1114 notes 95, 96.

TACHOMETER. A contrivance for measuring velocity.⁸⁵

TACHYCARDIA. Very rapid action of the heart, heart-hurry.⁸⁶

TACIT. The word "tacit" is defined as meaning implied or indicated, but not actually expressed;⁸⁷ existing, inferred, or understood without being openly expressed or stated;⁸⁸ implied by silence or

72. Kan.—Fosche v. Union Traction Co., 196 P. 423, 424, 108 Kan. 535.

73. Neb.—State v. Kistler, 227 N.W. 319, 320, 119 Neb. 89.

74. Neb.—State v. Kistler, 227 N.W. 319, 320, 119 Neb. 89.

75. U.S.—William Beadenkoff Co. v. Henwood & Nowak, D.C.Mass., 14 F.2d 125, 127.

76. Webster New Int.D.

77. Webster New Int.D.

78. Black L.D.

79. Tenn.—State ex rel. City of Alcoa v. Hannum, 11 S.W.2d 858, 859, 158 Tenn. 119.

80. Phrases

(1) "Gaming table" see Gaming § 1 g.

(2) "Mortality tables" see 58 C.J.S. pp 1210, 1211.

(3) "Table board" see 11 C.J.S. p 369 note 88.

(4) "Time tables" as imposing obligation on carrier see Carriers § 661.

81. La.—Taylor v. Hollander, 4 Mart. N.S., 535.

82. U.S.—Application of Craige, Cust. & Pat.App., 189 F.2d 620, 623. 60 C.J. p 1206 note 34—p 1207 note 38.

Marketing form for substances to be dissolved

"Not only are tablets notoriously old as a form for administering medicines but they are likewise a well known manner of marketing many types of compositions later to be dissolved."—Application of Craige, supra.

83. Ohio.—Murray v. Auglaize County, 1 Ohio N.P., N.S., 89, 92.

"Tabular matter" as a term employed in the printing trade see 57 C.J.S. p 454 note 38.

84. Ind.—Kunkle v. Coleman, 92 N.E. 61, 63, 64, 174 Ind. 315.

"Tabulated form" see 37 C.J.S. p 114 note 53.

85. New Standard D. See Motor Vehicles § 8.

86. Stedman Med.D.

Rapid heart

Tenn.—Phifer v. Mutual Ben. Health & Accident Ass'n, 148 S.W.2d 17, 21, 24 Tenn.App. 600.

87. U.S.—Kasishke v. Keppler, C.C. A.Okl., 158 F.2d 809, 811.

La.—Goree v. Midstates Oil Corporation, 18 So.2d 591, 596, 205 La. 988.

88. Or.—State v. Chadwick, 47 P.2d 232, 234, 150 Or. 645.

silent acquiescence;⁸⁹ done or made in silence;⁹⁰ understood; implied;⁹¹ unspoken.⁹²

A legal usage "tacit" means arising without express contract or agreement;⁹³ arising by operation of law.⁹⁴

In the civil code of Louisiana tacit is said of that which, although not expressed, is understood from the nature of the thing, or from the provision of the law.⁹⁵

Phrases employing the word "tacit" are set out in the note.⁹⁶

TACITA QUÆDAM HABENTUR PRO EXPRES-
SIS. See 60 C.J. p 1207 note 57.

TACK. The verb "to tack" is defined as meaning to annex as something additional or supplementary; append; also, to put or join together; connect.⁹⁷ As used with reference to a lien, "to tack" means to annex.⁹⁸

The word "tacking" is treated in various connections in this work. Tacking of possession in the law of prescription is discussed in Adverse Possession §§ 128-139; and in the law of mortgages the English doctrine of tacking is treated in Mortgages § 278. The tacking of successive disabilities for the

purpose of bringing a party within exceptions to the statute of limitations is discussed in Limitations of Actions § 219.

TACKLE. A mechanism or apparatus in general for applying the power of purchase in manipulation, shifting, raising, or lowering objects or materials; a mechanism of ropes, pulley blocks, hooks, etc., for raising and lowering heavy weights;⁹⁹ the instruments collectively for carrying on any specific work or undertaking; gear; tools; outfit; equipment.¹

TACKY. Having adhesive properties; tenacious; sticky: said especially of surfaces covered with partly dried varnish and the like, or with gold-size when ready to receive gold leaf.² It has been held to be a rather unusual, but seemingly proper, synonym of "gluey" or "sticky."³

TÆNIA ECHINOCOCCUS. One of the smallest tapeworms known, being only about 1/6 inch long. It has a head with four suckers and a rostellum encircled with hooks.⁴

TAFFETA. A class of silk dress goods, mainly used for lining and for outer garments.⁵

TAIL. In legal terminology the word "tail" means limited; abridged; reduced; curtailed, as a fee

89. Or.—State v. Chadwick, *supra*.

90. La.—Goree v. Midstates Oil Corporation, 18 So.2d 591, 596, 205 La. 988.

91. Or.—State v. Chadwick, 47 P.2d 282, 284, 150 Or. 645.

92. U.S.—Kasishke v. Keppler, C.C. A.Okla., 158 F.2d 809, 811.

93. U.S.—Kasishke v. Keppler, *supra*.

La.—Goree v. Midstates Oil Corporation, 18 So.2d 591, 596, 205 La. 988.

94. U.S.—Kasishke v. Keppler, C.C. A.Okla., 158 F.2d 809, 811.

95. La.Civ.Code art. 3556, subd. 30.

96. *Phrases*

(1) "Tacit dedication" see Dedication § 15.

(2) "Tacit hypothecation" see Mar-
itime Liens § 1.

(3) "Tacit mortgage" see Mortgages § 2; Husband and Wife § 562 b (3).

(4) "Tacit reconduction" see Land-
lord and Tenant § 73.

(5) "Tacit relocation" is a doctrine
borrowed from the Roman law. It is

a presumed renovation of the contract from the period at which the former expired, and is held to arise from implied consent of the parties, in consequence of their not having signified their intention that the agreement should terminate at the period stipulated. Although the original contract may have been for a period longer than one year, the renewed agreement can never be for more than one year because no verbal contract of location can extend longer.

Ga.—Standard Oil Co. v. Gilbert, 11 S. E. 491, 492, 84 Ga. 714.

Tenn.—Srygley v. City of Nashville, 135 S.W.2d 451, 452, 175 Tenn. 417. Renewal and extension of contracts generally see Contracts §§ 449, 450; renewal or continuance of contracts of employment see Master and Servant § 10.

97. New Standard D.

"Tacking it on as a rider" is a legislative phrase designating the practice of putting a measure, of doubtful strength on its own merits, into the general appropriation bill in order to compel members to vote for it or bring the wheels of government

to a stop.—Commonwealth v. Gregg, 29 A. 297, 161 Pa. 582. Constitutional provisions that no statute shall be enacted pertaining to more than one subject or object, which shall be clearly expressed in its title, are treated in Statutes § 212.

98. N.J.—Monmouth County Electric Co. v. McKenna, 60 A. 32, 35, 68 N. J.Eq. 160.

99. U.S.—Philadelphia & R. R. Co. v. Berg, C.C.A.Pa., 274 F. 534, 536.

The windlass and its appurtenances, as used for hoisting ore from small depths.—Philadelphia & R. R. Co. v. Berg, *supra*.

1. U.S.—Philadelphia & R. R. Co. v. Berg, *supra*.

2. New Standard D.

3. U.S.—Durkee-Atwood Co. v. Fifth Second Co., C.C.A.Minn., 79 F.2d 734, 737.

4. Neb.—Russo v. Swift & Co., 286 N.W. 291, 294, 136 Neb. 406. See Echinococcus 28 C.J.S. p 828 note 70.

5. U.S.—Eiseman v. Schiffer, C.C.N. Y., 157 F. 473, 474.

or estate in fee, to a certain order of succession, or to certain heirs.⁶

"Tailing" and "tailing pile" as mining terms see Mines and Minerals § 3 h.

TAILAGIUM. See Tallagium post.

TAILER. As a railroad employee see Railroads § 1 g.

TAILLIGHT. With respect to automobiles the term is defined in Motor Vehicles § 8. For other references see the index to that title.

TAILOR. One who makes or repairs men's outer garments, or makes cloaks, heavy close-fitting gowns, etc., for women; usually restricted to one who makes clothes to order.⁷ "Tailor" has also been applied to a "cleaner and presser" and a "cutter."⁸

"Tailor" has been held to be almost synonymous with, but distinguishable from, "clothier" see 14 C.J.S. p 1277.

TAKE. The word "take," which comes from the Scandinavian root meaning to grasp, grip, seize, lay hold of,⁹ is considered to be one of the commonest and plainest in the English language,¹⁰ and, while it has been said that the word cannot be easily misunderstood either by a lawyer or by a layman,¹¹ it does have many shades of meaning,¹² and the precise meaning which it is to bear in any case depends on the subject with respect to which it is used.¹³

In one sense "to take" means to acquire;¹⁴ to assume ownership;¹⁵ to receive;¹⁶ to obtain; to procure;¹⁷ to grasp;¹⁸ to seize;¹⁹ to lay hold of;²⁰ to get into one's power;²¹ to get possession of;²² to deprive one of possession of;²³ to get into one's possession or power;²⁴ and in a general sense "take" means to get or gain possession where it was theretofore held by another, and not by the person acting.²⁵

In law "take" means to become possessed of, as by descent or devise.²⁶

The word "take" has various other meanings, and

6. Black L.D.
Estates tail see Estates §§ 21-29.

7. Philippine.—Hashim v. Posadas, 48 Philippine 764, 767.

"Tailors to the trade" denotes the business of cutting, making, and trimming garments for merchant tailors in different parts of the United States.—Magid v. Tannenbaum, 149 N.Y.S. 445, 164 App.Div. 142.

8. Tex.—Southern Travelers' Ass'n v. Boyd, Civ.App., 1 S.W.2d 446, 448.
60 C.J. p 1208 note 87.

9. Pa.—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Commonwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.

The German root is "to put the hand on, to touch."—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Commonwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.

10. Pa.—Sharpless v. City of Philadelphia, 21 Pa. 147, 166, 9 Harris, 147, 166, 59 Am.D. 759.

11. Pa.—Sharpless v. City of Philadelphia, supra.

12. Miss.—Corpus Juris quoted in Kennedy v. New York Life Ins. Co., 172 So. 743, 745, 178 Miss. 258.
60 C.J. p 1208 note 91.

13. Conn.—Hallenbeck v. Getz, 28 A. 519, 520, 63 Conn. 385.

Miss.—Corpus Juris quoted in Kennedy v. New York Life Ins. Co., 172 So. 743, 745, 178 Miss. 258.

14. Conn.—Hallenbeck v. Getz, 28 A. 519, 520, 63 Conn. 385.

Ill.—Kimbell Trust & Savings Bank v. Hartford Accident & Indemnity Co., 164 N.E. 661, 662, 333 Ill. 318.

15. Ark.—Driver v. Driver, 63 S.W. 2d 274, 276, 187 Ark. 875.

N.C.—City of Durham v. Wright, 130 S.E. 161, 163, 190 N.C. 568.

16. Ala.—Tallassee Falls Mfg. Co. v. Tallapoosa County, 48 So. 354, 356, 158 Ala. 263.
60 C.J. p 1208 note 4.

Similarly defined

(1) To receive what is offered.—Hamilton v. Commonwealth, 3 Penr. & W., Pa., 142, 148.

(2) To gain or receive into possession.—City of Durham v. Wright, 130 S.E. 161, 163, 190 N.C. 568.

17. Conn.—Hallenbeck v. Getz, 28 A. 519, 520, 63 Conn. 385.

Ill.—Kimbell Trust & Savings Bank v. Hartford Accident & Indemnity Co., 164 N.E. 661, 662, 333 Ill. 318.

18. Mo.—Butler v. Imhoff, 142 S.W. 287, 290, 238 Mo. 584.

19. Ark.—Driver v. Driver, 63 S.W. 2d 274, 276, 187 Ark. 875.

Pa.—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Com-

monwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.
60 C.J. p 1208 note 6.

To seize with hands or otherwise
Iowa.—State v. Hromadko, 99 N.W. 560, 561, 123 Iowa 665, 666.

20. Ark.—Driver v. Driver, 63 S.W. 2d 274, 276, 187 Ark. 875.
60 C.J. p 1208 note 1.

21. Pa.—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Commonwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.

22. Kan.—State v. Miller, 36 P. 751, 752, 53 Kan. 324.

23. Ark.—Driver v. Driver, 63 S.W. 2d 274, 276, 187 Ark. 875.
N.C.—City of Durham v. Wright, 130 S.E. 161, 163, 190 N.C. 568.

24. Conn.—Hallenbeck v. Getz, 28 A. 519, 520, 63 Conn. 385.
Ill.—Kimbell Trust & Savings Bank v. Hartford Accident & Indemnity Co., 164 N.E. 661, 662, 333 Ill. 318.

Similarly defined

To gain control or possession in any way.—Butler v. Imhoff, 142 S.W. 287, 290, 238 Mo. 584.

25. Ga.—Whitworth v. Carter, 147 S.E. 904, 905, 39 Ga.App. 625.

26. U.S.—Louisville Trust Co. v. National Bank of Kentucky, D.C. Ky., 3 F.Supp. 909, 920.

it may signify to carry, convey, or transport;²⁷ to be entitled to;²⁸ to go, to move or direct the course or to proceed;²⁹ and to retract or revoke.³⁰

As used with respect to reception into the human body, the word "take" means to eat as food, or to swallow;³¹ to introduce or receive into one's body;³² to swallow, inhale, or imbibe,³³ as to take food, drink, gas, snuff, or medicine.³⁴

The word "take" is defined *supra* p 938 notes 19, 21 as meaning to seize; to get into one's power, and when employed with these meanings it may include either physical possession or domination without physical possession,³⁵ and the term may include the idea of compulsion³⁶ and force,³⁷ and it is sometimes used to imply the physical seizure of something tangible,³⁸ and in common acceptance, when used with reference to physical objects, means a physical change of an object from the possession of one person to the possession of the taker,³⁹ so that to "take" an article signifies merely to lay hold of, grasp, or seize it with the hands or otherwise.⁴⁰

As applied to land, "take" implies to assume ownership; to deprive one of the possession; to gain or

receive into possession; to seize;⁴¹ and when used with reference to property or a building "take" means to acquire the title to it, not merely the possession of it.⁴²

"Take" has been held to be equivalent to, or synonymous with, "assume" see 7 C.J.S. p 105 note 25, "be necessary" see 65 C.J.S. p 270 note 67, "drive" see 28 C.J.S. p 492 note 25.1, "inherit" see 43 C.J.S. p 393 note 18, "require" see 77 C.J.S. p 272 note 40, and "subscribe" see *ante* p 728 note 41.

"Take" has been compared with, or distinguished from, "drive" see 28 C.J.S. p 492 note 25.1, "inherit" see 43 C.J.S. p 393 note 20, "obtain" see 67 C.J.S. p 70 note 28, "receive" see 75 C.J.S. p 643 note 4, "retain" see 77 C.J.S. p 328 note 19, and "steal" see 82 C.J.S. p 1038 note 52.

Phrases employing the word "take" are set out in the note.⁴³

—**Taking.** The word "taking" is susceptible of different meanings.⁴⁴ It may be used as a noun,⁴⁵ and as a noun it is defined as meaning that which is taken or received.⁴⁶ In the verbal sense the

27. Pa.—Hamilton v. Commonwealth, 3 Penr. & W. 142, 148.

28. N.Y.—In re Bock, 211 N.Y.S. 621, 622, 125 Misc. 653.

29. Mo.—State v. Johnson, 22 S.W. 463, 466, 115 Mo. 480.

30. S.D.—Dimock State Bank v. Boehnen, 190 N.W. 485, 486, 46 S.D. 50.

31. Tex.—Maryland Casualty Co. v. Hudgins, 76 S.W. 745, 747, 97 Tex. 124, 104 Am.S.R. 857, 64 L.R.A. 349, 1 Ann.Cas. 252.

32. Miss.—Kennedy v. New York Life Ins. Co., 172 So. 743, 745, 178 Miss. 258.

33. Miss.—Kennedy v. New York Life Ins. Co., *supra*.

34. Miss.—Kennedy v. New York Life Ins. Co., *supra*.

35. Pa.—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Commonwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.

36. Pa.—Commonwealth v. McCusker, 70 A.2d 273, 275, 363 Pa. 450—Commonwealth v. McClain, 67 A.2d 795, 797, 165 Pa.Super. 331.

37. Pa.—Hamilton v. Commonwealth, 3 Penr. & Watts 142, 148. 60 C.J. p 1209 note 13.

38. Cal.—People v. Sanchez, 95 P.2d 462, 463, 35 Cal.App.2d 316.

39. Ill.—Kimbell Trust & Savings Bank v. Hartford Accident & Indemnity Co., 164 N.E. 661, 662, 333 Ill. 318.

Agreement to pay price

One who agrees "to take" a thing which is the subject of a price or compensation, *ex vi termini*, agrees to pay for such thing the price attached or whatever it is worth.—Sagory v. Dubois, 3 Sandf.Ch., N.Y., 466, 493.

40. Neb.—Gettinger v. State, 14 N. W. 403, 404, 13 Neb. 308.

W.Va.—State v. Chambers, 22 W.Va. 779, 789, 46 Am.R. 550.

41. Cal.—Wulzen v. San Francisco, 35 P. 353, 101 Cal. 15, 25, 40 Am.S. R. 17.

42. U.S.—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F.Supp. 909, 920.

43. Phrases

(1) "Take care of" see 12 C.J.S. p 1146 note 52.

(2) "Take over" means to get control of; to derive.—Louisville Trust Co. v. National Bank of Kentucky, *supra*.

(3) "Take place" as synonymous

with "happen" see 39 C.J.S. p 773 note 24.

(4) Other phrases employing the word "take" and of which more recent adjudications have not been found see 60 C.J. p 1209 note 34—p 1211 note 71.

44. Mass.—Turner v. Town of Gardner, 103 N.E. 54, 55, 216 Mass. 65.

45. U.S.—Warner Bros. Pictures v. Westover, D.C.Cal., 70 F.Supp. 111, 115.

46. U.S.—Warner Bros. Pictures v. Westover, *supra*.

Illustrative use

"So we speak of 'takings' of money, a 'taking' of fish. The 'taking' of a picture is the act of capturing a scene, including its background, on the photographic film, by the aid of the camera, and the accessories attached to it or aiding in the process. The scene and its background composed of drop curtains, painted screens, processed screens, and actors, supply the subject matter which is to be taken. Or, to put it in another way,—the first group is the means, the second the subject of the 'taking' or photographing, just as, in speaking of a 'taking' of fish, we refer to the result of the angling, the catch, and not to the angling itself, net or line, hook and sinker held by

primary conception of "taking" is said to be to seize, capture, lay hold of, or secure;⁴⁷ and in this sense is susceptible of a wider range of meaning not limited to being obtained by force or superior power, as to choose, accept, or assume.⁴⁸

"Taking" has been compared with, or distinguished from, "damage" see 25 C.J.S. p 443 note 12, "damaging" see 25 C.J.S. p 445 note 64, "detaining" see 26 C.J.S. p 1249 note 17, "detention" see 26 C.J.S. p 1256 note 16, and "soliciting" see 81 C.J.S. p 389 note 90.

Phrases employing the word "taking" are set out in the note.⁴⁹

—**Taken.** In its usual signification, "taken" implies a transfer of possession, dominion, or control;⁵⁰ and it may be employed as meaning seized, injured, destroyed, or deprived of,⁵¹ or it may imply an actual physical invasion or appropriation of property.⁵²

"Taken" has been held to be equivalent to, or synonymous with, "deprived" see 26 C.J.S. p 977 note 73, "obtained" see 67 C.J.S. p 71 note 29, and "seized" see 79 C.J.S. p 1024 note 43. "Destroyed" and "taken" have been held to be synonymous, and also have been distinguished see 26 C.J.S. p 1247 notes 35, 37.

—**Particular Applications.** The word "take," and the cognate forms, "taking" and "taken," are treated in various connections throughout this work. In certain criminal offenses a "taking" is an essential or important element, and this is particularly true as to such crimes as abduction, larceny, and robbery; and for specific references to the treatment of the

terms as applied to such offenses see the indexes to the titles Abduction, Larceny, and Robbery.

Various constitutional provisions regulate or prohibit the taking of property, and for references to what constitutes a "taking" of property within the scope of such provisions see the index to the title Constitutional Law.

Eminent domain is, broadly speaking, the right or power to take private property for public use, and for specific references to what constitutes a "taking" of property in the law of eminent domain see the index to the title Eminent Domain.

For other particular applications and specific uses of the words "take," "taking," and "taken" see the indexes to the various titles and consult the Descriptive-Word Index.

TAKENOKO. Bamboo sprouts.⁵³

TAKER. One who takes or acquires.⁵⁴ In some jurisdictions only a "taker" may transport venison, as stated in Game § 13.

TAKE-UP. In looms for weaving cloth, a device for taking up or rolling the completed fabric upon an intermittingly moving roller or cloth beam.⁵⁵

TALC. Not an article of food,⁵⁶ but rather a mineral, and as such defined in Mines and Minerals § 2 b (8).

TALES. A Latin term meaning such; such men.⁵⁷ The term is employed with reference to juries and it is stated, in Juries § 184 a, that where a sufficient number of jurors of the regular panel fail to ap-

the angler."—Warner Bros. Pictures v. Westover, supra.

47. Kan.—Shoen v. Baker, 287 P. 233, 234, 130 Kan. 630. 60 C.J. p 1211 note 95.

48. Kan.—Shoen v. Baker, supra.

49. Phrases

(1) "Taking an order" is in substance the making of an executory contract of sale.—State v. Sherman, 107 P. 33, 35, 81 Kan. 874, 135 Am.S. R. 403.

(2) "Taking of property" compared with, or distinguished from, "injury to property" see 43 C.J.S. p 1118 note 50.

(3) "Taking of property subject to mortgage" distinguished from "assumption of mortgage" see 7 C.J.S. p 137 note 29.

(4) Other phrases employing the word "taking" and of which more recent adjudications have not been found see 60 C.J. p 1212 notes 97-16.

50. Ill.—Kimbell Trust & Savings Bank v. Hartford Accident & Indemnity Co., 164 N.E. 661, 662, 333 Ill. 318. 60 C.J. p 1211 note 73.

Phrases employing the word "taken" and of which more recent adjudications have not been found see 60 C.J. p 1211 notes 77-93.

51. Ariz.—In re Forsstrom, 38 P.2d 878, 885, 44 Ariz. 472.

52. Tex.—Webb v. Dameron, Civ. App., 219 S.W.2d 581, 584.

Taken money

To say that one has "taken" money belonging to another and not ac-

counted for it is to say that he has stolen that money.—Swift & Co. v. Gray, C.C.A.Cal., 101 F.2d 976, 981.

53. U.S.—Nippon Co. v. U. S., 12 Ct. Cust.App. 548, 549. 60 C.J. p 1212 note 17.

54. Black L.D.

Particularly, one who takes an estate by devise.—Black L.D.

Phrases employing the word "taker" and of which more recent adjudications have not been found see 60 C.J. p 1212 notes 20, 21.

55. U.S.—Holmes v. Plainville Mfg. Co., Conn., 9 F. 757, 758, 20 Blatchf. 123.

56. U.S.—U. S. v. R. C. Boeckel & Co., Mass., 221 F. 885, 886.

57. Black L.D.

pear, or the number is reduced by challenges or otherwise so that a full jury cannot be obtained, the court may order a sufficient number to be summoned forthwith from the bystanders or others as the statute may direct, in order to make up the deficiency, and those summoned in this manner are sometimes known as a *tales de circumstantibus*, or more commonly as *talesmen*. Provisions for completing defective grand jury panels from bystanders or by other means are treated in *Grand Juries* § 22.

TALIS. As the first word of maxims of which there have been no recent applications see 60 C.J. p 1212 note 30—p 1213 note 33.

TALK. As a noun, the word "talk" is defined as meaning the act of talking, or that which is said; verbal interchange of ideas; oral or familiar written discourse; conversation; chat; and, more specifically, something said without adequate foundation; report; hearsay; rumor; gossip.⁵⁸

The verb "talk" means to give verbal utterance to; convey in speech; also, to discuss or reason about in spoken language; converse on.⁵⁹

There is a difference between talking "to," and talking "with" a person.⁶⁰ To talk "to" a person is to address words to him, and to talk "with" a person is to speak and listen alternately, to carry on a conversation.⁶¹

"To talk" has been contrasted with "to bargain" see 9 C.J.S. p 1541 note 47, and "talking" has been distinguished from "bargaining" see 9 C.J.S. p 1542 note 55, and the phrase "talking some" has been distinguished from "conversation" see 18 C.J.S. p 41 note 72.

TALLAGIUM or TAILAGIUM. A general word including all subsidies, taxes, tenths, fifteenths, im-

positions, or other burdens put or set upon any man.⁶²

TALLIAGE. Burdens, charges, or impositions, put or set upon persons or property for public uses.⁶³

TALLIES OF LOAN. In England exchequer bills were first called "tallies of loan," as stated in 33 C.J.S. p 110 note 2.

TALLOL. A by-product of the pine pulp out of which the paper is manufactured, and which is applied to paper bags by a waxing machine to render them waterproof.⁶⁴

TALLOW. Animal fat, especially suet; the fat of animals of the ox and sheep kinds extracted from membranous and fibrous matter by melting. It is white and almost tasteless when pure, and is used in soap and candles, and in oleomargarine, etc.⁶⁵ It has been distinguished from "ghee" see 38 C.J.S. p 774 note 50.

TAMBERINE. As a term applied to whisky see *Intoxicating Liquors* § 13.

TAMEN. As the first word of maxims of which there have been no recent applications see 60 C.J. p 1213 notes 44-46.

TAMP. To drive in or down by a succession of light or medium blows; as to tamp earth; to tamp tobacco in a pipe.⁶⁶

TAMPER. It has been said that the definitions of the word "tamper" connote secrecy and scheming or plotting,⁶⁷ and the term means to meddle so as to alter a thing, especially to make corrupting or perverting changes, as to tamper with a document or a text;⁶⁸ to interfere improperly;⁶⁹ to meddle; to

58. New Standard D.

"Talkies" as a species of motion picture see *Theaters and Shows* § 1.

59. New Standard D.

"Talked shop" means talked about business.—*Coveney v. Conlin*, 20 App. D.C. 303, 316.

60. Mo.—*Hill v. Montgomery*, 176 S. W.2d 284, 286, 352 Mo. 147.

"Talked with" as synonymous with "consulted" when used with reference to a verbal transaction between physician and patient see *Physicians and Surgeons* § 1.

61. Mo.—*Hill v. Montgomery*, 176 S. W.2d 284, 286, 287, 352 Mo. 147.

Difference illustrated

"The officer 'speaks' the word of command, but he does not 'talk' it." So, if Brown said to Raab 'Go on,' Raab truthfully did not have any 'talk with' Brown."—*Hill v. Montgomery*, supra.

62. N.J.—*Bernards v. Allen*, 39 A. 716, 718, 61 N.J.Law 228, 232. 60 C.J. p 1213 note 39.

63. Mo.—*State ex rel. Garth v. Switzler*, 45 S.W. 245, 248, 143 Mo. 287, 65 Am.S.R. 653, 40 L.R.A. 280. 60 C.J. p 1213 note 41.

64. Mo.—*Southern Advance Bag & Paper Co. v. Terminal R. Ass'n of St. Louis*, App., 171 S.W.2d 107, 110.

65. U.S.—*Swift & Co. v. U. S.*, 27 C. C.P.A., Customs, 181, 187. See *Customs Duties* § 58.

66. U.S.—*In re Ruzicka*, Cust. & Pat. App., 132 F.2d 146, 149.

67. U.S.—*U. S. v. Polonio*, D.C.Or., 77 F.Supp. 768, 770.

68. U.S.—*U. S. v. Polonio*, supra—*United States v. Tomicich*, D.C.Pa., 41 F.Supp. 33, 35.

69. U.S.—*Corpus Juris* cited in *Bersio v. U. S.*, C.C.A.N.C., 124 F.2d 310, 314—*U. S. v. Polonio*, D.C.Or., 77 F.Supp. 768, 770—*U. S. v.*

busy oneself rashly; to try trifling or foolish experiments.⁷⁰

The word "tamper," and the participle "tampering" are treated in various connections in this work. Tampering with evidence and witnesses as contempt is discussed in Contempt § 31, and tampering with ballots is treated in Elections §§ 217, 274, 290.

Under the provisions of 18 U.S.C.A. § 502 it is an offense to tamper with the motive power of certain vessels with the intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, and the construction which has been placed on the word "tamper" as used in this statute is discussed in Shipping § 12.

TANAMOSHI or **TANIMOSHI**. A sort of association⁷¹ or enterprise,⁷² peculiar to certain Oriental races,⁷³ particularly the Japanese.⁷⁴

TANGIBLE. Capable of being touched; perceptible to the touch; palpable;⁷⁵ tactile;⁷⁶ capable of being possessed or realized; readily apprehensible by the mind; real; substantial; evident.⁷⁷

The direct opposite of "tangible" is "intangible" as stated in 46 C.J.S. p 1100 note 12.

It is stated in Property § 5 that, with relation to its quality, property may be classified as either tangible or intangible, and "tangible property" is defined in that section. What constitutes the situs of tangible property for taxation purposes is treated

in the C.J.S. title Taxation § 115, also 61 C.J. p 223 note 12—p 224 note 24.

TANK. A large basin or cistern;⁷⁸ a receptacle for liquid.⁷⁹

TANKAGE. The residuum obtained in rendering refuse fats, etc., used, when dried, as a fertilizer or as a coarse food;⁸⁰ waste matter from tanks, especially the dried, nitrogenous residue from tanks in which fat has been rendered, used as a fertilizer;⁸¹ fertilizer.⁸²

TANNERY RUN. A term understood in the leather trade through custom and usage as designating sound quality leather of the top three grades.⁸³

TANNIN. A drug used in medicine and the arts.⁸⁴

TANNING. The art of changing a raw skin into leather;⁸⁵ the art or process of converting hides and skins into leather.⁸⁶

TANTAN. As a game of chance see Gaming § 1 b (3).

TANTUM. As the first word of maxims of which there have been no recent applications see 60 C.J. p 1214 notes 78–81.

TAP. In one sense the noun "tap" means a faucet,⁸⁷ and in a different sense it means a gentle or playful blow.⁸⁸

Tomicich, D.C.Pa., 41 F.Supp. 33, 35.
60 C.J. p 1213 note 49.

70. U.S.—U. S. v. Tomicich, *supra*.

71. Hawaii.—Territory v. Masato Nishimitsu, 28 Hawaii 471, 472.

72. Hawaii.—Choi Heylin v. Shin Sung Yil, 30 Hawaii 606, 608.

73. Hawaii.—Choi Heylin v. Shin Sung Yil, *supra*.

74. Hawaii.—Territory v. Masato Nishimitsu, 28 Hawaii 471, 472.

75. Ala.—Curry v. Alabama Power Co., 8 So.2d 521, 526, 243 Ala. 53.
Neb.—Moeller, McPherrin & Judd v. Smith, 255 N.W. 551, 555, 127 Neb. 424.

76. Neb.—Moeller, McPherrin & Judd v. Smith, *supra*.

77. Kan.—Williams v. Board of Com'rs of Osage County, 114 P. 858, 859, 84 Kan. 508, 34 L.R.A., N. S., 1221.

Neb.—Moeller, McPherrin & Judd v. Smith, 255 N.W. 551, 555, 127 Neb. 424.

78. Ky.—Standard Oil Co. v. Commonwealth, 82 S.W. 1020, 1022, 119 Ky. 75, 26 Ky.L. 985.

Phrases

(1) "Tank bottoms" see 11 C.J.S. p 531 note 61.1.

(2) "Tank car" see Railroads § 1 e.

(3) Other phrases of which more recent adjudications have not been found see 60 C.J. p 1214 notes 65–69.

79. Kan.—American Tank Co. v. Revert Oil Co., 196 P. 1111, 1112, 108 Kan. 690.

Similarly expressed

A tank of any kind is an artificial receptacle for liquids, and this definition would also apply to barrels or cans when they are tight enough to hold liquids.—Standard Oil Co. v. Commonwealth, 82 S.W. 1020, 1022, 119 Ky. 75, 26 Ky.L. 985.

80. U.S.—Swift & Co. v. U. S., 24 C. C.P.A., Customs, 420, 422.
60 C.J. p 1214 note 71.

81. U.S.—Swift & Co. v. U. S., *supra*.
60 C.J. p 1214 note 72.

82. N.Y.—Ross v. Genesee Reduction Co., 168 N.Y.S. 51, 52, 180 App.Div. 846.

83. Wis.—Graton & Knight Co. v. Mayville Shoe Corp., 18 N.W.2d 359, 361, 247 Wis. 11.

84. U.S.—W. N. Proctor & Co. v. U. S., C.C.Mass., 139 F. 586, 589.
As identical with "tannic acid" see 1 C.J.S. p 770 note 84.1.

85. U.S.—Tannage Patent Co. v. Donallan, C.C.Mass., 93 F. 811, 817.

86. U.S.—Tannage Patent Co. v. Donallan, *supra*.

87. Me.—Public Works Co. v. City of Old Town, 66 A. 723, 724, 102 Me. 306.

88. New Standard D.

The verb "to tap" is defined as meaning to let out or cause to flow by piercing; to open or break into so as to extract something; to pierce so as to let out, or draw off, a fluid.⁸⁹ It is also defined as meaning to touch or strike gently, as with the end of the finger.⁹⁰

Tapping. The present participle and verbal noun of "tap."⁹¹ The word has a well-defined meaning,⁹² and signifies to furnish a hole with an internal screw thread; screw threading a hole.⁹³

TAPE. A narrow fillet or band; a narrow piece of woven fabric used for strings and the like.⁹⁴ "Tapes" have been distinguished from "braid" see 11 C.J.S. p 764 note 89.

TAPIOCA. The starch grains contained in, and derived from, the root botanically known as *jatropha manihot*.⁹⁵

TARDY. Dilatory; late; not being in season.⁹⁶ School rules as to tardiness are treated in Schools and School Districts § 495 b.

TARE. An allowance for the outside or covering of the article, whether it be box, barrel, bag, bale, mat, etc.⁹⁷

TARGET. A mark fixed, at which aim is taken with a gun or other weapon.⁹⁸

Privilege taxes on dealers selling target rifles are treated in the C.J.S. title Weapons § 2, also 37 C.J. p 224 note 62 [a]. The offense of shooting at a

target within the limits of a municipal corporation is discussed in Weapons § 20, also 68 C.J. p 68 notes 28, 29.

TARIFF. As ordinarily understood, a system of rates and charges;⁹⁹ specifically, a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kinds of merchandise, with the duties or customs to be paid for the same as settled by authority or agreed on between the several princes and states that hold commerce together.¹

The word "tariff" is treated in various connections throughout this work, and for specific references see the indexes to the titles Carriers, Customs Duties and Railroads.

TASTE. As a noun, the word "taste" is defined as meaning the particular sensation excited when a soluble substance is brought into contact with certain parts of the mouth, particularly of the tongue; also, the quality or property that is thus perceived.² "Taste" is further defined as one of the senses which responds to its adequate stimulus with gustatory sensations and which thus gives the perception of the savors and flavors of different things.³

In a somewhat different sense, the word "taste" means style or form with respect to what is appropriate or pleasing, or in accordance with the rules of propriety, etiquette, etc.⁴ Taste, as used in this sense, depends on convention, and sometimes on irrational taboo, and varies with the period, the place, and the training, environment, and characteristics of persons.⁵

89. Vt.—Davidson v. Vaughn, 44 A. 2d 144, 146, 114 Vt. 43.

90. New Standard D.

91. New Standard D.

Phrases

(1) "Tapping hole" see 40 C.J.S. p 409 note 95.

(2) "Tapping test" consists in simply taking a hammer or some metal part and rapping the piece involved and listening for a metallic ring. If the piece is cracked it will be a dull sound and if the piece is solid it will have a "live" sound.—Lowden v. Hanson, C.C.A.Minn., 134 F.2d 348, 352.

92. U.S.—Rosenberg v. Shakeproof Lock Washer Co., D.C.Del., 20 F. Supp. 959, 963.

93. U.S.—Rosenberg v. Shakeproof Lock Washer Co., supra.

"Self-tapping screw" see 79 C.J.S. p 473 note 37.

94. U.S.—U. S. v. Burlington Venetian Blind Co., 3 Ct.Cust.App. 378, 380.

Phrases

(1) "Tape film" see 36 C.J.S. p 760 note 66.

(2) "Tape fuse" see Mines and Minerals § 3 h.

95. U.S.—Chew Hing Lung & Co. v. Wise, Cal., 20 S.Ct. 320, 176 U.S. 156, 44 L.Ed. 412.
60 C.J. p 1215 note 89.

96. Vt.—State v. Burroughs, 145 A. 260, 261, 102 Vt. 33.

97. U.S.—Napier v. Barney, C.C.N.Y., 17 F.Cas.No.10,009.

"Tare weight" of coal cars is the true empty weight of the cars.—

Thompson v. Shields, 4 N.W.2d 1, 4, 141 Neb. 508.

98. Ohio.—Widmer v. State, 142 N.E. 145, 109 Ohio St. 236.

99. U.S.—Pacific SS. Co. v. Cockette, C.C.A.Or., 8 F.2d 259, 261.

Phrases employing the word "tariff" and of which more recent adjudications have not been found see 60 C.J. p 1216 notes 3–9.

1. Tex.—Ft. Worth & D. C. R. Co. v. Cushman, 50 S.W. 1009, 1010, 92 Tex. 623.

2. New Standard D.

3. New Standard D.

4. New Standard D.

5. Mass.—Commonwealth v. Isenstadt, 62 N.E.2d 840, 844, 318 Mass. 543.

TAVERN. The term is defined in Innkeepers § 1 b; and zoning regulations relative to the use of property for tavern purposes are treated in Municipal Corporations § 226 (18).

TAVERN KEEPER. See Innkeepers § 2 a.

TAX. The word "tax," as a noun, is defined in Internal Revenue § 1 as an exaction for the support of government, and is defined in Taxation § 1 in substantially the same terms. The title Internal Revenue deals with taxes imposed by the federal government, such as income taxes, gift taxes, inheritance taxes, taxes on profits, corporations, and on specific articles and transactions, etc. The title Taxation deals with taxes imposed by the state governments and subdivisions thereof, and includes taxes on property, income, gifts, inheritances, and on transfers of corporate stock, and poll taxes, etc.

While the title Taxation deals with taxes imposed by the state governments and subdivisions thereof, taxes imposed by certain subdivisions of the state are treated in appropriate titles in this work. Thus, taxes imposed by counties are treated in Counties §§ 279-285; taxes imposed by drainage districts are discussed in Drains §§ 55-87; taxes imposed by municipalities are treated in Municipal Corporations §§ 1978-2121; and taxes imposed by school districts are discussed in Schools and School Districts §§ 376-413. See also Levees and Flood Control §§ 28-39.

License and excise taxes are treated generally in Licenses §§ 1-78, and, in Licenses § 30 a, reference is made to various titles in this work which treat particular occupations or businesses which are subject to license or excise taxes. Taxes on imports and exports are treated in Customs Duties § 1 et seq.

For other specific references see the indexes to the various titles and consult the Descriptive-Word Index.

The word "tax," as a verb, is defined as meaning to assess, fix, or determine judicially⁶ the amount of;⁷ as, to tax the cost of an action in court.⁸

Phrases employing the word "tax" are set out in the note.⁹

TAXABLE. The word "taxable" is sometimes applied as a noun to persons or to property subject to taxation,¹⁰ and when so used it means something of value.¹¹ It is, however, more frequently employed as an adjective, and as such is defined as meaning subject to taxation;¹² liable to taxation;¹³ subject or liable to taxation;¹⁴ liable to be assessed, along with others, for a share in a tax;¹⁵ subject to assessment, and to be levied upon and sold for taxes.¹⁶

The mere assessment of property has been said not to make it taxable; in order to render property taxable there must be the fundamental right to assess.¹⁷

6. Ind.—*Seiler v. State*, 65 N.E. 922, 927, 160 Ind. 605.
N.C.—*Hewlett v. Nutt*, 79 N.C. 263, 265.

Similarly defined

To assess, adjust, fix, determine; as to tax the items and the amount of the costs in a case.—*Seiler v. State*, 65 N.E. 922, 927, 160 Ind. 605.

7. Ind.—*Seiler v. State*, supra.

8. Ind.—*Seiler v. State*, supra.
N.C.—*Hewlett v. Nutt*, 79 N.C. 263, 265.

"Taxing master" as, at common law, an officer of court by whom costs in an action were taxed see Costs § 274.

9. "Tax avoidance" and "tax evasion"

(1) "Tax avoidance" is not "tax evasion."—*Jewel Tea Co. v. State Tax Com'r*, 293 N.W. 386, 391, 70 N.D. 229. Minimization, avoidance, or evasion of liability for federal taxes see Internal Revenue §§ 77-87.

(2) Tax avoidance by substitute which is really a sham is "tax evasion."—*Blakeslee v. Smith*, D.C.Conn., 26 F.Supp. 28, 34.

Other phrases

(1) "Tax accrual" is a tax which has become due and payable.—Appeal of Norton, 34 A.2d 536, 537, 21 N.J. Misc. 400.

(2) "Tax ferret" is a person engaged in the business of searching for property omitted from taxation.—*Pickett v. United States*, C.C.A.Mo., 100 F.2d 909, 913—61 C.J. p 1747 note 14. Contracts to search for property concealed or omitted from taxation see Municipal Corporations § 2050 and Taxation § 374.

(3) "Tax legislation" see 52 C.J.S. p 1048 note 57.

(4) For additional phrases see the indexes to the various titles throughout this work and consult the Descriptive-Word Index.

10. Miss.—*Mississippi State Tax Commission v. Brown*, 195 So. 465, 469, 188 Miss. 483, 127 A.L.R. 919. 60 C.J. p 1216 note 36.

11. Wyo.—*Williams v. School Dist. No. 32 in County of Fremont*, 102 P.2d 48, 52, 56 Wyo. 1.

12. Miss.—*Mississippi State Tax Commission v. Brown*, 195 So. 465, 469, 188 Miss. 483, 127 A.L.R. 919.

Phrases

(1) "Taxable costs" see Costs § 1 a.

(2) "Taxable dividend" see Internal Revenue § 205.

(3) Other phrases employing the word "taxable" and of which more recent adjudications have not been found see 60 C.J. p 1216 notes 23-35.

13. Wyo.—*Williams v. School Dist. No. 32 in County of Fremont*, 102 P.2d 48, 52, 56 Wyo. 1.

14. Pa.—*In re Taxables*, 35 Pa.Co. 373, 374.

15. Miss.—*Mississippi State Tax Commission v. Brown*, 195 So. 465, 469, 188 Miss. 483, 127 A.L.R. 919.

16. Wyo.—*Williams v. School Dist. No. 32 in County of Fremont*, 102 P.2d 48, 52, 56 Wyo. 1.

17. Wyo.—*Williams v. School Dist. No. 32 in County of Fremont*, supra.

WORDS AND PHRASES

AND

MAXIMS

IN THIS VOLUME

	Page		Page
Stirpes	95	Stowaway	107
Stirps	95	Stowman	108
Stitch	95	Straddle	108
St. John's bread.....	95	Straggler	108
Stob	95	Straight	108
Stock	95	Straight time	108
Stockholder	98	Strain	108
Stock in Trade.....	97	Strait	109
Stockjobber	98	Strand	109
Stockjobbing	99	Stranger	109
Stock-pile	99	Strangle	110
Stockyard	99	Strangulated	110
Stolen	99	Strangulation	110
Stomp	99	Strap	110
Stomping	99	Strapping	110
Stone	99	Stratagem	110
Stonecutter	99	Strategy	111
Stoneyard	99	Straw	111
Stood	99	Stray	111
Stool pigeon	99	Stream	111
Stoop	99	Streamline	115
Stop	99	Street	115
Stope	100	Streetwalking	521
Stopover	100	Strength	521
Stoppage	100	Streptococcus	521
Stopping	100	Streptothricosis	521
Storage	100	Stress	522
Store	100	Stretch	522
Storehouse	104	Stretchers	522
Storekeeper	105	Stria	522
Storer	105	Strict	522
Storeroom	105	Stricti juris	522
Stores	103	Strictly	522
Storm	106	Strife	522
Stormy	106	Strike	523
Story	107	Strikebreaker	546
Stove	107	Strike insurance	546
Stovepipe	107	Striker	546
Stove works	107	String	546
Stowage	107	Stringer	546

WORDS AND PHRASES

	Page		Page
Stringers	546	Subornare	572
Strip	547	Subpartnership	572
Stripper	547	Subpena	572
Strong	547	Subrent	572
Structural	547	Subrogatio	572
Structure	547	Subscribe	727
Strumpet	550	Subscribed	729
Stub	550	Subscriber	729
Stubble	551	Subscribing	728
Stubborn	551	Subscribing witness	728
Student	551	Subscription	730
Stud poker	551	Subsequens	759
Stuff	551	Subsequent	759
Stump	551	Subsequently	760
Stumpage	551	Subservient	760
Stupor	551	Subsidiary	760
St. Vitus' Dance	551	Subsidy	760
Style	551	Subsist	760
Sua cuique domus arx esto	551	Subsistence	760
Sua sponte	551	Substance	761
Sub (Latin)	552	Substantial	762
Sub (Prefix)	552	Substantially	765
Subagent	552	Substantia prior et dignior est accidente.....	765
Sub conditione	552	Substantiate	765
Subcontract	552	Substantiating	765
Subcontractor	552	Substantive	765
Subditis et obedientibus nisi, leges frustra feruntur	552	Substitute	766
Subdivide	552	Substituted	766
Subdivision	552	Substitution	766
Subdural	553	Substitutional gift	767
Subflow	553	Substitutionary legacy	767
Subfreights	553	Subtract	767
Subinfeudation	553	Substructure	767
Subirrigate	553	Subsurface	767
Subirrigation	553	Subtenant	767
Subjacent	553	Subterfuge	767
Subject	554	Subterranean	767
Subjective	557	Suburb	767
Subjective representations	557	Suburban	768
Subjective symptoms	557	Suburbs	768
Subject matter	555	Subversive	768
Subject to	555	Subvert	768
Sublata	557	Subway	768
Sublato	557	Succeed	768
Subleases	557	Succeeding	768
Sublet	557	Success	768
Submerged lands	557	Successful	768
Submission	557	Successfully	769
Submit	571	Succession	769
Sub modo	571	Successive	769
Sub nomine	571	Successively	769
Subordinate	571	Successor	770
Subordination	572	Succinct	770
Suborn	572	Succulent	770
		Succurritur minori facilis est lapsus juventutis	770

WORDS AND PHRASES

	Page		Page
Sucesion legitima	770	Summons	795
Such	771	Summum jus, summa injuria.....	795
Sucker	773	Sump	796
Sucrose	773	Sunday school	883
Suction	773	Sundries	884
Sudden	773	Sundry	883
Suddenly	774	Sunset	884
Sue	774	Sunstroke	884
Sue and be sued.....	775	Super	886
Sue out	775	Superannuated	886
Suerte de caña	775	Supercargo	886
Suertes	775	Superficies	886
Suffer	775	Super fidei chartarum, mortuis testibus, erit ad patriam de necessitate recurrendum...	887
Sufferance	777	Superflua	887
Suffered	777	Superfluous	887
Suffering	777	Superintend	887
Sufficiency	777	Superintendence	887
Sufficient	777	Superintendent	888
Sufficiently	778	Superior	888
Suffix	778	Supernumerary	888
Suffocate	778	Superphosphate	888
Suffocated	779	Superscription	888
Suffocation	779	Supersede	888
Suffrage	779	Superseded	889
Sugar	779	Superseding	889
Suggest	779	Supersession	899
Suggestio falsi	779	Superstitious	899
Suggestion	779	Superstructure	899
Sui	780	Supervene	899
Sui generis	785	Supervise	899
Sui haeredes	785	Supervised	900
Sui juris	785	Supervising	900
Suit	785	Supervision	900
Suitable	786	Supervisor	901
Suitableness	786	Supervisory	901
Suitor	787	Super visum corporis	901
Sulphate	787	Supplant	901
Sulphide	787	Supplement	901
Sulphite	787	Supplemental	902
Sulphonate	787	Supplementary	902
Sulphur	787	Suppletory oath	902
Sulphurets	787	Supplicavit	902
Sulphurous	787	Supplied	905
Sum	787	Supplies	902
Suma	788	Supply	902
Sumere	788	Support	905
Summa	788	Support of persons.....	906
Summarily	788	Suppose	908
Summary	788	Supposed	908
Summary manner	789	Supposition	908
Summer	795	Suppress	909
Summi cujusque bonitas commune perfugium omnibus	795	Suppression	909
Summon	795	Suppressio veri	909
Summonitiones	795	Supra	909

	Page		Page
Supreme	910	Sustrajo	928
Supt.	910	Sutler	928
Supuesto	910	Suum	929
Surcharge	910	S. W.	929
Sure	910	Swab	929
Surety	910	Swage	929
Suretyship	911	Swale	929
Surface	911	Swallow	929
Surgeon	911	Swamp	929
Surgery	911	Swamper	929
Surgical	911	Swap	929
Surname	911	Swatches	929
Surplus	911	Sway	929
Surplusage	916	Swear	929
Surplus water or waters.....	916	Sweat	929
Surprise	916	Sweatshop	930
Surrebutter	917	Sweep	930
Surrejoinder	917	Sweepstake	930
Surrender	917	Sweepstakes	930
Surreptio	919	Sweet	930
Surreptitious	919	Sweetmeat	930
Surreptitiously	919	Sweinmote	930
Surrogate	919	Swell	930
Surrogatum capit naturam rei surrogatæ....	919	Swift	930
Surround	919	Swim	930
Surtax	919	Swimming pool	931
Sur toute la profondeur qui pourra s'y trou- ver	919	Swindle	931
Surveillance	919	Swindled	931
Survey	919	Swindler	931
Surveying	920	Swindling	931
Surveyor	921	Swine	931
Surveyor's transit	921	Swipe	931
Survivability	921	Swiss muslins	931
Survival	921	Switch	931
Survive	921	Swivel	932
Surviving	922	Swords	932
Survivor	922	Sworn	929
Survivors	923	Sycophant	932
Survivorship	923	Syllabi	932
Susceptible	923	Syllabus	932
Suspect	923	Sylva cædua	932
Suspected	924	Symbol	932
Suspend	924	Symbolic	932
Suspended	925	Symbolical	932
Suspending	925	Symmetry	932
Suspense	925	Sympathetic	932
Suspension	926	Sympathizers	932
Suspensive	927	Symphathomimetic amine	932
Suspensory	927	Symphony	932
Suspicion	927	Symposium	932
Suspicious	928	Symptom	932
Sus. person	928	Symptomatology	933
Sustain	928	Synallagmatic contract	933
Sustenance	928	Synchronism	933
		Synchronization	933

WORDS AND PHRASES

	Page		Page
Synchronize	933	Takenoko	940
Syncrotax	933	Taker	940
Syndic	933	Take-up	940
Syndicalism	933	Taking	939
Syndicate	933	Talc	940
Syndicating	934	Tales	940
Syndrome	934	Talis	941
Synod	934	Talk	941
Synonymous	934	Tallagium	941
Synonymous words	934	Talliage	941
Synopsis	934	Tallies of loan	941
Synovitis	934	Tallol	941
Synthesis	935	Tallow	941
Syphilis	935	Tamberine	941
Syrian	935	Tamen	941
Syringe	935	Tamp	941
Syrup	935	Tamper	941
System	935	Tanamoshi	942
Systematic	936	Tangible	942
Systematically	936	Tanimoshi	942
Szechuans	936	Tank	942
T.	936	Tankage	942
Table	936	Tannery run	942
Tableau of distribution	936	Tannin	942
Tablet	936	Tanning	942
Tabular	936	Tantan	942
Tabulate	936	Tantum	942
Tachometer	936	Tap	942
Tachycardia	936	Tape	943
Tacit	936	Tapioca	943
Tacita quædam habentur pro expressis.....	937	Tapping	943
Tack	937	Tardy	943
Tackle	937	Tare	943
Tacky	937	Target	943
Tænia echinococcus	937	Tariff	943
Taffeta	937	Taste	943
Tail	937	Tavern	944
Tailagium	938, 941	Tavern keeper	944
Tailer	938	Tax	944
Taillight	938	Taxable	944
Tailor	938	Termination of strike.....	545
Take	938	Thread of stream	114
Taken	940	Trees or plants.....	97

INDEX TO STIPULATIONS

- Abandonment, § 30
- Abide event of another suit, stipulation to,
 - Amendment of pleadings in test case as ground for setting aside stipulation, § 35, p. 93
 - Conclusiveness on married woman defendant, § 15
 - Construction, operation, and effect, § 19
 - Newly discovered defenses as ground for relief, § 35, p. 93
 - Rescission, § 30
 - Validity, § 10, p. 16
 - Writing required, § 4, p. 5
- Abrogations, § 30
- Abstracts of title, stipulations relating to use as evidence, effect, § 23, p. 53
- Administrative regulations, construction and operation, validity of stipulations relating to, § 10, p. 15
- Admissions,
 - Authenticity of writings, conclusiveness, § 14, p. 36
 - Construction of stipulation to avoid giving it effect of admission, § 11, p. 27
 - Filing or entry in minutes not required where stipulation admitted, § 6
 - Genuineness of signatures to stipulations, failure to deny, § 5
 - Inadvertent admission, withdrawal, § 30
 - Relief from stipulation admitting untruth, § 35, p. 90
 - Stipulations relating to,
 - Construction, operation, and effect, § 24, pp. 56-65
 - Validity, § 10, p. 21
 - Writing not required where stipulation admitted, § 4, p. 6
- Affidavit of defense, stipulation submitting case on, construction and effect, § 21, p. 44
- Affidavits,
 - Making of oral stipulation supported by, effect, § 4, p. 7
 - Proceedings for relief from stipulations, § 36
 - Proof of disputed oral stipulation, § 33
 - Stipulations relating to affidavits as evidence, validity, § 10, p. 19
 - Use of affidavit in lieu of testimony, effect of stipulation for, § 23, p. 55
- Agent,
 - Authority to enter into stipulation, § 9
 - Stipulation by, conclusiveness, § 14, p. 34
- Agreed statement of facts,
 - Admissibility in evidence, § 33
 - Amendment, necessity of seeking prior to decision, § 36
 - Inadvertent omissions, amendment, § 37
 - Insurance policy attached to, effect, § 3, n. 16
- Agreed statement of facts—Continued
 - Request for modification, effect of request in brief, § 36, n. 9
 - Stipulations relating to,
 - Construction, § 25, p. 65
 - Operation and effect, § 25, pp. 67-74
 - Validity, § 10, p. 21
 - Dispensing with pleadings, § 10, p. 18
 - Trust estate not bound by statement signed by beneficiary but not by trustee, § 9, n. 38
 - Withdrawal or repudiation, § 30
- Ambiguity as precluding enforcement of stipulation, § 31
- Amendment of pleadings,
 - Conformity with stipulated facts, § 25, p. 72, n. 44
 - Effect on stipulation relating to issues, § 22, p. 48
 - Effect on stipulation to abide event of another suit, § 19
 - Stipulations relating to,
 - Construction, operation, and effect, § 21, p. 44
 - Evidence of stipulations, § 33
 - Validity, § 10, p. 18
- Amendment of stipulations, power of court, §§ 17, 37
- Another state, law of. Foreign law, generally, post
- Answer,
 - Complete admission of complaint, effect as agreed statement of facts, § 10, p. 22, n. 8
 - Extension of time to answer, construction and effect of stipulation, § 21, p. 45
 - Stipulation extending time, order not required, § 7
- Appeal,
 - Abide event of another cause on appeal, stipulation to, construction and effect, § 19
 - Agreed statement of facts, binding effect on appellate court, § 25, p. 68, n. 7
 - Availability of stipulation not brought to notice of trial court, § 31
 - Binding effect of stipulation relating to certain concession or theory, § 12
 - Correction of stipulations made in lower court, power of reviewing court, § 37
 - Setting aside stipulation, power of appellate court, § 36, n. 10
 - Stipulation as to binding effect of facts set out in previous opinion, law of case, § 17, n. 36
 - Stipulations relating to,
 - Construction, operation, and effect, § 28
 - Dismissal, effect, § 20
 - Writing required, § 4, p. 5
 - Supplemental pleading, first raising questions on appeal, conclusiveness of stipulation on court, § 21, p. 44

INDEX TO STIPULATIONS

Appeal—Continued

- Trial de novo, validity of stipulation as to appeal from municipal board, § 10, p. 24
- Appearance, stipulations relating to, construction and effect, § 26, p. 75
- Appraisal, stipulations relating to, construction and effect, § 26, p. 75
- Arbitration,
 - Damages in equity suit to be ascertained by arbitrators, validity of stipulation, § 10, p. 23
 - Filing or entry in minutes not required as to arbitration agreements, § 6
- Argument of counsel,
 - Dispensed with by stipulation, conclusiveness on court, § 17
 - Majority verdict, stipulation for, validity, § 10, p. 25
 - Motion to withdraw stipulation, failure to file brief or request oral argument, § 36
 - Stipulations relating to, construction and effect, § 26, p. 75
- Assent of,
 - Court, necessity, § 7
 - Parties or their representatives, necessity, § 3
- Assignees, conclusiveness of stipulations, § 14, p. 35
- Assumption of liability, stipulations relating to, construction and effect, § 29
- Attorneys,
 - Collusion, ground for relief from stipulation, § 35, p. 90
 - Right of client for relief from unauthorized stipulation, § 35, p. 93
 - Statements, etc., as proof of stipulation, § 33
 - Stipulation by, conclusiveness, § 14, p. 34
 - Stipulation to dismiss or discontinue action, conclusiveness on client, § 10, p. 17
 - Trial by member of bar in lieu of judge, validity of stipulation for, § 10, p. 24
 - Trial in absence of, validity of stipulation for, § 10, p. 23
 - Withdrawal by client of unauthorized stipulation, § 30
- Attorney's fees, stipulation relating to,
 - Conclusiveness on successor attorney, § 14, p. 36
 - Construction, § 11, p. 27, n. 8
 - Construction, operation, and effect, § 26, p. 75
 - Judgments, construction and effect, § 27, p. 79, n. 34
 - Validity, § 10, p. 26
- Authority to enter into, § 9
- Best evidence rule, effect on evidence admissible on stipulation, § 23, p. 49, n. 77
- Bill of exceptions,
 - Stipulation in lieu of, judge's approval required, § 7, n. 20
 - Stipulations relating to, construction and effect, § 28
- Bill of particulars, stipulations relating to, validity, § 10, p. 18
- Body execution, stipulation for, validity, § 10, p. 25
- Bonds,
 - Appeal bonds, stipulations relating to, construction and effect, § 28
 - Stipulation altering statutory conditions, validity, § 10, p. 26
 - Sureties, stipulations relating to, construction and effect, § 29

Briefs,

- Modification of agreed statement of facts requested in brief, effect, § 36, n. 9
- Motion to withdraw stipulation, failure to file brief or request oral argument, § 36
- Stipulation waiving filing, validity, § 10, p. 26
- Stipulations relating to, construction, operation, and effect, § 28
- Burden of proof,
 - Agreed statement of facts, operation and effect, § 25, p. 68
 - Stipulations relating to, validity, § 10, p. 19
- Capacity to enter into, § 8, n. 33; § 9
- Case stated, agreed statement of facts compared and distinguished from, § 10, p. 21, n. 8
- Certainty, necessity, § 3
- Certiorari,
 - Arguments dispensed with, conclusiveness of stipulation on court, § 17
 - Stipulation as to record before court, conclusiveness on court, § 17, n. 46
- Chambers,
 - Stipulation for trial at chambers, validity, § 10, p. 23
 - Stipulations relating to determination of questions at chambers, construction and effect, § 26, p. 75
- Change of conditions, relief from stipulation, § 35, p. 92
- Clerical errors and omissions, construction of stipulations, § 11, p. 29
- Collusion, ground for relief, § 35, p. 90
- Complaint, insufficiency, objection not waived by stipulation as to issues, § 22, p. 48
- Compromise and settlement, conclusiveness of stipulation for, § 13
- Conclusions of law,
 - Agreed statement of facts, effect, § 25, p. 74
 - Conclusiveness in stipulations, § 24, p. 60
 - Stipulations relating to, validity, § 10, p. 15
- Conclusiveness, §§ 6, 13; §§ 13-29, pp. 31-83
 - Agreed statement of facts, § 25, p. 67
 - Presumption of, § 33
 - Stipulations admitting designated facts, § 24, p. 58
 - Stipulations relating to evidence, § 23, p. 51
- Confession,
 - Judgment, stipulation to hold in escrow, validity, § 10, p. 25
 - Stipulation as to absence of coercion, effect, § 23, p. 50
 - Stipulation that confession was voluntary not deemed stipulation as to truth, § 24, p. 62, n. 49
- Conflict of laws, stipulation as to law governing contract, validity, § 10, p. 15, n. 89
- Consent decree, stipulation not regarded as, § 1
- Consent verdict, stipulation for,
 - Conclusiveness on married woman as party litigant, § 15
 - Validity, § 10, p. 24
- Consideration, necessity and sufficiency, § 8
- Consolidation of actions, submission of issues in consolidated action, effect of stipulation, § 21, p. 44

INDEX TO STIPULATIONS

- Consolidation of causes,
 - Stipulations relating to, construction, operation, and effect, § 26, p. 75
 - Validity of stipulation for, § 10, p. 24
- Constitutional provisions, stipulations relating to, validity, § 10, pp. 14, 15
- Construction,
 - Contracts, validity of stipulations relating to, § 10, p. 15
 - General rules of constructions, § 11, pp. 26-30
 - Wells, validity of stipulations relating to, § 10, p. 15
- Continuance, stipulations relating to,
 - Approval of court, necessity, § 7
 - Construction, operation, and effect, § 26, p. 75
 - Writing required, § 4, p. 5
- Contracts,
 - Compared with and distinguished from, § 1
 - Execution, stipulations relating to, construction and effect, § 29
 - Grounds for setting aside of contracts, applicability, § 35, p. 90
 - Stipulations relating to construction or legal effect, validity, § 10, p. 15
- Contradiction, right of party to contradict stipulation, § 13
- Copies,
 - Admissibility of copies as evidence, validity of stipulations relating to, § 10, p. 19
 - Stipulations relating to copies as evidence, construction and effect, § 23, p. 52
- Corporations, stipulation as to control by one person, conclusiveness, § 13, n. 77
- Costs,
 - Stipulations relating to,
 - Conclusiveness, § 16
 - Fund from which payable, construction and effect, § 27, p. 80
 - Tender prior to trial, construction and effect, § 29
 - Validity, § 10, p. 26
 - Time of making of order requiring security, § 10, p. 24
 - Writing required, § 4, p. 5
- Counterclaim,
 - Effect to abide event of another suit, § 19, n. 64
 - Withdrawal pursuant to stipulations, effect, § 20, n. 86
- County attorney,
 - Agreement with accused, conclusiveness, § 16
 - Authority to bind state by stipulations, § 9
- Court,
 - Amendment of stipulation, power of court, § 37
 - Assent to stipulation, necessity, § 7
 - Conclusiveness on court, § 17
 - Agreed statement of facts, § 25, p. 68
 - Stipulations admitting designated facts, § 24, p. 57
 - Stipulations relating to evidence, § 23, p. 51
 - Control of stipulations and power to grant relief from, § 34
 - Entry of stipulations in minutes, § 6
 - Favored by, § 2
 - Signing not required as to stipulations, § 5
 - Supervision by, §§ 1, 7
 - Writing not required as to stipulations in open court, § 4, p. 6
- Covenant not to sue, stipulation relating to, binding effect, § 14, p. 36
- Criminal prosecutions,
 - Burden of proof, effect of agreed statement of facts, § 25, p. 68, n. 5
 - Conclusiveness of stipulation as to fact, § 24, p. 60, n. 22
 - Conclusiveness of stipulations in, § 13; § 14, p. 35
 - County attorney, generally, ante
 - Stipulation that testimony in behalf of one accused should inure to benefit of other, effect, § 23, p. 51
 - Trial on transcript of preliminary hearing, effect of stipulation for, § 23, p. 52
- Cross-examination, successor-counsel's lack of opportunity for, effect on admissibility of depositions, § 23, p. 54
- Damages,
 - Appellate review of question of, construction and effect of stipulations, § 28, n. 61
 - Stipulations relating to,
 - Agreement that only issue was amount of damages, effect, § 22, p. 49, n. 76
 - Amount of recovery, construction and effect, § 26, p. 78; § 27, p. 79
 - Validity, § 10, p. 25
 - Dissolution of injunction, § 10, p. 26
- Date, indicating by numbers, disapproval of practice, § 3, n. 17
- Decree, stipulation not regarded as, § 1
- Default judgment,
 - Entry in violation of stipulation, effect, § 17, n. 45
 - Stipulation for entry of, construction and effect, § 26, p. 75; § 27, p. 80
- Definition, § 1
- Demurrer, stipulation extending time to plead, as giving no right to demur, § 21, p. 45
- Deposit in court, stipulations relating to disposition, construction and effect, § 29
- Depositions,
 - Stipulations relating to,
 - Construction, operation, and effect, § 23, p. 53
 - Validity, § 10, p. 20
 - Subsequent trial or action, use of depositions, effect of stipulations, § 23, p. 56
- Disability, conclusiveness of stipulations on persons under disability, § 15
- Discontinuance, stipulations relating to,
 - Construction, operation, and effect, § 20
 - Validity, § 10, p. 17
- Dismissal,
 - Appeal, construction and effect, § 28
 - Stipulations relating to,
 - Construction, operation, and effect, § 20
 - Validity, § 10, p. 17
 - Writing required, § 4, p. 5
 - Warrant of prosecution, effect of stipulation to set case for trial at indefinite time in future, § 10, p. 24
- Documents, stipulations relating to,
 - Construction and effect, § 23, pp. 51-53
 - Use as evidence, validity, § 10, p. 19
 - Dispensing with formal introduction, § 10, p. 21

INDEX TO STIPULATIONS

- "Duly recorded," construction of phrase, § 11, p. 30, n. 52
- Duress, ground for relief, § 35, p. 90
- Enforcement, § 31
- Entry of minutes of court, § 6
- Equitable relief, power of court to award contrary to stipulation, § 17
- Equitable remedy, enforcement of stipulations, § 31
- Equities weighed before vacating stipulation, § 34, n. 53
- Equity case,
 - Stipulation for trial by court as, construction and effect, § 26, p. 77
 - Stipulations relating to trial, validity, § 10, p. 23
- Errors, stipulation authorizing court to determine, conclusiveness, § 13, n. 64
- Escrow, return of deposit, stipulations relating to, construction and effect, § 29
- Evidence,
 - Admissibility, effect of stipulations relating to issues, § 22, p. 48
 - Admissibility of stipulations, § 33
 - Agreed statement of facts, admissibility of other evidence, § 25, p. 70
 - Effect of stipulation as evidence, § 12
 - Mistake, sufficiency of evidence to justify relief from stipulation, § 35, p. 91
 - Order of proof, stipulations relating to, construction and effect, § 26, p. 76
 - Proof of stipulations, § 33
 - Stipulation for reading of testimony on former trial, filing not required, § 6
 - Stipulations relating to,
 - Admission, effect, § 24, p. 63
 - Construction, operation and effect, § 23, pp. 49-56
 - Evidence admissible under pleadings, construction and effect, § 21, p. 44
 - Validity, § 10, pp. 15, 19
 - Admissibility of evidence without regard to pleadings, § 10, p. 18
 - Order of proof, § 10, p. 23
 - Writing required, § 4, p. 5
- Executed stipulations,
 - Filing or entry in minutes not required, § 6
 - Signing dispensed with, § 5
 - Writing dispensed with, § 4, p. 7
- Executions, stipulations relating to,
 - Construction, operation, and effect, § 27, p. 79
 - Validity, § 10, p. 25
 - Writing required, § 4, p. 5
- Executors and administrators,
 - Appointment, stipulations relating to, construction and effect, § 29
 - Conclusiveness on heirs of stipulation by administrator, § 14, p. 35
 - Determination of propriety of allowance of claims, stipulation affecting jurisdiction of court, validity, § 10, p. 13, n. 66
 - Expenses of administration, stipulations relating to, validity, § 10, p. 26
 - Foreign court, stipulation for appointment by, validity, § 10, p. 26
 - Successor administrator made party defendant, effect of stipulation, § 21, p. 43, n. 98
- Exhibits,
 - Agreed statement of facts, incorporation by reference, § 10, p. 23
 - Stipulations relating to, effect, § 23, p. 50
- Expenses, stipulations relating to allowance of personal expenses, construction and effect, § 29
- Expert witnesses,
 - Qualification, effect of stipulation, § 24, p. 62, n. 51
 - Stipulations relating to, construction and effect, § 23, p. 50
- Expressio unius doctrine,
 - Applicability, stipulations relating to evidence, § 23, p. 50
 - Application, § 11, p. 28
- Extension of time. Time, post
- Extradition proceedings, validity of stipulations in, § 10, p. 13, n. 57
- Federal court, concessions in companion case in state court, binding effect, § 12, n. 60
- Federal government,
 - Binding effect of stipulation, § 14, p. 35
 - Representatives of, authority to bind government, § 9
- Filing, necessity, § 6
- Findings of fact,
 - Falsity of stipulated fact, right of court to find, § 17, n. 46
 - Issues not determined by stipulation, power of court to adopt findings, § 17
 - Power of court to make findings contrary to stipulation, § 17
 - Setting aside stipulation, findings dispensed with, § 36
 - Stipulated admissions as precluding contrary finding, § 24, p. 59
 - Stipulated facts as precluding contrary finding, § 24, p. 64
 - Stipulation dispensing with, validity, § 10, p. 25
 - Stipulations relating to, construction, operation, and effect, § 26, p. 75
- Foreclosure sale, validity of oral agreement for payment out of proceeds, § 4, p. 5
- Foreign law,
 - Admissibility in evidence, validity of stipulations relating to, § 10, p. 19
 - Instructions, stipulations relating to, construction and effect, § 26, p. 77
 - Stipulation for judicial notice, effect, § 23, p. 50
 - Stipulations relating to,
 - Conclusiveness, § 13
 - Mistake as ground for relief, § 35, p. 91, n. 81
 - Validity, § 10, p. 15
- Forgeries, proof that documents are forgeries, effect of stipulation as to use of copies as evidence, § 23, p. 52
- Form, §§ 3-8, pp. 3-11
- Form of action, agreed statement of facts as precluding objections to, § 25, p. 72
- Former trial. Subsequent trial or action, generally, post
- Fraud,
 - Amendment of complaint to set up action for, effect of stipulation, § 21, p. 44
 - Statute of, validity of oral stipulation effecting division of property, § 4, p. 6, n. 56
 - Stipulation obtained by,
 - Ground for relief, § 35, p. 90
 - Repudiation, § 30

INDEX TO STIPULATIONS

- Future conditions, construction of stipulation as applying to, § 11, p. 29
- General denial,
 - Stipulation as to evidence admissible, effect, § 21, p. 43
 - Stipulation changing evidence admissible, validity, § 10, p. 19
- Guardian,
 - Conclusiveness on ward of stipulation by, § 15
 - Stipulation for dismissal of minor's claim, validity, § 10, p. 17
- Hearsay, depositions, right to object, effect of stipulation, § 23, p. 54, n. 52
- Heirs, conclusiveness on heirs of stipulation by administrator, § 14, p. 35
- Hospital records, stipulations relating to records as evidence, construction and effect, § 23, p. 52
- Husband and wife,
 - Conclusiveness of stipulations on married women, § 15
 - Stipulation making husband's testimony equivalent to wife's, § 10, p. 20, n. 95
- Illegitimate child, stipulation affecting unborn child, validity, § 10, p. 13, n. 58
- Impleader, stipulation by original parties, § 3, n. 18
- Implied terms and qualifications, § 11, p. 30
- Improvement, stipulation as to nature of improvement intended, effect, § 13, n. 72
- Improvvidence, relief from stipulation, § 35, pp. 90, 92
- Inadvertence,
 - Amendment of stipulation, court may permit, § 37
 - Relief from stipulation, § 35, p. 92
 - Withdrawal or repudiation of stipulation, § 30
- Inferences from agreed statement of facts, § 25, p. 73
- Injunctions,
 - Enforcement of stipulations by, § 31
 - Stipulations relating to,
 - Conclusiveness on court, § 17, n. 48
 - Prior proceedings made part of record, effect of stipulation, § 23, p. 52
 - Validity, § 10, p. 26
 - Admissions by stipulation, effect as to instructions, § 24, p. 65
 - Stipulations relating to,
 - Construction, operation and effect, § 26, p. 77
 - Validity, § 10, p. 24
- Insurance,
 - Liability stipulated by insurer, effect as regards amount of damages, § 24, p. 61, n. 48
 - Stipulation limiting insurer's liability, conclusiveness, § 13, n. 64
- Insurance policy attached to agreed statement of facts, effect, § 3, n. 16
- Intent of parties,
 - Admissibility of evidence of, § 33
 - Construction of stipulation,
 - Extending time to plead, § 21, p. 46
 - Relating to admissions, § 24, p. 57
 - Relating to agreed statement of facts, § 25, p. 66
 - Construction to give effect to, § 11, p. 27
 - Gathering from entire instrument, § 11, p. 30
 - Grammatical construction not permitted to override, § 11, p. 29
 - Stipulations relating to evidence, § 23, p. 50
- Interest,
 - Allowance on affirmance of judgment, stipulation for, construction and effect, § 28, n. 53
- Interest—Continued
 - Stipulation for adding to verdict, validity, § 10, p. 25
 - Stipulation for determination of interest on verdict, construction and effect, § 26, p. 77, n. 26
 - Stipulations relating to allowance of, construction and effect, § 27, p. 79, n. 37
- Interrogatories,
 - Order requiring answer, holding in abeyance, validity of stipulations, § 10, p. 24
 - Submission of case to jury on special interrogatories, stipulations relating to, construction and effect, § 26, p. 76
- Intervenors, conclusiveness of stipulations by original parties, § 14, p. 36
- Issues,
 - Agreed statement of facts, effect as to issuance, § 25, p. 68, n. 9
 - Construction of stipulation with reference to, § 11, p. 29
 - Stipulations relating to,
 - Construction, operation, and effect, § 22, pp. 46-49
 - Validity, § 10, p. 18
- Joinder of parties, stipulation waiving irregularity, validity, § 10, p. 17
- Judgments,
 - Abide event of another suit, generally, ante
 - Agreed statement of facts, proper judgment as only question to be determined, § 25, p. 69
 - Default judgment, entry in violation of stipulation, effect, § 17, n. 45
 - Final judgment, meaning in stipulation to abide event of another suit, § 19
 - Interpretation, agreement of counsel, conclusiveness on appellate court, § 28
 - Rendition of judgment not authorized by stipulation, power of court, § 17
 - Stipulations relating to,
 - Approval of court, necessity, § 7
 - Construction, operation, and effect, § 27, pp. 78-81
 - Modification of judgment appealed from, construction and effect, § 28
 - Proof by exemplified copy dispensed with, effect of stipulation, § 23, p. 50
 - Validity, § 10, p. 25
 - Broader relief than warranted by pleadings, § 10, p. 18
 - Writing required, § 4, p. 5
- Judicial notice,
 - Estate proceedings, power of appellate court, § 17
 - Stipulations relating to,
 - Effect, § 23, p. 50
 - Validity, § 10, p. 19
- Jurisdiction,
 - Admission of fact during trial as affecting jurisdiction previously attached under pleadings, § 24, p. 60
 - Enforcement of stipulations, § 31
 - Stipulations relating to,
 - Conclusiveness on court, § 17
 - Validity, § 10, p. 13
 - Agreed statement of facts attempting to confer jurisdiction, § 10, p. 22
- Jury,
 - Agreed statement of facts as precluding issue for jury, § 25, p. 70

INDEX TO STIPULATIONS

Jury—Continued

- Stipulation for reading of juror's affidavit as to proceedings in jury room, effect, § 23, p. 53
- Stipulations for trial by court or for trial of certain issues by jury, validity, § 10, p. 23
- Stipulations relating to, construction, operation, and effect, § 26, p. 75
- Jury trial, waiver, effect of stipulation to abide event of another suit, § 19
- Laches, application to set aside stipulation, § 36
- Law of another state. Foreign law, generally, ante
- Law of case, stipulation as to binding effect of facts set out in previous opinion, § 17, n. 36
- Layman's stipulation without counsel, construction, § 11, p. 28, n. 18
- Letters,
 - Series of letters as constituting stipulation, § 3, n. 16
 - Stipulations relating to letters as evidence, construction and effect, § 23, p. 51
- Liberal construction, § 11, p. 23
 - Stipulations relating to,
 - Admissions, § 24, p. 57
 - Evidence, § 23, p. 50
- Life sentence, stipulation as to time of commencement, conclusiveness on court, § 17, n. 57
- Limitation of actions,
 - Bar of claim of limitations, effect of stipulations, § 22, p. 46, n. 48
 - Stipulation filed after limitations had run, effect, § 11, p. 27, n. 6
- Map, stipulation as to facts disclosed by, effect, § 21, p. 43, n. 98
- Married women. Husband and wife, generally, ante
- Master, stipulations before, writing not required, § 4, p. 6
- Medical report, etc., effect as stipulated evidence of disability, § 3, n. 16
- Mental incompetents,
 - Conclusiveness of stipulations, § 15
 - Relief from stipulation, § 35, p. 92
- Minors,
 - Agreed statement of facts, propriety in suits involving rights of minors, § 10, p. 22, n. 10
 - Stipulation of guardian, etc., for dismissal of minor's claim, validity, § 10, p. 17
 - Stipulations involving rights of, conclusiveness, § 15
- Misconduct of counsel, stipulations relating to, construction and effect, § 26, p. 76
- Misrepresentation, ground for relief, § 35, p. 91
- Mistake,
 - Relief from stipulation, § 35, p. 91
 - Withdrawal or repudiation of stipulation, § 30
- Modification, power of court, §§ 17, 37
 - On motion, § 7
- Mortality table, stipulation as to particular table, conclusiveness on court, § 17, n. 46
- Motions,
 - Relief from stipulations, § 36
 - Summary enforcement of stipulations, § 31
- Municipality,
 - Notice of injury, stipulation relating to, binding effect at second trial, § 12, n. 59
 - Presentation of claim against, validity of stipulation relating to, § 10, p. 26
- Mutuality dispensed with, § 8

- National labor relations board, effect of stipulation concerning interstate activities, § 12, n. 59
- New trial,
 - Denial of, effect of stipulation as to notice to counsel, § 27, p. 80
 - Late filing of motion for, validity of stipulation, § 10, p. 26
 - Stipulations relating to, writing required, § 4, p. 5
- Next friend, conclusiveness of stipulation affecting minor's rights, § 15
- Nominal party, validity of stipulation by, § 9
- Non-parties, effect of stipulation by, § 9
- Notice, stipulations relating to, construction and effect, § 27, p. 80; § 29
- Nunc pro tunc entry of stipulation, § 6
- Objections,
 - Agreed statement of facts reserving right of objection, effect, § 25, p. 70
 - Depositions, effect of stipulations reserving or waiving objections, § 23, pp. 53, 54
 - Stipulation obviating necessity, validity, § 10, p. 24
 - Stipulation that objections, etc., on behalf of one accused shall inure to benefit of other accused, conclusiveness, § 13
 - Stipulations relating to objections to evidence, construction, operation, and effect, § 26, p. 75
- Operation and effect, §§ 6, 12
 - Persons in whose favor operative, § 16
- Option, exercise of, stipulations relating to, construction and effect, § 29
- Oral stipulation,
 - Admissibility in evidence, § 33
 - Record, making part of, necessity, § 6
 - Validity, § 4, pp. 4-7
- Ordinances,
 - Invalidity may not be stipulated, § 10, p. 15, n. 80
 - Waiver of production and preliminary proof, effect, § 24, p. 63, n. 54
- Parol evidence, admissibility to explain stipulation, § 33
- Partial invalidity, effect, § 3
- Parties,
 - Actions to enforce stipulations, § 31
 - Stipulations relating to,
 - Construction, operation, and effect, § 29
 - Persons against whom judgment to be rendered, construction and effect, § 27, p. 80
 - Validity, § 10, p. 17
 - Waiver of objections as to parties, § 10, p. 18
- Patents, stipulation withdrawing specified claim, necessity of court's approval, § 7, n. 22
- Payment, stipulations relating to, construction and effect, § 29
- Permits, construction and operation, validity of stipulations relating to, § 10, p. 15
- Persons concluded, §§ 14, 15, pp. 33-37
- Petition, stipulation as to sufficiency, validity, § 10, p. 15
- Physician, qualification as expert, effect of stipulation, § 24, p. 62, n. 51
- Physician's report, stipulation relating to report as evidence, construction and effect, § 23, p. 51
- Pleadings,
 - Admission of facts, judgment as legal conclusion, § 24, pp. 59, 60
 - Admissions by or as affecting pleadings, § 24, p. 64
 - Agreed statement of facts, effect, § 25, p. 71

INDEX TO STIPULATIONS

Pleadings—Continued

- Amendment, ante
 - Construction of stipulation in light of, § 11, p. 29
 - Failure to deny allegations, stipulations as equivalent to, § 24, p. 65
 - Inconsistency between stipulation and subsequent pleading, effect, § 6
 - Instructions, stipulation making pleadings part of, construction and effect, § 26, p. 77
 - Necessity of pleading stipulation relied on, § 32
 - Stipulation as having effect of pleading, § 6
 - Stipulations relating to,
 - Construction, operation, and effect, § 21, pp. 43-46
 - Validity, § 10, p. 18
 - Writing required, § 4, p. 5
 - Submission of case on pleadings alone, stipulations relating to, construction and effect, § 26, p. 76
 - Waiver of questions of pleading, effect of stipulation as to issues, § 22, p. 48
- ### Practical construction,
- Effect, § 11, p. 29
 - Stipulations relating to evidence, effect, § 23, p. 50
- ### Presumption of validity and binding effect, § 33
- ### Pre-trial examination, stipulations relating to, construction and effect, § 26, p. 75
- Conclusiveness on court, § 17
 - Construction and effect, § 29, n. 66
 - Validity, § 10, p. 12
- ### Proceeding in rem, validity of stipulation by some of parties, § 9
- ### Proceedings for relief from stipulations, § 36
- Construction, operation and effect, § 26, p. 76
 - Effect of stipulation as equivalent as to personal service, § 21, p. 43, n. 98
 - Validity, § 10, p. 16
 - Writing required, § 4, p. 5
- ### Public interest, stipulations involving matters of, validity, § 10, p. 13
- ### Public officers, stipulations as to power of, validity, § 10, p. 15
- ### Public policy, stipulations contrary to, invalidity, § 10, p. 12
- Evidence, stipulations relating to, § 10, p. 20
- ### Questions of law,
- Construction of stipulation as question for court, § 11, p. 27, n. 3
 - Stipulations relating to,
 - Conclusiveness, § 13
 - Conclusiveness on court, § 17
 - Construction, operation, and effect, § 26, p. 76
 - Validity, § 10, p. 14
- ### Railroads, delays in shipment, inferences from agreed statement of facts, § 25, p. 73, n. 63
- ### Real property, division effected by stipulation, sufficiency of description, § 3, n. 17
- ### Receivers, powers of, stipulations relating to, construction and effect, § 29
- ### Recitals, construction, § 11, p. 28
- ### Record,
- Agreed statement of facts including record in former suit, construction, § 25, p. 66
 - Certiorari, stipulation as to record before court, conclusiveness on court, § 17, n. 46
 - Constructive notice, validity of stipulations relating to, § 10, p. 15
 - Making stipulation part of, necessity, § 6

Record—Continued

- Stipulation as to record of court, conclusiveness on trial court, § 10, p. 26
 - Stipulation relating to,
 - Proceedings challenging initiative petition, construction of term "Record", § 11, p. 28, n. 21
 - Records as evidence, construction and effect, § 23, p. 52
- ### Record on appeal,
- Filing stipulations with, necessity, § 6
 - Stipulation as to contents, necessity of approval by court, § 7
 - Stipulations relating to, construction and effect, § 28
 - Unsigned stipulation contained in, effect, § 5
- ### Reference,
- Conclusiveness on referees of stipulations in cause, § 17
 - Proceedings for relief from stipulations, § 36
 - Stipulation for, binding effect at second trial, § 12, n. 59
 - Stipulations relating to,
 - Construction, operation and effect, § 26, p. 76
 - Writing required, § 4, p. 5
- ### Reinstatement, stipulations relating to, construction, operation, and effect, § 20
- ### Release, stipulations relating to, construction and effect, § 29
- ### Relief from stipulations, §§ 34-37, pp. 88-95
- ### Rent, stipulations relating to, construction and effect, § 29
- ### Reports,
- Investigator's report, stipulations relating to, construction and effect, § 29
 - Stipulations relating to reports as evidence, construction and effect, § 23, p. 51
- ### Repudiation, § 30
- ### Requisites, §§ 3-8, pp. 3-11
- ### Rescission, § 30
- ### Retroactive operation, § 13
- ### Review. Appeal, generally, ante
- ### Revival, stipulations relating to, construction, operation, and effect, § 20.
- ### Rules of law, stipulations relating to, validity, § 10, p. 14
- ### Sale of property in litigation, stipulations relating to, construction and effect, § 29
- ### Service of process, stipulations relating to, validity, § 10, p. 17
- ### Setting aside, §§ 34-37, pp. 88-95
- ### Setting aside order, stipulation relating to, validity, § 10, p. 26
- ### Settlement out of court, oral agreement permitted, § 4, p. 5
- ### Several instruments, construction as whole, § 11, p. 30
- Stipulations as to admissions, § 24, p. 57
- ### Signatures, necessity and sufficiency, § 5
- ### Silence deemed assent, § 3
- ### Specific performance of stipulations, § 31
- ### State, representatives of, authority to bind state, § 9
- ### Statutes, stipulations relating to, - Conclusiveness on court, § 17 - Validity, § 10, pp. 14, 15
- ### Stay of execution, validity of stipulations for, § 10, p. 25
- ### Stenographic record, stipulation in open court, necessity, § 4, p. 6, n. 56

INDEX TO STIPULATIONS

- Striking out,
 - Part of stipulation, § 37
 - Power of court on own motion, § 17
- Subject matter, § 10, pp. 12-26
 - Construction of stipulation with reference to, § 11, p. 29
- Subsequent action or trial, effect of previous stipulation, § 12
- Subsequent trial or action,
 - Admissibility of evidence, effect of stipulation relating to, § 23, p. 51.
 - Admission of facts by stipulation, effect, § 24, p. 60
 - Agreed statement of facts,
 - Availability, § 25, p. 71
 - Withdrawal or repudiation, § 30
 - Depositions, stipulations as to use, construction and effect, § 23, p. 56.
 - Judgment to be entered in one case on basis of verdict or judgment in another, construction and effect of stipulations, § 27, p. 79, n. 34
 - Stipulation as to issues, effect, § 22, p. 48.
 - Testimony of witnesses at former trial, stipulations relating to, construction and effect, § 23, p. 55.
- Summary,
 - Enforcement of stipulations, § 31
 - Judgment, agreed statement of facts, consideration on motions by both parties, § 25, p. 71
 - Proceedings to set aside stipulation, § 36
- Suspicion, stipulations viewed with, § 2
- Tax, stipulation as to non-liability, conclusiveness, § 14, p. 35, n. 7
- Technical terms, construction, § 11, p. 28
 - Stipulations relating to admissions, § 24, p. 57
- Time,
 - Amendment of pleadings, effect of stipulation, § 21, p. 45
 - Answer, stipulation extending time for, order not required, § 7
 - Application to set aside stipulation, § 36
 - Entry or rendition of judgment, stipulation relating to, construction and effect, § 27, p. 80
 - Extension of time,
 - For taking evidence, validity of stipulations, § 10, p. 19
 - To answer, validity of stipulations relating to, § 10, p. 18
 - To move to reinstate injunction, validity of stipulation for, § 10, p. 26
 - To plead, stipulations for, construction and effect, § 21, p. 45
 - To render judgment, validity of stipulation for, § 10, p. 25
 - Filing or entering in minutes of court, § 6
 - Stipulations relating to, construction, operation, and effect, § 26, p. 76
 - Trial, stipulation as to time of, validity, § 10, p. 23
- Title, stipulation as to title of record, effect, § 24, p. 62, n. 51
- Transfer of cause, stipulations relating to, construction and effect, § 26, p. 77
- Trial, stipulations relating to,
 - Conclusiveness on court, § 17
 - Construction, operation, and effect, § 26, pp. 74-78
- Trial, stipulations relating to—Continued
 - Validity, § 10, p. 23
 - Writing required, § 4, p. 5
- Trust fund, representatives of owners of fund, authority to stipulate as to payment of expenses of litigation, § 9
- Trusts,
 - Compensation of trustee, construction and effect of stipulation, § 26, p. 76, n. 95
 - Statement of facts signed by beneficiary but not by trustee, effect, § 9, n. 38
 - Testamentary trust fund, stipulations relating to, construction and effect, § 29
- Undue influence, ground for relief, § 35, p. 90
- United States, representatives of, authority to bind government, § 9
- "Until",
 - Construction of word, § 11, p. 28, n. 19
 - Meaning in stipulation extending time to plead, § 21, p. 46
- Vacation,
 - Stipulation for trial in vacation, validity, § 10, p. 23
 - Stipulation permitting rendition and entry of judgment in vacation, construction and effect, § 27, p. 80
 - Stipulations relating to determination of questions in vacation, construction and effect, § 26, p. 75
- Validity, §§ 3-8, pp. 3-11
 - Presumption of, § 33
- Variance, stipulations eliminating claim of variance, construction and effect, § 21, p. 44
 - Admission of allegations for purpose of determining venue, § 22, p. 47
- Jury trial of venue question, construction and effect of stipulation, § 26, p. 76, n. 94
- Verdict, stipulations relating to,
 - Construction, operation, and effect, § 26, p. 77
 - Validity, § 10, p. 24
- View of premises, stipulations relating to, construction and effect, § 26, p. 77
- Waiver, § 30
 - Construction of stipulation to avoid waiver not plainly intended, § 11, p. 27
- Wills,
 - Construction,
 - Stipulation relating to, effect at second trial, § 12, n. 59
 - Validity of stipulations relating to, § 10, p. 15
 - Contest, effect of stipulation to abide event of another suit, § 19, n. 71
 - Validity of stipulation by propounder and caveator, § 9, n. 49
- Wire recorder, trial proceedings taken on effect of stipulation as to transcript, § 28, n. 60
- Withdrawal, § 30
 - Testimony, construction and effect, § 23, pp. 54-56
- Witnesses, stipulations relating to,
 - Validity, § 10, p. 19
 - Absent witnesses' testimony, § 10, p. 20
- Workmen's compensation,
 - Admission of injury not deemed admission of liability, § 24, p. 62, n. 49
 - Stipulation as to number of employees, conclusiveness on court, § 17, n. 44
- Writing, necessity, § 4, pp. 4-7

INDEX TO STREET RAILROADS

- Abandonment,**
 Duties on ceasing operation, § 183
 Franchise, post
 Municipally owned system, § 181
 Power to permit, § 181
 Presumption, § 181
 Right of company, § 177
 Right of way over private property, reversion, § 99, p. 214
- Abutting owners,**
 See, also, Private property, generally, post
 Burden of proof, post
 Change of motive power, consent, § 142
 Consent to use of streets, §§ 53-70, pp. 172-182
 Change of route, § 77
 Defense to injunction suit by abutting owners, § 101, p. 217
 Purchase of consent, validity, § 65
 Refusal as excuse for nonperformance of franchise, § 92, p. 209
 Switches, turnouts, and sidings, § 79
 Use by one company of another's tracks, § 129
 Discontinuance of line,
 Injunction, § 179
 Right of company, § 181
 Injunction suits, § 101, pp. 216-219
 Noise, recovery of damages, § 189
 Paving of streets, municipality's failure to enforce duty of street railroad, § 124, p. 247
 Persons deemed "owners" entitled to consent to use of streets, § 64
 Protest against proposed location or method of construction, § 23
 Repair of streets, municipality's failure to enforce duty of street railroad, § 124, p. 247
 Rights and remedies, §§ 100-102, pp. 216-219
 Sale of franchise, petition of abutting owners, § 52
 Vibration, recovery of damages, § 189
- Accidents,**
 Collisions, generally, post
 Injuries to persons, generally, post
- Acknowledgment,** consent of abutting owners to use of streets, § 66
- Actions,** enforcement of obligations arising during public operation, § 345
- Actions for injuries,** §§ 296-338, pp. 443-514
 Admissibility of evidence, §§ 308-311, pp. 461-472
 Contributory negligence, § 310
- Affirmative defenses,**
 Burden of proof, § 305
 Negating in pleading, § 302, p. 449
 Preponderance of evidence, § 312
- Amendment of pleading,** § 302, p. 446; § 303
- Answer,** § 303
- Appeal and error,** § 337
- Appearance,** § 300
- Burden of proof,** §§ 305-307, pp. 454-461
- Complaint,** § 302, pp. 445-449
- Actions for injuries—Continued**
 Conditions precedent, § 301
 Contributory negligence,
 Burden of proof, § 307
 Evidence, § 319
 Damages, § 338
 Declaration, § 302, pp. 445-449
 Defenses,
 Admissibility of evidence, § 308
 Issues raised by pleading, § 304, p. 451
 Negating in pleading, § 302, p. 449
 Evidence,
 Admissibility, §§ 308-311, pp. 461-472
 Under pleading, § 304, p. 452
 Weight and sufficiency, §§ 312-321, pp. 472-485
 Instructions, §§ 330-335, pp. 507-513
 Issues, proof, and variance, § 304, pp. 451-454
 Joinder of parties, § 299
 Jurisdiction, § 297
 Law governing, § 296
 Limitations, § 298
 Notice of claim, condition precedent, § 300
 Parties, § 299
 Petition, § 302, pp. 445-449
 Pleading,
 Evidence admissible under, § 304, p. 452
 Issues made by, § 304, p. 451
 Presumptions, §§ 305-307, pp. 454-461
 Process, § 300
 Proximate cause, evidence, § 321
 Questions of law and fact, §§ 322-329, pp. 486-507
 Replication or reply, § 303
 Service of process, § 300
 Substitution of parties, § 299
 Sufficiency of evidence, §§ 312-321, pp. 472-485
 Time to sue, § 298
 Venue, § 297
 Verdict and findings, § 336
 Weight of evidence, §§ 312-321, pp. 472-485
- Additional tracks.** Tracks, post
- Adjuster,** authority to settle claim against company, § 12
- Admissions,** pleadings in actions for injuries, § 304, p. 452
- Advertisements,**
 Ordinance prohibiting commercial advertising on outside of streetcars, validity, § 163
 Power of company to display in streetcars, § 14
- Affidavits,** determination by commissioners in lieu of abutting owners' consent to use of streets, § 69, p. 181
- Affirmative defenses.** Actions for injuries, ante
- Afflicted persons,** contributory negligence on or near track, § 285
- Aged persons,**
 Contributory negligence,
 On or near tracks, § 285
 Question for jury, § 325, p. 503
 Injuries to persons on or near tracks, § 262

INDEX TO STREET RAILROADS

- Agent,
 - Abutting owner's agent, consent to use of street, § 64
 - Company acting as agent, liability for negligence of employees of principal, § 185
- Air brakes, regulations requiring, validity, § 167
- Air current set up by movement of car causing injuries to person on or near tracks, § 251, p. 384
- Alighting from left side of vehicle, contributory negligence of person on or near tracks, § 274, p. 414, n. 45
- Ambulance,
 - Collision with, § 241
 - Contributory negligence of driver or occupant, § 283
 - Question for jury, § 325, p. 498, n. 38
- Amendment of pleading, actions for injuries, § 302, p. 446; § 303
- Animals,
 - Collision, § 226
 - Approaching animals on or near tracks, § 234
 - Duties of motorman, § 237
 - Care required of street railroad, § 228
 - Crossing in front of car, § 231
 - Dog or animal not under control of owner, § 244
 - Lookout required of motorman, § 228
 - Meeting animals, § 233
 - Operation at night or under adverse weather conditions, § 240
 - Passing by streetcars, § 232
 - Questions for jury, § 324, p. 494
 - Runaways at intersection, § 238
 - Signal or warning, § 236
 - Unmanageable, duty of motorman meeting to prevent collision, § 233
- Driving on or near tracks, contributory negligence, § 274, p. 413
- Frightening animals, §§ 205, 206
- Contributory negligence, §§ 275, 279
- Instructions in action for injuries, § 331
- Negligence in respect of injuries resulting from fright, evidence, § 316, p. 479
- Questions for jury, § 324, p. 496
- Horses, generally, post
- Running at large, etc.,
 - Contributory negligence, § 286
 - Negligence in respect of injuries to, evidence, § 316, p. 478
- Answer, actions for injuries, § 303
- Appeal,
 - Actions for injuries, § 337
 - Commissioners' determination in lieu of abutting owners' consent to use of streets, § 69, p. 182
 - Determination as to necessity or location, § 26
 - Discontinuance of operation, proceedings for, § 182
 - Granting of franchise, § 48
 - Regulatory orders or rulings of state board, etc., § 162
- Appearance, actions for injuries, § 300
- Appraisers, determination of compensation for use of another company's tracks, § 30
- Approaching vehicles, negligence in operation, evidence, § 316, p. 478
- Arbitration, right to forfeit franchise because of arbitrators' inability to select third arbitrator, § 92, p. 207
- Arrest, admissibility of evidence as to arrest of motorman at time of accident, actions for injuries, § 309, p. 466
- Articles of incorporation, "franchise" as designating right to operate under, § 37
- Assault by employee,
 - Admissibility of evidence in action for, § 308
 - Liability of company, § 190, n. 70
 - Questions for jury, § 322
- Assignment,
 - Claim for injuries, parties to action, § 299
 - Leases, post
- Assured clear distance ahead, rule applicable to trolley cars, § 198, n. 50
- Attachment for personal injuries, priority over mortgage, § 157
- Attempt to pass in front of streetcar, contributory negligence,
 - Driver of vehicle, § 278
 - Question for jury, § 325, pp. 498, 499
- Attorney's fees,
 - Payment by company as condition of franchise ordinance, § 33, p. 156
 - Receivership proceedings, § 159, n. 66
- Automatic couplers, necessity, § 167
- Automatic signals,
 - Attempt to cross in front of streetcar, contributory negligence, § 278
 - Reliance on, contributory negligence of person injured, § 264, n. 79
- Automobiles. Motor vehicles, generally, post
- Barriers, failure to maintain at excavations, etc., liability for injuries, § 215
- Bells. Signals, generally, post
- Bicycle riders,
 - Contributory negligence, § 273
 - Children riding on or near tracks, § 284, n. 58
 - Streetcar approaching child cyclist, duty, § 234
- Blockade of street,
 - Contributory negligence of person injured on or near tracks, § 268
 - Offense of maintaining public nuisance, § 339, n. 57
- Board of education, consent to use of street adjoining school lands, § 64
- Boarding moving car, offenses, § 340
- Bonds, § 154
 - Bridge company, authority of street railroad to guarantee payment, § 85
 - Completion of railroad,
 - Requiring bond for, § 103
 - Right to resort to bond given for, § 104
 - Covenant as to mortgaged security, effect, § 156
 - Stock issued in exchange for, preferred status, § 13
 - Stockholders' liability, enforcement by bondholders, § 13
- Book value, purchase of system by municipality, § 344, n. 1
- Brakes,
 - Admissibility of evidence as to condition in actions for injuries, § 309, p. 465
 - Care required in equipping cars, § 196
 - Injuries to persons on or near tracks, § 247

INDEX TO STREET RAILROADS

Brakes—Continued

- Passing another vehicle, motorman's duty to apply brakes, § 232, n. 9
- Regulations relating to, validity, § 167

Branches,

- Delay in constructing, forfeiture of right to connect with main line, § 92, p. 207
- Extension of franchise, effect, § 88
- Right to construct, § 81

Breach of contract, injury as result of operation, right to sue for, § 296

Breach of duty, pleading, actions for injuries, § 302, p. 447

Breaker defined, § 1, p. 128, n. 36

Bribery, granting of franchise, effect, § 50

Bridges,

- Breaking by overweight truck, liability to following truck, § 213, n. 84
- Compensation for use, power to require, § 33, p. 158
- Consent of local authorities to use, § 38
- Cost of rebuilding, etc., contribution, § 119, p. 237
- Elevated railroads, right to construct, § 84
- Injunction against unauthorized construction of tracks over railroad bridge, § 28
- Municipal operation over, § 341
- Reciprocal rights of streetcar and motor vehicle, § 208, n. 76
- Refusal to permit tracks on, excuse for failure to operate, § 178
- Repairs, duty of street railroad, § 119, pp. 236-239
- Right to use, § 85
- Temporary pedestrian bridge over tracks, authority to require, § 107
- Use of city bridge, § 73, p. 187

Buildings, moving across tracks, regulations by company, § 180

Burden of proof,

- Abutting owners,
 - Actions for damages, § 102
 - Failure to obtain required consents, § 68
 - Injunction suits, § 101, p. 218
- Actions for injuries, §§ 305-307, pp. 454-461
- Construction or maintenance of street railroad, injuries resulting from, § 138
- Contributory negligence, actions for injuries, § 307
- Discontinuance of operation as being in public interest, § 182
- Instructions in actions for injuries, § 330
- License tax, right to recover, § 176
- Municipal consent to construction and operation, § 50
- Negligence, actions for injuries, §§ 305, 306, p. 455
- Regulation, unreasonableness of, § 160
- Passenger service regulation, § 164
- Res ipsa loquitur, application of doctrine as shifting burden, § 306, p. 458

Busses,

- Authority to operate, § 142
- Auxiliary bus lines, § 16
- License tax statute, applicability, trolley busses, § 175, n. 10
- Operation not deemed compliance with franchise requiring street railway, § 178

Busses—Continued

Replacement of streetcars as abandonment of right of way over private property, § 99, p. 215

Right of street railroad to prevent use of street by bus line, § 73, p. 186, n. 3

Substitution for streetcars, applicability of gross receipts, tax, § 174, n. 1

Bystanders, injury as result of collision between vehicle and streetcar, contributory negligence, § 310

Cable car defined, § 1, p. 129

Cable railroad,

Defined, § 1, p. 129

Status as street railroad within ordinance relating to warnings to prevent collisions, § 236

Care, pleading duty to exercise, actions for injuries, § 302, p. 446

Care required, §§ 189-212, pp. 310-340

Degree of care required, § 192

Regulations pertaining to, § 163

Carriage, streetcar not included in term, § 144

Cars. Streetcars, post

Cattle guards, road crossings, application of law to street railroads, § 238

Causal connection, pleading, actions for injuries, § 304, p. 452

Contributory negligence, § 303

Cause of injury,

Evidence in actions for damages, § 313

Proximate cause, generally, post

Certainty, pleading, actions for injuries, § 302, pp. 445, 446

Certificate of public convenience and necessity, necessity of, §§ 21, 24

Appeal from determination relating to, § 26

Commissioners, issuance by, § 24

Extension of line, § 24

Local franchise, granting of certificate not prerequisite to granting of, § 44

Certiorari,

Remedy for unauthorized discontinuance of operation, § 184

Review of proceedings to discontinue operation, § 182

Cessation of plaintiff's negligence, application of last clear chance doctrine, § 290

Change of grade of street, effect on duty of street railroad, § 1120

Change of route or location, § 77

Determination by commissioners, § 24

Children,

Abutting owners, right of fathers and guardians to consent to use of street, § 64

Anticipation of presence, duty, § 259

Boy on roller skates, § 263, n. 58

Status as pedestrian, § 209, n. 98

Care as to children on or near tracks, § 245

Contributory negligence,

Evidence in actions for injuries, § 319

Admissibility, § 310

Going on or near tracks, § 284

Question for jury, § 325, p. 503

Control of car to prevent injury, § 260

Danger to children, duty to anticipate, § 259

Injuries to, §§ 258-261, pp. 391-396

Instructions as to negligence of defendant in action for injuries, § 331

INDEX TO STREET RAILROADS

Children—Continued

- Leaving or entering moving cars, regulations prohibiting, § 164
- Lookout,
 - Regulations requiring vigilance, validity, § 169
 - Required to prevent injuries, § 260
- Negligence in operation on approaching, evidence, § 316, p. 476
- Ordering or frightening off car, questions for jury in action for injuries, § 324, p. 488, n. 32
- Precautions as to children on or near or approaching tracks, § 261
- Reliance on precautions of child or its custodian on or near tracks, § 261
- Rescue attempted, care required of motorman, § 251, p. 384
- Speed to prevent injuries, § 260
- Streetcar approaching children, duty, § 234
- Trespassers,
 - Cars or right of way, § 193, pp. 315-317
 - Playing on tracks, § 193, p. 314, n. 15
- Unavoidable accident, boy stepping onto tracks, § 212, n. 69
- Warning to prevent injury, § 260
- Circumstantial evidence,
 - Last clear chance, sufficiency, § 317
 - Negligence in operation, establishment by, § 316, p. 475
- Cities. Municipalities, generally, post
- City railroad defined, § 1, p. 126
- Claims, notice, condition precedent, action for injuries, § 301
- Cleaning of streets, regulations requiring, validity, § 170
- Coasting,
 - Cable car, defined, § 1, p. 129
 - Person coasting in street in violation of ordinance, duty of motorman, § 229
 - Steep grade, care as to persons on or near tracks, § 251, p. 384
- Collisions, §§ 224-244, pp. 347-372
 - See, also, Injuries to persons, generally, post
 - Adverse weather conditions, § 240
 - Animals, ante
 - Approaching vehicles,
 - Duties of motorman, § 237
 - On or near tracks, § 234
 - Backing streetcar, § 228
 - Coasting in street in violation of ordinance, § 229
 - Contributory negligence,
 - Bicycles, § 273
 - Driving directly behind trolley car, § 276, n. 26
 - Motorman violating company rule, bar to recovery for injuries, § 266
 - Question for jury, § 325, p. 497
 - Crossing track in front of streetcar, § 231
 - Curves and turns, care required, § 228
 - Dog or other animal not under control of owner, § 244
 - Duty and care required in general, § 228
 - Illness of motorman, § 228
 - Intersections, post

Collisions—Continued

- Meeting animals or vehicles, § 233
- Motor vehicles, post
- Nature and extent of liability generally, § 227
- Nighttime, operating at night, § 240
- Notice of law, duty of street railroad to take notice to prevent collision, § 233
- Ordinance, violation, § 229
- Parked vehicles, § 235
- Passengers on cars of other companies, degree of care required to passengers, § 224
- Passing animals or vehicles, § 232
- Private right of way, liability for damages, § 228
- Proximate cause of injury, § 212
- Rear-end collision, duty to following vehicle, § 226
- Signaling devices at road crossings, duty of inter-urban railroad to install, § 239
- Speed, § 230
 - Motorman approaching intersection, § 238
- Stalled vehicles, § 235
- Starting, negligence, § 231
- Statute, violation, § 229
- Steam railway crossing, § 225
- Streetcars or trains, §§ 224, 225
- Third persons jointly and severally liable for negligence, § 227
- Trespasser's vehicle on private right of way, liability of street railroads, § 228
- Vehicles generally, § 226
 - Motor vehicles, post
- Warning, duty to give, § 236
 - Intersection, § 239
- Wet and slippery surface of street, § 240
- Colored persons,
 - Offenses by company or servants as to separation, § 339
 - Regulation requiring segregation, § 164
- Commission. Public service commission, generally, post
- Commissioners,
 - Avoiding unnecessary injury to abutting owners in prescribing method of construction, etc., § 23
 - Determination of,
 - Compensation for use of another company's tracks, § 130
 - In lieu of abutting owners' consent to use of streets, § 69, pp. 179-182
 - Manner of crossing another street railroad, § 133
 - Powers and proceedings in determining necessity and location, § 24
 - Public service commission, generally, post
- Companies. Street railroad companies or corporations, generally, post
- Company rules,
 - Contributory negligence,
 - Admissibility on issue of, § 310
 - Person injured violating rule of company, § 266
 - Fire apparatus, exercise of precautions as to, § 242
 - Negligence, admissibility to show in actions for injuries, § 309, p. 463
 - Passing other cars or vehicles, duties as to persons on or near tracks, § 253
 - Proximate cause of injury, violation as, evidence, § 321

INDEX TO STREET RAILROADS

Company rules—Continued

- Question for jury, violation as, § 324, p. 490, n. 51
- Right and duty to adopt, § 171
- Speed violating company rules by motorman in collision, § 230

Compensation,

- Crossing another street railroad, § 135
- Receiver, § 159
- Use of,
 - Another railroad's tracks, § 152
 - Streets and bridges, power of municipality to exact § 33, pp. 156-160

Competency of evidence, actions for injuries, § 308

Complaint,

- Actions for injuries, § 302, pp. 445-449
- Construction or maintenance of street railroad, injuries resulting from, § 38
- Forfeiture of franchise, § 97
- Injunction suits by abutting owners, § 101, p. 218

Completion of line partially constructed,

- Delay as ground for forfeiting franchise, § 92, p. 207

- Duty of company, § 83, p. 196; § 103

Conclusions of law, pleading, actions for injuries, § 302, p. 445

Concurrent negligence, liability, § 212

Condemnation,

- Approval of right of way as dependent on, § 24
- Purchaser's succeeding to right of vendor, § 146
- Right to use tracks of another company, § 129
- Condition of cars, negligence in respect to, evidence in actions for injuries, § 315

- Admissibility of evidence, § 309, p. 465

Conditions precedent, actions for injuries, § 301

Conductor,

- Failure to provide, negligence, § 204
- Impeachment of testimony in actions for injuries, § 308

Lookout,

- Duty and care required, § 197, p. 320, n. 11
- Pedestrians, duty to keep lookout for, § 248
- Regulations requiring, § 166

Conflict of laws, actions for injuries, § 296

Congested traffic requiring warning signals at crossing, duty to install, § 239, n. 5

Connections,

- Between lines of same company, right to construct, § 82
- With other railroads, § 134

Consent to use of streets,

- Abutting owners, ante
- Municipalities, post

Consideration,

- Extension of franchise, § 88
- Grant of right of way over private property, § 99, p. 213
- Inadequacy, effect on validity of franchise, § 50

Consistency, pleading, actions for injuries, § 302, p. 446

Consolidation. Street railroad companies or corporations, post

Construction,

- Acquisition of right to use another's tracks as constituting construction, § 103
- Changes required or authorized by public authorities, § 107
- Conditions relating to, power to impose in granting consent to use of streets, § 33, p. 160

Construction—Continued

- Contract not to construct or operate road, validity, § 150

Delay,

- Effect on duty to construct, § 103
- Forfeiture of franchise, § 92, p. 207

Duty to construct, § 103

- Injunction against, remedy of abutting owners, § 101, pp. 216-219

Injuries from or incident to, §§ 136-138

Method of construction, §§ 105-108, pp. 222-227

- Distinguishing feature, § 1, p. 127

- Protest by abutting owners, § 23

Municipality, § 341

Offenses and penalties incident to, §§ 139-141

- Persons entitled to acquire and exercise right to construct and operate, § 20

Plan of construction, municipal regulation, § 106

Regulation by municipality and state, § 106

Restoration of street, § 111

Right to construct in general, § 19

Time for construction, § 104

Constructive notice, questions for jury in actions for injuries, § 324, p. 492, n. 76

Continuance of plaintiff's negligence, application of last clear chance doctrine, § 290

Contracts,

- Amendment of charter, effect on contract, § 17

- Construction by municipality, § 343

- Deed, contract for, right of vendee to consent to use of street, § 64

- Grant of franchise as binding contract on acceptance, § 35

- Impairment of obligation as to repair or paving of streets, § 116

- Joint or interchangeable use of tracks, § 152

- Lessee succeeding to rights of lessor, § 149

- Paving of streets, duty imposed by, § 113

- Purchaser's liability for contract of vendor, § 146

- Receiver, right to adopt or reject, § 159

- Refraining from construction or operation of line, validity, § 150

- Repair of streets, duty imposed by in general, § 112

- Regulation violated by, effect, § 160

- Unified management and operation, validity, § 151

Contributory negligence,

- Admissibility of evidence, actions for injuries, § 310, p. 469

- Alarm given by third persons, effect, § 268

- Animals permitted to run at large, etc., on or near tracks, § 286

- Avoidance of injury notwithstanding, questions for jury, § 326

- Bicycle rider, stop, look, and listen, § 273

- Burden of proof, actions for injuries, § 307

- Children, ante

- Collisions, ante

- Company rule, contributory negligence of person violating, § 266

- Construction or maintenance of street railroad, injuries resulting from, § 136

- Control of automobile or vehicle,

- Attempt to cross in front of streetcar, § 278, n. 52

- Person injured on or near tracks, § 274, p. 415

- Vehicle driven on or near tracks, § 275

- Crossings, post

INDEX TO STREET RAILROADS

Contributory negligence—Continued

- Curves, post
- Emergencies, § 265
- Errors in judgment, post
- Evidence, actions for injuries, § 319
- Guest in automobile, admissibility of evidence as to, § 310
- Horses, post
- Humanitarian doctrine, admissibility of evidence in action based on, § 311
- Instructions in actions for injuries, § 332
- Intoxication, post
- Last clear chance, post
- Motorcycle rider, § 273
- Motorman violating company rule, bar to recovery for injuries received in collision, § 266
- Ordinance, contributory negligence of person injured while violating ordinance, § 266
- Persons on or near tracks, §§ 263-295, pp. 397-443
 - Ability and opportunity to avoid injury, application of last clear chance doctrine, § 294
 - Acts in emergency or sudden peril, § 265
 - Admissibility of evidence in actions for injuries, § 310
 - Afflicted persons, § 285
 - Aged persons, § 285
 - Anticipation by person crossing tracks, § 270, p. 407
 - Anticipation of danger by occupant of vehicle driven by another, § 282
 - Assumptions,
 - Conduct of company and its servants by driver of vehicle, § 274, p. 414
 - Person crossing tracks, § 270, p. 406
 - Person walking on or near tracks, § 269
 - Attempt of vehicle to cross in front of streetcar, § 278
 - Belief or assumption of persons crossing tracks, § 270, p. 406
 - Bicycle rider, § 273
 - Call by third person, § 268
 - Cessation or continuance of plaintiff's negligence, application of last clear chance doctrine, § 290
 - Children, § 284
 - Comparison of care required of person injured and motorman, § 270, p. 406
 - Continuously looking and listening by vehicle crossing tracks, § 279, p. 426
 - Control of automobile or vehicle, § 274, p. 415
 - Crossing tracks, §§ 270, 271, pp. 403-412
 - Place other than regular crossing, § 270, p. 404
 - Duty to look, § 271, p. 412
 - Curving of tracks in front of vehicle, § 279, p. 425
 - Danger or peril, application of last clear chance doctrine, § 291
 - Degree of care required in crossing tracks, § 270, p. 405
 - Direction of looking, § 271, p. 412
 - Person crossing tracks, § 279
 - Distance for looking in crossing tracks, § 271, p. 412; § 279
 - Driving, occupying, or alighting from vehicle, §§ 274-282, pp. 413-432
 - Driving on or along tracks in general, § 276

Contributory negligence—Continued

Persons on or near tracks—Continued

- Elevated structure, passing under, § 272
- Emergency vehicle, driver or occupant, § 283
- Escape, neglecting opportunity to escape by driver of vehicle, § 274, p. 414
- Evidence, § 319
- Fender of automobile, riding on, § 282
- Funeral procession, duty of looking by individual drivers in procession, § 279, p. 425
- Guests in vehicle driven by another, § 282
- Hearing obstructed in entering on tracks, § 279, p. 427
- Heavy trucks, § 273, p. 414
- Horses, driving near cars, § 275
- Infirm person, § 285
- Injury avoidable notwithstanding contributory negligence, §§ 288-295, pp. 436-443
- Intoxication, § 285
- Knowledge or ignorance of peril, application of last clear chance doctrine, §§ 292, 293
- Law of the road, failure to observe, § 280
- Looking and listening,
 - Occupant of vehicle driven by another, § 282
 - Person entering on tracks, § 276
- Looking up at elevated train passing, § 272
- Miscalculation or error of judgment in crossing track, § 270, p. 403
 - Driver attempting to cross in front of streetcar, § 278
- Motorcycle rider, § 273
- Negligence, evidence, § 316, p. 475
- Occupant of,
 - Emergency vehicle, § 283
 - Vehicle driven by another, § 282
- Old, infirm, or afflicted persons, § 285
- Passiveness or inaction of guest in motor vehicle, § 282
- Place for listening and looking before crossing tracks, § 279
- Private premises, persons on private premises near tracks, § 256
- Protest by occupant of vehicle driven by another, § 282
- Proximate cause, § 287
- Reliance on,
 - Driver of vehicle by occupant, § 282
 - Precautions of company, § 264
- Rescue of property, § 263
- Right of way, assumption by driver of vehicle motorman will yield, § 274, p. 416
- Running board of automobile, riding on, § 282
- Safe place, stopping in safe place by driver of vehicle, § 279, p. 423
- Signal or warning, assumption or belief, § 270, p. 408
- Speed and control of car, assumption and belief, § 270, p. 407
 - By driver of vehicle, § 274, p. 415
- Stalling of motor vehicle, § 281
- Standing, leaning, stooping, or crouching on or near tracks, § 268
- Status of streetcar company, assumption by driver of vehicle, § 274, p. 416
- Stop, look, and listen,
 - Children, § 284

INDEX TO STREET RAILROADS

Contributory negligence—Continued

- Persons on or near tracks—Continued
 - Stop, look, and listen—Continued
 - Drivers of vehicles at crossing, § 279, pp. 422-428
 - Duty of person crossing tracks, § 271, p. 408
 - Stop signal, emergency vehicles passing, § 283
 - Stopping car, assumption or belief, § 270, p. 408
 - By driver of vehicle, § 274, p. 416
 - Stopping horse or vehicle on or near tracks, § 281
 - Streetcar crossing intersection, crossing in front of by vehicle, § 278
 - Subsequent or continuous look of person injured, § 271, p. 411
 - Sudden or temporary incapacity, § 285
 - Time for looking and listening by vehicle approaching or crossing tracks, § 279
 - Tractor-trailers, § 274, p. 414
 - Traffic signals,
 - Duty to look, § 271, p. 412
 - Stopping for, § 281
 - Truck proceeding slowly until struck by streetcar, § 279, p. 423, n. 88
 - Turning by vehicle to cross tracks, § 279, p. 425
 - Turning out for streetcars, duty of driver of vehicle, § 277
 - U-turn across tracks, § 278
 - View obstructed in entering on tracks, § 279, p. 427
 - Violation of statute, ordinance, or company rule, § 266
 - Walking on or near tracks, § 269
 - Warning of danger by occupant of vehicle driven by another, § 282
 - Workmen in street, § 267
 - Pleading, actions for injuries, § 302, p. 449; § 303; § 304, p. 453
 - Presumptions, actions for injuries, § 307
 - Proximate cause of injury, evidence, § 321
 - Questions for jury in actions for injuries, § 325
 - Reliance on precautions of company, § 264
 - Rescue of property, § 263
 - Stop, look, and listen, person crossing street, § 271, p. 408
 - Sudden peril, § 265
 - Violation of statute, ordinance, or company rule, § 266
 - Evidence, § 320
 - Wilful or wanton injuries, § 211
- Contributory wilful or wanton conduct, bar to recovery, § 211
- Control of automobile or vehicle. Contributory negligence, ante
- Control of car,
 - Children on or near tracks, § 260
 - Contributory negligence,
 - Occupant of vehicle driven by another, contributory negligence in not anticipating danger, § 282
 - Person injured crossing tracks, assumption as to control, § 270, p. 407
 - Duty to have car under control, § 198
 - Injuries to persons on or near tracks, § 249

Control of car—Continued

- Question for jury in actions for injuries, § 324, p. 490
- Reliance on exercise of due care of persons on or near tracks, § 251 p. 383
- Controller defined, § 1, p. 128
- Convertible car defined, § 1, p. 130
- Conveyance,
 - Abutting property after owner's consent to use of street, effect, § 67
 - Franchise or property of street railroad, §§ 145, 146
 - Right of way over private property, § 99, pp. 212-216
- Corporation, ownership of abutting property, consent to use of street, § 64
- Cost-plus plan, recovery by municipality repairing or paving streets, § 126, p. 252
- Counterclaim, actions to recover license taxes, § 176
- Course of employment, pleading negligence in, actions for injuries, § 302, p. 445
- Court,
 - Confirmation of determination by commissioners in lieu of abutting owners' consent to use of streets, § 69, p. 181
 - Determination of compensation for use of another company's tracks, § 130
 - Discontinuance of operation, consent required, § 181
 - Public convenience and necessity, finding of as prerequisite, § 25
- Covenants, grants of right of way over private property, § 99, p. 214
- Crippled persons, contributory negligence on or near tracks, § 285
- Crossings,
 - Contract not to cross another's tracks, effect, § 150
 - Contributory negligence,
 - Attempt of driver of vehicle to pass in front of streetcar, § 278
 - Evidence, § 319
 - Person crossing tracks, §§ 270, 271, pp. 403-412
 - Unfamiliar crossing, motorist failing to look and listen, § 279, p. 424, n. 96
 - Failure to check speed or stop, liability for injuries to persons on or near tracks, § 249
 - Flagman, duty and liability of company, § 202
 - Intersections, generally, post
 - Interurban railroads, right of way, § 209
 - Negligence in,
 - Approaching, questions for jury in actions for injury, § 324, p. 493
 - Operation, evidence as to, § 316, p. 477
- Other railroads, §§ 132, 133, 135
 - Care required, § 192
 - Flagman's signal to motorman as not relieving motorman from duty to use reasonable care, § 224
 - Permissive crossing defined, § 208, n. 76
 - Private right of way, crossing improved for public use, users as licensees, § 194
- Railroads, post
- Warning signals, regulations requiring, validity, § 169
- Crouching on or near tracks, contributory negligence, § 268

INDEX TO STREET RAILROADS

- Crowds, control of car required to avoid injuries to persons on or near tracks, § 249
- Crushing of pedestrian between passing trolley cars, contributory negligence as question for jury, § 325, p. 499, n. 40
- Curbing, motorist pulling away from curbing, duty to look for streetcar, § 276, n. 17
- Curbliner, sudden turn, contributory negligence of pedestrian injured, § 271, p. 410, n. 90
- Current breaker defined, § 1, p. 128
- Current of air set up by movement of car causing injuries to persons on or near tracks, § 251, p. 384
- Curves,
 - Care required of motorman, § 228
 - Contributory negligence,
 - Driver passing streetcar, § 277
 - Person injured from overhang, § 269
 - Tracks curving in front of vehicle, § 279, p. 425
 - Injuries to persons on or near tracks by rounding curve, § 254
 - Overhang, § 247
 - Lubricant on track, liability for injuries, § 220
 - Regulations requiring vigilance, validity, § 169
- Custodian of child on or near tracks, reliance on precautions of, § 261
- Custom,
 - Care as to persons on or near tracks, § 245
 - Negligence, admissibility of evidence on issue of in actions for injuries, § 309, p. 465
 - Pleading, actions for injuries, § 304, p. 453
 - Rear fender kept raised, liability for injuries to pedestrian, § 247
 - Reliance by motorist on custom of streetcar to sound signal, contributory negligence, § 274, p. 417, n. 96
 - Speed, admissibility of evidence as to in actions for injuries, § 309, p. 468
 - Stopping of car on approach of police vehicle, § 243
 - Superior right of fire apparatus on streets, § 242
- Damages,
 - Abutting owners, §§ 100, 102
 - Breach of contract relating to plan and mode of construction, § 108
 - Discontinuance of operation, § 184
 - Instructions in actions for injuries, § 335
 - Questions for jury in actions for injuries, § 329
 - Removal of tracks by municipal authorities, § 109
- Darkness, prevention of collision, § 240
- Deaf persons, contributory negligence on or near tracks, § 285
- Declaration. Complaint, generally, ante
- Dedication of street, effect of consent of abutting owners to use of street where part not dedicated, § 67
- Defects and obstructions in streets, §§ 213-223, pp. 340-347
 - Approval of officials as excuse, § 223
 - Cars in streets, § 219
 - Compliance with requirements as excuse, § 223
 - Construction or maintenance of street railway, injuries resulting from, §§ 136, 138
 - Contributory negligence of person injured, § 263, n. 62
 - Evidence, § 319
 - Excavations, generally, post
 - Fire apparatus obstructed by streetcar, penalty, § 242
- Defects and obstructions in streets—Continued
 - Forcible removal, liability of company, § 180
 - Horse frightened by unlicensed obstruction by street railroad, § 205
 - Liability of street railroad or municipality for injuries, § 186
 - Lookout, regulations requiring vigilance, validity, § 169
 - Lubricant on track, § 220
 - Negligence in respect of, evidence in actions for injuries, § 315
 - Admissibility of evidence, § 309, p. 464
 - Notice to company, § 222
 - Passage of streetcar obstructed by vehicle, right to shove vehicle aside by running against it, § 234
 - Proximate cause of injury, § 212
 - Questions for jury in actions for injuries, § 324, p. 488
 - Snow piled in street, § 221
 - Track,
 - Obstruction as offense, § 340
 - Protruding above surface of street, § 216
 - Prima facie negligence, § 315
 - Trolley wire poles, §§ 213, 218
 - Center line poles, § 223
 - Trolley wires, §§ 213, 217
- Defenses. Actions for injuries, ante
- Definiteness, pleading, actions for injuries, § 302, p. 446
- Definitions, §§ 1-4, pp. 126-131
 - Repair, § 123, p. 241
- Deformed persons, contributory negligence on or near tracks, § 285
- Depreciation, obsolescence, etc., state operation, § 345
- Derailment, res ipsa loquitur doctrine as applicable, § 306, p. 457
- Destruction of road or equipment, offense, § 340
- Devisee of abutting property, consent to use of street, § 64
- Disabled persons on or near tracks, injuries to, § 262
 - Contributory negligence, § 285
 - Question for jury, § 325, p. 503
- Discontinuance of operation, §§ 181-184, pp. 303-307
- Discovered peril. Last clear chance, generally, post
- Distance and direction for looking by vehicle approaching crossing, contributory negligence, § 279, p. 425
- Dividends, funds available for, § 13, n. 74
- Dogs, collision with dog not under control of owner, § 244
- Doors,
 - Opening door to permit passenger to alight from moving car, negligence, § 189
 - Standing vehicle having door open as streetcar passed, liability of streetcar operator, § 232, n. 15
- Double tracks. Tracks, post
- Drivers of vehicles,
 - Contributory negligence, admissibility of evidence in actions for injuries, § 310
 - Motor vehicles, generally, post
- Driving on or near tracks, contributory negligence of persons injured, § 274, p. 413
- Due care,
 - Common law definition in ordinance, § 169, n. 53
 - Person injured, presumption, § 307

INDEX TO STREET RAILROADS

- Dust, view of employee at steam railway crossing obscured by dust, duty, § 225
- Earnings,
 - Compensation for use of streets based on, § 33, p. 157
 - License tax based on percentage of, § 174
- Ears muffled, contributory negligence of person injured crossing tracks, § 271, p. 409
- Easements,
 - Abandonment, effect of consent of abutting owner to use of street, § 67
 - Nature of right of street railroad to use of street, § 72
 - Right of way acquired over private property, § 99, p. 214
- Ejection of trespassers, care required, § 193, p. 316
- Election,
 - Consent by voters to construction and operation, § 47
 - Municipal construction, § 341, n. 67
- Electricity,
 - Injury as result of escape from rails, res ipsa loquitur doctrine, § 306, p. 458
 - Power to distribute to private consumers, § 14
 - Right to use as motive power, § 142
 - Transmission line, construction not regarded as extension of railroad, § 24
 - Wires, generally, post
- Elevated railroads,
 - Acquisition of right to impair light, air, and access, § 99, p. 213, n. 90
 - Connection with surface railroad, § 134
 - Consent of abutting owners, necessity, § 56
 - Contributory negligence of person injured passing under structure, § 272
 - Dangerous condition of street, liability, § 213
 - Defined, § 3
 - Lease to state, § 345
 - Regulation relating to movement of cars, validity, § 168
 - Stations, platforms, etc., right to construct, § 84
- Emergencies,
 - Acts in, questions for jury in actions for injuries, § 324, p. 496
 - Boy stepping onto tracks, unavoidable accident, § 212, n. 69
 - Contributory negligence of person injured, § 265
 - Questions for jury in actions for injuries, § 325, p. 503
 - Error of judgment of motorman, liability of company, § 190
 - Instructions in actions for injuries, § 331
 - Last clear chance, generally, post
 - Signals or warnings, duty of motorman, § 202
- Emergency vehicles,
 - Ambulance, generally, ante
 - Contributory negligence of driver or occupant, § 283
 - Question for jury, § 325, p. 498, n. 38
 - Fire apparatus, generally, post
- Employees,
 - Acting for company, questions for jury in actions for injuries, § 322
 - Assault by employee, ante
 - Company's liability in general for acts of, § 190
 - Conductor, generally, ante
- Employees—Continued
 - Inability to obtain, excuse for nonperformance of duty to operate, § 178
 - Inexperienced or incompetent employees, generally, post
 - Negligence, admissibility of evidence in actions for injuries, § 309, p. 468
 - Offenses, § 339
 - Proof of relationship in actions for injuries, § 314
 - Regulations relating to, § 166
- Enfeebled persons, injuries to persons on or near tracks, § 262
- Contributory negligence, § 285
- Equipment, § 144
 - Care required as to construction and equipment of cars, § 196
 - Compliance with law as not absolving from duty as to lookout, § 248
 - Conditions relating to, power to impose in granting consent to use of streets, § 33, p. 160
 - Defects in, questions for jury in actions for injuries, § 324, p. 488
 - Injuries to persons on or near tracks, § 247
 - Negligence as to construction and equipment of cars, proximate cause of injury, § 212
 - Negligence in respect of, evidence in actions for injuries, § 315
 - Admissibility of evidence, § 309, p. 465
 - Offenses by company or servants, § 339
 - Ordinance requirements, admissibility of evidence to show negligence, § 309, p. 463
 - Regulations, equipment of cars, § 167
 - Right to install equipment reasonably required, § 105
- Equitable owner of abutting property, consent to use of street, § 64
- Equity suit,
 - Compelling performance of duty to remove tracks, etc., on abandonment, § 183
 - Forfeiture of franchise, § 97
 - Recovery of cost of repairing streets, § 126, p. 250
- Erections, construction or maintenance of street railroad, injuries resulting from, § 138
- Errors in judgment,
 - Contributory negligence,
 - Person injured crossing tracks, § 270, p. 403
 - Persons injured on or near tracks, § 265
 - One influenced by call by third person, § 268
 - Motorist meeting animals or vehicles, § 233
- Motorman,
 - Disabled persons on track, § 262
 - Imminent danger resulting in collision, § 226
 - Questions for jury in actions for injuries, § 324, p. 496
- Essential features and characteristics, § 1, p. 126
- Estoppel,
 - Acceptance of grant as estoppel to question conditions, § 32
 - Compelling removal from street occupied without authority, § 28
 - Consent of abutting owner to use of street, effect, § 68

INDEX TO STREET RAILROADS

Estoppel—Continued

Denial of,

Liability for cost of repairing or paving streets, § 127

Power of board to make order, § 162

Operation after expiration of franchise, § 87

Recovery of license fee or tax, § 176

Right to claim forfeiture of franchise, § 93

Evidence,

Actions for injuries,

Admissibility, §§ 308-311, pp. 461-472

Under pleading, § 304, p. 452

Weight and sufficiency, §§ 312-321, pp. 472-485

Burden of proof, ante

Construction or maintenance of street railroad, injuries resulting from, § 138

Contributory negligence, actions for injuries, § 319

Humanitarian doctrine, sufficiency in actions for injuries based on, § 317

Injunction suits by abutting owners, § 101, p. 218

Last clear chance, sufficiency in actions for injuries based on, § 317

Preponderance of evidence, generally, post

Proximate cause, sufficiency in actions for injury, § 321

Questions of law and fact, generally, post

Review of determination as to necessity or location, § 26

Willful or wanton injury, sufficiency in action for, § 318

Excavations,

Construction or maintenance of street railroad, liability for injuries resulting from, § 136

Liability for injuries, § 215

Repairs or restoration necessitated by, § 123, pp. 241-242

Exclusive franchise, construction, § 73, p. 186

Execution, paving assessment, § 126, p. 251

Executors and administrators, abutting owners, consent to use of street, § 64

Exemplary damages in actions for injuries, § 338

Question for jury, § 329

Expert testimony, question for jury in actions for injuries, § 322, n. 11

Extension of line,

Appeal from determination relating to, § 26

Certificate of public convenience and necessity as prerequisite, § 24

Condition of franchise, power to order extension, § 33, p. 155

Consent of abutting owners, necessity, § 58

Contract to establish joint station and terminus as precluding, § 150

Definition, § 83, p. 193

Fare reduced as condition of franchise, effect as modifying old franchise, § 36

Mortgage covering after-acquired property, § 156

Notice of application for, necessity, § 45

Power of company, § 14

Power to require or authorize,

Commissioners, § 24

Municipality, § 22

Purchaser's right, § 146

Repair of streets, effect on duty, § 118

Right and duty to construct, § 83, pp. 192-196

Extortion, granting of franchise, effect, § 50

Eyesight, contributory negligence of persons on or near tracks, § 285

Fares,

Charging excessive fares, forfeiture of franchise, § 92, p. 207

Condition relating to, power to impose in granting franchise, § 33, p. 160

Modification of old franchise by requiring lower fare as condition of franchise for extension, § 36

Sale of franchise to bidder offering lowest fare, § 52

Federal Safety Appliance Act, applicability, § 167

Fences,

Duty to maintain on retaining wall constructed by street railroad, § 136, n. 39

Embankment, duty to fence, § 213

Right of way, duty to fence, § 170

Fenders,

Absence of, proximate cause of injury, § 212, n. 62

Automobile, contributory negligence of person riding on, § 282

Care required in equipping cars, § 196

Injuries to persons on or near tracks, § 247

Pedestrian,

Falling over fender of unlighted streetcar, negligence, § 247

Struck by, duties as to raising and lowering of fender, § 247

Questions for jury in actions for injuries as to condition of equipment, § 324, p. 489

Raising and lowering fender, duties as to persons on or near tracks, § 247

Regulations requiring, validity, § 167

Financial loss,

Completion of line constructed in part, § 83, p. 196

Determination of whether line can be operated without loss, § 182

Duty to,

Perform conditions of franchise regardless of, § 32

Repair or pave streets as affected by, § 124, p. 248

Effect on duty to,

Continue service, § 177

Furnish adequate facilities, § 164

Excuse for nonperformance of franchise, § 92, p. 208

Extension of line, effect on duty to construct, § 83, p. 195

Regulations, reasonableness as affected by, § 160

Right to discontinue operation, § 181

Findings in actions for injuries, § 336

Fire apparatus,

Collision with, § 242

Contributory negligence of driver or occupant, § 283

Stopping of streetcars on approach of, regulations requiring, § 168

Fixtures, mortgage of realty as attaching to, § 156

Flagman,

Duty and liability of company, § 202

Signal to proceed as not relieving motorman from exercising care as to persons working on or near tracks, § 255

INDEX TO STREET RAILROADS

Flagman—Continued

Signaling motorman to cross intersection, duty to use reasonable care, § 224

Flashing signals, duty to install at ordinary crossing, § 239, n. 10

Fog,

Automobiles, contributory negligence as question for jury, § 325, p. 502, n. 58

Prevention of collision, § 240

Forfeiture. Franchise, post

Franchise, §§ 27-98, pp. 148-212

Abandonment, § 90

Ground for forfeiture, § 92, p. 207

Repair or paving of streets avoided by, § 124, p. 244

Acceptance,

Necessity and effect, § 35

Stockholders as bound by acceptance by directors, § 12

Amendment, § 36

Application for,

Necessity of compliance with statutory requirements, § 44

Notice of, § 45

Compensation for use of streets based on fixed sum per car, § 33, p. 156

Conditions of grant, §§ 32, 33, pp. 153-160

Conflicting grants, § 73, p. 186

Consent of city to use of streets, franchise granted by legislature subject to, § 19

Consolidation of companies, effect, § 153

Construction and operation of grant in general, §§ 71-74, pp. 182-188

Contract, franchise as binding contract on acceptance, § 35

Defined, § 37

Duration, § 87

Limitation as condition of grant, § 33, p. 155

Power of municipality to limit, § 34

Enlargement by legislature of rights under franchise granted by municipality, § 29

Exclusive franchise, § 73, p. 185

Power to grant, § 29

Excuses for nonperformance, § 92, p. 208

Expiration,

Continuance of service on basis of reasonable return, § 177

Effect, § 87

Removal of tracks, right to compel, § 109, n. 90

Restoration of streets after removal of tracks, § 121

Extension, § 88

Forfeiture, §§ 91-97, pp. 205-212

Estoppel to claim forfeiture, § 93

Extent of forfeiture, § 94

Grounds, § 92, pp. 206-209

Judicial or legislative determination of forfeiture, §§ 96, 97

Persons entitled to assert forfeiture, § 95

Remedies of company, § 91

Restoration of streets after removal of tracks, § 121

Waiver, § 93

Grant of franchise, §§ 27-52, pp. 148-171

Necessity, § 27

Review by commission or court, § 48

Franchise—Continued

Implied extension or renewal, § 88

Implied revocation, § 89

Irrevocable grant, right of forfeiture for breach of condition, § 92

Lessee bound by duties and liabilities of lessor, § 149

Misuser, ground for forfeiture, § 92, p. 206, n. 94

Nonuser, § 90

Ground for forfeiture, § 92, p. 207

Judicial determination of forfeiture not required, § 96

Unified management and operation, effect of contract for, § 151

Operation of cars on tracks belonging to municipality, § 343

Ordinance granting, sufficiency, § 46

Paving of streets, strict construction of franchise, § 113

Perpetual franchise, §§ 34, 87

Power to grant, § 29

Priority between conflicting grants, § 73, p. 186

Private or local statute, grant of franchise, § 30

Protection of rights, § 74

Relief from part of obligations, power to modify franchise, § 36

Renewal, § 88

Consent of abutting owners dispensed with, § 54

Construction of renewal ordinance, § 83, p. 192

Notice of application for, necessity, § 45

Repair of streets, duty imposed by in general, § 112

Revocation, § 89

Constitutional provision making franchise revocable at pleasure of city, § 34

Paving of streets, termination of duty, § 124, p. 244

Rights which may be conferred in general, § 31

Sale, §§ 145, 146

Highest bidder, § 52

Secondary franchise defined, § 37

Statutory term, effect of grant in excess of, § 87

Strict construction, § 71

Forfeiture provisions, § 91

Surrender, § 90

Transfer, §§ 145, 146

Unauthorized franchise, status as revocable license, § 89

Validity, §§ 50, 51

Fraud,

Consent of abutting owners obtained by, effect, § 66

Contract, stockholders entitled to sue for rescission, § 13

Determination by commissioners in lieu of abutting owners' consent to use of streets, § 69, p. 181

Granting of franchise, effect, § 50

Freight, transportation,

Authority of street railroad, § 15

Construction of franchise, § 72

Power of municipality to grant franchise, § 29

Regulation against operation of freight cars, §§ 163, 165

INDEX TO STREET RAILROADS

Freight, transportation—Continued

- Use of elevated tracks, consent of city, § 40
- Without authority,
 - Forfeiture of franchise, § 92, p. 207
 - Negligence, § 189
- Frequency of service, regulation, § 164
- Frightening animals. Animals, ante
- Fumigation of cars, regulations requiring, § 164
- Funeral processions,
 - Crossing in front of streetcar, contributory negligence of drivers of vehicles in procession, § 278
 - Custom of allowing to pass, admissibility of evidence in actions for injuries, § 310
 - Looking by individual drivers in procession before entering on tracks, contributory negligence, § 279, p. 425
- Gates, steam railway crossing, duty of operator of streetcar, § 225
- Gauge, change of,
 - Authority of company, § 105
 - Power to require, § 107
- General denial, actions for injuries,
 - Evidence admissible under, § 304, p. 453
 - Issues under, § 304, p. 451
- Going value, purchase by municipality, § 344, n. 1
- Gongs. Signals, generally, post
- Governor defined, § 1, p. 129
- Grade of street, tracks constructed with regard to future grade, negligence, § 223
- Greyhound motion defined, § 1, p. 128
- Grip car defined, § 1, p. 129
- Grip defined, § 1, p. 129
- Gross negligence,
 - Contributory negligence no defense, § 211
 - Lookout as to persons on or near tracks, failure to keep, § 250
 - Pleading, actions for injuries, § 302, p. 449
 - Preponderance of evidence, establishment by, § 318
- Gross receipts tax, applicability to company on substitution of busses, § 174
- Guardian of minor owner of abutting property, consent to use of street, § 64
- Guests,
 - Automobiles,
 - Contributory negligence, admissibility of evidence, § 310
 - Presumptions respecting negligence of guest in automobile struck by streetcar, § 307
 - Recovery under humanitarian doctrine, § 290, n. 1
 - Contributory negligence of occupant of vehicle driven by another, § 282
- Hanging on outside of car, offense, § 340
- Happening of accident,
 - Contributory negligence, presumption, § 307
 - Negligence, presumption from, § 306, p. 457
- Headlights. Lights, post
- Health regulations, § 164
- Hearing,
 - Commissioners, petition for permit to operate, § 24
 - Excuse for failure to hear by bicycle rider injured, § 273

Hearing—Continued

- Petition for determination by commissioners in lieu of abutting owners' consent to use of streets, § 69, p. 180
- Sound of approaching streetcar obstructed by person entering on tracks, contributory negligence, § 279, p. 427
- Helpless persons, negligence in operation while approaching, evidence, § 316, p. 476
- Highest bidder, sale of franchise to, § 52
- Horse railroad defined, § 1, p. 128
- Horses,
 - See, also, Animals, generally, ante
 - Collision, horse stopped close to tracks, § 235
- Contributory negligence,
 - Attempt to cross in front of streetcar, § 278
 - Child rider on or near tracks, § 284, n. 58
 - Driving near cars, § 275
 - Leaving horse on or near tracks, § 286
 - Riding on or near tracks, § 274, p. 413.
 - Stopping on or near tracks, § 281
 - Liability for frightening, §§ 205, 206
 - Loose on track, duties of streetcar operator, § 244
- Humanitarian doctrine,
 - See, also, Last clear chance, generally, post
 - Admissibility of evidence, § 311
 - Burden of proof, § 306, p. 456
- Contributory negligence,
 - Burden of proving freedom from when relying on doctrine, § 307
 - Injuries from operation of railroad avoidable notwithstanding contributory negligence, §§ 288-295, pp. 436-443
- Instructions, § 333
- Pleading, § 302, p. 448; § 304, p. 451, n. 97
- Consistency in pleading, § 302, p. 446
- Preponderance of evidence, necessity, § 317
- Questions for jury, § 326
- Sufficiency of evidence, § 317
- Husband and wife,
 - Consent to use of street, right of husband of legal owner of abutting property, § 64
 - Notice of claim for injuries, sufficiency, § 301
- Ignorance of peril on or near tracks, application of last clear chance doctrine, §§ 292, 293
- Illness of motorman resulting in collision, § 228
- Imminent danger,
 - Care required of motorman to avoid collision, § 228
 - Error of judgment by motorman resulting in collision, § 226
- Impeachment of witnesses in actions for injuries, § 308
- Implied waiver of grounds for forfeiture of franchise, § 93
- Improvement of streets,
 - Duty to improve street or to pay therefor in general, § 113
 - Paving of streets, generally, post
- Imputed negligence,
 - Burden of proof, § 307
 - Emergency vehicle, negligence of driver imputed to occupant, § 283
- Incapacity, pleading, actions for injuries, § 302, p. 446
- Income taxes, state assumption of company's debts and liabilities, § 345
- Indebtedness, municipal operation, § 341

INDEX TO STREET RAILROADS

Independent contractor,
 Liability of street railroad for injuries resulting from construction or maintenance work by, § 136
 Volunteer assisting employee of, liability of company for negligent or wrongful acts, § 191
 Indictment, obstructing streets with poles, etc., sufficiency, § 141
 Inexperienced or incompetent employees,
 Admissibility of evidence as to in actions for injuries, § 309, p. 468
 Liability of company for injuries, § 190
 Motorman, questions for jury in actions for injuries, § 324, p. 496
 Proximate cause of injury, § 212
 Infants. Children, generally, ante
 Infirm persons,
 Negligence in operation while approaching, evidence, § 316, p. 476
 On or near tracks, injuries to, § 262
 Contributory negligence, § 285
 Injunction against,
 Breach of duty relating to plan and mode of construction, § 108
 Construction and operation,
 After time limited, § 104
 Failure to obtain required consents of abutting owners, § 68
 Remedy of abutting owners, § 101, pp. 216-219
 Exercise of franchise, right of taxpayer to bring suit, § 50
 Failure to,
 Operate, § 179
 Perform conditions of franchise, § 32
 Granting of consent by local authorities, suit by taxpayer, § 48
 Interference with,
 Operation, rights, or franchise, §§ 74, 180
 Right to use streets, § 72
 Laying of tracks in street occupied by another company, § 131
 Maintenance, bar by consent of abutting owners to use of street, § 67
 Maintenance of tracks in dangerous condition, § 111
 Threatened removal of tracks, cross bill for compensation for use of streets, § 33, p. 158
 Unauthorized,
 Lease, § 147
 Occupation of street, § 28
 Revocation of franchise, § 89
 Use of tracks by another company, § 131
 Violation of contract for joint use of tracks, § 152
 Injuries caused by running of train, applicability of statute making railroad companies liable, § 163
 Injuries from or incident to construction or maintenance, §§ 136-138
 Injuries to animals. Animals, generally, ante
 Injuries to persons,
 Actions for injuries, generally, ante
 Anticipating danger to children, duty, § 259
 Approaching track, duty of motorist to stop, § 251, p. 385
 Assumption by motorman pedestrian would exercise due care, § 251, p. 381
 Attachment for, priority over mortgage, § 157

Injuries to persons—Continued
 Avoidable notwithstanding contributory negligence, §§ 288-295, pp. 436-443
 Questions for jury, § 326
 Binding effect of acts and contracts of company's representatives, § 12
 Change of relation from passenger to pedestrian, § 245
 Children, §§ 258-261, pp. 391-396
 Companies and persons liable, §§ 185-188
 Construction or maintenance of street railroad, injuries resulting from, §§ 136, 138
 Contract for medical aid, power of company to enter into, § 14
 Contributory negligence, generally, ante
 Crossing tracks between crossings, reliance on exercise of due care by pedestrian, § 251, p. 382
 Damages,
 Instructions, § 335
 Questions for jury, § 329
 Defects and obstructions in streets, generally, ante
 Elevated railroads, persons under, § 257
 Contributory negligence, § 272
 Instructions in actions for injuries, §§ 330-335, pp. 507-513
 Intervening independent cause, liability for injury, § 226
 Last clear chance, generally, post
 Leaving of track by car,
 Contributory negligence of person standing near track, § 268
 Injuries to persons on private premises, § 256
 Liability in general, §§ 189-204, pp. 310-329; §§ 207-212, pp. 331-340
 Meeting vehicles, duty to avoid injury, § 233
 Parallel tracks, reliance on pedestrian to exercise due care, § 251, p. 383
 Passengers, collision between cars of different streetcar systems, § 224
 Care required as to passengers on cars of other companies, § 224
 Persons on or near tracks, §§ 245-262, pp. 372-397
 Aged persons, § 262
 Approaching other cars or vehicles, § 253
 Brakes, care as to, § 247
 Care required in general, § 245
 Changing position by pedestrian, right to rely on exercise of due care, § 251, p. 383
 Children, §§ 258-261, pp. 391-396
 Contributory negligence, ante
 Control of car, generally, ante
 Current of air set up by movement of car causing injury, § 251, p. 384
 Curves, duty as to, § 254
 Custom as to, § 245
 Disabled persons, § 262
 Enfeebled persons, § 262
 Equipment, care as to, § 247
 Fenders, care as to, § 247
 Infirm or disabled persons, § 262
 Lights, care as to, § 247
 Lookout, post
 Lying on track, care required, § 262
 Obstruction of view at crossing, **duties**, § 252

INDEX TO STREET RAILROADS

Injuries to persons—Continued

- Persons on or near tracks—Continued
 - Overhang, care as to persons on or near tracks, § 247
 - Rounding curve, § 254
 - Passing other cars or vehicles, § 253
 - Precautions as to persons who are or should be seen, § 251, pp. 379-385
 - Proximate cause, § 212
 - Reliance on,
 - Due care by pedestrian, § 251, p. 381
 - Precautions or care of workmen, § 255
 - Signals, generally, post
 - Sleeping on or near track, § 262
 - Speed, generally, post
 - Status of injured person, § 253
 - Stopping, post
 - Violation of statute or ordinance while injuring, § 246
 - Working on or near tracks, § 255
- Presence of children,
 - Duty to anticipate, § 259
 - May be anticipated, care required, § 258
- Proximate cause, § 212
 - Instructions, § 334
- Questions of law and fact, §§ 322-329, pp. 486-507
- Reckless injury, question for jury, § 327
- Rescue of child from in front of approaching car,
 - duty of motorman, § 251, p. 384
- Sparks causing injuries to persons under elevated railroad, § 257
- Speed, post
- Street crossing, duty when approaching, § 252
- Verdicts and findings in actions for injuries, § 336
- Waiting to board car, reliance on due care by pedestrian, § 251, p. 383
- Wanton injuries, questions for jury, § 327
- Warning, generally, post
- Willful injuries,
 - Instructions in actions for injuries, § 333
 - Questions for jury, § 327
- Injuries to property, care required and liability in general, § 189
- Insolvency,
 - Duty to repair or pave street as affected by, § 124, p. 248
 - Obligations exceeding assets, § 13, n. 71
 - Reorganization of company, § 11
- Instructions in actions for injuries, §§ 330-335, pp. 507-513
 - Burden of proof, § 330
 - Contributory negligence, § 332
 - Damages, § 335
 - Last clear chance, § 333
 - Negligence of defendant, § 331
 - Proximate cause, § 334
 - Willful injury, § 333
- Insurer, street railroad not liable as, § 189
- Interference with operation, § 180
- Internal improvement, street railroad as, § 5
- Intersections,
 - Approaching, duties as to persons on or near tracks, § 252
- Collisions,
 - Ambulance right of way, § 241
 - Company rules, violation as to duties at intersection, § 238
 - Control of car by motorman, § 238

Intersections—Continued

- Collisions—Continued
 - Duties at or approaching, § 238
 - Lookout, duties of motorman, § 238
 - Railroad crossing rules, application, § 238
 - Starting by motorman at intersection, care required, § 238
 - Higher degree of care required, § 192
 - Lookout, greater vigilance required, § 197, p. 321
 - Negligence in approaching,
 - Questions for jury, § 324, p. 493
 - Sufficiency of evidence, § 316, p. 475
 - Reciprocal rights and duties of company and travelers,
 - At intersections, §§ 209, 210, pp. 333-337
 - Between intersections, §§ 208, 210
 - Right of way,
 - At intersections, §§ 209, 210, pp. 334-337
 - Between intersections, §§ 208, 210
 - Signals or warnings, duties and care required, § 202
 - Speed and control,
 - Care required, § 198
 - Duties of motorman, § 238
 - Reciprocal duties, § 209
 - Reducing speed, § 199
 - Stopping of car, regulations relating to, validity, § 168
 - Tracks of other railroads, §§ 132-135
 - Warning of approach, regulations requiring, validity, § 169
 - Warnings, reciprocal duties, § 209
- Interstate commerce commission, regulations, admissibility of evidence on issue of contributory negligence in actions for injuries, § 310
- Interurban railroads,
 - Automatic couplers, necessity, § 167
 - Defined, § 4
 - Fencing right of way, § 170
 - Franchise from city not required, § 40
 - Reciprocal rights and duties of company and traveler at public or private crossing, § 209
 - Signals, regulations relating to, validity, § 169
 - Speed, care required, § 198, n. 47
 - Transportation of freight, construction and operation of franchise, § 72
- Interurban service, additional franchise not required, § 27
- Intervening independent cause, liability for injuries in collision, § 226
- Intervention, mortgage foreclosure suit, § 158
- Intoxication,
 - Care required as to persons on or near tracks, § 262
 - Contributory negligence,
 - Admissibility on issue of, § 310
 - Person injured on or near tracks, § 285
 - Questions for jury, § 325, p. 503, n. 70
 - Automobile driver, § 325, p. 501, n. 52
 - Motorist, care required of motorman to avoid collision, § 228, n. 24
 - Motorman, admissibility of evidence to show intoxication at time of accident, § 309, p. 466
- Investigator, authority to settle claim against company, § 12
- Invitees, duties and care required, § 195
- Issues, actions for injuries, § 304, pp. 451-454
- Joinder of parties, actions for injuries, § 299

INDEX TO STREET RAILROADS

- Joint and several liability for negligence in collision, § 227
- Joint or interchangeable use of tracks, contracts for, § 152
- Joint-stock association, right to acquire and exercise right to construct and operate, § 20
- Joint tort-feasors, liability for negligence, § 185
- Joint use of street, § 73, p. 187
- Jurisdiction, actions for injury, § 297
- Jury questions. Questions of law and fact, generally, post
- Kid catcher defined, § 1, p. 128
- Knowledge,
 - Approach of car, necessity of sounding warning by streetcar, § 248
 - Danger or defect,
 - Admissibility of evidence in actions for injuries, § 309, p. 464
 - Pleading in actions for injuries, § 302, p. 446
 - Presumption in actions for injuries, § 305
 - Presence of person on or near tracks, application of last clear chance doctrine, § 293
- Laches,
 - Compelling removal from streets occupied without authority, § 28
 - Injunction suit by abutting owners, § 99, p. 217
 - Ouster of street railroad after expiration of franchise, § 87
 - Prevention of deviation from original location, § 75
 - Right to construct railroad lost by delay, § 104
- Last clear chance,
 - Admissibility of evidence, § 311
 - Answer in respect of, § 303
 - Burden of proof, § 306, p. 456
 - Contributory negligence,
 - Admissibility of evidence as to in action based on doctrine, § 311
 - Burden of proving freedom from in relying on doctrine, § 307
 - Care required after peril is or should be discovered, § 295
 - Injuries to persons on or near tracks avoidable notwithstanding contributory negligence, §§ 288-295, pp. 436-443
 - Ability and opportunity to avoid injury, § 294
 - Care required after peril is or should be discovered, § 295
 - Cause of injury, §§ 289, 290
 - Cessation or continuance of plaintiff's negligence, § 290
 - Danger or peril, §§ 291-293
 - Knowledge or ignorance of peril, §§ 292, 293
- Instructions, § 333
- Pleading, § 302, p. 448
- Preponderance of evidence, establishment by, § 317
- Proof of under general allegation of negligence, § 304, p. 453
- Questions for jury, § 324, p. 494; § 326
- Sufficiency of evidence, § 317
- Law, questions of. Questions of law and fact, generally, post
- Law of road,
 - Applicability, §§ 168, 210
 - Contributory negligence of person injured on or near tracks, § 280
- Leaning on or near tracks, contributory negligence, § 268
- Leases, §§ 147-149, pp. 266-269
 - Assignment of lease,
 - Liability for assignee's negligent operation of road, § 187
 - Rights and liabilities of assignee, § 149
 - Validity, § 147
 - Charter, lessee bound by charter of lessor, § 149
 - Elevated railroad, extension to commonwealth, § 345
 - Liability for negligent operation, § 187
 - License fee or tax, liability of lessee, § 175
 - Municipal system, § 343
 - Repair or paving of streets, duty of lessee, § 128
 - Right of over private property, § 99, p. 213
 - State, § 345
- Left turn,
 - Contributory negligence in turning left by driver meeting streetcar, § 280
 - Duty of motorman to give warning, § 202, n. 15
 - Signal ordinance inapplicable to streetcar, § 169, n. 47
- License,
 - Conductor, regulations requiring, § 166
 - Fees and taxes, §§ 174-176, pp. 295-300
 - Increase of license fee, power of municipality, § 33, p. 157
 - Placing of poles in street, effect as to liability for injuries, § 223
 - Power of city reserved in granting franchise, § 32
- Licensees,
 - Duties and care required, § 194
 - Evidence in actions for injuries to, § 318
- Liens, § 155
 - Consolidation of companies, effect, § 153
 - Cost of repairing or paving street, § 126, p. 250
 - Foreclosure, § 158
 - Priorities, § 157
- Life tenant of abutting property, consent to use of street, § 64
- Lights,
 - Assumption by driver of vehicle streetcar will have proper lights, contributory negligence, § 274
 - Compliance with law as not excusing vigilant lookout, § 248
 - Duties and care required, § 203
 - Headlights,
 - Duties and care required, § 203
 - Operating without headlight, § 240
 - Proximate cause of injury, § 212, n. 62
 - Regulations relating to, validity, §§ 167, 169
 - Injuries to persons on or near tracks, § 247
 - Lack of light by streetcar,
 - Contributory negligence of motorist attempting to cross in front of streetcar, § 278, n. 67
 - Stopping at intersection by motorist affecting contributory negligence, § 279, p. 424, n. 3
 - Negligence in respect of, admissibility of evidence, § 309, p. 467
 - Questions for jury in actions for injuries, § 324, p. 492
 - Red light,
 - Illness of motorman causing running through red light, § 228, n. 45

INDEX TO STREET RAILROADS

Lights—Continued

Red light—Continued

Stopping by streetcar, contributory negligence of driver or occupant of emergency vehicle assuming streetcar was stopped, § 283, n. 42

Running car at night,

High speed without lights, negligence, § 198

Without headlight burning, § 240

Streets, regulations requiring, validity, § 170

Traffic lights, stopping on tracks, contributory negligence, § 281

Limitation of actions for injuries, § 208

Injuries from negligence in repairing streets, § 138

Listening, contributory negligence, evidence in actions for injuries, § 319

Local authorities,

See, also, Municipalities, generally, post

Consent to construction and operation of street railroad, "local authorities" whose consent is necessary, § 42

Location. Route or location, generally, post

Location of route or tracks, §§ 75-78

Appeal from determination relating to, § 26

Charter, statement in, effect on power of municipality to grant rights in other streets, § 31

Choice by company, § 105

Designation by municipal authorities, necessity, etc., § 46

Determination of, §§ 21-26, pp. 142-148

Forfeiture of particular location, compelling removal of tracks, § 109

Private property, consent of local authorities, § 99, p. 215

Looking and listening, contributory negligence of person driving on or along tracks, § 276

Looking up at elevated train passing, contributory negligence, § 272

Lookout,

Approaching street crossing, duties as to persons on or near tracks, § 252

Care required of motorman, § 197, pp. 320-323

Children on or near tracks, § 260

Evidence in actions for injuries, § 316, p. 476

Contributory negligence,

Evidence in actions for injuries, § 319

Person injured on or near tracks, effect of failure to keep lookout, § 263

Crossing vehicles, negligence, evidence, § 316, p. 477

Curve, injuries to persons on or near tracks, § 254

Flat cars pushed from behind with electric engine, absence of lookout as negligence, § 229, n. 49

Intersection, prevention of collision, § 238

Liability for motorman's failure to keep where not contributing to injury, § 226

Meeting other cars or vehicles, § 253

Ordinary care requiring lookout to avoid collision, § 228

Particular places as to persons on or near tracks, § 248

Passing other cars or vehicles, § 253

Persons driving along tracks, duty of motorman, § 234

Persons on or near tracks, § 248

Failure to keep lookout as gross negligence, § 250

Lookout—Continued

Persons on or near tracks—Continued

Rounding curve, § 254

Proximate cause of injury, evidence as to, § 321

Question for jury in actions for injuries, § 324, p. 491

Regulations relating to, validity, § 169

Stalled vehicle on or near tracks, § 235

Sufficiency of lookout as to persons on or near tracks, § 248

Trespassers, § 193, p. 317

Turn in street, duty of motorman approaching, § 228

Vigilant watch ordinance, generally, post

Wilful or wanton injury, failure to keep lookout, § 211, n. 50

Workmen on or near tracks, care to avoid injury, § 255

Loops, right to construct, § 79

Mail truck parked to collect from box, negligence of motorman, § 235, n. 85

Maintenance, §§ 111-128, pp. 228-254

Injuries from or incident to, §§ 136-138

Negligence in respect of, admissibility of evidence in actions for injuries, § 309, p. 464

Offenses and penalties incident to, §§ 139-141

Repair of streets, generally, post

Mandamus, remedy for unauthorized discontinuance of operation, § 184

Map of purposed,

Extension, § 83, p. 193

Route, filing, etc., § 76

Master and servant, imputed negligence, presumption in actions for injuries, § 307

Materiality of evidence, actions for injuries, § 308

Materialmen, priority over mortgages, etc., § 157

Mayor, municipal consent to use of streets granted to mayor's agent, invalidity, § 41

Mechanic's lien, street railroad as subject to, § 155

Meeting,

Animals or vehicles resulting in collision, § 233

Other cars or vehicles, duties as to persons on or near track, § 253

Mental disability, contributory negligence as question for jury in action for injuries, § 325, p. 503

Messenger cable defined, § 1, p. 128

Mileage, license tax based on, § 174

Minors. Children, generally, ante

Misleading instructions in action for injuries, § 331, n. 5

Last clear chance, § 333, n. 21

Negligence of defendant, § 331, n. 9

Proximate cause, § 334, n. 23

Missiles, throwing at car, offenses, § 340

Mist, prevention of collision, § 240

Mistake,

See, also, Errors in judgment, generally, ante

Payment of license tax, effect, § 176

Monopoly, power to grant, § 29

Mortgages, § 156

Bonds secured by, rights of bondholders, § 154

Default, mortgagee taking possession, liability for negligent operation, § 185

Foreclosures, § 158

Priorities, § 157

Right of mortgagee to judicial determination in respect of forfeiture of franchise, § 95

INDEX TO STREET RAILROADS

- Motive power, § 142
 - Change, § 143
 - Materiality, § 1, p. 127
 - Regulation, § 163
- Motor defined, § 1, p. 128
- Motor vehicles,
 - Assumption of risk of collision, § 263, n. 67
 - Busses, generally, ante
 - Collision,
 - Ambulance, § 241
 - Concurrent negligence of host and motorman causing injuries to passenger, § 227
 - Crossing track in front of car, § 231
 - Duty and care required of street railroads, § 228
 - Fire apparatus, § 242
 - Intoxicated motorist, care required of motorman, § 228, n. 24
 - Lookout required of motorman, § 228
 - Loss of control by motorist resulting in collision, § 231, n. 2
 - Passing another vehicle at curve, negligence, § 228
 - Police vehicle, § 243
 - Suddenly moving motor vehicle onto tracks, contributory negligence, § 276, n. 35
 - Taxicab parking on tracks, joint and several liability to passenger in taxicab, § 227, n. 22
 - Violation of law in use affecting liability for negligent operation of street car, § 226
 - Contributory negligence, generally, ante
 - Control over moving automobile, presumption, § 307
 - Fender, contributory negligence of person riding on, § 282
 - Guests, generally, ante
 - Questions of law and fact in actions for injury, §§ 322-329, pp. 486-507
 - Reciprocal rights and duties of company and motorists, §§ 208-210, pp. 331-337
 - Right of way, generally, post
 - Running board, contributory negligence of person riding on, § 282
 - Stalled automobile pushed by streetcar, contributory negligence causing injury, § 263, n. 67
 - Unregistered automobile as trespasser, § 193, p. 315
- Motorcycles,
 - Contributory negligence,
 - Proximate cause of injury, § 287, n. 90
 - Rider injured on or near track, § 273
- Motorman, declarations or statements of as admissible in actions for injuries, § 308
- Movement of car, negligence as question for jury, § 324, p. 490
- Municipalities,
 - Abandonment of part of municipally owned system, § 181
 - Abutting owners' suit to enjoin construction, city as party, § 101, p. 218
 - Abutting property owned by city, consent to use of street by street railroad, §§ 64, 66
 - Acquisition by, § 341
 - Approval of route or location, necessity, § 22
 - Boundaries, extension, effect on street railroad's duty to pave streets, § 118
- Municipalities—Continued
 - Bridges, apportionment of cost of rebuilding, § 119, p. 238
 - Change of motive power, consent, § 143
 - Compensation for use of streets and bridges, power to exact, § 33, pp. 156-160
 - Consent to use of street, §§ 37-52, pp. 162-171
 - Change of route or location, § 77
 - Change to motor busses, § 142
 - Conditions, §§ 32, 33, pp. 153-160
 - Connections with other railroads, § 134
 - Election on question of, § 47
 - Extension of line, § 83, p. 193
 - Failure to obtain,
 - Remedies, § 28
 - Right to compel removal of tracks, § 109
 - Hearing on application for, necessity, § 45
 - Implied consent, § 46
 - License fee or tax as prerequisite, § 175
 - Necessity, §§ 37, 40
 - Notice of application for, § 45
 - Officers of boards from whom consent obtained, § 42
 - Operation and effect, § 50
 - Ordinance granting consent,
 - Submission to vote, § 47
 - Sufficiency, § 46
 - Persons to whom consent given, § 41
 - Presumption of granting of, § 49
 - Proceedings to obtain, §§ 44-48, pp. 166-169
 - Resolution granting, sufficiency, § 46
 - Review by commission or court, § 48
 - Revocation, § 89
 - Right to refuse consent, § 43
 - Switches, turnouts, and sidings, § 79
 - Time limit on construction of street railroad, § 104
 - Use by one company of another's tracks, § 129
 - Validity, §§ 50, 51
 - Consolidation, consent of abutting owners to continuance of operation, § 61
 - Discontinuance of operation, consent required, § 181
 - Extension of line, authority to require or authorize, § 22
 - Forfeiture of franchise, right to maintain proceedings, § 95
 - Franchise, power to grant, § 29
 - Lease of street railroad, consent, § 147
 - License fee or tax, power to impose, § 175
 - Line extending through several municipalities, consent of local authorities, § 40
 - Method of construction, regulation, § 106
 - Mortgage of franchise, etc., consent, § 156
 - Nonuser of franchise, declaration of revocation, § 96
 - Operation of, §§ 341-344, pp. 515-519
 - Authority, § 341
 - Bridge, operation over, § 341
 - Contract for construction, § 343
 - Invalid contract, § 344
 - Emergency deposit, grantor of street railway purchased by city as beneficial owner, § 344
 - Extent of system, § 342
 - Lease, § 343
 - Purchase of railroad, § 344
 - Special fund, application, §§ 342, 344

INDEX TO STREET RAILROADS

Municipalities—Continued

- Ordinances, generally, post
- Paving of streets, generally, post
- Police power, generally, post
- Power to change rights or duties of company § 17
- Private property, consent to construction on, § 99, p. 215
- Regulation, § 161
 - Effect of delegation of power to state board, etc., § 162
 - Questions for jury in action for injuries, § 322
- Relocation of tracks required or authorized by, § 107
- Repair of streets, generally, post
- Right of municipality to attack validity of franchise, § 50
- Route or location, appeal from decision of municipal authorities, § 26
- Sale of franchise, consent of municipal authorities, § 52
- Surrender of franchise, acceptance, § 90
- Time limit on construction, authority to impose, § 104
- Unification of transit system, § 341, n. 67
- Unified management and operation, consent to contract for, § 151
- Waiver of forfeiture of franchise, authority, § 93
- Nearsighted persons, contributory negligence on or near tracks, § 285
- Negative testimony, warning, sufficiency in actions for injuries, § 316, p. 475
- Negating defenses, pleading of action for injuries, § 302, p. 449
- Negligence,
 - Admissibility of evidence as to, actions for injuries, § 309, pp. 462-469
 - Burden of proof, actions for injuries, § 305; § 306, p. 455
 - Care required and liability in general, §§ 189-212, pp. 310-340
 - Circumstantial evidence, establishment by, § 316, p. 475
 - Collisions, generally, ante
 - Companies and persons liable, §§ 185-188
 - Construction or maintenance of street railroad, injuries resulting from, §§ 136, 138
 - Contributory negligence, generally, ante
 - Imputed negligence, generally, ante
 - Injuries to persons, generally, ante
 - Motorman, admissibility of evidence in action for injuries, § 309, p. 467
 - Operation, preponderance of evidence as essential, § 316, pp. 474-480
 - Other accidents, admissibility of evidence as to in actions for injuries, § 309, p. 466
 - Pleading, actions for injuries, § 302, pp. 445, 447
 - Necessity of pleading, § 304, p. 452
 - Preponderance of evidence, establishment by in actions for injuries, § 312
 - Presumptions, action for injuries, § 306, p. 455
 - Res ipsa loquitur, rebutting presumption of negligence when doctrine applies, § 306, p. 458
 - Speed, admissibility of evidence as to in actions for injuries, § 309, pp. 463, 467
 - Statutory provisions, burden of proving freedom from in action for injuries, § 306, p. 458

Negligence—Continued

- Weight and sufficiency of evidence in actions for damages based on, § 312
- Negotiable instruments,
 - Power of,
 - Company to issue, § 14
 - President and secretary to bind company by execution of notes, § 12
- Newsboy boarding car to sell papers, trespasser § 193, p. 315
- Noise,
 - Adjoining owner's right to damages, § 189
 - Excuse for not ringing bell, § 202, n. 19
 - Frightening of horses, § 205
 - Negligence in not yielding right of way to police vehicle, § 243, n. 56
- Notice,
 - Backing streetcar resulting in collision, § 228
 - Defect or obstruction in street, § 222
 - Paving of streets, § 125; § 126, p. 251
 - Questions for jury in actions for injuries, § 324 p. 492, n. 76
 - Repair of streets, § 125; § 126, p. 251
- Notice of claim, actions for injuries, condition precedent, § 301
- Nuisance,
 - Abatement, § 108
 - Abutting owners' action for damages, liability to abatement as defense, § 102
 - Criminal responsibility, § 140
 - Defect or obstruction in street, liability for injuries, § 223
 - Method of construction, § 105
 - Operation after expiration of franchise, § 87
 - Tracks in dangerous condition, § 111
 - Unauthorized,
 - Construction and operation, injunction by abutting owner, § 101, p. 216
 - Occupation of streets, § 28
 - Removal of tracks, etc., § 109
- Obstructions,
 - Defects and obstructions in streets, generally ante
 - View, generally, post
- Occupant of vehicle,
 - Contributory negligence as proximate cause of injury on or near tracks, § 287, n. 90
 - Emergency vehicle, contributory negligence, § 28
 - Vehicle driven by another, contributory negligence, § 282
- Offenses,
 - Construction and maintenance, offenses incident to, §§ 140, 141
 - Street railroad company or its servants, § 339
 - Street railroad property or operation, offense against, § 340
- Officers and agents, acts as binding on company, § 1
- One-man cars,
 - Operation as negligence, § 204
 - Power to authorize, § 166
- Open car defined, § 1, p. 130
- Operation,
 - Conditions relating to, power to impose in granting consent to use of streets, § 33, p. 160
 - Contract for unified management and operator validity, § 151
 - Contract not to operate, validity, § 150
 - Discontinuance, §§ 181-184, pp. 303-307

INDEX TO STREET RAILROADS

Operation—Continued

- Duty to operate, §§ 177-179
- Evidence as to in actions for injuries, § 313
- Injunction against, remedy of abutting owners, § 99, pp. 216-219
- Interference with, § 180
- Municipalities, ante
- Negligence,
 - Admissibility of evidence in actions for injuries, § 309, p. 465
 - Preponderance of evidence as essential to establish, § 316, pp. 474-480
- Persons entitled to acquire and exercise right to construct and operate, § 20
- Pleading, actions for injuries, § 302, p. 445; § 304, p. 452
- Right to operate in general, § 19
- States, § 345
- Opinion evidence, admissibility in action for injuries, § 309, p. 462
- Speed, § 309, p. 468
- Option, state's option to purchase, § 345
- Ordinances,
 - Agents of street railroad required to look out for vehicles approaching tracks, § 233
 - Amendment, franchise ordinance passed as amendment of void act, § 51
 - Brakes not complying with, injuries to persons on or near track, § 247
 - Compliance with as condition of franchise, § 33, p. 155
 - Contract, nature of ordinance granting right to construct and operate, § 37
 - Contributory negligence,
 - Evidence in actions for injuries, § 320
 - Admissibility, § 310
 - Person injured while violating ordinance, § 266
 - Enforcement of franchise ordinance by enacting penal ordinance, § 32
 - Expenses, payment by company as condition to grant of consent by municipality, § 33, p. 156
 - Extension of,
 - Franchise, presumption of acceptance of amendatory ordinance, § 88
 - Street railroad, validity, § 22
 - Fenders not in compliance with ordinance, care as to persons on or near tracks, § 247
 - Franchise ordinance,
 - Construction, § 71
 - Statutory conditions, § 32
 - Sufficiency, § 46
 - Granting consent to use of street, submission to popular vote, § 47
 - Injuries to persons on or near tracks while violating ordinance, § 246
 - Injury as result of failure to comply with, pleading in action for injuries, § 302, p. 447
 - Lease of street railroad, authorization, § 147
 - Lookout, care required, § 197, p. 322
 - Negligence in violating,
 - Admissibility in action for injury, § 309, p. 462
 - Presumption in action for injuries, § 306, p. 455
 - Notice of purposed ordinance granting franchise or consent to use of streets, § 45

Ordinances—Continued

- Paving of streets,
 - Change in obligation by subsequent ordinance, § 116
 - Duty imposed by in general, § 113
 - Exemption from duty, § 124, p. 245
- Prior apparatus having right of way over streetcar, § 242
- Proximate cause of injury, violation as, evidence, § 321
- Regulations in general, §§ 160-176, pp. 282-300
- Renewal of franchise, construction of ordinance, § 83, p. 192
- Repair of streets, duty imposed by, § 112
- Right of way regulations, § 210
- Sale of franchise, consent of municipal authorities, § 52
- Speed violations as negligence, § 200
 - Collision, § 230
 - Animals or vehicles crossing track in front of car, § 231
- Stopping by motorman required on first appearance of danger, § 234
- Vigilant watch ordinance, generally, post
- Violation,
 - Basis of actions for injuries, evidence, § 315
 - Cars stopping to take on passengers, negligence as to person on vehicle struck by car, § 234
 - Collision between cars of different streetcar systems causing injuries to passenger, § 224
 - Negligence per se, § 189
 - Warnings at intersection, streetcar approaching, § 239
- Other accidents, admissibility of evidence as to in actions for injuries, § 309, pp. 462, 466
- Overhang,
 - Care required of motorman in making curves and turns, § 228
 - Contributory negligence of person injured, §§ 268, 269
 - Injuries to persons on or near tracks, § 247
 - While rounding curve, § 254
 - Streetcar rounding curve, presumption respecting knowledge of pedestrian, § 307
- Ownership,
 - Burden of proof, action for injuries, § 305
 - Evidence as to in actions for injuries, § 313
 - Pleading, actions for injuries, § 302, p. 445; § 304, p. 452
- Parallel tracks, reliance on due care exercised by person waiting to board car on parallel track, § 251, p. 383.
- Park commissioners,
 - Authority to license railroad in parks, § 29
 - Consent to construction of street railroad, validity, § 46
- Parked vehicles,
 - Collision with, § 235
 - Meeting vehicle unable to pass parked car, § 233, n. 16
 - Negligent operation resulting in, evidence, § 316, p. 477
- Parties,
 - Actions for injuries, § 299
 - Injunction suit by abutting owners, § 101, p. 218
- Partnership, right to acquire and operate, § 20

INDEX TO STREET RAILROADS

Passengers,

- Cars of other companies, degree of care required to, § 224
 - Change of relation from passenger to pedestrian of person injured, § 245
 - Contributory negligence of occupant of vehicle driven by another, § 282
 - Determination of status, injuries to persons on or near track, § 253
 - Injuries to passengers in collision, concurrent negligence of host in motor vehicle and motor-man, § 227
 - Injuries to person ceasing to be passenger, contributory negligence in violating rule or regulation of company, § 266
 - Parked cars or vehicles discharging passengers, duties of motorman, § 253
 - Regulations for safety and comfort, company's right and duty to adopt, § 171
 - Service and accommodations, § 164
 - Third person injured by, liability of company, § 191
- ## Passing animals or vehicles, § 232
- Duties as to persons on or near track, § 253
 - Negligence as question for jury, § 324, p. 496
- ## Paving of streets,
- Assessments for, priority of mortgage, § 157
 - Change in obligation by subsequent statute or ordinance, etc., § 116
 - Company or person obligated, § 128
 - Doing of work at company's expense, § 126, pp. 249-252
 - Duty to pave or otherwise improve street or to pay therefor in general, § 113
 - Duty to "repair", etc., as including, § 123, p. 241
 - Estoppel of company to deny liability, § 127
 - Exemption from duty, § 124, p. 245
 - Purchaser's right to exemption of vendor, § 146
 - Existing, original, and subsequent pavement, duty to pay for, § 122
 - Extension of line and of municipal boundaries, effect, § 118
 - Financial hardship, effect on duty, § 124, p. 248
 - Maintenance of pavement, duty of, § 115
 - Necessity, determination of, § 123, p. 243
 - Notice by municipal authorities, Necessity, § 125
 - Prior to doing of work at company's expense, § 126, p. 251
 - Ownership of paving, § 111
 - Power of company, § 14
 - Release from duty, § 124, p. 246
 - Repair defined, § 123, p. 241
 - Right of use by street railroad as subject to right of city, § 72
 - Scope and extent of duty, § 115
 - Substitution of single for double tracks, effect, § 117
 - Tax as affecting duty, § 124, p. 248
 - Termination of duty, § 124, pp. 244-249
 - Violation of paving ordinance as negligence per se, § 213, n. 85

Pedestrians,

- Blinding lights, care required, § 247
- Care as to persons on or near tracks, § 245
- Change of relation from passenger to pedestrian of person injured, § 245

Pedestrians—Continued

- Conductor's duty to look out for, § 248
 - Injuries to persons, generally, ante
 - Knowledge of overhang of streetcar rounding curve, presumption, § 307
 - Reciprocal rights and duties, §§ 208-210, pp. 331-337
 - Willful or wanton injury, failure to see pedestrian, § 211, n. 50
- ## Penalties,
- License fee and tax, failure to pay, § 176
 - Obstruction of fire apparatus, negligence on part of street railroad, § 242
 - Regulations, violation of § 172
- ## Personal injuries,
- Actions for injuries, generally, ante
 - Injuries to persons, generally, ante
- ## Persons liable for injuries, §§ 185-188
- ## Petition,
- Actions for injuries, § 302, pp. 445-449
 - See, also, Complaint, generally, ante
 - Determination by commissioner in lieu of abutting owners' consent to use of streets, § 69, p. 180
 - Determination of propriety of forfeiture of right to operate, § 91
- ## Physical disability, contributory negligence of person on or near track, § 285
- ## Place, looking and listening by person crossing tracks, § 271, p. 410
- ## Place of injury, burden of proof of action for injuries, § 305
- ## Platforms,
- Children permitted to ride on, negligence, § 195
 - Passengers prohibited from riding on, validity of regulations by company, § 171
 - Persons on as trespassers, § 193, pp. 315-316
- ## Pleading,
- Actions for injuries, Answer, § 303
 - Complaint, declaration or petition, § 302, pp. 445-449
 - Evidence admissible under, § 304, p. 452
 - Issues formed by, § 304, p. 451
 - Complaint, generally, ante
 - Injunction suits by abutting owners, § 101, p. 218
 - Mortgage foreclosure suit, § 158
- ## Poles,
- Defects or obstructions, Approval of officials as excuse, § 223
 - Indictment for obstructing streets, sufficiency, § 141
 - Liability for, §§ 213, 218
 - License, person climbing trolley pole to repair city fire alarm wire, § 194
 - Location as constituting nuisance, § 105, n. 31
 - Motor vehicle striking defective pole, liability of company, § 191
 - Relocation, authority to require, § 107
 - Wrongful destruction by municipality, recovery of damages, § 137
- ## Police power,
- Compelling operation, § 179
 - Interference by conditions of grant, power of municipality, § 32
 - License fee or tax, imposition under, § 175
 - Maintenance of tracks, § 111

INDEX TO STREET RAILROADS

Police power—Continued

- Paving of streets,
 - Determination of necessity, § 123, p. 243
 - Imposition of duty, § 113
- Relocation of tracks, § 107
- Removal of tracks, § 109
- Repair of streets,
 - Determination of necessity, § 123, p. 243
 - Duty in general, § 112
- Police vehicles, collision with, § 243
- Contributory negligence, § 283
- Positive testimony, warning, sufficiency in action for injuries, § 316, p. 475
- Preponderance of evidence,
 - Contributory negligence, establishment by in actions for injuries, § 319
 - Gross negligence, establishment by, § 318
 - Last clear chance, reliance on, § 317
 - Negligence, proof by in actions for injuries, § 312; § 316, pp. 474-480
 - Proximate cause, establishment by in actions for injuries, § 321
 - Willful or wanton injury, establishment by, § 318
- Presumptions,
 - Abandonment of right to occupy street, § 181
 - Acceptance of ordinance extending franchise, § 88
 - Actions for injuries, §§ 305-307, pp. 454-461
 - Animals or vehicles crossing track in front of car, § 231
 - Bonds, proper exercise of authority to issue, § 154
 - Contributory negligence, actions for injuries, §§ 307, 319
 - Good faith in leasing franchises on property, § 147
 - Granting of consent to construction and operation, § 49
 - Person seen on or near track as not in danger, § 251, p. 381
- Prima facie case,
 - Contributory negligence, actions for injuries, § 319
 - Injuries in collision due to obstruction of street, § 315
- Private property,
 - See also Abutting owners, generally, ante
 - Acquisition and use, § 99, pp. 212-216
 - Failure to obtain right of way as precluding forfeiture of franchise, § 92, p. 209
 - Injuries to persons on, § 256
 - Paving on private right of way, power to compel, § 115
 - Right of way on,
 - Speed of cars, § 198, n. 47
 - Status of railroad, § 6
 - Substitute for highway temporarily obstructed, duty to maintain in safe condition, § 136
 - Trespassers on, § 193, p. 315
- Private roads, duties as to persons on or near track, § 252, n. 32
- Privilege tax on corporations, liability for, § 175
- Process, actions for injuries, § 300
- Projecting objects, res ipsa loquitur doctrine as applicable to injury resulting, § 306, p. 458
- Prone or erect persons on or near tracks, lookout required of motorman, § 248
- Proof,
 - Actions for injuries, § 304, pp. 451-454
 - Evidence, generally, ante

Property,

- Offenses against street railroad property, § 340
- Power of company to acquire and hold, § 14
- Protest by occupant of vehicle driven by another, contributory negligence on failure to protest, § 282
- Proximate cause of injuries, § 212
 - Burden of proof in actions for, § 306, p. 455
- Construction or maintenance of street railroad, injuries resulting from, § 136
- Contributory negligence,
 - Burden of proof in actions for, § 307
 - Evidence, § 321
 - Person injured on or near tracks, § 287
- Evidence in actions for, § 321
- Instructions in action for, § 334
- Pleading in actions for, § 302, p. 448; § 304, p. 451, n. 97
- Question for jury in action for, § 328
- Public authorities, construction, acquisition and operation, §§ 341-345, pp. 515-521
- Public convenience and necessity,
 - Appeal from determination, § 26
 - Certificate of public convenience and necessity, generally, ante
 - Extension of line, power of municipality, § 22
 - Finding by court as prerequisite, § 25
- Public nuisance, offenses by company, § 339, n. 57
- Public policy, conditions of grant, power of municipality, § 32
- Public service commission,
 - Bridges,
 - Determination of number of tracks on, § 85
 - Jurisdiction of contract for compensation for use, § 33, p. 159
 - Repairs, apportionment of cost, § 119, p. 237
 - Change of grade of street, necessity of consent, § 120
 - Changes in construction, authority to require, § 107
 - Discontinuance of operation,
 - Consent required, § 181
 - Proceedings for, § 182
 - Enforcement of conditions of franchise, § 32
 - Fare established by, effect on rate fixed by city, § 33, p. 160
 - Lease, approval, § 147
 - Maintenance and repair of streets, supervisory powers, § 114
 - Regulation, power of, § 162
 - Reorganized corporation, jurisdiction over, § 11
 - Stock, powers relating to, § 13
- Public service corporation, street railroad company as, § 7
- Public use of street cannot be denied by grant of franchise, § 31
- Public utility, street railroad regarded as, § 5
- Punitive damages in action for injuries, § 338
 - Question for jury, § 329
- Purchase, municipality, § 344
- Purchaser. Sale, generally, post
- Quadrilateral system defined, § 1, p. 128
- Quasi-public corporation, street railroad company regarded as, § 7
- Questions of law and fact in action for injuries
 - §§ 322-329, pp. 486-507
 - Act in emergencies, § 324, p. 496
 - Contributory negligence, § 325, p. 503

INDEX TO STREET RAILROADS

Questions of law and fact in action for injuries—
Continued
Approaching crossing or street intersection, § 324, p. 493
Approaching or passing other cars, § 324, p. 496
Approaching person, vehicle or animal on or near track, § 324, p. 494
Avoidance of injury from defect or obstruction in street, § 325, p. 502
Care in operation, § 324, p. 489
Children, contributory negligence, § 325, p. 503
Collision with streetcar, contributory negligence, § 325, p. 497
Companies and persons liable, § 323
Contributory negligence, § 325, pp. 497-503
Crossing, approaching, § 324, p. 493
Damages, § 329
Defects in tracks, structures, cars, equipment or streets, § 324, p. 488
Avoidance, § 325, p. 502
Disabled persons, contributory negligence, § 325, p. 503
Frightening animal by car, § 324, p. 496
Incompetency of motorman, § 324, p. 496
Intersection, approaching, § 324, p. 493
Lights, § 324, p. 492
Looking and listening, contributory negligence, § 325, p. 501
Lookout, § 324, p. 491
Mistakes of judgment, § 324, p. 496
Movement, speed and control of car, § 324, p. 490
Negative evidence, § 324, p. 493
Negligence of defendant, § 324, pp. 487-496
Obstruction in street, avoidance of injury, § 325, p. 502
Proximate cause, § 328
Signals and warnings, § 324, p. 492
Unavoidable accident, § 328
Willful, wanton or reckless injury, § 327
Quo warranto proceedings for forfeiture of franchise, § 97
Radio programs on cars, regulation, § 164
Railroads,
Bridges, injunction against unauthorized construction of street railroad over bridge, § 28
Crossings,
Care required of person in charge of streetcar, § 225
Failure to stop pursuant to statute ordinance, negligence, § 200
Regulations relating to movement of cars, § 168
Warning signals, regulations requiring, validity, § 169
Extension of line of steam railroad as street railroad, § 83, p. 192
Franchise to operate street railroad, propriety of grant to, § 20
Incorporation of street railroad under railroad incorporation act, § 9
Stop, look and listen, comparison of duty of person approaching crossing, § 271, p. 410
Rails. Tracks, generally, post.
Rate, transportation, effect on status as street railroad, § 1, p. 127
Rear view mirror, lack of as contributory negligence proximate cause of injury, § 287, n. 84

Receiver, § 159
Appointment for lessee, effect as terminating lease, § 148
Liability for negligent operation, §§ 185, 187
Right to reject lease, §§ 147, 159
Reciprocal rights and duties of company and travelers on street, §§ 207-210, pp. 331-337
Recklessness,
Contributory negligence no defense, § 211
Question for jury in action for injury, § 327
Recording, consent of abutting owners to use of streets, necessity, § 66
Redemption from mortgage foreclosure sale, § 158
Red lanterns at excavations, applicability of ordinance requiring, § 215
Regulation, §§ 160-176, pp. 282-300
Speed, §§ 200-201
Violation of company rules as negligence, §§ 192, 203
Relevancy of evidence, actions for injuries, § 308
Remainderman of abutting property, consent to use of street, § 64
Repair of streets,
Change in obligation by subsequent statute or ordinance, etc., § 116
Character of repairs required, § 123, pp. 241-244
Company or person obligated, § 128
Duty in general, § 112
Estoppel of company to deny liability, § 127
Excavations necessitating, § 123, pp. 241-242
Exemption from duty, § 124, p. 245
Extension of line and of municipal boundaries, effect, § 118
Failure to perform duty, liability, § 213
Financial hardship, § 124, p. 248
Injuries from or incident to, §§ 136, 138
Making repairs at company's expense, § 126, pp. 249-252
Necessity, determination of, § 123, p. 243
Neglect of duty, liability for injuries, § 186
Notice by municipal authorities,
Necessity, § 125
Prior to doing of work at company's expense, § 126, p. 251
Paving, inclusion in duty to "repair", etc., § 123, p. 241
Portion of street included, § 117
Release from duty, § 124, p. 246
Scope and extent of duty, § 115
Tax as affecting duty, § 124, p. 248
Temporary obstructions permitted, § 214
Termination of duty, § 124, pp. 244-249
Replication or reply, actions for injuries, § 303
Reproduction cost, purchase of system by municipality, § 344, n. 1
Repugnancy, pleading, actions for injuries, § 302, p. 446
Reputation, motorman, admissibility of evidence as to on issue of negligence in actions for injuries, § 309, p. 469
Res gestae, admissibility of evidence as part of in actions for injuries, § 308
Res ipsa loquitur,
Application of doctrine in action for injuries, § 306, p. 457
Pleading doctrine, actions for injuries, § 304, p. 453, n. 33

INDEX TO STREET RAILROADS

- Rescue from injuries from approaching car attempted, care required of motorman, § 251, p. 384
- Rescue of property, contributory negligence of person injured on or near track, § 263
- Resolution granting consent for construction and operation, § 46
- Restoration of street,
 - After construction of street railroad, § 111
 - Change of grade, § 120
 - Making of excavations, § 123, pp. 241-242
 - Removal of tracks, § 121
- Reversion, cessation of use of right of way over private property, § 99, p. 214
- Review. Appeal, generally, ante
- Revocation, consent by abutting owners to use of street, § 67
- Right of way,
 - Ambulance, § 241
 - Assumption by driver of motor vehicle on or near tracks, contributory negligence, § 274, p. 416
 - Collision with bus, ordinance giving streetcars right of way, § 229, n. 48
 - Defense in collision between cars of two different streetcar systems causing injuries to passenger, § 224
 - Defined, § 208, n. 75
 - Emergency vehicle, contributory negligence of driver or occupant, § 283
 - Fire apparatus, § 242
 - Instructions in action for injuries, § 331
 - Intersections, §§ 209, 210, pp. 334-337
 - Interurban railroads, public or private crossing, § 209
 - Knowledge of streetcar's right of way by driver of vehicle, contributory negligence, § 279, p. 423, n. 87
 - Ordinance giving priority to streetcars, validity, § 168
 - Police vehicles, § 243
 - Regulation by statute or ordinances, § 210
- Road bed, validity of regulations, § 170
- Roller skates, contributory negligence of boy on roller skates on or near tracks, § 263, n. 58
- Rolling stock, § 144
- Route or location. Location of route or tracks, generally, ante
- Rules of company. Company rules, generally, ante
- Runaways, duties of motorman approaching crossing, § 238
- Running at large, negligence in respect of animals, evidence, § 316, p. 479
- Running board,
 - Automobile, contributory negligence of person riding on, § 282
 - Reliance on person standing near track to avoid being hit by running board, § 251, p. 383
- Ruts, motorcyclist stuck in rut due to negligence of street railway company, recovery for resulting injury, § 273
- Safe condition, duty to construct and maintain tracks in, pleading action for injuries, § 302, p. 446
- Safety devices,
 - Care required in equipping cars, § 196
 - Ordinance going beyond common law standards, validity, § 161
- Safety zone,
 - Failure to light, liability for automobile collision, § 136, n. 49
- Safety zone—Continued
 - Liability of company to motorist, § 214
- Sale, §§ 145, 146
 - Bonds unlawfully issued, rights of bona fide purchaser, § 154
 - Consolidation not effected by, § 153
 - Duty of purchaser to repair or pave streets, § 128
 - Franchise, highest bidder, § 52
 - Liability of,
 - Purchaser, § 146
 - Vendor for negligent operation, § 188
 - Mortgage foreclosure sale, § 158
 - Mortgage indebtedness apportioned in case of sale of part of line, § 156
 - Organization of corporation by purchaser of street railroad, § 9
- Salt, regulations relating to placing on tracks, validity, § 170
- Sand,
 - Failure to provide to prevent skidding, negligence, § 198
 - Sprinkling on tracks, regulations requiring, validity, § 170
- School children,
 - Collision with automobile conveying, violation of statute, § 229, n. 49
 - Control of car to prevent injury at crossing, § 260
 - Reduced fare, power to require as condition of franchise, § 33, p. 160
- School lands abutting on street, authority of Board of Education to consent to use of street, § 64
- Scope of employment,
 - Liability of company for injurious acts of employees, § 190
 - Proof that employee was acting within at time of injury, § 314
- Screens, regulations requiring in winter, validity, § 167
- Seating capacity, regulation, § 164
- Seats, motorman, seat for, regulations requiring, § 167
- Second look, failure to take by streetcar operator in collision, § 238, n. 59
- Senses, failure to use his senses by person injured crossing tracks, contributory negligence, § 271, p. 409
- Separate negligent acts, pleading, actions for injuries, § 302, p. 445
- Separation of races, regulations requiring, § 164
- Service of process, actions for injuries, § 300
- Set-off, recovery by municipality of cost of repairing or paving streets, § 126, p. 252
- Sewers, right of street railroad to use streets as subject to right of city to construct sewers, § 72
- Sickness, motorman, liability for injuries, § 190
- Sidings,
 - License to construct, revocation, § 89
 - Right to construct, § 79
- Sight-seeing busses, authority to operate, § 16, n. 27
- Signals,
 - See also Warning, generally, post
 - Adverse weather conditions, prevention of collision, § 240
 - Ambulance or siren sounding, right of way at intersection, § 241
 - Animals or vehicles crossing track in front of car, sounding gong, § 231
 - Approaching street crossing, duties as to persons on or near track, § 252

INDEX TO STREET RAILROADS

Signals—Continued

- Assumption by,
 - Driver on tracks that streetcar will give proper warnings, contributory negligence, § 274
 - Motorman that child heard signal, § 261, n. 94
 - Automatic signals,
 - Attempt to cross in front of streetcar as contributory negligence, § 278
 - Contributory negligence of person injured in relying on, § 264, n. 79
 - Children on or near track, § 260
 - Collision, duty to give warning to prevent, § 236
 - Contributory negligence of person injured crossing track, § 270, p. 408
 - Disabled person on track, care required, § 262
 - Duties and care required, § 202
 - Frightening of horses, § 205
 - Injuries to persons on or near tracks, § 248
 - Instructions in action for injuries, § 331
 - Intersection,
 - Crossing without signal by traffic officer, § 252
 - Duty of motorman to give to prevent collision, § 239
 - Interurban railroads, duty to install at crossing, § 239
 - Meeting animals or vehicles, § 233
 - Nighttime operation, § 240
 - Offenses by company or its servants, § 339
 - Passing other cars or vehicles, duties as to persons on or near tracks, § 253
 - Pedestrian in imminent peril entitled to warning, § 292, n. 33
 - Persons on or near tracks in general, § 248
 - Police vehicles, right of way, § 243
 - Precautions as to persons who are or should be seen on or near tracks, § 251, p. 380
 - Questions for jury in action for injuries, § 324, p. 492
 - Regulations requiring warning signals, validity, § 169
 - Reliance on exercise of due care by pedestrian on or near track, § 251, p. 382
 - Rounding curve, injuries to persons on or near track, § 254
 - Stop signals, contributory negligence of motor vehicles passing, § 283
 - Traffic signals, generally, post
 - Workmen,
 - Care required, § 255
 - Contributory negligence, § 267
- Signs,
- Railroad crossings, duties of street railroad, § 239, n. 11
 - Stop signs, generally, post
- Sirens,
- Ambulance at intersections, right of way, § 241
 - Police vehicles, yielding right of way by streetcar, § 243, n. 56
- Skidding,
- Automobiles, care required of motorman, § 234
 - Failure to provide sand to prevent, negligence, § 198
 - Probability of, care required, § 192, n. 87
- Sleeping on or near tracks, care required as to person, § 262
- Slippery condition of street, duty to prevent collision, § 240

- Slot rails defined, § 1, p. 128
- Smoke, view of employee at steam railway crossing obscured by smoke, duty, § 225
- Smoking in streetcars, regulations prohibiting, § 164
- Snow,
 - Care required in removal, § 192, n. 84
 - Obstruction caused by, liability for injuries, § 221
 - Pedestrian's rights not enlarged by removal from tracks, § 208, n. 75
 - Regulations requiring removal, validity, § 170
 - Removal, right of company, § 221
- Snowsweeper streetcar, failure to have lights while waiting at railroad crossing, § 240
- Sole negligence, pleading, actions for injuries, § 302, p. 448
- Sparks, injuries to persons under elevated railroad, § 257
- Special fund, municipal operation, § 344
 - Application of fund, § 342
- Special plea, contributory negligence, actions for injuries, § 303
- Specific performance,
 - Contracts to,
 - Convey right of way over private property, § 99, p. 213
 - Operate street railroad, § 182
 - Duty to construct extension of line, § 83, p. 196
- Speed,
 - Adverse weather conditions, prevention of collision, § 240
 - Animals or vehicles crossing track in front of car, § 231
 - Approaching vehicles, § 234
 - Negligence in respect of, evidence, § 316, p. 478
 - Children on or near tracks, § 260
 - Contributory negligence,
 - Person crossing track, assumption as to speed, § 270, p. 407
 - Person injured on or near tracks, § 274, p. 415
 - Curves, injuries to persons on or near tracks, § 254
 - Duties and care required, §§ 198–201, pp. 323–327
 - Fire apparatus collision, negligence predicated on fact car was running at high speed, § 242
 - Frightened animals, duty to reduce speed, § 206
 - Injuries to persons,
 - Approaching track, § 251, p. 385
 - On or near tracks, § 249
 - Children, § 260
 - Intersections, ante
 - Knowledge of injured person, admissibility of evidence as to, § 310
 - Lookout as to person on or near track, gross negligence, § 249
 - Negligence, evidence as to, § 316, p. 478
 - Admissibility of, § 309, p. 467
 - Sufficiency, § 316, p. 475
 - Nighttime operation, § 240
 - Occupant of vehicle driven by another, contributory negligence in not anticipating danger, § 282
 - Ordinance requirements, admissibility of evidence as to in actions for injuries, § 309, p. 463
 - Parked or stalled vehicles, negligence as respects collision with, § 316, p. 477

INDEX TO STREET RAILROADS

Speed—Continued

- Passing,
 - Animals or vehicles, § 232
 - Other cars or vehicles, duty as to person on or near track, § 253
- Prevention of collision, § 230
- Proximate cause of injury, § 212, n. 65
 - Evidence, § 321
- Question for jury in action for injuries, § 324, p. 490
- Regulations, validity, § 168
- Reliance on exercise of due care by persons on or near tracks, § 251, p. 383
- Stalled vehicles, collision with, § 235
- Violation of statute, negligence, § 230
- Willful or wanton injuries, § 211
- Workmen on or near tracks, care required, § 255
- Split switch, *res ipsa loquitur* doctrine as applicable in case of injury caused by deflection of car, § 306, p. 457
- Sprinkling of tracks, regulations requiring, validity, § 170
- Stalled vehicles,
 - Collision with, § 235
 - Contributory negligence, § 281
 - Occupant of vehicle driven by another, § 282, n. 30
 - Negligent operation resulting in collision, evidence, § 316, p. 477
- Standing on or near track, contributory negligence of person injured, § 268
- Starting,
 - Collision with automobile, §§ 233, 234
 - Intersection, care to prevent collision, § 238
- State,
 - Operation by, § 345
 - Discontinuance of operation, consent required, § 181
 - Regulation, power of, § 160
 - Right to assert forfeiture of franchise, § 95
 - Street taken over as state highway, liability of municipality for wrongful destruction of tracks, etc., § 137
 - Substitution for municipality as party to contract for maintenance of highway, § 114
- Stations,
 - Defined, § 1, p. 129
 - Elevated railroads, right to construct, § 84
 - Joint station, contract to establish, effect, § 150
- Statutory provisions,
 - Amendment of charter of company, § 17
 - Articles of incorporation, annulment, § 18
 - Breach of statutory duty, pleading in actions for injuries, § 302, p. 448
 - Conditions imposed by statute, franchise ordinance need not incorporate, § 32
 - Consolidation of street railroad companies, § 153
 - Construction, statute relating to street railroad in general, § 8
 - Contributory negligence of person injured violating statute, § 266
 - Franchise grant by,
 - City construed with statutes, § 71
 - Private or local statutes, § 30
 - Incorporation acts, § 9
 - Injuries to persons on or near tracks while violating ordinance, § 246

Statutory provisions—Continued

- Method of construction of street railroad, regulatory power conferred on municipality, § 106
- Negligence, presumptions of burden of proof, § 306, p. 458
- Notice of claim, condition precedent to action for injuries, § 301
- Paving of streets,
 - Change in obligation by subsequent statute, § 116
 - Release from duty, § 124, p. 246
- Proximate cause of injury, violation as, evidence, § 321
- Questions for jury in action for injuries as to effect and reasonableness of regulations, § 322
- Ratification of invalid grant of franchise by municipality, § 51
- Regulation in general, §§ 160–176, pp. 282–300
- Repair of streets,
 - Duty imposed by, § 112
 - Release from duty, § 124, p. 246
- Right of way regulations, § 210
- Speed limits, violation as negligence, §§ 200, 230
- State operation, § 345
- Validity, § 8
- Venue, actions for injuries, § 297
- Violation,
 - Basis of actions for injuries, evidence, § 315
 - Negligence per se, § 189
- Warning by motorman approaching intersection, § 239
- Steam,
 - Regulation prohibiting use as motive power, § 163
 - Right to sue as motive power, § 142
- Steam railroads. Railroads, generally, ante
- Stock and stockholders, § 13
 - Franchise, acceptance by directors as binding on stockholders, § 12
 - Issuance of stock, organization effected prior to, § 10
 - Liability of stockholders, § 13
 - Negligence in operation, § 185
 - Preferred stock, § 13
- Stop, look and listen,
 - Bicycle rider, contributory negligence, § 273
 - Children entering on or near tracks, contributory negligence, § 284
 - Contributory negligence,
 - Instructions in action for injuries, § 332
 - Person injured crossing track, § 271, p. 408
- Stop signs,
 - Applicability of statute relating to, § 210, n. 45
 - Emergency vehicles, contributory negligence in passing, § 283
 - Failure to stop as negligence as to persons on or near tracks, § 249
 - Streetcar approaching, rights of motorman, § 238
- Stopping,
 - Animals or vehicles crossing track in front of car, § 231
 - Contributory negligence,
 - Driver of vehicle on or near tracks assuming streetcar will stop, § 274, p. 416
 - Evidence in actions for injuries, § 319
 - Person injured crossing track, assumption car will stop, § 270, p. 408
 - Curves, injuries to persons on or near track, § 254
 - Danger, regulation requiring stop, validity, § 169

INDEX TO STREET RAILROADS

Stopping—Continued

- Designation of stopping places, validity of regulations by company, § 171
- Distance, duty of person in charge of car approaching car ahead on same track to maintain stopping distance, § 224
- Duty to stop, § 199
 - Frightened animals, § 206
 - Pleading of actions for injuries, § 302, p. 447
 - Wilful or wanton injuries, § 211
- First appearance of danger, injuries to persons on or near track, § 253
- Horse or vehicle on or near track, contributory negligence, § 281
- Intersection, duties of motorman to prevent collision, § 238
- Meeting animals or vehicles, prevention of collision, § 233
- Negligence in respect of, sufficiency of evidence, § 316, p. 475
- Offenses by railroad company or its servants, § 339
- Peril to following vehicle, care to prevent damage, § 226
- Persons on or near tracks,
 - Care required, § 249
 - Contributory negligence of person injured, § 268
 - First appearance of danger, duty, § 253
 - Reliance on exercise of due care by persons on or near tracks, § 251, p. 383
 - Rounding curve, § 254
 - Workmen on or near tracks, § 255
- Plea setting up failure to stop actions for injuries, § 303
- Police vehicle to be given right of way, § 243
- Prevention of collision, signal not heeded by person in charge of animal or vehicle, § 236
- Red light, contributory negligence of driver or occupant of emergency vehicle assuming streetcar was stopped, § 283, n. 42
- Regulation relating to, § 164
- Validity, § 163
- Reliance on exercise of due care of persons on or near track, § 251, p. 383
- Steam railway crossing, § 225
- Street crossing, duties as to persons on or near track, § 252
- Sudden stop, questions for jury in action for injuries, § 324, p. 491, n. 69
- Unknown object on track, duty to stop, § 251, p. 385
- Workmen on or near tracks, care required, § 255
- Street crossings. Intersections, generally, ante
- Street railroad companies or corporations, §§ 6-18, pp. 131-141
 - Amendment of charter, § 17
 - Capital, § 13
 - Certificate or articles of incorporation, § 10
 - Consent to use of street, granting to individuals as binding municipality to accept corporation, § 50
 - Consolidation, § 153
 - Liability to repair or pave streets, § 124, p. 248; § 128
 - Mortgage, effect on property subject to, § 156

- Street railroad companies or corporations—Continued
 - Directors,
 - Acceptance of franchise, stockholders bound by, § 12
 - Municipal interference with judgment of, § 161
 - Dissolution, § 18
 - Survival of right to use streets, § 72
 - Extension of corporate life of grantee, effect as extending franchise, § 88
 - Forfeiture of charter, § 18
 - Incorporation, § 9
 - Leases, rights of dissenting stockholders, § 147
 - Liability for material purchased by officer or agent, § 110
 - Limitation of franchise by corporate life of grantee, § 87
 - Merger, § 153
 - Duty to repair or pave streets, § 128
 - New company seeking to operate under expired franchise, consent of abutting owners, § 62
 - Organization by purchaser, § 9
 - Powers in general, § 14
 - President, power to bind company by execution of notes, § 12
 - Receiver, generally, ante
 - Reorganization, § 11
 - Revocation of charter, § 18
 - Rules of company. Company rules, generally, ante
 - Special charter, § 9
 - Statutes relating to, construction and validity, § 8
 - Stock and stockholders, generally, ante
 - Successor,
 - Duty to,
 - Complete extension of line, § 83, p. 194
 - Construct railroad, § 103
 - Operate line, § 177
 - Liability for,
 - License fee or tax, § 175
 - Negligent operation by predecessor, § 185
 - Repair or paving of streets, § 128
 - Winding up, § 18
- Streetcars,
 - Additional cars, regulations requiring, § 164
 - Defined, § 1, p. 129
 - Destination, regulation requiring designation, § 164
 - Equipment, care required, § 196
 - License fees based on each car operated, § 174
 - Standing on tracks,
 - Liability for injuries, § 219
 - Regulation prohibiting, § 163
 - Temperature in cars, regulations, § 164
 - Term cars as including, § 1, p. 129
 - Trespassers on, care required, § 193, pp. 315-316
 - Use of cars of another company, contract for, § 144
- Streets,
 - Consent to use of. Municipalities, ante
 - Contributory negligence of person working in, evidence in actions for injuries, § 319
 - Defects or obstructions in streets, generally, ante
 - Paving of streets, generally, ante
 - Repair of streets, generally, ante
 - Structures in or over streets, right to construct, § 84
 - Subleases, § 149
 - Substitution of parties, actions for injuries, § 299

INDEX TO STREET RAILROADS

Subways,

- Defined, § 2
- Kiosks, power to require relocation, § 107
- Municipal construction and operation, § 343
- Promise of support to landowners, liability to landowners' successor, § 99, p. 213, n. 91
- Stations, determination of number and location, § 22

Successor. Street railroad companies or corporations, ante

Sudden incapacity, contributory negligence of person injured on or near track, § 285

- Sudden peril. Emergencies, generally, ante
- Sudden stop, duty to following vehicle, § 226, n. 19, 21
- Summer street car defined, § 1, p. 130

Supersedeas, effect of appeal from order approving location, § 26

Surplusage, proof of, actions for injuries, § 304, p. 452

Swerving,

- Meeting vehicles, § 233
- Vehicle passed by streetcar, § 232

Switches,

- Consent of abutting owners, § 60
- Injunction by abutting owners, § 99, p. 217
- Projecting into highway, negligence, § 189
- Right to construct, § 79
- Running cars against traffic, negligence, § 189
- Standing cars, liability for injuries, § 219
- Widening of street, effect on location of tracks and switches, § 78

Switchman, employment by company using another's tracks, § 129

Taxation,

- Acceptance of franchise taxes, waiver of right to forfeit franchise, § 93
- Conditions of grant limiting taxing power, power of municipality, § 32
- Double taxation, license tax and property tax, § 175
- Gross receipts tax, applicability to company on substitution of busses, § 174
- "In lieu" taxes, liability to pay additional amount for franchise, § 52
- Lessee's liability, § 49, n. 86
- License fees and taxes, §§ 174-176, pp. 295-300
- Liens for taxes, effect of consolidation of companies, § 153
- Mortgaged property, payment of taxes on, acquisition of lien superior to mortgage, § 157
- Paving of streets, imposition of duty as assumption of taxing power, § 113
- Privilege tax on corporations, applicability, § 175
- Repair of streets, imposition of tax as,
 - Affecting duty to repair or pave, § 124, p. 248
 - Exercise of taxing power, § 112
- State operation, § 345

Taxpayers,

- Appeal from order for discontinuance of street railroad, right of, § 182, n. 71
- Right to tax grant of franchise because of failure to obtain required consents of abutting owners, § 68
- Suit to enjoin,
 - Exercise of franchise, § 50
 - Granting of consent by local authorities, § 48

Telephone company, incidental interference by construction or maintenance of street railroad, right to relief, § 136

Temporary incapacity, contributory negligence of person injured on or near track, § 285

Tenant of abutting property, consent to use of street, § 64

Third persons, liability for negligence or wrongful acts of, § 191

Tickets, regulations requiring keeping of tickets for sale on cars, § 164

Time,

- Actions for injuries, § 298
- Looking and listening by,
 - Person crossing track, § 271, p. 410
 - Vehicle approaching a crossing of streetcar tracks, § 279, p. 425
- Skidding by automobile onto track in attempt to round curve, duty of motorman, § 234

Tires, contributory negligence of person injured stooping to fix flat tire, § 268, n. 10

Toll bridge, right to use, § 85

Toll roads,

- Consent to use,
 - Abutting owners, § 70
 - Local authorities, § 39
- Right to use, § 86

Topography causing hazardous crossing, duty to install warning signal or bell, § 239, n. 5

Towns and townships. Municipalities, generally, ante

Trackless trolleys, change from street cars as abandonment of right of way over private property, § 99, p. 215

Tracks,

- Additional tracks,
 - Commissioners may authorize under power to authorize extension, § 24
 - Consent of abutting owners, necessity, § 59
 - Injunction by abutting owner, § 101, p. 217
 - Power of municipality to authorize another track in same street, § 29
 - Right to construct, § 80
- Bridges, determination of number of tracks on, § 85
- Compensation for use of streets based on mileage, § 33, p. 156
- Connections with other railroads, § 134
- Construction and maintenance in proper or approved manner, nonliability for injuries, § 223
- Contract not to cross another's tracks, effect, § 150
- Criminal responsibility for failure to keep in repair, § 140
- Double tracks,
 - Change to single track, authority of company, § 105
 - Defined, § 1, p. 128
 - Forfeiture of right to construct by laying of single track, § 92, p. 208
 - Ordinance authorizing, effect as repeal of ordinance providing for single track, § 89
 - Right to construct, § 80
 - Substitution of single track, effect on duty to pave street, § 117

Extension of line, generally, ante

Grade of street, duty to conform with, § 120

Joint or interchangeable use, contracts for, § 152

Joint use of street, § 73, p. 187

Location of route or tracks, generally, ante

Lubricant on tracks, liability for injuries, § 220

Maintenance, duty in general, § 111

INDEX TO STREET RAILROADS

Tracks—Continued

- Method of laying, etc., choice by company, § 105
- Negligence in respect of, evidence, § 315
 - Admissibility of, § 309, p. 463
- Permitting use by another company, condition of franchise, § 33, p. 155
- Persons on or near tracks,
 - Injuries to persons, ante.
 - Trespassers, § 193, pp. 315, 317
- Power to impose conditions relating to, § 33, p. 160
- Projection above surface,
 - Liability for injuries, § 216
 - Nuisance, §§ 105, 111
- Regulations relating to, validity, § 170
- Relocation,
 - Power to compel, § 170, n. 80
 - Required or authorized by public authorities, § 107
- Removal,
 - Abandonment of line, § 183
 - Duty to restore street, § 121
 - Power of municipality, § 109
 - Right to compel, § 72
 - Absence of franchise right, § 89
 - After expiration of franchise, § 87
 - Termination of duty to improve street, § 124, p. 244
 - Widening of street, § 107, n. 57
- Repair,
 - Failure to keep in repair, liability, §§ 186, 213, 216
 - Joint expense of companies using same tracks, § 131
- Rights in and use of tracks of other railroads, §§ 129-131
- Sale of rails as personal property, § 145
- Spur track,
 - Cars standing on, liability for injuries, § 219
 - Right to construct, § 79
 - Substitution of rails, authority to require, § 107
 - Temporary tracks, consent of abutting owners dispensed with, § 57
 - Use of another's tracks, liability for negligent operation, § 185
 - Widening of street, effect on location of tracks, § 78
 - Wrongful destruction by municipality, recovery of damages, § 37
- Tractor-trailers, contributory negligence of person injured on or near track, § 274, p. 414
- Traffic officers,
 - Care required of, § 210, n. 46
 - Injuries to officer directing traffic at intersection, § 248
- Traffic signals,
 - Ambulance, right of way, § 241
 - Change, duties as to pedestrian at street crossing, § 252, n. 43
 - Contributory negligence,
 - Crossing track, § 270, p. 404
 - Person injured crossing street, duty to look, § 271, p. 412
 - Fire apparatus, right of way over streetcars, § 242
 - Intersection, duty of motorman to obey, § 238
 - Rounding curve, injuries to persons on or near track, § 254, n. 89

Traffic signals—Continued

- Stopping vehicle on or near tracks, contributory negligence, § 281
- Trailers, regulations requiring, § 164
- Tramway compared with and distinguished from, § 1, p. 126
- Transfers, power to require as condition of franchise, § 33, p. 160
- Trapped pedestrian, reliance by motorman pedestrian would exercise due care, § 251, p. 382
- Trespass,
 - Collision on private right of way with vehicle of trespasser, § 228
 - Duties and care required as to trespassers, § 193, pp. 314-317
 - Infant trespasser, question for jury in action for injuries, § 322, n. 11
 - Operation after expiration of franchise, § 87
 - Presumptions, actions for injuries, § 305
 - Proximate cause of injury, § 212
 - Recovery of damages for interference with operation, § 180
 - Unauthorized occupation of streets, removal of tracks, etc., §§ 28, 109
 - Willful or wanton injury to trespassers, evidence as to, § 318
- Trolley rope, injury caused by, res ipsa loquitur doctrine, § 306, p. 457
- Trucks,
 - Contributory negligence of person injured on or near tracks, § 274, p. 414
 - Unloading from street side, contributory negligence of person injured, § 267, n. 99
- Trustees,
 - Abutting property, consent to use of street, § 64
 - Taking over company, § 13
- Tunnels,
 - Municipal construction and operation, § 343
 - Route determined by commissioners, § 24, n. 94
 - Status as street railroad, § 2
- Turning out for streetcar, contributory negligence of driver of vehicle, § 277
- Turnouts,
 - Consent of abutting owners, necessity, § 60
 - Right to construct, § 79
- Turnpikes,
 - Abutting owners' consent to use, § 70
 - Consent of local authorities to use, § 39
 - Right to use, § 86
- Turns,
 - Care required of motorman, § 228
 - Crossing streetcar track by vehicle, contributory negligence, § 279, p. 425
 - Sudden turn of motorist in front of oncoming streetcar, § 231, n. 86
 - U-turn by motorist across streetcar tracks, contributory negligence, § 278
- Ultra vires,
 - Condition of grant, estoppel to attack, § 32
 - Lease of all franchises and property, § 147
- Unauthorized occupation of streets,
 - Abutting owners' rights and remedies, § 99, p. 215
 - Effect, § 28
 - Ratification by local authorities, § 40
 - Removal of tracks, etc., § 109
- Unavoidable accident,
 - Boy stepping onto tracks, § 212, n. 69
 - Questions for jury in action for injuries, § 328

INDEX TO STREET RAILROADS

- Unconsciousness of motorman,
 - Collision resulting, § 228
 - Liability for injuries, § 190
- Underground railroad, municipal construction and operation, § 343
- Unified management and operation, validity of contract for, § 151
- Unknown object on track, duty to stop on discovery, § 251, p. 385
- U-turn, contributory negligence of person injured on or near tracks, § 278
- Vacation of streets, right to compel on expiration of franchise, § 87
- Valuation, purchase of system by municipality, § 344, n. 1
- Variance, actions for injuries, § 304, pp. 451-454
- Vehicles,
 - Busses, generally, ante
 - Collisions, ante
 - Nature of vehicles which may be used, § 144
 - Negligence in approaching vehicles on or near track, evidence, § 316, p. 476
 - Streetcars, generally, ante
- Venue, actions for injuries, § 297
- Verdicts and findings in action for injuries, § 336
- Vestibules, regulations requiring in winter, validity, § 167
- Vibrations, abutting owner's right to damages, § 189
- View, obstruction,
 - Contributory negligence of person injured as question for jury, § 325, p. 502, n. 57
 - Driver of vehicle, contributory negligence of person injured, § 276
 - Person entering on track, contributory negligence, § 279, p. 427
 - Street crossing, duties as to persons on or near track, § 252
- Vigilance, motorman, admissibility of evidence as to in actions for injuries, § 309, p. 467
- Vigilant watch ordinance, § 252
 - Care as to persons on or near track, § 248
 - Children on or near tracks, care required, § 261
 - Contributory negligence of person injured on or near track, § 263, n. 70
 - Reliance on exercise of due care by pedestrian, § 251, p. 382
 - Stopping of car to prevent injuries to persons on or near track, § 251, p. 384
- Violence, excuse for failure to perform duty to operate, § 178
- Vision obscured, duty to stop, look and listen by person crossing track, § 271, p. 410
- Waiting rooms or cars, regulations requiring, § 164
- Waiver,
 - Grounds for forfeiture of franchise, § 93
 - Notice of claim for injuries, § 301
 - Notice to repair or pave streets, § 126, p. 251
- Walking on or near track, contributory negligence of person injured, § 269
- Wantonness,
 - Answer to complaint charging, actions for injuries, § 303
 - Burden of proof, actions for injuries, § 306, p. 456
 - Lookout as to persons on or near tracks, failure to keep, § 250
 - Pleading, actions for injuries, § 302, p. 449
 - Preponderance of evidence, establishment by in actions for injuries, § 318
 - Questions for jury in action for injuries, § 327
- Warning,
 - See, also, Signals, generally, ante
 - Admissibility of evidence in respect of failure to sound, actions for injuries, § 310
 - Approach to person on or near track, evidence as to, § 316, p. 475
 - Backing streetcar resulting in collision, § 228
 - Crossing vehicles, negligence, evidence, § 316, p. 477
 - Duties and care required, § 202
 - Failure to give, proximate cause of injury, § 212, n. 65
 - Infants, evidence as to negligence in warning of approach of car, § 316, p. 476
 - Intersections, reciprocal duties, § 209
 - Knowledge of injured person respecting, admissibility of evidence as to, § 310
 - Negligence in respect of, admissibility of evidence in actions for injuries, § 309, p. 467
 - Occupant of vehicle driven by another, contributory negligence in failure to warn of danger, § 282
 - Positive testimony, sufficiency in respect of, § 316, p. 475
 - Precautions as to persons who are or should be seen on or near tracks, § 251, p. 380
 - Proximate cause of injury, evidence, § 321
 - Regulations requiring, validity, § 169
 - Reliance on exercise of due care by pedestrians, § 251, p. 382
 - Rounding curve, § 254
- Watchman, steam railway crossings, duty of operator of streetcar, § 225
- Water, construction causing more water to flow onto adjoining land, liability, § 36, n. 49
- Wet condition of street, duty to prevent collision, § 240
- Widening of street,
 - Effect on right to lay tracks and switches, § 78
 - Removal of tracks to allow for, § 107, n. 57
- Willfulness,
 - Answer to complaint charging, actions for injuries, § 303
 - Burden of proof, actions for injuries, § 306, p. 456
 - Instructions in action for injuries, § 333
 - Pleading, actions for injuries, § 302, p. 449
 - Preponderance of evidence, establishment by in actions for injuries, § 318
 - Questions for jury in action for injuries, § 327
- Windows,
 - Automobiles, failure to keep open in heavy fog as contributory negligence, § 325, p. 502, n. 58
 - Duty of motorman to keep front window clear, § 197, p. 323
- Wires,
 - Defect or obstruction in street, liability, §§ 213, 217
 - Electric wires over private property,
 - Right to compel removal, § 99, p. 213
 - Right to use after termination of trolley service, § 99, p. 214, n. 11
 - Right to use overhead wires, § 142
 - Wrongful destruction by municipality, recovery of damages, § 137
- Workmen in street, contributory negligence of person injured, § 267
 - Question for jury, § 325, p. 498
- Workmen on or near tracks, injuries to, § 255
- Wrecking or attempting to wreck car, offense, § 340

INDEX TO SUBMISSION OF CONTROVERSY

- Abstract question, controversy presenting, § 4
- Accident, dismissal for including in statement through accident matters which do not exist, § 6
- Additional facts declining to hear controversy on ground additional facts should have been included, § 6
- Additional parties, order to bring in additional party, § 5
- Additional statements of fact to cure defect, court's power to order, § 13
- Advisory opinion,
 - Controversy presenting, § 4
 - Dismissal of submission seeking, § 11, n. 17
- Affidavit of reality of controversy, § 7
 - Transcript on appeal to include, § 16
- Agreed statement of facts used merely as evidence, distinction between, § 1
- Amendment of agreed facts, § 14
- Amicable submission, § 4, n. 34
- Appeal and error, § 16
 - Dismissal of appeal where agreement is not entered on record, § 9
 - Estoppel to object to right to review, § 10
 - Judgment in proceedings without affidavit of reality of controversy as nonappealable, § 7
- Appellate courts, jurisdiction of, § 3
- Attorney,
 - Affidavit of reality of consent made by, § 7
 - Power to submit controversy, § 5
 - Signing agreement by, § 6
- Bankruptcy, dismissal of submission on defendant becoming bankrupt, § 11
- Briefs, statement in briefs not considered, § 13, n. 37
- Cancellation of agreement for submission, § 11
- Charter, submission of controversy to construe city charter before it becomes effective, § 4, n. 37
- Class, parties in controversy affecting all of a class, § 5, n. 46
- Clerk of court, authority to enter agreement of record, § 9
- Collusion, grounds for dismissal of submission, § 11
- Colorable dispute, controversy presenting, § 4
- Common law practice, § 1
- Consent proceeding, § 1
- Consent to jurisdiction, § 3
- Construction,
 - Agreement for submission, § 15
 - Statement or agreement, § 13
 - Statute, submission for purpose of, § 4, n. 26
 - Statutes permitting submission, § 2
- Controversies which may be submitted, § 4
- Corporations, power to submit controversy, § 5
- Costs, § 17
- Courts having jurisdiction, § 3
- Court's powers in general, § 13
- Decision of court on agreed facts, § 15
- Declaratory judgment, submission of controversy where declaratory judgment action might be maintained, § 4, n. 26
- Default judgment on submission, § 15
- Defendant, designating party as, § 5
- Definition, § 1
- Designation of parties on submission, § 5
- Discontinuance of original action if parties agree to submission, § 10
- Discretion of court, award of cost, § 17
- Dismissal, § 6
 - Agreement for submission, § 11
 - Appeal on ground agreement is not entered on record, § 9
 - Appellate court's power to dismiss submission, § 16
 - Failure to file affidavit of reality of controversy as ground, § 7
 - Original action if parties agree to submission, § 10
- Documents annexed to agreed statement, § 6
- Duress, cancellation of agreement on ground of, § 11
- Entry of agreement on record, § 9
- Evidence,
 - Adding facts other than contained in agreement, § 13
 - Court not required to take, § 6
 - Submission containing evidence of facts, § 6
- Facts, § 15
 - Submission must contain agreement as to facts, § 6
- Filing agreement to submit, § 9
- Findings of fact on submission, § 15
- Form of judgment, construction of provisions of submission as to, § 15
- Fraud,
 - Cancellation of agreement on ground of, § 11
 - Dismissal of submission embracing statements which do not exist through fraud, § 6
- Future rights, submission of controversy involving, § 4, n. 37
- Good faith, affidavit of, § 7
- Hearing, §§ 12-14
- Infants, controversy involving rights of infant, § 5
- Inference, facts must not be left to, § 6
- Inferences from agreement, § 13
- Inferences of fact, appellate court's power to draw, § 16
- Interest included in amount awarded, § 15
- Issues of fact, determination by court, § 13
- Judgment,
 - Agreement of facts required to state matters relating to, § 6
 - Dismissal of submission where no enforceable judgment could be entered, § 11
 - Entry of agreement on record as part of judgment, § 9
 - Setting aside or vacating judgment in proceeding without affidavit of reality of controversy, § 7

INDEX TO SUBMISSION OF CONTROVERSY

- Jurisdiction, § 3
 - Affidavit of realty of controversy as necessary to confer, § 7
 - Agreement of facts required to show, § 6
 - Failure to enter agreement of record as depriving court of jurisdiction, § 9
 - Objection to want of, § 10
- Justiciable controversy, necessity, § 6
- Law of another state, stipulation as to, § 6, n. 58
- Legal conclusions in statement not binding on court, § 13
- Master, appointment to report facts in case, § 13
- Mistake,
 - Amendment of agreement to correct mistake, § 14
 - Cancellation of agreement on ground of, § 11
 - Dismissal for including statement through mistake matters which do not exist, § 6
- Modification of judgment of another court,
 - Ground for dismissal of submission, § 11
 - Jurisdiction of proceeding, § 3
- Moot questions, controversy presenting, § 4
- Moot submission, ground for dismissal, § 11
- Mortgage guarantor and certificate holders, dismissal of submission failing to include, § 5, n. 51
- Municipal corporations, power to submit controversy, § 5
- Nature, § 1
- Necessary parties, § 5
- Officers, submission for determination of duties, § 4, n. 25
- Operation and effect of submission, § 10
- Parties, § 5
 - Affidavit of realty of controversy made by, § 7
 - Consent to amendment of agreed facts, § 14, n. 63
- Penalties, judgment for stipulated penalty, § 15, n. 75
- Persons who may submit controversy, § 5
- Persons who must make affidavit of realty of controversy, § 7
- Plaintiff, designating party as, § 5
- Pleading,
 - Necessity for, § 8
 - Waiver of irregularities and defects by agreeing to submission, § 10
- Prayer for judgment, necessity for, § 6
- Prayer for relief, amendment of, § 14
- Presumption agreement containing all facts, § 13
- Presumption in favor of judgment on appeal, § 16
- Public importance, review of question involving, § 16
- Public policy, submission of controversy involving, § 4
- Punitive damages, submission including claim for, § 6
- Purpose of proceedings, § 1
- Questions of law,
 - Determination by court, § 13
 - Necessity that controversy present, § 4
- Real controversy, necessity for, § 4
- Realty of controversy, affidavit, transcript on appeal to include affidavit, §§ 7, 16
- Receiver's certificate, judgment in stipulated case conflicting with order providing for issuance, § 15
- Removal of cloud on title, submission of controversy for purpose of, § 4, n. 26
- Requisites of submission, §§ 6-9
- Reservations, agreement for submission must be without reservations, § 6
- Scope of appeal, § 16
- Scope of inquiry, § 13
- Setting aside or vacating judgment in proceedings without affidavit of realty of controversy, § 7
- Signing agreement for submission, § 6
- Special judge, power to determine controversy, § 12
- Special proceedings, submission of controversies subject of special proceedings, § 4
- Special term of court, hearing submission at, § 12
- Special verdict, agreed statement as, § 1
- Statute of limitations, consideration where statute is claimed in briefs, § 13, n. 37
- Statutory provisions, § 2
- Substitute for action, § 1
- Summons, jurisdiction not affected by failure to serve, § 1, n. 7
- Term of court for hearing, § 12
- Third parties, controversy involving rights of, § 5
- Time for appeal, § 16
- Title to realty, construction of agreement submitting, § 13
- Transcript on appeal to include agreed statement of facts, § 16
- Trial, §§ 12-14
- Trial by court without jury distinguished, § 1
- Trust, decision as to whether consent necessary for revocation was given, § 15, n. 73
- Trust deed, determination of validity of sale by trustee under deed, § 6, n. 54
- Trust indenture, submission for purpose of construction, § 4, n. 26
- Truth of facts do not concern court, § 13, n. 30
- Waiver,
 - Affidavit of realty of controversy, § 7
 - Defects of pleading by agreeing to submission, § 10
- Withdrawal from agreement without consent of other party, § 13

INDEX TO SUBROGATION

- Abutting owners, subrogation of municipality to rights of injured person against, § 16
- Accommodation acceptor, holder's right to subrogation on failure of accommodation acceptor to pay, § 24
- Accommodation endorser,
Assumption of liability of accommodation endorser by others, subrogation of persons assuming liability, § 23, n. 3
Notice by endorser of claim to subrogation, § 23, n. 3
Payment of negotiable instrument by, subrogation on payment, § 23
Subrogation to rights to recover attorney's fees on payment of note by, § 14, p. 613, n. 17
- Accommodation maker,
Payment of note by accommodation maker essential to subrogation, § 10, p. 608, n. 53
Subrogation of maker paying note, § 23
- Accrual of right to subrogation, § 11
- Actions, establishment and enforcement of right, §§ 63-72, pp. 714-726
- Adequate remedy at law affecting application of doctrine, § 6, p. 594
- Administrators' bonds, § 60, pp. 711, 712
Parties in action by surety to enforce subrogation to original administrator's rights, § 67, n. 75
Time to sue to enforce or establish surety's right, § 66, pp. 717, 718
- Admiralty, doctrine applicable to suits in, § 64, p. 715
- Admissibility of evidence in action to establish or enforce subrogation, § 69
- Advancement by third persons,
Means to discharge or discharging debt or encumbrance securing same, §§ 38-42, pp. 649-663
Necessaries or to discharge encumbrance on property of persons incompetent to contract, § 43
- Agent, subrogation to rights of principal, § 26
- Aggravation of injury, tortfeasor settling claim subrogated to injured person's claim for aggravation of injury, § 16, n. 56
- Alimony, enforcement of conventional subrogation by surety paying part of alimony, § 48, p. 673, n. 52
- Alteration of new mortgage received by person advancing money to discharge prior mortgage, § 39, p. 659
- Amendment of complaint in action to establish or enforce subrogation, § 68, p. 722
- Ancillary proceedings to enforce or establish right, § 64, pp. 716, 717
- Annuities, subrogation to rights of annuitant, § 7, n. 91
- Answer, action to establish or enforce subrogation, § 68, p. 722
- Answer raising right to subrogation, § 64, p. 717
- Anticipating defenses, pleading in action to establish or enforce subrogation, § 68, p. 722
- Appeal, review of right to subrogation by appeal, § 72
- Appeal bond,
Proceedings by surety in aid of execution to enforce and establish right, § 64, p. 716
Subrogation between successive sureties, § 56, n. 28
Subrogation of sureties, § 61, pp. 713, 714
On appeal bond of indemnitor, § 59, p. 697
- Assessment subrogation of person discharging assessment lien, § 31, p. 633
- Assignee of insolvent debtor giving note to creditor, subrogation of, § 25
- Assignments,
Advancement by third persons of means to discharge debt or encumbrance securing same, necessity of assignment for purpose of subrogation, § 38, p. 649
As having nothing to right of subrogation, § 5, p. 592, n. 27
Contractor's assignment of funds after contract of suretyship, priority of surety's rights as against assignee, § 59, pp. 706, 707
Contractors' bond sureties, right of subrogation as independent of assignment, § 59, p. 700
Contractor's surety, subrogation to rights of funds assigned by contractor, § 59, p. 703
Debt to third person paying debt as affecting right to subrogation, § 9, p. 606
- Mortgages,
Subrogation of assignee of mortgage compelled to pay mortgage for protection of assignee's interest, § 33, p. 635, n. 93
Subrogation of purchaser of discharging mortgage dependent on assignment, § 33, p. 636
- Necessity of assignment,
By creditor to surety or guarantor entitled to subrogation, § 50
To effect subrogation, § 14, p. 612
Where right of subrogation exists, § 3, n. 41
- Note, subrogation of assignee without recourse, § 23
- Principal's rights and remedies, subrogation of surety to existing independent of assignment, § 57
- Redemptioneer entitled to assignment to protect right of subrogation, § 39, p. 655, n. 76
- Retained percentages under construction contract, subrogation of contractor's surety as against assignee, § 59, pp. 706-709
- Right of subrogation, § 12
- Subrogation as not assignment, § 1, n. 3
- Surety's rights acquired by subrogation, § 53
- Assumption,
Chattel mortgage, subrogation of purchaser discharging assumed mortgage, § 33, p. 641

INDEX TO SUBROGATION

Assumption—Continued

- Debt, subrogation of surety to creditor's rights against third person assuming to pay, § 54, p. 687
- Encumbrance by junior encumbrancer, subrogation of junior encumbrancer paying assumed encumbrance, § 36, p. 644
- Encumbrance by purchaser, subrogation of purchaser discharging assumed encumbrances, § 32
- Lien by purchaser, subrogation of grantor or mortgagor paying after transfer of encumbered property, § 37
- Mortgage or deed of trust, subrogation of purchaser assuming, § 33, pp. 636, 637
- Vendor's lien by purchaser, subrogation of purchaser discharging lien assumed, § 33, p. 639
- Vendor's lien by vendee, subrogation of lender of funds to discharge assumed lien, § 42, n. 65

Attachment,

- Attaching creditor not paid in full subrogated to rights of lien discharged, § 35, p. 643
- Subrogation of purchaser of attached property discharging judgment lien, § 33, p. 640
- Surety's right to attach principal's property before debt becomes due, § 64, p. 715, n. 24

Attachment proceedings affecting right of subrogee, § 13

Attorney, subrogation of attorney paying judgment to rights of client against sheriff, § 25

Attorney's fees,

- Accommodation endorser subrogated to right to recover fees on payment of notes, § 14, p. 613, n. 17
- Surety's recovery on note to which he has been subrogated, § 52

Ball bonds in criminal cases, subrogation of surety, § 61, p. 713

Bankruptcy,

- Contractor affecting surety's right of contribution, § 59, p. 704, n. 10
- Judgment against bankrupt principal as not providing for subrogation of sureties, § 71

Bankruptcy trustee removing goods pledged from jurisdiction as not divesting right to subrogation, § 13

Banks, administrator surcharged with deposit in insolvent bank subrogated to rights of estate against bank, § 27

Bill in action to establish or enforce subrogation, § 68, pp. 720, 722

Bills and notes,

- Assignee of note, right to subrogation, § 12, n. 85
- Assignee without recourse paying note, subrogation of, § 23
- Conflict of law as to guarantor's right of subrogation, § 46
- Endorsement, generally, post
- Exchange of notes, subrogation of holders to securities given by persons exchanging, § 24
- Guardian paying notes secured by chattel mortgage subrogated to chattel mortgagee's rights, § 28
- Holder, subrogation of, § 24
- Holder of instrument, subrogation of person secondarily liable to rights of, § 23

Bills and notes—Continued

- Interest coupon note, subrogation of purchaser to rights of holder of vendor's lien note, § 42, n. 76
- Joinder of guarantors of note in action to establish and enforce rights, § 67
- Joint obligors of notes, subrogation of executor of joint obligor paying note to rights of holder of note, § 17, n. 76
- Lender of money to take up note secured by vendor's lien, subrogation of, § 42
- Limitation of action of surety on note to establish or enforce right, § 66, p. 718
- Maker, subrogation of, § 23
- Partial substitution dependent on payment of note in full, § 10, p. 609
- Parties liable, subrogation of, § 23
- Purchaser of worthless note whose money was used to pay off another note as not subrogated to collateral, § 44
- Subrogation of parties to, §§ 22-24, pp. 621-624
- Sureties or guarantors, subrogation of, § 59, pp. 698, 699
- Surety bringing action on bill or note with respect to which he has been subrogated, § 52
- Voluntary payment by endorser affecting subrogations, § 23
- Bond of coexecutor, subrogation of coexecutor sued on, § 27
- Bottomry lien, subrogation of lender of funds to discharge lien, § 40
- Building contract, person completing building as not volunteer, § 9, p. 604, n. 24
- Bulk sales, subrogation of accommodation maker to rights of holder to avoid bulk sale, § 23, n. 15
- Burden of proof, action to establish or enforce subrogation, § 69
- Carrier's lien,
 - Payment of freight by person secondarily liable as subrogating payer to right of lien, § 14, p. 613, n. 21
 - Subrogation of third person discharging lien, § 14, p. 611, n. 7
- Champertous deed, subrogation of grantee of, § 14, p. 614
- Chattel mortgages. Mortgages, generally, post
- Checks,
 - Payment by bank after withdrawal of authority, subrogation of bank, § 9, p. 604
 - Subrogation of drawee against guarantor bank, § 59, p. 698
 - Subrogation of payee to collateral where drawee applies funds in satisfaction of another debt, § 24
- City, subrogation to rights of city, § 5, p. 590, n. 1
- Civil law, subrogation as adopted from, § 2, p. 579
- Claims,
 - Against debtor, necessity for, § 7
 - Against decedent's estate, subrogation of executor paying disallowed or unsworn claims, § 27
 - Right of creditor to enforce claim of debtor against another, § 5, p. 590
- Clean hands maxim, application of, § 6, p. 594
 - Purchaser of mortgaged chattel discharging mortgage, § 33, pp. 640, 641
- Codebtor paying more than proportion of debt, subrogation of, § 17
- Coexecutor, subrogation against, § 27

INDEX TO SUBROGATION

- Collateral security,
 - Subrogation of guarantor of note to collateral, § 59, p. 698, n. 69
 - Subrogation of person secondarily liable paying note to holder's right in collateral security, § 23
- Collector's bond, subrogation of surety, § 54, p. 689, n. 8
- Commingle funds as barring right to subrogation, § 6, p. 598, n. 79
- Common law, subrogation as not common law doctrine, § 2, p. 578
- Community property, subrogation of spouse paying encumbrance, § 31, p. 632
- Complaint in action to establish or enforce subrogation, § 68, pp. 721, 722
- Compromise with creditor, payment of compromise affecting subrogation to rights of creditor, § 48, p. 674
- Compulsion,
 - Person voluntarily satisfying debt or default of another affecting right to subrogation, § 16
 - Third person in paying debt affecting right to subrogation, § 9, p. 603
- Compulsory payment of debt for which another is primarily liable, subrogation of person paying under compulsion, § 8
- Condemnation, subrogation of condemnor to mortgagee's rights, subrogation, § 31, p. 632, n. 57
- Condition precedent to action to establish or enforce right, § 65
- Conditional sale lien, subrogation of purchaser discharging lien, § 33, p. 641
- Conditional sales, sureties on conditional sales note subrogated to rights of principal, § 57, n. 34
- Conditional tender of payment of debt, sufficiency to support right of subrogation, § 10, p. 608
- Conflict of laws,
 - As to guarantor's right to subrogation, § 46
 - Contractor's surety's right to subrogation against assignee of retained percentages, § 59, p. 706, n. 24
 - Limitation of action to establish or enforce right, § 66, p. 718, n. 50
- Consent, partial subrogation allowed where creditor consents, § 10, p. 609
- Consideration of agreement for conventional subrogation, § 4
- Constables,
 - Subrogation of constable satisfying another's debt, § 29
 - Subrogation to creditor's rights on forthcoming bond, § 29
- Constitutionality of statute,
 - Denying depositary's surety's right to subrogation to priority of state, § 59, p. 697
 - Providing that stockholder paying liability is substituted to claim of creditor against corporation, § 17, n. 73
- Constructive fraud preventing person from being protected by subrogation, § 6, p. 596
- Constructive trust,
 - Subrogation as in nature of, § 2, p. 581
 - Subrogation in constructive trust in favor of one causing trust to arise, § 6, p. 596, n. 62
- Contractor's bonds,
 - Bondholders paying claims of sub-contractor subrogated to rights of sub-contractors against surety on bond, § 9, p. 605, n. 32
 - Subrogation of sureties, § 59, pp. 699-709
 - Rights of creditor, § 47, p. 670, n. 28; § 52, n. 34
- Contracts,
 - Application of doctrine to contract rights, § 5, p. 588, n. 82
 - Conventional subrogation, ante
 - Legal subrogation,
 - Contract as controlling exercise of right, § 3
 - Effect of agreement for, § 3
 - Not dependent on contract, § 3
 - Loss or injuries caused by fault of another, subrogation of persons liable, § 16
 - Modification or extinguishment of right of subrogation by contract, § 13
 - Payment of debt under contract to pay as not voluntary, § 9, pp. 605-607
 - Subrogation arising by, § 1
 - Third person contracting to pay debt, subrogation of surety to creditor's rights against third person, § 54, p. 687
- Contribution,
 - Subrogation as arising out of right of contribution, § 2, p. 581, n. 26
 - Subrogation of indemnitors to right, § 57, n. 34
- Contributory negligence, subrogation of persons whose own negligence contributed to loss or injury, § 16
- Conventional subrogation, § 4
 - Advances of money to discharge mortgage pursuant to agreement, § 39, pp. 656-659
 - Defined, § 1
 - Loans for payment of existing mortgages pursuant to agreement, § 39, pp. 656-659
 - Loans to discharge debt or encumbrance securing same, § 38, pp. 649, 650
 - Loss of right by conventional subrogee, § 13
 - Matter of legal right, § 5, p. 592, n. 17
 - Partial subrogation, § 10, p. 609
 - Pleading contract in suit for conventional subrogation, § 68, p. 722, n. 11
 - Prejudicing or injuring rights, application of doctrine, § 6, p. 598
 - Sureties' right to enforce, § 48, p. 673, n. 52
- Corporations, director's right of subrogation against corporation, § 25
- Co-sureties,
 - Bail bond, surety's right of contribution from co-surety, § 61, p. 713
 - Fiduciary's surety subrogated to rights and remedies against co-surety, § 60, p. 711
 - Joint bill by co-sureties to enforce subrogation, § 67
 - Subrogation of co-surety to rights and securities of creditors against co-sureties, § 59, p. 698, n. 68
 - Subrogation of surety paying debts to rights of co-surety, § 47, p. 668
 - Subrogation of surety to securities given creditor by co-surety, § 54, p. 684
 - Subrogation to rights of co-surety, § 58
 - Surety's right to subrogation to claim of paid creditor asserted to detriment of innocent creditors of insolvent co-surety, § 55

INDEX TO SUBROGATION

- Cotenant, subrogation of cotenant to creditor's rights against interest of his cotenant, § 21
- Creditor as party to agreement for conventional subrogation, § 4
- Cross-petition or cross-bill asserting right to contribution, § 64, p. 717
- Custom, subrogation as not originating in custom, § 2, p. 578
- Death of contractor affecting surety's right to subrogation, § 59, p. 705, n. 15
- Decedent's estate. Executors or administrators, post
- Deeds of trust,
 - Beneficiary or trustee discharging junior deed of trust, § 36, p. 645
 - Foreclosure, subrogation of purchaser discharging encumbrance, § 35
 - Lender of funds to discharge deed of trust, subrogation of, § 39, pp. 654-657
 - Lender of money pursuant to agreement that it shall be applied to payment of existing deed of trust, § 39, pp. 656-659
 - Purchaser of chattels encumbered by deed or trust discharging lien, § 33, p. 641
 - Security, advances by third person for discharging debt secured by deed under agreement to take new security as not voluntary payment, § 39, pp. 656-659
 - Subrogation of person discharging, § 33, pp. 632, 634-639
 - Subrogation of purchaser of property encumbered by deed of trust, § 33, pp. 634-639
 - Third person discharging prior deed of trust, subrogation of, § 36, p. 646
- Defective title, subrogation of purchaser discharging vendor's lien affected by, § 33, p. 639
- Defense,
 - Assertion of right of subrogation by way of defense, § 64, p. 717
 - Pleading anticipating defenses in action to establish or enforce subrogation, § 68, p. 722
 - Pleading defenses in action to establish or enforce subrogation, § 68, p. 722
- Definition, § 1
 - Stranger, § 9, p. 603
 - Surety, § 47, p. 668, n. 19
 - Volunteer, § 9, p. 603
- Demand as condition precedent to action to enforce or establish right, § 65
- Depository, subrogation of official's security to rights against failed depository, § 60, p. 710
- Depository bond,
 - Subrogation between official surety and sureties for depository, § 56, n. 30
 - Subrogation of sureties, § 59, pp. 695-697
 - Paying part of losses to rights of creditor, § 48, p. 673, n. 53
 - To right of creditor, § 47, p. 668, n. 17
- Deposits in banks,
 - Administrator surcharged with deposit in insolvent bank subrogated to rights of estate, § 27
 - Subrogation of guardian paying ward for deposit in insolvent bank, § 28
 - Subrogation of officer depositing fund in bank becoming insolvent, § 30
- Deposits in court, subrogation of purchaser depositing money in court to discharge judgment lien, § 33, p. 640
- Deputies, subrogation of official's security compelled to pay for default of deputy, § 60, p. 710
- Deputy collector of internal revenue, subrogation of deputy paying government money deposited in bank becoming bankrupt, § 29
- Deputy sheriff, sheriff subrogated to deputy's rights, § 29
- Devisees, subrogation of devisee paying debt or claim against estate, § 15
- Director, subrogation against corporation, § 25
- Discount, satisfaction of debt at discount affecting amount recoverable by subrogee, § 14, p. 614, n. 28
- Discretion of court in applying doctrine, § 5, pp. 591, 592
- Displacement of intervening right or title, doctrine inapplicable if right displaced, § 6, p. 598
- Dividends,
 - Subrogation of guarantor of dividends, § 52, n. 24
 - Subrogation of guarantor of stock dividends to rights of creditor, § 47, p. 669, n. 20; § 48, p. 673, n. 52
- Doctrine of subrogation defined, § 1, n. 1
- Dower,
 - Purchaser of mortgaged property discharging mortgage subrogated as against dower of grantor's wife, § 33, p. 639
 - Subrogation of widow discharging encumbrance, § 31, p. 632
- Drafts, subrogation of payee to collateral where drawee applies fund to another debt, § 24
- Duress, payment by third person under duress affecting right to subrogation, § 9, p. 603, n. 19
- Earned and unpaid monthly estimates under construction contracts, contractor's surety's superior rights over assignees of, § 59, p. 707
- Encouragement of doctrine, § 5, p. 590
- Encumbrances and liens,
 - Advancement by third persons of means to discharge debt or encumbrances securing same, §§ 38-42, pp. 649-663
 - Advances by third persons to discharge encumbrance on property of person incompetent to contract, § 43
 - Cotenant discharging lien, § 21
 - Creditor's liens passing on subrogation, § 14, pp. 611-614
 - Creditor's right to enforce lien of debtor against another, § 5, p. 590
 - Incompetent persons, loans by third persons to discharge encumbrance on property of, § 43
 - Loans to discharge encumbrance on property of person incompetent to contract, § 43
 - Maritime liens, generally, post
 - Mechanics' lien, generally, post
 - Person whose property or funds is applied by others to satisfy encumbrance, § 44
 - Persons against whom surety may enforce liens of creditor, § 55
 - Persons discharging, §§ 31-37, pp. 630-648
 - Administrator, § 27
 - Assumption of chattel mortgage, subrogation of purchaser discharging assumed mortgage, § 33, p. 641
 - Assumption of encumbrance by junior encumbrancer, subrogation of encumbrancer paying assumed encumbrance, § 36, p. 644

INDEX TO SUBROGATION

Encumbrances and liens—Continued

Persons discharging—Continued

- Assumption of vendor's lien by purchaser, subrogation of purchaser discharging lien, § 33, p. 639
- Chattel mortgage, purchaser of chattel discharging mortgage, § 33, pp. 640, 641
- Conditional sale lien, purchaser of chattel discharging lien of conditional sale, § 33, p. 641
- Cotenant, § 21
- Deed of trust, § 33, pp. 634-639
- Equity of redemption, purchasers of, § 34
- Execution, generally, post
- Executor, § 27
- Failure of title,
 - Pledged stock, subrogation of purchaser discharging lien affected by failure of title, § 33, p. 641
 - Purchaser of land discharging judgment lien, subrogation affected by failure of title, § 33, p. 640
 - Subrogation of mortgaged chattel discharging mortgage affected by failure, § 33, p. 641
 - Subrogation of purchaser discharging vendor's lien affected by, § 33, p. 639
- Foreclosure sale purchaser discharging encumbrances, § 35
- Grantee of purchaser at execution, foreclosure, judicial or similar sale, discharging encumbrances, § 35, p. 642
- Grantor paying after transfer of mortgaged property, § 37
- Guardian, § 28
- Judgment lien, purchaser discharging, § 33, p. 640
- Judicial sale purchaser discharging encumbrances, § 35
- Junior encumbrancer discharging senior lien, § 36, pp. 644-647
- Maritime lien, § 31, p. 633
- Mortgages, post
- Partition sale purchaser, § 35, p. 643
 - Discharging judgment lien, § 35, p. 642
- Pledged property, subrogation of purchaser of pledged property discharging lien, § 33, p. 641
- Purchaser,
 - Administrator's sale, subrogation of purchaser invalid at sale, § 35, p. 644
 - Encumbered property discharging lien, § 32
 - Equity of redemption, § 34
 - Execution, foreclosure, judicial and similar sales, § 35
 - Mortgaged property discharging mortgage, subrogation of, § 33, pp. 634-639
 - Vendor's lien, subrogation of purchaser discharging lien, § 33, p. 639
- Redemption, subrogation of person redeeming from foreclosure, § 34
- Sheriff's sale purchaser, § 35, p. 642
- Subsequent encumbrancers, § 36, pp. 644-647
- Trustee, § 30, n. 27
- Vendor's liens, post

Encumbrances and liens—Continued

- Priority, subrogation not allowed if priority is disturbed, § 6, p. 598
- Salvage lien, subrogation of third person advancing money to pay off lien, § 40
- Statutory lien, subrogation of officer's surety to, § 60, p. 709, n. 50; § 60, p. 710
- Subordinate liens, enforcement of subrogation against, § 6, p. 597
- Surety subrogated to liens of creditor to secure payment, § 54, p. 685
- Tax collector's surety subrogated to statutory lien, § 60, p. 710
- Wage lien, subrogation of lender of funds to discharge lien, § 41
- Endorsement,
 - Holder of bill or note subrogated to endorser's rights, § 24
 - Joint endorsers, subrogation of holders to security given by, § 24
 - Maker of note subrogated to transferee's rights against endorser, § 23
 - Mortgagor discharging note subsequently endorsed by vendee of mortgaged property, § 37, n. 89
 - Payment of instrument by, subrogation on payment, § 23
 - Subrogation of endorsers who are co-sureties to rights of creditors against co-sureties, § 59, p. 698, n. 68
 - Subrogation to security held by debtor as endorser, § 9, p. 603, n. 16
- Endorser, subrogation of endorser paying bill or note, § 23
- Equal equities,
 - Affecting right, § 6, p. 595
 - Application of doctrine, § 6, p. 598
- Equitable assignment,
 - Junior encumbrancer discharging senior lien to protect interest as equitable assignee, § 36, p. 644
 - Payment of debt by surety operating as equitable assignment of debt and evidences thereof, § 54, p. 683
 - Subrogation operating as, § 14, p. 612
- Equitable lien founded on assignment of future payments by contractor, rights of surety to, § 59, p. 703, n. 2
- Equitable nature,
 - Action to establish and enforce right, § 64, pp. 715-717
 - Doctrine, § 2, pp. 580, 581
 - Equitable right, necessity of, § 5, pp. 592, 593
 - Equity of redemption, subrogation of purchasers of equity of redemption,
 - Discharging encumbrance, § 34
 - To lien or mortgage which he pays off, § 34
 - Establishment and enforcement of right, §§ 63-72, pp. 714-726
 - Estoppel to assert right of subrogation, § 13
 - Lender of funds to discharge debt secured by deed of trust or mortgage under agreement to take new security, § 39, p. 658
 - Evidence, action to establish or enforce subrogation, § 69
- Execution,
 - Discharge of execution for lien, subrogation of person discharging, § 31, p. 633

INDEX TO SUBROGATION

Execution—Continued

- Purchaser at execution sale discharging encumbrances, subrogation of, § 35
- Redemption by person not entitled to redeem, subrogation of such person paying money to execution sale purchaser, § 34
- Subrogation of sheriff satisfying execution, § 29
- Surety paying after levy on sufficient of principal's property affecting subrogation to rights of creditor, § 48, p. 672
- Surety paying execution, subrogation to rights of creditor, § 54, p. 685, n. 68
- Executors or administrators,
 - Bond of executors or administrators, subrogation of sureties, § 60, pp. 711, 712
 - Coexecutor, subrogation against, § 27
 - Encumbrance, subrogation of executor or administrator discharging, § 27
 - Lender of money to pay estate debts, subrogation to representative's right to reimbursement, § 38, pp. 653, 654
 - Presentation of claim for subrogation, § 64, p. 716
 - Purchaser at administrator's sale discharging mortgage, subrogation of, § 35, p. 642
 - Purchaser at void administrator's sale, subrogation of, § 35, p. 644
 - Subrogation of, § 27
 - Person giving service or property to, § 15, p. 616
 - Surety's rights acquired by subrogation passing to personal representatives, § 53
- Exhaustion of remedies against principal as condition to right of subrogation, § 65
- Existence of claim or obligation, § 7
 - Loan by third persons to pay existing claim or obligation, § 38, p. 651
 - Mortgage of ward's property affecting subrogation of mortgagee advancing money to discharge encumbrance, § 43
 - Vendor's lien, subrogation of lender of funds to discharge vendor's lien dependent on existence of lien, § 42
- Extent of right, § 5, pp. 588-594
 - Conventional subrogation, § 4
- Failure of consideration for note, subrogation of maker of note transferred by payee to pay for land, § 23
- Failure of title,
 - Pledged stock, subrogation of purchaser discharging lien affected by failure, § 33, p. 641
 - Purchaser of encumbered property, subrogation of purchaser discharging encumbrance, § 32, p. 634
 - Purchaser of land discharging judgment lien, failure of title affecting right to subrogation, § 33, p. 640
 - Purchaser of mortgaged chattel discharging mortgage, right to subrogation affected by failure, § 33, p. 641
 - Purchaser of mortgaged property, subrogation of purchaser discharging mortgage, § 33, pp. 634, 637
 - Subrogation of purchaser discharging vendor's lien affected by, § 33, p. 639
- Fair result, subrogation dependent upon, § 6, pp. 596-599
- Federal court's jurisdiction of suit by surety to establish preferred claim, § 64, p. 715, n. 17

Fidelity bonds,

- Pleading laches in action by surety on fidelity bond to enforce subrogation, § 68, p. 722, n. 16
- Subrogation of surety, § 54, p. 687, n. 89; p. 688, n. 98, 7
- Fiduciary bonds, subrogation of surety, § 54, pp. 688-690; § 60, pp. 711, 712
- Fiduciary capacity, subrogation of persons acting in, §§ 25-30, pp. 624-630
- Fireman,
 - Subrogation of city paying injured fireman's wages to fireman's claim against tortfeasor, § 16, n. 67
 - Subrogation of town to claims against person injuring fireman, § 16, n. 67
- Foreclosure. Mortgages, post
- Form, subrogation doctrine as ignoring form, § 2, p. 580, n. 21
- Form of remedy to establish and enforce right, § 64, pp. 715-717
- Forthcoming bond, subrogation of sheriff or constables to creditor's right on bond, § 29
- Foundation in justice and equity, § 2, pp. 579, 580
- Fraud,
 - Advancements by third person to discharge debt or lien securing it obtained by fraud, § 38, p. 651
 - Agent fraudulently using principal's funds to pay off another's property, subrogation of principal, § 44
 - Contractor's surety subrogated to cause of action in fraud against contractor, § 59, p. 701, n. 85
 - Debtor's fraud as barring right of subrogation, § 14, p. 613
 - Enforcement of subrogation against innocent surety wronged by principal's fraud, § 6, p. 598, n. 79
 - Holder of fraudulent deed of trust discharging prior deed, § 36, p. 646
 - Loans to discharge vendor's lien operating as fraud, § 42
 - Loans to pay mortgage procured by fraud, subrogation of defrauded lender, § 39, p. 655
 - Note obtained by, subrogation of maker to rights of payee, § 23
 - Purpose of subrogation is to prevent, § 2, p. 583
 - Release of security, subrogation of surety affected by fraudulent release, § 49
 - Request to third person to pay debt operating as fraud affecting subrogation, § 9, p. 606, n. 40
 - Right of subrogation affected by, § 6, p. 596
 - Subrogation of surety against innocent person wronged by principal's fraud, § 54, p. 688
 - Trust deed providing for subrogation obtained by fraud, § 31, p. 630, n. 38
 - Volunteer, person induced by fraud to pay another's debt as not volunteer, § 9, p. 603
- Freedom from fault as requisite to right, § 6, pp. 595, 596
- Funds of persons applied to satisfy debts of another, § 44
- General denial in suit to establish or enforce subrogation, § 68, p. 722, n. 16
- General principles applicable to rights of subrogation, §§ 5-14, pp. 588-614
- Good conscience,
 - Subrogation as based on, § 5, p. 588

INDEX TO SUBROGATION

Good conscience—Continued

- Subrogation founded on doctrine of, § 2, p. 579, n. 19
- Good faith, mistake in payment made under good faith, § 9, p. 607
- Grantee of purchasers,
 - At execution, foreclosure, judicial and similar sale discharging encumbrances, § 35, p. 642
 - Mortgaged premises discharging mortgage, subrogation of, § 33, p. 637
- Ground rent, subrogation of bondholder to pay ground rent, § 38, p. 651
- Guarantors. Sureties or guarantors, post
- Guardian,
 - Purchaser compelled to pay mortgage released by guardian without authority subrogated to guardian's rights, § 33, p. 636
 - Right of subrogation, § 28
- Guardian's bond, subrogation of surety, § 54, p. 689, n. 8; § 60, pp. 711, 712
 - To rights of creditor, § 48, p. 673, n. 52
- He who seeks equity must do equity, application of doctrine, § 6, p. 594
- Head tax on alien passengers, subrogation of person paying, § 31, p. 633
- Heirs,
 - Subrogation of heir discharging encumbrance to rights of creditors, § 21, n. 98
 - Subrogation of heir paying debt or claim against estate, § 15
- Highway contractor's surety, § 59, p. 700, n. 80, p. 704, n. 7, 10, 15, p. 706, n. 24, p. 707, n. 25.
- Highway districts, subrogation of state voluntarily paying debt of dissolved highway district, § 9, p. 602, n. 16
- Homestead, subrogation of widow discharging encumbrance, § 31, p. 632
- Homestead rights, subrogation against, § 36, p. 647
- Hospital, subrogation of hospital treating injured person to claim against tortfeasor, § 16, n. 67
- Husband and wife,
 - Advancement by husband to pay notes secured by mortgage as volunteer, § 38, p. 651, n. 16
 - Encumbrance on spouse's property, subrogation of spouse discharging, § 31
 - Lender of funds for necessities or to discharge encumbrance on property of married woman, § 43
 - Payment by wife of husband's debt, subrogation of wife to right of creditors, § 17, n. 74
 - Surety of wife or husband, right of wife to right of subrogation, § 47, p. 669
 - Surviving spouse, subrogation of surviving spouse paying debt or claim against decedent's estate, § 15
- Ignorance, subrogation of person paying debt in ignorance of facts, § 9, p. 607
- Ignorance of subrogee, relief notwithstanding ignorance, § 6, p. 596
- Illegal act, subrogation not predicated on failure to do illegal act, § 5, p. 593
- Implied assignment, necessity to effect subrogation, § 14, p. 612, n. 11
- Implied contract for conventional subrogation, § 4
- Improvement assessment liens, subrogation of lender of money to pay, § 38, p. 653

Improvements,

- On land of another, subrogation of person making, § 45
- Subrogation of person making improvements on good faith belief that he is owner of property, § 7, n. 91
- Incompetent persons,
 - Loans for necessities or to discharge encumbrance on property of person incompetent to contract, § 43
 - Third person advancing funds to discharge encumbrance on property of persons incompetent to contract, § 43
- Indemnitors,
 - Subrogation of sureties of, § 59, p. 697
 - Subrogation to right of contribution, § 57, n. 34
 - Surety, § 62
- Indemnity, subrogation of person paying pursuant to indemnity agreement to creditor's right, § 16
- Independent proceedings to establish or enforce right, § 64, pp. 716, 717
- Independent sureties, subrogation between, § 56
- Infants, lender of funds for necessities or to discharge encumbrance on property of infant, § 43
- Injury caused by fault of another, subrogation of persons liable for, § 16
- Instructions to jury, actions to establish or enforce subrogation, § 70
- Insurance agent, subrogation to insurer's right against insured, § 26
- Insurance beneficiary subrogated to rights of person paid from insurance proceeds, § 44
- Intent,
 - Decedent's estate, intention of person paying claim against estate to be subrogated, § 15, p. 616
 - To extinguish debt by payment, § 10, p. 610
- Intention to waive right of subrogation, § 13
- Interest,
 - Note, recovery by surety suing on note to which he has been subrogated, § 52
 - Subrogee's right to interest on sum involved from date of payment, § 71
- Intermeddler's right to subrogation, § 6, p. 595
 - Paying debt of another, § 9, pp. 601-607
- Intervening equities, subrogation not allowed as against, § 14, p. 613
- Intervening liens, notice to lender of funds to discharge debt secured by deed of trust or mortgage under agreement to take new security affecting right of subrogation, § 39, p. 659
- Investment by guardian, subrogation of guardian wrongfully investing funds, § 28
- Issues and proof, action to establish or enforce subrogation, § 68, pp. 722, 723
- Joinder of parties in action to establish or enforce subrogation, § 67
- Joint accommodation makers, subrogation to rights of comaker, § 23
- Joint endorsers, subrogation of holders to securities given by, § 24
- Joint judgment debtors, subrogation of, § 19
- Joint tortfeasors,
 - Appeal bond surety in action against joint tortfeasor, subrogation to rights of judgment creditor against other tortfeasors, § 61, p. 714
 - Subrogation against, § 16, n. 71
 - Subrogation of indemnitors to joint tortfeasor's right to contribution, § 57, n. 34

INDEX TO SUBROGATION

- Jointly or jointly and severally liable for same debt, subrogation of person so liable, §§ 17-21, pp. 618-621
- Judgment,
 - Assignment of judgment against principal to surety affecting right of subrogation of surety, § 50
 - Bills and notes, right of persons secondarily liable paying instrument to protection of judgment obtained by holder, § 23
 - Creditor's judgments passing on subrogation, § 14, pp. 611-614
 - Fiduciary satisfying judgment, subrogation to beneficiary's rights, § 25
 - Joint judgment debtors, subrogation to creditor's right to extent of amount paid, § 19
 - Stranger paying judgment, right of subrogation, § 9, p. 608, n. 38
 - Surety's right of subrogation affected by assignment, § 50
 - Tender of amount of debt by stranger as not payment affecting subrogation, § 10, p. 609
- Judgment lien,
 - Assignee of vendor discharging lien, subrogation of, § 37
 - Discharge of lien, subrogation of person discharging, § 31, p. 633
 - Junior judgment creditor discharging prior encumbrance, § 36, p. 645
 - Partition sale purchaser discharging judgment lien, subrogation of, § 35, p. 642
 - Subrogation of purchaser of land discharging lien, § 33, p. 640
- Judgment or decree,
 - Appeal bond surety's subrogated on paying judgment, § 61, pp. 713, 714
 - Establishment and enforcement of subrogation, action for, § 71
- Judicial bond,
 - Subrogation of original surety against successive surety, § 56, n. 24
 - Subrogation of sureties, § 61, pp. 712-714
- Judicial sales, subrogation of judicial sale purchaser discharging encumbrances, § 35
- Junior encumbrancer,
 - Advances by junior encumbrancer to discharge superior liens affecting right to subrogation, § 38, p. 649, n. 2
 - Discharging senior lien, § 36, pp. 644-647
 - Purchaser of land encumbered by vendor's lien discharging lien subrogated as against junior encumbrancers, § 33, p. 639
 - Redemption by junior encumbrancer from prior mortgage, subrogation of, § 39, p. 656
 - Subrogation of junior encumbrancer discharging lien, § 31, p. 631
- Junior lienholder, subrogation not allowed where junior lienholder's rights would be prejudiced, § 6, p. 598
- Jurisdiction to establish or enforce right, § 64, p. 716
- Kinds of subrogation, § 1
- Laches,
 - Action to establish or enforce subrogation, pleading laches, § 68, p. 722, n. 16
 - Enforcement and establishment of right, § 66, pp. 718, 719
- Landlord and tenant,
 - Encumbrance discharged by lessee, subrogation of lessee discharging, § 31, p. 631
 - Materialmen furnishing material to lessee not subrogated to lessee's privilege of paying rent due under lease, § 45
- Landlord's lien, subrogation of lender of rent money to lien, § 38, p. 652
- Landlord subordinating lien to chattel mortgage, right to subrogation, § 9, p. 604, n. 26
- Lawful transactions, necessity of, § 5, pp. 592, 593
- Legal subrogation, § 3
 - Defined, § 1
- Legatees,
 - Subrogation of legatees paying debt or claim against estate, § 15
 - Subrogation of lender of money to devisee charged with payment of legacies to rights of legatee, § 38, p. 652
- Legislature's right to limit application of doctrine, § 6, p. 594
- Liability to pay, insufficiency to support right of subrogation, § 10, p. 608
- Liens and encumbrances, generally, ante
- Life insurance beneficiary, subrogation to creditor's claims against estate of insured, § 15, p. 616
- Life tenant,
 - Liability for improvement made by good faith owner under doctrine of subrogation, § 7, n. 91
 - Subrogation of executor secondarily liable paying for losses by life tenant, § 27
 - Subrogation of tenant discharging encumbrance on estate, § 31, p. 631
- Limitation of actions,
 - Enforcement or establishment of right, § 66, p. 718
 - Exemption from statute, subrogation including right to exemption, § 14, p. 612, n. 17
 - Joint mortgagor discharging liability on note barred by limitations as not volunteer, § 18, n. 80
 - Surety's right to subrogation of payment after running of limitations in favor of surety, § 48, p. 672
- Loans,
 - Construction contractor, superior to contractor's surety over assignment securing loan, § 59, pp. 707, 709
 - Third persons making loans for necessities or to discharge encumbrances on property of persons incompetent to contract, § 43
 - Third persons to discharge debt or encumbrance securing same, §§ 38-42, pp. 649-663
- Loss caused by fault of another, subrogation of persons liable for, § 16
- Loss of right of subrogation, § 13
 - Junior encumbrancer redeeming from prior mortgage, § 39, p. 656
- Malpractice, tort-feasor settling with injured person subrogated to injured person's claim for malpractice, § 16, n. 56
- Maritime liens,
 - Lender of money to discharge lien, § 40
 - Subrogation of person discharging, § 31, p. 633
- Marriage of mortgagor, conventional subrogation affected by knowledge of, § 4
- Master and servant,
 - Subrogation of master to rights of injured person against servant, § 16

INDEX TO SUBROGATION

Master and servant—Continued

- Wages and medical expenses of injured employee, subrogation of person paying, § 16, n. 67
- Materialmen's and laborer's lien, subrogation of mortgagor lending funds to pay, § 41
- Matter of right doctrine as not matter of right, § 5, pp. 591, 592
- Maxims of equity, application of, § 6, pp. 594-599
- Mechanics' lien,
 - Lender of money to discharge lien, § 41
 - Payment of lien as essential to subrogation, § 10, p. 607, n. 50
 - Subrogation of person discharging, § 32, p. 633
 - Subrogation of person paying, § 31, p. 631, n. 45
 - Lien to protect another's right, § 31, p. 631, n. 40
- Surety's right to acquire lien on theory of subrogation to contractor's rights, § 59, p. 702
- Medical expenses of injured employee, subrogation of person paying, § 16, n. 67
- Medium of payment,
 - Affecting right to subrogation, § 10, p. 608
 - Bill or note, medium affecting right to subrogation, § 23
 - Surety's or guarantor's right to subrogation affected by, § 48, p. 671
- Meritorious transaction, necessity of, § 5, pp. 592, 593
- Mistake,
 - Advancement by third person of means to discharge or discharging debt or encumbrance securing same, § 38, p. 651
 - Partial subrogation affected by failing to pay debt in full caused by mistake, § 10, p. 609
 - Payment of debt or default of another by mistake, § 16
 - Payments made under mistake as not voluntary entitling payer to subrogation, § 9, p. 607
 - Purpose of subrogation is to relieve from mistake, § 2, p. 583
 - Relief notwithstanding subrogee's mistakes, § 6, p. 596
- Modification of right of legal subrogation by contract, § 3
- Money judgment in action to enforce subrogation, § 71
- Moral obligation payment under moral obligations as not voluntary, § 9, p. 604
- Mortgages,
 - Administrator's sale purchaser discharging mortgage, subrogation of purchaser to rights of mortgagee, § 35, p. 642
 - Advances by third person to discharge mortgage, § 39, pp. 654-659
 - Agent fraudulently using principal's funds to pay off mortgage on another's property, § 44
 - Agent paying mortgage, subrogation of agent to principal's rights, § 26
 - Assignee of second mortgage claiming subrogation, § 12, n. 85
 - Assumption of mortgage by purchaser, subrogation of purchaser discharging assumed mortgage, § 33, pp. 636, 637
 - Bondholder advancing money to pay ground rent, subrogation of, § 38, p. 651
 - Conventional subrogation dependent upon knowledge of marriage of mortgagor, § 4, n. 66
 - Cotenant paying off mortgage on common estate, subrogation of, § 21

Mortgages—Continued

- Creditor's mortgages passing on subrogation, § 14, pp. 611-614
- Discharge of mortgage,
 - By purchaser of mortgaged chattel, subrogation of, § 33, pp. 640, 641
 - Subrogation of person discharging, § 31, pp. 632, 633; § 33, pp. 634-639
- Equity of redemption, subrogation of purchaser of equity of redemption to lien or mortgage which he pays off, § 34
- Execution sale purchaser, discharging mortgage, subrogated to rights of holder of mortgage, § 35, p. 643
- Executor paying mortgage, subrogation of estate to mortgage, § 27
- Extension of time of payment of first mortgage, application of subrogation to make first mortgage inferior to second mortgage, § 6, p. 598, n. 86
- Foreclosure,
 - By way of subrogation by endorser paying installment of interest on mortgage, § 23
 - Grantor or mortgagor discharging encumbrance after transfer of mortgaged property, § 37
 - Purchaser discharging mortgage, § 35
 - Subrogation on mortgagor's repudiation of foreclosed mortgage, § 39, p. 656
- Grantee of owner satisfying mortgage, subrogation limited to amount paid for land, § 14, p. 614
- Grantee of purchaser of mortgaged premises discharging mortgage, subrogation of, § 33, p. 637
- Grantor paying after transfer of mortgaged property, § 37
- Guarantor,
 - Subrogation to rights of creditors, § 47, p. 669, n. 20
 - Subrogation to rights of mortgagee, § 48, p. 673, n. 52, p. 675, n. 68
- Guardian paying note secured by mortgage subrogated to mortgagee's right, § 28
- Intervening liens, notice by junior mortgagee discharging lien affecting right to subrogation, § 36, pp. 645, 646
- Joint mortgagor paying more than proportionate share of debt, subrogation of, § 18
- Junior encumbrancer discharging prior encumbrances, § 36, p. 645
- Junior mortgagee,
 - Discharging senior liens, § 36, pp. 644-647
 - Paying senior mortgage, § 36, p. 644
- Lender of funds to discharge mortgage, subrogation of, § 39, pp. 654-659
- Mortgagor paying after transfer of mortgaged property, § 37
- Partial subrogation by junior mortgagee discharging senior lien, § 38, pp. 646, 647
- Payment by grantor of mortgagor after transfer of mortgaged property, § 37
- Priority,
 - Mortgage discharged by junior encumbrancer to protect rights, § 36, p. 645
 - Surety's right to enforce priority to creditor's mortgage, § 55
- Purchaser of mortgaged chattel discharging mortgage, subrogation of, § 33, pp. 640, 641

INDEX TO SUBROGATION

Mortgages—Continued

- Purchaser of mortgaged property discharging lien, subrogation of, § 33, pp. 634-639
- Receiver paying taxes on behalf of first mortgagee, subrogation to rights of owner against second mortgagee, § 25
- Redemption,
 - Subrogation of person entitled to redeem on discharge of mortgage, § 31, p. 632, n. 57
 - Surety subrogated to principal's right to redeem, § 57, n. 84
- Redemptioner, subrogation of, § 39, pp. 655, 656
- Security, advances by third persons for discharging debt secured by mortgage under agreement to take new security as not voluntary payment, § 39, pp. 657-659
- Sheriff's sale purchaser discharging mortgage subrogated to mortgagee's rights, § 35, p. 642
- Ship mortgage, subrogation of lender of funds to discharge, § 39, p. 654, n. 56
- Stock, purchaser paying mortgage with stock, right to full value of stock on subrogation of purchaser, § 14, p. 614, n. 28
- Successor of mortgagor as party in action to enforce subrogation, § 67, n. 75
- Surety, subrogation of surety to mortgage, § 49
- Vendor's lien, subrogation of mortgagee lending money to discharge vendor's lien, § 42
- Motor vehicles, subrogation of owner to rights of injured persons against operator, § 16
- Municipal corporations, subrogation of municipal corporations to rights of injured persons against abutting owner, § 16
- Name in which suit is brought to enforce subrogation, § 67
- Nature, § 2, pp. 580, 581
- Nature of remedy to establish and enforce right, § 64, pp. 715-717
- Necessaries, third persons making advances for necessities, § 43
- Necessary parties, action to establish or enforce right, § 67
- Negligence,
 - Loss of right to subrogation by inexcusable negligence, § 13
 - Right affected by, § 6, p. 596
 - Third person affecting subrogation of surety to rights of creditors against third person, § 54, p. 688
- Notice,
 - Assignee of contractor of surety's right, § 59, p. 707
- Intervening liens,
 - Junior mortgagee discharging liens affecting right to subrogation, § 36, pp. 645, 646
 - Lender of money to discharge debt secured by deed or mortgage under agreement to take new security, § 39, p. 658
 - Time of paying senior encumbrance affecting subrogation, § 31, p. 631
- Junior encumbrances affecting subrogation of purchaser discharging mortgage, § 33, pp. 638, 639
- Payment as condition precedent to action to enforce or establish right, § 65
- Third person receiving benefits of misappropriation of trust funds affecting subrogation of surety, § 54, p. 690
- Obligation against debtor, necessity for, § 7

- Obligation aiding in enforcement of subrogation, necessity for, § 7
- Officers, subrogation of officer paying another's debt, § 29
- Official bonds, subrogation of surety, § 54, pp. 688-690; § 60, pp. 709-711
- Operation and effect, § 14, pp. 611-614
- Operation of law, legal subrogation arising by, § 3
- Origin and basis, § 2, pp. 578-580
 - Legal subrogation, § 3
- Overpayment of claims by administrator, subrogation of administrator, § 27
- Own debt, payment of debt assumed by another as not voluntary, § 9, p. 604
- Own rights, subrogation to, § 8
- Part payment,
 - Affecting right to subrogation, § 10, pp. 608-610
 - Lender of money to discharge part of vendor's lien, § 42
 - Loans by third persons applied to partially discharge debt, § 38, p. 652
 - Mortgage by purchaser of land, partial subrogation of, § 33, p. 635, n. 93
 - Senior claim by junior encumbrancer affecting right of subrogation, § 36, pp. 646, 647
 - Sureties or guarantors affecting subrogation to rights of creditor, § 48, pp. 672-675
- Partial subrogation,
 - Joinder of parties in action to enforce, § 67
 - Judgment or decree for, § 71
 - Junior encumbrancer paying part of senior encumbrance, § 36, pp. 646, 647
 - Lender of money to discharge part of vendor's lien, § 42
 - Loans by third persons to discharge debt or encumbrance securing same, partial payment by loan, § 38, p. 652
 - Mortgage foreclosure sale purchaser discharging mortgage, § 35, p. 642, n. 85
 - Purchaser of land encumbered by mortgage making part payment to mortgagee, § 33, p. 635, n. 93
 - Purchaser of mortgaged property discharging mortgage, § 33, p. 638, n. 31
 - Sureties and guarantors, § 48, pp. 672-675
 - Vendor paying encumbrance after transfer of mortgaged property, § 37, n. 84
- Partial substitution payment in full affecting right, § 10, pp. 608-610
- Parties, establishment or enforcement of right, § 67
- Parties to contract for conventional subrogation, § 4
- Partition sale,
 - Purchaser discharging lien, § 35, p. 643
 - Subrogation of purchaser discharging judgment lien, § 35, p. 642
- Partnership,
 - Creditors of firm as not subrogated to partner's right to have firm's assets appropriated to firm's indebtedness, § 44
 - Debts of firm, subrogation of partner paying, § 20
 - General creditors, subrogation of individual paying general creditors of partnership, § 14, p. 612, n. 8
- Payment,
 - Application of loan to discharge mortgage affecting lender's right of subrogation, § 39, p. 655
 - Application of loan to payment of debt, § 38, p. 651

INDEX TO SUBROGATION

Payment—Continued

- Application of money advanced for discharging debt secured by deed or mortgage under agreement to take security discharged affecting right of subrogation, § 39, p. 657
- Debt, § 10, pp. 607-610
 - Accrual of right to subrogation on payment, § 11
 - Appeal bond surety's right of subrogation dependent on payment, § 61, p. 714
 - As requisite, § 5, p. 590
 - Bill or note, § 23
 - Funds or property applied to pay debts or encumbrances of another, § 44
 - Pleading in action to establish or enforce subrogation must allege, § 68, p. 721
 - Presumption of payment, § 69
 - Subrogation of surety to rights of principal dependent on, § 57
 - Sureties or guarantors, § 48, pp. 670-675
- Performance of legal duty, right of subrogation of person paying debt under, § 9, p. 604
- Persons against whom contractor's surety is entitled to unpaid funds, § 59, pp. 704-709
- Persons entitled to subrogation, §§ 15-62, pp. 614-714
- Persons whose funds or property is applied by others to payment of debts or encumbrances, § 44
- Petition in action to establish or enforce subrogation, § 68, pp. 721, 722
- Plea, action to establish or enforce subrogation, § 68, p. 722
- Pleading,
 - Defense, pleading asserting right to subrogation by way of defense, § 64, p. 717
 - Establishment and enforcement of subrogation, § 68, pp. 720-723
- Pledge,
 - Person not entitled to subrogation to security pledged, § 8
 - Sale of pledged property to creditor affecting surety's right of subrogation, § 49
 - Subrogation of purchaser of pledged property discharging lien, § 33, p. 641
- Prayer for general relief as entitling person to subrogation, § 68, p. 721
- Preference, payment by creditor of preferred creditor as not voluntary, § 9, p. 605
- Preference of state, subrogation to rights of preference, § 5, p. 590
- Premiums, subrogation of agent paying premiums to insurer's rights against insured, § 26
- Presumption of subrogation, § 69
- Presumptions, action to establish or enforce subrogation, § 69
- Primary liability, subrogation not available to person primarily liable, § 8
- Principal debtor, right of subrogation against, § 7
- Priorities,
 - Depositor's right of priority, subrogation of surety on depositary's bond, § 59, pp. 696, 697
 - Enforcement of right against inferior lien, § 6, p. 597
 - Mortgage, purchaser's right of subrogation to mortgage discharge as including priority over junior lien, § 33, p. 636
 - Subrogation not allowed if application disturbs priority of lien, § 6, p. 598

Priorities—Continued

- Subrogee's right to priority in payment of claims, § 14, p. 612
- Surety subrogated to priority rights of creditors, § 54, pp. 685, 686
- Tax lien over contractor's surety claim to contribution, § 59, p. 706
- Privilege aiding in enforcement of subrogation, necessity for, § 7
- Privity, legal subrogation not dependent on privity, § 3
- Probate jurisdiction to enforce or establish right, § 64, p. 716
- Progress payments under construction contract, subrogation of contractor's surety as against assignee of, § 59, p. 708
- Proper party, action to establish or enforce subrogation, § 67
- Property applied to satisfy debt or encumbrance of another, § 44
- Protection of own rights and interests, subrogation of person paying for purpose of, § 9, pp. 604, 605
- Public policy,
 - Application of doctrine demanded by public policy, § 5, p. 589
 - Application of doctrine where it would be contrary to, § 5, p. 593
 - Contracts providing for pro tanto subrogation of sureties or guarantors to rights of creditor, § 48, pp. 674, 675
 - Subrogation of surety on bail bond in criminal cases, § 61, p. 713
- Purchaser,
 - Encumbered property discharging lien, subrogation of, § 32
 - Interest coupon note to rights of holder of vendor's note, § 42, n. 76
 - Mortgaged property discharging mortgage or deed of trust, subrogation of, § 33, pp. 634-639
- Purpose of subrogation, § 2, pp. 581-583
- Questions of law and fact, action to establish or enforce subrogation, § 70
- Ratification of payment by third person of debt, right of subrogation, § 9, p. 606
- Receiver, subrogation of, § 25
- Recognizance to stay joint judgment, subrogation of co-debtor paid judgment to creditor's rights against surety on recognizance, § 19
- Recovery over, persons against whom there may be recovery over as parties in action to enforce subrogation, § 67
- Redemption,
 - From mortgage foreclosure sale, subrogation of co-mortgagor redeeming from sale, § 18
 - Subrogation of person redeeming from foreclosure, § 34
- Redemption, subrogation of, § 39, pp. 655, 656
- Refunding municipal bondholders, subrogations to rights of holder of original obligations, § 38, p. 653
- Relation back,
 - Contractor's surety's right to contribution, § 59, p. 705
 - Doctrine cannot be used by subrogee, § 14, p. 613
- Relationship of subrogee to debt discharged, §§ 8, 9, pp. 600-607
- Relatives paying debt, right to subrogation, § 9, p. 602, n. 16

INDEX TO SUBROGATION

- Remaindermen, subrogation as against remaindermen of purchaser acquiring mortgaged property on discharge of mortgage, § 33, p. 637
- Remedies, subrogation as passing creditor's remedy, § 14, pp. 611-614
- Rent, subrogation of owner to rights of tenant against collector of rent, § 7
- Repairman's lien, junior lienholder's right of subrogation to repairman's lien rights, § 36, p. 646
- Replevin bond, subrogation of sureties, § 61, p. 713
- Representative capacity, subrogation of persons acting in, §§ 25-30, pp. 624-630
- Request by debtor to third person to pay debt, § 9, p. 606
- Requisites of contract to effect conventional subrogation, § 4
- Restitution, subrogation as akin to equitable principle of, § 2, p. 581
- Retained percentages under construction contract, surety's rights, § 59, p. 699, n. 79; § 59, p. 700, n. 81; § 59, pp. 701, 702, 705-709
- Review of right to subrogation, § 72
- Rights defined, § 4, n. 74
- Sale, subrogation as in effect a sale, § 1, n. 1.
- Salvage lien, subrogation of third person advancing money to pay off lien, § 40
- School fund mortgage, subrogation of person paying mortgage and securing invalid assignment, § 31, p. 631
- School treasurer subrogation of treasurer paying legitimate orders drawn on him, § 29
- School trustees, subrogation of trustee incurring unauthorized debts to rights of creditors, § 29
- Scope of remedy, § 5, pp. 588-594
- Seaman's wages,
 - Subrogation of person paying, § 31, p. 633
 - Subrogation of third person advancing wages, § 41
- Secondary liability,
 - Bills and notes, subrogation of persons secondarily liable paying instrument, § 23
 - Enforcement of subrogation against, § 7
 - Executor secondarily liable for losses by life tenant, subrogation of executor paying losses against life tenant, § 27
 - Joint judgment paid by person secondarily liable, subrogation of payor, § 19, n. 87
 - Payment of debt by person secondarily liable as not constituting voluntary payment, § 9, p. 604
- Securities and guarantors,
 - Attorney's fees, subrogation to rights of creditor including, § 52
 - Subcontractors, subrogation to rights of, § 59, p. 701, n. 83
 - United States, depositary's surety subrogated to priority of United States, § 59, p. 696, n. 53
- Self protection, subrogation of person paying debt for self protection, § 9, p. 604
- Senior encumbrancer discharging junior encumbrance, § 36, p. 644
- Sheriff's sale purchaser discharging mortgage, § 35, p. 642
- Sheriffs, subrogation of, § 29
- Sheriffs' sureties, § 60, p. 711
- Ship mortgage, subrogation of lender of money to discharge mortgage, § 39, p. 654, n. 56
- Shipwrecked seaman, subrogation of person paying cost or repatriation to rights of seaman against United States, § 43
- Soldiers, subrogation of government to injured soldier's claim for damages, § 16, n. 67
- State,
 - Depositary's surety subrogated to state's right of priority, § 59, pp. 696, 697
 - Funds of individual applied to debts of state, subrogation of individual to rights of state, § 44
 - Secondary liability, subrogation of person secondarily liable against state accepting liability for claims, § 14, p. 614, n. 31
 - Subrogation of state voluntarily paying debts of dissolved highway districts, § 9, p. 602, n. 16
 - Subrogation to rights of state, § 5, p. 590
 - Surety paying debt owing to state, subrogated to state's priority, § 54, pp. 685, 686
 - Tax collector's surety subrogated to state's right to participate in confused tax funds, § 60, p. 710
- State guaranty fund, subrogation of surety on depositary's bond to fund, § 59
- Statutes,
 - Application of doctrine which would accomplish purpose which is contrary to statute, § 5, p. 593
 - Contractor's surety, subrogation over assignee of contractor, § 59, p. 709
 - Depositary's surety subrogated to priority of state, § 59, p. 697
 - Enforcement of right, statutes prescribing mode of, § 64, p. 715
 - Judicial bonds, subrogation of sureties, § 61, p. 713
 - Judicial proceeding to establish right of subrogation unnecessary when right granted by statute, § 63
 - Subrogation as not originating in statute, § 2, p. 578
 - Surety paying bond given United States subrogated to priority of United States, § 54, p. 686
- Statutory provisions,
 - Assignment of judgment to surety satisfying judgment, § 50
 - Sureties and guarantors, subrogation to rights of creditor, § 47, pp. 668, 669
- Stock,
 - Pledged stock, subrogation of purchaser of pledged stock discharging lien, § 33, p. 641
 - Right to full value of stock on subrogation of purchaser paying mortgage off with stock, § 14, p. 614, n. 28
- Stock dividends, subrogation of guarantor to rights of creditor, § 47, p. 669, n. 20; § 48, p. 673, n. 52
- Stockholder, subrogation of stockholder paying liability to claim of creditor against corporation, § 17, n. 73
- Stockholders paying corporate obligation as not volunteer, § 9, p. 605, n. 34
- Stranger,
 - Decedent's estate, subrogation of stranger paying claims against, § 15, pp. 615, 616
 - Defined, § 9, p. 603
 - Paying debt of another, right of subrogation, § 9, pp. 601-607
- Street improvement district, subrogation to district's right to exemption from statute of limitation, § 14, p. 612, n. 17

INDEX TO SUBROGATION

- Streets, subrogation of municipality to rights of person injured on street against abutting owner, § 16
- Subagent, subrogation of general agent to creditor's right against subagent, § 26
- Subcontractors, subrogation of sureties to rights of, § 59, p. 701, n. 83
- Subcontractor's surety, § 59, p. 702
- Subordinate proceedings to enforce or establish right, § 64, pp. 716, 717
- Subrogation equitable origin, § 2, pp. 578-580
- Subrogation statutes, limitation of right by, § 6, p. 594
- Substitution as synonymous with subrogation, § 1
- Superior equity necessary, § 6, pp. 594, 595
- Supersedeas bond,
 Contribution of sureties, § 61, p. 714
 Subrogation as between successive sureties, § 56, n. 24, 25
- Support bond, subrogation of surety to rights of principal, § 57, n. 34
- Sureties or guarantors, §§ 46-62, pp. 666-714
 Acceptance of right of subrogation at time of payment, § 48, p. 675
 Acts of creditor affecting subrogation to rights of creditor, §§ 49, 51, pp. 676-679
 Administrator's bond, generally, ante
 Appeal bond,
 Subrogation between successive sureties, § 56, n. 28
 Subrogation of surety on appeal bond of indemnitor to creditor's rights, § 59, p. 697
 Assignment,
 Contractor's assignment of funds after contract of suretyship, surety's rights as superior to assignee's, § 59, pp. 706, 707
 Principal's rights and remedies, subrogation of surety existing independent of assignment, § 57
 Surety's rights acquired by subrogation, § 53
 Assignment by creditor of rights and remedies to surety affecting subrogation to rights of creditors, § 50
 Assumption by third person to pay debt, subrogation of surety for original debtor to creditor's rights against third person, § 54, p. 687
 Attorney's fees, recovery in action on note on which surety has been subrogated, § 52
 Bail bond, § 61, pp. 713, 714
 Bills or notes, § 59, pp. 698, 699
 Bona fide purchasers of trust property, subrogation of surety against, § 54, p. 690
 Collateral security,
 Subrogation of guarantor of note to collateral, § 59, p. 698, n. 69
 Subrogation of surety to collateral given by creditor, § 54, pp. 683, 684
 Subrogation of surety to collateral needed to satisfy debts for which surety is not bound or collateral which has been exhausted, § 52
 Subrogation of surety to principal's rights in collateral, § 57, n. 34
 Common-law liens of creditor, subrogation of surety to, § 54, p. 685
- Sureties or guarantors—Continued
 Compensated sureties subrogated to rights of creditor, § 47, p. 669
 Compulsory payments by surety as requisite to subrogation to rights of creditor, § 48, pp. 671, 672
 Condition precedent to action to enforce or establish right, § 65
 Conditional sales note, subrogation of sureties to rights of principal, § 57, n. 34
 Conflict of law as to guarantor's right of subrogation, § 46
 Contractors' bonds, generally, ante
 Contracts,
 Principal's contract with surety or guarantor to enter into undertaking affecting subrogation to rights of creditor, § 48, pp. 675, 676
 Pro tanto subrogation to rights of creditor, contract providing for, § 48, pp. 674, 675
 Subrogation of surety to rights acquired under or arising out of contract secured, § 54, p. 683
 Subrogation to rights of creditors unnecessary, § 48, p. 675
 Co-sureties, generally, ante
 Creditor, subrogation to rights of, §§ 47-56, pp. 667-693
 Appeal bond of indemnitor, subrogation of surety on, § 59, p. 697
 Fiduciary bonds, § 60, pp. 711, 712
 Judicial bonds, § 61, pp. 712-714
 Official bonds, sureties on, § 60, pp. 709-711
 Sheriffs' sureties, § 60, p. 711
 Sureties of sureties, § 59, p. 697
 Dealings of creditor subsequent to suretyship but before payment affecting subrogation to rights of creditor, § 49
 Definition of surety, § 47, p. 668, n. 19
 Depository bonds, § 59, pp. 695-697
 Subrogation between official surety and sureties for depository, § 56, n. 30
 Discharge of right after payment by surety affecting subrogation to rights of creditor, § 49
 Dividends, subrogation of guarantor of dividends, § 52, n. 24
 Doctrine formerly confined to transactions between principals and sureties, § 5, p. 591
 Election of right of subrogation at time of payment, § 48, p. 675
 Equitable assignment, payment of debt operating as equitable assignment of debt and evidences thereof, § 54, p. 683
 Essentials to creation or existence of subrogation to rights of creditor, § 48, pp. 670-676
 Execution,
 Levied on sufficient principal's property, payment by surety after, § 48, p. 672
 Subrogation of surety paying execution to rights of creditor, § 54, p. 685
 Executors' bonds, § 60, pp. 711, 712
 Exhaustion by surety of legal rights against principal as condition to subrogation to rights of creditor, § 48, p. 677
 Extent of subrogation to rights of creditors, § 52
 Fidelity bonds, generally, ante

INDEX TO SUBROGATION

Sureties or guarantors—Continued

- Fiduciary bonds, § 60, pp. 711, 712
 - Subrogation of surety to rights of beneficiary or obligee against third person receiving trust property or participating in breach of trust, § 54, pp. 688-690
- Fines, surety paying bond subrogated to paying official bond subrogated to fine imposed on officer, § 54, p. 686, n. 85
- Fraud,
 - Contractor's surety subrogated to cause of action to fraud against contractor, § 59, p. 701, n. 85
 - Principal, application of doctrine against innocent surety wronged by, § 6, p. 598, n. 79
 - Release of security affecting subrogation to rights of surety, § 49
 - Subrogation of surety against innocent person wronged by principal's fraud, § 54, p. 688
- Guardian's bond, § 54, p. 689, n. 8; § 60, pp. 711, 712
- Highway contractor's sureties, § 59, p. 700, n. 80; § 59, p. 704, n. 7, 10, 15; § 59, p. 706, n. 24; § 59, p. 707, n. 25
- Hired sureties subrogated to rights of creditor, § 47, p. 669
- Identicalness in undertakings of principal and surety or guarantor affecting subrogation to rights of creditor, § 48, p. 676
- Ignorance of surety of rights of creditor affecting subrogation, § 54, p. 682
- Implied vendor's lien, subrogation of surety to, § 54, p. 684
- Indemnification, subrogation of surety limited to, § 52
- Indemnitors, sureties of, § 59, p. 697; § 62
- Indemnity taken by surety at time of contract as waiving right of subrogation, § 51
- Independent or ancillary proceedings to establish and enforce rights of surety, § 64, p. 716
- Independent sureties, subrogation between, § 56
- Installment payments by surety affecting subrogation to rights of creditors, § 48, p. 675
- Interest on note, recovery by surety bringing action on note to which he has been subrogated, § 52
- Interest paid by surety, subrogation to rights of creditor including, § 52
- Joint debtor of principal, subrogation of surety to creditor's rights against other debtor, § 54, p. 687
- Joint tortfeasors, subrogation of surety for one joint tortfeasor to creditor's rights against other, § 54, p. 688
- Judgment against principal and surety, surety's right to enforce, § 54, p. 685
- Judgment against principal assigned to surety satisfying judgment affecting subrogation, § 50
- Judgment or decree establishing surety's right of subrogation, § 71
- Judicial bonds, § 61, pp. 712-714
 - Subrogation of original surety against second surety, § 56, n. 24

Sureties or guarantors—Continued

- Laches affecting action by surety to establish or enforce right, § 66, p. 718
 - Pleading, § 68, p. 72, n. 16
- Legal rights and remedies available to creditor, subrogation of surety to, § 54, pp. 684-686
- Legal subrogation, right of surety, § 3, n. 42
- Liens of creditors, persons against whom surety may enforce liens, § 55
- Limitation of action by surety to establish or enforce right, § 66, p. 718
- Limitation of action in favor of surety, payment after running of limitations, § 48, p. 672.
- Limitation of subrogation to rights of creditors, § 52
- Materialmen, subrogation of contractor's surety to rights of, § 59, p. 701
- Medium of payment affecting subrogation to rights of creditor, § 48, p. 671
- Necessity of relationship of principal and surety, § 8.
- Negligence of third person affecting subrogation of sureties to creditor's rights against wrongdoer, § 54, p. 688
- Official bonds, § 60, pp. 709-711
 - Subrogation of surety to beneficiary's or obligee's rights against third person receiving trust property or participating in breach of trust, § 54, pp. 688-690
- Part payment by sureties or guarantors affecting subrogation to rights of creditor, § 48, pp. 672-675
- Partial subrogation to rights of creditors, § 48, pp. 672-675
- Particular purposes or types of persons, subrogation of sureties for, §§ 59-61, pp. 695-714
- Parties in action by guarantor to establish or enforce subrogation, § 67
- Payment as essential to subrogation to rights of creditor, § 48, pp. 670-675
- Persons against whom surety may enforce liens and securities of creditor, § 55
- Pleading suretyship in action to establish or enforce subrogation, § 68, p. 722, n. 11
- Pledged property, sale of pledged property by creditor to himself affecting subrogation to rights of creditor, § 49
- Presumption that surety made payment with intent of exercising right of subrogation, § 48, p. 675
- Principal's rights, subrogation of surety to, § 57
 - Appeal bond surety, § 61, p. 714
- Fiduciary bonds, § 60, pp. 711, 712; § 61, p. 713
 - Judgment or decree establishing right of sureties to subrogation against principal, § 71
- Official bonds, § 60, pp. 709-711
- Sheriffs' sureties, § 60, p. 711
- Priority,
 - Rights of creditors, subrogation to, § 54, pp. 685, 686
 - Subrogation of sureties on depository bonds to depositor's right of priority, § 59, pp. 696, 697
 - Subrogation of sureties to rights of persons acquiring property or interest prior to suretyship, § 55

INDEX TO SUBROGATION

Sureties or guarantors—Continued

Priority—Continued

- Surety's rights over principal or creditors, time for accrual, § 47, pp. 669, 670
- Tax lien over contractor's surety's claim to subrogation, § 59, p. 706
- Public policy affecting contract providing for pro tanto subrogation to rights of creditor, § 48, pp. 674, 675
- Purchase by surety of debt by payment thereof, § 54, p. 683
- Purchasers of principal's property subsequent to suretyship, enforcement by surety of creditor's liens and securities against, § 55
- Reimbursed surety, § 52
- Relation back of surety's right to subrogation, § 47, pp. 669, 670
- Release by surety of indemnity as barring subrogation to lien against third person, § 55
- Release of rights after payment by surety affecting subrogation to rights of creditor, § 49
- Replevin bond, § 61, p. 713
- Request of surety or guarantor to enter into undertaking affecting subrogation to right of creditor, § 48, pp. 675, 676
- Rights and remedies of creditor to which subrogated, § 54, pp. 682-690
- Satisfaction wrongfully entered by creditor of record affecting subrogation to rights of creditor, § 49
- Securities of creditor, persons against whom surety may enforce securities, § 55
- Sheriff, subrogation of sureties to creditor's right against sheriff for wrongful act, § 54, p. 688
- Sheriffs' sureties, § 60, p. 711
- State, subrogation of surety paying debt owing to state's priority, § 54, pp. 685, 686
- Statutory liens in favor of creditors, subrogation of surety to, § 54, p. 685
- Stockholder's liability, subrogation of guarantor on bank's bond to, § 54, p. 686, n. 87
- Subcontractor's surety, § 59, p. 702
- Subsequent purchaser of encumbrance, enforcement of liens and securities of creditors on principal's property against persons acquiring or encumbering property subsequent to suretyship, § 55
- Successive sureties, subrogation as between, § 56
- Superior rights of surety recovering against third person, § 54, p. 687
- Supersedeas bond, § 61, p. 714
 - Subrogation between successive sureties, § 56, n. 24, 25
- Support bond, subrogation of surety to rights of principal, § 57, n. 34
- Sureties of sureties, § 59, p. 697
- Tax collector's bond, § 54, p. 688, n. 7; § 54, p. 689, n. 8; § 60, p. 710
- Third persons,
 - Collateral given to creditor, subrogation of surety to, § 54, p. 684
 - Subrogation to rights and remedies of creditor against, § 54, pp. 686-690
 - Subrogation to rights of, judicial bonds, § 61, p. 713
- Time of accrual of subrogation to rights of creditor, § 47, pp. 669, 670

Sureties or guarantors—Continued

- Time to sue to establish or enforce right, § 66, p. 717
- Tortfeasors, subrogation of surety to creditor's rights against tortfeasor, § 54, pp. 687-690
- Transfer of surety's rights acquired by subrogation, § 53
- Treasurer's bond, § 60, p. 709, n. 50
- Truck, subrogation of surety to rights of beneficiary or obligee against third person receiving trust property or participating in breach of trust, § 54, pp. 688-690
- Trustees' bonds, § 60, pp. 711, 712
- Trusts, subrogation of fiduciary's surety against third person participating in breach of trust, § 60, p. 712
- United States, subrogation of surety paying debt owing to sovereign's priority, § 54, pp. 685, 686
- Vendor's lien, subrogation of surety to, § 54, p. 684
- Voluntary payment of debt by surety affecting subrogation of rights of creditor, § 48, pp. 671, 672
- Waiver of rights, § 51
 - Contract waiving surety's right, § 51
 - Presumption of waiver, § 69
 - Subrogation of surety to rights of principal, § 57
 - Surety on official bond, § 60, p. 710, n. 51
- Wrongdoers, subrogation of surety to creditor's rights against wrongdoer, § 54, pp. 687-690
- Sureties or guardian, appeal bond, generally, ante
- Surviving spouse, subrogation of surviving spouse paying claim against decedent's estate, § 15
- Tax collector's bond, subrogation of surety, § 54, p. 688, n. 7; § 60, p. 710
- Tax lien,
 - Priority over contractor's claim to subrogation, § 59, p. 706
 - Subrogation of appeal bond surety to rights of government under tax lien, § 61, p. 714, n. 95
 - Subrogation of lender of money to pay liens, § 38, p. 653
- Taxes, contractor's surety's right to contribution as superior to claim for unpaid taxes, § 59, p. 705
- Technicalities disregarded in applying doctrine, § 5, p. 589
- Tenancy to extend scope of remedy, § 5, pp. 590, 591
- Tenant in common. Cotenants, ante
- Tenants by entirety, subrogation of wife discharging encumbrance on, § 31, p. 632
- Tender,
 - Condition precedent to action to enforce or establish right, § 65
 - Debt by stranger as not payment essential to subrogation, § 10, p. 609
- Time,
 - Right to subrogation accrues, § 11
 - Sue to establish and enforce right, § 66, pp. 717-719
- Title, subrogation not allowed if application overthrows legal title, § 6, p. 598
- Tortfeasors, subrogation of surety of one joint tortfeasor to creditor's rights against other, § 54, p. 688

INDEX TO SUBROGATION

Torts,

- Application of doctrine to tortious transactions, § 5, p. 588, n. 82; § 5, p. 593
- Right of subrogation affected by reaping advantage from own wrongdoing, § 6, p. 596
- Subrogation of persons liable for torts caused by fault of another, § 16
- Surety subrogated to creditor's rights against tortfeasors, § 54, pp. 687-690
- Town supervisor, payment by supervisor of tax collector's shortage as not voluntary, § 9, p. 604, n. 31
- Treasurer's bond, subrogation of surety, § 60, p. 709, n. 50

Trial, action to establish or enforce subrogation, § 70

Trustees, subrogation of, § 30

Trustee's bonds, subrogation of sureties, § 60, pp. 711, 712

Trusts,

- Statute protecting title of creditors without notice against trust implied by law as barring subrogation, § 14, p. 613
- Subrogation of fiduciary's surety against third person participating in breach of trust, § 60, p. 712
- Subrogation of surety to right of beneficiary or obligee against third person receiving trust property or participating in breach of trust, § 54, pp. 688-690

United States,

- Contractor's right to contribution superior to claim of United States for unpaid taxes, § 59, p. 705
- Depository's surety subrogated to priority of United States, § 59, p. 696, n. 53
- Payment of claim for money stolen by soldier as not voluntary, § 9, p. 604, n. 29
- Shipwrecked seaman, subrogation of person paying cost of repatriation of shipwrecked seaman, rights of seaman against United States, § 43
- Soldier's injury, subrogation of government to soldier's claim for damages, § 16, n. 67
- Surety paying debt owing to United States subrogated to United States' priority, § 54, pp. 685, 686

Unjust enrichment,

- Funds or property applied to satisfy debts or encumbrances of another resulting in unjust enrichment, § 44
- Legal subrogation based on prevention of, § 3, n. 34
- Loans by third persons to discharge debt or encumbrance securing same, § 38, p. 651, n. 17
- Purpose of subrogation is to prevent, § 2, p. 583
- Subrogation as akin to doctrine of, § 2, p. 581
- Subrogation founded on principle of, § 2, p. 579, n. 19

Usurious transactions,

- Enforcement of right where resort to usurious agreement is necessary, § 5, p. 593
- Subrogation of purchaser under usurious transaction discharging mortgage, § 33, p. 639, n. 38
- Subrogation of third person discharging prior deed of trust involving usurious transaction, § 36, p. 646

Variance between pleadings and proof, action to establish or enforce subrogation, § 68, pp. 722, 723

Vendor's lien,

- Discharge of lien, subrogation of person discharging, § 31, p. 633
- Guardian discharging lien, subrogation of, § 28
- Guardian using ward's money to pay off vendor's lien, subrogation of ward to vendor's lien discharged, § 44
- Joint grantee or vendee paying more than share of purchase price, subrogation of, § 18
- Lender of money to discharge debt secured by lien, § 42
- Loss of right of subrogation to vendor's lien, § 13
- Maker of note transferred by payee in payment of land subrogated to lien, § 23
- Purchaser at void foreclosure sale of lien, subrogation of purchaser discharging lien, § 35, p. 644
- Purchaser of land encumbered by vendor's lien discharging lien, subrogation of, § 33, p. 639
- Purchaser of vendor's lien notes as not volunteer, § 42
- Seller discharging lien assumed by purchaser, § 37
- Surety subrogated to, § 54, p. 684

Voluntary payment,

- Advancement by third person of money to discharge debt, § 38, p. 649
- Secured by deed of trust or mortgage under agreement to take new security as not voluntary payment, § 39, pp. 657-659
- Agent voluntarily paying own funds for protection of principal, right of subrogation, § 26
- Appeal bond surety paying judgment as not volunteer, § 61, p. 713, n. 95
- Contractor's surety, § 59, p. 703
- Debt of another, right to subrogation, § 9, pp. 601-607
- Decedent's estate, subrogation of volunteer paying debts or claims against, § 15, pp. 615, 616
- Deed of trust, purchaser of chattels encumbered by deed of trust discharging encumbrance as not volunteer, § 33, p. 641
- Encumbrance discharged by volunteer, right to subrogation, § 31, p. 630
- Encumbrance or lien,
 - Payment by volunteers discharging, § 31, p. 631
 - Subrogation of volunteer discharging, § 31, pp. 630-633
- Endorser of note affecting right to subrogation, § 23
- Execution sale purchaser at void sale discharging lien as not volunteer, § 35, p. 643
- Foreclosure sale purchaser discharging liens as not volunteer, § 35, p. 642
- Husband advancing money to wife to pay note, § 38, p. 651, n. 16
- Joint mortgagor discharging liability on note barred by limitation, § 18, n. 80
- Judicial sale purchaser at void sale, discharging lien as not volunteer, § 35, p. 643
- Junior encumbrancer paying prior encumbrance as not volunteer, § 36, p. 644

INDEX TO SUBROGATION

Voluntary payment—Continued

- Lender of money to discharge,
 - Debt secured by vendor's lien as not volunteer, § 42
 - Maritime lien as not volunteer, § 40
 - Mortgage or deed of trust as volunteer, § 39, p. 654
 - Wage liens as volunteer, § 41
- Maker having defense to liability on note paying note, § 23
- Maritime lien, subrogation of volunteer paying, § 31, p. 633
- Mortgages,
 - Purchaser of mortgaged chattel discharging mortgage as not volunteer, § 33, p. 640
 - Subrogation of purchaser of mortgage property discharging lien as volunteer, § 33, p. 635
- Mortgagors discharging mortgage debt after transfer of mortgaged property, § 37, n. 77
- Officer as volunteer, § 29
- Person paying debt or default of another, § 16
- Pleading in action to establish or enforce subrogation alleging subrogee was not volunteer, § 68, p. 721
- Purchasers,
 - Discharging encumbrance on property purchased as not volunteer, § 32
 - Land encumbered by vendor's lien discharging lien as volunteer, § 33, p. 639
 - Mortgaged property discharging,
 - Lien as volunteer, § 33, p. 638, n. 34
 - Mortgage as not volunteer, § 33, p. 638, n. 30
 - Vendor's lien notes as not volunteer, § 42
- Senior encumbrancer discharging junior encumbrance as volunteer, § 36, p. 644

Voluntary payment—Continued

- Surety affecting subrogation to rights of creditor, § 48, pp. 671, 672
- Third person voluntarily advancing funds to discharge encumbrance on property of person incompetent to contract, § 43
- Vendor's lien, lender of funds to pay debt secured by lien as not volunteer, § 42
- Wage liens, lender of funds to discharge as volunteer, § 41
- Volunteer defined, § 9, p. 603
- Wage lien, subrogation of person advancing funds to discharge lien, § 41
- Wages of injured employee, subrogation of person paying, § 16, n. 67
- Waiver of right, § 13
 - Endorser of note, § 23
 - Lender of funds for discharging debt secured by deed of trust or mortgage under agreement to take new security, § 39, p. 658
 - Pleading waiver, § 68, p. 722, n. 11
 - Presumption of waiver by surety, § 69
 - Surety, §§ 51, 57
 - Official bond, § 60, p. 710, n. 51
- Warrant holders, subrogation of lender of money to discharge warrants to rights of holders, § 38, p. 652
- Warranty, action for breach of warranty to enforce right, § 64, p. 716
- Water lien, subrogation of landlord paying tenant's water charges, § 31, p. 631, n. 45
- Weight and sufficiency of evidence in action to establish and enforce subrogation, § 69
- Widow discharging encumbrance on dower or homestead of state, subrogation of, § 31, p. 632
- Wills, subrogation of estate of person electing to take against will to rights of legatees and heirs, § 15, p. 615, n. 37

INDEX TO SUBSCRIPTIONS

- Abandonment,
 - Evidence, § 22, p. 758
 - Purpose, failure of consideration, § 6, n. 9
 - Railroad, recovery back of subscription, § 21
 - Undertaking, liability of subscriber, § 16
- Abatement of subscription, § 18
- Acceptance, § 4
 - Assignment of unaccepted subscription, § 11
 - Question for jury in action on subscription, § 22, p. 759
 - Revocation of subscription, § 19
- Account, right of contributors to call on trustees or owners of fund to account, § 21, n. 13
- Actual constructive delivery of subscription paper, § 3
- Admissibility of evidence, § 22, p. 757
- Age, coercion and duress affecting validity, § 7, n. 12
- Agents,
 - Designation by beneficiary to whom subscription notes payable, § 2
 - Power to bind subscribers to other terms, § 2
- Answer in action on, § 22, p. 756
- Appeal, presumption of consideration, § 22, pp. 756, 757
- Assent,
 - Change of plans or purpose, consent of subscriber, § 15
 - Validity, §§ 7-9
- Assignment, § 11
 - Parties to action on subscription, § 22, p. 754
- Assumption of duties or liabilities,
 - Assignment, § 11, n. 50
 - Consideration, § 5, p. 737
- Bank guaranty, consideration, § 5, p. 738, n. 90
- Benefit to promisor, consideration, § 5, p. 739
- Bonds issued on faith of subscription, ultra vires, § 9
- Borrowing of money by subscriber's representative for completion of project as equitable assignment of subscription, § 11
- Borrowing to complete project as release of subscriber, § 20
- Burden of proof in action on subscription, § 22, p. 756
- Certainty, § 2
 - Obligation, § 2
- Change of plan or purpose, performance of conditions, § 15
- Charitable purpose,
 - Benefit to promisor as consideration, § 5, p. 739
 - Fraud and misrepresentation, § 8
- Charity, consideration, § 5, p. 735, n. 62
- Checks, delivery as resulting in subscription contract, § 3
- Churches, maintenance by trustees in reliance on pledge as consideration, § 5, p. 737, n. 75
- Circumstantial evidence of reliance on defendant's promise, § 22, p. 758
- Coercion affecting validity, § 7, n. 12
- Collateral agreements, performance, § 13
- Complaint in action on subscription, § 22, p. 755
- Conditions,
 - Burden of proof in action on subscription, § 22, p. 757
 - Evidence, § 22, pp. 756, 757
 - Issue in action on subscription, § 22, p. 756, n. 70
 - Other subscription, § 17
 - Performance, §§ 13-17, pp. 744-749
 - Subscriptions in aid of railroad, § 13
 - Time for performance by railroad to receive benefits, § 14
- Consideration, §§ 5, 6, pp. 734-740
 - Burden of proof, § 22, p. 757
 - Evidence, § 22, pp. 756, 757
 - Failure of consideration, § 6
 - Pleading in action on subscription, § 22, p. 755
 - Presumptions, § 22, p. 756
 - Question for jury in action on subscription, § 22, p. 759
 - Revocation of subscription, § 19
- Construction, § 10
- Contents, § 2
- Corporations,
 - Actions on subscription, § 22, p. 753, n. 28
 - Illegal and ultra vires subscription, § 9
- Counterclaim, evidence to warrant recovery by way of counterclaim, § 22, p. 759
- Counties, parties to action on subscription, § 22, p. 754
- Cy pres doctrine, substantial performance of conditions, § 13, n. 78
- Date, validity of undated paper, § 2
- Death of subscriber,
 - Payment, § 18
 - Revocation or lapse of subscription, § 19
 - Time of performance of conditions by beneficiary, § 14, n. 26
- Defenses, burden of proof, § 22, p. 757
- Defenses in action on subscription, answer raising insufficient defense, § 22, p. 756, n. 61
- Defenses to action, § 22, p. 753
- Definiteness, § 2
 - Obligation, § 2
- Definitions, § 1
- Delivery, § 3
 - Evidence, § 22, p. 758
 - Questions for jury in action on policy, § 22, p. 759
- Demand, pleading in action on subscription, § 22, p. 755
- Demand for payment as condition to action on subscription, § 18
- Direction of verdict in action on subscription, § 22, p. 759
- Diversion of money from purpose for which subscribed, release of subscribers, § 16
- Duress affecting validity, § 7, n. 12
- Equity jurisdiction to administer relief in suit to enforce subscription, § 22, p. 753
- Escrow delivery, § 3, p. 734, n. 32

INDEX TO SUBSCRIPTIONS

- Estoppel,
 - Claim of revocation by subscriber, § 19, n. 85
 - Consideration, § 5, pp. 736, 737
- Evidence in action on subscription, § 22, p. 756
- Execution, § 3
- Existence,
 - Consideration at time of making subscription, § 5, p. 734
 - Payee at time of subscription, § 2
- Expenses, consideration for subscription, § 5, pp. 736, 737
- Failure of consideration, § 6
 - Recovery back of subscription, § 21
- Failure or want of consideration,
 - Burden of proof, § 22, p. 757
 - Direction of verdict for defendant, § 22, p. 759
- Foreign government, subscriptions to aid, recovery back, § 21, n. 11
- Forfeiture of rights by lapse of time, § 14
- Form and contents, § 2
- Fraud,
 - Evidence, § 22, p. 758
 - Questions for jury, § 22, p. 759
- Fraud and misrepresentation, effect, § 8
- Gratuitous contribution, § 1
- Guaranty, release or discharge of subscriber, § 20
- Hospitals, performance of conditions, § 13, n. 72
- Illegal subscription, § 9
- Illusory consideration, § 5, p. 736
- Illusory promise, § 2
- Increase in total as releasing subscriber, § 20
- Insanity of subscriber, revocation or lapse of subscription, § 19
- Intent,
 - Construction of contract, § 10
 - Title to funds subscribed, § 12
- Interest charged on subscription, § 18
- Issues, proof and variance in action on subscription, § 22, p. 756
- Joint and several liabilities, parties to action on subscription, § 22, p. 755
- Joint or several liability of subscribers, § 10
- Lapse of subscription, § 19
- Lapse of time, avoidance of subscriptions, § 13
- Letters, definiteness of obligation, § 2, n. 15
- Liberal construction, § 10, n. 38
- Loan by payee to subscriber, consideration, § 5, p. 734
- Mental capacity, validity of assent, § 7, n. 12
- Mental capacity to make subscription, question for jury, § 22, p. 759
- Misapplication of funds, liability of subscriber, § 16
- Moral obligation, consideration, § 5, p. 736
- Mutual promises of subscribers, consideration, § 5, pp. 738, 739
- Mutual subscriptions, release or discharge of subscriber, § 20
- Mutuality of promises, consideration, § 5, p. 735
- Naked promise, consideration, § 5, p. 737
- Naked promise to give insufficient, § 5, p. 734
- Names,
 - Action on subscription, § 22, pp. 753, 754
 - Signature of subscription contract, § 3
- Nature, § 1
- Notice,
 - Performance, pleading in action on subscription, § 22, p. 755
 - Revocation of subscription, § 19
- Notice to subscriber of acceptance, § 4
- Offer, acceptance, § 4
- Opinions, misrepresentation, § 8
- Oral subscription, §§ 1, 2
- Other subscriptions,
 - Misrepresentations as to, § 8
 - Performance of subscription conditioned on, § 17
- Parol inducement to subscribe, evidence in action on subscription, § 22, p. 758
- Parties to actions, § 22, p. 753
- Payee, necessity of naming in subscription papers, § 2
- Payment, § 18
 - Release of subscriber, § 20
- Payment from specified fund, performance of condition, § 13
- Performance of conditions, §§ 13-17, pp. 744-749
 - Questions for jury, § 22, p. 759
 - Time, § 14
- Plea, answer and reply in action on subscription, § 22, p. 756
- Pleading in action on subscription, § 22, p. 755
- Pledge, consideration, § 5, p. 734, n. 49
- Pledge payable after death, performance of condition, § 13, n. 71
- Presumptions in action on subscription, § 22, p. 756
- Promissory estoppel doctrine, application, § 5, pp. 737, 738
- Promissory representations, misrepresentation, § 8
- Proof in action on policy, § 22, p. 756
- Public policy,
 - As to subscriptions for public object, consideration, § 5, p. 735
 - Construction of contract, § 10
 - Contracts contrary to, § 9
- Public works, legality of subscriptions in aid of, § 9
- Questions for jury in action on subscription, § 22, p. 759
- Railroads,
 - Acceptance of subscription, § 4
 - Assignment of subscription in aid of, § 11
 - Consideration, § 5, p. 738
 - Construction of subscription, § 10, n. 41, 46
 - Fraud and misrepresentation affecting validity, § 8, n. 17
 - Location, termini and stations, performance of conditions, § 13
 - Mutual promises of subscribers as consideration, § 5, p. 739
 - Payment of subscriptions in aid of, § 18, n. 66, 74, 77
 - Performance of conditions in subscriptions in aid of railroad, § 13
 - Subscriptions in aid of, § 2
 - Abandonment of road affecting recovery of subscription, § 21
 - Actions on, § 22, p. 753, n. 22, 28
 - Delivery, § 3
 - Evidence, § 22, p. 758, n. 10
 - Recovery back, § 21
 - Release or discharge of subscriber, § 20
 - Revocation or lapse, § 19
 - Time for performance of subscriptions in aid of, § 14
 - Title to funds subscribed in aid of, § 12
- Recovery back of subscriptions, complaint, § 22, p. 756
- Recovery by subscription, § 21
- Release of subscriber by change of plan or purpose without his consent, § 15
- Release or discharge of subscriber, § 20
- Reply in answer on, § 22, p. 756

INDEX TO SUICIDE

- Revenue stamps, affixing, § 3
- Revocation of subscription, § 19
- Signature,
 - Contract by subscriber, § 3
 - Questions for jury in action on subscriptions, § 22, p. 759
- Stamps, affixing revenue stamps, § 3
- Statutes,
 - Burden of proof of want of consideration, § 22, p. 757, n. 87
 - Frauds, limitation imposed on oral contract, § 2
- Statutory duty of promisee to disburse funds, consideration, § 5, p. 736
- Stipulation extending time for performance as waiver as to time for completion, § 14
- Subscriptions, actions, § 22, pp. 753-759
- Substantial compliance with conditions, subscriptions in aid of railroad, § 13
- Substantial performance,
 - Conditions of, § 13
 - Subscription conditioned on other subscription, § 17, n. 59
- Temporary suspension of project as an abandonment, § 16
- Time,
 - Acceptance of offer within reasonable time, § 4
 - Enforcement as test of performance of conditions, § 13, n. 71
 - Performance of subscription contract, § 14
- Title to funds subscribed, § 12
- Trial in actions on subscriptions, § 22, p. 759
- Trust funds, recovery back of subscriptions, § 21
- Ultra vires subscription, § 9
- Unilateral contract, consideration, § 5, p. 737, n. 76
- Variance in action on policy, § 22, p. 756
- Verdict in action on subscription, § 22, p. 759
- Weight and sufficiency of evidence, § 22, p. 758
- Withdrawal by subscriber before delivery, § 3
- Work done or obligations or expenses incurred, consideration, § 5, p. 736
- Writing, §§ 1, 2
 - Assignment, § 11

INDEX TO SUICIDE

- Accessories,
 - Advising, aiding or inciting to commit, § 4
 - Instruction, § 6
- Advising, aiding or inciting to commit, §§ 4, 5
 - Prosecution and punishment, § 6
- Attempts, § 3
 - To commit, punishment, § 6
- Common law, § 1
 - Advising, aiding or inciting to commit, § 4
 - Attempt to commit as misdemeanor, § 3, n. 29
 - Felony, § 2
 - Indictable offense, § 3
- Compacts to commit, § 5
- Confession, conviction on, § 6
- Criminality, § 2
 - Advising, aiding or inciting to commit, §§ 4, 5
 - Attempt, § 3
- Definitions, § 1
- Evidence in prosecution for murder, § 6
- Felo de se, § 1
- Felony, § 2
 - Advising, aiding or inciting to commit, § 4
- Forfeiture of goods and chattels at common law, § 2
- Ignominious burial at common law, § 2
- Indictment for attempt, § 3
- Instructions in prosecution, § 6
- Intention essential, § 1
- Malum in se, § 2, n. 23
- Manslaughter,
 - Assisting in commission of self-destruction, § 4
 - Compacts to commit suicide, § 5
- Mental capacity,
 - Advising, aiding or inciting to commit, § 4
 - Essential, § 1
- Misdemeanor, attempt to commit, § 3, n. 29
- Moral turpitude, suicide as crime involving, § 2
- Murder,
 - Advising, aiding, etc., §§ 4, 5
 - Prosecution and punishment, § 6
 - Compacts to commit suicide, § 5
- Poison, aiding one to commit suicide, § 4
- Prosecution and punishment, § 6
- Public wrong, § 2
- Questions for jury in prosecution, § 6
- Sanity essential, § 1

INDEX TO SUMMARY PROCEEDINGS

- Amendment to cure defects and irregularities in pleading, § 4, p. 793
- Appeal in proceedings, § 4, p. 795
- Certiorari to review proceedings, § 4, p. 795
- Civil or criminal, § 2
- Common law, proceeding in derogation of, § 3
- Confession of judgment, construction of statute providing for recovery of amount due by summary process, § 3
- Constitutionality of statute authorizing proceedings with respect to infringement of right to trial by jury, § 4, p. 793
- Construction of statutes, § 3
- Continuance of hearing, § 4, p. 794
- Conversion of ordinary action into summary one and vice versa, § 4, p. 792
- Cumulative nature, § 2
- Default judgment not authorized, § 4, p. 794
- Defense in proceeding, § 4, p. 793
- Defenses, pleading, § 4, p. 793
- Definitions, § 1
- Discretion of court to entertain proceedings, § 4, p. 792
- Evidence,
 - Admissible under pleadings, § 4, p. 793
 - Establishment of right to relief, § 4, p. 794
- Ex parte hearing, § 4, p. 793
- Exclusive nature, § 2
- Hearing, § 4, p. 793
- Interrogatories, relief as prayed on failure of defendant to answer, § 4, p. 794
- Judgment, § 4, p. 794
- Judicial proceedings, § 2
- Jury trial, right to, § 4, p. 793
- Liberal construction of statute, § 3
- Money judgment, § 4, p. 794
- Nature, § 2
- Notice of application for appeal, § 4, p. 795
- Notice of proceedings by pleading, § 4, p. 792
- Notice to defendant, § 4, p. 792
 - Hearing, § 4, p. 794
- Order to show cause, citation of necessary parties, § 4, p. 792, n. 29
- Pleading not taken as confessed on defendant's default, § 4, p. 794, n. 63
- Pleadings, § 4, p. 792
- Plenary proceedings distinguished, § 1, n. 2
- Presumption of jurisdiction, prerequisite, § 4, p. 792, n. 20
- Presumptions on appeal as to jurisdiction, § 4, p. 795
- Procedure, § 4, pp. 792-795
- Process in proceedings, § 4, p. 792
- Proof, conformity of judgment with proof adduced, § 4, p. 794
- Record, § 4, p. 794
- Refusal of relief, § 4, p. 794
- Relief, § 4, p. 794
- Retroactive operation of statute, § 3
- Review, § 4, p. 795
- Statutes,
 - Appeal, § 4, p. 795
 - Construction, § 3
 - Procedure, § 4, p. 792
 - Record to show proceedings conforming to statute, § 4, p. 794
- Statutory proceedings, § 2
- Strict construction of statutes, § 3
- Subpoena, proceeding ordinarily begun without subpoena, § 4, p. 792
- Summons,
 - Following common law rules at hearing, § 4, p. 794
 - Proceeding ordinarily begun without summons, § 4, p. 792
 - To appear, § 4, p. 792
 - To defendant to appear, hearing, § 4, p. 794
- Supplemental pleadings to cure defects or irregularities in pleading, § 4, p. 793
- Trial by court, § 4, p. 793

INDEX TO SUNDAY

- Absentee votes, voted on Sunday, § 55
- Accident insurance, injuries received in unlawful conduct on Sunday, recovery, § 39
- Acknowledgments,
 - Ratification of Sunday transaction, § 31
 - Sunday act, validity, § 28
- Action on Sunday contract, ratification, § 31
- Actions,
 - Defenses to action on Sunday contract or transaction, § 35
 - Injuries received or inflicted on Sunday, § 40
 - Right of action on Sunday contracts and transactions, § 35
 - Sunday contracts and transactions, §§ 35-38, pp. 859-867
- Actions and proceedings under penal statute, § 23
- Adjournment,
 - Court to Sunday, § 51
 - Maliciously procuring adjournment of cause to Saturday, § 57
 - Taking depositions from Saturday to Sunday, § 50
- Admissibility of evidence,
 - In action on Sunday contract or transaction, § 37
 - Prosecution for violation of Sunday law, § 21
- Admission fees,
 - Moving pictures, permitted or prohibited acts, § 18, p. 835
 - Taking, prohibited Sunday act, § 13, p. 819
- Admissions on Sunday, competency as evidence, § 29
- Advertising with provision for taking telephone orders to be filled on Monday, permitted act, § 15
- Aerial exhibitions, permitted and prohibited act, § 18, p. 838
- Affidavit,
 - Dated on Sunday but actually made on another day, § 49
 - Execution of bail trover process on Sunday, § 43
 - Filing on Sunday, § 49
 - Issuance of attachment on Sunday, § 43, n. 28
 - Necessity for service of process on Sunday, § 42, n. 24
- Agent or employee doing business in violation of Sunday law without assent of owner, § 6
- Agents, contract for executed authority to act as special agent, validity, § 27, p. 852
- Amendment of defense to include plea of Sunday execution, § 36
- Amusements,
 - Permitted and prohibited acts, § 18, pp. 831-840
 - Sale of tickets or taking admission fees, prohibited Sunday Act, § 13, p. 819
- Animals,
 - Impounding on Sunday of animals running at large, § 55
 - Taking and impounding on Sunday as work of necessity, § 13, p. 822, n. 86
- Answer in action on Sunday contract or transaction, § 36, n. 94
- Appeal,
 - Returnable on Sunday, subject to motion to dismiss, § 56
 - Taking on Sunday, § 53
- Appeal and error,
 - In prosecution for violation of Sunday law, § 22
 - Taking on application for on Sunday, § 53
- Appeal bonds executed on Sunday, § 48
- Appearance,
 - Bonds executed on Sunday, § 48
 - Waiver of right to object to Sunday proceedings, § 56
- Arbitration and award, making and publication of award on Sunday, § 54
- Arrest,
 - Civil cause, made on Sunday, § 42
 - On Sunday, § 45
 - Surety and bail bond given in civil case made on Sunday, § 43
- Assault and battery, issuance and execution of warrant on Sunday, § 45, n. 46
- Assault as act in emergency in violation of Sunday law, § 11, n. 45
- Assault by employee on Sunday, employer's liability, § 39, n. 76
- Assessor, Sunday work, § 55
- Assignment,
 - Contract, rights of assignee under Sunday transaction, § 33
 - Ratification of Sunday transaction, § 31
 - Sunday execution, validity, § 28
- Athletic contests, permitted and prohibited acts, § 18, p. 837
- Attachment, issuance of writ of levy on Sunday, § 43
- Attorneys, permitted and prohibited acts on Sunday, § 13, p. 822
- Avoidable acts, exception from Sunday law, § 11
- Bail, waiver of right to question arrest by giving bail, § 56
- Bail bonds, entry on Sunday, § 48
- Bail trover process, execution on Sunday, § 43
- Bailment, Sunday contract or transaction, § 35
- Bakeries, ordinance requiring closing on Sunday, validity, § 7, n. 29
- Barber shops, permitted and prohibited Sunday act, § 14
- Baseball, permitted and prohibited acts, § 18, pp. 838, 839
- Benefits, restoration to defend action on ground of Sunday transaction, § 35
- Benevolent societies, acts on Sunday, validity, § 28
- Beverages, sale, permitted and prohibited Sunday act, § 17
- Bill of exceptions, signature on Sunday, § 53
- Bona fide purchasers, rights under Sunday transaction, § 33

INDEX TO SUNDAY

Bonds,

Entry on Sunday, § 48

Filing on Sunday, § 49

Book account, dated on Sunday, competency as evidence, § 29

Breach of the peace, issuance and service of warrants on Sunday, § 45

Burden of proof,

In action on Sunday contract or transaction, § 37

Publication was made on Sunday, § 56

Business in violation of Sunday law, act in exercise of ordinary calling, § 9

Business or occupation, regulation of observance of Sunday law, § 6

Butcher shops, ordinance requiring Sunday closing, validity, § 7, n. 28

Carriage of persons or property, permitted or prohibited acts, § 16

Certiorari,

Criminal proceedings, inquiry into irregularity of proceedings, § 56

Service on Sunday on justice of the peace, § 53

Charitable societies,

Acts on Sunday, validity, § 28

Sports and entertainment, permitted act, § 18, p. 833

Charity,

Baseball, § 18, p. 840

Defined, § 11

Exemption from Sunday observance law, § 11

Food or refreshments furnished, permitted and prohibited act, § 17

Injuries received or inflicted on Sunday, actions, § 40

Moving pictures, § 18, p. 835

Questions for jury in action on Sunday contract or transaction, § 38

Regulation of Sunday observance, exception, § 5

Sale of tobacco, cigars, etc., on Sunday, prohibited act, § 13, p. 820

Sports and entertainments, § 18, p. 833

Telegraph companies, permitted Sunday act, § 13, p. 819

Travel on Sunday, permitted and prohibited act, § 13, p. 821

Will drawn on Sunday, § 13, p. 823

Checks,

Collection of checks as ratification of Sunday contract, § 31

Sunday execution, validity, § 27, p. 851, n. 97

Churches, services rendered at church, permitted and prohibited Sunday act, § 13, p. 823

City limits, gaming at premises outside city limits permitted, § 13, p. 822, n. 89

Civil and political institution, § 1

Civil effect of Sunday regulations on private acts and transactions, §§ 24-40, pp. 848-869

Civil process, §§ 42-44, pp. 870-873

Commercial exhibits, permitted and prohibited Sunday acts, § 13, p. 822, n. 86

Commissioner of general land office, keeping office open on Sunday, § 55

Commissions, contract to pay, validity, § 26, n. 65

Common labor defined, § 5

Common law,

Arrest in civil cause on Sunday, § 42

Dies non juridicus, § 41

Issuance of process on Sunday, § 42

Common law—Continued

Offense of exercising common vocation of life on Sunday, § 9

Search warrants, issuance and execution on Sunday, § 26

Sunday observance as duty, § 4

Compelling labor of others as violation of Sunday observance law, § 5

Compensation,

Business or occupation, violation of Sunday law, § 6

Work or labor in violation of Sunday observance law, § 5

Complaint,

Filing on Sunday, § 49

Violation of Sunday law, § 20

Concerts, permitted and prohibited act, § 18, p. 833

Confectionary stores furnishing food or refreshments, permitted and prohibited Sunday act, § 17

Conflict of laws,

Actions for injuries received or inflicted on Sunday, § 40

Contracts executed on Sunday, § 24

Consideration,

Ratification of Sunday contract, § 31

Restoration to defend action on ground of Sunday transaction, § 35

Constitutional provisions, regulation of observance, § 3, pp. 800-803

Continuation of cause from Saturday to Monday, § 51

Contracts,

Actions on Sunday contracts, §§ 34-38, pp. 859-867

Consummation on the week day, validity, § 27, p. 853

Contemplated performance on Sunday,

Defenses to action on contract, § 35

Demurrer to pleading relying on contract, § 36

Contemplating or requiring Sunday performance, §§ 32, 33, 35

Delivery on Sunday, validity, § 28

Enforcement of Sunday contract, right of action, § 35

Evidence in action on Sunday contract, § 37

Exceptions to Sunday laws, pleading facts within, § 36

Executed authority to act as special agent, validity, § 27, p. 852

Formation and consummation on Sunday, § 27, pp. 849-853

Validity, § 27, p. 853

Injury in pursuance of illegal acts, recovery, § 39

Instructions in actions on Sunday contracts, § 38

Issues, proof and variance in action on Sunday contract, § 36

Judgment in action on Sunday contract, § 38

Law governing validity, § 24

Limitations of rule as to invalidity of Sunday contract, § 27, p. 852

Negotiation or consummation on Sunday, validity, §§ 25-29, pp. 848-855

Performance of obligations by payment or otherwise on Sunday, validity, § 28

Pleading in actions on contracts under Sunday law, § 36

Preliminary transaction for consummation taking place on Sunday, § 26

Prohibited Sunday work, § 13, p. 817

INDEX TO SUNDAY

Contracts—Continued

- Questions for jury in action on Sunday contract, § 38
- Ratification, §§ 31, 32
 - Right of action, § 35
- Rescission of Sunday contract, § 30
- Restoration of consideration or benefit to defend action on grounds of Sunday transaction, § 35
- Review in actions on Sunday contract, § 38
- Special contracts made on Sunday, right of action, § 35
- Trial in actions on Sunday contracts, § 38
- Verdict in action on Sunday contract, § 38
- Writing, Sunday execution, § 27, p. 851
- Convenience as criterion for necessity of work on Sunday, § 11
- Conversion of bailed property, right of action on Sunday transaction, § 35
- Costs, taxation on Sunday, § 53
- Court,
 - Holding on Sunday, § 51
 - Waiver of right to question propriety of holding, § 56
- Criminal process, issuance and execution on Sunday, §§ 45, 46
- Criminal prosecutions, certiorari to inquire into irregularity in proceedings, § 56
- Dancing, permitted and prohibited act, § 18, p. 833
- Date,
 - Book account dated on Sunday, competency as evidence, § 29
 - Contract fixing date falling on Sunday, validity, § 32
 - Execution of instrument, allegation of date in defense, § 36
 - Instrument, presumptions in action, § 37
- Day of the week, § 1
- Decrees on Sunday, § 53
- Deeds,
 - Execution on Sunday, validity, § 28
 - Issue of validity of deed executed on Sunday, raising by pleading, § 36
 - Ratification of Sunday transaction, § 31
 - Sunday execution, validity, § 27, p. 851, n. 97
- Defects, proceeding to assert defects in proceedings performed on Sunday, § 56
- Defenses,
 - Actions for injuries received or inflicted on Sunday, § 40
 - Demurrer to defense of illegality, § 36
 - Injuries received or inflicted on Sunday affecting other defenses, § 39
 - Pleading defense of illegality under Sunday law, § 36
 - To actions on Sunday contracts and transactions, § 35
- Definiteness of pleadings in action on Sunday contracts or transactions, § 36
- Definition, § 1
- Delicatessen stores, furnishing food or refreshments, permitted and prohibited act, § 17, n. 33
- Delivery,
 - Assigned chose in action on Sunday, validity, § 28
 - Foodstuffs, permitted and prohibited acts, § 17
 - Instrument on Sunday, rights of third persons, § 33
 - On Sunday, validity of contract, § 28

- Demanding payment as ratification of Sunday contract, § 31
- Demurrer, action for injuries inflicted or received on Sunday, §§ 36, 40
- Depositions,
 - Notice to take on Sunday, § 47
 - Taking on Sunday, § 50
- Desirability as criterion for necessity of work on Sunday, § 11
- Dice, rolling as permitted act, § 13, p. 822, n. 89
- Dies non juridicus, § 41
- Directors of corporation meeting on Sunday, validity of act, § 28, n. 31
- Disability, rescission of Sunday contract, § 30
- Discharge of jury on Sunday, § 52
- Disorderly conduct disturbing others as violation of Sunday law, § 8
- Disposition of property, permitted Sunday act, § 13, p. 823
- Distinction, § 1
- Distrain for rent on Sunday, § 55
- District attorney, performing services on Sunday, extra compensation, § 55
- Disturbance,
 - Breach of the peace for issuance and service of warrants on Sunday, § 45
 - Sunday contracts, validity, § 27, p. 850
 - Violation of Sunday law, § 8
- Driveways, repairs, permitted and prohibited Sunday act, § 16
- Drug stores, permitted and prohibited Sunday act, § 14
- Drugs, sale on Sunday, prohibited and permitted act, § 13, p. 820
- Duration of day, § 2
- Educational work, exemption from Sunday regulation as charity, § 11
- Election, Sunday moving pictures, § 18, p. 836
- Emergency,
 - Judgment on Sunday, § 53, n. 28
 - Words of necessity as including emergencies, § 11
- Employees, injuries received or inflicted on Sunday affecting other defenses, § 39
- Enforcement. Regulation and enforcement of observance, post
- Entertainments,
 - Permitted and prohibited act, § 18, pp. 831-840
 - Selling tickets, etc., as prohibited Sunday act, § 13, p. 819
- Entries on Sunday, competency as evidence, § 29
- Entry by clerk of order made on Sunday, § 53
- Equity, relief under Sunday contract, § 35
- Escrows, delivery on Sunday, validity, § 28
- Estoppel,
 - Establishing binding obligation, defenses, § 35
 - Representations made on Sunday as serving as basis of estoppel, § 28
- Evening of Lord's day, § 2
- Evidence,
 - Actions,
 - Injuries inflicted on Sunday, § 40
 - Sunday contract or transaction, § 37
 - Aid of warrant to show breach of peace for issuance of warrant, § 45, n. 46
 - Competency of Sunday admissions, entries or statements, § 29
 - Judgment rendered on Sunday, § 56
 - Prosecution for violation of Sunday law, § 21

INDEX TO SUNDAY

Evidence—Continued

- Service of summons on Sunday authorized, § 42, n. 24
- Exceptions to Sunday laws, pleading facts within exception, § 36
- Exchange of property, right of action on Sunday contract, § 35
- Excuse for nonpublication of notice, § 47
- Execution,
 - Contract or transaction on Sunday, pleading, § 36
 - Return on Sunday, § 44
- Exemptions, Sunday law observance, §§ 10-18, pp. 811-840
- Exposing for sale, permitted or prohibited acts, § 15
- Expositions, permitted and prohibited acts, § 18, p. 837
- Fairs, permitted and prohibited acts, § 18, p. 837
- Farmers,
 - Permitted or prohibited acts, § 13, p. 816
 - Sale of foods, permitted and prohibited Sunday act, § 17
- Felony, issuance and service of warrant on Sunday, § 45
- Filling stations, quitclaim deed requiring Sunday performance, validity, § 32, n. 16
- Final process, service or execution on Sunday, § 44
- Finding in action on Sunday contract or transaction, § 38
- First day of week, § 1
- Fishing, permitted and prohibited acts, § 18, p. 838
- Food, furnishing, permitted and prohibited act, § 17
- Foodstuffs, delivery, permitted and prohibited acts, § 17
- Football, permitted and prohibited acts, § 18, p. 838
- Foreseeable act, exceptions from Sunday law, § 11
- Fraud,
 - Damages resulting from Sunday transaction, right of action, § 35
 - Referendum on Sunday moving pictures, § 18, p. 837
- Fruit stand, permitted and prohibited acts, § 17
- Gambling devices, search warrant executed on Sunday, § 46, n. 54
- Gaming, permitted and prohibited acts on Sunday, § 13, p. 822
- Garages, prohibited Sunday work, § 13, p. 817
- Garnishment proceedings on Sunday, § 43
- Gasoline services, prohibited acts under Sunday law, § 13, p. 817
- Gifts, execution and completion on Sunday, validity, § 28
- Giving away wares in shop open on Sunday, violation of law, § 7, n. 39
- Gratuitous work, exemption from Sunday observance law, § 11
- Guaranty, signature on Sunday, validity, § 26, n. 58
- Habeas corpus, defects arising from Sunday proceedings, relief, § 56
- Hearing set by mistake for Sunday, § 51
- Highways, repairs, permitted and prohibited Sunday act, § 16
- Hire, Sunday contract or transaction, right of action, § 35
- Holding court,
 - On Sunday, § 51
 - Waiver of right to question propriety of holding, § 56
- Holy day, § 1

- Hotel keepers, sale of cigars and tobacco on Sunday, prohibited act, § 13, p. 820
- Hunting, shooting or fishing, permitted or prohibited acts, § 18, p. 838
- Ice factory, permitted and prohibited Sunday act, § 13, p. 818, n. 21
- Impounding animals running at large on Sunday, § 55
- Indictment or information,
 - Dated as having been drawn on Sunday, § 49
 - Quashing where search warrant served on Sunday, § 56, n. 73
 - Violation of Sunday law, § 20
- Indorsement of negotiable instrument on Sunday, rights of third persons, § 33
- Industrial plants, permitted and prohibited Sunday act, § 13, p. 818
- Information, filing on Sunday, § 49
- Injunction, issuance on Sunday, § 42
- Injuries received or inflicted on Sunday,
 - Actions for injuries, § 40
 - Notice of injury, § 47
 - Resultant rights and liabilities, § 39
- Injury to bailed property, right of action on Sunday transaction, § 35
- Instructions to jury,
 - Action for injuries inflicted or received on Sunday, § 40
 - Action on Sunday contract or transaction, § 38
 - Giving on Sunday, § 51
 - Prosecution for violation of Sunday law, § 22
- Insurance,
 - Change of beneficiary on Sunday, validity, § 28
 - Injuries received in unlawful conduct on Sunday, recovery, § 39
 - Issuance on secular day and effective on Sunday, validity, § 28
 - Sunday law as excuse for not keeping watchman in insured building according to terms of policy, § 32
 - Sunday regulation as prohibiting regular business of insurer, § 9
- Intent, indictment for violation of Sunday law, § 20
- Interest, contracting for interest to commence running on Sunday, validity, § 32
- Intoxicating liquors,
 - Breach of the peace, issuance or service of warrant on Sunday, § 45, n. 44
 - Furnishing, permitted and prohibited act, § 17
- Issues, proof and variance,
 - In action on Sunday contract or transaction, § 36
 - In prosecution for violation of Sunday law, § 20
- Joint adventure agreement, signature on Sunday, § 27, p. 853, n. 17
- Joint and lawful enterprise, recovery from those with whom they are acting, § 39
- Judgment,
 - Actions on Sunday contract, § 38
 - In action on Sunday contract or transaction, motion to modify, § 38
 - On Sunday, § 53
 - Rendered on Sunday, presumption favoring validity, § 56
- Judicial acts on Sunday, § 53
- Judicial and official acts and proceedings, §§ 41-57, pp. 870-883
- Judicial proceedings, performance of miscellaneous matters on Sunday, § 55

INDEX TO SUNDAY

- Jurisdiction alleged to be lacking by reason of acts having been performed on Sunday, § 56
- Jurors, summoning on Sunday by sheriff, § 55
- Jury,
 - Deliberation on Sunday, § 51
 - Discharge on Sunday, § 52
- Justice of the peace, personal liability for holding court on Sunday, § 51
- Keeping open shop,
 - Disturbance of public as violation of Sunday law, § 8
 - Violation of Sunday observance law, § 7
- Law governing,
 - Action for injuries received or inflicted on Sunday, § 40
 - Private acts and transactions, § 24
- Leases, signature on Sunday, validity, § 26, n. 58
- Letters, written on Sunday, acceptance of contract, § 26
- Light plants, operation on Sunday, permitted act, § 13, p. 821
- Limitation of liability, effect of injuries received or inflicted on Sunday, § 39
- Limitations of rule as to invalidity of Sunday contracts or undertaking, § 27, p. 852
- Liquor. Intoxicating liquors, ante
- Livery stable keepers, exception from Sunday law observance, § 13, p. 817
- Lock keepers of canals, permitted and prohibited Sunday act, § 16
- Lord's day, § 1
- Mail,
 - Carrying on Sunday, permitted and prohibited act, § 16, n. 96
 - Permitted and prohibited Sunday act incident to carriage of mail, § 16
- Maliciously procuring service of process on Saturday, § 57
- Manufacturing plants, permitted and prohibited acts on Sunday, § 13, p. 818
- Medicine, sale on Sunday, permitted or prohibited act, § 13, pp. 820, 821
- Mercy, sale on Sunday, § 15
- Mesne process, service on Sunday, § 44
- Mines, permitted and prohibited Sunday act, § 13, p. 823
- Ministerial act, § 41
 - Bonds entered on Sunday, § 48
 - Filing of complaint and reception on Sunday, § 49
 - Issuance of civil process, § 42
 - Service of process, § 42
 - Sheriff summoning jurors on Sunday, § 55
 - Spreading of judgment on record by clerk, § 53
- Miscellaneous transactions, validity of private acts or transactions on Sunday, § 28
- Mortgage foreclosure, day appointed for sale in published notice being Sunday, § 47
- Motion to modify judgment in action on Sunday contract or transaction, § 38
- Motions,
 - Decision on Sunday, § 53
 - Notice of motion on Sunday, § 47
- Motor services, prohibited acts under Sunday law, § 13, p. 817
- Moving pictures, permitted and prohibited acts, § 18, p. 834
- Municipal corporations,
 - Authority to regulate Sunday observance, § 3, p. 802
 - Business or occupation, regulation of Sunday law, § 6
 - Regulation of Sunday observance,
 - Keeping open shop, § 7
 - Observance, work or labor, § 5
- Municipal regulation,
 - Observance, exception, § 10
 - Sale of necessities on Sunday, prohibition, § 15, n. 41
 - Sports and entertainments, permitted and prohibited act, § 18, p. 833
- Natural forces, prevention of loss through as work of necessity, § 11, n. 59
- Nature, § 1
- Necessity,
 - Construction of term, § 11
 - Question for jury in action on Sunday contract or transaction, § 38
 - Service of process on Sunday, § 42
- Negligence of party acting causing necessity, exceptions from Sunday law, § 11
- Negotiable instruments, indorsee or holder in due course, rights under Sunday transaction, § 33
- Newspapers,
 - Permitted and prohibited work on Sunday, § 13, p. 818
 - Sunday publication of summons or legal notice, § 47
- Non assumpsit, plea as sufficient to raise issue of renewal of contract by promise to pay on subsequent secular day, § 36
- Nonjudicial day, § 41
- Note,
 - Giving of note as ratification of Sunday contract, § 31
 - Signature on Sunday, validity, § 26, n. 58
- Notice,
 - Execution and service on Sunday, § 47
 - Giving on Sunday, validity, § 28
 - Publication of legal notice on Sunday, § 47
- Notice or knowledge essential to illegality of contract, pleading by party seeking to defeat recovery, § 36
- Object and purpose of Sunday law, § 3, p. 801
- Observance, § 1
 - Regulation and enforcement, §§ 3-23, pp. 800-847
- Officer performing duty, statute prohibiting labor on Sunday, § 5, n. 83
- Official proceedings, performance on Sunday, § 55
- Oil wells, permitted and prohibited Sunday act, § 13, p. 823
- Opening or closing establishment on Sunday, liability for keeping it open, § 7
- Orders on Sunday, § 53
- Ordinary calling,
 - Acts done in exercise of,
 - As violation of Sunday law, § 9
 - Sale of cigars or tobacco on Sunday, § 13, p. 820
 - Sunday contracts, validity, § 27, p. 850
- Origin, § 1
- Ownership of establishment violating Sunday closing law as immaterial, § 7
- Papers, filing on Sunday, § 49

INDEX TO SUNDAY

- Pari delicto,
 - Contracts contemplating or requiring Sunday performance, § 32
 - Decision of Sunday contract, § 30
 - Illegal contracts, basis of unenforceability, § 27, p. 852
- Park authority, sale, permitted and prohibited acts, § 17
- Parol ratification of Sunday contract, § 31, n. 73
- Part payment on Sunday, validity of contract, § 28
- Particularity of pleading of illegality, § 36
- Partnership, keeping open shop, liability, § 7
- Patriotic enterprise, exemption of work from Sunday regulation as charity, § 11
- Payment,
 - Performance of obligation on Sunday, validity, § 28
 - Purchase price of stock on Sunday, right of action, § 35, n. 52
- Penny arcade, permitted and prohibited acts, § 18, p. 833
- Personal engagement, violation of Sunday law observance, § 6
- Persons observing another day, exemption from Sunday law observance, § 12
- Photographers, permitted and prohibited Sunday act, § 13, p. 823
- Physicians and surgeons, permitted Sunday act, § 13, p. 823
- Pilots, tender of services on Sunday basis for payment of pilotage, validity, § 26
- Place, indictment for violation of Sunday law, § 20
- Plea in abatement based on defective service of process, § 56
- Plea of guilty,
 - Acceptance on Sunday, § 53
 - Judgment entered on Sunday, § 53, n. 26
- Plea of non est factum, proof of defense of illegality under Sunday law, § 36
- Pleadings,
 - Filing on Sunday, § 49
 - In action for injuries received or inflicted on Sunday, § 40
 - In action on Sunday contract or transaction, § 36
 - Issuance of service of process on Sunday, § 56
- Police power, enactment of Sunday regulation, § 3, p. 802
- Power of attorney, ratification of Sunday transaction, § 31
- Preliminary transactions for consummation of contract transacted on Sunday, § 26
- Presence of others, disturbance of public as violation of Sunday law, § 8
- Preservation or protection of property, exemption from Sunday observance law, § 11
- Presumption, judgment rendered on Sunday, validity, § 56
- Presumptions in action on Sunday contract or transaction, § 37
- Prison guards,
 - Work of necessity, § 11, n. 57
 - Work on Sunday as work of necessity, § 55
- Prisoner, conveying to jail, permitted and prohibited act, § 16, n. 96
- Process,
 - Civil process, §§ 42-44, pp. 870-873
 - Criminal process, issuance and execution on Sunday, §§ 45, 46
- Process—Continued
 - Issuance of service on Sunday, raising question of want of jurisdiction, § 56
 - Issuance on Sunday, § 42
 - Quashing, § 56
 - Maliciously procuring service on Saturday, § 57
 - Quashing process issued on Sunday, § 56
 - Refusal of court to dismiss actions for illegality of Sunday process as not precluding courts of another state, § 56
 - Return on Sunday, § 42
 - Service of criminal process on Sunday, § 45
 - Service on Sunday, § 42
- Professional services, permitted and prohibited Sunday acts, § 13, pp. 822, 823
- Profit,
 - As criterion for necessity of work on Sunday, § 11
 - Business or occupation, violation of Sunday law, § 6
- Prohibition, raising issue of invalid Sunday service of summons, § 56
- Promoting attendance at unlawful place as work for necessity or charity exempting it from Sunday observance law, § 11
- Proof of defense of illegality under Sunday law, § 36
- Prosecution for violation of criminal statutes, §§ 19-22, pp. 841-847
- Proximate cause, injury received or inflicted on Sunday, §§ 39, 40
- Public meetings, prohibiting attendance, disturbance of others as violating Sunday law, § 8
- Public policy, requirement of Sunday observance not extended on grounds of, § 4
- Public safety, acts to secure as work of necessity, § 11
- Publication,
 - Arbitration award on Sunday, § 54
 - Summons and notices on Sunday, § 47
- Quasi-judicial proceedings, judgment rendered on Sunday, § 53, n. 27
- Questions for jury,
 - Actions for injuries inflicted or received on Sunday, § 40
 - In actions on Sunday contract or transaction, § 38
 - In prosecution for violation of Sunday law, § 22
- Quitclaim deeds, contract requiring Sunday performance, validity, § 32, n. 16
- Ratification of contracts contemplating or requiring Sunday performance, § 32
- Ratification of Sunday contract or transaction, §§ 24, 31, 35
- Questions for jury, § 38
- Real estate, contracts executed on Sunday, validity, § 27, p. 851, n. 95
- Real property, sales or purchases, permitted or prohibited Sunday act, § 13, p. 819
- Receipt, ratification of Sunday contract, § 31
- Recognizance, entry on Sunday, § 48
- Referendum, Sunday moving pictures, § 18, p. 836
- Refreshments, furnishing, permitted and prohibited Sunday act, § 17
- Regulation and enforcement of observance, §§ 3-23, pp. 800-847
- Action, Sunday contract or transaction, right of action, § 35
- Actions and proceedings under penal statutes, § 23
- Acts done in exercise of ordinary calling, § 9
- Acts outside prohibited hours, § 4

INDEX TO SUNDAY

Regulation and enforcement of observance—Cont'd

- Amusements, § 18, pp. 831-840
 - Selling tickets or taking admission fees as permitted or prohibited acts, § 13, p. 819
- Attorneys, permitted and prohibited acts, § 13, p. 822
- Authority of municipality, § 3, p. 802
- Business or occupation, § 6
- Carriage of persons or property, § 16
- Character of party benefited by performance, determination of necessity for work, § 11
- Charity, generally, ante
- Civil effect on private acts and transactions, §§ 24-40, pp. 848-869
- Complaint, indictment or information for violation, § 20
- Concerts, permitted and prohibited act, § 18, p. 833
- Constitutionality and validity, § 3, p. 802
- Contracts, making contracts as within prohibition, § 13, p. 817
- Convenience, desirability or profitableness as criterion for necessity, § 11
- Daily necessity, exception, § 11
- Dancing, permitted and prohibited act, § 18, p. 833
- Delivery of foodstuffs, § 17
- Disposition of property, permitted act, § 13, p. 823
- Distinction between keeping open and act in pursuit of traffic, § 7
- Disturbance of public, § 8
- Emergency, § 11
- Enforcement, §§ 19-23, pp. 841-847
- Engaging in traffic after opening for different purpose, § 7
- Entertainment, § 19, pp. 831-840
- Establishments not included in scope of statute, § 7
- Evidence in prosecution for violation of law, § 21
- Exceptions, §§ 10-18, pp. 811-840
- Farmers, permitted or prohibited act, § 13, p. 816
- Food, furnishing, permitted and prohibited act, § 17
- Foreseeable or avoidable character of act, § 11
- Fruit stand, § 17
- Gaming, permitted and prohibited act, § 13, p. 822
- Garage or service stations, prohibited work, § 13, p. 817
- Gasoline services, permitted acts, § 13, p. 817
- Illegal business, keeping open for, § 7
- Incidental acts to acts which are lawful, work of necessity, § 11
- Injuries received or inflicted in violation of Sunday law, §§ 39, 40
- Intent, effect of transaction or nontransaction of business in shop, § 7
- Justification for failure to act, § 39
- Keeping open shop, § 7
- Law governing private acts and transactions, § 24
- Legislative declaration as to necessity, § 11
- Licensed business, permitted and prohibited act, § 13, p. 823
- Mail, permitted and prohibited acts incident to carriage, § 16
- Manufacturing in similar industrial plants, permitted and prohibited act, § 13, p. 818
- Mines, permitted and prohibited act, § 13, p. 823
- More than one kind of trade or traffic pursued in shop, § 7
- Motor services, prohibited act, § 13, p. 817

Regulation and enforcement of observance—Cont'd

- Moving pictures, permitted and prohibited acts, § 18, p. 834
- Necessity, construction of term, § 11
- Necessity arising through act or negligence of party acting, § 11
- Newspapers, permitted and prohibited act, § 13, p. 818
- Nonadmittance of customers to place kept open for traffic, § 7
- Object and purpose, § 3, p. 801
- Oil wells, permitted and prohibited act, § 13, p. 823
- Opening for purpose other than trade or traffic, § 7
- Outdoor sports and amusements, § 18, p. 837
- Ownership of establishment immaterial, § 7
- Park authority, § 17
- Particular acts or transactions permitted or prohibited, §§ 13-18, pp. 816-840
- Partnership, keeping open shop, § 7
- Penny arcade, permitted and prohibited act, § 18, p. 833
- Persons observing another day, § 12
- Persons who may commit offense, § 7
- Plea alleging defective process by virtue of observance law, § 56
- Pleading facts within exception, § 36
- Preservation or protection of property, exceptions to law, § 11
- Professional or skilled services, permitted and prohibited act, § 13, pp. 822, 823
- Public safety, acts to secure as works of necessity, § 11
- Refreshments, permitted and prohibited act, § 17
- Regular or usual course of business not essential in place kept open, § 7
- Regulation generally, §§ 19-23, pp. 841-847
- Repair of motor vehicles, prohibited act, § 13, p. 817
- Repetition of acts on successive Sundays, § 9
- Restaurant or innkeepers, permitted and prohibited act, § 17
- Review in prosecution for violation of law, § 22
- Sale of tobacco, cigars, etc., prohibited act, § 13, p. 820
- Sales of real property, permitted and prohibited act, § 13, p. 819
- Scope and extent of laws, §§ 4-12, pp. 803-816
- Selling tickets or taking admission fees, permitted or prohibited acts, § 13, p. 819
- Sports and entertainments, § 18, pp. 831-840
- Subscription contracts, exception, § 13, p. 818
- Telegraph companies, permitted and prohibited act, § 13, p. 819
- Tobacco, cigars, etc., sale as permitted or prohibited act, § 13, p. 820
- Transportation of persons or property, § 16
- Travel, permitted and prohibited act, § 13, p. 821
- Trial in prosecution for violation of law, § 22
- Water and light plants, permitted act, § 13, p. 821
- Wills drawn on Sunday as permitted act, § 13, p. 823
- Work of necessity, generally, post
- Work or labor, § 5
- Reinstatement of member in benefit society on Sunday, validity, § 28
- Religious belief to circumvent Sunday statute, § 3, p. 802

INDEX TO SUNDAY

- Religious booklets, distribution on Sunday, § 15
- Religious duty, power to impose observance of Sunday as religious duty, § 3, p. 802
- Religious pictures, moving pictures, permitted act, § 18, p. 836
- Religious societies,
 - Acts on Sunday, validity, § 28
 - Sports and entertainments, permitted act, § 18, p. 833
- Religious worship,
 - Charging or taking admission fees, prohibited Sunday act, § 13, p. 819
 - Work incident exempted from Sunday observance regulation as charity, § 11
- Renewal of Sunday,
 - Acts or contracts, § 31
 - Contract or transaction, defenses, § 35
- Rent, seizure of goods of tenant on Sunday, § 55
- Repairmen of motor vehicles, prohibited Sunday work, § 13, p. 817
- Repairs,
 - Highways or driveways, permitted and prohibited Sunday act, § 16
 - Incident to traveling or transportation, permitted or prohibited act, § 16
- Replevin bond executed on Sunday, § 48
- Replication or reply, defense of illegal Sunday contract or transaction, § 36
- Representations made on Sunday as capable of serving as basis of estoppel, § 28
- Rescission of Sunday contract, § 30
- Restaurant keepers, sale of cigars or tobacco, prohibited act, § 13, p. 821
- Restaurants or innkeepers, furnishing food or refreshment, permitted and prohibited act, § 17
- Restoration of consideration or benefits to defend action on ground of Sunday transaction, § 35
- Retainer of attorney as appearance waiving right to object to Sunday proceedings, § 56
- Return,
 - Process on Saturday, adjournment, maliciously procuring adjournment of cause to Saturday, § 57
 - Writ of error on Sunday, § 53
- Review,
 - Actions on Sunday contracts, § 38
 - Proceedings to review on Sunday, § 53
- Reviewing prosecution for violation of law, § 22
- Sabbath,
 - Duration, § 2
 - Exemption from Sunday law regulation of persons believing seventh day to be Sabbath, § 12
 - Religious observance, § 3, p. 800, n. 32, 34
- Sabbath as not strictly synonymous, § 1
- Sales,
 - Casual sales, validity, § 27, p. 851
 - Casual Sunday sales as not labor, § 15
 - Civil effect of Sunday regulation, § 24
 - Disturbance of public as violation of public law, § 8
 - Farmer's Sunday sales, prohibited act, § 13, p. 816
 - Food and refreshments, permitted and prohibited Sunday act, § 17
 - Newspapers, prohibited Sunday act, § 13, p. 818
 - Real property, permitted and prohibited Sunday acts, § 13, p. 819
- Sales—Continued
 - Right of action on illegal transaction, § 35
 - Tickets for admissions, prohibited and permitted Sunday acts, § 13, p. 819
 - Tobacco, cigars, etc., permitted and prohibited act, § 13, p. 820
- Saturday, proceedings on Saturday against persons observing seventh day, § 57
- Search warrants, issuance and execution on Sunday, § 46
- Sentence, pronouncement on Sunday, § 53
- Service,
 - Application for appointment of receiver on Sunday, § 47
 - Certiorari on justice of the peace on Sunday, § 53
 - Notice on Sunday, § 47
- Service stations, prohibited Sunday work, § 13, p. 817
- Servile labor,
 - Defined, § 5
 - Selling tickets or taking admission fees, prohibited Sunday act, § 13, p. 819
- Settlement of liability on Sunday, validity, § 26, n. 65
- Shows, disturbance of public as violation of Sunday law, § 8
- Signature,
 - Bill of exceptions on Sunday, § 53
 - Contracts on Sunday, validity, § 26
 - Notice on Sunday, § 47
- Skilled services, permitted and prohibited Sunday act, § 13, pp. 822, 823
- Slot machines, permitted and prohibited Sunday act, § 13, p. 822, n. 86
- Special verdict in action on Sunday contract or transaction, § 38
- Sports,
 - Disturbance of public as violation of Sunday law, § 8
 - Permitted and prohibited act, § 18, pp. 831-840
 - Selling tickets, etc., prohibited Sunday act, § 13, p. 819
 - Travel on Sunday, permitted and prohibited acts, § 13, p. 821
- Statements on Sunday, competency as evidence, § 29
- Statute of limitations,
 - Acknowledgment on Sunday affecting, § 28, n. 30
 - Part payment on Sunday as taking debt out of operation of statute, § 28
- Statutory provisions, regulation of observance, § 3, pp. 800-803
- Stock, payment of purchase price on Sunday, right of action, § 35, n. 52
- Subscription contracts, exception from Sunday law violation, § 13, p. 818
- Summons,
 - Prohibition to raise question of invalid Sunday service, § 56
 - Publication on Sunday, § 47
- Sunday, incidental acts to acts which are lawful, work of necessity, § 11
- Supersedeas bond executed on Sunday, § 48
- Surety, procuring signature of another as ratification of Sunday note, § 31
- Tavern or shop within Sunday closing law, § 7, n. 21
- Tax on admissions from moving pictures, permitted or prohibited acts, § 18, p. 836
- Tax sale, service on Sunday of notice of redemption from, § 47

INDEX TO SUNDAY

- Taxation of costs on Sunday, § 53
- Taxpayers' petition, Sunday execution, validity, § 28
- Telegram requiring Sunday delivery, demurrer in action for damages from delay in transmission, § 36, n. 5
- Telegraph companies, permitted and prohibited Sunday Act, § 13, p. 819
- Terms of court,
 - Effect on, § 41
 - Expiring on Saturday, power to hold court on Sunday, § 51
- Third persons, illegality of Sunday transaction affecting right, § 33
- Threshing machine, moving on Sunday, permitted and prohibited act, § 16, n. 97
- Ticket sellers, permitted and prohibited services incident to travel, § 16
- Tickets, selling, permitted and prohibited Sunday acts, § 13, p. 819
- Transactions other than contracts consummated on Sunday, ratification, § 31
- Transportation of persons or property, permitted or prohibited acts, § 16
- Travel, permitted and prohibited Sunday act, §§ 13, 16, p. 821
- Travel on Sunday, injuries received or inflicted, rights and liabilities, § 39, n. 68, 70
- Treason, issuance and service of warrants on Sunday, § 45
- Trial,
 - Actions on Sunday contracts, § 38
 - Bond for appearance at trial, entry on Sunday, § 48
 - Conduct on Sunday, § 51
 - In prosecution for violation of law, § 22
- Trust deeds, Sunday execution, validity, § 28
- Undertakers, permitted Sunday act, § 13, p. 823
- Undertakings on appeal executed on Sunday, § 48
- Validity of negotiations or consummation on Sunday, §§ 25-29, pp. 848-855
- Verdict,
 - Delivery and acceptance on Sunday, § 51
 - Discharge of jury on Sunday after agreement on verdict, § 52
 - In action on Sunday contract or transaction, § 38
 - Rendered on Sunday, § 53
- Waiver of defects of performance of act on Sunday, § 56
- Warrants, issuance and service on Sunday, § 45
- Warranty, Sunday contract, right of action, § 35
- Watchman, Sunday law excuse for not keeping watchman in insured building according to terms of policy, § 32
- Water and light plants, operation as permitted acts, § 13, p. 821
- Weight and sufficiency of evidence,
 - In action on Sunday contract or transaction, § 37
 - In prosecution for violation of law, § 21
- Wills,
 - Execution on Sunday, validity, § 28, n. 23
 - Permitted and prohibited acts, § 13, p. 823
- Witness, refusal to be sworn on Saturday on ground it was his Sabbath, § 57
- Work and labor in violation of Sunday law, acts in exercise of ordinary calling, § 9
- Work of necessity,
 - Baseball, § 18, p. 840
 - District attorney performing services on Sunday, § 55
 - Exception to Sunday law observance, validity of statute or ordinance, § 10
 - Exemption from Sunday regulation law, § 11
 - Food or refreshments furnished, permitted and prohibited act, § 17
 - Gasoline and motor services, § 13, p. 817
 - Injuries received or inflicted on Sunday, action, § 40
 - Moving pictures, § 18, p. 835
 - Newspaper work, § 13, p. 818
 - Prison guards working on Sunday, § 55
 - Regulation of Sunday observance, exception, § 5
 - Sale of tobacco, cigars, etc., on Sunday, prohibited act, § 13, p. 820
 - Sale on Sunday, § 15
 - Telegraph companies, permitted Sunday acts, § 13, p. 819
 - Travel on Sunday, permitted act, § 13, p. 821
 - Water and light plants, operation on Sunday, § 13, p. 822
 - Wills drawn on Sunday, § 13, p. 823
- Work or labor,
 - Disturbance of public as violation of Sunday law, § 8
 - Regulation of Sunday law observance, § 5
- Wrecker service, exemption from Sunday law observance, § 13, p. 817
- Writing, contracts, Sunday execution, § 27, p. 851
- Writs,
 - Award of judicial writs, § 42
 - Error, application for on Sunday, § 53
 - Service on Sunday, § 44

INDEX TO SUPERSEDEAS

- Actions on bond, § 10
- Administrators, remedy to obtain review of interlocutory order making temporary appointment, § 3
- Amendment of petition, § 4
- Answer to application for writ and demand for jury trial as waiver of irregularity in issuance or return, § 6
- Appeal and error, § 11
- Appellate courts, authority to issue writ, § 2
- Application for supersedeas, § 4
- Assignee of judgment as defendant, costs, § 12
- Assignee of judgment as proper defendant to petition for supersedeas, § 4
- Audita querela, supersedeas to lie in cases where writ of audita querela would lie, § 3
- Bill in equity,
 - Writ and proceedings in nature of substitute, § 1
 - Writ as in nature of, § 4
- Bond, operation and effect of writ without requiring bond, § 8
- Bond given after expiration of period but order for supersedeas given within period, § 5
- Bonds or undertakings,
 - Actions on, § 10
 - Pauper's oath, proceeding on, § 10
 - Required, § 10
- Certiorari, supersedeas not to function as, § 1
- Chambers, authority to issue writ, § 2
- Commencement of new suit, § 1
- Commencement of proceeding, § 5
- Condemnation proceedings, staying actions by issuing writ in vacation or at chambers, § 2
- Contempt in violation of writ, § 9
- Continuation of original suit, § 1
- Costs, § 12
- Courts of appeal, supersedeas to interlocutory order of court by Supreme Court, § 3
- Default judgment, supersedeas allowed after motion to lower court made and overruled, § 2
- Definition, § 1
- Demurrer, petition for writ, § 4
- Demurrer to petition on bond, § 10
- Discharge of supersedeas, bond becoming absolute, § 10
- Discharge of writ, § 7
- Discretion of court as to issuance, § 2
- Discretionary action of trial court, review, § 11
- Executions,
 - Authority of court to supersede its own execution, § 2
 - Petition for supersedeas to prevent sale of exempt property, § 4
 - Stay in vacation or at chambers by issuing writ, § 2
 - Writ used to suspend or quash, § 3
- Forfeiture of judgment, petition to supersede, § 4, n. 77
- Forma pauperis, § 8
- Fraud, grounds for relief, § 1
- Hearing on petition, § 4
- In forma pauperis, § 10
- Injunction,
 - Supersedeas as not a revival or reinstatement of injunction dissolved, § 8, n. 30
 - Supersedeas to injunction beyond the power of court to issue, § 3
 - Writ of supersedeas not to operate as, § 1
- Injunctive remedy in character, § 1
- Interlocutory,
 - Decrees, operation and effect of supersedeas, § 8
 - Judgment, discretion of court as to issuance of writ, § 2, n. 89
 - Orders or decrees,
 - Supersedeas not to issue, § 3
 - Supersedeas to, § 3
- Issuance of writ, quashing writ for improper issuance, § 7
- Judges, application to for writ, § 2
- Judgment,
 - Bond given the force of judgment where supersedeas is set aside, § 10
 - Money judgment on supersedeas bond, § 10
 - Quashing of writ where it embraces several judgments, § 7
- Judgment or decree, suspension of efficacy by writ, § 1
- Jurisdiction, want of jurisdiction as ground for relief, § 1
- Jurisdiction and authority to grant, § 2
- Mandamus,
 - Staying proceedings at chambers or in vacation by issuing supersedeas, § 2
 - Supersedeas not to function as writ of mandamus, § 1
- Money judgments on supersedeas bond, § 10
- Motion to quash or vacate writ, § 7
- Nature and scope of remedy, § 1
- Notice,
 - Application in vacation, § 4
 - Supersedeas, § 5
 - Writ, time of taking effect, § 8
- Open and close in supersedeas proceeding, § 4
- Operation and effect of supersedeas, § 8
- Order for issuance, quashing writ for variance between writ and order, § 7
- Order for supersedeas not supersedeas of itself, § 5
- Parties,
 - Motion to discharge supersedeas, § 7
 - Pleadings to be made in names of parties, § 4
 - To petition for supersedeas, § 4
- Pendente lite, order appointing receiver, superseding § 3
- Petition for supersedeas, § 4
- Pleading,
 - In action on bonds, § 10
 - Petition for supersedeas, § 4

INDEX TO SUPERSEDEAS

- Proceedings which may be superseded, § 3
- Process,
 - Abuse, jurisdiction to award writ to prevent, § 2
 - Prevention of abuse of process, § 1
- Prohibitive remedy in character, § 1
- Proof of allegations of petition for supersedeas required, § 4
- Quashing of writ, § 7
- Questions for jury in hearing on petition, § 4
- Recall of order for supersedeas, § 5
- Receiver, superseding order of appointment, § 3
- Recognizance, issuance of writ without recognizance, § 10
- Record of court, writ granted out of court where record on which it is procured remains, § 2
- Res judicata, supersedeas to stay proceedings, pending determination of appeal containing issues which would become res judicata, § 3
- Return, waiver of irregularity, § 6
- Scope of remedy, § 1
- Service of writ, § 5
- Stay of proceedings synonymous, § 1
- Supreme Court,
 - Authority to issue writs in term or vacation, § 2
 - Interlocutory orders and decrees,
 - Power to grant writs of supersedeas to, § 3
 - Power to grant writs to orders and decrees, § 3
- Term of court, discharge of writ granted to stay proceedings until next term of court, § 7
- Time,
 - Discharge of writ by lapse of time, § 7
 - Issuance, § 5
 - Taking effect, § 8
- Vacation of court,
 - Authority to issue writ, § 2
 - Notice of application for petition, § 4
- Vacation of writ, § 7
- Variance, quashing of writ, § 7
- Verification of petition, § 4
- Violation of writ, § 9
- Waiver of irregularity in issuance or return, § 6
- Writ, requisite, § 5
- Writ of audita querela, writ of supersedeas as substitute, § 1

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STIPULATIONS

§ 1. Definition and Nature

Library References

Stipulations ⇐1.

page 2

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Cal.—Baker v. Solari, 333 P.2d 791, 166 C.A.2d 472—Southern Pac. Co. v. Schwartz, 38 Cal.Rptr. 243, 226 C.A.2d 481—McBain v. Santa Clara Sav. & Loan Ass'n, 51 Cal.Rptr. 78, 241 C.A.2d 829—C.J.S. quoted at length in Lovret v. Seyfarth, 101 Cal.Rptr. 143, 154, 22 C.A.3d 841

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Other definitions

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Cal.—Barendregt v. Downing, 346 P.2d 870, 175 C.A.2d 733.

Del.—Application of Wilmington Suburban Water Corp., Super., 203 A.2d 817, 8 Storey 8, aff'd. in part, Sup., 211 A.2d 602, 8 Storey 494.

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N.C.—Blair v. Fairchilds, 213 S.E.2d 428, 25 N.C.App. 416, cert. den. 215 S.E.2d 622, 287 N.C. 464.

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Acts held not stipulations

U.S.—England v. Doyle, C.A.Cal., 281 F.2d 304.

Ariz.—State v. Treadaway, 568 P.2d 1061, 116 Ariz. 163.

Cal.—People v. Castro, 123 Cal.Rptr. 810, 50 C.A.3d 938.

Idaho—First Sec. Bank v. Neibaur, 570 P.2d 276, 98 Idaho 598.

Ill.—Margonis v. Ross, 253 N.E.2d 577, 116 Ill.App.2d 234.

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N.J.—State v. Christopher, 373 A.2d 705, 149 N.J.Super. 269.

N.Y.—Paragon Progressive Federal Credit Union v. Byndloss, 212 N.Y.S.2d 989—Trophy Productions, Inc. v. Cinema-Vue Corp., 385 N.Y.S.2d 70, 53 A.D.2d 18.

Ohio—State v. Washington, 381 N.E.2d 1142, 56 Ohio App.2d 129, 10 O.O.3d 150.

Wash.—Peter Kiewit Sons' Co. v. Washington State Dept. of Transp., 635 P.2d 740, 30 Wash.App. 424

Acts held stipulations

Cal.—People v. Surety Ins. Co., 95 Cal.Rptr. 925, 18 C.A.3d Supp. 1

Ill.—Nelson v. Union Wire Rope Corp., 187 N.E.2d 425, 39 Ill.App.2d 73

Mass.—Swift v. Hiscock, 183 N.E.2d 875, 344 Mass. 691

Outside presence of jury

Cal.—Romeo v. Jumbo Market, 56 Cal.Rptr. 26, 247 C.A.2d 817.

Concession held not a stipulation

N.Y.—Modern Pool Products, Inc. v. Rudel Machinery Co., 294 N.Y.S.2d 426, 58 Misc.2d 83

Purpose of stipulation

Cal.—Aten v. Workers' Compensation Appeals Bd., 142 Cal.Rptr. 42, 75 C.A.3d 113.

Tex.—Peat, Marwick, Mitchell & Co. v. Sharp, Civ. App., 585 S.W.2d 905, err. ref. no rev. err.

Offer to stipulate not timely

Or.—State v. Winters, 578 P.2d 439, 34 Or.App. 157.

Offer to stipulate not accepted

Colo.—Guzman v. Gleason, 598 P.2d 145, 42 Colo.App. 284, aff., Sup., 623 P.2d 378.

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Stipulation with consent of court

N.Y.—Kolmer v. Kolmer, 178 N.Y.S.2d 258, 13 Misc.2d 313, aff'd. 177 N.Y.S.2d 1009, 6 A.D.2d 1001

5. Cal.—Holtkamp v. States Marine Corp., 331 P.2d 679, 165 C.A.2d 131—Palmer v. City of Long Beach, 199 P.2d 952, 33 C.2d 134—Los Angeles City School Dist. of Los Angeles County v. Landier Management Co., 2 Cal.Rptr. 662, 177 C.A.2d 744

N.Y.—Storman v. City of New York, 120 N.Y.S.2d 569—Martin v. Martin, 312 N.Y.S.2d 520, 63 Misc.2d 530

N.D.—Voskuil v. Voskuil, 256 N.W.2d 526

Tex.—Jackson v. Lewis, Civ.App., 554 S.W.2d 21.

Wis.—Schmidt v. Schmidt, 162 N.W.2d 618, 40 Wis.2d 649.

Stipulation of settlement, etc.—In re Shaver's Estate, 122 N.Y.S.2d 578, 282 App.Div. 816—Scharff v. Scharff, 132 N.Y.S.2d 874—Ressler v. Druck, 243 N.Y.S.2d 552, 40 Misc.2d 654.

"Procedural stipulations" distinguished from "contractual stipulations"

N.D.—Lawrence v. Lawrence, 217 N.W.2d 792.

6. Judicial admission

N.C.—State v. Williams, 241 S.E.2d 149, 35 N.C.App. 216, petition den. 244 S.E.2d 156, 294 N.C. 739.

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Essence is agreement

U.S.—U.S. v. Harris, C.A.Ind., 542 F.2d 1283, cert. den. 97 S.Ct. 1558, 430 U.S. 934, 51 L.Ed.2d 779.

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Necessity of offer and acceptance

Kan.—State v. Wilson, 523 P.2d 337, 215 Kan. 28.

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10. Consent decree held to be a stipulation
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§ 2. Favored by Courts

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page 3

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Ariz.—Gangadean v. Flori Inv. Co., 474 P.2d 1006, 106 Ariz. 245—State v. Sorrell, 506 P.2d 1065, 109 Ariz. 171.

Cal.—Harris v. Spinali Auto Sales, Inc., 49 Cal.Rptr. 610, 240 C.A.2d 447

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Defendant cannot compel codefendant to stipulate

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Defendant can not compel prosecution to stipulate

Ill.—People v. Williams, 400 N.E.2d 980, 36 Ill.Dec. 400, 81 Ill.App.3d 122.

Prosecution not required to stipulate to defendant's prior record

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Stipulations affecting the rights and obligations of parties to a lawsuit are not to be entered into, or to be treated, lightly.¹⁵⁵

§ 2 STIPULATIONS

Page 3

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Sufficient certainty held shown

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Ohio—Duff v. Public Utilities Commission, 384 N.E.2d 264, 56 Ohio St.2d 367, 10 O.O.3d 493.

Tex.—Steward v. State, Cr., 422 S.W.2d 733.

Omissions held immaterial

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Stipulation inadequate

N.Y.—Kalb v. Chemical Bank New York Trust Co., 316 N.Y.S.2d 381, 64 Misc.2d 824.

Agreement held proper

Ariz.—City of Tucson v. Gallagher, 493 P.2d 1197, 108 Ariz. 140, 65 A.L.R.3d 597.

Tex.—Sutton v. State Highway Dept., Civ.App., 549 S.W.2d 59, err. ref. no rev. err.

Clear, unequivocal, and complete

N.J.—State v. Smith, 362 A.2d 578, 142 N.J. Super. 575.

Time limit not required

Ill.—Strozewski v. Sherman Equipment Co., 395 N.E.2d 38, 32 Ill.Dec. 91, 76 Ill.App.3d 266.

Stipulation ambiguous but not disputed

Wash.—Graves v. P. J. Taggares Co., 605 P.2d 348, 25 Wash.App. 118, rem'd, 616 P.2d 1223, 94 Wash.2d 298.

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Ark.—McCroskey v. State, 614 S.W.2d 660, 272 Ark. 356.

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Ill.—C.J.S. Cited in Village of Schaumburg v. Franberg, 424 N.E.2d 1239, 1242, 54 Ill.Dec. 336, 99 Ill.App.3d 1

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Okl.—Bovaird Supply Co. v. Wofford, 255 P.2d 523, 208 Okl. 315.

Tex.—Seale v. State, 256 S.W.2d 86, 158 Tex.Cr.R. 440

Wash.—State v. Adler, 558 P.2d 817, 16 Wash.App. 459.

Wis.—State v. Craft, 298 N.W.2d 530, 99 Wis.2d 128

Willingness to stipulate insufficient

Cal.—De Mota v. Superior Court of Cal., Calaveras County, 278 P.2d 537, 130 C.A.2d 58

Voluntariness of assent

Tex.—Goodson v. Carr, Civ.App., 428 S.W.2d 875.

page 4

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Lack of ruling on objection to stipulation not acceptance by silence

Neb.—Blobaum v. State, Dept. of Roads, 137 N.W.2d 855, 179 Neb. 304.

Silence held not consent

Fla.—Miami Herald Pub. Co. v. Payne, 358 So.2d 541, adopted App., 360 So.2d 122.

N.Y.—Glass v. Glass, 287 N.Y.S.2d 149, 29 A.D.2d 685.

A mistaken belief by one of the parties does not render a stipulation invalid.^{20 5}

20.5. Cal.—City of Burbank v. Nordahl, 18 Cal.Rptr. 710, 199 C.A.2d 311.

Where stipulations are unaccompanied by an affidavit as required by statute, the trial court lacks jurisdiction to render judgment.^{20 10}

20.10. N.Y.—Davidson v. Hicks, 238 N.Y.S.2d 910, 38 Misc.2d 858.

§ 4. — Oral or in Writing

23. U.S.—Biby v. Kansas City Life Ins. Co., C.A. Ark., 629 F.2d 1289.

Ala.—Aaron v. State, 192 So.2d 456, 43 Ala.App. 450.

Ariz.—Hackin v. Rupp, 453 P.2d 519, 9 Ariz.App. 354.

Cal.—Roscoe Moss Co. v. Roggero, 54 Cal.Rptr. 911, 246 C.A.2d 781—May v. May, 79 Cal.Rptr. 622, 275 C.A.2d 264.

Fla.—Morris v. Truax, App. 152 So.2d 515—Orthwein v. Cobbs Fruit & Preserving Co., App., 229 So.2d 607

Ga.—Davenport v. Davenport, 128 S.E.2d 772, 218 Ga. 475

Iowa—Swartz v. Meredith Pub. Co., 117 N.W.2d 898, 254 Iowa 518.

Ky.—Clark v. Com., 418 S.W.2d 241

Nev.—Engelstad v. Matheson, 522 P.2d 1018, 90 Nev. 204.

N.Y.—Altholtz v. Altholtz, 165 N.Y.S.2d 827, 5 Misc.2d 647.

Pa.—Roman v. Alizauskas, 54 Luz.L.Reg. 169.

Tex.—Maddox v. City of Amarillo, Civ.App., 390 S.W.2d 51—Thompson v. Kirkland, Civ.App., 422 S.W.2d 258—Helms v. State, Cr., 484 S.W.2d 925.

Wis.—Sheridan v. Sheridan, 223 N.W.2d 557, 65 Wis.2d 504

Letters held to constitute stipulation in writing U.S.—U.S. ex rel. and for Use of Tennessee Val. Authority v. McCoy, D.C.N.C., 198 F.Supp. 716.

Writing held sufficient

Tex.—Williams v. State, Cr., 492 S.W.2d 507.

25. Ariz.—C.J.S. quoted at length in Hackin v. Rupp, 452 P.2d 519, 521, 9 Ariz.App. 354.

Tex.—McClain v. Hickey, Civ.App., 418 S.W.2d 588, err. ref. no rev. err.

Other statements of purpose

Tex.—Sone v. Braung, Civ.App., 469 S.W.2d 605, err. ref. no rev. err.

26. Alaska—Interior Credit Bureau, Inc. v. Bussing, 559 P.2d 104.

Cal.—Roscoe Moss Co. v. Roggero, 54 Cal.Rptr. 911, 246 C.A.2d 781

Hawaii—Kauai v. Kauai County, 386 P.2d 880, 47 Haw. 271, 7 A.L.R.3d 1385

Kan.—C.J.S. cited in State v. Roach, 576 P.2d 1082, 1086, 223 Kan. 732.

N.Y.—In re Gardiner's Estate, 126 N.Y.S.2d 121, 204 Misc. 884—Accarino v. Hirsch, 175 N.Y.S.2d 435, 6 A.D.2d 795—Rosen v. Grand, 175 N.Y.S.2d 441, 6 A.D.2d 799.

Tex.—McClain v. Hickey, Civ.App., 418 S.W.2d 588, err. ref. no rev. err.—Texas Elec. Service Co. v. Yater, Civ.App., 494 S.W.2d 271, err. ref. no rev. err.

27. Stipulation not inferred

Cal.—Langford v. Eckert, 88 Cal.Rptr. 429, 9 C.A.3d 439.

28. Tex.—Cantu v. Cantu, Civ.App., 253 S.W.2d 957.

page 5

30. N.Y.—Cohen v. Coleman, 442 N.Y.S.2d 834, 110 Misc.2d 419.

36. Agreement for extension of time in which to file pleading

Pa.—Harris v. Greenberg, 17 D. & C.2d 166.

37. Ga.—Dein v. Mossman, 262 S.E.2d 83, 244 Ga. 866.

N.C.—Amick v. Shipley, 259 S.E.2d 329, 43 N.C.App. 507.

Relieving judge of duty of reducing testimony to writing

N.D.—Ranes Motor Co. v. Thompson, 251 N.W.2d 741.

Criminal prosecutions

Tex.—Williams v. State, Cr., 483 S.W.2d 460.

40. Extension of time to bring to trial

Cal.—Gentry v. Nielsen, 176 Cal.Rptr. 385, 123 C.A.3d 27.

46. U.S.—Brown v. Estelle, D.C.Tex., 468 F.Supp. 422, aff'd, C.A., 591 F.2d 1207.

Ga.—Davenport v. Davenport, 128 S.E.2d 772, 218 Ga. 475.

Pa.—Flynn v. Sievers, 10 D. & C.2d 383, 19 Monroe L.R. 46, aff'd, 132 A.2d 180, 389 Pa. 142.

Wash.—Rogers Walla Walla, Inc. v. Ballard, 553 P.2d 1379, 16 Wash.App. 92.

48. N.D.—State v. Carlson, 258 N.W.2d 253

page 6

56. U.S.—Rogers v. U.S., C.A.Ill., 319 F.2d 5, cert den. 84 S.Ct. 524, 375 U.S. 989, 11 L.Ed.2d 475—Mittlieder v. Chicago & N.W. Ry. Co., C.A. Neb., 441 F.2d 52.

Ala.—Robertson v. State, 98 So.2d 620, 39 Ala.App. 312.

Alaska—Interior Credit Bureau, Inc. v. Bussing, 559 P.2d 104.

Ariz.—Hackin v. Rupp, 452 P.2d 519, 9 Ariz.App. 354.

Cal.—Preiss v. Good Samantan Hospital, 340 P.2d 661, 171 C.A.2d 559—Lyons v. Lyons, 12 Cal.Rptr. 349, 190 C.A.2d 788—Linder v. Cooley, 31 Cal.Rptr. 271, 216 C.A.2d 390.

Conn.—Bryan v. Reynolds, 123 A.2d 192, 143 Conn. 456.

D.C.—U.S. v. Brown, C.A., 428 F.2d 1100, 138 U.S. App.D.C. 398—U.S. v. Rucks, C.A., 475 F.2d 1326, 155 U.S.App.D.C. 57.

Ga.—Davenport v. Davenport, 128 S.E.2d 772, 218 Ga. 475.

Hawaii—Kau v. Kauai County, 386 P.2d 880, 47 Haw. 271, 7 A.L.R.3d 1385.

Ill.—People v. Johnson, 257 N.E.2d 121, 121 Ill.App.2d 97.

Kan.—C.J.S. cited in State v. Roach, 576 P.2d 1082, 1086, 223 Kan. 732.

Ky.—Clark v. Com., 418 S.W.2d 241.

N.J.—State v. Morales, 283 A.2d 127, 116 N.J. Super. 538.

N.Y.—Schlossberg v. Schlossberg, 309 N.Y.S.2d 631, 34 A.D.2d 699.

N.D.—C.J.S. cited in Aaker v. Aaker, 338 N.W.2d 645, 647.

Ohio—Schwartz v. Leiser, App., 140 N.E.2d 1.

Pa.—Appel Vending Co. v. 1601 Corp., 203 A.2d 812, 204 Pa.Super. 243—In re Colonial Motor Lodge, Inc., dissolution, 59 Lanc.Rev. 441.

Tenn.—Bearnan v. Camatos, 385 S.W.2d 91, 215 Tenn. 231.

Tex.—Matthews v. State, Cr., 414 S.W.2d 938—Sone v. Braung, Civ.App., 469 S.W.2d 605, err. ref. no rev. err.

Wash.—Baird v. Baird, 494 P.2d 1387, 6 Wash.App. 587.

Wis.—Schmidt v. Schmidt, 162 N.W.2d 618, 40 Wis.2d 649.

Statute of frauds not violated

N.Y.—Anders v. Anders, 179 N.Y.S.2d 274, 6 A.D.2d 440.

In chambers held not equivalent to stipulation in open court

Ala.—Anonymous v. Anonymous, 353 So.2d 515, app. after remand Civ.App., 353 So.2d 519, cert. den. Sup., 353 So.2d 520.

N.Y.—Accarino v. Hirsch, 175 N.Y.S.2d 435, 6 A.D.2d 795—Rosen v. Grand, 175 N.Y.S.2d 441, 6 A.D.2d 799—People ex rel. Putziger v. Putziger, 254 N.Y.S.2d 916, 22 A.D.2d 821.

Oral concessions not stipulation

N.Y.—Davis v. Sapa, 3 Dept., 484 N.Y.S.2d 568, 107 A.D.2d 1005.

No particular form required

Cal.—Harris v. Spinali Auto Sales, Inc., 49 Cal.Rptr. 610, 240 C.A.2d 447.

As part of judgment application

Conn.—Masti-Kure Products Co. v. Appel, 285 A.2d 346, 161 Conn. 108.

Stipulation of paternity

Ind.—Bramblett v. Lee, 320 N.E.2d 778, 162 Ind.App. 654, cert. den. 96 S.Ct. 1115, 424 U.S. 915, 47 L.Ed.2d 320.

Statement not stipulation

Or.—Matter of Marriage of Trudel, App., 608 P.2d 1230, 45 Or.App. 663.

58. Nev.—Casentini v. Hines, 625 P.2d 1174, 97 Nev. 186.

N.D.—C.J.S. cited in Aaker v. Aaker, 338 N.W.2d 645, 647.

60. U.S.—C.J.S. cited in In re Herrera, Bkrcty.App. Col., 23 B.R. 796, 797.

Cal.—Linder v. Cooley, 31 Cal.Rptr. 271, 216 C.A.2d 390—C.J.S. quoted in Harris v. Spinali Auto Sales, Inc., 49 Cal.Rptr. 610, 614, 240 C.A.2d 447.

D.C.—Massachusetts Ave. Heights Citizens Ass'n v. Embassy Corp., C.A., 433 F.2d 513, 139 U.S.App. D.C. 355.

Minn.—Minnesota Vikings Football Club, Inc. v. Metropolitan Council, 289 N.W.2d 426.

Mo.—Crocker v. Consolidated Service Car Co., 365 S.W.2d 524.

N.Y.—Schlossberg v. Schlossberg, 309 N.Y.S.2d 631, 34 A.D.2d 699.

Recitation in court not binding or final

Wis.—Birts v. State, 228 N.W.2d 351, 68 Wis.2d 389.

61. N.Y.—In re Dolgin Eldert Corp., 286 N.E.2d 228, 31 N.Y.2d 1, 334 N.Y.S.2d 833.

Wash.—Gaskill v. City of Merce Island, 576 P.2d 1318, 19 Wash.App. 307.

May be binding if made in chambers

N.Y.—Royal Globe Ins. Co. v. Dinan, 248 N.Y.S.2d 469, 42 Misc.2d 595.

page 7

63. Cal.—Linder v. Cooley, 31 Cal.Rptr. 271, 216 C.A.2d 390.

Pa.—Flynn v. Sievers, 10 D. & C.2d 383, 19 Monroe L.R. 46, aff'd. 132 A.2d 180, 389 Pa. 142—Appel Vending Co. v. 1601 Corp., 203 A.2d 812, 204 Pa.Super. 243.

Court may recognize, etc.

Cal.—St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp., 135 Cal.Rptr. 120, 65 C.A.3d 66.

Consent

Tex.—Rodriguez v. State, Cr., 534 S.W.2d 335.

64. Voluntary submission to polygraph examination

Fla.—Codie v. State, 313 So.2d 754.

65. U.S.—U.S. v. Mohel, C.A.N.Y., 604 F.2d 748.

Ill.—People v. Walker, 270 N.E.2d 159, 132 Ill.App.2d 766.

67. Ala.—Emergency Aid Ins. Co. v. Dobbs, 83 So.2d 335, 263 Ala. 594.

69. Cal.—Bowden v. Green, 180 Cal.Rptr. 90, 128 C.A.3d 65.

Ill.—Strozewski v. Sherman Equipment Co., 395 N.E.2d 38, 32 Ill.Dec. 91, 76 Ill.App.3d 266.

70. Hawaii—Kau v. Kauai County, 386 P.2d 880, 47 Haw. 271, 7 A.L.R.3d 1385.

§ 5. — Signing

75. U.S.—Hadden v. U.S., 130 F.Supp. 610, 131 Ct.Cl. 326.

Ind.—Owens v. State, 373 N.E.2d 913, 176 Ind.App. 1. N.Y.—Altholtz v. Altholtz, 165 N.Y.S.2d 827, 5 Misc.2d 647—Redding v. New York City Transit Authority, 212 N.Y.S.2d 494—Veith v. ABC Paving Co., Inc., 396 N.Y.S.2d 556, 58 A.D.2d 257.

N.C.—Amick v. Shipley, 259 S.E.2d 329, 43 N.C.App. 507.

N.D.—Ranes Motor Co. v. Thompson, 251 N.W.2d 741.

Tenn.—Wachovia Bank & Trust Co., N.A. v. Glass, App., 375 S.W.2d 950.

Tex.—Cromeans v. State, 268 S.W.2d 133, 160 Tex. Cr.R. 135—Thompson v. Kirkland, Civ.App., 422 S.W.2d 258—Daggett v. State, Cr., 492 S.W.2d 583.

Wash.—Baird v. Baird, 494 P.2d 1387, 6 Wash.App. 587.

Stipulation signed by parties and not attorneys, etc.

(2) Other cases.

N.Y.—Levy v. Levy, 135 N.Y.S.2d 95, 284 App.Div. 983.

Failure to object

U.S.—U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines, C.A.Wis., 504 F.2d 1288.

page 8

77. Tex.—Hawkins v. State, Cr.App., 613 S.W.2d 720, cert. den. 102 S.Ct. 422, 454 U.S. 919, 70 L.Ed.2d 231, reh. den. 102 S.Ct. 660, 454 U.S. 919, 70 L.Ed.2d 632.

78. N.C.—Hall v. Lassiter, 260 S.E.2d 155, 44 N.C. App. 23, cert. den. 265 S.E.2d 395, 299 N.C. 330.

80. Ariz.—State v. Blier, 557 P.2d 1058, 113 Ariz. 501.

Cal.—Johnston, Baker & Palmer v. Record Mach. & Tool Co., 6 Cal.Rptr. 847, 183 C.A.2d 200.

85. Ariz.—State v. Mulligan, 613 P.2d 1266, 126 Ariz. 210.

§ 6. — Entry on Minutes, Filing, or Record

88. Alaska—Interior Credit Bureau, Inc. v. Bussing, 559 P.2d 104.

Cal.—Roscoe Moss Co. v. Roggero, 54 Cal.Rptr. 911, 246 C.A.2d 781—May v. May, 79 Cal.Rptr. 622, 275 C.A.2d 264.

Fla.—Codie v. State, 313 So.2d 754.

Ill.—City of Chicago v. Angeles, 158 N.E.2d 641, 21 Ill.App.2d 458.

Iowa—C.J.S. cited in State v. Marti, 290 N.W.2d 570, 587.

Mo.—L—— J—— S—— v. V—— H—— S——, App., 514 S.W.2d 1.

N.Y.—Veith v. ABC Paving Co., Inc., 396 N.Y.S.2d 556, 58 A.D.2d 257.

N.D.—Ranes Motor Co. v. Thompson, 251 N.W.2d 741.

Ohio—Ohio Cas. Ins. Co. v. Davey Tree Expert Co., 173 N.E.2d 412.

Pa.—Appel Vending Co. v. 1601 Corp., 203 A.2d 812, 204 Pa.Super. 243.

Tex.—Thompson v. Kirkland, Civ.App., 422 S.W.2d 258—Magaline v. J. V. Harrison Truck Lines, Inc., Civ.App., 446 S.W.2d 920, err. ref. no rev. err.

Vt.—In re Waite, 443 A.2d 462, 140 Vt. 628.

Wash.—Owens-Corning Fiberglas Corp. v. Department of Labor and Industries, 612 P.2d 799, 25 Wash. App. 658.

Wis.—Czap v. Czap, 69 N.W.2d 488, 269 Wis. 557—Pasternak v. Pasternak, 109 N.W.2d 511, 14 Wis.2d 38—Schmidt v. Schmidt, 162 N.W.2d 618, 40 Wis.2d 649.

Good practice to read into record

Minn.—Sauke v. Bird, 125 N.W.2d 421, 267 Minn. 129.

Purpose

Tex.—Texas Elec. Service Co. v. Yater, Civ.App., 494 S.W.2d 271, err. ref. no rev. err.

90. Pa.—Com. ex rel. Patricia L.F. v. Malbert J.F., Jr., 420 A.2d 572, 278 Pa.Super. 343.

Tex.—Markman v. Gaitz, Civ.App., 499 S.W.2d 692, err. ref. no rev. err.

91. Or.—Alexander v. Gladden, 288 P.2d 219, 205 Or. 375.

92. Cal.—McDowell v. Orsini, 127 Cal.Rptr. 285, 54 C.A.3d 951.

page 9

93. Del.—Gaster v. Wilmington Plumbing Supply Co., Inc., 321 A.2d 504.

Ind.—Hawkins v. Hawkins, 309 N.E.2d 177, 160 Ind. App. 5.

N.Y.—Narsu v. Polsinelli, 426 N.Y.S.2d 162, 74 A.D.2d 952.

94. Ariz.—Pearl v. Superior Court In and For Mohave County, 429 P.2d 498, 6 Ariz.App. 6.

Cal.—Harris v. Spinali Auto Sales, Inc., 49 Cal.Rptr. 610, 240 C.A.2d 447.

§ 6 STIPULATIONS

Page 9

95. U.S.—Sampson v. Sony Corp. of America, C.A.N.Y., 434 F.2d 312
- Cal.—Linder v. Cooley, 31 Cal.Rptr. 271, 216 C.A.2d 390—Harris v. Spinali Auto Sales Inc., 49 Cal.Rptr. 610, 240 C.A.2d 447.
- Pa.—Marmara v. Rawle, 399 A.2d 750, 264 Pa.Super. 229.
6. Mo.—State ex rel. State Highway Commission v. Southside Nat. Bank, App., 585 S.W.2d 512

page 10

13. Tex.—Austin v. Austin, 603 S.W.2d 204, on remand, Civ App., 619 S.W.2d 290
14. N.Y.—Schlossberg v. Schlossberg, 309 N.Y.S.2d 631, 62 Misc.2d 699.

§ 7. — Supervision and Assent of Court

19. U.S.—U.S. v. Ferreboeuf, C.A.Wash., 632 F.2d 832, cert. den. 101 S.Ct. 1398, 450 U.S. 934, 67 L.Ed.2d 368.
- Cal.—People v. Reeves, 51 Cal.Rptr. 691, 415 P.2d 35, 64 C.2d 766, cert. den. 87 S.Ct. 332, 385 U.S. 952, 17 L.Ed.2d 229—People v. Levey, 105 Cal.Rptr. 516, 304 P.2d 452, 8 C.3d 648.
- Me.—Rush v. Aroostook County, 447 A.2d 478
- Minn.—Matter of LaRocque, 295 N.W.2d 97.
- N.Y.—Anders v. Anders, 168 N.Y.S.2d 1000, 9 Misc.2d 1, mod. on oth. grds. 179 N.Y.S.2d 274, 6 A.D.2d 440.

Stipulation approved

- U.S.—In re New York, N.H. & H.R. Co., C.A.Conn., 298 F.2d 761—Parsons v. Buckley, Vt., 85 S.Ct. 503, 379 U.S. 359, 13 L.Ed.2d 352—Lee v. Macon County Bd. of Ed., C.A.Ala., 468 F.2d 956
- Colo.—People v. Barbour, 639 P.2d 1065
- Conn.—Peterson v. City of Norwalk, 203 A.2d 294, 152 Conn. 77.
- Fla.—Butler v. State, App., 228 So.2d 421, 36 A.L.R.3d 1274
- Ill.—People ex rel. Scott v. Janson, 312 N.E.2d 620, 57 Ill.2d 451.
- Ky.—Strong v. Com., 507 S.W.2d 691.
- N.Y.—In re Morrissey's Estate, 182 N.Y.S.2d 508, 16 Misc.2d 421

Discretion to allow or disallow

- U.S.—Biby v. Kansas City Life Ins. Co., C.A.Ark., 629 F.2d 1289.
- Ga.—Johnson v. Cook, 180 S.E.2d 591, 123 Ga.App. 302.
- Hawaii—State v. El'Ayache, 618 P.2d 1142, 62 Haw. 646.
- Ill.—Krotke v. Chicago, R.I. & P.R. Co., 327 N.E.2d 212, 26 Ill.App.3d 493.
- Ind.—Rivera v. Simmons Co., 345 N.E.2d 227, 264 Ind. 401.
- S.C.—State v. Greene, 180 S.E.2d 179, 255 S.C. 548.

Function of court

- Wash.—Baird v. Baird, 494 P.2d 1387, 6 Wash.App. 587.

Stipulation denied

- U.S.—Acree v. Drummond, D.C.Ga., 336 F.Supp. 1275, mod. on oth. grds. C.A., 458 F.2d 486, stay den. 93 S.Ct. 18, 409 U.S. 1228, 34 L.Ed.2d 33, cert. den. 93 S.Ct. 431, 432, 409 U.S. 1006, 34 L.Ed.2d 299—U.S. v. Brinklow, C.A.Colo., 560 F.2d 1003, cert. den. 98 S.Ct. 893, 434 U.S. 1047, 54 L.Ed.2d 798.
- Alaska—Jerral v. Kenai Peninsula Borough School Dist., 567 P.2d 760.

Duty to insure voluntariness

- U.S.—U.S. v. Miller, C.A.Cal., 588 F.2d 1256, cert. den. 99 S.Ct. 1426, 440 U.S. 947, 59 L.Ed.2d 636.
- Cal.—People v. Hall, 167 Cal.Rptr. 844, 616 P.2d 826, 28 C.3d 143.
20. U.S.—Witherspoon v. U.S., C.A.Mich., 633 F.2d 1247, cert. den. 101 S.Ct. 1396, 450 U.S. 933, 67 L.Ed.2d 367

- Fla.—Whitney v. Cochran, 152 So.2d 727, cert. den. 84 S.Ct. 166, 375 U.S. 888, 11 L.Ed.2d 118, reh. den. 84 S.Ct. 355, 375 U.S. 949, 11 L.Ed.2d 280
- N.Y.—Prouty v. Drake, 144 N.Y.S.2d 517, 208 Misc.540

- Tex.—Harnes v. State, App. 4 Dist., 636 S.W.2d 513, rev. ref.

21. N.Y.—People v. Iucci, 401 N.Y.S.2d 823, 61 A.D.2d 1

- N.D.—State v. Carlson, 258 N.W.2d 253.

Defendant represented by counsel

- Kan.—White v. State, 568 P.2d 112, 222 Kan. 709
22. U.S.—Caraballo v. Lykes Bros. S.S. Co., D.C.Pa., 212 F.Supp. 216—Medinger v. Baraban, D.C.Mo., 34 F.R.D. 533

- Cal.—In re Dulfon's Estate, 52 Cal.Rptr. 398, 243 C.A.2d 469

- Fla.—Tsilidis v. Pedakis, App., 132 So.2d 9

- Ga.—Davenport v. Davenport, 128 S.E.2d 772, 218 Ga. 475.

- Ind.—Anderson v. Sell, 276 N.E.2d 194, 150 Ind.App. 262.

- Wis.—O'Connor v. O'Connor, 180 N.W.2d 735, 48 Wis.2d 535

23. Colo.—People v. Anderson, App., 649 P.2d 720.
- Iowa—Windus v. Great Plains Gas, 122 N.W.2d 901, 255 Iowa 587

- Tex.—Cantu v. Cantu, Civ App., 253 S.W.2d 957

26. D.C.—U.S. v. Brown, D.C., 50 F.R.D. 110.

- Md.—Couser v. State, 356 A.2d 612, 31 Md.App. 401

- Mich.—Pantlind Hotel Co. v. City of Grand Rapids, 201 N.W.2d 695, 42 Mich.App. 262.

27. U.S.—Sincok v. Gately, D.C.Del., 262 F.Supp. 739—A & S Sign Co. v. Maughan, C.A.Ariz., 419 F.2d 1152

- Cal.—C.J.S. cited in Green v. Linn, 26 Cal.Rptr. 889, 893, 210 C.A.2d 762

- Conn.—Liberty Bank for Sav. v. Armstrong, 423 A.2d 171, 36 Conn.Super. 629.

- Md.—Pedicord v. Franklin, 310 A.2d 561, 270 Md. 164.

- Mich.—Dana Corp. v. Appeal Bd. of Mich. Employment Sec. Commission, 123 N.W.2d 277, 371 Mich. 107

- N.Y.—People v. Mammone, 193 N.Y.S.2d 90, 9 A.D.2d 780, aff'd. 199 N.Y.S.2d 510, 7 N.Y.2d 998, 166 N.E.2d 514, cert. den. 81 S.Ct. 67.

Stipulation denied

- U.S.—In re Flexton Corp., D.C.Pa., 143 F.Supp. 267.

- Fla.—Alkow v. Blocker, App., 168 So.2d 340.

- N.Y.—Erdogan v. Simone, 415 N.Y.S.2d 301, 69 A.D.2d 931.

- Wash.—Chase v. City of Tacoma, 594 P.2d 942, 23 Wash.App. 12.

- Waiver of minor's rights

- Cal.—Everett v. Everett, 129 Cal.Rptr. 8, 57 C.A.3d 65.

- Test

- Pa.—Com. v. Brindell, 384 A.2d 942, 252 Pa.Super. 602.

29. U.S.—A & S Sign Co. v. Maughan, C.A.Ariz., 419 F.2d 1152.

page 11

When a stipulation is accepted by the court, the court becomes an additional party to the action.³¹⁵

- 31.5. Cal.—Harris v. Spinali Auto Sales, Inc., 49 Cal.Rptr. 610, 240 C.A.2d 447—Leonard v. City of Los Angeles, 107 Cal.Rptr. 378, 31 C.A.3d 473.

§ 8. — Consideration

32. Ariz.—Bekins v. Van & Storage Co. v. Industrial Commission, 422 P.2d 400, 4 Ariz.App. 569.

- Hawaii—C.J.S. cited in Kam Chin Chun Ming v. Kam Hee Ho, 371 P.2d 379, 393, 45 Haw. 521, reh. den. 373 P.2d 141

- N.Y.—Atlas v. Wood, 226 N.Y.S.2d 43, 33 Misc.2d 543, aff'd. 232 N.Y.S.2d 743, 17 A.D.2d 821.

- Utah—C.J.S. cited in United Factors v. T.C. Associates, Inc., 445 P.2d 766, 768, 21 Utah 2d 351.

33. Unilateral stipulation valid

- U.S.—Garden Homes, Inc. v. Mason, D.C.N.H., 142 F.Supp. 744, app. dissm., C.A., 238 F.2d 654

34. Iowa—Strait v. Baxter, 140 N.W.2d 903, 258 Iowa 960

- Mo.—State v. Ghan, App., 558 S.W.2d 304.

36. Cal.—Barendregt v. Downing, 346 P.2d 870, 175 C.A.2d 733.

- Ill.—American Nat. Bank & Trust Co. of Chicago v. Mar-K-Z Motors & Leasing Co., Inc., 298 N.E.2d 209, 11 Ill.App.3d 1046, aff'd. 309 N.E.2d 567, 57 Ill.2d 29.

- Mo.—Ellis v. Williams, 312 S.W.2d 97

37. U.S.—State of Okl. v. U.S., 173 F.Supp. 349, 146 Ct.Cl. 185

- Cal.—Davison v. Anderson, 271 P.2d 233, 125 C.A.2d Supp. 908

- Mo.—State v. Ghan, App., 558 S.W.2d 304.

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page 12

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Page 13

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page 14

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page 15

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84. U.S.—Hussey v. Campbell, D.C.Ga., 189 F.Supp. 54, affd. 82 S.Ct. 327, 368 U.S. 297, 7 L.Ed.2d 299, reh. den. 82 S.Ct. 596, 368 U.S. 1005, 7 L.Ed.2d 547—U.S. v. Lewiston Lime Co., C.A. Idaho, 466 F.2d 1358.

Wyo.—Aetna Cas. and Sur. Co. v. Langdon, 624 P.2d 240.

86. Ariz.—State v. Boggs, 441 P.2d 778, 103 Ariz. 328.

87. U.S.—Gunn v. U.S., C.A. Ark., 283 F.2d 358.

Cal.—Duncan v. Garrett, 1 Cal.Rptr. 459, 176 C.A.2d 291—Merchants Fire Assur. Corp. of New York v. Retail Credit Co., 23 Cal.Rptr. 544, 206 C.A.2d 55—People v. Southern Pac. Co., 25 Cal.Rptr. 644, 208 C.A.2d 745.

Conn.—State v. White, Cir.A.D., 193 A.2d 175, 2 Conn. Cir. 1.

Kan.—State v. Gregory, 542 P.2d 1051, 218 Kan. 180.

Ohio—Welsh v. Brown-Graves Lumber Co., 389 N.E.2d 514, 58 Ohio App.2d 49, 12 O.O.3d 192.

88. U.S.—Connelly's Estate v. U.S., D.C.N.J., 398 F.Supp. 815, affd., C.A., 551 F.2d 545.

Kan.—Mobile Acres, Inc. v. Kurata, 508 P.2d 889, 211 Kan. 833.

Tex.—Atlantic Richfield Co. v. Hilton, Civ.App., 437 S.W.2d 347, err. ref. no rev. err., cert. den. 90 S.Ct. 221, 396 U.S. 905, 24 L.Ed.2d 182.

89. N.Y.—M. F. Hickey Co., Inc. v. Imperial Realty Co., Inc., 342 N.Y.S.2d 186, 73 Misc.2d 498.

90. Cal.—Merchants Fire Assur. Corp. of New York v. Retail Credit Co., 23 Cal.Rptr. 544, 206 C.A.2d 55.

92. Cal.—In re Myers' Estate, 41 Cal.Rptr. 151, 230 C.A.2d 465.

94. U.S.—In re Mulcahy, Bkrtcy.Ind., 3 B.R. 454.

Fla.—Massachusetts Bonding & Ins. Co. v. Bryant for Use and Benefit of American Oil Co., App., 175 So.2d 88, affd., Sup., 189 So.2d 614.

Mo.—Crull v. Gleb, App., 382 S.W.2d 17.

N.C.—State v. Prevette, 250 S.E.2d 682, 39 N.C.App. 470, app. after remand 259 S.E.2d 595, 43 N.C. App. 450, app. dism. review den., Sup., 261 S.E.2d 295, cert. den. 100 S.Ct. 2988, 447 U.S. 906, 64 L.Ed.2d 855.

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N.C.—State v. Prevette, 250 S.E.2d 682, 39 N.C.App. 470, app. after remand 259 S.E.2d 595, 43 N.C. App. 450, app. dism. review den., Sup., 261 S.E.2d 295, cert. den. 100 S.Ct. 2988, 447 U.S. 906, 64 L.Ed.2d 855.

- N.J.—State v. Elysee, 388 A.2d 254, 159 N.J. Super. 380.
N.Y.—Beach Haven Apartments No. 4, Inc. v. Wolf, 412 N.Y.S.2d 566, 97 Misc.2d 824.
Wis.—Grams v. Melrose-Mindoro Joint School Dist. No. 1, 254 N.W.2d 730, 78 Wis.2d 569

Time for change of venue

- S.D.—Blair v. Scherie Irrigation Sales Inc., 252 N.W.2d 320.

page 16

96. U.S.—Harris v. American Intern. Fuel & Petroleum Co., D.C.Pa., 124 F.Supp. 878.
La.—Smith v. Northern Ins. Co. of N.Y., App., 120 So.2d 309.
97. La.—Smith v. Northern Ins. Co., of N.Y., App., 120 So.2d 309.
Pa.—Foley Bros. Inc. v. Com. Dept. of Highways, 163 A.2d 80, 400 Pa. 584

Law of damages of another state

- N.Y.—Alfieri v. Cabot Corp., 235 N.Y.S.2d 753, 17 A.D.2d 455, motion den. 192 N.E.2d 272, 13 N.Y.2d 855, 242 N.Y.S.2d 492, affd. 195 N.E.2d 310, 13 N.Y.2d 1027, 245 N.Y.S.2d 600.

Public policy considerations

- N.Y.—Martin v. City of Cohoes, 332 N.E.2d 867, 37 N.Y.2d 162, 371 N.Y.S.2d 687, on remand 377 N.Y.S.2d 757, 50 A.D.2d 1035, app. dsm. 349 N.E.2d 875, 39 N.Y.2d 740, 384 N.Y.S.2d 774, motion den. 352 N.E.2d 588, 39 N.Y.2d 910, 386 N.Y.S.2d 401—Trophy Productions, Inc. v. Cinema-Vue Corp., 385 N.Y.S.2d 70, 53 A.D.2d 18
99. Pa.—Conyer v. Borough of Norristown, 428 A.2d 749, 58 Pa. Cmwlth. 629
2. Idaho—Kershaw v. Pierce Cattle Co., 393 P.2d 31, 87 Idaho 323
7. U.S.—U.S. ex rel Tennessee Valley Authority v. An Easement and Right-of-Way Over Four Tracts of Land, D.C.Tenn., 537 F.Supp. 4, affd., C.A., 698 F.2d 1225.

page 17

10. U.S.—State of Minn., by Spannaus v. Standard Oil Co. (Indiana), D.C.Minn., 516 F.Supp. 682.
Cal.—O'Keefe v. Miller, 42 Cal.Rptr. 343, 231 C.A.2d 920—Big Bear Municipal Water Dist. v. Superior Court for San Bernardino County, 75 Cal.Rptr. 580, 269 C.A.2d 919.
N.Y.—Gimbel Bros. v. Inc. v. Swift, 307 N.Y.S.2d 952, 62 Misc.2d 156.
Tex.—State v. Reeh, Civ.App., 434 S.W.2d 416, err. ref. no rev. err.
12. Cal.—Big Bear Municipal Water Dist. v. Superior Court for San Bernardino County, 75 Cal.Rptr. 580, 269 C.A.2d 919.
13. Effect of rule
Wis.—Fehrenbach v. Fehrenbach, 167 N.W.2d 218, 42 Wis.2d 410.
15. Tenn.—Stewart v. University of Tennessee, 519 S.W.2d 591
25. Ariz.—Velasco v. Mallory, 427 P.2d 540, 5 Ariz. App. 406.
28. Standing
U.S.—Regents of University of California v. Bakke, Cal., 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed.2d 750.
N.C.—Stanley v. Department of Conservation and Development, 199 S.E.2d 641, 284 N.C. 15.

page 18

29. U.S.—Steiner v. 20th Century-Fox Film Corp., C.A.Cal., 120 F.2d 105.
La.—Foshee v. Longino, App., 236 So.2d 870.

Mandatory statutory requirement of written pleading may be waived.^{32,5}

- 32.5. Ill.—People v. Layfield, 212 N.E.2d 112, 65 Ill.App.2d 140
33. S.D.—Foss v. Foss, 163 N.W.2d 354, 83 S.D. 574.

36. Statutory violations invalid

- N.Y.—Millard v. Millard, 385 N.Y.S.2d 215, 87 Misc.2d 477

39. Waiver of personal service

- Cal.—O'Keefe v. Miller, 42 Cal.Rptr. 343, 231 C.A.2d 920

40. Cal.—General Ins. Co. of America v. Superior Court of Alameda County, 124 Cal.Rptr. 745, 541 P.2d 289, 15 C.3d 449.

- Ga.—Minnesota Mut. Life Ins. Co. v. Love, 171 S.E.2d 361, 120 Ga.App. 502.

- La.—Globe Auto. Finance Co. v. Language, App., 261 So.2d 708.

- N.Y.—Burke Supply Co., Inc. v. Amanda's Fryn' High, Inc., 433 N.Y.S.2d 58, 106 Misc.2d 911—Rich v. Lefkovits, 437 N.E.2d 260, 56 N.Y.2d 276, 452 N.Y.S.2d 1

Waiving defense of statute of limitations

- N.Y.—Salesian Soc., Inc. v. Village of Ellenville, 396 N.Y.S.2d 711, 58 A.D.2d 711, app. den., 365 N.E.2d 774, 42 N.Y.2d 810, 399 N.Y.S.2d 1025.

A person may not stipulate contrary to the allegations of his pleading.^{48,5}

- 48.5. Pa.—Gillette Co. v. Master, 182 A.2d 734, 408 Pa. 202.

49. Ala.—McCall v. Morgan, 14 So.2d 374, 244 Ala. 472.

- Ark.—Little v. Farm Bureau Co-op. Mill & Supply, 272 S.W.2d 818, 224 Ark. 289.

- Fla.—Lotspeich Co. v. Neogard Corp., App. 3 Dist., 416 So.2d 1163

- Ky.—C.J.S. cited in Baker v. Reese, 372 S.W.2d 788, 789.

- N.Y.—Nishman v. DeMarco, 430 N.Y.S.2d 339, 76 A.D.2d 360, app. dsm. 420 N.E.2d 979, 53 N.Y.2d 642, 438 N.Y.S.2d 787

- Tex.—First Nat. Bank in Dallas v. Kinabrew, Civ. App., 589 S.W.2d 137, err. ref. no rev. err.

50. Ga.—King v. Steel Builders, 85 S.E.2d 466, 91 Ga. App. 203.

51. U.S.—U.S. v. Reading Co., C.A.Pa., 289 F.2d 7 Cal.—Sarten v. Pomatto, 13 Cal.Rptr. 588, 192 C.A.2d 288.

52. U.S.—Cramer v. Virginia Commonwealth University, D.C.Va., 486 F.Supp. 187

- N.C.—C.J.S. cited in Rural Plumbing & Heating, Inc. v. H. C. Jones Const. Co., 149 S.E.2d 625, 631, 268 N.C. 23.

page 19

55. U.S.—Ute Indian Tribe v. State Tax Commission of State of Utah, C.A.Utah, 574 F.2d 1007, cert. den. 99 S.Ct. 452, 439 U.S. 965, 58 L.Ed.2d 423.

- D.C.—Smith, Kirkpatrick & Co. v. Continental Autos, Limited, D.C., 184 F.Supp. 764.

- N.C.—Nebel v. Nebel, 85 S.E.2d 876, 241 N.C. 491—Rural Plumbing & Heating, Inc. v. H. C. Jones Const. Co., 149 S.E.2d 625, 268 N.C. 23.

56. Cal.—Leonard v. City of Los Angeles 107 Cal. Rptr. 378, 31 C.A.3d 473.

- Colo.—C.J.S. cited in Board of County Com'rs of Garfield County v. Tenbrook, App., 491 P.2d 597, 600.

- N.D.—State v. Unterseher, 255 N.W.2d 882.

- Wash.—State v. Wiley, 613 P.2d 549, 26 Wash.App. 422.

Agreements favored by law

- Ind.—Nix v. State, 166 N.E.2d 326, 240 Ind. 392.
However, a party is entitled to present its evidence live if it elects to do so, and has no obligation to proceed by way of stipulation.

- U.S.—Graphic Realty & Discount Co. v. Home Fire & Marine Ins. Co. of Cal., D.C.Mass., 193 F.Supp. 421.

- Pa.—Com. v. Evans, 348 A.2d 92, 465 Pa. 12.

57. Cal.—People v. Torres, App., 20 Cal.Rptr. 315, cert. den. 83 S.Ct. 89, 371 U.S. 850, 9 L.Ed.2d 86—People v. Bellejos, 30 Cal.Rptr. 725, 216

STIPULATIONS § 10

Page 20

- C.A.2d 286—People v. Davis, 76 Cal.Rptr. 242, 270 C.A.2d 841

- Colo.—C.J.S. cited in Board of County Com'rs of Garfield County v. Tenbrook, 491 P.2d 597, 600.

- Ind.—Schalkie v. State, 396 N.E.2d 384, 272 Ind. 134.

- Mo.—C.J.S. cited in State v. Stead, 473 S.W.2d 714, 715

Polygraph test

- Colo.—People v. Orr, 566 P.2d 1361, 39 Colo.App. 289.

- Ga.—Dein v. Mossman, 262 S.E.2d 83, 244 Ga. 866.

- N.J.—State v. Smith, 362 A.2d 578, 142 N.J. Super. 575.

58. Colo.—C.J.S. cited in Board of County Com'rs of Garfield County v. Tenbrook, App., 491 P.2d 597, 600.

- Ill.—People v. Tilden, 388 N.E.2d 1046, 27 Ill.Dec. 83, 70 Ill.App.3d 859

59. Colo.—C.J.S. cited in Board of County Com'rs of Garfield County v. Tenbrook, App., 491 P.2d 597, 600

60. Ill.—People v. Hall 190 N.E.2d 292, 27 Ill.2d 501—People v. Clark, 208 N.E.2d 126, 59 Ill. App.2d 160.

- Ohio—C.J.S. cited in Markert v. Bosley, 207 N.E.2d 414, 416, 2 Ohio Misc. 109

Attorney fees

- Mont.—Fillbach v. Inland Const. Corp., 584 P.2d 1274, 178 Mont. 374.

62. Ala.—Gulledge v. Frosty Land Foods Intern., Inc., 414 So.2d 60.

- Miss.—Blakeney v. Hawkins, 384 So.2d 1035.

- Mo.—State v. Mercer, 618 S.W.2d 1, cert. den. 102 S.Ct. 432, 454 U.S. 933, 70 L.Ed.2d 240.

Chain of custody

- Ga.—Riley v. State, 226 S.E.2d 922, 237 Ga. 124

63. Ala.—Jones v. Gladney, 339 So.2d 1019.

66. Mass.—Healthco, Inc. v. Zambelis, 321 N.E.2d 671, 2 Mass.App. 914.

70. La.—Delta Equipment & Const. Co. v. Cook, App., 142 So.2d 427.

73. U.S.—U.S. v. Higgins, C.A.Wis., 507 F.2d 808.

page 20

84. Cal.—People v. Poon, 178 Cal.Rptr. 375, 125 C.A.3d 55.

- N.Y.—Frachia v. State, 281 N.Y.S.2d 428, 54 Misc.2d 25.

- Pa.—Mead Johnson & Co. v. Breggar, 189 A.2d 866, 410 Pa. 408.

- Tenn.—Burlison v. State, 501 S.W.2d 801.

85. Cal.—Robinson v. Wilson, 118 Cal.Rptr. 569, 44 C.A.3d 92.

- N.C.—State v. Jones, 243 S.E.2d 118, 294 N.C. 642.

86. U.S.—Sommers Plastic Products Co. v. U.S., Cust.Ct., 268 F.Supp. 490.

- Cal.—Robinson v. Wilson, 118 Cal.Rptr. 569, 44 C.A.3d 92.

- Ill.—People v. Brown, 268 N.E.2d 202, 131 Ill.App.2d 5.

- La.—State v. Jackson, 396 So.2d 1291.

- N.H.—Concord Natural Gas Co. v. City of Concord, 314 A.2d 679, 114 N.H. 54.

88. U.S.—U.S. v. Waterman S.S. Corp., C.A.Ala., 397 F.2d 577.

- Cal.—People v. Washington, 157 Cal.Rptr. 58, 95 C.A.3d 488.

- Mo.—State v. Biddle, 599 S.W.2d 182.

- N.Y.—In re Schrier's Estate, 260 N.Y.S. 610, 145 Misc. 593, motion den. 263 N.Y.S. 539, 147 Misc. 539.

- W.Va.—State v. Frazier, 252 S.E.2d 39.

Polygraph test results

- La.—State ex rel. Fields v. Maggio, 368 So.2d 1016.

A party cannot, by waiver, prohibit the opposing party from introducing proper evidence.^{88,5}

- 88.5. Ga.—Woodring v. State, 202 S.E.2d 696, 130 Ga.App. 247.

- Tenn.—Wilson v. State, Cr.App., 574 S.W.2d 52.

Page 20

89. Additional period of time for depositions N.Y.—Titan Air Conditioning Corp v Chase Manhattan Bank, N.A., 402 N.Y.S.2d 12, 61 A.D.2d 764

95. Cal.—LeVanseler v. LeVanseler, 24 Cal Rptr. 206, 206 C.A.2d 611.

Ill.—People v. Pygott, 211 N.E.2d 382, 64 Ill App 2d 284.

Mich.—People v. Autry, 152 N.W.2d 55, 7 Mich App 480.

Tex.—Austin v Austin, 603 S.W.2d 204, on remand, Civ.App., 619 S.W.2d 290.

97. Me.—Berman v Frendel, 148 A.2d 93, 154 Me 337.

Ohio—State v Washington, 381 N.E.2d 1142, 56 Ohio App.2d 129, 10 O.O.3d 150

98. Ill.—City of Chicago, ex rel. Cohen v Keane, 434 N.E.2d 325, 61 Ill.Dec 172, 105 Ill.App.3d 298

page 21

3. U.S.—U.S. v Harding, 491 F.2d 697. App after remand 507 F.2d 294, cert. den 95 S.Ct. 1437, 420 U.S. 997, 43 L.Ed.2d 679.

Cal.—In re Griffin, 114 Cal Rptr 74, 39 C.A.3d 279 Mo—Home Builders Ass'n of Greater Kansas City v. Kansas City, 464 S.W.2d 5, app after remand 509 S.W.2d 134.

N.C.—Edwards v City of Raleigh, 81 S.E.2d 273, 240 N.C. 137.

Ohio—Peters Motors v. Rodgers, 120 N.E.2d 80, 161 Ohio St 480—Krabill v Gibbs, 235 N.E.2d 514, 14 Ohio St.2d 1.

Pa.—In re Custody of Phillips, 394 A.2d 989, 260 Pa.Super. 402.

Tex.—Sims v State, Cr., 388 S.W.2d 714—Stell v State, Cr., 496 S.W.2d 623.

6. Fla.—Shaheen v. State, App., 228 So.2d 444.

8. U.S.—De La Maza v. U.S., C.A.Cal., 215 F.2d 138—Burststein v. U.S., C.A.Mo., 232 F.2d 19—Minneapolis Brewing Co. v. Merritt, D.C.N.D., 413 F.Supp. 146—Amalgamated Sugar Co. v. U.S., Cust.Ct., 281 F.Supp. 373—U.S. v. Schor, C.A.N.Y., 418 F.2d 26.

Conn.—Houston v. Highway Commissioner, 210 A.2d 176, 152 Conn. 557.

Ga.—Erskine v Klein, 126 S.E.2d 755, 218 Ga. 112.

Ill.—People v. Mikka, 131 N.E.2d 79, 7 Ill.2d 454, cert. den. 76 S.Ct. 656, 350 U.S. 1009, 100 L.Ed. 871, cert. den. 78 S.Ct. 1157, 357 U.S. 910, 2 L.Ed.2d 1160.

Kan.—State v. Young, 614 P.2d 441, 228 Kan. 355

Mich.—People v. Green, 182 N.W.2d 96, 26 Mich.App. 329.

Pa.—Glen Alden Corp. v. Unemployment Compensation Bd. of Review, 150 A.2d 591, 189 Pa.Super. 286.

page 22

9. Ind.—Nix v. State, 166 N.E.2d 326, 240 Ind. 392.

10. U.S.—U.S. v. Bizzard, C.A.Ga., 674 F.2d 1382, cert. den. 103 S.Ct. 305, 459 U.S. 973, 74 L.Ed.2d 286.

Submission on facts which may not be true to obtain advisory opinion discouraged

Minn.—Minnesota Power & Light Co. v. Personal Property Tax, Taxing Dist., City of Fraser, School Dist. No. 695, 182 N.W.2d 685, 289 Minn. 64.

Stipulated facts contrary to record

Ala.—Garrett v. Mathews, D.C.Ala., 474 F.Supp. 594, affd. C.A., 625 F.2d 658, reh. den. 629 F.2d 1349.

14. N.C.—C.J.S. quoted in Swartzberg v. Reserve Life Ins. Co., 113 S.E.2d 270, 277, 252 N.C. 150—C.J.S. quoted in In re Edmundson, 159 S.E.2d 509, 513, 273 N.C. 92.

Pa.—Department of Labor & Industry v. Standard Products Co., 83 Dauph. 121.

Tex.—Snyder v. State, Cr.App., 629 S.W.2d 930, 29 A.L.R. 4th 755

16. U.S.—U. S. v. Cutler, C.A.Cal., 676 F.2d 1245.

Ind.—Brown v. Rodgers, 61 Ind 449.

Mich.—Gillett v Detroit Bd of Trade, 9 N.W. 428, 46 Mich 309

Agreed statement held not sufficient to support judgment

Cal.—Division of Labor Law Enforcement v. Brooks, 38 Cal.Rptr 284, 226 C.A.2d 631.

17. U.S.—Russo v State of N.Y., C.A.N.Y., 672 F.2d 1014, on reh., mod on oth grds 721 F.2d 410

Ind.—Bechert v Bechert, App., 435 N.E.2d 573.

Me—Carey v Cyr, 113 A.2d 614

page 23

24. U.S.—Minneapolis Brewing Co v Merritt, D.C.N.D., 143 F.Supp 146.

25. Cal.—People v. Valles, 154 Cal.Rptr 543, 593 P.2d 240, 24 C.3d 121, 15 A.L.R.4th 1116

N.Y.—Wolf v Assessors of the Town of Hanover, 126 N.E.2d 537, 308 N.Y. 416

Okl.—C.J.S. black letter summary quoted in Ferrell v. State ex rel Dept of Highways, 387 P.2d 129, 132

To try particular issues before new jury

U.S.—O'Donnell v. Watson Bros. Transp. Co., D.C.Ill, 183 F.Supp. 577

Court commissioner may act as judge

Cal.—Rooney v. Vermont Inv. Corp., 515 P.2d 297, 110 Cal.Rptr 353, 515 P.2d 297, 10 C.3d 351—Rosenstock v. Municipal Court of Los Angeles Judicial Dist., 132 Cal Rptr. 59, 61 C.A.3d 1

Course of procedure

Fla.—Clark v Munroe, App. 1 Dist., 407 So.2d 1036.

N.Y.—Rogers v. Niforatos, 394 N.Y.S.2d 473, 57 A.D.2d 984

Waiver of hearing

N.Y.—Abramovich v. Board of Ed. of Central School Dist. No. 1 of Towns of Brookhaven and Smithtown, 403 N.Y.S.2d 919, 62 A.D.2d 252, affd. 386 N.E.2d 1077, 46 N.Y.2d 450, 414 N.Y.S.2d 109, reorg. den. 390 N.E.2d 318, 46 N.Y.2d 1076, 416 N.Y.S.2d 1029, cert. den. 100 S.Ct. 89, 442 U.S. 845, 62 L.Ed.2d 58.

26. Pa.—Hill v. Mayusky, 32 Northumb.L.J. 46.

27. R.I.—Rowell v. Kaplan, 235 A.2d 91, 103 R.I. 60

30. Allowing member of bar to act as judge

N.M.—Doe v. State, 570 P.2d 589, 91 N.M. 51, on remand 572 P.2d 960, 91 N.M. 232.

page 24

42. Kan.—Lardner v. Cook, 103 P.2d 849, 152 Kan. 266.

Miss.—Pearl River Val. Water Supply Dist v. Wood, 172 So.2d 196, 252 Miss. 580.

51. Alaska—Thomson v. Wheeler Const. Co., 385 P.2d 111

52. Ohio—Welsh v Brown—Graves Lumber Co., 389 N.E.2d 514, 58 Ohio App.2d 49, 12 O.O.3d 192.

54. Denial of continuance motion

Cal.—San Bernardino County v. Doria Min. & Engineering Corp., 140 Cal.Rptr. 383, 72 C.A.3d 776

A trial court's role as fact finder should not be usurped by a stipulation on a matter of fact which, in the end, has to be determined by the finder of fact.⁵⁴⁵

54.5. Wis.—Birts v. State, 228 N.W.2d 351, 68 Wis 2d 389

55. Okl.—C.J.S. black letter summary quoted in Ferrell v. State ex rel. Dept. of Highways, 387 P.2d 129, 133.

Pa.—C.J.S. black letter summary quoted in Foote v. Maryland Cas. Co., 186 A.2d 255, 258, 409 Pa. 307

56. Cal.—Linder v. Cooley, 31 Cal.Rptr. 271, 216 C.A.2d 390.

Stipulations may not be used to interfere with the responsibility of the

trial judge of correctly instructing the jury.⁵⁷⁵

57.5. Alaska—Harris v Morns, 531 P.2d 517

Colo—People v Campbell, 589 P.2d 1360, 196 Colo. 390

page 25

62. Stipulation held not binding

Cal.—Valdez v Taylor Auto. Co., 278 P.2d 91, 129 C.A.2d 810

72. N.Y.—Taylor v. State, 404 N.Y.S.2d 714, 63 A.D.2d 748

Wash.—Smyth v Worldwide Movers, Inc v. Whitney, 491 P.2d 1356, 6 Wash App. 176.

Extended purpose of decision

Mass—Marotta v. Board of Appeals of Revere, 143 N.E.2d 270, 236 Mass. 199.

Judgment to be entered on happening of event

U.S.—All States Investors, Inc. v. Bankers Bond Co., C.A.Ky., 343 F.2d 618. Cert den 86 S.Ct 69, 382 U.S. 830, 15 L.Ed.2d 74, reh den. 86 S.Ct. 286, 382 U.S. 922, 15 L.Ed.2d 237.

76. Pa.—Foote v. Maryland Cas. Co., 186 A.2d 255, 409 Pa. 307

Wash.—Smyth Worldwide Movers, Inc. v. Whitney, 491 P.2d 1356, 6 Wash.App. 176.

77. Mont.—Heller v. Osburnsen, 548 P.2d 607, 169 Mont. 459.

W.Va.—State ex rel. Mynes v. Kessel, 158 S.E.2d 896, 152 W.Va. 37.

page 26

89. Ill.—People ex rel. Scott v. Janson, 312 N.E.2d 620, 57 Ill.2d 451.

Other stipulations

U.S.—Geiger v. Keilani, D.C.Mich., 270 F.Supp 761—Burleson v. Coastal Recreation, Inc., C.A.Tex., 572 F.2d 509, reh. gr 577 F.2d 354, dissolution of embankment ordered 595 F.2d 332.

Cal.—Hehr v. Swendseid, 52 Cal.Rptr. 107, 243 C.A.2d 142.

Fla.—Jackson v. State, App., 382 So.2d 749.

Ill.—Parker v Board of Trustees of Southern Illinois University, 220 N.E.2d 258, 74 Ill.App.2d 467.

Mo—State ex rel. Lucas v. Moss, 498 S.W.2d 289, 66 A.L.R.3d 630.

N.Y.—H.A.E.F.F. Realty Corp. v. J.P.G. Restaurant Corp., 270 N.Y.S.2d 335, 50 Misc.2d 266—Grinnell Corp. v. American Dist. Tel. Co., 302 N.Y.S.2d 198, 32 A.D.2d 901, motion gr. 254 N.E.2d 914, 25 N.Y.2d 684, 306 N.Y.S.2d 685.

Pa.—Rizzetto v. F. W. Wint Co., 33 D. & C.2d 215, 30 Leh.L.J. 370.

90. Fla.—B & B Const. Co. of Ohio, Inc. v. Rinker Materials Corp., App., 294 So.2d 131.

Stipulation invalid

U.S.—Life Assur. Soc. of U.S. v. MacGill, C.A.Fla., 551 F.2d 978, reh. den. 554 F.2d 1065.

N.Y.—Bernard v. Kuha, 394 N.Y.S.2d 782, 90 Misc.2d 148.

Wash.—Petersen v. Port of Seattle, 618 P.2d 67, 94 Wash.2d 479.

99. N.J.—Eden v. Conrail, 418 A.2d 278, 175 N.J. Super. 263, mod. on oth. grds. 435 A.2d 556, 87 N.J. 467.

§ 11. Construction in General

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3. U.S.—Azevedo v. C.I.R., C.A., 246 F.2d 196—U.S. v. Fallbrook Public Utility Dist., D.C.Cal., 165 F.Supp. 806—Andersen v. C.I.R., C.A.Or., 341 F.2d 584—Ace Lines, Inc. v. U.S., D.C.Iowa, 239 F.Supp. 804—Davis v. Mathews, C.A.W.Va., 361 F.2d 899.

Ala.—C.J.S. cited in In re Carroll, 247 So.2d 350, 354, 287 Ala. 29.

Alaska—Godfrey v. Hemenway, 617 P.2d 3.

Ariz.—Bekins Van & Storage Co. v. Industrial Commission, 422 P.2d 400, 4 Ariz.App. 569

Cal.—Domarad v. Fisher & Burke, Inc., 76 Cal.Rptr. 529, 270 C.A.2d 543.

Colo.—Police Pension and Relief Bd. v. Behnke, 353 P.2d 370, 143 Colo 365

D.C.—National Welfare Rights Organization v. Richardson, D.C., 334 F.Supp. 488.

Fla.—Lesperance v. Lesperance, App., 257 So.2d 66

Ga.—Womble v. Womble, 183 S.E.2d 747, 228 Ga. 10

Ill.—Long v. Kissner, 279 N.E.2d 146, 3 Ill.App.3d 730.

Iowa—In re Williams' Estate, 216 N.W.2d 568

Mass.—Com. v. Marinucci Bros. & Co., 242 N.E.2d 418, 354 Mass. 743—Loranger Const. Co. v. C. Franklin Corp., 247 N.E.2d 391, 355 Mass. 727.

Mich.—Mayberry v. Addison, 191 N.W.2d 504, 34 Mich.App. 462—Daul v. Dewey, 195 N.W.2d 309, 37 Mich.App. 708—C.J.S. quoted in Kline v. Kline, 284 N.W.2d 488, 493, 92 Mich.App. 62.

N.J.—Sheeran v. Sitren, 403 A.2d 53, 168 N.J.Super. 402.

N.M.—In re Quantius' Will, 277 P.2d 306, 58 N.M. 807—Brock v. Harkins, App., 458 P.2d 848, 80 N.M. 596, cert. den. 458 P.2d 859, 80 N.M. 607—Anderson v. Jenkins Const. Co., App., 487 P.2d 1352, 83 N.M. 47.

N.Y.—Rando v. Impresa Navigazioni Commerciali, S.A., 173 N.Y.S.2d 375, 9 Misc.2d 576—S. J. Groves & Sons Co. v. State, 275 N.Y.S.2d 693, 27 A.D.2d 637—Warren v. Vick Chemical Co., 325 N.Y.S.2d 495, 37 A.D.2d 913—City of Binghamton v. Arlington Hotel, Inc., 326 N.Y.S.2d 296, 38 A.D.2d 622—L. Roseman Corp. v. Dormitory Authority, 328 N.Y.S.2d 886, 38 A.D.2d 809, affd. 290 N.E.2d 823, 31 N.Y.2d 768, 338 N.Y.S.2d 623

N.D.—Rummel v. Rummel, 234 N.W.2d 848

Ohio—Henslee v. State Personnel Bd. of Review, 239 N.E.2d 121, 15 Ohio App.2d 84—Farm Bureau Agr. Credit Corp. v. Dicke, 277 N.E.2d 562, 29 Ohio App.2d 1.

Okl.—Lillard Pipe & Supply, Inc. v. Bailey, 387 P.2d 118.

Or.—Landolt v. Flame, Inc., 492 P.2d 785, 261 Or. 243.

Pa.—DeCarbo v. Borough of Ellwood City, 284 A.2d 342, 3 Pa.Cmwlth. 569—C.J.S. cited in Longenecker v. Matway, 462 A.2d 261, 263, 315 Pa.Super. 411.

Tex.—Westridge Villa Apartments v. Lakewood Bank & Trust Co., Civ.App., 438 S.W.2d 891, err. ref. no rev. err.—C. Hayman Const. Co. v. American Indem. Co., Civ.App., 473 S.W.2d 62.

Wash.—Turner v. City of Walla Walla, 517 P.2d 985, 10 Wash.App. 401.

W.Va.—State ex rel. Scott v. Taylor, 160 S.E.2d 146, 152 W.Va. 151.

Wis.—Burner v. Wille, 141 N.W.2d 895, 30 Wis.2d 658

Ambiguous stipulations

(2) Construed strongly against preparing party.

Cal.—Bree v. Beall, 171 Cal.Rptr. 73, 114 C.A.3d 650.

N.Y.—In re Mintzer's Will, 286 N.Y.S.2d 879, 29 A.D.2d 792.

(3) Other matters.

U.S.—Lubin v. U.S., C.A.Cal., 313 F.2d 419—Ideal Basic Industries, Inc. v. Morton, C.A.Alaska, 542 F.2d 1364.

Tex.—Jackson v. Lewis, Civ.App., 554 S.W.2d 21.

Wis.—Kovarik v. Vesely, 89 N.W.2d 279, 3 Wis.2d 573.

By court

(3) Other matters.

U.S.—American Airlines, Inc. v. City of Philadelphia, D.C.Pa., 414 F.Supp. 1226.

Pa.—Appel Vending Co. v. 1601 Corp., 203 A.2d 812, 204 Pa.Super. 243.

Question of law

U.S.—Los Angeles Shipbuilding & Drydock Corp. v. U.S., C.A.Cal., 289 F.2d 222.

N.D.—Park View Manor, Inc. v. Housing Authority of Stutsman County, 300 N.W.2d 218.

Exhibit attached

U.S.—Gourlielli's Estate v. C.I.R., C.A., 289 F.2d 69, revd on oth. grds. 82 S.Ct. 1080, 369 U.S. 672, 8 L.Ed.2d 187

Arbitration agreements

Tex.—Aguilar v. Abraham, Civ.App., 588 S.W.2d 599

Parol evidence not admissible

U.S.—In re W. T. Grant Co., D.C.N.Y., 1 B.R. 516

page 27

4. U.S.—Giannini v. Standard Oil Co., D.C.Ind., 130 F.Supp. 740—U.S. v. Reading Co., C.A.Pa., 289 F.2d 7

Alaska—C.J.S. cited in Godfrey v. Hemenway, 617 P.2d 3, 8.

Ariz.—Harsh Bldg. Co. v. Bialac, 529 P.2d 1185, 22 Ariz.App. 591.

Cal.—Sanserino v. Shamberger, 54 Cal.Rptr. 206, 245 C.A.2d 630—First & C Corp. v. Wencke, 61 Cal.Rptr. 531, 253 C.A.2d 719—Garrett v. Shenson Meat Co., 85 Cal.Rptr. 65, 5 C.A.3d 69

Colo.—Bemis Co. v. Fimble, App., 470 P.2d 88.

Conn.—Foley v. Foley, 181 A.2d 607, 149 Conn. 469

Fla.—Chung-Ling Yu v. Crser, App., 330 So.2d 198.

Ill.—Kazubowski v. Kazubowski, 235 N.E.2d 664, 93 Ill.App.2d 126, cert. den. 89 S.Ct. 993, 393 U.S. 1117, 22 L.Ed.2d 122.

Iowa—C.J.S. cited in Hawkins/Korshoj v. State Bd. of Regents, 255 N.W.2d 124, 126

La.—State, Through Dept. of Highways v. Salles, App., 387 So.2d 1278, writ ref., Sup., 393 So.2d 744.

Mo.—Landers v. Smith, App., 379 S.W.2d 884—Pierson v. Allen, 409 S.W.2d 127.

N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280

N.Y.—O'Brien v. Assessor of Town of Mamaroneck, 232 N.E.2d 844, 20 N.Y.2d 587, 285 N.Y.S.2d 843—In re Shulsky's Estate, 309 N.Y.S.2d 84, 34 A.D.2d 545, app. dismissed, 263 N.E.2d 391, 27 N.Y.2d 743, 314 N.Y.S.2d 993—Cullen v. Naples, 291 N.E.2d 587, 31 N.Y.2d 818, 339 N.Y.S.2d 464, on remand 341 N.Y.S.2d 21, 41 A.D.2d 671, affd. 299 N.E.2d 898, 32 N.Y.2d 878, 346 N.Y.S.2d 533.

N.C.—Rickert v. Rickert, 193 S.E.2d 79, 282 N.C. 373

Ohio—City of Cincinnati v. Dale, 252 N.E.2d 287, 20 Ohio St.2d 32.

Okl.—Howell v. Blue Cross and Blue Shield of Oklahoma, 609 P.2d 1283.

Pa.—Foote v. Maryland Cas. Co., 109 P.L.J. 465, mod. on oth. grds. 186 A.2d 255, 409 Pa. 307—Com ex rel. Boatwright v. Hendrick, 260 A.2d 763, 436 Pa. 326—C.J.S. cited in Longenecker v. Matway, 462 A.2d 261, 263, 315 Pa.Super. 411

S.C.—Webster v. Holly Hill Lumber Co., 234 S.E.2d 232, 268 S.C. 416.

Vt.—Eunich v. Coffee-Rich, Inc., 298 A.2d 846, 130 Vt. 537.

Wis.—C.J.S. cited in D'Angelo v. Cornell Paperboard Products Co., 147 N.W.2d 321, 326, 33 Wis.2d 218.

Defects

(1) Cannot be supplied, under guess of construction, by the courts inserting an essential element, such as the subject matter to which the agreement shall apply.

U.S.—Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., C.A.Fla., 270 F.2d 635.

(2) Nor can a defect be remedied by any conduct of the parties which falls short of an agreement of itself or an estoppel.

U.S.—Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., C.A.Fla., 270 F.2d 635.

(3) Nor can such deficiency be supplied by one party without the assent of the other, whether attempted by testimony or otherwise.

U.S.—Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., C.A.Fla., 270 F.2d 635.

Desired results

Mo.—State v. Jones, App., 539 S.W.2d 317, app. after remand, 549 S.W.2d 925.

Question of fact

U.S.—WO Co. v. Benjamin Franklin Corp., C.A.N.H., 562 F.2d 1339

5. Ariz.—Gear v. City of Phoenix, 379 P.2d 972, 93 Ariz. 260.

N.H.—D. Latchis, Inc. v. Borofsky Bros., Inc., 343 A.2d 637, 115 N.H. 401

Objective standard

Cal.—Consolidated Dock & Storage Co. v. Superior Court of Los Angeles County, 96 Cal.Rptr. 254, 18 C.A.3d 949

Wis.—Wright v. Wright, 284 N.W.2d 894, 92 Wis.2d 246, cert. den. 100 S.Ct. 1600, 445 U.S. 951, 63 L.Ed.2d 786

6. U.S.—U.S. v. Championship Sports, Inc., D.C. N.Y., 284 F.Supp. 501—Chouest v. A & P Boat Rentals, Inc., C.A.La., 472 F.2d 1026, cert. den. 93 S.Ct. 3012, 412 U.S. 949, 37 L.Ed.2d 1002.

Ala.—In re Carroll, 247 So.2d 350, 287 Ala. 25.

Ark.—Rasmussen v. Reed, 505 S.W.2d 222, 255 Ark. 1064.

Cal.—Harris v. Spinali Auto Sales, Inc., 20 Cal.Rptr. 586, 202 C.A.2d 215—Haseltine v. Haseltine, 21 Cal.Rptr. 238, 203 C.A.2d 48.

Colo.—State Highway Dept. v. Swift 270 P.2d 751, 129 Colo. 413.

Del.—Application of Wilmington Suburban Water Corp., Super., 203 A.2d 817, 8 Storey 8, affd. in part, Sup., 211 A.2d 602, 8 Storey 494.

Fla.—Woods v. Greater Naples Care Center, App. 1 Dist., 406 So.2d 1172, review den. 413 So.2d 876.

Ill.—Shrout v. McDonald's System, Inc., 234 N.E.2d 45, 90 Ill.App.2d 60, cert. den. 89 S.Ct. 375, 393 U.S. 951, 21 L.Ed.2d 363

Mo.—State ex rel. Emge v. Corcoran, App., 468 S.W.2d 724.

N.J.—Department of Health v. Passaic Valley Sewerage Commission, 242 A.2d 675, 100 N.J.Super. 540, affd. 253 A.2d 577, 105 N.J.Super. 565—State v. Hollander, 493 A.2d 563, 201 N.J.Super. 453.

N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280.

N.Y.—Pereira v. Pereira, 319 N.E.2d 413, 35 N.Y.2d 301, 361 N.Y.S.2d 148.

N.C.—Noble v. Noble, 196 S.E.2d 62, 18 N.C.App. 111.

Tex.—Texas General Indem. Co. v. Jones, Civ.App., 601 S.W.2d 194.

Wash.—McCadam v. Hoshor, 503 P.2d 756, 7 Wash. App. 913

W.Va.—State ex rel. Scott v. Taylor, 160 S.E.2d 146, 152 W.Va. 151.

Wis.—Poeske v. Estreen, 198 N.W.2d 625, 55 Wis.2d 238.

7. U.S.—Reese v. C.I.R., C.A., 615 F.2d 226.

Ariz.—Gear v. City of Phoenix, 379 P.2d 972, 93 Ariz. 260.

Ind.—C.J.S. cited in Groves v. Burton, 123 N.E.2d 705, 706, 125 Ind.App. 302.

Md.—C.J.S. cited in Rosello v. Friedel, 220 A.2d 537, 542, 243 Md. 234.

N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280.

S.C.—C.J.S. cited in Suddeth v. Knight, App., 314 S.E.2d 11, 14, 280 S.C. 540.

Tex.—Jackson v. Lewis, Civ.App., 554 S.W.2d 21

8. U.S.—A & A Sign Co. v. Maughan, C.A.Ariz., 419 F.2d 1152.

Mich.—Whitley v. Chrysler Corp., 130 N.W.2d 26, 373 Mich. 469.

N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280.

N.Y.—In re Stillman's Estate, 371 N.Y.S.2d 78, 82 Misc.2d 736—Plateis v. Flax, 388 N.Y.S.2d 245, 54 A.D.2d 813.

N.C.—Owen v. Claude De Bruhl Agency, 86 S.E.2d 197, 241 N.C. 597.

S.C.—C.J.S. cited in Suddeth v. Knight, App., 314 S.E.2d 11, 14, 280 S.C. 540.

Tex.—Mann v. Fender, Civ.App., 587 S.W.2d 188, err. ref. no rev. err.

Waiver established

Alaska—Storrs v. Lutheran Hospitals and Homes Soc. of America, Inc., 609 P.2d 24, app. after remand 661 P.2d 632.

Colo.—Andreatta v. Andreatta, App., 537 P.2d 748

Fla.—Pritchett v. Kerr, App., 354 So.2d 972.

Ga.—Hodges v. Hodges, 221 S.E.2d 597, 235 Ga. 848

Page 27

Neb—State v. Dandridge, 312 N.W.2d 286, 209 Neb 885.
 N.M.—State v. DeSantos, App., 575 P.2d 612, 91 N.M. 428.
 Wash—Mahomet v. Hartford Ins. Co., 477 P.2d 191, 3 Wash App 560.
 9. Alaska—Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027.
 10. U.S.—Glens Falls Ins. Co. v. Gray, C.A.Fla., 386 F.2d 520.
 Ind—City of Cannelton v. Lewis, 111 N.E.2d 899, 123 Ind.App. 473.
 N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280—Crabtree v. Measday, 508 P.2d 1317, 85 N.M. 20, cert. den. App., 508 P.2d 1302, 85 N.M. 5.
 N.D.—Chapin v. Letcher, 93 N.W.2d 415.
 Or.—In re Comings' Estate, 299 P.2d 612, 208 Or. 63.
 11. U.S.—In re Air & Space Mfg., Inc., C.A.Ind., 394 F.2d 900, cert. dismissed 89 S.Ct. 40, 393 U.S. 801, 21 L.Ed.2d 85—C.J.S. cited in U.S. v. 133.79 Acres of Land, More or Less, in Sebastian County, Ark., D.C.Ark., 313 F.Supp. 697, 702.
 Cal.—Hillman v. Stults, 70 Cal.Rptr. 295, 263 C.A.2d 848—Bookstein v. Bookstein, 86 Cal.Rptr. 495, 7 C.A.3d 219.
 N.J.—Sheeran v. Sitren, 403 A.2d 53, 168 N.J.Super. 402.
 N.Y.—People v. Myers, 392 N.Y.S.2d 59, 56 A.D.2d 854.
 Tex.—O'Conner v. State, Cr., 401 S.W.2d 237.
Violation of stipulated agreement not shown
 N.H.—Kilroe v. Troast, 376 A.2d 131, 117 N.H. 598.
 N.Y.—Edwards v. Christian, 403 N.Y.S.2d 119, 61 A.D.2d 1045, aff'd 389 N.E.2d 141, 46 N.Y.2d 964, 415 N.Y.S.2d 828.
 page 28
 13. Ind.—City of Cannelton v. Lewis, supra, n. 10.
 N.M.—Southern Union Gas Co. v. Cantrell, 261 P.2d 645, 57 N.M. 612—In re Quantus' Will, 277 P.2d 306, 58 N.M. 807—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280—Parks v. Parks, 574 P.2d 588, 91 N.M. 369.
 N.C.—Norfolk Southern Ry. Co. v. Horton, 165 S.E.2d 6, 3 N.C.App. 383.
 Pa.—Heidelberg Tp. v. C & H Development Co., Inc., 414 A.2d 745, 51 Pa.Cmwlth. 418.
 Tex.—O'Conner v. State, Cr., 401 S.W.2d 237—Bohin v. State, Cr., 475 S.W.2d 241.
 14. N.M.—Southern Union Gas Co. v. Cantrell, supra, n. 13.
 15. N.M.—Southern Union Gas Co. v. Cantrell, supra, n. 13.
 16. U.S.—C.J.S. quoted in U.S. v. 133.79 Acres of Land, More or Less, in Sebastian County, Ark., 313 F.Supp. 697, 702.
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 17. Cal.—Bookstein v. Bookstein, 86 Cal.Rptr. 495, 7 C.A.3d 219.
 Ky.—City of Murray v. Com., App., 584 S.W.2d 403.
 18. Cal.—Baker v. Solari, 333 P.2d 791, 166 C.A.2d 472.
 Ind.—City of Cannelton v. Lewis, supra, n. 10.
 19. Ill.—People v. Joe, 201 N.E.2d 416, 31 Ill.2d 220—ITT Abrasive Products Co. v. Lewis, App., 298 N.E.2d 242, 12 Ill.App.3d 83.
 N.Y.—Columbia Broadcasting System, Inc. v. Roskin Distributors, Inc., 294 N.Y.S.2d 804, 31 A.D.2d 22, aff'd 268 N.E.2d 128, 28 N.Y.2d 559, 319 N.Y.S.2d 449.
"Relied upon"
 U.S.—Meyer's Estate v. C.I.R., C.A.Ala., 200 F.2d 592.
"Charter"
 Tenn.—Hickerson v. Flannery, 302 S.W.2d 508, 42 Tenn.App. 329.
"Reasonable time"
 Okl.—Petroleum Reserve Corp. v. Dierksen, 623 P.2d 602.

page 29

31. Ill.—Lawson v. G. D. Searle & Co., 356 N.E.2d 779, 1 Ill.Dec. 497, 64 Ill.2d 543.
 39. Iowa—C.J.S. quoted in State v. Marti, 290 N.W.2d 570, 587.
 Or.—Western Bank v. Western Bancorporation, 617 P.2d 258, 47 Or.App. 191.
 40. Mich.—C.J.S. quoted at length in Whitley, v. Chrysler Corp., 130 N.W.2d 26, 29, 373 Mich. 469.
 Pa.—C.J.S. quoted at length in Foote v. Maryland Cas. Co., 186 A.2d 255, 258, 409 Pa. 307.
 Tex.—C.J.S. cited in Peat, Marwick, Mitchell & Co. v. Sharp, Civ.App., 585 S.W.2d 905, 909, err. ref. no rev. err.
 41. U.S.—Bond v. Floyd, Ga., 87 S.Ct. 339, 385 U.S. 116, 17 L.Ed.2d 235.
 Ariz.—Gear v. City of Phoenix, 379 P.2d 972, 93 Ariz. 260.
 D.C.—National Audubon Soc., Inc. v. Watt, C.A., 678 F.2d 299, 219 U.S.App.D.C. 435.
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 N.J.—Sheeran v. Sitren, 403 A.2d 53, 168 N.J.Super. 402.
 N.M.—Griego v. Hogan, 377 P.2d 953, 71 N.M. 280.
 N.Y.—Jay v. Friedrich Bros., 140 N.Y.S.2d 405.
 N.C.—Rickert v. Rickert, 193 S.E.2d 79, 282 N.C. 373.
 Pa.—C.J.S. cited in Edwards v. Donley, 297 A.2d 149, 150, 223 Pa.Super. 71.
 Vt.—In re Neglected Child, 296 A.2d 250, 130 Vt. 525.
 Wis.—D'Angelo v. Cornell Paperboard Products Co., 147 N.W.2d 321, 33 Wis.2d 218.
 42. Ind.—City of Cannelton v. Lewis, supra, n. 10.
 N.Y.—O'Brien v. Assessor of Town of Mamaroneck, 232 N.E.2d 844, 20 N.Y.2d 587, 285 N.Y.S.2d 843.
Stipulation contrary to record held improper
 U.S.—Schwarzkopf v. John H. Breck, Inc., 340 F.2d 978, 52 CCPA 957.
 44. Ind.—City of Cannelton v. Lewis, 111 N.E.2d 899, 123 Ind.App. 473.
 Tex.—C.J.S. cited in Peat, Marwick, Mitchell & Co. v. Sharp, Civ.App., 585 S.W.2d 905, 909, err. ref. no rev. err.
 45. U.S.—Springfield Television, Inc. v. City of Springfield, Mo., C.A.Mo., 462 F.2d 21.
 Colo.—Denver Urban Renewal Authority v. Steiner Am. Corp., 500 P.2d 983, 31 Colo.App. 125.
 Iowa—C.J.S. cited in Hawkins/Korschoj v. State Bd. of Regents, 255 N.W.2d 124, 127.
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 N.C.—Outer Banks Contractors, Inc. v. Forbes, 276 S.E.2d 375, 302 N.C. 599.
 46. Ill.—People v. Pehl, 285 N.E.2d 612, 6 Ill.App.3d 296.
 page 30
 47. Ariz.—Gear v. City of Phoenix, 379 P.2d 972, 93 Ariz. 260.
 48. Conn.—Foley v. Foley, 181 A.2d 607, 149 Conn. 469.
 Mich.—C.J.S. quoted in Whitley v. Chrysler Corp., 130 N.W.2d 26, 29, 373 Mich. 469.
Particular stipulations construed
 U.S.—Sanchez v. Maher, C.A.Conn., 560 F.2d 1105.
 51. N.Y.—C.J.S. quoted at length in Shlakman v. Board of Higher Ed. of City of New York, 161 N.Y.S.2d 529, 534, 5 Misc.2d 901—Vendall, Inc. v. Statler Mfg. Corp., 171 N.Y.S.2d 938, 5 A.D.2d 882.
 52. Cal.—C.J.S. cited in City of Burbank v. Nordahl, 18 Cal.Rptr. 710, 719, 199 C.A.2d 311—Spillman v. U.S., C.A.Ariz., 413 F.2d 527, cert. den. 90 S.Ct. 265, 396 U.S. 930, 24 L.Ed.2d 228.
 Mont.—Richardson Const. Co. v. State Bd. of Equalization, 443 P.2d 36, 151 Mont. 327.
 N.Y.—In re Mintzer's Will, 286 N.Y.S.2d 879, 29 A.D.2d 792—A. E. Ottaviano, Inc. v. State, 299 N.Y.S.2d 938, 32 A.D.2d 87.
 Tex.—Zeller v. University Sav. Ass'n, Civ.App., 580 S.W.2d 658.
 Utah—Rees v. Archibald, 311 P.2d 788, 6 Utah 2d 264.
Inference drawn from what stipulation fails to say
 U.S.—Vanity Fair Paper Mills, Inc. v. F.T.C., C.A.N.Y., 311 F.2d 480.
 53. U.S.—Rockport Yacht & Supply Co. v. M/V Contessa, D.C.Tex., 209 F.Supp. 396.
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page 31

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page 32

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Page 32

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No meeting of minds

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Erroneous application

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page 33

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Particular transactions

- (3) Other transactions.

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Pre-trial conference stipulation not bar

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Subsidiary of parent corporation

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Trustee bound

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Municipalities

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Pre-trial stipulation

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page 34

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- Cal.—Los Angeles County v. Bartlett, 21 Cal.Rptr. 776, 203 C.A.2d 523

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- Ill.—People v. Baynes, 430 N.E.2d 1070, 58 Ill.Dec. 819, 88 Ill.2d 225

- N.Y.—William Higgins & Sons, Inc. v. State, 231 N.E.2d 285, 20 N.Y.2d 425, 284 N.Y.S.2d 425—In re Mintzer's Will, 286 N.Y.S.2d 879, 29 A.D.2d 792—Maiucco v. Rebusman, 285 N.Y.S.2d 497, 55 Misc.2d 453

- Pa.—Borg-Warner Corp. v. Board of Finance and Revenue, 227 A.2d 153, 424 Pa. 343

- S.C.—Fischl v. Fischl, 251 S.E.2d 743, 272 S.C. 297

- Wash.—State ex rel. Carroll v. Gatter, 260 P.2d 360, 43 Wash.2d 153

- One may not escape the effect of one's binding stipulation on the ground that it may not be binding on others.^{87.5}

- 87.5. Tex.—Ex parte Southland Independent School Dist., Civ.App., 518 S.W.2d 921

89. U.S.—Laird v. Air Carrier Engine Service, Inc., C.A. Fla., 263 F.2d 948—Gresham & Co., Inc. v. U.S., 470 F.2d 542, 200 Ct.Cl. 97

- Ark.—Arkansas State Highway Commission v. Triplett, 389 S.W.2d 439, 239 Ark. 354

- Cal.—In re Francis W., 117 Cal.Rptr. 277, 42 C.A.3d 892

- D.C.—Pitts v. U.S., Mun.App., 95 A.2d 588

- Ill.—Kazubowski v. Kazubowski, 235 N.E.2d 664, 93 Ill.App.2d 126, cert. den. 89 S.Ct. 993, 393 U.S. 1117, 22 L.Ed.2d 122

- La.—Campbell v. Prejean, App., 392 So.2d 747

- Minn.—Burner Service & Construction Controls Co., Inc. v. City of Minneapolis, 250 N.W.2d 224, 312 Minn. 104

- Mo.—Williams v. Wilder, App., 397 S.W.2d 696

- Nev.—Second Baptist Church of Reno v. Mount Zion Baptist Church, 466 P.2d 212, 86 Nev. 164

- N.H.—Hayes v. State, 252 A.2d 431, 109 N.H. 353

- N.M.—Snyders v. Hale, App., 557 P.2d 583, 89 N.M. 734, cert. den. 558 P.2d 620, 90 N.M. 8

- N.C.—Thomas v. Poole, 282 S.E.2d 515, 54 N.C.App. 239, review den. 287 S.E.2d 902, 304 N.C. 733

- Tex.—Matthews v. State, Cr., 414 S.W.2d 938

- Wash.—Riordan v. Commercial Travelers Mut. Ins. Co., 525 P.2d 804, 11 Wash.App. 707

Change of counsel

- U.S.—Marden v. International Ass'n of Machinists and Aerospace Workers, C.A. Fla., 576 F.2d 576

- Ga.—Grizzle v. Federal Land Bank of Columbia, 244 S.E.2d 362, 145 Ga.App. 385

§ 14. Persons Concluded

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Cal.—People v. Nelson, 32 Cal.Rptr. 675, 218 C.A.2d 359.

91. Ind.—Music v. State, 161 N.E.2d 615, 240 Ind. 54.

Mont.—Counts v. Chapman, 589 P.2d 151, 180 Mont. 102.

N.Y.—Wolf v. Wolf, 167 N.Y.S.2d 798, 4 A.D.2d 952, motion gr. 175 N.Y.S.2d 167, 4 N.Y.2d 924, 151 N.E.2d 352.

W.Va.—Butler v. Smith's Transfer Corp., 128 S.E.2d 32, 147 W.Va. 402.

page 35

92. Cal.—Green v. Linn, 26 Cal.Rptr. 889, 210 C.A.2d 762.

93. U.S.—U.S. v. Town of Clarksville, Va., C.A.Va., 224 F.2d 712.

94. U.S.—U.S. v. Fallbrook Public Utility Dist., D.C. Cal., 165 F.Supp. 806—U.S. v. 237,500 Acres of Land, More or Less, in Counties of Inyo and Kern, State of Cal., D.C.Cal., 236 F.Supp. 44, aff'd, C.A., 404 F.2d 336.

Cal.—In re Thatcher's Estate, 262 P.2d 337, 120 C.A.2d 811.

Mass.—Perkins School for the Blind v. Rate Setting Commission, 423 N.E.2d 765, 383 Mass. 825.

N.Y.—Fisher v. Levine, 325 N.E.2d 151, 36 N.Y.2d 146, 365 N.Y.S.2d 828.

Wis.—City of Manitowoc v. Manitowoc Police Dept., 236 N.W.2d 231, 70 Wis.2d 1006.

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N.Y.—Haydon v. Proskauer, 120 N.Y.S.2d 322, 281 App.Div. 483.

Prosecuting attorney

N.Y.—People v. Prado, 365 N.Y.S.2d 943, 81 Misc.2d 710.

95. La.—Livingston Supply Co. v. American Emp. Ins. Co., App., 216 So.2d 158, writ ref. 218 So.2d 902, 253 La. 627, writ ref. 227 So.2d 596, 254 La. 860.

97. Cal.—People v. Ward, 258 P.2d 86, 118 C.A.2d 604.

Ga.—Snell v. State, 282 S.E.2d 408, 158 Ga.App. 860.

Ill.—People v. Clark, 208 N.E.2d 126, 59 Ill.App.2d 160.

Ohio—State v. Robbins, 199 N.E.2d 742, 176 Ohio St. 362—Brookhart v. Haskins, 205 N.E.2d 911, 2 Ohio St.2d 36, rev'd. on oth. grds. 86 S.Ct. 1245, 384 U.S. 1, 16 L.Ed.2d 314.

Where a stipulation is tantamount to a guilty plea, the trial court must be careful to insure that accused understands the consequences of a stipulated trial.^{97.5}

97.5. D.C.—Glenn v. U.S., App., 391 A.2d 772.

98. U.S.—Desmarais v. Gentle, C.A.Me., 342 F.2d 754.

1. U.S.—Wilkinson v. Abrams, D.C.Pa., 81 F.R.D. 52.

Ariz.—In re Wiswall's Estate, 464 P.2d 634, 11 Ariz. App. 314.

Miss.—Roberts v. James Mfg. Co., 197 So.2d 808.

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Cal.—In re Majtan's Estate, 46 Cal.Rptr. 561, 237 C.A.2d 7—Patterson v. Sharp, 89 Cal.Rptr. 396, 10 C.A.3d 990.

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Conn.—Southern New England Tel. Co. v. Public Utilities Commission, 328 A.2d 695, 165 Conn. 114.

Fla.—State Road Dept. v. Bramlett, App., 179 So.2d 137, rev'd. on oth. grds. and rem'd. 189 So.2d 481.

Idaho—C.J.S. cited in Arnett v. Throop, 272 P.2d 308, 310, 75 Idaho 331.

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Ind.—Hawkins v. Hawkins, 309 N.E.2d 177, 160 Ind. App. 5.

Iowa—Worden v. Sioux City, 152 N.W.2d 192, 260 Iowa 1219.

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Mo.—Frankel v. Moskovitz, App., 503 S.W.2d 428.

Nev.—Nevada Indus. Commission v. Bibb, 358 P.2d 360, 77 Nev. 8.

N.Y.—Topolski v. Pietrzykowski, 121 N.Y.S.2d 219, 281 App.Div. 1009—First Federal Sav. & Loan Ass'n of Kingston v. Soura, 228 N.Y.S.2d 876, 33 Misc.2d 54.

N.C.—Buncombe County Bd. of Health v. Brown, 156 S.E.2d 708, 271 N.C. 401.

Tex.—C.J.S. cited in Gilley v. Morse, Civ.App., 375 S.W.2d 569, 570—Hough v. Johnson, Civ.App., 456 S.W.2d 775—Best Inv. Co. v. Hernandez, Civ. App., 479 S.W.2d 759, err. ref. no rev. err.—C.J.S. cited in United Services Auto. Ass'n v. Ratterree, Civ.App., 512 S.W.2d 30, 34, err. ref. no rev. err.

Utah—First of Denver Mortg. Investors v. C. N. Zundel and Associates, 600 P.2d 521.

Wash.—Murphy v. City of Seattle, 647 P.2d 540, 32 Wash.App. 386.

Party in default bound

Mich.—Unger v. Forest Home Tp., 237 N.W.2d 582, 65 Mich.App. 614.

Non-party bound by stipulation

Cal.—Palmer v. City of Oakland, 150 Cal.Rptr. 41, 86 C.A.3d 39.

3. U.S.—Knox v. American Nat. Bank in St. Louis, D.C.Mo., 488 F.Supp. 259.

Cal.—Southern Pac. Co. v. Schwartz, 38 Cal.Rptr. 243, 226 C.A.2d 481.

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Mich.—Rockwood v. Hugg, 129 N.W.2d 380, 373 Mich. 332.

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Not used against non-agreeing party

Ohio—Burdge v. Board of County Comm'rs, 455 N.E.2d 1055, 7 Ohio App.3d 356, 7 O.B.R. 454.

4. Cal.—In re Majtan's Estate, 46 Cal.Rptr. 561, 237 C.A.2d 7.

Ill.—Burriss v. John Blue Co., 358 N.E.2d 724, 3 Ill.Dec. 326, 44 Ill.App.3d 653.

N.J.—Wilkins v. Smith, 436 A.2d 951, 181 N.J.Super. 121.

N.M.—State ex rel. Bliss v. Davis, 319 P.2d 207, 63 N.M. 322.

Ohio—Cole v. Ottawa Home & Sav. Ass'n, 246 N.E.2d 542, 18 Ohio St.2d 1.

5. N.M.—Freedman v. Perea, 517 P.2d 67, 85 N.M. 745.

6. N.M.—Freedman v. Perea, 517 P.2d 67, 85 N.M. 745.

7. U.S.—Utah v. U.S., 89 S.Ct. 761, 394 U.S. 89, 22 L.Ed.2d 99.

Tax commission

(2) Other matters

U.S.—Cole v. C.I.R., C.A., 272 F.2d 13.

Former guardian's surety

Tex.—In re Rasco, Civ.App., 552 S.W.2d 557.

Public Utility Commission

Pa.—Glenside Suburban Radio Cab, Inc. v. Pennsylvania Public Utility Commission, 411 A.2d 874, 49 Pa.Cmwlth. 523.

page 36

10. Attorney bound

N.Y.—Zagoory v. Fein, 396 N.Y.S.2d 263, 58 A.D.2d 810.

12. Mo.—C.J.S. quoted in Williams v. Wilder, App., 397 S.W.2d 696, 704.

Pa.—Shender v. Zoning Bd. of Adjustment, 131 A.2d 90, 388 Pa. 265.

Failure to object

Mo.—Williams v. Wilder, App., 397 S.W.2d 696.

13. Cal.—Coughlin v. Blair, 262 P.2d 305, 41 C.2d 587.

§ 15. — Persons under Disability

The joining of a next friend in a stipulation is no basis for recognizing its legal efficacy.^{17.5}

17.5. U.S.—Crawford v. Loving, D.C.Va., 84 F.R.D. 80.

19. Conn.—State v. Woodworth, Cir. A.D., 227 A.2d 435, 4 Conn.Cr. 149.

23. Covenant not to execute

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page 37

24. Mich.—C.J.S. quoted in Pleznac v. Griva, 272 S.W.2d 712, 714, 86 Mich.App. 528.

§ 16. Persons in Whose Favor Operative

27. U.S.—Broward County, Florida Commission for Use and Benefit of General Elec. Co. v. Continental Cas. Co., D.C.Fla., 243 F.Supp. 118.

Cal.—City of Burbank v. Nordahl, 18 Cal.Rptr. 710, 199 C.A.2d 311.

Colo.—Cline v. McDowell, 284 P.2d 1056, 132 Colo. 37.

N.Y.—Alexander v. A.R.Z. Corp., 127 N.Y.S.2d 349, 283 App.Div. 656.

29. Conn.—State ex rel. Hess v. Osborn, 117 A.2d 88, 19 Conn.Super. 461.

N.Y.—Pitney-Bowes, Inc. v. Jefferson County News Co., 139 N.Y.S.2d 426, 207 Misc. 551.

30. U.S.—Thibodo v. U.S., D.C.Cal., 134 F.Supp. 88—Zenith Radio Corp. v. Hazeltine Research, Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129.

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31. Ariz.—Driscoll v. Harmon, 569 P.2d 274, 116 Ariz. 332, app. after remand 601 P.2d 1051, 124 Ariz. 15.

Mass.—Henry F. Michell Co. v. Fitzgerald, 231 N.E.2d 373.

Wis.—Kornitz v. Commonwealth Land Title Ins. Co., 260 N.W.2d 680, 81 Wis.2d 322.

§ 17. Conclusive Effect on Court

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- Ariz.—State v. Carlisle, 527 P.2d 278, 111 Ariz. 233
- Cal.—Craft v. Craft, 316 P.2d 345, 49 C.2d 189—People By and Through Department of Public Works v. Lagas, 324 P.2d 926, 160 C.A.2d 28—C.J.S. cited in Green v. Linn, 26 Cal.Rptr. 889, 893, 210 C.A.2d 762.
- D.C.—C.J.S. cited in Cowan v. U.S., App., 331 A.2d 323, 327—C.J.S. cited in Byrd v. U.S., App., 485 A.2d 947, 949.
- Fla.—Gunn Plumbing, Inc. v. Dania Bank, 252 So.2d 1—Dorson v. Dorson, 393 So.2d 632.
- Ill.—Parker v. Board of Trustees of Southern Illinois University, 220 N.E.2d 258, 74 Ill.App.2d 467.
- Ind.—Board of Trustees of Police Pension Fund of City of Terre Haute v. State ex rel. Russell, 219 N.E.2d 886, 247 Ind. 570—Marotta v. Iroquois Realty Co., App., 412 N.E.2d 797.
- Iowa—C.J.S. cited in Bartels v. Hennessey Bros., Inc., 164 N.W.2d 87, 91.
- Kan.—In re Maguire's Estate, 466 P.2d 358, 204 Kan. 686, mod. on oth. grds. 476 P.2d 618, 206 Kan. 1.
- La.—Placid Oil Co. v. A. M. Dupont Corp., 156 So.2d 444, 244 La. 1075.
- Md.—C.J.S. cited in Peddicord v. Franklin, 310 A.2d 561, 567.
- Mich.—Wentzel v. Hutchison, 122 N.W.2d 80, 370 Mich. 420.
- Miss.—Roberts v. Robertson, 100 So.2d 586, 232 Miss. 796.
- Mo.—State v. Jones, App., 539 S.W.2d 317, app. after remand, 549 S.W.2d 925.
- Mont.—School Dist. No. 4, Lincoln County v. Colburg, 547 P.2d 84, 169 Mont. 368.
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- Wash.—Riordan v. Commercial Travelers Mut. Ins. Co., 525 P.2d 804, 11 Wash.App. 707.
- Wis.—Hansen v. Village of Oregon, 105 N.W.2d 815, 11 Wis.2d 399—General Automotive Mfg. Co. v. Singer, 120 N.W.2d 659, 19 Wis.2d 528.
- Wyo.—In re Stringer's Estate, 343 P.2d 508, 80 Wyo. 389, reh. den. and mod. on oth. grds. 345 P.2d 786, 80 Wyo. 389.
- Probate Court**
- Cal.—In re Estate of Burson, 124 Cal.Rptr. 105, 51 C.A.3d 300.
- Express approval not necessary**
- Ga.—Hodges v. Hodges, 221 S.E.2d 597, 235 Ga. 848.

35. Cal.—Leonard v. City of Los Angeles, 107 Cal.Rptr. 378, 31 C.A.3d 473
- Del.—Continental Cas. Co. v. Ocean Acc. & Guarantee Corp., Super., 209 A.2d 743, 8 Storey 338
- Kan.—In Interest of Geisler, 610 P.2d 640, 4 Kan.App.2d 684
- La.—Cuoco v. Pk-a-Pak Grocery Corp., App., 379 So.2d 856.
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- N.Y.—Wojcik v. Miller Bakesies Corp., 162 N.Y.S.2d 337, 2 N.Y.2d 631, 142 N.E.2d 409
- Or.—Denessen v. Taylor, 255 P.2d 148, 198 Or. 347
- Wash.—Reilly v. State, 566 P.2d 1283, 18 Wash.App. 245
36. U.S.—Berry v. C.I.R., C.A., 254 F.2d 471—Ruderman v. U.S., C.A.N.Y., 355 F.2d 995.
- Ariz.—Gangadean v. Florin Inv. Co., 474 P.2d 1006, 106 Ariz. 245
- Cal.—In re Howe's Estate, 107 Cal.Rptr. 766, 31 C.A.3d 949.
- Hawan.—Hogan v. Watkins, 39 Haw. 584.
- Kan.—Manhattan Bible College v. Stritesky, 387 P.2d 225, 192 Kan. 287.
- Ky.—C.J.S. cited in Baker v. Reese, 372 S.W.2d 788, 789.
- Md.—Benson v. Mays, 227 A.2d 220, 245 Md. 632.
- Mich.—Menendez v. City of Detroit, 60 N.W.2d 319, 337 Mich. 476.
- N.J.—Ambassador Ins. Co. v. Montes, 388 A.2d 603, 76 N.J. 477.
- N.D.—Vetter v. Benson County, 81 N.W.2d 758.
- Tex.—Tnity Universal Ins. Co. v. Bellmead State Bank of Waco, Civ.App., 396 S.W.2d 163, err. ref. no rev. err.
- Law of case**
- (2) Other matters.
- Fla.—Hodges v. Nofsinger, App., 183 So.2d 14.
- Findings by trial court**
- U.S.—Randall Foundation, Inc. v. Riddell, C.A.Cal., 244 F.2d 803.
- Stipulated question not decided**
- Cal.—Brown v. Hanford Elementary School Bd., 69 Cal.Rptr. 154, 263 C.A.2d 170.
- Not binding in original mandamus proceeding**
- Cal.—Mooney v. Pickett, 94 Cal.Rptr. 279, 483 P.2d 1231, 4 C.3d 669.
- Appellate court not bound**
- Ill.—Renfield Importers, Ltd. v. Foremost Sales Promotions, Inc., 315 N.E.2d 561, 21 Ill.App.3d 577.

page 38

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- Cal.—People v. McGinnis, 57 Cal.Rptr. 661, 249 C.A.2d 613.
- Ga.—Same v. Clark, 219 S.E.2d 407, 235 Ga. 279.
- Nev.—Second Baptist Church of Reno v. Mount Zion Baptist Church, 466 P.2d 212, 86 Nev. 164.
- N.Y.—Frost v. Stone, 144 N.Y.S.2d 481, rev'd on oth. grds., A.D., 165 N.Y.S.2d 260, 4 A.D.2d 780.
39. Cal.—In re Estate of Burson, 124 Cal.Rptr. 105, 51 C.A.3d 300.
- N.Y.—Francis v. Francis, 126 N.Y.S.2d 173.
- N.D.—Bjerken v. Ames Sand & Gravel Co., Inc., 206 N.W.2d 884.
40. Iowa—In re Clark's Estate, 181 N.W.2d 138.
41. U.S.—Manhattan Fuel Co., Inc. v. New England Petroleum Corp., D.C.N.Y., 422 F.Supp. 797, adhered to 439 F.Supp. 959, aff'd., C.A., 578 F.2d 1368.
42. Iowa—C.J.S. quoted in In re Clark's Estate, 181 N.W.2d 138, 142.
43. N.J.—Stalford v. Barkalow, 106 A.2d 342, 31 N.J.Super. 193.

44. U.S.—C.J.S. cited in Burstin v U.S., C.A.Mo., 232 F.2d 19, 23
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- Ariz.—Mugrove v. Leonard, 396 P.2d 614, 97 Ariz. 44.
45. Cal.—In re Cummings' Estate, 69 Cal.Rptr. 792, 263 C.A.2d 661—Jones v. World Life Research Institute, 131 Cal.Rptr. 674, 60 C.A.3d 836
- Decision contrary to law precluded**
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46. U.S.—Azevedo v. C.I.R., C.A., 246 F.2d 196—New Amsterdam Cas. Co., v. Waller, C.A.N.C., 323 F.2d 20, cert. den. 84 S.Ct. 1124, 376 U.S. 963, 11 L.Ed.2d 981—Love Equipment Rentals, Inc. v. Brenholt, C.A.Colo., 416 F.2d 361—Gilreath v. Daniel Funeral Home, Inc., C.A.Ark., 421 F.2d 504.
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- Mich.—Lamphere School Dist. v. Lamphere Federation of Teachers, 241 N.W.2d 257, 67 Mich.App. 485.
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- Mont.—New Silver Bell Min. Co. v. Lewis and Clark County, 284 P.2d 1012, 129 Mont. 269.
- N.H.—Bartlett v. Bartlett, 357 A.2d 460, 116 N.H. 269.
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- N.D.—Le Pire v. Workmen's Compensation Bureau, 111 N.W.2d 355.
- Ohio—C.J.S. cited in Markert v. Bosley, 207 N.E.2d 414, 417, 2 Ohio Misc. 109.
- Or.—Koennecke v. Waxwing Cedar Products, Ltd., 543 P.2d 669, 273 Or. 639
- Pa.—In re Zook's Estate, 1 Pa.Dist. & Co.2d 137, 4 Fiduciary 488, 54 Lanc.L.Rev. 135.
- Tex.—Perry v. Aetna Life Ins. Co. of Conn., Civ.App., 380 S.W.2d 868, err. ref. no rev. err.—Beddall v. Reader's Wholesale Distributors, Inc., Civ.App., 408 S.W.2d 237.
- Utah—Madsen v. Madsen, 276 P.2d 917, 2 Utah 2d 423.
- Wash.—Glaser v. Holdorf, 330 P.2d 1066, 53 Wash.2d 92
- W.Va.—Frazee Lumber Co. v. Haden, 197 S.E.2d 634, 156 W.Va. 844.
- Wis.—Birts v. State, 228 N.W.2d 351, 68 Wis.2d 389.
- Truth of stipulated fact**
- (1) U.S.—Bacon v. Kansas City Southern Ry. Co., C.A.La., 373 F.2d 515.
- Tex.—Adams v. Herd, Civ.App., 526 S.W.2d 295.
- Stipulation held not controlling**
- (2) Other stipulations.
- U.S.—Howard v. Ward County, D.C.N.D., 418 F.Supp. 494.
- N.M.—Doe v. State, 570 P.2d 589, 91 N.M. 51, on remand 572 P.2d 960, 91 N.M. 232.
- N.D.—Matter of Application for Disciplinary Action Against Lee, 283 N.W.2d 179.
- Matrimonial cases**
- Vt.—Gerdell v. Gerdell, 313 A.2d 8, 132 Vt. 58.

Stipulation not binding where possibility of fraud

N.Y.—National Bank of North America v Systems Home Improvement, Inc., 393 N.Y.S.2d 744, 57 A.D.2d 596.

47. Md.—C.J.S. cited in Peddicord v. Franklin, 310 A.2d 561, 567, 270 Md. 164.

Stipulation of no adequate remedy at law not binding

Ill.—George F. Mueller & Sons, Inc. v. Morales, 323 N.E.2d 518, 25 Ill.App.3d 466.

page 39

48. U.S.—Texas Gas Transmission Corp. v. Federal Power Commission, C.A., 441 F.2d 1392—U.S. ex rel. Gockley v. Myers, C.A.Pa., 450 F.2d 232, cert. den. 92 S.Ct. 738, 404 U.S. 1063, 30 L.Ed.2d 752.

Ala.—Montgomery v. Mardis, Civ.App., 416 So.2d 1042.

Cal.—City of Burbank v. Nordahl, 18 Cal.Rptr. 710, 199 C.A.2d 311.

N.Y.—Uni-Serv Corp. v. Linker, 311 N.Y.S.2d 726, 62 Misc.2d 861—Cohen v. Levitt, 320 N.Y.S.2d 1002, 36 A.D.2d 992.

N.C.—State v. Phifer, 254 S.E.2d 586, 297 N.C. 216.

Okl.—Smith v. State, Cr., 405 P.2d 1020.

S.D.—Bitterman v. Reinfield, 59 N.W.2d 548, 75 S.D. 73.

Utah—LeGrand Johnson Corp. v. Peterson, 486 P.2d 1040, 26 Utah 2d 158.

Injunction

(3) Other instances.

Tex.—American Nat. Ins. Co. v. Wilson State Bank, Civ.App., 480 S.W.2d 296.

Stipulation as equitable factor to be considered

U.S.—Fulton v. Kaiser Steel Corp., C.A.Tex., 397 F.2d 580.

49. S.C.—C.J.S. quoted in Porter Bros., Inc. v. Specialty Welding Co., App., 331 S.E.2d 783, 784.

Tex.—Hamilton v. Hamilton, 280 S.W.2d 588, 154 Tex. 511—Domengeaux v. Kirkwood & Co., Civ.App., 297 S.W.2d 748.

50. Ala.—Argo v. State, 195 So.2d 901, 43 Ala.App. 564, cert. den. 195 So.2d 909, 280 Ala. 707, cert. den. 88 S.Ct. 129, 389 U.S. 865, 19 L.Ed.2d 136.

Hawaii—C.J.S. cited in State v. Tangalin, 657 P.2d 1025, 1026, 66 Hawaii 100.

Mich.—People v. Drew, 182 N.W.2d 366, 26 Mich.App. 337.

Okl.—Ex parte Higgs, 263 P.2d 752, 97 Okl.Cr. 338.

52. Ariz.—Siler v. Superior Court In and For Coconino County, 316 P.2d 296, 83 Ariz. 49.

D.C.—Hammill v. Olympic Airways, S.A., D.C., 398 F.Supp. 829.

54. Miss.—Roberts v. James Mfg. Co., 197 So.2d 808.

57. U.S.—Cory Corp. v. Sauber, C.A.Ill., 284 F.2d 767, cert. den. 81 S.Ct. 1659, 366 U.S. 935, 6 L.Ed.2d 847—Los Angeles Shipbuilding & Drydock Corp. v. U.S., C.A.Cal., 289 F.2d 222—Mead's Bakery, Inc. v. C.I.R., C.A.Tex., 364 F.2d 101—Graham & Co., Inc. v. U.S., 470 F.2d 542, 200 Ct.Cl. 97.

Cal.—De Celle v. City of Alameda, 9 Cal.Rptr. 549, 186 C.A.2d 574.

Kan.—In re Maguire's Estate, 466 P.2d 358, 204 Kan. 686, mod. on oth. grds. 476 P.2d 618, 206 Kan. 1.

La.—New Orleans Fire Fighters Ass'n Local 632 v. City of New Orleans, App., 260 So.2d 779, writ ref. 262 So.2d 787, 262 La. 187, and 262 So.2d 788, 226 La. 190, aff'd. 269 So. 194, 263 La. 649, cert. den. 93 S.Ct. 1902, 411 U.S. 933, 36 L.Ed.2d 392.

N.J.—Meicer v. Zuck, 245 A.2d 61, 101 N.J.Super. 577.

N.M.—Taisodia v. Rainaldi, 547 P.2d 553, 89 N.M. 70.

Tex.—Washington v. Law, Civ.App., 519 S.W.2d 953, err. ref. no rev. err.

Subsidiary questions of law

U.S.—Hanson v. Ford Motor Co., C.A.Minn., 278 F.2d 586.

Especially public law

N.J.—Nolan v. Witkowski, 153 A.2d 745, 56 N.J.Super. 480, aff'd. 161 A.2d 102, 32 N.J. 426.

Creation of trust

S.C.—Morris v. Beacham, 262 S.E.2d 921, 274 S.C. 320.

59. U.S.—Eureka Williams Corp. v. McCorquodale, 205 F.2d 155, 40 C.C.P.A., Patents, 1028, cert. den. 74 S.Ct. 121, 346 U.S. 872, 98 L.Ed. 380.

Ind.—Raper v. Union Federal Sav. and Loan Ass'n of Evansville, 336 N.E.2d 840, 166 Ind.App. 482.

Iowa—C.J.S. cited in Bartels v. Hennessey Bros., Inc., 164 N.W.2d 87, 91.

Questions specifically reserved for later determination

Or.—Baker County v. Wolff, 516 P.2d 1307, 16 Or.App. 1.

A stipulation cannot place restrictions upon a court's duty to protect the best interests of a child.^{62.5}

62.5 Colo.—In re People in Interest of A.R.S., 502 P.2d 92, 31 Colo.App. 268—People in Interest of G.K.H., App., 698 P.2d 1386.

N.Y.—Application of Holland, 157 N.Y.S.2d 623, 2 A.D.2d 987.

§ 19. — To Abide Event**Library References**

Stipulations ⇌ 18(5).

page 40

63. U.S.—Leesona Corp v Duplan Corp., D.C.R.I., 317 F.Supp. 290.

N.Y.—Botsford v. Liberty Bell Bakery, Inc., 362 N.Y. S.2d 88, 46 A.D.2d 978.

N.C.—C.J.S. black letter summary quoted in Norfolk Southern Ry. Co. v. Horton, 165 S.E.2d 6, 9, 3 N.C.App. 383.

64. U.S.—Russell v. U.S., 320 F.2d 920, 162 Ct.Cl. 544—Western Maryland Ry. Co. v. Continental Grain Co., D.C.N.Y., 219 F.Supp. 126.

D.C.—Lord Mfg. Co. v. Stinson, D.C., 73 F.Supp. 984.

Fla.—Giblin v. City of Coral Gables, App., 206 So.2d 434.

Idaho—C.J.S. cited in Kershaw v. Pierce Cattle Co., 393 P.2d 31, 35, 87 Idaho 323.

65. U.S.—Sampson v. Sony Corp. of America, C.A. N.Y., 434 F.2d 312.

Md.—Kasten Const. Co. v. Anne Arundel County, 278 A.2d 282, 262 Md. 482.

Rule inapplicable where other case disposed of on jurisdictional grounds

U.S.—General Instrument Corp. v. U.S., Cust.Ct., 326 F.Supp. 1393, rev'd. on oth. grds., C.A., 462 F.2d 1156.

66. U.S.—Sumitomo Corp. v. Parakopi Compania Maritima, S.A., D.C.N.Y., 477 F.Supp. 737, aff'd. C.A., 620 F.2d 286.

67. N.C.—Norfolk Southern Ry. Co. v. Horton, 165 S.E.2d 6, 3 N.C.App. 383.

68. N.J.—State v. Williams, 255 A.2d 817, 106 N.J. Super. 371, cert. den. 90 S.Ct. 1510, 397 U.S. 1069, 25 L.Ed.2d 691.

70. Cal.—Griffith v. City of Los Angeles, 346 P.2d 49, 175 C.A.2d 331.

71. Del.—Spruance v. Director of Revenue, Super., 277 A.2d 695, aff'd. 282 A.2d 619.

Idaho—Rathbun v. Department of Highways, 496 P.2d 937, 94 Idaho 700.

Matters with respect to service of process have been adjudicated.^{72.1}

72.1. Quashing service of process

Cal.—Lewis Mfg. Co. v. Superior Court In and For Los Angeles County, 295 P.2d 145, 140 C.A.2d 245.

page 41

80. Cal.—City of Port Hueneme v City of Oxnard, 341 P.2d 325, 52 C.2d 888.

page 42

84. Fla.—Safeco Ins. Co v Rochow, App., 384 So.2d 163.

§ 20. — For Dismissal, Discontinuance, Reinstatement, or Revival

85. U.S.—C.J.S. quoted in Dawson v Fidelity and Deposit Co of Md., D.C.S.D., 189 F.Supp. 854, 870—Vogelstein v. National Screen Service Corp., D.C.Pa., 204 F.Supp. 591, aff'd., C.A., 310 F.2d 738, cert. den. 83 S.Ct. 1894, 374 U.S. 840, 10 L.Ed.2d 1061, reh. den. 84 S.Ct. 34, 375 U.S. 873, 11 L.Ed.2d 103—Viking Theatre Corp. v. Paramount Film Distributing Corp., D.C.Pa., 245 F.Supp. 404, rev'd. on oth. grds., C.A., 362 F.2d 980—Viking Theatre Corp. v. Paramount Film Distributing Corp., C.A.Pa., 362 F.2d 980—Tucker v. Reading Co., D.C.Pa., 54 F.R.D. 601.

Idaho—Kershaw v. Pierce Cattle Co., 393 P.2d 31, 87 Idaho 323.

Minn.—Schoenfeld v. Buker, 114 N.W.2d 560, 262 Minn. 122.

Neb.—Workman v. Workman, 95 N.W.2d 186, 167 Neb. 857.

N.J.—Scotch Plains Tp. v. Town of Westfield, 199 A.2d 673, 83 N.J.Super. 323.

N.Y.—Lyro Textile Co. v. Cohen, 164 N.Y.S.2d 894, 6 Misc.2d 859—Colla-Negri v. Colla-Negri, 165 N.Y.S.2d 1019, 8 Misc.2d 415, app. conditionally dismissed 186 N.Y.S.2d 562, 8 A.D.2d 718.

R.I.—Rebello v. Cardoso, 103 A.2d 80, 81 R.I. 360.

86. U.S.—International Dry Spray Corp. v. Western Newspaper Union, D.C.N.Y., 127 F.Supp. 481—C.J.S. quoted in Dawson v. Fidelity and Deposit Co. of Md., D.C.S.D., 189 F.Supp. 854, 870.

Cal.—Davis v. Pine Mountain Lumber Co., App., 77 Cal.Rptr. 825.

Del.—Lutz v. A. L. Garber Co., Inc., Ch., 357 A.2d 746.

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Idaho—Kershaw v. Pierce Cattle Co., 393 P.2d 31, 87 Idaho 323.

Mich.—Bowman v. Coleman, 97 N.W.2d 118, 356 Mich. 390.

Minn.—Favorite v. Minneapolis St. Ry. Co., 91 N.W.2d 459, 253 Minn. 136.

Mo.—Pierson v. Allen, 409 S.W.2d 127.

N.J.—Trenton Oil Co. v. Dries, 103 A.2d 399, 30 N.J.Super. 122.

N.Y.—Bruck v. Contos, 203 N.Y.S.2d 350, 24 Misc.2d 1093—Davis v. Lyndel Corp., 228 N.Y.S.2d 451, 16 A.D.2d 802—Hinds v. Gulutz, 305 N.Y.S.2d 691, 461 Misc.2d 384—Palmer v. Palmer, 308 N.Y. S.2d 562, 62 Misc.2d 73.

Ohio—In re Woods' Estate, 175 N.E.2d 316, 115 Ohio App. 81.

Or.—Henderson v. Morey, 405 P.2d 359, 241 Or. 164.

Person not party or privy, etc.

Ill.—Burriss v. John Blue Co., 358 N.E.2d 724, 3 Ill.Dec. 326, 44 Ill.App.3d 653.

Mont.—Howard S. Wright Const. Co. v. F. E. DeBeer Mechanical Const. Co., 604 P.2d 323, 185 Mont. 47.

Withdrawal of counterclaim and defenses there-

to

(3) Other statements.

Ill.—Fargo v. Engling, 232 N.E.2d 531, 90 Ill.App.2d 264.

Particular stipulations construed

U.S.—Viking Theatre Corp. v. Paramount Film Distributing Corp., D.C.Pa., 245 F.Supp. 404, rev'd. on oth. grds., C.A., 362 F.2d 980—Bourazak v. North River Ins. Co., D.C.Ill., 280 F.Supp. 87.

Page 42

Cal—Reid v. Valley Restaurants, Inc., 311 P.2d 473, 48 C.2d 606—Wagner v. O'Bannon, 79 Cal Rptr 44, 274 C.A.2d 121

Mo—Landers v. Smith, App., 379 S.W.2d 884

Mont—State ex rel City of Havre v. District Court of Twelfth Judicial Dist. In and For Hill County, 609 P.2d 275, 187 Mont. 181, cert. den. 101 S.Ct. 219, 449 U.S. 875, 66 L.Ed.2d 97

Neb—State v. Sanchell, 216 N.W.2d 504, 191 Neb. 505, reh. 202 N.W.2d 562, 192 Neb. 380

Nev—Turner v. Dorland, 514 P.2d 210, 89 Nev. 408

N.Y.—Idan Holding Corp. v. 244 Water Realty Corp., 161 N.Y.S.2d 907, 6 Misc.2d 173

Or—Bergquist v. International Realty, Ltd., 537 P.2d 553, 272 Or. 416

W.Va.—State ex rel Scott v. Taylor, 160 S.E.2d 146, 152 W.Va. 151

Wis.—Webster v. Klug and Smith, 260 N.W.2d 686, 81 Wis.2d 334

Court powerless to prevent dismissal

N.M.—Elwess v. Elwess, 389 P.2d 7, 73 N.M. 400

Stipulation by all parties

Vt.—Gloss v. Delaware & Hudson R. Co., 378 A.2d 507, 135 Vt. 419

87. Fla.—Barnard v. Overstreet, App., 259 So.2d 517.

Ill.—Kleppinger v. Nelson, 253 N.E.2d 703, 113 Ill. App.2d 276

Minn.—Favorite v. Minneapolis St. Ry. Co., 91 N.W.2d 459, 253 Minn. 136

88. Alaska—Albritton v. Larson's Estate, 428 P.2d 379.

89. Conn.—Doucette v. Bouchard, 265 A.2d 618, 28 Conn.Sup. 460

90. Mo.—Portell v. Pevely Dairy Co., 388 S.W.2d 790

Pa.—Harris v. Rundle, 366 A.2d 970, 27 Pa.Cmwlth. 445.

91. N.M.—Halmon v. Pico Drilling Co., 432 P.2d 830, 78 N.M. 474.

No res judicata

N.Y.—In re Horton's Estate, 370 N.Y.S.2d 43, 82 Misc.2d 370.

92. N.Y.—Perlmutter v. Perlmutter, 420 N.Y.S.2d 409, 71 A.D.2d 1017.

A stipulation discontinuing a proceeding without prejudice to either side is not an adjudication on the merits, but serves to place the parties in status quo, as though no proceeding had ever been instituted.^{92.5}

92.5. N.Y.—Greenberg v. New York City Planning Commission, 368 N.Y.S.2d 554, 48 A.D.2d 830, app. dism. 337 N.E.2d 607, 37 N.Y.2d 782, 375 N.Y.S.2d 99

93. Fla.—Travelers Indem. Co. v. Walker, App., 401 So.2d 1147.

Pa.—Brown v. Popky, 52 Luz.L.Reg. 185.

R.I.—Rebello v. Cardoso, supra, n. 85.

Vt.—Alma Realty Co., Inc. v. Sugarbush Valley Corp., 392 A.2d 379, 136 Vt. 406.

Discontinuance without prejudice

N.Y.—Phoenix Assur. Co. v. Stark Mobile Homes, Inc., 330 N.Y.S.2d 548, 39 A.D.2d 514.

95. Alleged incompetence of court appointed attorney

Cal.—In re Dapper, 77 Cal.Rptr. 897, 454 P.2d 905.

A stipulation that a dismissal be vacated and set aside will be given effect.^{95.5}

95.5. Ill.—Roin v. Checker Taxi Co., 184 N.E.2d 736, 36 Ill.App.2d 447.

No entitlement to vacation of dismissal

N.Y.—Incorporated Village of Thomaston v. Biener, 443 N.Y.S.2d 887, 84 A.D.2d 781.

§ 21. — As to Pleadings

page 43

97. Cal.—Burrows v. State, 66 Cal Rptr 868, 260 C.A.2d 29

Fla.—Board of Regents for and on Behalf of University of Florida v. Hardin, 393 So.2d 1134

Iowa—In re Millers' Estate, 159 N.W.2d 441

N.Y.—Fifty States Management Corp. v. Public Service Mut. Ins. Co., 324 N.Y.S.2d 345, 67 Misc.2d 778.

Pa.—Donahue v. R. C. Mahon Co., 280 A.2d 563, 219 Pa. Super. 210

Tex.—Boulte v. State, 341 S.W.2d 936, 170 Tex. Cr. R. 453

Counsel cannot by agreement alter or extend reach or potential of pleading

Miss.—State v. Wood, 187 So.2d 820

98. U.S.—Perera Co., Inc. v. Goldstone, C.A. Cal., 491 F.2d 386.

Ariz.—Sonnenberg v. Ashby, 495 P.2d 500, 17 Ariz. App. 60

Ga.—Hewitt Contracting Co. v. State Highway Dept., 149 S.E.2d 735, 113 Ga.App. 770.

Idaho—Big Lost River Irr. Dist. v. Zollinger, 363 P.2d 706, 83 Idaho 401

Ill.—People v. Miles, 300 N.E.2d 822, 13 Ill.App.3d 453

Iowa—Swan Lake Consol. School Dist. v. Consolidated School Dist. of Dolliver, 58 N.W.2d 349, 244 Iowa 1269.

Kan.—Stanolind Oil & Gas Co. v. Cities Service Gas Co., 313 P.2d 279, 181 Kan. 526

Mass.—Poirer v. Superior Court, 150 N.E.2d 558, 337 Mass. 522

Mo.—Hays v. Missouri Pac. R. Co., 304 S.W.2d 800.

Neb.—Workman v. Workman, 95 N.W.2d 186, 167 Neb. 857.

Nev.—Scott v. Justice's Court of Tahoe Tp., 435 P.2d 747, 84 Nev. 9

N.M.—Griego v. Roybal, 442 P.2d 585, 79 N.M. 273, app. after remand 465 P.2d 85, 81 N.M. 202

N.Y.—Nishman v. DeMarco, 430 N.Y.S.2d 339, 76 A.D.2d 360, app. dism. 420 N.E.2d 979, 53 N.Y.2d 642, 438 N.Y.S.2d 787.

N.C.—City of Durham v. Reidsville Engineering Co., 120 S.E.2d 564, 255 N.C. 98—State v. Fountain, 185 S.E.2d 284, 13 N.C.App. 107, cert. den. 186 S.E.2d 513, 280 N.C. 303.

Pa.—Poluka v. Cole, 56 Sch. L.R. 96.

Tex.—Woodall v. Schmuldach, Civ.App., 299 S.W.2d 780

Stipulation as equivalent to personal service

(3) Other instances.

N.Y.—Polydor Inc. v. Johnson, 418 N.Y.S.2d 12, 70 A.D.2d 848.

Extension of time for filing pleadings not abuse of discretion

Va.—American Liberty Ins. Co. v. Breslerman, 113 S.E.2d 862, 201 Va. 822.

Waiver of objections to pleadings in consolidated cases

Va.—American Liberty Ins. Co. v. Breslerman, 113 S.E.2d 862, 201 Va. 822.

Pleadings must support proof

N.C.—Rural Plumbing & Heating, Inc. v. H. C. Jones Const. Co., 149 S.E.2d 625, 268 N.C. 23

99. Mass.—Poirer v. Superior Court, 150 N.E.2d 558, 337 Mass. 522.

Nev.—Flintkote Co. v. Interstate Equipment Corp., 571 P.2d 815, 93 Nev. 597.

Pa.—Harris v. Rundle, 366 A.2d 970, 27 Pa.Cmwlth. 445.

Wis.—D'Angelo v. Cornell Paperboard Products Co., 147 N.W.2d 321, 33 Wis.2d 218.

5. Cal.—Benson v. Andrews, 332 P.2d 698, 166 C.A.2d 44.

page 44

6. Miss.—Roberts v. Finger, 86 So.2d 463, 227 Miss. 671

10. U.S.—U.S. v. Zimmerman, D.C.N.Y., 20 F.R.D. 587

La.—State v. Howard, 149 So.2d 409, 243 La. 971

Mass.—Tassinari v. Massachusetts Turnpike Authority, 197 N.E.2d 584, 347 Mass. 222

N.Y.—Furst v. Massachusetts Bonding & Ins. Co., 241 N.Y.S.2d 111, 19 A.D.2d 605

12. Ind.—Brademas v. Hartwig, 369 N.E.2d 954, 175 Ind. App. 4

16. Conn.—Falis v. Dawson, Super., 175 A.2d 191, 22 Conn. Sup. 472

17. Ga.—Kerr v. Callaway, 117 S.E.2d 243, 102 Ga. App. 653

19. Ariz.—State v. Palmer, 424 P.2d 838, 5 Ariz. App. 190.

Dismissal held proper

U.S.—Marr County Chapter of Nat. Organization for Women v. Marr County, D.C.Cal., 82 F.R.D. 605.

Cal.—Verdier v. Verdier, 284 P.2d 94, 133 C.A.2d 325

Narrow construction

Wis.—D'Angelo v. Cornell Paperboard Products Co., 147 N.W.2d 321, 33 Wis.2d 218.

Stipulation of no objection to amended indictment as waiver of plea

Cal.—People v. Johnson, 95 Cal.Rptr. 316, 18 C.A.3d 458, reh. den. 96 Cal.Rptr. 695, 18 C.A.3d 458

Dismissal not proper

Ill.—Strozewski v. Sherman Equipment Co., 395 N.E.2d 38, 32 Ill. Dec. 91, 76 Ill.App.3d 266.

23. Wis.—D'Angelo v. Cornell Paperboard Products Co., 147 N.W.2d 321, 33 Wis.2d 218.

page 45

26. N.Y.—Sellnow v. Sellnow, 417 N.Y.S.2d 790, 70 A.D.2d 980.

A stipulation permitting the inclusion in an amended complaint of another cause of action does not constitute a waiver of defenses.^{26.5}

26.5. N.Y.—Shongut v. Margolis, 193 N.Y.S.2d 925, affd. 202 N.Y.S.2d 222, 10 A.D.2d 885, app. den. 205 N.Y.S.2d 811, 10 A.D.2d 1002.

An agreement that an amended complaint and demurrers thereto are deemed refiled after an amended complaint is stricken waives any error in striking out the amended complaint.^{33.5}

33.5. Ind.—Davis v. Louisville & N.R. Co., 173 N.E.2d 749, 132 Ind.App. 419, cert. den. 82 S.Ct. 828, 369 U.S. 820, 7 L.Ed.2d 786.

34. Pa.—Hartung v. Mail, 37 Erie Co. 215.

35. Cal.—Holtkamp v. States Marine Corp., 331 P.2d 679, 165 C.A.2d 131.

N.Y.—Santos v. Chappell, 313 N.Y.S.2d 320, 63 Misc.2d 730.

37. N.Y.—Copperman v. Labansky, 178 N.Y.S.2d 451, 13 Misc.2d 827.

40. Cal.—H & H Inv. Co. v. T-J Const. Co., 79 Cal.Rptr. 890, 275 C.A.2d 58.

N.Y.—Security Title & Guaranty Co. v. Wolfe, 392 N.Y.S.2d 30, 56 A.D.2d 745.

page 46

41. La.—Southern Discount Co. v. Williams, App., 226 So.2d 60.

Other matters have been adjudicated with respect to the effect of a stipulation extending defendant's time to answer.^{44.5}

44.5. U.S.—Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., D.C. Pa., 55 F.R.D. 404

Cal.—Billings v. Edwards, 154 Cal Rptr 453, 91 C.A.3d 826

N.Y.—Columbia Broadcasting System, Inc. v. Roskin Distributors, Inc., 294 N.Y.S.2d 804, 31 A.D.2d 22, Aff'd 268 N.E.2d 128, 28 N.Y.2d 559, 319 N.Y.S.2d 449—Preferred Elec. & Wire Corp. v. Price, 326 N.Y.S.2d 614, 68 Misc.2d 423

Right to question sufficiency of service of process and jurisdiction of person

Fla.—Paulson v. Faas, App., 171 So.2d 9

§ 22. — As to Issues

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47. Idaho—C.J.S. quoted at length in Big Lost River Irrigation District v. Zollinger, 363 P.2d 706, 709, 83 Idaho 401

Mich.—Lipsitz v. Schechter, 142 N.W.2d 1, 377 Mich. 685.

Particular terms construed

(1) Mo.—Aetna Cas. & Sur. Co. v. Traders Nat. Bank & Trust Co., App., 514 S.W.2d 860

Particular stipulations construed

U.S.—U.S. v. Reading Co., C.A. Pa., 289 F.2d 7—City of Philadelphia v. Morton Salt Co., D.C. Pa., 248 F.Supp. 506—Locks v. Laird, D.C. Cal., 300 F.Supp. 915, aff'd, C.A., 441 F.2d 479, cert. den. 92 S.Ct. 446, 404 U.S. 986, 30 L.Ed.2d 370

Fla.—Gunn Plumbing, Inc. v. Dania Bank, 252 So.2d 1.

Ill.—Eshick v. Montgomery, 278 N.E.2d 412, 3 Ill. App.3d 447.

N.Y.—George Colon Contracting Corp. v. Morrison, 162 N.Y.S.2d 841, aff'd, 157 N.Y.S.2d 927, 2 A.D.2d 869, appeal den. 158 N.Y.S.2d 797, 3 A.D.2d 690.

Pa.—DeCarbo v. Borough of Ellwood City, 284 A.2d 342, 3 Pa.Cmwlth 569

Tex.—International Sec. Life Ins. Co. v. Peery, Civ. App., 475 S.W.2d 311, err. ref. no rev. err.

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Fla.—Peters v. Meeks, 163 So.2d 753.

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Kan.—Stanolind Oil & Gas Co. v. Cities Service Gas Co., 313 P.2d 279, 181 Kan. 526.

Md.—Rossello v. Fnedel, 220 A.2d 537, 243 Md. 234. Mass.—Day v. Crowley, 172 N.E.2d 251, 341 Mass. 666.

Mo.—Somerset Villa, Inc. v. City of Lee's Summit, 436 S.W.2d 658.

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N.Y.—United County Realty Corp. v. Kranert, 232 N.Y.S.2d 663, 35 Misc.2d 438

N.C.—Redevelopment Commission of City of Washington v. Abeyounis, 161 S.E.2d 191, 1 N.C.App. 270

Tex.—City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671

Utah—Amoss v. Bennion, 517 P.2d 1008, 30 Utah 2d 312

Wis.—Sigman v. General Drivers and Dairy Emp. Union, Local 563, 92 N.W.2d 219, 5 Wis.2d 6

Wyo.—Downing v. Stiles, 635 P.2d 808

Elimination of issues

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N.Y.—Albano v. Kirby, 330 N.E.2d 615, 36 N.Y.2d 526, 369 N.Y.S.2d 655

Tex.—Skillern & Sons, Inc. v. Stewart, Civ. App., 379 S.W.2d 687, err. ref. no rev. err.

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La.—Colvin v. Bennett, App., 395 So.2d 881

Burden of proof held not affected

U.S.—Thriftcheck Service Corp. v. C.I.R., C.A., 287 F.2d 1

Judicial admission

Ky.—Baker v. Reese, 372 S.W.2d 788.

Summary decree due to stipulation that only issue is one of law

Fla.—State Farm Mut. Auto. Ins. Co. v. Ranson, App., 121 So.2d 175.

Statute of limitations considered

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No agreement to stipulate shown

Ind.—Mingle v. State, App., 396 N.E.2d 399, 182 Ind. App. 653

page 47

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372—Fieser v. Stinnett, 509 P.2d 1156, 212 Kan. 26

Ky.—Allen v. Ferguson, 255 S.W.2d 8

La.—Mire v. Timmons, App., 155 So.2d 265, writ ref. 156 So.2d 227, 244 La. 1024

Mass.—Schroeder v. Federal Ins. Co., 179 N.E.2d 328, 343 Mass. 472—Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248, 347 Mass. 697

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Miss.—Vance v. Vance, 63 So.2d 214, 216 Miss. 816. Neb.—Kuhlmann v. Platte Val. Irr. Dist., 89 N.W.2d 768, 166 Neb. 493

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N.M.—Martinez v. Research Park, Inc., 410 P.2d 200, 75 N.M. 672—Brown v. Cory, 422 P.2d 33, 77 N.M. 295

N.Y.—Garfield v. Equitable Life Assur. Soc. of U.S., 194 N.Y.S.2d 627, 9 A.D.2d 887

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Ohio—Tritt v. Pennsylvania R. Co., App., 122 N.E.2d 412

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Pa.—In re Reed's Trust, 12 Fiduciary 144—Schwall v. Lehigh Farm Bureau Co-op. Ass'n., 30 Lehigh L.J. 281

R.I.—Burrillville Racing Ass'n v. Mello, 270 A.2d 513, 107 R.I. 669

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Tex.—Martin v. Bane, Civ. App., 450 S.W.2d 142

Vt.—Rice v. Press, 94 A.2d 397, 117 Vt. 442—Town of Putney v. Town of Brookline, 225 A.2d 388, 126 Vt. 194—Gregoire v. Insurance Co. of North America, 261 A.2d 25, 128 Vt. 255—Brassard Bros., Inc. v. Barre Town Zoning Bd. of Adjustment, 264 A.2d 814, 128 Vt. 416—Stevens v. Cross Abbott Co., 283 A.2d 249, 129 Vt. 538

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Departure for limited purpose

N.C.—Cogdill v. North Carolina State Highway Commission, 182 S.E.2d 373, 279 N.C. 313.

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Abuse of discretion

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N.C.—Town of Blowing Rock v. Gregorie, 90 S.E.2d 898, 243 N.C. 364.

Page 47

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Issues held not before reviewing court on appeal
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Hawaii.—In re Kobayashi, 358 P.2d 539, 44 Haw. 584
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Issues not enlarged

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52. Cal.—Trafton v. Youngblood, 69 Cal Rptr. 568, 442 P.2d 648, 69 C.2d 17—People v. Johnson, 95 Cal Rptr. 316, 18 C.A.3d 458, reh den. 96 Cal Rptr. 695, 18 C.A.3d 458

Ga.—Lively v. Thompson, 75 S.E.2d 846, 88 Ga App 31, transf. 73 S.E.2d 90, 209 Ga. 425—Neal v. Dover, 123 S.E.2d 760, 217 Ga. 545

53. Ga.—Jones v. Harrison, 80 S.E.2d 155, 210 Ga 373.

A trial court may go outside of the stipulation of issues made by the parties and consider equitable issues when the remedy sought is equitable.^{53.5}

53.5. Conn.—City of Hartford v. American Arbitration Ass'n, 391 A.2d 137, 174 Conn. 472

54. U.S.—Watler v. M/V Sea Lane, D.C. Fla., 232 F.Supp. 387

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Propriety of court's discretionary decision

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60. **Failure to object not consent**

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61. Cal.—Bemer v. Bemer, 314 P.2d 114, 152 C.A.2d 766

62. Ariz.—Wolf Corp. v. Louis, 464 P.2d 672, 11 Ariz.App. 352

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Waiver of objection

Ind.—State Farm Mut. Auto. Ins. Co. v. Shuman, 370 N.E.2d 941, 175 Ind.App. 186

page 48

68. U.S.—McCullough Transfer Co. v. Virginia Sur. Co., C.A. Ohio, 213 F.2d 440—Marsman v. C.I.R., C.A., 216 F.2d 77, cert. den. 75 S.Ct. 364, 348 U.S. 943, 99 L.Ed. 738.

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Stipulation insufficient to exclude issue

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71. Kan.—C.J.S. quoted in Wentz Equipment Co. Inc. v. Missouri Pacific R. Co., 673 P.2d 1193, 1195, 9 Kan App 2d 141.

74. U.S.—Fancher v. Clark, D.C. Colo., 127 F.Supp. 452—Little v. C.I.R., C.A., 273 F.2d 746—Midland Management Co. v. C.I.R., C.A. Mo., 316 F.2d 190

Cal.—Larsen v. Beekmann, 80 Cal Rptr. 654, 276 C.A.2d 185

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Particular issues

(1) Cal.—Quinn v. Litten, 307 P.2d 90, 148 C.A.2d 631

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Ill.—People v. Long, 261 N.E.2d 437, 126 Ill App 2d 103

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75. U.S.—Bryan v. C.I.R., C.A., 209 F.2d 822, cert. den. 75 S.Ct. 289, 348 U.S. 912, 99 L.Ed. 715

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page 49

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Amount of damages

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§ 23. — As to Evidence

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Best evidence rule, etc.

U.S.—U.S. v. Cantu, C.A. Tex., 510 F.2d 1003

Purpose for which evidence admitted

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Ark.—Spillers v. State, 595 S.W.2d 650, 268 Ark. 217.

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Particular stipulations

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- Minn.—Yellow Mfg. Acceptance Corp v Handler, 83 N.W.2d 103, 249 Minn 539
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- Mont.—State v. White, 405 P.2d 761, 146 Mont 226, cert den 86 S.Ct. 1955, 384 U.S. 1023, 16 L.Ed.2d 1026
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- N.Y.—Furst v. Massachusetts Bonding & Ins. Co., 241 N.Y.S.2d 111, 19 A.D.2d 605
- N.C.—Hayes v. Ricard, 112 S.E.2d 123, 251 N.C. 485
- N.D.—In re Sales and Use Tax Determination by State Tax Com'r, 225 N.W.2d 571.
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- (3) Ga.—Newton v. Higdon, 177 S.E.2d 57, 226 Ga. 649
- Stipulation valid despite failure to disclose information**
- U.S.—U.S. v Ramirez, C.A.Tex., 513 F.2d 72, reh den 515 F.2d 1184, cert. den 96 S.Ct. 215, 423 U.S. 912, 46 L.Ed.2d 140
- Prosecution not bound to agree to offers to stipulate**
- Mo—State v Mullen, App., 528 S.W.2d 517.
- Or.—State v. Skelton, 599 P.2d 1171, 41 Or.App 497
- Tex.—Buitron v State, Cr. 519 S.W.2d 467, cert. den. 96 S.Ct. 64, 423 U.S. 837, 46 L.Ed.2d 56.
- Statutory right to appeal adverse suppression ruling**
- Hawaii—State v. Doyle, 638 P.2d 332, 64 Haw 229
78. U.S.—Charles H. Demarest, Inc v U.S., Cust.Ct., 174 F.Supp 380—U.S. v Booker, C.A.N.Y., 363 F.2d 856—Butler v. Wilson, C.A.Nev., 365 F.2d 308—Herman v. Eagle Star Ins. Co., D.C.Cal., 283 F.Supp. 33, affd. 396 F.2d 427—Herman v. Eagle Star Ins. Co., C.A.Cal., 396 F.2d 427—U.S. v. Wing, C.A.Cal., 450 F.2d 806, cert. den. 92 S.Ct. 1267, 405 U.S. 994, 31 L.Ed.2d 462.
- Cal—People v. Chand, 253 P.2d 499, 116 C.A.2d 242—People v. Sorrentino, 303 P.2d 859, 146 C.A.2d 149—People v. Hurst, 6 Cal.Rptr. 483, 183 C.A.2d 379—People v. Curry, 13 Cal.Rptr. 596, 192 C.A.2d 664—People v. Rogers, 24 Cal.Rptr. 324, 207 C.A.2d 254—People v. Jaquish, 53 Cal.Rptr. 123, 244 C.A.2d 444—Leonard v. City of Los Angeles, 107 Cal.Rptr 378, 31 C.A.3d 473.
- D.C.—Sawyer v. U.S., 303 F.2d 392, 112 U.S.App.D.C. 381, cert. den. 83 S.Ct. 150, 371 U.S. 879, 9 L.Ed.2d 116.
- Ga.—Maddox v. Seay, 256 S.E.2d 904, 243 Ga 793.
- Ill.—People v. Smith, 203 N.E.2d 879, 32 Ill.2d 88—Gomez v. Resolute Ins. Co., 276 N.E.2d 69, 2 Ill.App.3d 180.
- Iowa—State v. Galloway, 167 N.W.2d 89, app. after remand 187 N.W.2d 725.
- La.—Frank v. St. Landry Parish School Bd., App., 225 So.2d 62, writ ref. 227 So.2d 589, 254 La 838.
- Mich.—People v. DuBois, 155 N.W.2d 692, 9 Mich. App. 30.
- Minn—State v. Cavegn, 294 N.W.2d 717, cert den 101 S.Ct. 580, 449 U.S. 1017, 66 L.Ed.2d 477
- Mo—Schmitt v. Pierce, 344 S.W.2d 120—City of St. Joseph v. Gann, App. 463 S.W.2d 582
- N.J.—State v. McDavitt, 297 A.2d 849, 62 N.J. 36
- N.Y.—Decker v. Rodabaugh, 130 N.Y.S.2d 96, 283 App Div 911
- Okla.—One 1937 Dodge Coupe v State ex rel Springer, 265 P.2d 703
- Pa.—Com v Cornish, 370 A.2d 291, 471 Pa 256.
- Tex—Ex parte Lyles, Cr. 323 S.W.2d 950, 168 Tex Cr R 145—Meek v. Bower, Civ App., 333 S.W.2d 175—Missouri Pac R. Co v Watson, Civ App., 346 S.W.2d 640, err ref no rev err—Vannerson v. State, Cr., 403 S.W.2d 791—Leong v Wright, Civ App., 478 S.W.2d 839, err ref no rev err
- Wash—State v. Davis, 514 P.2d 149, 82 Wash 2d 790
- Hearsay**
- Cal—People v. Brown, 303 P.2d 68, 145 C.A.2d 778, cert den 77 S.Ct. 585, 352 U.S. 1012, 1 L.Ed.2d 559—Nardoni v McConnell, 310 P.2d 644, 48 C.2d 500—People v. Zavaleta, 6 Cal.Rptr 166, 182 C.A.2d 422
- N.M.—Caranta v. Pioneer Home Improvements, Inc., 467 P.2d 719, 81 N.M. 393
- Stipulation constituting waiver of objections**
- Ill—People v. Bennett, 402 N.E.2d 650, 37 Ill Dec 648, 82 Ill App 3d 225
- Md—Perkins v State, 339 A.2d 360, 26 Md App 526
- Ohio—State v. Maupin, 330 N.E.2d 708, 42 Ohio St 2d 473, 71 O.O.2d 485
- Or—State v. Bennett, 521 P.2d 31, 17 Or App 197
- Polygraph operator's testimony**
- Cal—Robinson v Wilson, 118 Cal Rptr 569, 44 C.A.3d 92
- Ga—Golpin v. State, 288 S.E.2d 692, 161 Ga App 434.
- Mo.—State v. Rogers, App., 621 S.W.2d 111
- Utah—State v. Jenkins, 523 P.2d 1232
- Results of lie detector test admissible**
- Fla—Moore v. State, App., 299 So 2d 119
- Ga.—State v. Chambers, 239 S.E.2d 324, 240 Ga 76, app after remand 245 S.E.2d 467, 146 Ga.App 126
- Ind—Owens v State, 373 N.E.2d 913, 176 Ind App. 1
- Kan.—State v. Roach, 576 P.2d 1082, 223 Kan 732
- Mo—State v. Hughes, App., 594 S.W.2d 630.
- N.J.—State v. Baskerville, 354 A.2d 328, 139 N.J.Super. 389, affd 374 A.2d 441, 73 N.J. 230.
- N.C.—State v. Steele, 219 S.E.2d 540, 27 N.C.App. 496
- Ohio—State v. Hill, 317 N.E.2d 233, 40 Ohio App 2d 16
- Wash.—State v. Renfro, 639 P.2d 737, 96 Wash.2d 902, cert. den 103 S.Ct. 94, 459 U.S. 842, 74 L.Ed.2d 86
- Wis—Pickens v State, 292 N.W.2d 601, 96 Wis 2d 549
- Information otherwise prohibited by statute**
- D.C.—Cowan v U.S., App., 331 A.2d 323
- Discretion not abused**
- U.S.—U.S. v Wilks, C.A.Kan., 629 F.2d 669
- N.C.—State v. Harvell, 262 S.E.2d 850, 45 N.C.App. 243, app dism., 269 S.E.2d 626, 300 N.C. 200.
- Okla.—Jones v. State, Cr., 527 P.2d 169

page 50

79. U.S.—U.S. v. Spann, C.A.Kan., 515 F.2d 579
- Cal.—People v. McClain, 26 Cal.Rptr 244, 209 C.A.2d 224
- Tex—Austin v Austin, 603 S.W.2d 204, on remand, Civ.App., 619 S.W.2d 290.
82. Ill.—Scott v. Dreis & Krump 'Mfg. Co., 326 N.E.2d 74, 26 Ill.App.3d 971.
- N.Y.—Frank B. Hall and Co. of New York, Inc v. Orient Overseas Associates, 411 N.Y.S.2d 233, 65 A.D.2d 424, affd. 401 N.E.2d 189, 48 N.Y.2d 958, 425 N.Y.S.2d 66.

Answers to interrogatories

- Ga—Woodson v. Burton, 243 S.E.2d 885, 241 Ga. 130.

83. Conn—State v. Darwin, 290 A.2d 593, 29 Conn Sup 423
- Ill—People v. Daniels, 200 N.E.2d 110, 50 Ill App 2d 108
- Tex—O'Connor v State, Cr., 401 S.W.2d 240
84. U.S.—Johnson v U.S., C.A.Mass., 325 F.2d 709—Farmers Co-op Elevator Ass'n Non-Stock of Big Springs, Neb. v Strand, C.A.Neb., 382 F.2d 224, cert. den 88 S.Ct. 589, 389 U.S. 1014, 19 L.Ed.2d 659, reh den 88 S.Ct. 815, 390 U.S. 913, 19 L.Ed.2d 887
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- Cal—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—Ex parte Malone, 284 P.2d 805, 44 C.2d 700—People v. Williams, 35 Cal.Rptr 805, 223 C.A.2d 676—People v. Brim, 65 Cal.Rptr 265, 257 C.A.2d 839—People v. Marquez, 66 Cal.Rptr. 615, 259 C.A.2d 593, cert. den 89 S.Ct. 386, 393 U.S. 955, 21 L.Ed.2d 367—People v. Wheeler, 67 Cal Rptr 246, 260 C.A.2d 522—People v. Rodriguez, 80 Cal Rptr 397, 275 C.A.2d 946—People v. Garcia, 91 Cal Rptr 671, 13 C.A.3d 486
- Conn—Cardona v. Valentin, 273 A.2d 697, 160 Conn 18.
- Fla.—James v State, App. 305 So 2d 829
- Ill—People v. Daniels, 200 N.E.2d 110, 50 Ill App.2d 108—People v. Dillon, 236 N.E.2d 411, 93 Ill. App.2d 151—People v. Miles, 300 N.E.2d 822, 13 Ill App 3d 453
- La—State v. Cazes, 263 So.2d 8, 262 La. 202.
- Mich.—McPherson v. Ervin, 107 N.W.2d 804, 362 Mich. 370
- Miss—Pruett v State, 261 So 2d 119
- Neb—Sheets v Davenport, 150 N.W.2d 224, 181 Neb. 621—American Oil Co. v City of Omaha, 155 N.W.2d 805, 182 Neb 532
- N.Y.—Simmons v Westwood Apartments Co., 261 N.Y.S.2d 736, 46 Misc.2d 1093, affd 271 N.Y.S.2d 731, 26 A.D.2d 764, app. den. 221 N.E.2d 811, 18 N.Y.2d 786, 275 N.Y.S.2d 271
- N.D.—State v. Jager, 85 N.W.2d 240.
- Okla.—Beam v State, 264 P.2d 1001, 97 Okl Cr 324.
- Or.—State By and Through State Highway Commission v. Bailey, 319 P.2d 906, 212 Or 261.
- Wis—State v. Harper, 205 N.W.2d 1, 57 Wis.2d 543.
- Exclusion of evidence held not error**
- U.S.—Pagano v Magic Chef, Inc., D.C.Pa., 181 F.Supp. 146.
- Fla—Florida First Nat. Bank of Jacksonville v. Dent, App., 350 So.2d 481, app after remand 404 So 2d 1123.
- Ill.—People v. Madden, 368 N.E.2d 384, 10 Ill.Dec. 789, 52 Ill.App.3d 951
- Stipulations waiving jury trial**
- Kan.—White v. State, 568 P.2d 112, 222 Kan. 709.
- Voice identification not error**
- Colo.—People v. Thatcher, 638 P.2d 760
85. U.S.—U.S. v. Stavros, C.A.Ill., 597 F.2d 108.
- Substantive evidence**
- Md.—Harris v. State, 342 A.2d 305, 27 Md.App. 547.
86. **Weight not established**
- Ill—La Penta v Mutual Trust Life Ins. Co., 123 N.E.2d 165, 4 Ill.App.2d 60.
89. Ill—People v. Smith, 314 N.E.2d 510, 20 Ill. App.3d 794.
90. U.S.—Duncan v. Lord, D.C.Pa., 409 F.Supp. 687.
- Ill.—People v. Hawkins, 189 N.E.2d 252, 27 Ill.2d 339—People v. McGhee, 314 N.E.2d 313, 20 Ill. App.3d 915.
92. Tex.—Thompson v. State, 339 S.W.2d 209, 170 Tex.Cr.R. 258—Wright v. State, Cr., 364 S.W.2d 384, cert den. 84 S.Ct. 96, 375 U.S. 870, 11 L.Ed.2d 96.
- Circumventing normal procedure**
- Cal—People v. Diggs, 169 Cal.Rptr. 386, 112 C.A.3d 522.
- N.J.—State v. Elysee, 388 A.2d 254, 159 N.J.Super. 380.
93. Ga—Birt v. State, 233 S.E.2d 362, 238 Ga. 402.

95. U.S.—U.S. v. Doran, C.A. Ill., 299 F.2d 511, cert. den. 82 S.Ct. 1563, 2 cases, 370 U.S. 925, 8 L.Ed.2d 504, 82 S.Ct. 1565, 370 U.S. 925, 8 L.Ed.2d 505, reh. den. 83 S.Ct. 17, 371 U.S. 854, 9 L.Ed.2d 92—U.S. v. Chikata, C.A. Wash., 427 F.2d 385

Cal.—Owens v. White Memorial Hospital, 292 P.2d 288, 138 C.A.2d 634—People v. Matthews, 329 P.2d 983, 163 C.A.2d 795—People v. Pierre, 3 Cal.Rptr. 290, 178 C.A.2d 585

D.C.—U.S. Auto Ass'n v. Alexander Film Co., Mun. App., 93 A.2d 770

Ind.—State v. Tolliver, 205 N.E.2d 672, 246 Ind. 319

Mo.—State v. Harrelson, App., 543 S.W.2d 234

Ohio—Petticrew v. Petticrew, 129 N.E.2d 194, 98 Ohio App. 260, app. dism. 117 N.E.2d 706, 161 Ohio St. 110

Or.—Hunt v. Ferguson—Paulus Enterprises, 415 P.2d 13, 243 Or. 546

Vt.—Nicholson v. Doyle, 218 A.2d 689, 125 Vt. 538

Wash.—State v. Cole, 413 P.2d 341, 68 Wash.2d 400

Not conclusive

Pa.—Com. v. Yorktowne Paper Mills, Inc., 214 A.2d 203, 419 Pa. 363, app. after remand 231 A.2d 287, 426 Pa. 18

97. Ariz.—State v. Valdez, 371 P.2d 894, 91 Ariz. 274

Ill.—People v. Hodges, 343 N.E.2d 565, 36 Ill.App.3d 422

Md.—Kelly v. State, 298 A.2d 470, 16 Md.App. 533, affd. 310 A.2d 538, 270 Md. 139

Minn.—Anderson v. Florence, 181 N.W.2d 873, 288 Minn. 351

N.C.—State v. Vestal, 180 S.E.2d 755, 278 N.C. 561, app. after remand 195 S.E.2d 297, 283 N.C. 249

Testimony properly admitted

Tex.—Sikes v. State, 334 S.W.2d 440, 169 Tex.Cr.R. 443—Exxon Corp. v. West, Civ.App., 543 S.W.2d 667, cert. den. 98 S.Ct. 224, 434 U.S. 875, 54 L.Ed.2d 154, err. ref. no rev. err.

State not obliged to rely on defendant's stipulation as to qualifications

Ill.—People v. Biles, 305 N.E.2d 388, 15 Ill.App.3d 828

Stipulation as to polygraph operator not binding

Or.—State v. Tavernier, 555 P.2d 481, 27 Or.App. 115

page 51

99. Cal.—People v. McCoy, 252 P.2d 371, 115 C.A.2d 565

Ill.—People v. Hodges, 343 N.E.2d 565, 36 Ill.App.3d 422

La.—Alleman v. Houston Fire & Cas. Ins. Co., App., 142 So.2d 846

Pa.—Com. v. Liddick, 401 A.2d 323, 485 Pa. 121

S.C.—C.J.S. cited in Suddeth v. Knight, App., 314 S.E.2d 11, 14, 280 S.C. 540

Stipulation by accused without counsel held ineffective

Ill.—People v. Zazzetta, 189 N.E.2d 260, 27 Ill.2d 302

3. Mont.—McGuire v. American Honda Co., 566 P.2d 1124, 173 Mont. 171

Tenn.—Prater v. Louisville & N.R. Co., 462 S.W.2d 514, 62 Tenn.App. 318

4. U.S.—Hembree v. U.S., C.A. Mo., 347 F.2d 109—Schlemmer v. Provident Life & Acc. Ins. Co., C.A. Cal., 349 F.2d 682—C.J.S. cited in Osborne v. U.S., C.A. Mo., 351 F.2d 111, 120—J. G. Watts Construction Co. v. U.S., 161 Cl.Ct. 801

D.C.—Verkouteren v. District of Columbia, C.A., 346 F.2d 842, 120 U.S.App.D.C. 361, app. after remand 433 F.2d 461, 139 U.S.App.D.C. 303—Alper v. District of Columbia, C.A., 346 F.2d 845, 120 U.S.App.D.C. 364

Ind.—Brugner v. Shaffer, 210 N.E.2d 439, 138 Ind. App. 183

Kan.—C.J.S. quoted in Wentz Equipment Co. Inc. v. Missouri Pacific R. Co., 673 P.2d 1193, 1195, 9 Kan.App.2d 141

La.—Lefort v. Meibaum Bros., Inc., App., 321 So.2d 1264

Mass.—New England Gas & Elec. Ass'n v. Ocean Ace & Guarantee Corp., 116 N.E.2d 671, 330 Mass. 640

N.J.—Sarris v. A. A. Pruzick & Co., 117 A.2d 305, 37 N.J. Super 340

Pa.—Com. ex rel. Romanowicz v. Romanowicz, 248 A.2d 238, 213 Pa. Super 382—Edwards v. Donley, 297 A.2d 149, 223 Pa. Super 71

Tex.—W. T. Burton Co. v. Keown Contracting Co., Civ. App., 353 S.W.2d 909, err. ref. no rev. err.—Langford v. Shamburger, Civ. App., 417 S.W.2d 438, err. ref. no rev. err.

Va.—McLaughlin v. Gholson, 171 S.E.2d 816, 210 Va. 498

Stipulation by accused without counsel held ineffective

Iowa—State v. Hancock, 164 N.W.2d 330

Uncertain stipulation not binding on appellate court

Ga.—Hurd v. State, App., 187 S.E.2d 545, 125 Ga. App. 353

On appeal

Colo.—Colorado River Water Conservation Dist. v. Municipal Subdistrict, Northern Colorado Water Conservancy Dist., 610 P.2d 81, 198 Colo. 352

5. Cal.—People v. Perez, 66 Cal.Rptr. 473, 259 C.A.2d 371

Ill.—People v. Ziebell, 227 N.E.2d 127, 82 Ill.App.2d 350

Mont.—School Dist. No. 4, Lincoln County v. Colburg, 547 P.2d 84, 169 Mont. 368

Kan.—C.J.S. quoted in Wentz Equipment Co. Inc. v. Missouri Pacific R. Co., 673 P.2d 1193, 1195, 9 Kan.App.2d 141

6. U.S.—Charles H. Demarest, Inc. v. U.S., Cust. Ct., 174 F.Supp. 380

Ariz.—State v. Valdez, 371 P.2d 894, 91 Ariz. 274

Cal.—Baker v. Commoford, 295 P.2d 522, 140 C.A.2d 599—Burrows v. State, 66 Cal.Rptr. 868, 260 C.A.2d 29

Hawaii—C.J.S. cited in State v. Tangalin, 657 P.2d 1025, 1026, 66 Hawaii 100

Ill.—People v. Potts, 220 N.E.2d 251, 74 Ill.App.2d 301

N.J.—Hoboken Camera Center, Inc. v. Hardford Acc. & Indem. Co., 226 A.2d 439, 93 N.J. Super 484

Pa.—Broadbent v. A. Moe & Co., 220 A.2d 340, 208 Pa. Super 28

Stipulation not "clear, unequivocal and convincing evidence"

U.S.—Hoonsilapa v. Immigration and Naturalization Service, C.A., 575 F.2d 735, mod. on oth. grds. 586 F.2d 755

7. U.S.—Davis v. C.I.R., C.A., 241 F.2d 701

Conn.—Gervais v. Foehrenbach, 181 A.2d 253, 149 Conn. 461

Ill.—People v. Voight, 391 N.E.2d 219, 29 Ill. Dec. 60, 72 Ill.App.3d 472

Neb.—Sheets v. Davenport, 150 N.W.2d 224, 181 Neb. 621

N.C.—Wachovia Bank & Trust Co. v. Wilder, 120 S.E.2d 404, 255 N.C. 114

Tex.—McGee v. State, 355 S.W.2d 187, 172 Tex. Cr. R. 198

8. Cal.—People v. Torres, App., 20 Cal.Rptr. 315, cert. den. 83 S.Ct. 89, 371 U.S. 850, 9 L.Ed.2d 86

N.C.—Wallace Men's Wear, Inc. v. Harris, 220 S.E.2d 390, 28 N.C.App. 153, cert. den. 222 S.E.2d 703, 289 N.C. 298

9. Mo.—Barnes v. State Dept. of Public Health and Welfare, App., 320 S.W.2d 88

Tex.—Buchanan v. American Nat. Ins. Co., Civ. App., 446 S.W.2d 384, err. ref. no rev. err.

10. Ohio—Sowers v. Ohio Civil Rights Commission, 252 N.E.2d 463, 20 Misc. 115

Sustaining objection not erroneous

Ga.—Hill v. State, 236 S.E.2d 626, 239 Ga. 278

13. D.C.—D.C. Transit Systems, Inc. v. Simpkins, App., 367 A.2d 107

La.—Kimball v. Audubon Ins. Co., App., 103 So.2d 529

14. U.S.—L. L. Antle & Co. v. Genovese, C.A. Mo., 245 F.2d 215—In re Natta, D.C. Del., 48 F.R.D. 319

Cal.—Cooley v. State Bd. of Funeral Directors and Embalmers, 296 P.2d 588, 141 C.A.2d 293—People By and Through Department of Public Works v. Lagris, 324 P.2d 926, 160 C.A.2d 28—People v. Chavez, 329 P.2d 907, 50 C.2d 778, cert. den. 79 S.Ct. 356, 358 U.S. 946, 3 L.Ed.2d 353, cert. den. 79 S.Ct. 1126, 359 U.S. 993, 3 L.Ed.2d 982—Whoriskey v. City and County of San Francisco, 28 Cal.Rptr. 833, 213 C.A.2d 400

Ill.—People v. Jackson, 202 N.E.2d 72, 52 Ill.App.2d 405

Ky.—Scudamore v. Horton, 426 S.W.2d 142

Mich.—Foy v. Foy, 177 N.W.2d 681, 22 Mich.App. 514—People v. Matthews, 184 N.W.2d 366, 28 Mich.App. 278

Miss.—Blakeney v. Hawkins, 384 So.2d 1035

N.J.—State v. Nobles, 191 A.2d 793, 79 N.J. Super 442

N.Y.—Bankers Trust Co. v. Stanford Brands, Inc., 409 N.Y.S.2d 137, 65 A.D.2d 522

N.M.—Caranta v. Pioneer Home Improvements, Inc., 467 P.2d 719, 81 N.M. 393

Okla.—In re Hess' Estate, 379 P.2d 851, app. dism. and cert. den. 84 S.Ct. 157, 375 U.S. 45, 11 L.Ed.2d 108, reh. den. 84 S.Ct. 354, 375 U.S. 949, 11 L.Ed.2d 285—Lewis v. State, Cr., 458 P.2d 309

S.D.—Langan v. Van Dusen, 108 N.W.2d 470, 79 S.D. 108

Tex.—Hedtko v. Transport Ins. Co., Civ. App., 383 S.W.2d 474, err. ref. no rev. err.

Wash.—State v. Benson, 364 P.2d 220, 58 Wash.2d 490

Wis.—Schipper v. Schipper, 174 N.W.2d 474, 46 Wis.2d 303

Truth of contents established prima facie

Colo.—Denver—Chicago Trucking Co. v. Republic Drug Co., 306 P.2d 1076, 134 Colo. 461

Stipulation conceding genuineness of documents

Ill.—Northern Trust Co. v. Moscatelli, 203 N.E.2d 447, 54 Ill.App.2d 316

Ind.—Lyons v. State, 431 N.E.2d 78

Polygraph tests

Ariz.—State v. Trotter, 514 P.2d 1249, 110 Ariz. 61

Ark.—Foots v. State, 528 S.W.2d 135, 258 Ark. 507

Cal.—Robinson v. Wilson, 118 Cal.Rptr. 569, 44 C.A.3d 92

Fla.—Askary v. State, App., 294 So.2d 33, revd. in part on oth. grds., Sup., 330 So.2d 458, vac. in part on oth. grds., App., 335 So.2d 345—Brown v. State, App. 1 Dist., 452 So.2d 122, review den. 458 So.2d 274

Ga.—Williams v. State, 250 S.E.2d 848, 148 Ga.App. 55

Ill.—People v. Monigan, 390 N.E.2d 562, 28 Ill. Dec. 395, 72 Ill.App.3d 87, app. after remand, 423 N.E.2d 546, 53 Ill. Dec. 162, 97 Ill.App.3d 885

Ind.—Willis v. State, 374 N.E.2d 520, 268 Ind. 269

Mo.—State v. Jacks, App., 525 S.W.2d 431

Nev.—Corbett v. State, 584 P.2d 704, 94 Nev. 643

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N.Y.—People v. Hargrove, 363 N.Y.S.2d 24, 80 Misc.2d 317

N.C.—State v. Williams, 241 S.E.2d 149, 35 N.C.App. 216, petition den. 244 S.E.2d 156, 294 N.C. 739

N.D.—State v. Olmstead, 261 N.W.2d 880, certiorari denied 98 S.Ct. 2264, 436 U.S. 918, 56 L.Ed.2d 759

Ohio—State v. Towns, 301 N.E.2d 700, 35 Ohio App.2d 237

Okla.—Walton v. State, Cr., 565 P.2d 716

Utah—State v. Collins, 612 P.2d 775

Wash.—State v. Ross, 497 P.2d 1343, 7 Wash.App. 62, 52 A.L.R.3d 997

Wis.—State v. Mendoza, 258 N.W.2d 260, 80 Wis.2d 122, app. after remand 291 N.W.2d 478, 96 Wis.2d 106

Wyo.—Cullin v. State, 565 P.2d 445.

Notice of alibi

Or.—State v. Hari, 518 P.2d 1054, 16 Or.App. 357

Accident reports

Ariz.—Nash v. Kamrath, 521 P.2d 161, 21 Ariz.App. 530.

Videotaped testimony

Vt.—State v. Moffitt, 340 A.2d 39, 133 Vt. 366.

Police reports

Ill.—Wilkinson v. Mullen, 327 N.E.2d 433, 27 Ill. App.3d 804.

Report of child welfare service

La.—Tutorship v. Taylor, App., 329 So.2d 910
N.Y.—Scoville v. Scoville, 366 N.Y.S.2d 676, 47 A.D.2d 971.

Real property assessment

Pa.—Westinghouse Elec. Corp. v. Board of Assessment Appeals, 373 A.2d 766, 30 Pa.Cmwlth. 264.

Death certificate

N.C.—Spillman v. Forsyth Memorial Hospital, 227 S.E.2d 292, 30 N.C.App. 406.

Microscopic hair comparison test

R.I.—State v. Vargus, 373 A.2d 150, 118 R.I. 113.

Photographs

Ill.—Greig v. Gruffel, 364 N.E.2d 660, 7 Ill.Dec. 499, 49 Ill.App.3d 829.

La.—State v. Lindsey, 404 So.2d 466, app. after remand 428 So.2d 420, cert. den. 104 S.Ct. 261, 464 U.S. 908, 78 L.Ed.2d 246, reh. den. 104 S.Ct. 515, 464 U.S. 1004, 78 L.Ed.2d 702.

Truth serum test

Del.—Reynolds v. State, 424 A.2d 6.

Attorney's time records

Or.—Tidewater Contractors, Inc. v. Wheeler, 638 P.2d 499, 55 Or.App. 497, review den. 644 P.2d 1131, 292 Or. 722.

16. U.S.—Bravo v. Craven, D.C.Cal., 319 F.Supp. 154, aff'd., C.A., 433 F.2d 1371.

Cal.—Morgan v. Morgan, 294 P.2d 45, 139 C.A.2d 704.
N.Y.—Baecher v. Baecher, 396 N.Y.S.2d 447, 58 A.D.2d 821.

page 52

18. Map

Fla.—Gilman Paper Co. v. Newman, App., 398 So.2d 887.

19. Iowa—State v. Triplett, 79 N.W.2d 391, 248 Iowa 339, cert. gr. 78 S.Ct. 64, 355 U.S. 811, 2 L.Ed.2d 30, cert. dism. 78 S.Ct. 1358, 357 U.S. 217, 2 L.Ed.2d 1361.

La.—Suffrin v. Dupont, App., 241 So.2d 581.

20. Fla.—Zuppardi v. State, 367 So.2d 601.

Ga.—Lamb v. Bryan, 223 S.E.2d 122, 236 Ga. 237—Sheppard v. State, 226 S.E.2d 744, 138 Ga.App. 597.

Ohio—State v. Wellman, 344 N.E.2d 146, 45 Ohio App.2d 264, 74 O.O.2d 396.

21. Ohio—Rindlaub v. Travelers Ins. Co., 119 Ohio App. 77, 196 N.E.2d 602, aff'd. 194 N.E.2d 577, 175 Ohio St. 303.

Wis.—Rupp v. Travelers Indem. Co., 115 N.W.2d 612, 17 Wis.2d 16.

23. Cal.—People v. Dessauer, 241 P.2d 238, 38 C.2d 547, cert. den. 73 S.Ct. 96, 344 U.S. 858, 97 L.Ed.2d 666.

27. U.S.—Resor v. Rodriguez, C.A.N.Y., 373 F.2d 20.
Cal.—People v. Robertson, 181 Cal.Rptr. 198, 129 C.A.3d 546.

Prior transcript testimony may be stipulated into evidence.^{27.5}

27.5. U.S.—U. S. v. Manbeck, D.C.S.C., 526 F.Supp. 1091, aff'd. in part, vac. in part, rev'd. in part on oth. grds. C.A., 744 F.2d 360, cert. den. 105 S.Ct. 1197, 84 L.Ed.2d 342.

29. Tex.—Frede v. Lauderdale, Civ.App., 322 S.W.2d 379.

30. Miss.—McNair v. Capital Elec. Power Ass'n, 324 So.2d 234.

32. Cal.—People v. Hernandez, 17 Cal.Rptr. 20, 197 C.A.2d 25

33. Cal.—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Ambrose, 318 P.2d 181, 155 C.A.2d 513

34. Kan.—Kirkpatrick v. Ault, 258 P.2d 262, 174 Kan. 701

Preliminary examination

Mich.—People v. Faison, 165 N.W.2d 495, 14 Mich. App. 226.

Juvenile court

Ga.—Haralson v. Moore, 223 S.E.2d 107, 236 Ga. 131, app. after remand 227 S.E.2d 247, 237 Ga. 257

35. Md.—Dietz v. Moore, 351 A.2d 428, 277 Md. 1 N.H.—Walker v. Walker, 210 A.2d 468, 106 N.H. 282

Ohio—Marks v. Wagner, 370 N.E.2d 480, 52 Ohio App.2d 320, 6 O.O.3d 360

Tex.—Loper v. Andrews, Civ.App., 395 S.W.2d 873, aff'd, Sup., 404 S.W.2d 300

page 53

36. La.—State v. Henry, 352 So.2d 643.
Tenn.—Hale v. State, 281 S.W.2d 51, 198 Tenn. 461

37. Waiver of all objections to records except hearsay

Miss.—City of Bay St. Louis v. Johnston, 222 So.2d 841

38. La.—Broxton v. Davis, App., 80 So.2d 593.

A stipulation to admit an abstract permits admission of documents contained in abstract.^{39.5}

39.5. Ala.—Ennis v. Whitaker, 206 So.2d 367, 281 Ala. 563

40. Cal.—Topanga Corp. v. Gentile, 58 Cal.Rptr. 713, 249 C.A.2d 681—People v. Alvarado, 58 Cal.Rptr. 822, 250 C.A.2d 584

Ky.—Stone Coal Corp. v. Varney, 336 S.W.2d 41. Nev.—Lockart v. Maclean, 361 P.2d 670, 77 Nev. 210.

Tex.—Lee v. State, 342 S.W.2d 753, 170 Tex.Cr.R. 566.

Mutually binding

Ariz.—Jones v. Queen Ins. Co., 262 P.2d 250, 76 Ariz. 212.

Other matters relating to the construction and effect of stipulations as to depositions have been adjudicated.^{44.5}

44.5. Cal.—Los Angeles County Emp. Ass'n, Local No. 660 v. Sanitation Dist. No. 2 of Los Angeles County, 152 Cal.Rptr. 415, 89 C.A.3d 294.

Ind.—Hales & Hunter Co. v. Norfolk & W. Ry. Co., 428 N.E.2d 1225.

Stipulations restricting use of depositions

Ariz.—Broker v. Hunter, 528 P.2d 1269, 22 Ariz.App. 510, op. approved 535 P.2d 1051, 111 Ariz. 578.

Kan.—Henderson v. Hassur, 594 P.2d 650, 225 Kan. 678.

Psychiatric reports

Ill.—People v. Pembrock, 320 N.E.2d 470, 23 Ill. App.3d 991, aff'd. 342 N.E.2d 28, 62 Ill.2d 317

Interpretation erroneous

Wis.—Milwaukee & Suburban Transport Corp. v. Milwaukee County, 263 N.W.2d 503, 82 Wis.2d 420.

Deposition repudiating earlier deposition

Ala.—Tomaras v. Papadeas, 358 So.2d 428.

Contents not admissible

N.M.—Millican v. State, 581 P.2d 1287, 91 N.M. 792.

46. N.H.—Harmon v. Kennett Co., 168 A.2d 482, 103 N.H. 219.

N.Y.—Gunthardt v. Gunthardt, 223 N.Y.S.2d 420, 32 Misc.2d 914.

Okla.—Brown v. Brown, App., 465 P.2d 777.

Waiver of signature

Mo.—Tuttle v. Tomasino, 336 S.W.2d 683

Statutory basis for taking deposition changed by stipulation

Ala.—Smith v. State, Cr., 310 So.2d 484, 54 Ala.App. 561

page 54

51. N.Y.—Murphy v. New York Cent. R. Co., 183 N.Y.S.2d 787, 16 Misc.2d 249—Denco v. Pancrazio A. Sarubbi, Inc., 187 N.Y.S.2d 509, 19 Misc.2d 647

Pa.—Starnier v. Wirth, 269 A.2d 674, 440 Pa. 177.

Failure to file exceptions held immaterial

Ky.—Gibbs v. Terry, 281 S.W.2d 712.

Court decides legality and pertinency of the questions

Cal.—Wilson v. Superior Court, Contra Costa County, 307 P.2d 37, 148 C.A.2d 433

52. U.S.—Frechette v. Welch, C.A.N.H., 621 F.2d 11. Cal.—Margolis v. Teplin, 329 P.2d 535, 163 C.A.2d 526.

Colo.—Howard v. Beavers, 264 P.2d 858, 128 Colo. 541

Admission of defective depositions held not error

Cal.—Dodd v. Cantwell, 4 Cal.Rptr. 113, 179 C.A.2d 727

Waiver of signing

Ala.—In re Carroll, 247 So.2d 350, 287 Ala. 29.

Rule of practice not waived

5 C.—Webster v. Holly Hill Lumber Co., 234 S.E.2d 232, 268 S.C. 416

55. U.S.—Republic Productions, Inc. v. American Federation of Musicians of U.S. and Canada, D.C. N.Y., 30 F.R.D. 159.

59. U.S.—Samanski v. Mobile Seafood Co., C.A.Ala., 258 F.2d 823—Dale Benz, Inc., Contractors v. American Cas. Co. of Reading, Pa., C.A.Ariz., 305 F.2d 641—U.S. v. Bates, C.A.Ill., 407 F.2d 590—U.S. v. Kurfess, C.A.Ill., 426 F.2d 1017, cert. den. 91 S.Ct. 60, 400 U.S. 830, 27 L.Ed.2d 60.

Ariz.—State v. Romero, 269 P.2d 724, 77 Ariz. 229.

Cal.—Newman v. Los Angeles Transit Lines, 262 P.2d 95, 120 C.A.2d 685—People v. Huerta, 306 P.2d 505, 148 C.A.2d 272—LeVanseler v. LeVanseler, 24 Cal.Rptr. 206, 206 C.A.2d 611

Ga.—Travelers Ins. Co. v. Miller, 122 S.E.2d 268, 104 Ga.App. 554

Ill.—People v. Lehman, 125 N.E.2d 506, 5 Ill.2d 337—People v. Rutledge, 232 N.E.2d 521, 90 Ill.App.2d 251—People v. Henry, 347 N.E.2d 447, 37 Ill. App.3d 813.

Iowa—Brown v. Guiter, 128 N.W.2d 896, 256 Iowa 671.

Me.—Goldthwaite v. Sheraton Restaurant, 145 A.2d 362, 154 Me. 214, 79 A.L.R.2d 881.

Minn.—Southdale Center, Inc. v. Lewis, 110 N.W.2d 857, 260 Minn. 430, 6 A.L.R.3d 345—Leskinen v. Pucelj, 115 N.W.2d 346, 262 Minn. 461.

Pa.—Com. v. Davis, 322 A.2d 103, 457 Pa. 194.

Tex.—Miers v. Housing Authority of City of Dallas, Civ.App., 266 S.W.2d 487, cert. ques. ans. 266 S.W.2d 842, 153 Tex. 236, conf. to Civ.App., 268 S.W.2d 325—Shepherd v. State, 284 S.W.2d 155, 162 Tex.Cr.R. 235—Rendon v. State, Cr., 397 S.W.2d 430—Matthews v. State, Cr., 414 S.W.2d 938.

Va.—Breeding v. Johnson, 159 S.E.2d 836, 208 Va. 652.

Held insufficient

La.—Gulco Finance Co. of Livingston v. Lee, App., 241 So.2d 301.

Refusal of motion for continuance not error

Ind.—Grimm v. State, 374 N.E.2d 501, 268 Ind. 145.

60. U.S.—U.S. v. Garcia, C.A.Minn., 593 F.2d 77.

Ga.—Wilkes v. Sheppard, 122 S.E.2d 534, 104 Ga.App. 710.

Ill.—People v. Joe, 201 N.E.2d 416, 31 Ill.2d 220.

Page 54

Md—Hardesty v. State, 165 A.2d 761, 223 Md. 559—
Rose v. State, 377 A.2d 588, 37 Md. App. 388
Neb—Omaha Nat. Bank v. Jensen, 58 N.W.2d 582, 157
Neb. 22
62. US—C.J.S. cited in US v. Spann, C.A. Kan.,
515 F.2d 579, 583
D.C.—US v. Kember, C.A. 648 F.2d 1354, 208 U.S.
App.D.C. 380
Mass—Iverson v. Building Inspector of Dedham, 241
N.E.2d 817, 354 Mass. 688
Minn—Southdale Center, Inc. v. Lewis, 110 N.W.2d
857, 260 Minn. 430, 6 A.L.R.3d 345
Neb—C.J.S. cited in Ireland v. Stalbaum, 77 N.W.2d
155, 157, 162 Neb. 630
N.Y.—Mahon v. Giordano, 291 N.Y.S.2d 854, 30
A.D.2d 792

page 55

63. Preservation of objections as to competen-
cy, materiality, or relevancy
U.S.—Reed v. Murphy, C.A. Miss., 232 F.2d 668, cert.
den. 77 S.Ct. 45, 352 U.S. 831 1 L.Ed.2d 51
Competency of witness may not be challenged
Okla.—Runyon v. State, Cr., 304 P.2d 353
64. Minn.—Southdale Center, Inc. v. Lewis, 110
N.W.2d 857, 260 Minn. 430, 6 A.L.R.3d 345
65. Tex.—Austin v. Austin, 603 S.W.2d 204, on re-
mand, Civ.App., 619 S.W.2d 290
68. Insufficient foundation
Ill.—People v. Harrison, 186 N.E.2d 657, 26 Ill.2d 377,
cert. den. 83 S.Ct. 1531, 373 U.S. 928, 10 L.Ed.2d
426
70. U.S.—Koenig v. Frank's Plastering Co., D.C.
Neb., 227 F.Supp. 849, affd., C.A., 341 F.2d 257
Ill.—People v. Lewis, 468 N.E.2d 1222, 82 Ill.Dec. 442,
103 Ill.2d 111, cert. den. 105 S.Ct. 1364, 84
L.Ed.2d 384, and 105 S.Ct. 1383, 84 L.Ed.2d 403
Md.—Barnes v. State, 354 A.2d 499, 31 Md.App. 25.
Mo.—Gaddy v. State Bd. of Registration for Healing
Arts, App., 397 S.W.2d 347
Pa.—In re Sayre's Estate, 279 A.2d 51, 443 Pa. 548.
Witness may testify despite stipulation
Ark.—Rochester v. State, 467 S.W.2d 182, 250 Ark.
758.

Violation of stipulation not shown

Ariz.—State v. Bartanen, 591 P.2d 546, 121 Ariz. 454,
cert. den. 100 S.Ct. 174, 444 U.S. 884, 62 L.Ed.2d
113.

71. U.S.—Tucker v. Brady, C.A. Cal., 305 F.2d 550.
Utah—Stevens v. Gray, 259 P.2d 889, 123 Utah 395

Jury verdict

Neb.—Thorpe v. Zwonechek, 129 N.W.2d 483, 177
Neb. 504
Tex.—Austin v. Austin, 603 S.W.2d 204, on remand,
Civ.App., 619 S.W.2d 290

72. Utah—State v. Scandrett, 468 P.2d 639, 24 Utah
2d 202

Judge must find basis to determine ultimate
facts from conflicting evidence

Md.—Barnes v. State, 354 A.2d 499, 31 Md.App. 25
75. Cal.—People v. Lopez, 257 P.2d 670, 118 C.A.2d
235—People v. Ramos, 322 P.2d 51, 158 C.A.2d
156, cert. diss. 80 S.Ct. 95, 361 U.S. 844, 4
L.Ed.2d 82—People v. Coblenz, 40 Cal.Rptr. 116,
229 C.A.2d 296—People v. Jackson, App., 78
Cal.Rptr. 20

Ga.—Strozier v. State, 200 S.E.2d 762, 231 Ga. 140.
Ind.—Mattingly v. State, 145 N.E.2d 650, 237 Ind. 326.
N.D.—Stetson v. Investors Oil, Inc., 140 N.W.2d 349
Tex.—King v. State, 320 S.W.2d 842, 167 Tex.Cr.R.
494.
Wash.—State v. Dunn, 424 P.2d 897, cert. den. 88 S.Ct.
136, 389 U.S. 867, 19 L.Ed.2d 140.

Previous testimony held not to include previous
stipulation

U.S.—Massa v. C. A. Venezuelan Navigacion, C.A.
N.Y., 332 F.2d 779, cert. den. 85 S.Ct. 262, 379
U.S. 914, 13 L.Ed.2d 186.

76. Cal.—People v. Griffin, 58 Cal.Rptr. 707, 250
C.A.2d 545

77. Ga.—Goodwin v. Allen, 78 S.E.2d 804, 89 Ga.
App. 187

page 56

91. Refusal to answer not made admissible
Fla.—Walton v. Robert E. Haas Const. Corp., App.,
259 So.2d 731.

92. Ky.—Cooper v. Cooper, 248 S.W.2d 702, cert.
den. 73 S.Ct. 171, 344 U.S. 876, 97 L.Ed. 678,
motion gr. 73 S.Ct. 385

§ 24. — As to Admissions

93. U.S.—Smith v. C.I.R., C.A. Ga., 249 F.2d 218—
Gibbs v. Randolph, C.A. Tex., 250 F.2d 41.

Ala.—Brazelton v. State, Cr. 282 So.2d 342, 50 Ala.
App. 723.

Colo.—Martelli v. Merchants Oil Inc., App., 470 P.2d
55

Ga.—Interstate Life & Acc. Ins. Co. v. Merritt, 207
S.E.2d 231, 131 Ga.App. 825

Kan.—Brack v. McDowell, 320 P.2d 1056, 182 Kan.
368

La.—McCann v. Mercer, App., 191 So.2d 150.

N.J.—General Elec. Co. v. E. Fred Sulzer & Co., 222
A.2d 655, 92 N.J. Super 210

N.Y.—In re Friedman's Will, 123 N.Y.S.2d 788.

Wyo.—Boode v. Allied Mut. Ins. Co., 458 P.2d 653.

Particular stipulations construed

U.S.—Wright v. U.S., C.A. Ohio, 243 F.2d 546—Bard-
well v. C.I.R., C.A. Colo., 318 F.2d 786—U.S. v.
Morrison Industries, Inc., D.C. Ohio, 227 F.Supp.
974—U.S. v. Newman, D.C. Fla., 265 F.Supp. 540,
affd., C.A., 405 F.2d 189—U.S. v. Barber, D.C.
Del., 303 F.Supp. 807

Cal.—People v. Moore, 33 Cal.Rptr. 709, 220 C.A.2d
249—Page v. Preuss, 38 Cal.Rptr. 221, 226 C.A.2d
494.

Del.—Dulany Foods, Inc. v. Sytnik, 271 A.2d 795.

D.C.—U.S. v. Brown, C.A., 428 F.2d 1100, 138 U.S.
App.D.C. 398—Purvis v. U.S., App., 270 A.2d 501

Ga.—Southwire Co. v. Metal Equipment Co., 198
S.E.2d 687, 129 Ga.App. 49, cert. den. 94 S.Ct.
723, 414 U.S. 1092, 38 L.Ed.2d 550.

Ill.—Hunter v. Alfina, 251 N.E.2d 303, 112 Ill.App.2d
432.

Kan.—Winfield Livestock Auction, Inc. v. Farmers
State Bank of Hardtner, 394 P.2d 7, 193 Kan. 414.

La.—Bodde v. Morehouse Parish Police Jury, App., 91
So.2d 463.

Md.—Serdene v. Aetna Life Ins. Co., 319 A.2d 858, 21
Md.App. 453.

Mass.—W. U. Tel. Co. v. Fitchburg Gas & Elec. Light
Co., 137 N.E.2d 459, 334 Mass. 587.

Mich.—Dana Corp. v. Appeal Bd. of Mich. Employ-
ment Sec. Commission, 123 N.W.2d 277, 371 Mich.
107.

Minn.—Dziuk v. Loehrer, 123 N.W.2d 86, 266 Minn.
153.

Mo.—Corte v. St. Louis Public Service Co., 370 S.W.2d
297—Smolly v. Hoffman, App., 458 S.W.2d 579.

Mont.—Shipman v. Todd, 310 P.2d 300, 131 Mont.
365—Robinson v. Laffoon, 311 P.2d 768, 131
Mont. 446.

N.Y.—Kogan v. D'Angelo, 427 N.E.2d 505, 54 N.Y.2d
781, 443 N.Y.S.2d 366, on remand 443 N.Y.S.2d
152, 83 A.D.2d 930.

N.D.—State v. Unterseher, 255 N.W.2d 882.

Tex.—Waples-Platter Co. v. Commercial Standard Ins.
Co., 294 S.W.2d 375, 156 Tex. 234—Leach v.
Brown, Civ.App., 298 S.W.2d 185, err. ref. no rev.
err.—U.S. Fire Ins. Co. v. Carter, Civ.App., 468
S.W.2d 151, err. ref. no rev. err., Sup., 473 S.W.2d
2.

Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

Stipulations insufficient to warrant particular
conclusions

U.S.—Ene Human Relations Commission v. Tullio,
C.A. Pa., 493 F.2d 371.

Ariz.—State v. Broadfoot, 566 P.2d 685, 115 Ariz. 537.

Conn.—Lambrakos v. Carson, 391 A.2d 142, 174 Conn.
482

Ind.—Bottema v. Hendricks County Farm Bureau Co-
op. Ass'n, Inc., App., 306 N.E.2d 128

Md.—R.S. Const. Co. Inc. v. Mayor and City Council
of Baltimore, 309 A.2d 629, 269 Md. 704.

Mass.—Board of Assessors of Lynn v. Shop-Lease Co.,
Inc., 307 N.E.2d 310, 364 Mass. 569.

Mo.—Farmers Mut. Fire and Lightning Ass'n v. La
Vallee, App., 501 S.W.2d 69

Or.—Bell v. Arrant, 585 P.2d 744, 36 Or. App. 795

Tex.—Bourland v. State, Cr., 502 S.W.2d 8

Wis.—Milwaukee & Suburban Transport Corp. v. Mil-
waukee County, 263 N.W.2d 503, 82 Wis.2d 420

page 57

94. U.S.—Gibbs v. Randolph, C.A. Tex., 250 F.2d 41

98. Or.—City of Salem v. Trussell, 474 P.2d 371, 3
Or. App. 465.

99. U.S.—U.S. v. Webb, C.A. Md., 595 F.2d 203.

2. Iowa—Bartels v. Hennessey Bros., Inc., 164
N.W.2d 87.

4. Tex.—Mann v. Fender, Civ.App., 587 S.W.2d 188,
err. ref. no rev. err.

9. N.J.—State v. Leach, 362 A.2d 1286, 143 N.J. Su-
per. 289

page 58

13. Cal.—Long v. Long, 59 Cal.Rptr. 790, 251 C.A.2d
732

14. Or.—Morey v. Redifer, 282 P.2d 1062, 204 Or.
194.

15. Pa.—Burns v. Employers' Liability Assur. Corp.,
209 A.2d 27, 205 Pa. Super 389

16. U.S.—Missouri-Illinois R. Co. v. U.S., 381 F.2d
1001, 180 Ct.Cl. 1179

Ariz.—Pearl v. Superior Court In and For Mohave
County, 429 P.2d 498, 6 Ariz. App. 6—Guard v.
Maricopa County, 481 P.2d 873, 14 Ariz. App. 187.

Cal.—Rollins v. Hedim, 250 P.2d 728, 114 C.A.2d 488—
People v. Quarles, 266 P.2d 68, 123 C.A.2d 1—
People v. Murray, 287 P.2d 775, 135 C.A.2d 600—
Sparks v. Richardson, 296 P.2d 892, 141 C.A.2d
286—Thayer v. Board of Osteopathic Examiners,
320 P.2d 28, 157 C.A.2d 4—People v. Rogers, 24
Cal.Rptr. 324, 207 C.A.2d 254—Shakin v. Board of
Medical Examiners, 62 Cal.Rptr. 274, 254 C.A.2d
102, 23 A.L.R.3d 1398, app. diss., cert. den. 88
S.Ct. 1112, 390 U.S. 410, 19 L.Ed.2d 1272.

D.C.—Weaver v. Du Pont, Mun.App., 119 A.2d 716.

Fla.—New York Cent. Mut. Fire Ins. Co. v. Diaks, 69
So.2d 786.

Ga.—Hawes v. Nashville, C. & St. L. Ry. Co., 156
S.E.2d 455, 223 Ga. 527, conf. to 157 S.E.2d 37,
116 Ga. App. 301—Carroll v. Morrison, 161 S.E.2d
269, 224 Ga. 277.

Ill.—People ex rel. Borelli v. Lohman, 150 N.E.2d 116,
13 Ill.2d 506—People v. Manley, 202 N.E.2d 109,
52 Ill. App.2d 315—People v. Teycial, 219 N.E.2d
711, 73 Ill. App.2d 72.

Ind.—Uhl v. Litter's Quarry of Indiana, Inc., 384 N.E.2d
1099, 179 Ind. App. 178.

Iowa—State v. Post, 99 N.W.2d 314, 251 Iowa 345—In
re English's Estate, 206 N.W.2d 305.

Kan.—Stieben v. Constructive and General Laborers
Local Union, No. 685 of Salina, 317 P.2d 436, 181
Kan. 832.

La.—Hamby v. Hayden, App., 162 So.2d 726.

Me.—Bickford v. Berry, 196 A.2d 752, 160 Me. 9, Am.
on oth. grds. 199 A.2d 566, 160 Me. 132.

Md.—Henderson v. Warden, Md. Penitentiary, 206
A.2d 793, 237 Md. 519—Glassman Const. Co. v.
Baltimore Brick Co., 228 A.2d 472, 246 Md. 478—
Middleton v. State, 267 A.2d 759, 10 Md. App. 18.

Minn.—Ketterer v. Independent School Dist. No. 1 of
Chippewa County, 79 N.W.2d 428, 248 Minn. 212.

Mo.—City of St. Louis v. Londoff, App., 518 S.W.2d
312.

Neb.—Kuhmann v. Platte Val. Irr. Dist., 89 N.W.2d
768, 166 Neb. 493.

N.J.—*State v. Marchese*, 101 A.2d 13, 14 N.J. 16—C.J.S. cited in *State by Van Riper v. Atlantic City Elec. Co.*, 128 A.2d 861, 864, 23 N.J. 259.

N.M.—*Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 428 P.2d 15, 78 N.M. 41.

N.C.—*Edwards v. City of Raleigh*, 81 S.E.2d 273, 240 N.C. 137—*Lumbee River Conference of Holiness Methodist Church v. Locklear*, 98 S.E.2d 453, 246 N.C. 349—*Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 148 S.E.2d 693, 267 N.C. 528—*Rural Plumbing & Heating, Inc. v. H. C. Jones Const. Co.*, 149 S.E.2d 625, 268 N.C. 23—*Atlantic Coast Line R. Co. v. State Highway Commission*, 150 S.E.2d 70, 268 N.C. 92—*Dale v. Dale*, 173 S.E.2d 643, 8 N.C.App. 96—*Crowder v. Jenkins*, 180 S.E.2d 482, 11 N.C.App. 57.

Ohio—*State v. Sellers*, App., 118 N.E.2d 193.

Okl.—*Jackson v. State*, Cr., 401 P.2d 199—*Will v. Jones*, App., 463 P.2d 702.

Tenn.—*Shay v. Harper*, 303 S.W.2d 335, 202 Tenn. 141—*Price v. State Farm Mut. Auto. Ins. Co.*, 486 S.W.2d 721.

Tex.—*Conley v. State*, Cr., 390 S.W.2d 276—*Chaney v. State*, Cr., 464 S.W.2d 653—*Johnson v. State*, Cr., 478 S.W.2d 954.

Wis.—*City of Milwaukee v. Richards*, 69 N.W.2d 445, 269 Wis. 570.

Stipulation held binding as to material facts
U.S.—*Illinois Cent. Gulf R. Co. v. Tabor Grain Co., D.C.Ill.*, 488 F.Supp. 110.

N.Y.—*Perillo v. De Martini*, 387 N.Y.S.2d 280, 54 A.D.2d 691.

Particular facts or admissions

(3) U.S.—*Grinder v. Southern Farm Bureau Cas. Ins. Co., C.A.Ark.*, 590 F.2d 741.

(4) Cal.—*South Bay Irrigation Dist. v. California-American Water Co.*, 133 Cal.Rptr. 166, 61 C.A.3d 944, cert. den. 88 S.Ct. 28, 434 U.S. 801, 54 L.Ed.2d 59.

(12) Other facts or admissions
U.S.—*Biewer v. C.I.R., C.A.Mich.*, 341 F.2d 394—*U.S. v. Nephrite Jade, D.C.Mo.*, 325 F.Supp. 986.

Ala.—*Alabama Power Co. v. Sellers*, 214 So.2d 833, 283 Ala. 137.

Cal.—*People v. Irvin*, 70 Cal.Rptr. 892, 264 C.A.2d 747—*Mézerkour v. Texaco Oil Co.*, 72 Cal.Rptr. 1, 266 C.A.2d 76, reh. den. 72 Cal.Rptr. 639.

Fla.—*Crowe v. Overland Hauling, Inc.*, App., 245 So.2d 654.

Ga.—*Walker v. Greene*, 197 S.E.2d 867, 128 Ga. App. 794.

Ill.—*People v. Sanders*, 370 N.E.2d 1213, 13 Ill.Dec. 186, 55 Ill.App.3d 178.

Mass.—*New Hampshire Ins. Co. v. Fahey*, 430 N.E.2d 1193, 385 Mass. 137.

Nev.—*Wehrheim v. State*, 443 P.2d 607, 84 Nev. 477.

N.C.—*Appalachian South, Inc. v. Construction Mortg. Corp.*, 182 S.E.2d 15, 11 N.C.App. 651, cert. den. 183 S.E.2d 244, 279 N.C. 396.

Ohio—*Richley v. Van Horneff II*, App., 311 N.E.2d 37, 38 Ohio App.2d 22.

Or.—*Tiano v. Elsensohn*, 520 P.2d 358, 268 Or. 166.

Tenn.—*State, Dept. of Highways v. Urban Estates, Inc.*, 465 S.W.2d 357, 255 Tenn. 193.

Tex.—*Wood v. Self*, Civ.App. 362 S.W.2d 188—*Hoggett v. Wright*, Civ.App., 374 S.W.2d 690, err. ref. no rev. err.—*Dusek v. State*, Cr., 467 S.W.2d 270.

Vt.—*State v. Lawrence*, 360 A.2d 55, 134 Vt. 373.

Wash.—*Frase v. Johnson*, 513 P.2d 857, 9 Wash.App. 634.

Wyo.—*Bard Ranch, Inc. v. Weber*, 538 P.2d 24, reh. den. 541 P.2d 791.

Criminal cases

U.S.—*U. S. v. DeSimone*, C.A.Ala., 660 F.2d 532, reh. den. 666 F.2d 592, cert. den. 102 S.Ct. 1732, 455 U.S. 1027, 72 L.Ed.2d 149, and 102 S.Ct. 1976, 456 U.S. 928, 72 L.Ed.2d 444.

Ill.—*Village of Schaumburg v. Franberg*, 424 N.E.2d 1239, 54 Ill.Dec. 336, 99 Ill.App.3d 1.

Mich.—*People v. Cissom*, 197 N.W.2d 282, 39 Mich. App. 80.

Tex.—*Reasoner v. State*, Civ.App., 463 S.W.2d 55, err. ref. no rev. err.

Stipulation need not be read to jury

U.S.—*Nanda v. Ford Motor Co.*, C.A.Ill., 509 F.2d 213.

17. U.S.—C.J.S. cited in *Burstein v. U.S.*, C.A.Mo., 232 F.2d 19, 23—*Furniture Forwarders of St. Louis, Inc. v. Chicago, R.I. & P.R. Co., C.A.Mo.*, 393 F.2d 537—*U.S. v. 3,788 16 Acres of Land, More or Less, in Emmons County, N.D.*, C.A.N.D., 439 F.2d 291.

Ala.—*Champion Intern. Corp. v. State*, 405 So.2d 932, on remand, Civ.App., 405 So.2d 937.

Ariz.—*State v. Sorrell*, 506 P.2d 1065, 109 Ariz. 171.

Cal.—*In re Adams' Estate*, 311 P.2d 197, 151 C.A.2d 317—*People v. Bauer*, 50 Cal.Rptr. 687, 241 C.A.2d 632—*Shakin v. Board of Medical Examiners*, 62 Cal.Rptr. 274, 254 C.A.2d 102, 23 A.L.R.3d 1398, app. dism., cert. den. 88 S.Ct. 1112, 390 U.S. 410, 19 L.Ed.2d 1272.

Iowa—*Pappas v. Hauser*, 197 N.W.2d 607.

La.—*Mack v. Mack*, App., 371 So.2d 1170.

Mich.—*Wechsler v. Zen*, 140 N.W.2d 581, 2 Mich.App. 438.

N.M.—*State Highway Commission v. Ruidoso Tel. Co. (NSL)*, 389 P.2d 606, 73 N.M. 487.

N.C.—*Crowder v. Jenkins*, 180 S.E.2d 482, 11 N.C.App. 57.

Ohio—*Moss v. Lordier*, App., 129 N.E.2d 84.

R.I.—*State v. Smyth*, 397 A.2d 497, 121 R.I. 188.

Tex.—*Fraser v. Pierce*, Civ.App., 398 S.W.2d 955, err. ref. no rev. err.

Stipulations regarded in decision

(3) Other matters

Ill.—*Sanborn v. Sanborn*, 396 N.E.2d 1192, 33 Ill.Dec. 468, 78 Ill.App.3d 146.

Stipulated facts as found by court

U.S.—*National Fruit Product Co. v. U.S.*, D.C.Va., 105 F.Supp. 658, aff'd., C.A., 199 F.2d 754, cert. den. 73 S.Ct. 866, 345 U.S. 950, 97 L.Ed. 1373.

N.Y.—*Town of Vienna v. State*, 119 N.Y.S.2d 545, 203 Misc. 1053.

Stipulation takes precedence over pretrial order

U.S.—*Bouchard v. U.S.*, D.C.Wis., 143 F.Supp. 5.

Amount of judgment

(2) Other cases.

La.—*Governale v. Travelers Ins. Co.*, App., 378 So.2d 615.

N.Y.—*Vista Sales Corp. v. Briggsford Corp.*, 319 N.Y.S.2d 96, 65 Misc.2d 690.

R.I.—*Sims Tire Co., Inc. v. Colonial Discount Tire, Inc.*, 414 A.2d 467.

Interest

Ind.—*State Dept. of Revenue v. American Motorists' Ins. Co.*, 396 N.E.2d 907, 182 Ind.App. 645.

N.M.—*First Nat. Bank of Albuquerque v. Energy Equities Inc.*, App., 569 P.2d 421, 91 N.M. 11.

page 59

18. Colo.—*Board of County Com'rs of Weld County v. Highland Mobile Home Park, Inc.*, App., 543 P.2d 103.

20. Kan.—*Burke v. Board of Ed. of Common School Dist. No. 110*, 313 P.2d 272, 181 Kan. 534.

Okl.—*Negrate v. Gunter*, 285 P.2d 194.

Or.—*Bennett v. Pratt*, 365 P.2d 622, 228 Or. 474.

Wash.—*State ex rel. Carroll v. Gatter*, 260 P.2d 360, 43 Wash.2d 153.

21. U.S.—*U.S. v. Pagan*, D.C.N.Y., 140 F.Supp. 711—*Portage Plastics Co. v. U.S.*, D.C.Wis., 326 F.Supp. 452.

Ariz.—*Guard v. Maricopa County*, 481 P.2d 873, 14 Ariz.App. 187.

Ark.—*Rooker v. City of Little Rock*, 352 S.W.2d 172, 234 Ark. 372.

Cal.—*In re Challiman's Estate*, 274 P.2d 439, 127 C.A.2d 736—*Steele v. Steele*, 282 P.2d 171, 132 C.A.2d 301—*Ach v. Finkelstein*, 70 Cal.Rptr. 472, 264 C.A.2d 667.

Fla.—*Mitchum v. State*, App., 244 So.2d 159.

Ill.—*People v. Carter*, 235 N.E.2d 382, 92 Ill.App.2d 120.

Iowa—*Appleby v. Farmers State Bank of Dows*, 56 N.W.2d 917, 244 Iowa 288.

La.—*Succession of Kamlade*, 94 So.2d 257, 232 La. 275.

Neb.—*Matter of Wells*, 249 N.W.2d 904, 197 Neb. 584.

N.J.—*Depew v. Hillsborough Tp.*, 155 A.2d 766, 31 N.J. 157.

N.Y.—*People v. Eisenberg*, 238 N.E.2d 719, 22 N.Y.2d 99, 291 N.Y.S.2d 318.

N.C.—*Orange County v. Heath*, 180 S.E.2d 810, 278 N.C. 688.

Okl.—*Lampe v. State*, Cr., 540 P.2d 590.

Or.—*Morey v. Redifer*, 282 P.2d 1062, 204 Or. 194.

Utah—*Buzianis v. Beneficial Homes, Inc.*, 550 P.2d 174.

Wash.—*Kerns v. Pickett*, 287 P.2d 88, 47 Wash.2d 184.

Wis.—*Peterman v. State*, 151 N.W.2d 677, 35 Wis.2d 790, cert. den. 88 S.Ct. 226, 389 U.S. 899, 19 L.Ed.2d 223.

On appeal

U.S.—*U.S. v. Sinor*, C.A.Fla., 238 F.2d 271 cert. den. 77 S.Ct. 1287, 353 U.S. 985, 1 L.Ed.2d 1144—*U.S. v. 3,788.16 Acres of Land, More or Less, in Emmons County, N.D.*, C.A.N.D., 439 F.2d 291—*U.S. v. Beil*, C.A.Ga., 577 F.2d 1313, reh. den. 585 F.2d 521.

Cal.—*In re Marriage of Denney*, 171 Cal.Rptr. 440, 115 C.A.3d 543.

Colo.—*Allred v. City of Lakewood*, 576 P.2d 186, 40 Colo.App. 238.

Ill.—*People v. Hampton*, 302 N.E.2d 691, 14 Ill.App.3d 427.

La.—*Harrison v. McKoin*, App., 332 So.2d 890.

Ohio—*Spitz v. Volibar Realty Co., App.*, 138 N.E.2d 438.

Okl.—*Leeper v. State*, Cr., 554 P.2d 810.

Motion to vacate consent decree

U.S.—*Vecchione v. Wohlgemuth*, D.C.Pa., 426 F.Supp. 1297, aff'd., C.A., 558 F.2d 150, cert. den. 98 S.Ct. 439, 434 U.S. 943, 54 L.Ed.2d 304.

22. U.S.—*Baker v. Chicago, B. & Q.R. Co., C.A. Iowa*, 220 F.2d 721—*Jackson v. U.S.*, C.A.Mo., 330 F.2d 679, cert. den. 85 S.Ct. 105, 379 U.S. 855, 13 L.Ed.2d 58—C.J.S. cited in *U.S. v. 133.79 Acres of Land, More or Less, in Sebastian County, Ark.*, 313 F.Supp. 697, 703.

Ill.—*Thornton v. Illinois Founders Ins. Co.*, 418 N.E.2d 744, 49 Ill.Dec. 724, 84 Ill.2d 365.

La.—*Talbot v. Eusea*, App., 151 So.2d 531.

N.Y.—*Jet Brokers, Inc. v. Glickberg*, 126 N.Y.S.2d 160, 204 Misc. 962.

N.D.—*Saupe v. Lowe*, 78 N.W.2d 163.

Okl.—*Public Service Co. v. Sonagera*, 253 P.2d 169, 208 Okl. 95—*Smith v. State*, Cr., 568 P.2d 1319.

Tex.—*Piro v. Piro*, Civ.App., 349 S.W.2d 626.

Criminal case

U.S.—*U.S. v. Houston*, C.A.Cal., 547 F.2d 104.

Ariz.—*State v. Caldwell*, 573 P.2d 864, 117 Ariz. 464.

Findings held supported by stipulations

(3) Cal.—*Kuncaid v. Gomez*, 79 Cal.Rptr. 539, 274 C.A.2d 839.

Ohio—*Case v. Business Centers, Inc.*, 357 N.E.2d 47, 48 Ohio App.2d 267, 2 O.O.3d 229.

R.I.—*Randall v. Norberg*, 403 A.2d 240, 121 R.I. 714.

Tex.—*Womack v. State*, 286 S.W.2d 140, 162 Tex.Cr.R. 435.

page 60

23. U.S.—*Julian v. U.S.*, C.A.Mich., 236 F.2d 155.

Burden of proof met

Kan.—*Jackson County State Bank v. Williams*, 573 P.2d 1092, 1 Kan.App.2d 649.

24. Kan.—*Clardy v. National Life & Acc. Ins. Co.*, 561 P.2d 892, 1 Kan.App.2d 1.

La.—*Duke v. Valley Forge Life Ins. Co., App.*, 341 So.2d 1366, 1 A.L.R.4th 1193.

Question moot

Md.—*Grove v. Frame*, 402 A.2d 892, 285 Md. 691.

25. D.C.—*Glenn v. U.S.*, App., 391 A.2d 772.

Page 60

Ga.—Tribble v. State, 80 S.E.2d 711, 89 Ga.App. 593
Minn.—First Nat. Bank of Hennepin v. Olson, 74
N.W.2d 123, 246 Minn. 28
Miss.—Bridges v. Bridges, 330 So.2d 260
Ohio—Armes v. Liquor Control Commission, App., 322
N.E.2d 297

Stipulation held to make prima facie case
N.M.—Webb v. Richardson, 363 P.2d 626, 69 N.M. 15

Conviction on plea of guilty
Tex.—Milligan v. State, Cr., 478 S.W.2d 552

Basis of injunction

Ohio—Ackerman v. Tri-City Geriatric & Health Care,
Inc., 378 N.E.2d 145, 55 Ohio St.2d 51, 9 O.O.3d
62

Not guilty plea

U.S.—U.S. v. Lawrie, C.A.Minn., 568 F.2d 98, cert.
den 98 S.Ct. 1607, 435 U.S. 969, 56 L.Ed.2d 60,
reh. den 98 S.Ct. 2860, 436 U.S. 951, 56 L.Ed.2d
794.

26. U.S.—Malik v. Universal Resources Corp., D.C.
Cal., 425 F.Supp. 350
Ariz.—State v. Peterson, 512 P.2d 600, 20 Ariz.App.
296

Ill.—People v. Blakely, 323 N.E.2d 430, 25 Ill.App.3d
165.

Mich.—People v. Kremko, 218 N.W.2d 112, 52 Mich.
App. 565

Va.—Henderson & Russell Associates, Inc. v. Warwick
Shopping Center, Inc., 229 S.E.2d 878, 217 Va.
486.

27. U.S.—U.S. v. Cline, C.A.N.C., 388 F.2d 294

28. Ga.—Josey v. Ledbetter, 175 S.E.2d 900, 226 Ga.
563.

29. U.S.—Azevedo v. C.I.R., C.A., 246 F.2d 196—
Herrang v. Great Atlantic & Pacific Tea Co.,
C.A.Ky., 253 F.2d 954—Schering Corp. v. Martin
Wholesale Distributors, Inc., D.C.Pa., 212 F.Supp.
325

Ga.—Pioneer Investments, Inc. v. Adrine, 103 S.E.2d
686, 97 Ga.App. 520.

Pa.—MacDonald v. Feldman, 142 A.2d 1, 393 Pa. 274.

30. Waiver of jurisdiction

Alaska—Matter of J.H.B., 578 P.2d 146.

31. Cal.—Loomis v. State, 39 Cal.Rptr. 820, 228
C.A.2d 820

32. U.S.—Consolidated Molded Products Corp. v.
U.S., 600 F.2d 793, 220 Ct.Cl. 594.

N.J.—Hoppe v. Ranzini, 385 A.2d 913, 158 N.J.Super.
158.

33. Cal.—Noonan v. Green, 80 Cal.Rptr. 513, 276
C.A.2d 25.

34. Ala.—Champion Intern. Corp. v. State, 405 So.2d
932, on remand, Civ.App., 405 So.2d 937.

35. Ga.—Estes v. Perkins, 238 S.E.2d 423, 239 Ga.
636.

Ohio—Allstate Ins. Co. v. Boggs, 271 N.E.2d 855, 27
Ohio St.2d 216

36. U.S.—U.S. Steel Corp. v. United Mine Workers of
America, C.A.Pa., 534 F.2d 1063.

N.C.—McRorie v. Creswell, 160 S.E.2d 681, 273 N.C.
615.

**Contrary allegations in different action not newly
discovered evidence**

La.—Maines v. Home Ins. Co., App., 322 So.2d 320.

37. U.S.—White v. City of Suffolk, D.C.Va., 460
F.Supp. 516.

page 61

39. Cal.—Hart v. Richardson, 285 P.2d 685, 134
C.A.2d 242—Harris v. Spinali Auto Sales Inc., 49
Cal.Rptr. 610, 240 C.A.2d 447.

Fla.—Gunn Plumbing, Inc. v. Dania Bank, 252 So.2d 1.
Me.—Seigny v. City of Biddeford, 344 A.2d 34.

Mo.—C.J.S. cited in Edwards v. Hrebec, App., 414
S.W.2d 361, 366.

Okla.—Parish v. Ned, 264 P.2d 762

S.D.—Chicago & N.W. Ry. Co. v. Gillis, 129 N.W.2d
532, 80 S.D. 617.

45. Colo.—Shore v. Denver Bldg. & Const. Trades
Council, 263 P.2d 315, 128 Colo. 424

Mass.—Roach v. Newton Redevelopment Authority,
396 N.E.2d 170, 8 Mass.App. 618, aff'd Sup. 407
N.E.2d 1251, 381 Mass. 135

47. **Failure to object to use in companion suit**
La.—Smith v. Bayou Rentals, Inc., App., 345 So.2d
1229.

48. U.S.—Azevedo v. C.I.R., C.A., 246 F.2d 196—In
re Hardin, C.A.Wis., 458 F.2d 938

Cal.—Shyvers v. Mitchell, 284 P.2d 826, 133 C.A.2d
569—Walnut Creek Pipe Distributors, Inc. v. Gates
Rubber Co. Sales Division, 39 Cal.Rptr. 767, 228
C.A.2d 810

Ga.—Harden v. Clarke, 179 S.E.2d 667, 123 Ga.App.
142

Ill.—Paul Harris Furniture Co. v. Morse, 130 N.E.2d
16, 7 Ill.App.2d 42, aff'd in part and rev'd. in part
on oth. grds., 139 N.E.2d 275, 10 Ill.2d 28.

Kan.—Baker v. City of Leoti, 292 P.2d 720, 179 Kan.
122

Mich.—Gantz v. City of Detroit, 252 N.W.2d 764, 399
Mich. 649.

N.M.—Arvas v. Feather's Jewelers, App., 582 P.2d
1302, 92 N.M. 89.

N.Y.—Alten v. Doral Const. Corp., 128 N.Y.S.2d 452,
205 Misc. 733.

Tex.—Texas Emp. Ins. Ass'n v. Elder, 282 S.W.2d 371,
155 Tex. 27—Cathy v. State, Cr., 402 S.W.2d 743.

49. U.S.—By's Chartering Service, Inc. v. Interstate
Ins. Co., C.A.Mass., 524 F.2d 1045

Ariz.—Valley Nat. Bank of Phoenix v. Fulton, 266 P.2d
397, 77 Ariz. 11

Cal.—People v. Yoshimura, 154 Cal.Rptr. 314, 91
C.A.3d 609

Me.—Hammond v. Maine Cent. R.R., 390 A.2d 502.

Mo.—McCory v. Knowles, App., 478 S.W.2d 682, 64
A.L.R.3d 544.

Tenn.—Steiner-Liff Iron & Metal Co. v. Woodmont
Country Club, 480 S.W.2d 533

page 62

51. U.S.—C.I.R. v. American Ass'n of Engineers Em-
ployment, C.A., 204 F.2d 19.

Ga.—Wade-Corry Co. v. Moseley, 156 S.E.2d 64, 223
Ga. 474.

Ill.—First Nat. Bank of Clayton v. Lowery, 149 N.E.2d
660, 17 Ill.App.2d 288.

La.—State v. Skyeagle, App., 345 So.2d 189, writ den.,
Sup., 347 So.2d 261

N.C.—Home Finance Co. of Georgetown v. O'Daniel,
74 S.E.2d 717, 237 N.C. 286.

Tex.—City of Galveston v. Russo, Civ.App., 508
S.W.2d 882, err. ref. no rev. err.

Utah—Rees v. Archibald, 311 P.2d 788, 6 Utah 264.

Waiver of right to contest fact

N.D.—City of Hazelton v. Daugherty, 275 N.W.2d 624.

page 63

53. U.S.—Burstin v. U.S., C.A.Mo., 232 F.2d 19—
Employers Fire Ins. Co. v. Laney & Duke Storage
Warehouse Co., C.A.Fla., 392 F.2d 138—Furni-
ture Forwarders of St. Louis, Inc. v. Chicago, R.I.
& P.R. Co., C.A.Mo., 393 F.2d 537—Benjamin's
Estate v. C.I.R., C.A., 465 F.2d 982.

Ariz.—State v. Bray, 472 P.2d 54, 106 Ariz. 185.

Cal.—Morningred v. Golden State Co., 16 Cal.Rptr.
219, 196 C.A.2d 130—Mock v. Shulman, 38 Cal.
Rptr. 39, 226 C.A.2d 263—People v. Carnesi, 94
Cal.Rptr. 555, 16 C.A.3d 863.

Del.—Singer v. Magnavox Co., Ch., 367 A.2d 1349,
aff'd in part. rev'd. in part on oth. grds. 380 A.2d
969.

Fla.—Clark v. State, App., 293 So.2d 768.

Ill.—People v. Triem Steel & Processing, Inc., 125
N.E.2d 678, 5 Ill.App.2d 371—People ex rel. Curry
v. Decatur Park Dist., 189 N.E.2d 338, 27 Ill.2d
434—People v. Wiggins, 293 N.E.2d 696, 9 Ill.
App.3d 1078—People v. Griffin, 310 N.E.2d 746,
18 Ill.App.3d 873

Kan.—Stieben v. Constructive and General Laborers
Local Union, No. 685, of Salina, 317 P.2d 436, 181
Kan. 832

Me.—Seigny v. City of Biddeford, 344 A.2d 34.

Miss.—Smith v. State, 63 So.2d 557, 217 Miss. 123

Mo.—Cox v. McNeal, App., 577 S.W.2d 881.

Neb.—Webber v. City of Omaha, 211 N.W.2d 911, 190
Neb. 678.

N.C.—C.J.S. quoted in State v. Powell, 118 S.E.2d 617,
619, 254 N.C. 231—State v. Billings, 205 S.E.2d
577, 22 N.C.App. 73.

Ohio—Markert v. Bosley, 207 N.E.2d 414, 2 Ohio Misc.
109.

Okla.—Briggs v. McAdams Pipe & Supply Co., 359 P.2d
572—American-First Title & Trust Co. v. First
Federal Sav. & Loan Ass'n of Coffeyville, Kan.,
415 P.2d 930.

Tex.—Ratliff v. State, 276 S.W.2d 519, 161 Tex.Cr.R.
332—Weeks v. State, 289 S.W.2d 758, 163 Tex.
Cr.R. 226—Hartman v. Crain, Civ.App., 398
S.W.2d 387—Clark v. State, Cr., 413 S.W.2d 107—
International Sec. Life Ins. Co. v. Rosson, Civ.
App. 466 S.W.2d 52, err. dism.

54. U.S.—Bruno New York Industries Corp. v. U.S.,
342 F.2d 75, 169 Ct.Cl. 999—F & D Property Co.
v. Alkire, C.A.Colo., 385 F.2d 97—Employers
Fire Ins. Co. v. Laney & Duke Storage Warehouse
Co., C.A.Fla., 392 F.2d 138—Missouri-Illinois R.
Co. v. U.S., 381 F.2d 1001, 180 Ct.Cl. 1179.

Cal.—In re Duggan, 130 Cal.Rptr. 715, 551 P.2d 19, 17
C.2d 416

Ill.—People v. Steele, 224 N.E.2d 634, 79 Ill.App.2d
421—People v. Busch, 268 N.E.2d 209, 131 Ill.
App.2d 430—People v. Walker, 270 N.E.2d 159,
132 Ill.App.2d 766—People v. Sanders, 370 N.E.2d
1213, 13 Ill.2d 186, 55 Ill.App.3d 178.

Iowa—C.J.S. cited in Bartels v. Hennessey Bros., Inc.,
164 N.W.2d 87, 91

Mo.—Kelly v. State, App., 623 S.W.2d 65.

N.C.—Moore v. Humphrey, 101 S.E.2d 460, 247 N.C.
423—C.J.S. quoted in State v. Powell, 118 S.E.2d
617, 619, 254 N.C. 231—West v. West, 127 S.E.2d
531, 257 N.C. 760—State v. McWilliams, 178
S.E.2d 476, 277 N.C. 680.

N.Y.—People v. Rutkowski 415 N.Y.S.2d 262, 69
A.D.2d 869.

Tex.—Wiles v. State, Cr., 397 S.W.2d 865—Cox v.
Elerson, Civ.App., 437 S.W.2d 312, err. ref. no rev.
err.

Wis.—Howland v. State, 186 N.W.2d 319, 51 Wis.2d
162.

Ala.—Leonard v. State, Cr.App., 369 So.2d 873, writ
den., Sup., 369 So.2d 877.

Ill.—Morton Grove Park Dist. v. American Nat. Bank
& Trust Co. of Chicago, 350 N.E.2d 149, 39 Ill.
App.3d 426.

Okla.—Cook v. State, Cr., 556 P.2d 1067.

Utah—Redevelopment Agency of Salt Lake City v.
Mitsui Inv. Inc., 522 P.2d 1370.

Stipulation as evidence
(3) Other matters

Alaska—Huff v. State, 598 P.2d 928.

Fla.—Bobenhausen v. Boucher, App., 377 So.2d 31.

Wash.—State v. Irving, 601 P.2d 954, 24 Wash.App.
370.

55. U.S.—U.S. v. Calc, D.C.N.Y., 508 F.Supp. 1038.

Mass.—Com. v. Waters, 395 N.E.2d 894, 8 Mass.App.
918.

56. U.S.—U.S. v. Palmiotti, C.A.N.Y., 254 F.2d 491.

Cal.—People v. Yoshimura, 154 Cal.Rptr. 314, 91
C.A.3d 609.

Ill.—People v. Mikka, 131 N.E.2d 79, 7 Ill.2d 454, cert.
den. 76 S.Ct. 656, 350 U.S. 1009, 100 L.Ed. 871,
cert. den. 78 S.Ct. 1157, 357 U.S. 910, 2 L.Ed.2d
1160.

N.Y.—People v. Gross, 130 N.Y.S.2d 282.

S.D.—State v. Cran, 281 N.W.2d 81.

Tex.—Adams Leasing Co. v. Knighton, Civ.App., 456
S.W.2d 574—Bryers v. State, Cr., 480 S.W.2d 712

—Harrison v. State, Cr., 501 S.W.2d 668.

Discretion of court

La.—State v. Gilmore, 332 So.2d 789.

Prosecution may prove elements of crime which defense has stipulated

Ill.—People v. Blackwell, 394 N.E.2d 1329, 31 Ill. Dec. 952, 76 Ill. App.3d 371—People v. Campbell, 396 N.E.2d 607, 33 Ill. Dec. 218, 77 Ill. App.3d 804

Mo.—State v. Dalton, App., 587 S.W.2d 644

57. U.S.—Shrader v. Riddle, D.C. Va., 405 F.Supp. 752, aff'd, C.A., 551 F.2d 309

Cal.—People v. Washington, 157 Cal. Rptr. 58, 95 C.A.3d 488.

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Ill.—People v. Posey, 404 N.E.2d 482, 39 Ill. Dec. 98, 83 Ill. App.3d 885

Or.—State v. McKendall, 584 P.2d 316, 36 Or. App. 187.

Illegality of search held immaterial etc.

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58. U.S.—Gragg v. Travelers Ins. Co., C.A. Okl., 459 F.2d 418.

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Evidence held admissible

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page 64

61. **Impeachment disproving stipulation**

N.M.—Whitfield Tank Lines, Inc. v. Navajo Freight Lines, Inc., App., 564 P.2d 1336, 90 N.M. 454, cert. den., Sup., 567 P.2d 486, 90 N.M. 637.

62. U.S.—U.S. v. Certain Parcel of Land in Jackson County, Mo., D.C. Mo., 322 F.Supp. 841—Duncan v. Lord, D.C. Pa., 409 F.Supp. 687.

Me.—Seigny v. City of Biddeford, 344 A.2d 34.

Evidence as to value of property in dispute

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Colo.—Hatch v. Wagner, 590 P.2d 973, 41 Colo. App. 35.

63. **Stipulation not precluding admission**

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Stipulation based on mutual mistake

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64. Hawaii—De Victoria v. H and K Contractors, 545 P.2d 692, 56 Haw. 552.

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Prejudicial error

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65. U.S.—Tarkington v. U.S. Lines Co., C.A. N.Y., 250 F.2d 129—Bailey v. Kawasaki-Kisen, K.K., C.A. La., 455 F.2d 392, app. after remand 478 F.2d 839—Lehrman v. Gulf Oil Corp., C.A. Tex., 464 F.2d 26, cert. den. 93 S.Ct. 687, 409 U.S. 1077, 34 L.Ed.2d 665, app. after remand 500 F.2d 659, reh. den. 503 F.2d 1403, cert. den. 95 S.Ct. 1128, 420 U.S. 929, 43 L.Ed.2d 400

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Application of statute not precluded

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66. Cal.—People v. Mariscano, 135 P.2d 16, 57 Cal. App.2d 591—Shaw v. Board of Administration, 241 P.2d 635, 109 C.A.2d 770—Weller v. Chavarria, 43 Cal. Rptr. 364, 233 C.A.2d 234

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Value; quantities

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Stipulation as basis for finding

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69. Cal.—Steele v. Steele, 282 P.2d 171, 132 C.A.2d 301

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page 65

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Instruction held proper

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§ 25. — As to Agreed Statement of Facts

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82. N.Y.—People v. Fwilo, 365 N.Y.S.2d 194, 47 A.D.2d 727.

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Page 65

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Particular terms construed

(8) Other terms.

Or.—Parker v. McCartney, 338 P.2d 371, 216 Or. 283

Agreed statements held sufficient to show certain facts

(6) U.S.—U.S. v. Rodriguez, C.A. Ill., 241 F.2d 463—Title Guarantee Co. v. U.S., 432 F.2d 1363, 193 Ct. Cl. 1—Mercantile-Safe Deposit & Trust Co. v. U.S., D.C. Md., 368 F. Supp. 743.

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page 66

85. Fla.—Morrison v. Morrison, App., 122 So.2d 199.

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Ultimate facts

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90. Tex.—E. F. Hutton & Co., Inc. v. Fox, Civ. App., 518 S.W.2d 849, err. ref. no rev. err.

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The procedure of treating facts in a case as though there had been a stipulation as to their correctness does not apply to counsels' statements made solely as evidence.^{92.5}

92.5. Mass.—Medford Red Cab, Inc. v. Duncan, 172 N.E.2d 260, 341 Mass. 708.

page 67

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Preservation of right to assert other facts

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Alteration of facts discretionary with court

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 N.H.—Dodge v. Clair, 198 A.2d 12, 105 N.H. 276
 Wyo.—Kennedy v. Kennedy, 456 P.2d 243, app. after remand 483 P.2d 516.

1. U.S.—Leizerowski v. Eastern Freightways, Inc., C.A. Pa., 514 F.2d 487.

Cal.—Russ-Field Corp. v. Underwriters at Lloyd's London, England, 330 P.2d 432, 164 C.A.2d 83—Hemphill v. Contractors' State License Bd., 334 P.2d 287, 167 C.A.2d 340

Fla.—David Properties, Inc. v. Selk, App., 151 So.2d 334

Kan.—Mitchell v. Moon, 478 P.2d 203, 206 Kan. 213
 Ky.—Grayson Motor Sales, Inc. v. Shannon, 322 S.W.2d 465

La.—Western Sur. Co. v. Avoyelles Farmers Co-op., 277 So.2d 627

Mich.—Verburb v. City of Grand Rapids 115 N.W.2d 94, 366 Mich. 398

Mo.—Sears, Roebuck & Co. v. Hupert App., 352 S.W.2d 382

N.H.—Welch v. Bergeron, 337 A.2d 341, 115 N.H. 179

N.Y.—Central Funding Co. v. Deglin, 412 N.Y.S.2d 184, 67 A.D.2d 673, aff'd 401 N.E.2d 417, 48 N.Y.2d 964, 425 N.Y.S.2d 307

Ohio—Spitz v. Volibar Realty Co., App., 138 N.E.2d 438

R.I.—Randall v. Norberg, 403 A.2d 240, 121 R.I. 714

Tex.—Higginbotham v. Bagley, Civ.App., 346 S.W.2d 142

Utah—Flannery v. Flannery, 536 P.2d 136.

2. Ark.—C.J.S. cited in Lasley v. Bank of Northeast Arkansas, 627 S.W.2d 261, 263, 4 Ark.App. 42
 Colo.—Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1 in City and County of Denver, 535 P.2d 200, 188 Colo. 310

page 68

3. U.S.—U.S. v. Tolbert, C.A. Wis., 406 F.2d 81—United Transp. Union, Local Lodge No. 31 v. St. Paul Union Depot Co., C.A. Minn., 434 F.2d 220, cert. den. 91 S.Ct. 1194, 401 U.S. 975, 28 L.Ed.2d 324—Stranahan v. A/S Atlantica and Tinfos Papiabrik, C.A. Or., 471 F.2d 369, cert. den. 93 S.Ct. 2293, 412 U.S. 906, 36 L.Ed.2d 971

Kan.—Baker v. City of Leoti, 292 P.2d 720, 179 Kan. 122

Md.—Liu v. Dunnigan, 333 A.2d 338, 25 Md. App. 178

Ohio—Spitz v. Volibar Realty Co., App., 138 N.E.2d 438

Tex.—Pena v. Salinas, Civ.App., 536 S.W.2d 671.

5. Ark.—Lasley v. Bank of Northeast Arkansas, 627 S.W.2d 261, 4 Ark.App. 42.

Cal.—People v. Smith, 48 Cal.Rptr. 382, 409 P.2d 222, 63 C.2d 779, cert. den. 87 S.Ct. 2119, 388 U.S. 913, 18 L.Ed.2d 1353, reh. den. 88 S.Ct. 13, 389 U.S. 893, 19 L.Ed.2d 211

Ky.—Mansbach Metal Co. v. Com., Dept. of Revenue, 521 S.W.2d 85

N.C.—Dulin v. Faures, 145 S.E.2d 873, 266 N.C. 257

R.I.—Scittarelli v. Providence Gas Co., 415 A.2d 1040.

Case submitted wholly on stipulated facts

Tex.—Employers Cas. Co. v. American Emp. Ins. Co., Civ.App., 397 S.W.2d 292, err. ref. no rev. err.

6. Ala.—Walker v. Southern Trucking Corp., 219 So.2d 379, 283 Ala. 551, 37 A.L.R.3d 1013

Kan.—Baker v. City of Leoti, 292 P.2d 720, 179 Kan. 122

Md.—Garland v. Director of Patuxent Institution, 167 A.2d 91, 224 Md. 653

S.C.—Belue v. Fetner, 164 S.E.2d 753, 251 S.C. 600

Proof not in conflict

U.S.—Branding Iron Club v. Riggs, C.A. Okl., 207 F.2d 720

7. U.S.—Associated Beverages Co. v. P. Ballantine & Sons, C.A. Ga., 287 F.2d 261—Stancil v. U.S., D.C. Va., 200 F.Supp. 36—U.S. v. Sommers, C.A. Colo., 351 F.2d 354—Hinckley v. C.I.R., C.A. Minn., 410 F.2d 937

Cal.—Munger & Munger v. McBratney, 280 P.2d 232, 131 C.A.2d Supp. 866—Chimenti v. Chimenti, 84 Cal.Rptr. 32, 4 C.A.3d 354

Fla.—Allstate Ins. Co. v. Duffy, App., 237 So.2d 225

La.—Fenerty v. Culotta, 83 So.2d 888, 228 La. 649

Mass.—Lapp Insulator Co. v. Boston & M.R.R., 112 N.E.2d 359, 330 Mass. 205—Maine v. Burnett, 179 N.E.2d 903, 343 Mass. 555

Mo.—Alexander v. Glasgow, 275 S.W.2d 339, 365 Mo. 24

N.C.—Blair v. Fairchilds, 213 S.E.2d 428, 25 N.C.App. 416, cert. den. 215 S.E.2d 622, 287 N.C. 464

Or.—Gunderson Bros. Engineering Corp. v. State Tax Commission, 471 P.2d 802, 256 Or. 98

Pa.—In re Monheim's Estate, 304 A.2d 115, 451 Pa. 489

R.I.—Mart Realty, Inc. v. Norberg, 303 A.2d 361, 111 R.I. 402

Tex.—Parsons v. Watley, Civ.App., 492 S.W.2d 61

Wis.—Markham v. Markham, 223 N.W.2d 616, 65 Wis.2d 735.

Appeal

(2) U.S.—U.S. ex rel. Barksdale v. Blackburn, C.A. La., 610 F.2d 253, on rehearing 639 F.2d 1115, cert. den. 102 S.Ct. 603, 454 U.S. 1056, 70 L.Ed.2d 593.
 Kan.—Beall v. Hardie, 279 P.2d 276, 177 Kan. 353
 Mo.—Elder v. Delcour, 269 S.W.2d 17, 364 Mo. 835, 47 A.L.R.2d 370

(3) Other statements

U.S.—Gambill v. U.S., C.A. Ky., 276 F.2d 180.

Ariz.—Wolf Corp. v. Louis, 464 P.2d 672, 11 Ariz. App. 352

Ark.—DuBois v. State, 494 S.W.2d 700, 254 Ark. 543, app. after remand 527 S.W.2d 595, 258 Ark. 459.

Cal.—People v. Payne, 81 Cal.Rptr. 635, 1 C.A.3d 361

Haw.—Matter of 711 Motors, Inc., 547 P.2d 1343, 56 Haw. 644

Ill.—People v. Wiggins, 293 N.E.2d 696, 9 Ill.App.3d 1078.

N.C.—Ferguson v. Morgan, 191 S.E.2d 817, 282 N.C. 83

Tex.—Walters v. State, Cr., 491 S.W.2d 685.

Wyo.—Richmond v. State, 554 P.2d 1217, reh. den. 558 P.2d 509.

8. N.C.—Rutherford v. Harbison, 118 S.E.2d 540, 254 N.C. 236

9. U.S.—U.S. v. Sampson, C.A. Cal., 224 F.2d 721—Crane v. Winkle, C.A. Cal., 298 F.2d 261—Gordon Mailoux Enterprises, Inc. v. Firemen's Ins. Co. of Newark, N.J., C.A. Guam, 366 F.2d 740

Cal.—Munger & Munger v. McBratney, 280 P.2d 232, 131 C.A.2d Supp. 866

Ind.—Tahash v. Clements, 125 N.E.2d 439, 234 Ind. 197.

Kan.—State v. Teeslink, 278 P.2d 591, 177 Kan. 268.

Mo.—Milton Const. & Supply Co. v. Metropolitan St. Louis Sewer Dist., 352 S.W.2d 685.

Mont.—Hughes v. Melby, 362 P.2d 1014, 139 Mont. 308

N.C.—City of Greensboro v. Wall, 101 S.E.2d 413, 247 N.C. 516—Piedmont Canteen Service, Inc. v. Johnson, 123 S.E.2d 582, 256 N.C. 155, 91 A.L.R.2d 1127

STIPULATIONS § 25**Page 69**

Ohio—Women's Federal Sav. and Loan Ass'n v. Cuyahoga County Bd. of Revision, 212 N.E.2d 828

Tex.—Newman Bros. Drilling Co. v. Stanolind Oil & Gas Co., Civ.App., 296 S.W.2d 567, rev'd on oth. grds., 305 S.W.2d 169, 157 Tex. 489—Perry v. Aetna Life Ins. Co. of Conn., Civ.App., 380 S.W.2d 868, err. ref. no rev. err.

Issues

(1) Ind.—Anderson v. Pre-Fab Transit Co., Inc., App., 409 N.E.2d 1157

Iowa—Cleghorn v. Benjamin, 31 N.W.2d 887, 239 Iowa 455

Resolution of conflict in facts set out in stipulation

W.Va.—State ex rel. Hardesty v. Aracoma—Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc., 129 S.E.2d 921, 147 W.Va. 645

page 69

11. Ariz.—Wolf Corp. v. Louis, 464 P.2d 672, 11 Ariz. App. 352

Cal.—Mangini v. Wolfschmidt, Limited, 13 Cal.Rptr. 503, 192 C.A.2d 64

12. U.S.—Archer v. C.I.R., C.A. Ga., 227 F.2d 270—U.S. v. Sims, C.A. Mo., 529 F.2d 10

Tex.—Williams v. State, Cr., 492 S.W.2d 507.

Prima facie case

U.S.—Getty Oil Co. v. U.S., 399 F.2d 222, 185 Ct.Cl. 244.

Cal.—Hohn v. Riverside County Flood Control and Water Conservation Dist., 39 Cal.Rptr. 647, 228 C.A.2d 605.

La.—Johnson v. National Life & Acc. Ins. Co., App., 331 So.2d 87

Not competent evidence

Ark.—Wabash Life Ins. Co. v. Parchman, 458 S.W.2d 390

Cal.—People v. Hall, 167 Cal.Rptr. 844, 616 P.2d 826, 28 C.3d 143

13. U.S.—Lawrence v. U.S., C.A. Tex., 378 F.2d 452.

Cal.—Austin v. City of Santa Monica, 44 Cal.Rptr. 857, 234 C.A.2d 841—In re Estate of Burnson, 124 Cal. Rptr. 105, 51 C.A.3d 300

Mo.—Alexander v. Glasgow, 275 S.W.2d 339, 365 Mo. 24

14. N.C.—U Drive It Auto Co. v. Atlantic Fire Ins. Co., 80 S.E.2d 35, 239 N.C. 416—Town of Blowing Rock v. Gregorie, 90 S.E.2d 898, 243 N.C. 364

15. Cal.—Division of Labor Law Enforcement v. Brooks, 38 Cal.Rptr. 284, 226 C.A.2d 631.

Ohio—Cunningham v. J. A. Myers Co., 200 N.E.2d 305, 176 Ohio St. 410

Court should disregard special findings

Tex.—DoAll Dallas Co. v. Trinity Nat. Bank of Dallas, Civ.App., 498 S.W.2d 396, err. ref. no rev. err.

16. Agreed facts held to sustain finding

N.C.—Ahoskie Production Credit Ass'n v. Whedbee, 110 S.E.2d 795, 251 N.C. 24.

17. Cal.—Miller v. Hassen, 6 Cal.Rptr. 202, 182 C.A.2d 370

Ill.—People v. Thornton, 282 N.E.2d 276, 4 Ill.App.3d 896

Pa.—Com. v. Pennsylvania Labor Relations Bd. v. Venango/Clanion Mental Health Center, Inc., Cmwlth., 415 A.2d 1259, 52 Pa.Cmwlth. 341.

Tex.—Schreiber v. State, Cr., 480 S.W.2d 688.

A stipulation on a material fact is treated as evidence in the nature of an admission.^{18 5}

18.5. Cal.—Turner Gas Co., Inc. v. Workmen's Compensation Appeals Bd., 120 Cal.Rptr. 663, 47 C.A.3d 286.

Where facts are stipulated they are deemed established as fully as if determined by a jury verdict.^{18 10}

Page 69

18.10. N.C.—Thomas v Poole, 282 S E 2d 515, 54 N.C. App. 239, review den 287 S E 2d 902, 304 N.C. 733

19. Kan.—Beach v Beach, 367 P 2d 74, 189 Kan. 29 N.C.—Rutherford v Harbison, 118 S E 2d 540, 254 N.C. 236

Ohio—Cunningham v. J. A. Myers Co., 200 N.E.2d 305, 176 Ohio St. 410—Rrawu, Inc. v. Liquor Control Commission, 349 N.E.2d 304, 46 Ohio St.2d 436, 75 O.O.2d 494

Okl.—Nanonka v Hoskins, 645 P.2d 507

Pa.—Frankel v. Reliance Mut. Life Ins. Co. of Ill., 184 A.2d 305, 199 Pa. Super. 295

Whether plaintiff entitled to judgment as matter of law

Okl.—American Iron & Mach. Works Co. v. Insurance Co. of North America, 375 P.2d 873

Question one of law

Colo.—Barocas v. Bohemia Import Co., Inc., 518 P.2d 850, 33 Colo. App. 263

20. Mich.—City of Dearborn v. Michigan Turnpike Authority, 73 N.W.2d 544, 344 Mich. 37

N.Y.—Pink v. Isle Theatrical Corp., 3 N.E.2d 521, 271 N.Y. 390, motion den 4 N.E.2d 251, 272 N.Y. 500

N.C.—Ashokie Production Credit Ass'n v. Whedbee, 110 S.E.2d 795, 251 N.C. 24

Tex.—Employers Cas. Co. v. American Emp. Ins. Co. Civ. App., 397 S.W.2d 292, err. ref. no rev. err.

page 70

21. N.C.—Town of Blowing Rock v. Gregorie, 90 S.E.2d 898, 243 N.C. 364

Verdict held proper

Ariz.—Busby Bee Buffet, Inc. v. Ferrell, 310 P.2d 817, 82 Ariz. 192

Ind.—Hamp v. State, 301 N.E.2d 412, 157 Ind. App. 567.

22. Kan.—City of Wichita v. Unified School Dist. No. 259 (Wichita), Sedgwick County, 439 P.2d 162, 201 Kan. 110, app. after remand 472 P.2d 253, 205 Kan. 701

Tex.—Mortenson v. Trammell, Civ. App., 604 S.W.2d 269, err. ref. no rev. err.

A trial court is not required to advise accused of his right to confrontation in a trial that is tantamount to a plea of guilty in which each of the elements of the crime is stipulated to and no defense is offered.^{23, 25}

23.5. U.S.—U.S. v. Schuster, C.A. Cal., 734 F.2d 424, cert. den 105 S.Ct. 959, 83 L.Ed.2d 965.

25. **Statement of agreed facts with right of court to determine admissibility**

Ga.—Northwestern University v. Crisp, 88 S.E.2d 26, 211 Ga. 636

26. U.S.—Russell Box Co. v. C.I.R., C.A., 208 F.2d 452—Beck v. U.S., C.A. Wash., 298 F.2d 622, cert. den 8 S.Ct. 1558, 370 U.S. 919, 8 L.Ed.2d 499—Burnett v. C.I.R., C.A. Tex., 356 F.2d 755, cert. den. 87 S.Ct. 77, 385 U.S. 832, 17 L.Ed.2d 68—Rezaazadeh v. C.I.R., C.A. Wis., 356 F.2d 898

Cal.—Stafford-Lewis v. Wain, 276 P.2d 157, 128 C.A.2d 614

Kan.—Board of Com'rs of Shawnee County v. Thomas, 140 P. 849, 92 Kan. 408

Mass.—Metcalfe & Eddy, Inc. v. City of Lynn, 474 N.E.2d 196, 19 Mass. App. 974, review den 477 N.E.2d 595, 394 Mass. 1103

Tex.—Rodriguez v. State, Cr., 373 S.W.2d 258—Hillcrest State Bank of University Park v. Evis-Southwest, Inc., Civ. App., 402 S.W.2d 276, err. ref. no rev. err., Sup., 409 S.W.2d 841

Additional proof; discretion of court

(1) Del.—Blandin v. United North & South Development Co., 121 A.2d 686, 35 Del. Ch. 471, Aff'd, 134 A.2d 706, 36 Del. Ch. 538

Iowa—State v. Nowlin, 244 N.W.2d 596

27. Minn.—Craigmire v. Sorenson, 80 N.W.2d 45, 248 Minn. 286

Mont.—C.J.S. cited in Grinde v. Tindall, 562 P.2d 818 821 172 Mont. 199

28. Stipulation as to record owner

N.D.—United Accounts Inc. v. Larson, 121 N.W.2d 628

page 71

31. L.S.—Butler v. Norfolk Southern Ry. Co., D.C. N.C., 140 F.Supp. 601

Effect of bilateral summary judgment motions

Wis.—Wiegand v. Gissal, 138 N.W.2d 740, 28 Wis.2d 488

32. N.D.—C.J.S. black letter summary quoted in Bjerkén v. Ames Sand & Gravel Co., Inc., 206 N.W.2d 884, 889

33. U.S.—C.I.R. v. Finley, C.A., 265 F.2d 885, cert. den 80 S.Ct. 87

On remand of case

U.S.—U.S. v. Harding, C.A. Colo., 507 F.2d 294, cert. den 95 S.Ct. 1437, 420 U.S. 997, 43 L.Ed.2d 679

Agreement between counsel that decision in one case will control all matters involved in companion case is binding.^{35, 1}

35.1. Ga.—Dye v. Hirsch, 90 S.E.2d 332, 92 Ga.App. 803

Where a stipulation as to amount has been conditioned on the validity of a particular system of accounting which has been held invalid on appeal, the stipulation is ineffective in a retrial.^{35, 5}

35.5. Ga.—Blackmon v. Dilworth, 189 S.E.2d 106, 125 Ga.App. 823

36. U.S.—Russell v. U.S., C.A. Cal., 288 F.2d 520, cert. den 83 S.Ct. 296, 371 U.S. 926, 9 L.Ed.2d 234—Kreps v. C.I.R., C.A. N.Y., 351 F.2d 1—U.S. v. Sommers, C.A. Colo., 351 F.2d 354

Ala.—Spradley v. State, Cr. App., 414 So.2d 170

Ark.—Jones v. Brooks, 343 S.W.2d 99, 233 Ark. 148—DuBois v. State, 494 S.W.2d 700, 254 Ark. 543, app. after remand 527 S.W.2d 595, 258 Ark. 459

Cal.—People v. Gambos, 84 Cal. Rptr. 908, 5 C.A.3d 187

Conn.—DeRosa v. Terry Steam Turbine Co., 214 A.2d 684, 2b Conn. Supp. 131

Ga.—Tribble v. State, 80 S.E.2d 711, 89 Ga.App. 593

Ill.—People v. Kane, 333 N.E.2d 247, 31 Ill. App.3d 500—Bridges v. Neighbors, 336 N.E.2d 233, 32 Ill. App.3d 704

Ind.—Rassi v. Trunkline Gas Co., 240 N.E.2d 49, 262 Ind. 1

La.—Alleman v. State, Dept. of Highways, App. 3 Civ., 416 So.2d 272, writ den., Sup., 421 So.2d 907.

Md.—Murray v. State, 174 A.2d 794, 226 Md. 624

N.C.—State v. Mitchell, 196 S.E.2d 736, 283 N.C. 462

Tex.—Steward v. State, Cr., 422 S.W.2d 733

Criminal cases

Fla.—Fischler v. Askew, App., 349 So.2d 227

Ill.—People v. Morris, 285 N.E.2d 247, 6 Ill. App.3d 136—People v. Buford, 312 N.E.2d 796, 19 Ill. App.3d 766

La.—State v. Pounds, 359 So.2d 150

Mich.—People v. Stewart, 256 N.W.2d 31, 400 Mich. 540

N.J.—State v. Leach, 362 A.2d 1286, 143 N.J. Super. 289

Okl.—Driver v. State, Cr., 634 P.2d 760

37. U.S.—Niagara Mohawk Power Corp. v. U.S., 525 F.2d 1380, 207 Ct. Cl. 576

Ala.—Spradley v. State, Cr. App., 414 So.2d 170

Cal.—People v. Gambos, 84 Cal. Rptr. 908, 5 C.A.3d 187—Smith v. City of Riverside, 110 Cal. Rptr. 67, 34 C.A.3d 529

Ga.—School Boy Sportswear Corp. v. Cornelia Garment Co., 126 S.E.2d 248, 106 Ga. App. 99

Ill.—People v. Hodges, 332 N.E.2d 677, 30 Ill. App.3d 912

Me.—Vashon v. Quirion, 184 A.2d 776, 158 Me. 386

Mo.—Mutual Finance Co. v. Goodman Finance Co., App., 367 S.W.2d 31

N.J.—Woodhouse v. Woodhouse, 105 A.2d 517, 15 N.J. 550

N.C.—Edwards v. City of Raleigh, 81 S.E.2d 273, 240 N.C. 137

Tex.—Associates Development Corp. v. W.F. & J.F. Barnes, Inc., Civ. App., 614 S.W.2d 876, err. dism.

Vt.—Travelers Ins. Co. v. Blanchard, 433 A.2d 296, 139 Vt. 559

Wyo.—Moore v. State, 542 P.2d 109

38. U.S.—Koelling v. U.S., D.C. Neb., 171 F.Supp. 214

39. U.S.—Foster v. U.S., D.C. Tex., 85 F.Supp. 447

Colo.—People v. Hanson, 537 P.2d 739, 189 Colo. 101—Board of County Com'rs of Weld County v. Highland Mobile Home Park, Inc., App., 543 P.2d 103

Mich.—Kenny v. Village of Novi, 141 N.W.2d 56, 377 Mich. 476

Tex.—May v. City of McKinney, Civ. App., 479 S.W.2d 114, err. ref. no rev. err.

Waiver

Mass.—Rzeznik v. Chief of Police of Southampton, 373 N.E.2d 1128, 374 Mass. 475

40. Ill.—Braden v. Weinert, 423 N.E.2d 1326, 53 Ill. Dec. 522, 97 Ill. App.3d 929

43. Me.—Bragdon v. Smith, 12 A.2d 665, 136 Me. 474

44. La.—State v. Vanderhoff, 415 So.2d 190

Or.—Johnson v. City of Astoria, 363 P.2d 571, 227 Or. 585

Tex.—Smith v. State, Cr., 411 S.W.2d 548

Amendment

(3) Other matters

Ariz.—Ries v. McComb, 545 P.2d 65, 25 Ariz. App. 554

page 72

45. Ala.—Stewart v. Childress, 111 So.2d 8, 269 Ala. 87

Tex.—Banker v. Jefferson County Water Control and Imp. Dist. No. One, Civ. App., 277 S.W.2d 130

Defect in petition held supplied by statement of facts

Pa.—Flynn v. Rodkey, 159 A.2d 265, 192 Pa. Super. 56.

page 73

59. U.S.—U.S. v. Ellison, C.A. Cal., 469 F.2d 413—U.S. v. Oliver, C.A. N.Y., 523 F.2d 253

Cal.—Black v. Black, 204 P.2d 950, 91 Cal. App.2d 328—Fran-Well Heater Co. v. Robinson, 5 Cal. Rptr. 900, 182 C.A.2d 125

Ill.—People v. McAllister, 334 N.E.2d 885, 31 Ill. App.3d 825

Ind.—Raper v. Union Federal Sav. and Loan Ass'n of Evansville, 336 N.E.2d 840, 166 Ind. App. 482

Iowa—Naxera v. Wathan, 159 N.W.2d 513.

Me.—Dead River Co. v. Assessors of Houlton, 103 A.2d 123, 149 Me. 349—Fitzgerald v. Baxter State Park Authority, 385 A.2d 189.

Mich.—Friedman v. Winshall, 73 N.W.2d 248, 343 Mich. 647

N.M.—Till v. Jones, App., 497 P.2d 745, 83 N.M. 743, cert. den. 497 P.2d 742, 83 N.M. 740

N.C.—State v. Tippet, 155 S.E.2d 269, 270 N.C. 588.

Okl.—Continental Oil Co. v. National Fire Ins. Co. of Connecticut, 541 P.2d 1315.

R.I.—Randall v. Norberg, 403 A.2d 240, 121 R.I. 714

Burden to overcome presumptions or inferences
Ill—People v. Garrett, 326 N.E.2d 143, 26 Ill App 3d 786, revd. on oth grds 339 N.E.2d 753, 62 Ill 2d 151

La—In re Liquidation of Delta Sec Bank & Trust Co., App., 327 So 2d 163

61. S.C.—C.J.S. cited in Garrett v. Pilot Life Ins Co., 128 S.E.2d 171, 173, 241 S.C. 299

62. U.S.—Hancock Bank v. U.S., D.C. Miss., 254 F Supp 206, affd., C.A., 400 F.2d 975

Cal—Tassi v. Tassi, 325 P.2d 872, 160 C.A.2d 680 Conn.—State v. Fico, 162 A.2d 697, 147 Conn 426

Fla—Schottenstein v. Schottenstein, App., 384 So 2d 933

Ohio—Case v. Business Centers, Inc., 357 N.E.2d 47, 48 Ohio App 2d 267, 2 O.O.3d 229

S.C.—C.J.S. cited in Garrett v. Pilot Life Ins Co., 128 S.E.2d 171, 173, 241 S.C. 299

63. U.S.—U.S. v. Gibson—Specialty Co., C.A. Mont., 507 F.2d 446.

Iowa—Bartels v. Hennessey Bros., Inc., 164 N.W.2d 87 N.J.—Maplewood Tp., Essex County v. Essex County Bd of Taxation, 120 A.2d 783, 39 N.J. Super 202

S.C.—C.J.S. cited in Garrett v. Pilot Life Ins Co., 128 S.E.2d 171, 173, 241 S.C. 299

Tenn—Steiner—Luff Iron & Metal Co. v. Woodmont Country Club, 480 S.W.2d 533

Contrary inferences

U.S.—Stewart v. U.S., C.A. Fla., 512 F.2d 269

64. Mont.—C.J.S. cited in Grinde v. Tindall, 562 P.2d 818, 820, 172 Mont 199

S.C.—C.J.S. cited in Garrett v. Pilot Life Ins Co., 128 S.E.2d 171, 173, 241 S.C. 299

66. U.S.—Purvis v. Great Falls Bldg. and Const Trades Council, D.C. Mont., 266 F Supp 661.

Colo.—Southland Corp. v. D.C. Burns Realty & Trust Co., 444 P.2d 394, 166 Colo 444

Tex.—Perry v. Aetna Life Ins. Co. of Conn., Civ App., 380 S.W.2d 868, err ref. no rev err—Calvert v. General Retail Corp., Civ.App., 390 S.W.2d 10, err ref. no rev err—Stewart v. Mobley, Civ.App., 500 S.W.2d 246, err ref. no rev err.

Essential difference from ordinary stipulation
Tex.—Farah v. First Nat Bank of Ft. Worth, App., 624 S.W.2d 341, error refused n r e

67. Ala—Parker—Blake Co v. Ladd, 70 So 188, 14 Ala App 407.

Ill.—People v. Maurice, 202 N.E.2d 480, 31 Ill.2d 456 N.M.—Till v. Jones, App., 497 P.2d 745, 83 N.M. 743, cert. den 497 P.2d 742, 83 N.M. 740

N.C.—U Drive It Auto Co. v. Atlantic Fire Ins Co., 80 S.E.2d 35, 239 N.C. 416.

Or—State v. Nagel, 567 P.2d 585, 30 Or.App. 495

page 74

68. U.S.—Fisher v. American Nat Ins Co, D.C. Pa., 137 F.Supp. 902, affd., C.A., 241 F.2d 175

N.C.—U Drive It Auto Co. v. Atlantic Fire Ins. Co., supra, n. 67.

69. Pa—Burns v. Employers' Liability Assur Corp., 82 Dauph. 375, affd. 209 A.2d 27, 205 Pa.Super 389—Conyer v. Borough of Norristown, 428 A.2d 749, 58 Pa.Cmwlth 629.

70. Colo—Weather Engineering & Mfg., Inc v. Pinon Springs Condominiums, Inc., 563 P.2d 346, 192 Colo 495

Conclusion not warranted

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§ 26. — As to Trial

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Stipulations ⇌ 18(8).

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Neb—Reorganized Church of Jesus Christ of Latter Day Saints v. Universal Sur Co., 128 N.W.2d 361, 177 Neb 60—Martin v. Martin, 197 N.W.2d 388, 188 Neb 393

N.Y.—Kremens v. Minc, 390 N.Y.S.2d 639, 55 A.D.2d 928

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Colo—Colorado Skyline Investments, Limited v. District Court In and For Boulder County, 417 P.2d 502, 160 Colo. 392.

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232, 15 A.D.2d 494—People v. Gardner, 242 N.Y.S.2d 93, 39 Misc 2d 870

Okl—Montgomery v. State, Cr., 474 P.2d 667

Or—Meier v. Bray, 475 P.2d 587, 256 Or 613

Pa—Finke v. Manno, 23 Beaver 101—Com v. Tick, Inc., 38 D. & C.2d 299

R.I.—Seaportel Metals, Inc v. Ciccone, 166 A.2d 130, 92 R.I. 31

S.C.—Spell v. Traxler, 93 S.E.2d 601, 229 S.C. 466 Tex—O'Donnell v. Preston, Civ App., 301 S.W.2d 288, err ref no rev err

Physical examination of defendant

Tex—Martinez v. State, 333 S.W.2d 370, 169 Tex Cr R 229

Standard of reasonable doubt not waived by stipulating to trial on preliminary transcript

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Matters with respect to deliberation of jury
Cal—People v. Beverly, 43 Cal Rptr 743, 233 C.A.2d 702, cert den 86 S.Ct 1937, 384 U.S 1014, 16 L.Ed 2d 1035, reh den 87 S.Ct 18, 385 U.S 891, 17 L.Ed 2d 124

Bifurcated hearing

Minn.—Drew v. Drew, 244 N.W.2d 491, 309 Minn 577.

Stipulation constituting waiver

Cal—Farrar, Herrick and Associates v. Safecare Co., Inc., 171 Cal Rptr 191, 115 C.A.3d 123

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Summary judgment proceeding

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Case not rendered moot

D.C.—National Audubon Soc. v. Andrus, D.C., 442 F Supp 42

Cross examination

N.Y.—People v. Cotton, 402 N.Y.S.2d 871, 61 A.D.2d 881

Witnesses

D.C.—T.V. Tower, Inc v. Marshall, D.C., 444 F.Supp. 1233.

page 75

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Right to open and close

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S.D.—In re K.D.E., 210 N.W.2d 907, 87 S.D. 501.

Criminal charges

La.—State v. Case, 357 So.2d 498.

Okl.—McCoy v. State, Cr., 536 P.2d 1309.

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Page 75

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Nev—Drummond v State, 462 P 2d 1012, 86 Nev 4
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Statutory time period not tolled

Fla—In Interest of J.F., App. 384 So 2d 713
85. U.S.—Kaufman v Jeffords, D.C.N.Y., 268 F Supp 784

Fla—City of Opa-Locka v Metropolitan Dade County, App., 247 So 2d 755

Iowa—Wells v Wells, 168 N.W.2d 54
Or.—Simpson v Simpson, 689 P 2d 1040, 70 Or App 381

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Wis.—In re Hill's Hill, 59 N.W.2d 437, 264 Wis 410, mandate am 60 N.W.2d 254, 264 Wis 410

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N.Y.—Hubbell v South Nassau Communities Hospital, 260 N.Y.S.2d 539, 46 Misc.2d 847—Smith v. Robilotto, 276 N.Y.S.2d 323, 27 A.D.2d 684.

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N.M.—State v. Chavez, App., 461 P.2d 919, 80 N.M. 786.

Tex.—Adam v. State, Cr., 490 S.W.2d 189

91. Motion for new trial

Colo.—Martin v. Opdyke Agency, Inc., 398 P.2d 971, 156 Colo. 316.

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Kan.—In re Lester's Estate, 379 P 2d 275, 191 Kan 83
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Excuse of juror

U.S.—U.S. v. Pacente, C.A.Ill., 503 F.2d 543, cert. den. 95 S.Ct. 623, 419 U.S. 1048, 42 L.Ed.2d 642

Absence of judge from voir dire proceedings
U.S.—Taylor v U.S., D.C.Pa., 386 F Supp 132, affd., C.A., 521 F.2d 1399

Alternate juror

U.S.—U.S. v. Lamb, C.A.Cal., 529 F.2d 1153
Cal.—People v. Knox, 157 Cal Rptr 238, 95 C.A.3d 420

Challenges

Fla.—Thomas v State, 403 So 2d 371
94. Cal.—People v. Warren, 346 P 2d 64, 175 C.A.2d 233

Fla.—Safer v City of Jacksonville, App., 237 So 2d 8—Crawford v Baron, App., 244 So 2d 559

Md.—Parklawn, Inc v Giant Food, Inc, 277 A.2d 80, 262 Md 148

Mass.—Roth v Westinghouse Elec Corp., 308 N.E.2d 925, 2 Mass App 120

N.Y.—Kremens v Minc, 390 N.Y.S.2d 639, 55 A.D.2d 928

N.M.—Peay v Ortega, 686 P 2d 254, 101 N.M. 564.

Tex.—Dill v Graham, Civ App., 530 S.W.2d 157, err ref no rev. err.

Not entitled to submit issues to jury

La.—Marks v Singleton, App., 391 So 2d 538

Or.—Kuhns v Standard Oil Co of Cal., Western Operations, 478 P 2d 396, 257 Or 482

page 76

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Ala.—Seibert v State, 343 So 2d 784, on remand 343 So 2d 785, revd on oth grds 343 So 2d 786, on remand 343 So 2d 787, writ den 343 So 2d 788.

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Ill.—Department of Public Works and Bldgs, For and On Behalf of People v. Kelly, 353 N.E.2d 195, 40 Ill.App 3d 896

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Md.—Plaza Corp v Alban Tractor Co., 151 A.2d 170, 219 Md 570

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Neb.—Martin v Martin, 197 N.W.2d 388, 188 Neb 393.

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Wash.—Norris Industries v Halverson—Mason Constructors, 529 P 2d 1113, 12 Wash App 393

Issue to be tried in another court

Conn.—Cocco v Cocco, 347 A.2d 72, 166 Conn 37.

N.Y.—Mouscardy v. Mouscardy, 382 N.Y.S.2d 820, 52 A.D.2d 841, app. dism. 355 N.E.2d 299, 39 N.Y.2d 1013, 387 N.Y.S.2d 244

Temporary judge

Cal.—Nierenberg v Superior Court for Los Angeles County, 130 Cal Rptr. 847, 59 C.A.3d 611.

Not entitled to submit further evidence

La.—Campbell v. Prejean, App., 392 So.2d 747.

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Cal.—People v. Thompson, 25 Cal Rptr 649, 208 C.A.2d 841

Sufficient number to render verdict

Pa.—Kardibin v. Associated Hardware, 426 A.2d 649, 284 Pa Super 586, 15 A.L.R. 4th 201

1. Ariz.—State v. Cumbo, 396 P 2d 11, 96 Ariz. 385.

Impleading parties

Minn.—Lee v Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 290 Minn. 321

3. Pa.—Balin v. Pleasure Time, Inc., 364 A.2d 449, 243 Pa Super. 61

Wis.—Reith v. Wynhoff, 137 N.W.2d 33, 28 Wis 2d 336

Fixing of referee's fee and disbursements by court

N.Y.—People ex rel New York Cent R Co. v State Tax Commission, 116 N.Y.S.2d 595, 280 App Div 627, affd 111 N.E.2d 733, 305 N.Y. 613

5. U.S.—West Coast Products Corp. v Southern Pac. Co., C.A.Cal., 226 F.2d 830

Kan.—White v State, 568 P 2d 112, 222 Kan 709.

Or.—Supove v. Densmoor, 358 P 2d 510, 225 Or. 365

6. N.Y.—Phillips v Blenheim, 300 N.Y.S.2d 800, 32 A.D.2d 660

8. Conn.—Harris v. Clinton, 112 A.2d 885, 142 Conn. 204

10. Motion for new trial

Tex.—Texas & N.O.R. Co v Arnold, Civ App., 381 S.W.2d 388, app. dism., Sup., 388 S.W.2d 181.

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Mo.—Dobbins v Freeman, App., 397 S.W.2d 734

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Indefinite time in future

(2) Other matters.

Cal.—Chapin v Superior Court of Tuolumne County, 44 Cal Rptr. 496, 234 C.A.2d 571—Imperial Ins. Co v California Cas. Indem Exchange, 204 Cal. Rptr. 819, 158 C.A.3d 540.

Vacation of trial setting no bar to summary judgment

Nev.—Olson v. Iacometti, 533 P.2d 1360, 91 Nev. 241.

page 77

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N.C.—Andrews v. Andrews, 113 S.E.2d 47, 252 N.C. 97.

Tex.—Hamilton v. Hamilton, 280 S.W.2d 588, 154 Tex. 511.

16. Or.—Pacific General Contractors v. Slate Const. Co., 251 P 2d 454, 196 Or. 608.

Pa.—Saenger v Terry Foam, Inc., 14 Bucks 300.

17. Iowa—Wharton v. City of Oskaloosa, 158 N.W.2d 834.

Irregularities in the granting of a new trial may be cured by stipulation.^{17.5}

17.5. La.—Manuel v. Moity, App., 313 So.2d 278, writ den, Sup., 318 So 2d 48.

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Ala.—Pennington v. Yarbrough, Civ.App., 406 So.2d 943.

Ariz.—State v. Chambers, 451 P.2d 27, 104 Ariz. 247.

Cal.—People v. Walker, 318 P.2d 77, 155 C.A.2d 273—Stoddard v. Rheem, 13 Cal Rptr. 496, 192 C.A.2d 49—Huntingdon v. Crowley, 51 Cal.Rptr. 254, 414

P 2d 382, 64 C 2d 647—Cracknell v. Fisher Governor Co., 56 Cal Rptr 64, 247 C A 2d 857
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Minn.—Cole v. State, 183 N W 2d 290, 289 Minn 503
Pa.—Foote v. Maryland Cas Co., 109 P L J 465, mod on oth grds 186 A 2d 255, 409 Pa 307

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Mo.—Truck Ins Exchange v. Hunt, App., 590 S W 2d 425

Pa.—McCann v. Hedin, 105 A 2d 594, 377 Pa 508
Tex.—Missouri Pac R Co v. Whittenburg and Alston, 424 S W 2d 427

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Or.—Davis v. Dumont, 627 P 2d 907, 52 Or App. 73

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Reduction

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La.—Hathorn v. McKay, App., 236 So.2d 74.

W.Va.—Hardin v. New York Cent R. Co., 116 S E 2d 697, 145 W Va 676—Butler v. Smith's Transfer Corp., 128 S E 2d 32, 147 W Va 402

Stipulation held exceeded

Fla.—Stevens Markets, Inc v. Markantonatos, 189 So.2d 624, on remand 189 So 2d 904

N.C.—Noble v. Noble, 196 S.E.2d 62, 18 N.C.App. 111

Stipulation to take general verdict

Mich.—Conel Development, Inv. v. River Rouge Sav Bank, 269 N.W.2d 621, 84 Mich App 415.

page 78

31. Neb.—Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 72 N W 2d 669, 161 Neb. 152

32. Okl.—Geschwind v. Brorsen, 258 P 2d 619, 208 Okl 683

§ 27. — As to Judgments and Executions

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Colo.—Denver Nat Bank v. Von Brecht, 322 P 2d 667, 137 Colo 88

Conn.—Liberty Bank for Sav v. Armstrong, 423 A 2d 171, 36 Conn Sup 629

Fla.—Zimmer v. Chase Federal Sav and Loan Ass'n, App., 120 So 2d 653—Dade County v. Morton, App., 223 So 2d 116

Ga.—Tolbert v. Tolbert, 206 S.E.2d 63, 131 Ga App 388

Hawaii—Kahl v. Kahl, 427 P 2d 86, 49 Haw 688

Ill.—Equitable Life Assur Soc of U.S. v. Wagner, 119 N E 2d 405, 2 Ill App 2d 284

Ky.—Turner v. Turner, 441 S W 2d 105

La.—Wooten v. Wimberly, 272 So 2d 303

Md.—Korzendorfer Realty, Inc v. Buffalo, 286 A.2d 142, 264 Md. 293

Mass.—Rudolph v. City Manager of Cambridge, 167 N E 2d 151, 341 Mass. 31

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Minn.—Hempstead v. Minneapolis Sheraton Corp., 166 N W 2d 95, 283 Minn 1

N.M.—Freedman v. Perea, 517 P 2d 67, 85 N.M. 745

N.Y.—Kurrus v. Kurrus, 136 N Y S 2d 395—Frost v. Stone, 165 N Y S 2d 260, 4 A D 2d 780—Ferguson v. 444 West 55th St Corp., 211 N Y S 2d 841, 13 A D 2d 454, rearg den 215 N Y S 2d 1013, 13 A D 2d 641, app dism 228 N Y S 2d 829, 11 N Y S 2d 945, 183 N E 2d 230—Town of Oyster Bay v. Forte, 219 N Y S 2d 456, 34 Misc 2d 5—Uni-Serv Corp v. Linker, 311 N Y S 2d 726, 62 Misc 2d 861

N.C.—West v. West, 127 S.E.2d 531, 257 N.C. 760—State v. Hall, 147 S E 2d 548, 267 N.C. 90

N.D.—Oliver Corp v. Kirschmann Motors, Inc., 84 N W 2d 890—Gasior v. Wentz, 89 N.W.2d 886

Or.—Beck v. Southern Oregon Health Service, Inc., 469 P 2d 622, 255 Or 590.

Pa.—Zawada v. Pennsylvania System Bd. of Adjustment, Broth. of Ry & S S Clerks, Freight Handlers, Exp and Station Emp., 140 A 2d 335, 392 Pa. 207, cert den. 79 S Ct 48, 358 U.S. 829, 3 L Ed 2d 68

R.I.—Seaportel Metals, Inc. v. Ciccone, 166 A 2d 130, 92 R I 31

Tenn.—Doe v. Sides, 432 S.W.2d 889, 222 Tenn. 121

Tex.—Nichols v. State, Cr., 255 S.W.2d 522—Inwood Const. Co. v. Huntington Corp., Civ App., 400 S.W.2d 372, err. ref. no rev. err. app after remand 472 S.W.2d 804, err. ref no rev err.

Va.—Culmore Realty Co. v. Caputi, 124 S E 2d 7, 203 Va 403

Wash.—Washington Asphalt Co. v. Harold Kaeser Co., 316 P 2d 126, 51 Wash.2d 89, 69 A.L.R.2d 752—Petition of City of Anacortes, 500 P.2d 546, 81 Wash.2d 166.

Wis.—Mallon v. State, 181 N.W.2d 364, 49 Wis.2d 185.

Particular stipulations

(1) Fla.—Burda Metals, Inc. v. Heavy Equipment Rental Co., App., 243 So.2d 163.

La.—Calandro Development, Inc. v. R. M. Butler Contractors, Inc., App., 249 So 2d 254.

Or.—Johnson v. Northwest Acceptance Corp., 485 P.2d 12, 259 Or. 1.

Mont.—Morris v. McCarthy, 497 P.2d 102, 159 Mont. 236.

(5) U.S.—Prudential Ins Co of America v. Burress, D.C.Cal., 181 F.Supp 391—McDaniel v. Cohen, D.C. Va., 288 F Supp 808—Himalayan Industries v. Gibson Mfg. Co., C.A.Cal., 434 F.2d 403.

Fla.—Beardmore v. Abbott, App., 218 So 2d 807

Ind.—Honey Creek Corp v. WNC Development Co., 331 N E 2d 452, 165 Ind App 141

La.—May v. Market Ins Co., 387 So 2d 1081

Mont.—Big Sky Livestock, Inc v. Herzog, 558 P 2d 1107, 171 Mont 409

Nev.—Western Industries, Inc v. General Ins Co., 533 P 2d 473, 91 Nev. 222

N.Y.—First Trust & Deposit Co v. Atkinson, 419 N Y S 2d 830, 100 Misc 2d 537

N.C.—Rickert v. Rickert, 193 S E 2d 79, 282 N.C. 373

Okla.—Cook v. Alexander, 405 P 2d 990—Reeves v. First State Bank, App., 463 P 2d 340

Or.—Chamberlain v. Jim Fisher Motors, Inc., 578 P 2d 1225, 282 Or 229

Tex.—Garrett's Estate v. Gay, Civ App., 392 S W 2d 565, err dism.

Wis.—O'Connor v. O'Connor, 180 N.W.2d 735, 48 Wis 2d 535

(7) Other stipulations

U.S.—Minneapolis Brewing Co v. Merritt, D.C.N.D., 143 F Supp 146—Cole v. Bookwalter, D.C.Mo., 170 F Supp 527—Minnesota Min & Mfg Co v. Technical Tape Corp., C.A.Ill., 313 F 2d 306—In re Kriger, Bkrcy Or., 2 B R 19

Ala.—Bagwell Elec Steel Castings, Inc v. State Dept of Indus Relations, 158 So 2d 122, 42 Ala App 189, certiorari denied 158 So 2d 121, 275 Ala 677

Alaska—Godfrey v. Hemenway, 617 P 2d 3

Cal.—Harris v. Spinali Auto Sales, Inc., 20 Cal Rptr. 586, 202 C A 2d 215—People v. McGill, 86 Cal Rptr. 283, 6 C A 3d 953—Delagrang v. Sacramento Sav. and Loan Ass'n, 135 Cal Rptr. 314, 65 C A 3d 828

Conn.—Patterson v. Dempsey, 207 A 2d 739, 152 Conn 431

Fla.—Oakwood Manor, Inc v. Eck, App., 358 So 2d 585

Ill.—Wright v. Royse, 193 N E 2d 340, 43 Ill.App.2d 267—People v. Morgan, 204 N.E.2d 314, 55 Ill App.2d 157—Franks v. Shemneck, 210 N.E.2d 335, 61 Ill App 2d 325

Ind.—Nicholas v. State, 300 N.E.2d 656, 261 Ind. 115.

La.—Davis v. Radoste, 75 So 2d 230, 226 La 160—Champ Auto Sales, Inc. v. Savoy, App., 207 So 2d 566

Me.—Vaillancourt v. Gagnon, 314 A.2d 405

Mich.—Christopher v. Nelson, 213 N W 2d 867, 50 Mich App. 710

Minn.—Youngstown Mines Corp v. Prout, 124 N W 2d 328, 266 Minn 450.

N.Y.—Gordon v. Merchants Mut. Cas. Co., 133 N.Y. S.2d 209—In re Casey's Estate, 159 N Y S 2d 132, 6 Misc 2d 870—Freidberg v. Freidberg, 182 N Y S.2d 838, 17 Misc.2d 190—Ingenleuf v. Harmac Properties, Inc., 184 N.Y.S.2d 67, 17 Misc.2d 4—Dobrish v. OPA Corp., 200 N Y S 2d 707

N.C.—Gregory v. Cothran, 138 S.E.2d 634, 262 N.C. 745

N.D.—Lawrence v. Lawrence, 217 N W 2d 792.

Okla.—Williams v. State, Cr., 632 P.2d 1238.

Or.—George H. Buckler Co. v. American Metallic Chemical Corp., 332 P.2d 614, 214 Or 639.

S.D.—Brennan v. Brennan, 224 N.W.2d 192, 88 S.D. 541

Tex.—Klaeveman v. Klaeveman, Civ.App., 300 S.W.2d 205, err dism.

Utah—Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P 2d 793.

Vt.—Tromblay v. Dacres, 376 A.2d 753, 135 Vt. 335.

Wis.—Miller v. Miller, 227 N.W.2d 626, 67 Wis 2d 435

Action not terminated

(2) Other stipulations

U.S.—Vutton et Fils, S.A. v. J. Young Enterprises, Inc., C.A.Cal., 609 F 2d 1335, app after remand 644 F.2d 769.

Transcripts

Mo.—State v. Tompkins, 277 S.W.2d 587.

Masters' report

S.C.—Carroll v. Britt, 86 S.E.2d 612, 227 S C 9.

Page 78

Lack of jurisdiction to enter order

Cal—Roberts v Roberts, 50 Cal Rptr 408, 241 C A 2d 93

Injunctions

Mo—Russell v Allen, App, 496 S W 2d 290

Consent judgment

U.S.—Sun Life Assur Co of Canada v Clyce D C Tex, 512 F Supp 430

Cal—People v Bestline Products, Inc, 132 Cal Rptr 767, 61 C A 3d 879—Ellena v State, 138 Cal Rptr 110, 69 C A 3d 245

Tex—Tips v Green, Civ App, 533 S W 2d 155, err dism

Prior convictions

Okla—Gatlin v State, Cr, 553 P 2d 204

Percentage of claims

(2) Other matters

Mo—State ex rel State Highway Commission v Southside Nat. Bank, App, 585 S W 2d 512

page 79

35. U.S.—Norwich Pharmacal Co v Rakway, Inc, D C Pa, 189 F Supp 348—Miami Health Studios, Inc v City of Miami Beach, C A Fla, 491 F 2d 98

Cal—Larkin v Jesberg, 12 Cal Rptr 655, 191 C A 2d 272

Colo—Cline v McDowell, 284 P 2d 1056, 132 Colo 37

Fla—Peters v Spielvogel, App, 163 So 2d 59

N.H.—D. Latchis, Inc v Borofsky Bros, Inc, 343 A 2d 637, 115 N H 401

N.Y.—Dictograph Products, Inc v Empire State Hearing Aid Bureau, Inc, 167 N.Y.S.2d 541, 4 A D 2d 508—In re Shehan's Will, 164 N.Y.S.2d 641, 7 Misc.2d 62

Utah—Carter v Spencer, 286 P 2d 245, 4 Utah 2d 1—United Factors v T C Associates, Inc, 445 P 2d 766, 21 Utah 2d 351.

Wash—In re Bailey's Estate, 354 P 2d 920, 56 Wash 2d 623.

Wyo—Town of Glenrock v Chicago & N W Ry Co., 281 P 2d 455, 73 Wyo 385

Vacating decree

Colo—England v Colorado Agency Co, 359 P 2d 1, 145 Colo 310

36. N.M.—Putelli v Hardy, 499 P 2d 688, 84 N M 66

Stay of execution

Cal—Jones v World Life Research Institute, 131 Cal Rptr 674, 60 C A 3d 836.

37. U.S.—Brecklein v Bookwalter, D C Mo, 313 F Supp 550—Koehnemann v U.S., D C Ill, 322 F Supp 1200, affd, C A, 457 F 2d 500—Algonquin Deep Sea Research Corp v Perini Corp, D C Mass, 353 F Supp 561—Dale Ingram, Inc v U.S., 475 F 2d 1177, 201 Ct.Cl. 56

Ala.—Mercantile Life Ins Co v Johnson, 132 So 2d 248, 41 Ala App 307, cert den 132 So 2d 251, 272 Ala 707

Ariz.—Musgrove v Leonard, 396 P.2d 614, 97 Ariz 44

Ark—Brown v Keaton, 334 S W 2d 676, 232 Ark 12

Cal.—In re Alvarez's Estate, 283 P 2d 312, 133 C.A.2d 15—People v Cozza, 300 P 2d 19, 143 C.A.2d 661—Johnston v Seargeants, 313 P 2d 41, 152 C.A.2d 180—Cardan v Stern, 324 P 2d 736, 160 C A 2d 135—Kitagawa v Williams, 335 P 2d 509, 168 C A 2d 779—O'Callaghan v Southern Pac. Co., 20 Cal.Rptr 708, 202 C A 2d 364—Moss v Bluemm, 40 Cal Rptr 50, 229 C A 2d 70—City of Ukiah v Fones, 48 Cal Rptr 865, 410 P 2d 369, 64 C 2d 104

Colo—Continental Nat Bank v Dolan, 564 P 2d 955, 39 Colo App. 16

Conn.—Liberty Bank for Sav v. Armstrong, 423 A.2d 171, 36 Conn.Sup 629.

Fla—Lopez v Cohen, App 4 Dist., 406 So.2d 1253

Ga.—Owens v Floyd County, 99 S E 2d 560, 96 Ga App 25, foll 99 S E 2d 564, 96 Ga App 29

Hawai—Aninamalu Corp v Honolulu Transport & Warehouse Corp, 537 P 2d 17 56 Haw 362

Ill—Ras v Allan Anthony Elec Corp, 204 N E 2d 797, 55 Ill App 2d 176

Ky—Pyramid Life Ins Co v Wallen, 338 S W 2d 385

La—Roberts v Williams, App, 99 So 2d 392—State Farm Mut Auto Ins Co v U S Fidelity & Guaranty Co, App, 111 So 2d 175—Catania v Fidelity & Cas Co of New York, App, 182 So 2d 565—Luquette v Bouillon, App, 184 So 2d 766—Benoit v American Mut Ins Co of Boston, App, 236 So 2d 674, writ den 239 So 2d 366, 256 La 874

Mich—A. B Beard and Son v. Ministrelli Const Co, 126 N W 2d 695, 372 Mich 364

Miss—C.J.S. quoted in Johnston v Stinson, 434 So 2d 715, 719

Mont—Stensvad v Miners and Merchants Bank of Roundup, 640 P 2d 1303, 196 Mont 193, cert den 103 S Ct 69, 459 U S 831, 74 L Ed 2d 369

N.H.—Bromfield v Seybolt Motors Inc, 309 A 2d 914, 113 N H 525

N.J.—Lea v Lea, 112 A 2d 540, 18 N J 1—Louis Schlesinger Co v Wilson, 127 A 2d 13, 22 N J 576—Pisano v S Klein on the Square, 188 A 2d 622, 78 N J Super 375

N.M.—Bokum v Elkins, 355 P 2d 137, 67 N M 324—Transwestern Pipe Line Co v Yandell, 367 P 2d 938, 69 N M 448

N.Y.—Rentways, Inc v O'Neill Milk & Cream Co, 126 N E 2d 271, 308 N Y 342—Application of Bounds, 234 N Y S 2d 758, 18 A D 2d 731—Dellas v McMorran, 272 N Y S 2d 813, 51 Misc 2d 223

N.C.—Carolina Central Gas Co v Hyder, 86 S E 2d 458, 241 N.C. 639—Jordan v Blackwelder, 108 S E 2d 429, 250 N.C. 189

Ohio—St Paul Fire & Marine Ins Co v Battle, 337 N E 2d 806, 44 Ohio App 2d 261, 73 O O 2d 291

Okla—Smith v Clark, 315 P 2d 960

Pa—Foote v Maryland Cas Co, 186 A 2d 255, 409 Pa 307—Lynch v Metropolitan Life Ins Co, 222 A 2d 925, 422 Pa 488

S.D.—Matter of J M A., 286 N W 2d 324

Tenn—Aetna Cas & Sur Co v Miller, 491 S W 2d 85

Tex.—Griffin v Gulf, C & S F Ry Co, Civ App, 298 S W 2d 659—Getz v Collins, Civ App, 303 S W 2d 818—Chavis v King, Civ App, 351 S W 2d 265—Mansell v Hendrickson, Civ.App, 417 S W 2d 908—Hospital Ass'n of Southern Pac Lines in Texas and Louisiana v Giannelloni, Civ App, 431 S W 2d 949—Doyle v Second Master—Bilt Homes, Inc, Civ App, 453 S W 2d 226, err ref no rev err—Betts v Baldwin, Civ App, 482 S W 2d 299.

Vt—Smith v State Highway Bd, 292 A 2d 814, 130 Vt 317

W Va—Butler v Smith's Transfer Corp, 128 S E 2d 32, 147 W Va 402.

Wis—Wussow v Commercial Mechanisms, Inc, 293 N W 2d 897, 97 Wis 2d 136

Wyo—Nichols v Pangarova, 443 P 2d 756.

Insufficient ad damnum in writ

(2) Jury verdict in trial de novo not limited by stipulated amount

N.Y.—Lazzaro v Schinzling, 374 N Y S 2d 25, 49 A D 2d 1006

Proof of damage

(4) Other matters.

U.S.—U.S. v 615 10 Acres of Land, More or Less, in Grayson et al. Counties, Com of Va, D C Va, 327 F Supp 691

Cal.—City of Los Angeles v Monahan, 127 Cal Rptr 763, 55 C A 3d 846

Hawai—City and County of Honolulu v Bishop Trust Co, 404 P 2d 373, 48 Haw 444, 23 A L R 3d 692

Kan.—Dondlinger & Sons' Const Co, Inc. v Emcco, Inc., 606 P 2d 1026, 227 Kan. 301.

Okla—Davidson v First State Bank & Trust Co, Yale, 559 P 2d 1228.

Or—Storey v Madsen, 554 P 2d 500, 276 Or 181

Interest

(1) U.S.—Firemen's Fund Ins Co v. Standard Oil Co of Cal, C A Cal, 339 F 2d 148—U.S. v Bolt,

D C Tenn. 246 F Supp 583, affd, C A, 375 F 2d 725—U.S. v 278 59 Acres of Land, More or Less, in Brevard County, State of Fla, C A Fla, 364 F 2d 63—Economy Plumbing & Heating Co, Inc v U.S., 470 F 2d 585, 200 Ct Cl 31

Cal—Munier v Hawkins, 12 Cal Rptr 274, 190 C A 2d 655

Colo—Hawkins v Powers, App, 635 P 2d 915

La—Patout v R S & S, Inc, App, 342 So 2d 1161.

Mass—Swift v American Universal Ins Co, 212 N E 2d 448, 349 Mass 637, 19 A L R 3d 1145

Mich—Dittus v Geyman, 242 N W 2d 800, 68 Mich App 433

Mo—Filmmakers Releasing Organization v Realart Pictures of St Louis, Inc, App, 374 S W 2d 535

N.Y.—Chase Manhattan Bank (N A) v State, 367 N Y S 2d 580, 48 A D 2d 11, affd 357 N E 2d 366, 40 N Y 2d 590, 388 N Y S 2d 896

N.C.—Jackson v City of Gastonia, 100 S E 2d 241, 247 N C 88

Pa—Mauch v Pension Bd of City of Pittsburgh, 119 A 2d 193, 383 Pa 448

Wis—Wyandotte Chemicals Corp v Royal Elec Mfg Co, Inc, 225 N W 2d 648, 66 Wis 2d 577.

(2) Hawai—City and County of Honolulu v Bishop Trust Co, 404 P 2d 373, 48 Haw 444, 23 A L R 3d 692

Damage award mooted

La—Charia v Stanley, App, 359 So 2d 291, writ den., Sup, 362 So 2d 579

No relation back

Wash—Pearson Const Corp v Intertherm, 566 P 2d 575, 18 Wash App 17

Costs

Hawai—Smothers v Renander, 633 P 2d 556, 2 Haw App 400

page 80

38. Utah—Jenkins v Jenkins, 281 P.2d 989, 3 Utah 2d 200

39. U.S.—Los Angeles Shipbuilding & Drydock Corp v U.S., C A Cal, 289 F 2d 222—Long v Bacon, D C Iowa, 239 F Supp. 911.

N.Y.—Drazin v. Drazin, 295 N.Y.S.2d 183, 31 A.D.2d 531

N.D.—State Bank of Towner, Inc v Rauh, 288 N.W.2d 299

W Va—Hardin v New York Cent. R Co, 116 S.E.2d 697, 145 W Va 676

40. D.C.—Waltermeyer v Autocar Sales & Service Co, Mun App, 103 A 2d 921.

Nev—Conrad v Sadur, 422 P 2d 236, 83 Nev 39

Or—State ex rel Everett v Sanders, 544 P 2d 1043, 274 Or. 75.

41. U.S.—U.S. v. Webb, C A Md., 595 F.2d 203

Cal—Sweeney v McClaran, 130 Cal Rptr 205, 58 C A 3d 824.

Ill—In Interest of Sudler, App., 328 N.E.2d 909, 28 Ill App 3d 1037, cert den 97 S Ct 60, 429 U.S. 817, 50 L Ed 2d 77

Mass—Glenn Acres, Inc v Cliffwood Corp, 228 N E 2d 835, 353 Mass 150.

42. U.S.—Monett v U.S., 419 F 2d 434, 190 Ct Cl. 1, cert den 91 S.Ct. 91, 400 U.S. 846, 27 L Ed 2d 82

Fla—Geiser v Permacrete, Inc, 90 So 2d 610

La—Moak v Link-Belt Co, 242 So 2d 515, 257 La 281—Hightower v Dixie Auto Ins. Co, App., 247 So.2d 912—Gallin v Travelers Ins Co., App, 323 So 2d 908, writ den 329 So.2d 452.

Tex—Krupp Organization v Belin Communities, Inc., Civ.App., 582 S.W.2d 514, err ref no rev err.

43. U.S.—Winter v Welker, D C Pa., 174 F.Supp. 836—Lipp v National Screen Service Corp., D.C. Pa, 188 F Supp. 245, affd., C.A., 290 F 2d 321, cert den 82 S.Ct. 61, 368 U.S. 835, 7 L Ed 2d 36

Fla—Sperry v Rodgers, App., 399 So.2d 465.

La—Emmco Ins Co v Aetna Cas. & Sur Co., App., 86 So 2d 249—Campbell Const. Co. v Barnhill Bros., Inc, App, 245 So.2d 776.

Ohio—Miles v. N J Motors, Inc, 338 N.E.2d 784, 44 Ohio App 2d 351, 73 O.O.2d 404

Pa—Temple v Able Tool Co., Inc., 359 A.2d 412, 240 Pa Super 609

45. Fla—Adams v Dade County, App., 335 So.2d 594

Tex—Person v Latham, Civ App., 582 S.W.2d 246, err. ref. no rev. err.

Time limit not set

Conn—Tishman Equipment Leasing, Inc. v Levin, 202 A.2d 504, 152 Conn. 23

§ 28. — As to Review

page 81

53. U.S.—U.S. v Miller, C.A.N.Y., 248 F.2d 163—State of Alaska v Udall, C.A. Alaska, 420 F.2d 938, cert. den. 90 S.Ct. 1522, 397 U.S. 1076, 25 L.Ed.2d 811

Alaska—Channel Flying, Inc. v Bernhardt, 451 P.2d 570

Cal—Allen v Gardner, 298 P.2d 585, 142 C.A.2d 467—People v Barrozo, 56 Cal.Rptr. 491, 423 P.2d 563, 65 C.2d 810

Conn—State v Raffone, 285 A.2d 323, 161 Conn. 117

Hawaii—State v Vincent, 450 P.2d 996, 51 Haw. 40

Idaho—Big Lost River Irr. Dist. v Zollinger, 363 P.2d 706, 83 Idaho 401

Ill.—Ashton v Sweeney, 112 N.E.2d 183, 350 Ill.App. 135

La—State ex rel Comfarto v City of New Orleans, App., 124 So.2d 155

Nev—Houghton Elevator Co. v R. C. Johnson and Associates, 494 P.2d 961, 88 Nev. 165

N.Y.—Jones v. Wicks, 213 N.Y.S.2d 759, 29 Misc.2d 781, affd. 227 N.Y.S.2d 486, 16 A.D.2d 685, app. diss. 185 N.E.2d 900, 12 N.Y.2d 667, 233 N.Y.S.2d 460, affd. 190 N.E.2d 240, 12 N.Y.2d 1049, 239 N.Y.S.2d 880—Remold Realty, Inc. v Kensico Acres, Inc., 217 N.Y.S.2d 229, 13 A.D.2d 1034—Mussman v Modern Deb, Inc., 411 N.Y.S.2d 330, 66 A.D.2d 719, affd. 401 N.E.2d 217, 48 N.Y.2d 941, 425 N.Y.S.2d 95

N.C.—State v. Hall, 147 S.E.2d 548, 267 N.C. 90

Ohio—City of Lima v Elliott, 217 N.E.2d 878, 6 Ohio App.2d 243

Okl.—Arthur v Arthur, 354 P.2d 199—Pitman v State, Cr., 487 P.2d 716

Pa.—Com v Budd, 140 A.2d 346, 186 Pa. Super. 65—Washington Mall v. Board for Assessment and Revision of Taxes of Washington County, 285 A.2d 885, 4 Pa. Cmwlth. 251—Stardust, Inc. v Com., Liquor Control Bd., 374 A.2d 989, 30 Pa. Cmwlth. 569

Tenn.—Shay v. Harper, 303 S.W.2d 335, 202 Tenn. 141

Tex.—McDonald v. State, Cr., 385 S.W.2d 253

Particular stipulations

(5) Other stipulations.

Ark—Jones v. Donovan, 426 S.W.2d 390, 244 Ark. 474

Cal.—Vestal v. State Personnel Bd. of State of Cal., 3 Cal.Rptr. 618, 178 C.A.2d 920—In re Ketchel, 66 Cal.Rptr. 881, 438 P.2d 625

Fla.—Maddox v. Dade County, App., 321 So.2d 610

Iowa—Iowa Public Service Co. v. Sioux City, 116 N.W.2d 466, 254 Iowa 22

La.—Weber v. Press of H. N. Cornay, Inc., App., 144 So.2d 581—Red Ball Motor Freight, Inc. v. Younger Bros., Inc., App., 204 So.2d 781

Mass—Framingham Fire Fighters Local 1652, IAFF, AFL-CIO v Town of Framingham, 319 N.E.2d 912, 2 Mass.App. 899

Mich.—In re Brown, 177 N.W.2d 732, 22 Mich.App. 459

Mont.—Fraser v. Clark, 352 P.2d 681, 137 Mont. 362

Neb.—City of Omaha Human Relations Dept. v. City Wide Rock & Excavating Co., 268 N.W.2d 98, 201 Neb. 405

N.H.—Massachusetts Bonding & Ins. Co. v. Keefe, 127 A.2d 266, 100 N.H. 361

N.Y.—Liberty Mut. Ins. Co. v. Mart, 134 N.Y.S.2d 132, 284 App.Div. 668

N.C.—State v. Hunter, 96 S.E.2d 840, 245 N.C. 607

N.D.—Sittner v. Mistelski, 140 N.W.2d 360

Okl.—City of Lawton v Lewis, 566 P.2d 133

Or.—State v Haynes, 602 P.2d 272, 288 Or. 59, cert. den. 100 S.Ct. 2175, 446 U.S. 945, 64 L.Ed.2d 802

Pa.—Bensalem Tp. v. Beyer, 15 Bucks 266

W. Va.—In re Murphy's Estate, 85 S.E.2d 836, 140 W. Va. 539

Parties

(2) Other matters

Minn.—Olson v Hertz Corp., 133 N.W.2d 519, 270 Minn. 223

Parties may not extend time to argue on appeal by stipulation

N.Y.—People v Mosher, 156 N.Y.S.2d 826, 2 A.D.2d 835

Stipulation may not enlarge scope of review

Del.—Green v Wilmington Sav. Fund Soc., 310 A.2d 638

Appeal not rendered moot

Ga.—P. C. Garley Contractors, Inc. v. Exxon Co., U.S.A., 240 S.E.2d 208, 143 Ga.App. 827

Time for appeal

Me.—Begin v Jerry's Sunoco, Inc., 435 A.2d 1079

Me.—Young v Sturdy Furniture Co., 441 A.2d 320

54. Ariz.—Town of Gila Bend v Hughes, 477 P.2d 566, 13 Ariz.App. 447

55. U.S.—Commanding Officer U.S. Army Base, Camp Breckinridge, Ky. v U.S. ex rel Bumanis, C.A. Ky., 207 F.2d 499

Miss.—Burnside v Burnside, 86 So.2d 333, 228 Miss. 180

57. Utah—American Housing Corp. v Richardson, 417 P.2d 973, 18 Utah 2d 197

58. U.S.—National Corn Growers Ass'n v. Bergland, D.C. Iowa, 484 F.Supp. 1342—Brown & Root, Inc. v M/V Persander, C.A. Tex., 648 F.2d 415

Ala.—Jones v Gladney, 339 So.2d 1019

Ill.—Van Fleet v Van Fleet, 425 N.E.2d 69, 54 Ill. Dec. 557, 99 Ill.App.3d 225

La.—Denton v Fontenot, App., 214 So.2d 394

No modification required

N.Y.—New Yorker Magazine, Inc. v Gerosa, 157 N.Y.S.2d 468, 2 A.D.2d 600, affd. 165 N.Y.S.2d 469, 3 N.Y.2d 362, 144 N.E.2d 367, app. diss. 78 S.Ct. 777, 356 U.S. 339, 2 L.Ed.2d 809, reh. den. 78 S.Ct. 1147, 357 U.S. 915, 2 L.Ed.2d 1163, and 79 S.Ct. 321, 358 U.S. 938, 3 L.Ed.2d 309

Letter held not stipulation approving reversal

Cal.—Landberg v Landberg, 101 Cal.Rptr. 335, 24 C.A.3d 742

Stipulation of reversible error binding

Cal.—People v Carlucci, 152 Cal.Rptr. 439, 590 P.2d 15, 23 C.3d 249

page 82

60. Mont.—Central Montana Stockyards v. Fraser, 320 P.2d 981, 133 Mont. 168

Tex.—Amoco Production Co. v Texas Elec. Service Co., Civ.App., 614 S.W.2d 194

61. U.S.—Robinson v Eliot, C.A. Mont., 262 F.2d 383

Cal.—People v Davis, 76 Cal.Rptr. 242, 270 C.A.2d 841

Fla.—Quick v Leatherman, 96 So.2d 136

Ga.—Gable v Gable, 189 S.E.2d 409, 229 Ga. 131

Ill.—People v Niewinski, 142 N.E.2d 151, 13 Ill.App.2d 307

N.J.—Monaco v Jackson Engineering Co., 132 A.2d 548, 45 N.J. Super 313

N.Y.—Powers v Mulford, 158 N.Y.S.2d 707, 3 A.D.2d 99

Or.—Nepom v Department of Revenue, 536 P.2d 496, 272 Or. 249

Pa.—In re Obici's Estate, 97 A.2d 49, 373 Pa. 567—Zawada v Pennsylvania System Bd. of Adjustment, Broth. of Ry. & S.S. Clerks, Freight Handlers, Exp. and Station Emps., 140 A.2d 335, 292 Pa. 207, cert. den. 79 S.Ct. 48, 358 U.S. 829, 3 L.Ed.2d 68

Tex.—Missouri Pac. R. Co. v. Whittenburg and Alston, 424 S.W.2d 427

Va.—Elder v Holland, 155 S.E.2d 369, 208 Va. 15

Wis.—State v Rodell, 117 N.W.2d 278, 17 Wis.2d 451—State v Smith, 198 N.W.2d 588, 55 Wis.2d 451

Damages

(3) Other matters

La.—Brooks v Kirkpatrick, App., 175 So.2d 342

Or.—Storey v Madsen, 554 P.2d 500, 276 Or. 181

Disposition including matters prematurely presented

Cal.—Clovis Ready Mix Co. v Aetna Freight Lines, 101 Cal.Rptr. 820, 25 C.A.3d 276

62. Mich.—In re Brown, 177 N.W.2d 732, 22 Mich. App. 459

Mo.—Gilbert v Edwards, App., 276 S.W.2d 611

Neb.—City of Omaha Human Relations Dept. v City Wide Rock & Excavating Co., 268 N.W.2d 98, 201 Neb. 405

N.Y.—McGraw Enterprises, Inc. v. Critic-Hennietta, Inc., 389 N.Y.S.2d 200, 54 A.D.2d 1101

Pa.—Deitch Co. v Board of Property Assessment, Appeals and Review of Allegheny County, 209 A.2d 397, 417 Pa. 213

§ 29. — Other Stipulations

66. U.S.—Likins-Foster Monterey Corp. v U.S., C.A. Cal., 308 F.2d 595—Vanity Fair Paper Mills Inc. v FTC, C.A.N.Y., 311 F.2d 480—Calabrese v United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, D.C.N.J., 211 F.Supp. 609, affd., C.A., 324 F.2d 955—U.S. v Guidarelli, C.A.N.Y., 318 F.2d 523, cert. den. 84 S.Ct. 72, 375 U.S. 828, 11 L.Ed.2d 60—H. B. Zachry Co. v U.S., Ct.Cl., 344 F.2d 352, 170 Ct.Cl. 115—Bland v State of Ala., C.A. Ala., 356 F.2d 8, cert. den. 86 S.Ct. 1203, 383 U.S. 947, 16 L.Ed.2d 210—Kolens v S.S. Good Hope, D.C. Va., 241 F.Supp. 967

Ariz.—Hensley v Langmade, 291 P.2d 781, 80 Ariz. 1—State Tax Commission v Graybar Elec. Co., 344 P.2d 1008, 86 Ariz. 253

Cal.—People v Sutton, 70 Cal.Rptr. 846, 264 C.A.2d 554

Colo.—Konecny v. von Gunten, 379 P.2d 158, 151 Colo. 376

Conn.—Gendron v Borough of Naugatuck, 144 A.2d 818, 21 Conn. Sup. 78

Fla.—Brooks v Adams, App., 115 So.2d 578

Ga.—Hamby v Hamby, 121 S.E.2d 169, 103 Ga.App. 826

Hawaii—In re Campbell's Estate, 382 P.2d 920, 46 Haw. 475

Idaho—Verry v Goodman, 301 P.2d 1111, 78 Idaho 298—Parther v Loyd, 382 P.2d 910, 86 Idaho 45

La.—Corsey v State, Through Dept. of Corrections, App., 366 So.2d 964

Miss.—Riegelhaupt v Ostroffsky, 115 So.2d 331, 237 Miss. 521—Stegall v City of Jackson, 143 So.2d 298, 244 Miss. 169

Mont.—State By and Through State Highway Commission v City Service Co., 385 P.2d 604, 142 Mont. 559

N.M.—State ex rel. State Highway Commission v. Myers, 383 P.2d 274, 72 N.M. 319

N.Y.—Stell Mfg. Corp. v Century Industries, Inc., 260 N.Y.S.2d 547, 23 A.D.2d 281, motion den. 211 N.E.2d 530, 16 N.Y.2d 874, 264 N.Y.S.2d 111, affd. 213 N.E.2d 313, 16 N.Y.2d 1020, 265 N.Y.S.2d 902—Reiche v. Schuster, 263 N.Y.S.2d 287, 47 Misc.2d 782

N.D.—Gessner v. Benson, 79 N.W.2d 152

Okl.—Lillard Pipe & Supply, Inc. v. Bailey, 387 P.2d 118

Or.—State By and Through State Highway Commission v. Feves, 365 P.2d 97, 228 Or. 273—Friedman v Bridger, 426 P.2d 859, 246 Or. 549

Pa.—Foley Bros., Inc. v. Com. Dept. of Highways, 163 A.2d 80, 400 Pa. 584

Tex.—Smith v Miller, Civ.App., 298 S.W.2d 845, err. ref. no rev. err.—Alexander v. Golden v. West Free Press, Inc., Civ.App., 336 S.W.2d 825—Sabine River Authority v. Crabb, Civ.App., 372 S.W.2d 575

Page 82

Utah—Hammond v. Calder, 334 P 2d 562, 8 Utah 2d 333, cert den 80 S Ct 51
Va.—Parker v. DeBove, 142 S E 2d 510, 206 Va 220
Wis.—Kleinschmidt v. Aluminum & Bronze Foundry Inc., 79 N W 2d 802, 274 Wis 231

Procedural matters

(2) Other matters

Ariz—Stewart v. Stevens, 366 P 2d 84, 90 Ariz 103

Residence

Tenn—Bearman v. Camatos, 385 S W 2d 91, 215 Tenn 231

Making garnishment statute inapplicable

La—Globe Auto Finance Co v. Language, App, 261 So 2d 708

Extent of submission to jurisdiction

U S—In re Penn Central Transp Co, D C Pa, 391 F Supp 1404

Attorney fees

Okla—Howell v. Blue Cross and Blue Shield of Oklahoma, 609 P 2d 1283

Matters as to disqualification of judges

Cal—Olson v. Cory, 178 Cal Rptr 568, 636 P 2d 532, 27 C 3d 532, app after remand 197 Cal Rptr 843, 673 P 2d 720, 35 C 3d 390

page 83

70. U S—In re S S Tropic Breeze, C A Puerto Rico, 456 F 2d 137

Cal—California Home Extension Ass'n v. Hilborn, 252 P 2d 368, 115 C A 2d 634

71. Wash—Pitts v. Percy, 302 P 2d 476, 49 Wash 2d 445

72. Tex—Gonzales v. Farmers Ins Exchange, Civ App, 399 S W 2d 888, err ref no rev. err

74. N Y—Deering Realty Corp v. Podyen, 236 N Y S 2d 869, 18 A D 2d 821

Tex—Sabine River Authority v. Crabb, Civ App, 372 S W 2d 575

75. D C—Schrier v. Home Indem Co App, 273 A 2d 248

Kan—City of Wichita v. Kansas Gas & Elec Co, 464 P 2d 196, 204 Kan 546

Mich—Goodwill Industries of Detroit v. Whitsitt, 116 N.W.2d 783, 367 Mich 569

N.Y.—Martinoff v. Triboro Roofing Co, 228 N Y S 2d 139

Pa—Lakeland Joint School Dist Authority v. School Dist of Scott Tp, 200 A 2d 748, 414 Pa 451

Tex—Marion v. Hutton, Civ App, 374 S W 2d 284, err ref no rev. err

79. N.Y.—Application of Fifth Madison Corp, 161 N Y S 2d 326, 3 A D 2d 430, affd 175 N Y S 2d 173, 4 N Y 2d 932, 151 N E 2d 357

84. Wash—Cook v. Vennigerholz, 269 P 2d 824, 44 Wash 2d 612

§ 30. Rescission, Withdrawal, Abrogation, Waiver, or Abandonment

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89. U S—Matter of Hyong Jin Kim, Bkrcty N Y, 15 B.R. 198

Ala—Tyson v. U S Pipe & Foundry Co, 240 So 2d 674, 286 Ala 425

Cal—Arnold v. State, App., 78 Cal Rptr 309, 273 C.A.2d 575

Ga.—White v. State, 266 S E 2d 528, 153 Ga App 808

Ill.—Kazubowski v. Kazubowski, 235 N E 2d 664, 93 Ill.App.2d 126, cert den 89 S Ct 993, 393 U S 1117, 22 L Ed 2d 122

Minn.—C.J.S. cited in Gran v. City of St. Paul, 143 N.W.2d 246, 274 Minn 220

Mo—Sale v. Brown, App, 396 S.W.2d 750

N.Y.—Barcia v. Barcia, 127 N.Y.S.2d 443, 283 App Div. 726—Penn Central Corp v. Consolidated Rail

Corp., 436 N E 2d 512, 50 N Y 2d 120, 451 N Y S 2d 62

Okla—Coon v. Jones, 303 P 2d 425—McFarling v. Demco, Inc. 546 P 2d 625

Pa—C.J.S. cited in Conyer v. Borough of Norristown, 428 A 2d 749 751, 58 Pa Cmwlth 629

Tex—Yarber v. Igichart, Civ App, 264 S W 2d 474

Leave held properly denied

U S—L S v. State of Tex, D C Tex, 523 F Supp 703

N Y—Oswald v. Oswald, 341 N Y S 2d 959, 73 Misc 2d 607

Okla—Smith v. Owens, 397 P 2d 673

Polygraph tests

Ark—Hokomb v. State, 594 S W 2d 22, 268 Ark 138

app after remand 609 S W 2d 78, 271 Ark 619

Wis—Pickens v. State, 292 N W 2d 601, 96 Wis 2d 549

Application not timely

U S—Pueblo of Santo Domingo v. U S, 647 F 2d 1087, 227 Ct Cl 265 cert den 102 S Ct 2296, 456 U S 1006, 73 L Ed 2d 1300

page 84

90. Cal—Meder v. Safeway Stores, Inc., 159 Cal Rptr 609, 98 C A 3d 497

91. Okla—Cartwright v. Atlas Chemical Industries, Inc., App, 593 P 2d 104, 18 A L R 4th 180

92. U S—Aetna Life Ins Co v. Barnes, C A Tex, 361 F 2d 685—Albee Homes, Inc v. Lutman, D C Pa, 274 F Supp 875, affd in part and dism in part, C A, 406 F 2d 11

Ill—Stony Island Church of Christ v. Stephens, 369 N E 2d 1313, 12 Ill Dec 299, 54 Ill App 3d 662

N Y—People ex rel Putziger v. Putziger, 254 N Y S 2d 916, 22 A D 2d 821

93. U S—U S v. Gould, C A Fla, 301 F 2d 353

Ariz—Miller v. Schafer, 432 P 2d 585, 102 Ariz 457

Cal—Prescott v. Ralph's Grocery Co, 265 P 2d 904, 42 C 2d 158

Standards for allowing withdrawal enumerated

Okla—Cartwright v. Atlas Chemical Industries, Inc., App, 593 P 2d 104, 18 A L R 4th 180

95. D C—C.J.S. cited in Byrd v. U S, App, 485 A 2d 947, 950

La—Hampton v. State, App, 376 So 2d 980, writ den Sup, 378 So 2d 432, app after remand, App 1 Cir, 434 So 2d 433

A stipulation properly withdrawn or set aside is not binding.⁹⁵

98.5. U S—National Union Fire Ins Co of Pittsburgh, Pa v. D & L Const Co, C A Mo, 353 F 2d 169, cert den 86 S Ct 1462, 384 U S 941, 16 L Ed 2d 539

Cal—Harris v. Spinali Auto Sales Inc, 49 Cal Rptr. 610, 240 C A 2d 447

Tex—Wilkins v. Cook, Civ App, 454 S W 2d 769, err ref no rev. err

99. U S—Sel-O-Rak Corp v. Henry Hanger & Display Fixture Corp of America, D C Fla, 159 F Supp 769, Affd, C A, 270 F 2d 635

Cal—Arnold v. State, App, 78 Cal Rptr 309, 273 C.A.2d 575

Minn—Gethsemane Lutheran Church v. Zacho, 92 N W 2d 905, 253 Minn 469

2. Ariz—C.J.S. cited in Loya v. Fong, 404 P 2d 826, 829, 1 Ariz App, 482

Md—C.J.S. cited in Peddicord v. Franklin, 310 A 2d 561, 567, 270 Md 164

Mass—Kentucky Package Store, Inc v. Checani, 117 N E 2d 139, 331 Mass 125

Agreed case

(3) Other matters

Cal—In re Miller's Estate, 299 P 2d 1005, 143 C A 2d 544

3. Colo.—Line v. People, 386 P 2d 52, 153 Colo 368

Acts held not to constitute waiver

Ariz—Loya v. Fong, 404 P.2d 826, 1 Ariz App 482

Voluntary joinder in litigating issue

Ariz—Loya v. Fong, 404 P 2d 826, 1 Ariz App 482

Waiver must be explicit

U S—Insurance Co of North America v. Northwestern Nat Ins Co, D C Mich, 371 F Supp 550, affd, C A, 494 F 2d 1192

4. Md—Pedicord v. Franklin, 310 A 2d 561, 270 Md 164

Mont—McCarthy v. Employers' Fire Ins Co, 37 P 2d 579, 97 Mont 540, 97 A L R 292

Okla—C.J.S. cited in Hamco Oil & Drilling Co v. Ervin, 354 P 2d 442, 445

page 85

5. U S—Laird v. Air Carrier Engine Service, Inc, C A Fla, 263 F 2d 948

§ 31. Enforcement of Stipulation in General

Library References

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6. U S—Brinson v. Tomlinson, C A Fla, 264 F 2d 30, cert den 80 S Ct 79—U S v. Best Foods, Inc, 51 CCPA 1—American Hoist & Derrick Co v. Chicago, M, St P & P R Co, C A Ohio, 414 F 2d 68—U S v. Wysocki, C A Fla, 457 F 2d 1155, cert den 93 S Ct 145, 409 U S 859, 34 L Ed 2d 105—C.J.S. cited in Tom v. Twomey, D C Ill, 430 F Supp 160, 163

Ariz—Driscoll v. Harmon, App, 569 P 2d 274, 116 Ariz 332, app after remand 601 P 2d 1051, 124 Ariz 15

Cal—General Ins Co of America v. Superior Court of Alameda County, 124 Cal Rptr 745, 541 P 2d 289, 15 C 3d 449

Colo—Dailey v. Montview Acceptance Co, App, 514 P 2d 76

D C—Costen v. Buschow, D C App, 213 A 2d 759

Idaho—C.J.S. cited in Kershaw v. Pierce Cattle Co, 393 P 2d 31, 34, 87 Idaho 323—Kershaw v. Pierce Cattle Co, 393 P 2d 31, 87 Idaho 323

Ill—860 Lake Shore Drive Trust v. Gerber, 153 N E 2d 253, 19 Ill App 2d 1—Roin v. Checker Taxi Co, 184 N E 2d 736, 36 Ill App 2d 447—People v. McCrory, 190 N E 2d 159, 41 Ill App 2d 59—Kazubowski v. Kazubowski, 235 N E 2d 664, 93 Ill App 2d 126, cert den 89 S Ct 993, 393 U S 1117, 22 L Ed 2d 122

Iowa—In re Clark's Estate, 181 N W 2d 138

La—Globe Auto Finance Co v. Language, App., 261 So 2d 708

Mich—Congresshills Apartments v. Ypsilanti Tp, 302 N W 2d 274, 102 Mich App 668, app after remand 341 N W 2d 121, 128 Mich App 279

Mo—McKinnies v. Universal Cartage and Delivery Service Co, Inc., App, 582 S W 2d 358

Neb—Kuhlmann v. Platte Val Irr Dist, 89 N W 2d 768, 166 Neb 493—Martin v. Martin, 197 N.W.2d 388, 188 Neb 393

Nev—Conrad v. Sadur, 422 P 2d 236, 83 Nev. 39

N J—Carlsen v. Carlsen, 139 A 2d 309, 49 N J Super 130

N M—Southern Union Gas Co v. Cantrell, 261 P 2d 645, 57 N M 612

N Y—Stein v. Severino, 245 N Y S 2d 634, 41 Misc.2d 209—Harvey v. Harvey, 297 N.Y.S.2d 320, 58 Misc 2d 917—Oswald v. Oswald, 341 N.Y.S.2d 959, 73 Misc 2d 607.

N D—Park View Manor, Inc v. Housing Authority of Stutsman County, 287 N.W.2d 83, app. after remand 300 N W 2d 218

Pa—Long v. Trader Horn Coal Co, 152 A.2d 257, 396 Pa. 203—Hopewell v. Hummick, 48 Luz L Reg 47, exceptions dism 49 Luz L Reg 5—Epp's Used Cars v. Few, 180 A 2d 111, 197 Pa.Super 478—Foote v. Maryland Gas Co, 186 A 2d 255, 409 Pa. 307—Gallagher v. Swiderski, 45 Erie 15.

Tenn—Bearman v. Camatos, 385 S.W.2d 91, 215 Tenn 231

Tex—Hasley v. State, Cr, 442 S W 2d 739

Utah—Johnson v Peoples Finance & Thrift Co., 272 P 2d 171, 2 Utah 2d 246

Reason for rule

(2) Other statements

Fla—James v State, App., 305 So 2d 829

Oral promises, not part of record

Ohio—Schwartz v Leiser, App., 140 NE 2d 1

Effect of order

Pa—Hopewell v Humink, 49 Luz L Reg 5

Duty of trial court to see that county attorney abides by stipulation to recommend minimum term

Okl—Courtney v State, Cr., 341 P 2d 610

No breach

Minn—Burgstahler v Fox, 186 NW 2d 182, 290 Minn 495

Polygraph testing

N J—State v Cole, 330 A 2d 594, 131 NJ Super 470—State v Taylor, 353 A 2d 555, 139 NJ Super 301—State v Smith, 362 A 2d 578, 142 NJ Super 575

Discretionary power of court

N Y—Transportation House, Inc v E D V Maintenance Corp., 443 NYS 2d 168, 84 AD 2d 534

Criminal cases

N Y—People v Aratino, 445 NYS 2d 951, 111 Misc 2d 1015

7. U S—Kaminer Const Corp v U S, 488 F 2d 980, 203 Ct Cl 182

Md—Pedicord v Franklin, 310 A 2d 561, 270 Md 164

N Y—Margulies v Margulies, 344 NYS 2d 482, 42 AD 2d 517, app dism 307 NE 2d 562, 33 NY 2d 894, 352 NYS 2d 447

Refusal held not error

U S—U S v Achilli, CA 113, 234 F 2d 797, cert gr 77 S Ct 588, 352 U S 1023, 1 L Ed 2d 595, affd 77 S Ct 995, 353 U S 373, 1 L Ed 2d 918 reh den 77 S Ct 1391, 354 U S 943, 1 L Ed 2d 1540, reh den 77 S Ct 1394, 354 U S 943, 1 L Ed 2d 1540
Cal—People v Gambos, 84 Cal Rptr 908, 5 CA 3d 187

Fla—Fisher v Fisher, App., 344 So 2d 1291

Subsequent de novo trial

Or—Tiano v Elsensohn, 520 P 2d 358, 268 Or 166

Criminal actions

N Y—People v Iucci, 401 NYS 2d 823, 61 AD 2d 1

Grant error

Fla—Regency Highland Associates v Regency Highland Condominium Ass'n, Inc., App., 405 So 2d 788

9. Mont—State Highway Commission v Kinman, 430 P 2d 110, 150 Mont 12

Allegation of noncompliance not established

Fla—PHELPS v State, App., 353 So 2d 1221

10. S C—C.J.S. cited in Suddeth v Knight, App., 314 S E 2d 11, 14, 280 S C 540

11. U S—Henry Hanger & Display Fixture Corp of America v Sel-O-Rak Corp., CA Fla., 270 F 2d 635

S C—C.J.S. cited in Suddeth v Knight, App., 314 S E 2d 11, 14, 280 S C 540

page 86

14. U S—Securities and Exchange Commission v Arkansas Loan & Thrift Corp., DC Ark., 294 F Supp. 1233, affd, CA, 422 F 2d 475

Ariz—Harsh Bldg Co v Bialac, 529 P 2d 1185, 22 Ariz App 591

Cal—In re Estate of Burson, 124 Cal Rptr 105, 51 CA 3d 300

N Y—Karpinski v Karpinski, 130 NYS 2d 364

Pa—Cooper-Bessemer Co v Ambrosia Coal & Const Co., 291 A 2d 99, 447 Pa 521—Council of Borough of Monroeville v Al Monzo Const Co., 289 A 2d 496, 5 Pa Cmwlth 97

15. Cal—Faye v Feldman, 275 P 2d 121, 128 CA 2d 319

17. Trial judge's signature required

W Va—Boken v Boken, 225 S F 2d 679, 154 W Va 637

19. Kan—Stanolind Oil & Gas Co. v Cities Service Gas Co., 313 P 2d 279, 181 Kan 526

N Y—Park Inn Hotel, Inc v Messing, 224 NYS 2d 179, 31 Misc 2d 961—People v Rhem, 276 NY S 2d 751, 52 Misc 2d 853—Adams v George T Cantrell, Inc., 286 NYS 2d 128, 29 AD 2d 559

Opposition to motion

N Y—Krellberg v Gregory, 217 NYS 2d 685, 28 Misc 2d 438

Judgment embodying terms of stipulation

Utah—Johnson v Peoples Finance & Thrift Co., 272 P 2d 171, 2 Utah 2d 246—Bean v Carlson, 445 P 2d 144, 21 Utah 2d 309

21. N Y—Korrol v Part, 194 NYS 2d 341, 21 Misc 2d 1001—Adams v George T Cantrell, Inc., 286 NYS 2d 128, 29 AD 2d 559

Separate action required

S D—Schuldt v State Farm Mut Auto Ins Co., 272 NW 2d 94

22. N Y—Korrol v Part, 194 NYS 2d 341, 21 Misc 2d 1001

23. Conn—Shanbrom v Tupko, Ct A D, 260 A 2d 900, 5 Conn Cir 724, app den 257 A 2d 45 158 Conn 645

Fla—Safer v City of Jacksonville, App., 217 So 2d 8

24. N Y—Kret v Gergely, 407 NYS 2d 578, 64 AD 2d 692, affd 393 NE 2d 1040, 47 NY 2d 990, 419 NYS 2d 967

Restitution order

U S—Brennan v State of Iowa, CA Iowa, 494 F 2d 100, cert den 95 S Ct 2422, 421 U S 1015, 44 L Ed 2d 683

25. Plenary action

N Y—Krellberg v Gregory, 217 NYS 2d 685, 28 Misc 2d 438—Stein v Severino, 245 NYS 2d 634, 41 Misc 2d 209—Smith v Snide, 404 NYS 2d 927, 63 AD 2d 797

However, power to enforce a stipulation does not survive when the action or proceeding in which it is made has definitely terminated.²⁵

25.5. N Y—Smith v Snide, 404 NYS 2d 927, 63 AD 2d 797

Proceeding to obtain possession of tenant's apartment having ceased to exist the court is without power to enforce a stipulation made by the parties

N Y—Korral v Part, 194 NYS 2d 341, 21 Misc 2d 1001

26. U S—Kilfoyle v Heyson, DC Pa., 417 F Supp 239

Colo—Sakal v Donnelly, 494 P 2d 1316, 30 Colo App 384

Tex—Browning v Holloway, Civ App., 620 SW 2d 611

28. N Y—Allard v Allard, 277 NYS 2d 50, 27 AD 2d 776

Terminating rights of infant

N Y—Kret v Gergely, 407 NYS 2d 578, 64 AD 2d 692, affd 393 NE 2d 1040, 47 NY 2d 990, 419 NYS 2d 967

§ 33. Evidence

page 87

32. Burden of establishing agreement

Nev—Coleman v Thompson, 319 P 2d 541, 73 Nev 345

35. Cal—People By and Through Dept of Public Works v Amsden Corp., 109 Cal Rptr 1, 31 CA 3d 83

Colo—Cline v McDowell, 284 P 2d 1056

Kan—Westamerica Securities, Inc v Cornelius, 520 P 2d 1262, 214 Kan 301

Vt—State v McGrath, 296 A 2d 636, 130 Vt 400

36. U S—Burton v GAC Finance Co., CA Ga., 525 F 2d 961

Silence does not establish binding stipulation

U S—Long Island Lighting Co v Standard Oil Co of California, CA NY, 521 F 2d 1269, cert den 96 S Ct 855, 423 U S 1073, 47 L Ed 2d 83

40. Utah—State v Bailey, 282 P 2d 339, 3 Utah 2d 254

46. Mich—Shaw v Shaw, 198 NW 2d 902, 40 Mich App 475

NC—Nesbitt v Fairview Farms, Inc., 80 SE 2d 472, 219 NC 481

Wis—State v Harper, 205 NW 2d 1, 57 Wis 2d 543

Evidence held sufficient to show:

(1) Cal—People v Crowder, 64 Cal Rptr 913, 257 CA 2d 564—Anderson v Southern Pac Co., 70 Cal Rptr 389, 264 CA 2d 230—Donovan v Wechsler, 89 Cal Rptr 669, 11 CA 3d 210

Fla—Bodney v Bodney, App., 246 So 2d 578

Iowa—Humboldt Livestock, Auction, Inc v B & H Cattle Co., 155 NW 2d 478, 261 Iowa 419

R I—Butler Auto Sales, Inc v Skog, 208 A 2d 124, 99 R I 361

Vt—In re Cartmell's Estate, 138 A 2d 592, 120 Vt. 234

(3) Wash—Baird v Baird, 494 P 2d 1387, 6 Wash App 587

(5) U S—Inversiones Financieras C Por A v Hitachi Sales Caribe, Inc., DC Puerto Rico, 337 F Supp 54
Ariz—State v Chambers, 451 P 2d 27, 104 Ariz 247
Cal—Strode v Board of Medical Examiners of Cal., 15 Cal Rptr 879, 195 CA 2d 291—Felder v Felder, 55 Cal Rptr 780, 247 CA 2d 718.

Colo—Williams v Guaranty Nat Ins Co., 382 P 2d 802, 152 Colo 457—Carroll v Flierl, App., 471 P 2d 644

Conn—First Hartford Realty Corp v Plan and Zoning Commission of Town of Bloomfield, 338 A 2d 490, 165 Conn 533

Ill—People v Morris, 285 NE 2d 247, 6 Ill App 3d 136

Ind—Miller v. Miller, 231 NE 2d 828, 142 Ind App 90

Minn—Gabel v Ferodowill, 95 NW 2d 101, 254 Minn. 324

Mo—Edwards v Hrebec, App., 414 SW 2d 361.

N J—Schlemm v Schlemm, 158 A 2d 508, 31 NJ 557

N M—Oberman v Oberman, 483 P 2d 1312, 82 NM. 472

Pa—Richards v Dobson, 155 A 2d 619, 397 Pa. 407—Cooper-Bessemer Co v Ambrosia Coal & Const Co., 291 A 2d 99, 447 Pa 521

Utah—Hammond v Calder, 334 P 2d 562, 8 Utah 2d 333, cert den 80 S Ct 51

Wis—Schmidt v Schmidt, 162 NW 2d 618, 40 Wis 2d 649

page 88

47. Evidence held insufficient

(1) N Y—Bronxville Palmer, Limited v State, 309 NYS 2d 672, 34 AD 2d 714, motion gr 262 NE 2d 670, 27 NY 2d 722, 314 NYS 2d 529

(2) U S—U S v Chikata, CA Wash., 427 F 2d 385—Locklin v Day-Glo Color Corp., CA Ill., 429 F 2d 873, cert den. 91 S Ct 582, 400 U S. 1020, 27 L Ed 2d 632, and 91 S Ct 584, 400 U S. 1020, 27 L Ed 2d 632
Cal—Purm v Callahan, 286 P 2d 526, 135 CA 2d 70—People v Fenton, 296 P 2d 829, 141 CA 2d 357

Ga—Minnesota Mut Life Ins Co. v Love, 171 S E 2d 361, 120 Ga App 502

Ill—Johnston v Pennsylvania R Co., 151 NE 2d 125, 17 Ill App 2d 508

La—Lung v Hesser, App., 197 So 2d 399.

Mich—Shane v Hackney, 67 NW 2d 256, 341 Mich 91.

Mo—Stewart v Stewart, App., 277 SW 2d 322, transf., Sup., 269 SW 2d 49—Edwards v Hrebec, App., 414 SW 2d 361

Mont—State Highway Commission v Schmidt, 420 P 2d 153, 148 Mont 316

Page 88

N.M.—Clovis Nat Bank v Thomas, 425 P 2d 726, 77 N.M. 554
 N.Y.—Walker v Walker, 296 N.Y.S.2d 492, 58 Misc.2d 729—In re Frutiger's Estate, 272 N.E.2d 543, 29 N.Y.2d 143, 324 N.Y.S.2d 36
 Ohio—Edwards v Edwards, 157 N.E.2d 454, 107 Ohio App. 169
 Okl.—Farnsworth v State, Cr., 343 P.2d 744
 Tex.—Cantu v Cantu, Civ App., 253 S.W.2d 957—Brown & Root, Inc v Gragg, Civ App., 444 S.W.2d 656, err ref no rev err—Barfield v State, Cr., 467 S.W.2d 431
 Vt.—Petition of New England Tel & Tel Co., 136 A.2d 357, 120 Vt. 181

§ 34. Relief from Stipulation

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Stipulations —13.

49. Ariz.—Town of Gila Bend v Hughes, 477 P.2d 566, 13 Ariz.App. 447
 N.Y.—Central Valley Concrete Corp v Montgomery Ward & Co., 310 N.Y.S.2d 925, 34 A.D.2d 860
 50. U.S.—C.J.S. cited in Osborne v U.S., C.A.Mo., 351 F.2d 111, 120—Logan Lumber Co v C.I.R., C.A.Fla., 365 F.2d 846—Hester v New Amsterdam Cas Co., D.C.S.C., 268 F.Supp. 623
 Ariz.—Anonymous v. Anonymous, 460 P.2d 32, 10 Ariz.App. 496—Town of Gila Bend v Hughes, 477 P.2d 566, 13 Ariz.App. 447—Guard v Maricopa County, 481 P.2d 873, 12 Ariz.App. 187—Harsh Bldg Co v. Bialac, 529 P.2d 1185, 22 Ariz.App. 591
 Cal.—Los Angeles City School Dist of Los Angeles County v. Landier Management Co., 2 Cal Rptr 662, 177 C.A.2d 744—Cntr v. Farmers Ins Group, 41 Cal.Rptr. 401, 230 C.A.2d 788, 12 A.L.R.3d 1142—Harris v Spinali Auto Sales, Inc., 49 Cal Rptr. 610, 240 C.A.2d 447—Sanserino v Shamberger, 54 Cal Rptr 206, 245 C.A.2d 630—Colwell Co. v. Hubert, 56 Cal.Rptr 753, 248 C.A.2d 567
 Ill.—Klingman v. Levinson, 292 N.E.2d 111, 9 Ill App 3d 179
 Kan.—Morrison v. Hurst Drilling Co., 512 P.2d 438, 212 Kan. 706.
 Md.—Pedicord v. Franklin, 310 A.2d 561, 270 Md 164
 Mass.—Francesconi v Planning Bd of Wakefield, 187 N.E.2d 807, 345 Mass 390
 Neb.—C.J.S. cited in Knigge v. Knigge, 282 N.W.2d 581, 584, 204 Neb 421, mod on oth grds. 286 N.W.2d 444, 205 Neb 149.
 N.Y.—Haas v. Rothenberg, 175 N.Y.S.2d 280, 6 A.D.2d 797, motion den 177 N.Y.S.2d 1015, 6 A.D.2d 881—Bruck v. Contos, 203 N.Y.S.2d 350, 24 Misc.2d 1093—Antenna Systems Corp v Entron Inc., 228 N.Y.S.2d 905, 34 Misc.2d 739—Girdler v State, 248 N.Y.S.2d 531, 42 Misc.2d 558—Wagner v. Wagner, 269 N.Y.S.2d 177, 25 A.D.2d 796.
 N.D.—C.J.S. cited in Bjerken v. Ames Sand & Gravel Co., Inc., 206 N.W.2d 884, 888—Lawrence v Lawrence, 217 N.W.2d 792.
 Utah—Klein v. Klein, 544 P.2d 472
Question of fact for court
 Ga.—Dye v. Hirsch, 90 S.E.2d 332, 92 Ga.App. 803.
Motion properly denied where proceeding not pending
 N.Y.—Application of Holland, 157 N.Y.S.2d 623, 2 A.D.2d 987
After judgment
 Neb.—Matter of Wells, 249 N.W.2d 904, 197 Neb 584.
No right to suppress in criminal case stipulation in civil case
 U.S.—U.S. v Ostrer, D.C.N.Y., 481 F.Supp. 407.
 51. U.S.—Central Distributors, Inc v MET, Inc., C.A.Fla., 403 F.2d 943
 Iowa—In re Clark's Estate, 181 N.W.2d 138.
 Mass.—Com. v. Clarke, 216 N.E.2d 783, 350 Mass 721

N.Y.—Horodecky v. Horodniak, 190 N.Y.S.2d 235, 19 Misc.2d 72, affd 192 N.Y.S.2d 262, 9 A.D.2d 732, app den 196 N.Y.S.2d 595, 10 A.D.2d 557

Ability to perform

N.Y.—Ochs v. Fitzmorris, 378 N.Y.S.2d 488, 51 A.D.2d 583
 52. U.S.—Mitchell v. C & P Shoe Corp., C.A.Fla., 286 F.2d 109
 Ariz.—Harsh Bldg Co v. Bialac, 529 P.2d 1185, 22 Ariz.App. 591
 Cal.—Morningred v. Golden State Co., 16 Cal Rptr 219, 196 C.A.2d 130—City of Burbank v Nordahl, 18 Cal Rptr 710, 199 C.A.2d 311—Colwell Co v. Hubert, 56 Cal Rptr 753, 248 C.A.2d 567—McDonagh v. Gourneau, 83 Cal Rptr 63, 2 C.A.3d 1033
 Idaho—Loughrey v. Weitzel, 498 P.2d 1306, 94 Idaho 833
 Ky.—Bristow v. Tauli, 219 S.W.2d 641, 310 Ky 82
 Mass.—New England Trust Co v Triggs, 135 N.E.2d 541, 334 Mass 324
 Minn.—Schoenfeld v. Buker, 114 N.W.2d 560, 262 Minn 122—Ryan v. Ryan, 193 N.W.2d 295, 292 Minn 52
 Neb.—McKinney v. Cass County, 144 N.W.2d 416, 180 Neb. 685
 N.Y.—Kay v. Tankel, 225 N.Y.S.2d 642, 16 A.D.2d 96—Hinds v. Gulutz, 305 N.Y.S.2d 691, 61 Misc.2d 384
 S.C.—C.J.S. cited in Edens v. Cole, 201 S.E.2d 382, 384, 261 S.C. 556
 Tex.—New v. First Nat Bank of Midland, Civ App., 476 S.W.2d 121, err ref no rev err, Sup., 480 S.W.2d 622
 Wis.—Petoskey v. Schmidt, 124 N.W.2d 1, 21 Wis.2d 323

Must appeal exercise of discretion

Okl.—Coon v. Jones, 303 P.2d 425

page 89

53. U.S.—Garner v U.S., 161 Ct Cl 73—Henry v C.I.R., C.A.Miss., 362 F.2d 640—Ehlers v Vinal, C.A.Neb., 382 F.2d 58—Farmers Co-op Elevator Ass'n Non-Stock of Big Springs, Neb v Strand, C.A.Neb., 382 F.2d 224, cert den 88 S.Ct 589, 389 U.S. 1014, 19 L.Ed.2d 659, reh den 88 S.Ct 815, 390 U.S. 913, 19 L.Ed.2d 887—Albee Homes, Inc v Lutman, D.C.Pa., 274 F.Supp. 875, affd in part and app dism in part, C.A., 406 F.2d 11—A & A Sign Co v. Maughan, C.A.Ariz., 419 F.2d 1152—Sherman v U.S., C.A.Ga., 462 F.2d 577, on remand 360 F.Supp. 119, app after remand 492 F.2d 1045.
 D.C.—Pitts v U.S., Mun App., 95 A.2d 588—Maaticco v Novick, Mun App., 108 A.2d 540
 Minn.—Minnesota Vikings Football Club, Inc v Metropolitan Council, 289 N.W.2d 426
 Neb.—Martin v. Martin, 197 N.W.2d 338, 188 Neb. 393
 N.Y.—Antenna Systems Corp v Entron Inc., 228 N.Y.S.2d 905, 34 Misc.2d 739—Estate of Sanchez, 481 N.Y.S.2d 601, 126 Misc.2d 199
 54. Cal.—Ross v. Atchison, T & S F Ry Co., 296 P.2d 372, 141 C.A.2d 178—City of Burbank v Nordahl, 18 Cal Rptr 710, 199 C.A.2d 311
 N.Y.—Raplee v Piper, 152 N.Y.S.2d 799, 2 A.D.2d 732, rearg and app den. 154 N.Y.S.2d 1017, 2 A.D.2d 824, affd. 164 N.Y.S.2d 732, 3 N.Y.2d 179, 143 N.E.2d 919, 64 A.L.R.2d 1397—Central Valley Concrete Corp. v Montgomery Ward & Co., 310 N.Y.S.2d 925, 34 A.D.2d 860.
 Tex.—Franco v State, Cr., 552 S.W.2d 142
 Wis.—Schmidt v. Schmidt, 162 N.W.2d 618, 40 Wis.2d 649
Discretion held abused
 Iowa—In re Clark's Estate, 181 N.W.2d 138
 Mich.—St. Clair Commercial and Sav Bank v Macaulay, 238 N.W.2d 806, 66 Mich.App. 210.
 N.Y.—In re Shapiro's Estate, 221 N.Y.S.2d 444, 14 A.D.2d 898
Discretion held not abused
 U.S.—Mitchell v. C & P Shoe Corp., C.A.Fla., 286 F.2d 109—Associated Beverages Co v P Ballantine &

Sons, C.A.Ga., 287 F.2d 261—Henry v C.I.R., C.A.Miss., 362 F.2d 640
 Ariz.—Harsh Bldg Co v. Bialac, 529 P.2d 1185, 22 Ariz.App. 591
 Ark.—Hurley Pickett Lake Farms, Inc v Sullivan, 434 S.W.2d 88, 245 Ark 709
 Cal.—Los Angeles City School Dist. of Los Angeles County v. Landier Management Co., 2 Cal Rptr 662, 177 C.A.2d 744—Johnston, Baker & Palmer v Record Mach & Tool Co., 6 Cal Rptr 847, 183 C.A.2d 200—Lyons v. Lyons, 12 Cal Rptr 349, 190 C.A.2d 788—Johnstone v Bettencourt, 16 Cal Rptr 6, 195 C.A.2d 538—Silver v City of Los Angeles, 36 Cal Rptr 260, 224 C.A.2d 52
 Conn.—Southern New England Tel Co. v. Public Utilities Commission, 328 A.2d 695, 165 Conn 114
 Idaho—Singleton v. Pichon, 635 P.2d 254, 102 Idaho 588
 Ky.—Com., Dept of Highways v Tanner, 424 S.W.2d 384
 Mich.—Wechsler v. Zen, 140 N.W.2d 581, 2 Mich App 438
 N.Y.—Longwood Associates v Board of Assessors, 394 N.Y.S.2d 907, 58 A.D.2d 581
 S.C.—Edens v. Cole, 201 S.E.2d 382, 261 S.C. 556
 Tex.—Westridge Villa Apartments v Lakewood Bank & Trust Co., Civ App., 438 S.W.2d 891, err ref no rev err
 55. U.S.—Norwich Pharmacal Co v Rakway, Inc., D.C.Pa., 189 F.Supp. 348—Seybert v Robert Lee Pontiac, Inc., D.C.Pa., 244 F.Supp. 184
 Fla.—Xenakis v. Leslie, App., 152 So.2d 500—Villa v Numac Const. Corp., App., 334 So.2d 274
 Idaho—Thompson v. Turner, 558 P.2d 1071, 98 Idaho 110
 N.M.—Marrujo v Chavez, 426 P.2d 199, 77 N.M. 595
 N.Y.—In re Shaver's Estate, supra, n 52—People ex rel Garber v Garber, 238 N.Y.S.2d 572, 18 A.D.2d 990—Huie v Payuk, 333 N.Y.S.2d 251, 39 A.D.2d 982—Solack Estates, Inc v Goodman, 425 N.Y.S.2d 906, 102 Misc.2d 504, affd. 432 N.Y.S.2d 3, 78 A.D.2d 512.
 N.D.—C.J.S. cited in Bjerken v. Ames Sand & Gravel Co., Inc., 206 N.W.2d 884, 889
Exceptional circumstances required
 U.S.—Fenix v. Finch, C.A.Mo., 436 F.2d 831.
 Fla.—City of Vero Beach v. Thomas, App., 388 So.2d 1374
Heavy burden
 U.S.—City of Lakeland Fla v. Union Oil Co of California, D.C.Fla., 352 F.Supp. 758
 56. N.D.—C.J.S. cited in Bjerken v. Ames Sand & Gravel Co., Inc., 206 N.W.2d 884, 889
Discretion not abused
 U.S.—Mary S. Krech Trust v Lakes Apartments, C.A. Fla., 642 F.2d 98, reh den 645 F.2d 72.
 57. U.S.—Stravroudis v. U.S., C.A.N.Y., 309 F.2d 480—Silverstein v City of Detroit, Mich., D.C. Mich., 335 F.Supp. 1306
 Cal.—Los Angeles City School Dist of Los Angeles County v Landier Management Co., 2 Cal Rptr 662, 177 C.A.2d 744.
 Hawaii—C.J.S. cited in State v. Foster, 354 P.2d 960, 971
 Mich.—Wechsler v. Zen, 140 N.W.2d 581, 2 Mich App. 438
 Wash.—Baird v Baird, 494 P.2d 1387, 9 Wash App. 587.
Discretion abused
 N.Y.—Tepper v Tannenbaum, 441 N.Y.S.2d 470, 83 A.D.2d 541
 58. U.S.—A & A Sign Co v. Maughan, C.A.Ariz., 419 F.2d 1152
 N.Y.—Girdler v State, 248 N.Y.S.2d 531, 42 Misc.2d 558—Hinds v. Gulutz, 305 N.Y.S.2d 691, 61 Misc.2d 384—Huie v Payuk, 333 N.Y.S.2d 251, 39 A.D.2d 982
 59. Neb.—Martin v. Martin, 197 N.W.2d 388, 188 Neb. 393
 N.Y.—Stein v Severino, 245 N.Y.S.2d 634, 41 Misc.2d 209

Or—Agri-Link Corp v Schmitz, 538 P 2d 924, 272 Or 654

60. Utah—Freeman v Gee, 423 P 2d 155, 18 Utah 2d 339

61. US—US v Righter, C A Mo., 400 F 2d 344 NY—Central Valley Concrete Corp v Montgomery Ward & Co., 310 NYS 2d 925, 34 AD 2d 860

62. US—Francis I du Pont & Co v Sheen, D C Pa., 214 F Supp 860, revd on oth grds., C A., 324 F 2d 3

NY—County Dollar Corp v City of Yonkers, 436 NYS 2d 54, 80 AD 2d 612

A person who seeks relief from the burdensome effects of a stipulation may be fully protected by enforcement of the stipulation in a reasonable and non-burdensome manner.^{62.5}

62.5. Cal—Los Angeles City School Dist of Los Angeles County v Landier Management Co., 2 Cal Rptr 662, 177 C A 2d 744

63. US—US v. Dioguardi, D C NY., 350 F Supp 1177.

NY—Willig v Rapaport, 438 NYS 2d 872, 81 AD 2d 862

Tenn—Phillips v Pittsburgh Consol Coal Co., 541 S W 2d 411

§ 35. — Grounds

page 90

64. US—Matter of Hyong Jin Kim, Bkrcy NY., 15 BR 198

D.C.—Waltemeyer v Autocar Sales & Service Co., Mun App., 103 A 2d 921

Kan—C.J.S. quoted at length in Morrison v Hurst Drilling Company, 512 P 2d 438, 441, 212 Kan 706

Mo—C.J.S. quoted in State ex rel Turri v Keet, App., 626 S W 2d 422, 425

NY—Rose v Rose, 121 NYS 2d 213, affd., A D., 131 NYS 2d 902, 283 App.Div. 1086, rearg and app den 134 NYS 2d 276, 284 App Div. 851, revd. on oth grds 128 NE 2d 417, 309 NY 713—Jet Brokers, Inc v. Glickberg, 126 NYS 2d 160, 204 Misc 962—McManus v New York Tel Co., 176 NYS 2d 380, 14 Misc 2d 22—Lezny v Lezny, 194 NYS 2d 775, 21 Misc 2d 993

N.D.—Lawrence v Lawrence, 217 N W 2d 792

Okla.—McFarling v Demco, Inc., 546 P 2d 625

Wyo—Younglove v. Graham and Hill, 526 P 2d 689

Grounds for relief from stipulation held not shown

US—Colgate-Palmolive Co v. Carter Products, Inc., C A Md., 243 F 2d 163, cert den. 78 S Ct 30, 355 U.S. 823, 2 L.Ed.2d 38—Francis I. du Pont & Co v Sheen, C.A.Pa., 324 F 2d 3—Jackson v Dunham-Bush, Inc., D C Md., 220 F Supp 377, affd. C.A., 333 F 2d 287

Cal—People v Trujillo, 136 Cal Rptr 672, 67 C A 3d 547

D.C.—Maistaco v Novick, Mun App., 108 A 2d 540

Fla—Curr v. Helene Transp. Corp., App., 287 So 2d 695.

Ill—Roin v. Checker Taxi Co., 184 NE 2d 736, 36 Ill App.2d 447—Esders v Chicago, R I & P.R. Co., 222 NE 2d 117, 76 Ill.App.2d 210, cert. den 87 S.Ct. 1309, 386 U.S. 993, 18 L.Ed.2d 339—In re Moss' Estate, 248 N.E.2d 513, 109 Ill App 2d 185

La.—Calhoun v. Louisiana Materials Co., App., 206 So 2d 147, writ ref. 208 So 2d 324, 251 La 1050 NY—In re Shaver's Estate, 122 NYS 2d 578, 282 App Div. 816

65. US—Winter v. Welker, D.C.Pa., 174 F Supp 836—Ranick v United Steelworkers of America, D.C.Pa., 202 F Supp 901

Cal—Los Angeles City School Dist of Los Angeles County v Landier Management Co., 2 Cal Rptr 662, 177 C A 2d 744—People v. Dugas, 51 Cal. Rptr 478, 242 C A 2d 244

Fla—Curr v. Helene Transp. Corp., App., 287 So 2d 695

Ga—Thompson v Thompson, 228 S E 2d 886, 237 Ga 509

Iowa—In re Clark's Estate, 181 N W 2d 138

Md—Pedicord v Franklin, 310 A 2d 561, 270 Md 164

NY—In re Grossman's Will, 126 NYS 2d 835, 204 Misc 1066—Schlanger v Schlanger, 129 NYS 2d 760—Girdler v State, 248 NYS 2d 531, 42 Misc 2d 558

No basis for estoppel

Wis—Schmitz v Schmitz, 236 N W 2d 657, 70 Wis 2d 882

67. US—H B Zachry Co v US, 344 F 2d 352, 170 Ct Cl 115—US v Harding, C A Colo., 491 F 2d 697, app after remand 507 F 2d 294, cert den 95 S Ct 1437, 420 US 997, 43 L Ed 2d 679

Mass—Fall River Trust Co v B G Browdy, Inc., 195 NE 2d 63, 346 Mass 614—Henry F. Michell Co v Fitzgerald, 231 NE 2d 373

Minn—Levine v Holdahl-Colstad, inc., 88 N W 2d 865, 251 Minn 512

Neb—Meyer v City of Grand Island, 171 N W 2d 242, 184 Neb 657

NY—Barcia v Barcia, 127 NYS 2d 443, 283 A D 726—Monasebian v DuBois, 293 NYS 2d 27, 30 A D 2d 839

Manifest injustice

US—In re Burnham, Bkrcy Ga., 12 BR 286

68. Colo—Eisenson v Eisenson, 407 P 2d 20, 158 Colo 394

69. Mo—State ex rel Turri v Keet, App., 626 S W 2d 422

70. US—US v City of Tacoma, Wash., C A Wash., 330 F 2d 153

71. Cal—Harris v Spinali Auto Sales, Inc., 49 Cal Rptr 610, 240 C A 2d 447.

Ill—In re Moss' Estate, 248 NE 2d 513, 109 Ill App 2d 185

NY—In re Grossman's Will, 126 NYS 2d 835, 204 Misc 1066

72. Duress not shown

Cal—Golden v Penland, 300 P.2d 279, 143 C A 2d 583, cert den 77 S Ct 556, 352 US 1000, 1 L Ed 2d 545

NY—Helwig v Wilkens, 379 NYS 2d 413, 51 A D 2d 694, app dism 351 N.E.2d 424, 39 NY 2d 798, 385 NYS 2d 757.

Duress of directed verdict

Ariz—Harsh Bldg. Co. v. Bialac, 529 P 2d 1185, 22 Ariz.App. 591

73. Cal—People v. Trujillo, 136 Cal.Rptr. 672, 67 C A 3d 547.

Fla—Groover v Groover, App., 383 So.2d 280

Ill—Keith v Rucker, 16 Ill 389

NY—Frost v Stone, 144 NYS 2d 481, revd on oth grds., A D., 165 NYS 2d 260, 4 A D 2d 780—Stein v Severino, 245 NYS 2d 634, 41 Misc 2d 209

Wis.—Burmeister v Vondrachek, 273 N W 2d 242, 86 Wis 2d 650.

N.H.—Durkin v Durkin, 397 A 2d 304, 119 N.H. 41

75. NY—Frost v Stone, 144 NYS 2d 481, revd on oth grds., A D., 165 NYS 2d 260, 4 A D 2d 780

77. Wis—Czap v. Czap, 69 N W 2d 488, 269 Wis 557

Facts held not to show fraud

US—Stickler v C I R., C A., 464 F.2d 368

La—State v Collins, App 2 Cir., 459 So.2d 99.

page 91

81. US—Brinson v Tomlinson, C A Fla., 264 F 2d 30, cert den 80 S Ct 79

Cal—C.J.S. quoted at length in Harris v Spinali Auto Sales, Inc., 49 Cal Rptr. 610, 614, 240 C.A.2d 447

Colo—Banking Bd v District Court In and For City and County of Denver, 492 P 2d 837, 177 Colo 77—Higby v Higby, App., 538 P 2d 493

Kan—Runyon v City of Neosho Rapids, 585 P 2d 1069, 2 Kan App 2d 619

Minn—Levine v Holdahl-Colstad, Inc., 88 N W 2d 865, 251 Minn 512

N M—Marrujo v Chavez, 426 P 2d 199, 77 N M 595

Pa—Grove v Lewis Bros., 80 York 49

Tex—Franco v State, Cr., 552 S W 2d 142

82. Idaho—Call v Marler, 403 P 2d 588, 89 Idaho 120

Ind—Greenwood Const Co v Lippman's Estate, App., 235 NE 2d 715, 142 Ind App 488, reh den 237 NE 2d 112, 142 Ind 488

Kan—Runyon v City of Neosho Rapids, 585 P 2d 1069, 2 Kan App 2d 619

83. Mistake held not shown

US—Kathe v US, C A Cal., 284 F 2d 713

Cal—Brooms v Brooms, 311 P 2d 567, 151 C A 2d 351—Felder v Felder, 55 Cal.Rptr 780, 247 C A 2d 718

Ga—White v State, 266 S E 2d 528, 153 Ga App 808

NY—Puleo v Arnone, 184 NYS 2d 69, 15 Misc 2d 794

85. Unilateral mistake insufficient

Mich.—Meyer v Rosenbaum, 248 N W 2d 558, 71 Mich App 388

87. Cal—C.J.S. cited in Harris v Spinali Auto Sales, Inc., 49 Cal.Rptr 610, 615, 240 C A 2d 447

Okla—C.J.S. cited in Cartwright v Atlas Chemical Industries, Inc., App., 593 P 2d 104, 117, 18 A L R 4th 180

Utah—C.J.S. quoted in United Factors v T C Associates, Inc., 445 P 2d 766, 769, 21 Utah 2d 351

88. NY—Bruck v Contos, 203 NYS 2d 350, 24 Misc 2d 1093

89. US—Boston Edison Co v. Campanella & Cardi Const Co., C A Mass., 272 F 2d 430—Logan Lumber Co. v C I R., C A Fla., 365 F.2d 846

Colo—Higby v Higby, App., 538 P 2d 493

NY—People v Cefaro, 258 NYS 2d 289, 45 Misc 2d 990

Wyo—Olds v Hosford, 354 P 2d 947, reh den 359 P 2d 406

page 92

91. Hawaii—C.J.S. quoted at length in State v Foster, 354 P 2d 960, 971, 44 Haw 403

93. US—Jackson v Dunham-Bush, Inc., D C Md., 220 F Supp 377, affd C A., 333 F 2d 287—Hester v New Amsterdam Cas Co., D C S.C., 268 F Supp 623.

Cal—Baker v Solan, 333 P 2d 791, 166 C A 2d 472—Welch v Kai, 84 Cal Rptr. 619, 4 C A 3d 374—Carter v Carter, 97 Cal Rptr 274, 19 C A 3d 479.

Del—Application of Wilmington Suburban Water Corp., Super., 203 A 2d 817, 8 Storey 8, affd. in part, Sup., 211 A 2d 602, 8 Storey 494.

Kan—Bodie v Balch, 347 P.2d 378, 185 Kan 711

Mass.—Massachusetts General Hospital v City of Revere, 191 NE 2d 120, 346 Mass 217

Minn—Levine v Holdahl-Colstad, Inc., 88 N W 2d 865, 251 Minn 512.

NY—Marrello v Caputo, 165 N.Y.S.2d 258, 4 A D 2d 768—Liro Textile Co. v. Cohen, 164 NYS 2d 894, 6 Misc 2d 859—Danman v. Board of Ed of City of New York, 190 NYS 2d 225, 23 Misc 2d 664

Utah—First of Denver Mortg Investors v C. N Zundel and Associates, 600 P 2d 521

94. US—Hester v New Amsterdam Cas Co., D C S.C., 268 F Supp 623—US v McGregor, C.A. Ariz., 529 F 2d 928

96. US—Norwich Pharmacal Co v Rakway, Inc., D.C.Pa., 189 F Supp. 348

Ark—Omohundro v Saline County, 289 S W 2d 185, 226 Ark 253

Cal—Harris v Spinali Auto Sales, Inc., 49 Cal.Rptr 610, 240 C A 2d 447

Conn—Sparaco v Tenney, 399 A 2d 1261, 175 Conn 436

Mich—Meyer v Rosenbaum, App., 248 N W 2d 558, 71 Mich.App. 388

§ 35 STIPULATIONS

Page 92

NY—Girdler v. State, 248 N.Y.S.2d 531, 42 Misc.2d 558—*Manos v. Manos*, 383 N.Y.S.2d 645, 52 A.D.2d 934

Pa.—Zvonik v. Zvonik, 435 A.2d 1236, 291 Pa. Super 309

Wash.—Baird v. Baird, 494 P.2d 1387, 6 Wash. App. 587

97. *Cal.—In re Marriage of Jacobs*, 180 Cal. Rptr. 234, 128 C.A.3d 273

NY—Haas v. Rothenberg, 175 N.Y.S.2d 280, 6 A.D.2d 797, motion den. 177 N.Y.S.2d 1015, 6 A.D.2d 881—*Russo v. Russo*, 232 N.Y.S.2d 577, 17 A.D.2d 129—*Application of Venice Amusement Corp.*, 235 N.Y.S.2d 54

Stipulation held properly set aside under circumstances

Cal.—Ralston Purina Co. v. Los Angeles County, 128 Cal. Rptr. 556, 56 C.A.3d 547

NY—Horodecky v. Horodniak, 192 N.Y.S.2d 262, 9 A.D.2d 732, app. den. 196 N.Y.S.2d 595, 10 A.D.2d 557.

Ambiguity

Mass.—Massachusetts General Hospital v. City of Revere, 191 N.E.2d 120, 346 Mass. 217

Stipulation in open court not subject to attack because minutes of court did not show all details

Cal.—Harris v. Spinah Auto Sales, Inc., 49 Cal. Rptr. 610, 240 C.A.2d 447

Obvious and radical difference in understanding of terms

NY—Way v. Town of Poughkeepsie, 426 N.Y.S.2d 810, 75 A.D.2d 602

Use of inadmissible evidence at trial

U.S.—U.S. v. Weber, C.A. Me., 668 F.2d 552, cert. den. 102 S.Ct. 2904, 457 U.S. 1105, 73 L.Ed.2d 1313

page 93

1. Change not shown

U.S.—Vallejos v. CE Glass Co., C.A.N.M. 583 F.2d 507

La.—State v. Collins, App., 459 So.2d 99

A stipulation limiting attorney fees to attorney for an estate is ineffective where subsequent occurrences made services of another attorney necessary and beneficial to the estate.¹⁵

1.5. *Wash.—In re Brodner's Estate*, 497 P.2d 625, 6 Wash. App. 966.

4. *U.S.—Major v. Orthopedic Equipment Co., Inc.*, D.C. Va., 496 F.Supp. 604

Court barred from passing on issue

N.Y.—Cunningham v. Mayer, 155 N.Y.S.2d 939.

6. *Alaska—Kimball v. First Nat. Bank of Fairbanks*, 455 P.2d 894

Or.—Financial Indem. Co. v. Bevans, 590 P.2d 276, 38 Or. App. 369.

Pa.—Dickey v. Offner, 43 Ene 79

7. *Cal.—Harris v. Spinah Auto Sales, Inc.*, 49 Cal. Rptr. 610, 240 C.A.2d 447

§ 36. — Proceedings for Relief

8. *N.Y.—In re Foreclosure of Tax Liens by City of New York*, 138 N.Y.S.2d 591—*McManus v. New York Tel. Co.*, 176 N.Y.S.2d 380, 14 Misc.2d 22.

N.C.—C.J.S. quoted at length in Norfolk Southern Ry. Co. v. Horton, 165 S.E.2d 6, 10, 3 N.C.App. 383—*Blair v. Fauchilds*, 213 S.E.2d 428, 25 N.C. App. 416, cert. den. 215 S.E.2d 622, 287 N.C. 464

Affirmative application

Fla.—Munilla v. Perez-Cobo, App., 335 So.2d 584.

Plenary suit

N.Y.—Horodecky v. Horodniak, 190 N.Y.S.2d 235, 19 Misc.2d 72, affd. 192 N.Y.S.2d 262, 9 A.D.2d 732, app. den. 196 N.Y.S.2d 595, 10 A.D.2d 557

Postconviction proceeding

Md.—Palmer v. State, 313 A.2d 698, 19 Md. App. 678

9. *U.S.—C.J.S. cited in Tom v. Twomey*, D.C. Ill., 430 F.Supp. 160, 163

Cal.—Troxell v. Troxell, 46 Cal. Rptr. 723, 237 C.A.2d 147

Fla.—Curr v. Helene Transp. Corp., App., 287 So.2d 695

Minn.—Levine v. Holdahl-Colstad, Inc., 88 N.W.2d 865, 251 Minn. 512

Jurisdiction

NY—Furer v. Paterno, 150 N.Y.S.2d 829

Vt.—Hector Isabelle Builder, Inc. v. Welch, 214 A.2d 63, 125 Vt. 267

Motion denied under circumstances

NY—Danman v. Board of Ed. of City of New York, 190 N.Y.S.2d 225, 23 Misc.2d 664—*A. & B. Service Station, Inc. v. State*, 376 N.Y.S.2d 656, 50 A.D.2d 973

Statement of grounds required

Cal.—Harris v. Spinah Auto Sales, Inc., 49 Cal. Rptr. 610, 240 C.A.2d 447

"Affidavit of merits"

NY—People v. Prado, 365 N.Y.S.2d 943, 81 Misc.2d 710

10. *U.S.—U.S. v. 3,788 16 Acres of Land, More or Less, in Emmons County, N.D.*, C.A.N.D., 439 F.2d 291

Cal.—Thayer v. Board of Osteopathic Examiners, 320 P.2d 28, 157 C.A.2d 4

NY—Girdler v. State, 248 N.Y.S.2d 531, 42 Misc.2d 558—*Matter of Horton's Estate*, 379 N.Y.S.2d 569, 51 A.D.2d 856

Court to which appeal is taken, etc.

Cal.—Bordin v. Bordin, 13 Cal. Rptr. 837, 193 C.A.2d 132

11. *Cal.—Los Angeles City School Dist. of Los Angeles County v. Landier Management Co.*, 2 Cal. Rptr. 662, 177 C.A.2d 744

NY—In re Grossman's Will, 126 N.Y.S.2d 835, 204 Misc. 1066

All parties must be before court

NY.—Yellen v. 999 Summit Corp., 120 N.Y.S.2d 841

page 94

12. *NY—McManus v. New York Tel. Co.*, 176 N.Y.S.2d 380, 14 Misc.2d 22—*Chase Manhattan Bank v. Porter Flushing Realty Inc.*, 243 N.Y.S.2d 59, 40 Misc.2d 405—*Phoenix Assur. Co. v. Stark Mobile Homes, Inc.*, 330 N.Y.S.2d 548, 39 A.D.2d 514

16. *Cal.—Los Angeles City School Dist. of Los Angeles County v. Landier Management Co.*, 2 Cal. Rptr. 662, 177 C.A.2d 744

17. *NY.—Longwood Associates v. Board of Assessors*, 387 N.Y.S.2d 973, 88 Misc.2d 35, affd. 394 N.Y.S.2d 907, 58 A.D.2d 581

Insufficient evidence of fraud

III—*In Interest of Sudler*, 328 N.E.2d 909, 28 Ill. App.3d 1037, cert. den. 97 S.Ct. 60, 429 U.S. 817, 50 L.Ed.2d 77

19. *Mo.—McKinnies v. Universal Cartage and Delivery Service Co., Inc.*, App., 582 S.W.2d 358

20. *Mich.—Wagner v. Myers*, 93 N.W.2d 914, 355 Mich. 62.

21. *N.Y.—In re Murphy's Will*, 298 N.Y.S.2d 181, 31 A.D.2d 909

Wash.—State ex rel. Carroll v. Gatter, 260 P.2d 360, 43 Wash.2d 153.

22. *Mo.—McKinnies v. Universal Cartage and Delivery Service Co., Inc.*, App., 582 S.W.2d 358

25. *U.S.—Helene Curtis Industries v. Dimerstein*, D.C. N.Y., 17 F.R.D. 223.

N.Y.—People v. Syracuse Milk Dealers, Inc., 197 N.Y.S.2d 897, 10 A.D.2d 812.

N.C.—C.J.S. quoted in Norfolk Southern Ry. Co. v. Horton, 165 S.E.2d 6, 10, 3 N.C.App. 383.

Utah—Johnson v. Peoples Finance & Thrift Co., 272 P.2d 171, 2 Utah 2d 246

Loss of jurisdiction

(2) Other matters

U.S.—Thompson v. Harry C. Erb, Inc., C.A. Pa., 240 F.2d 452

NY—Lowell Adams Discount Co. v. Carter, 159 N.Y.S.2d 27, 5 Misc.2d 562

Laches as question of fact

Cal.—Los Angeles City School Dist. of Los Angeles County v. Landier Management Co., 2 Cal. Rptr. 662, 177 C.A.2d 744

Application after verdict

Mich.—Conel Development, Inc. v. River Rouge Sav. Bank, 269 N.W.2d 621, 84 Mich. App. 415

After close of proponent's case-in-chief

Conn.—Savarese v. Hart, 439 A.2d 386, 183 Conn. 416

26. *NY—Cousins Knitwear Co. v. B. & B. Sweater Mills, Inc.*, 208 N.Y.S.2d 108—*Milpac Dyeing Co. v. B. & B. Sweater Mills, Inc.*, 208 N.Y.S.2d 109, 28 Misc.2d 548

§ 37. — Nature and Extent of Relief

27. *Iowa—In re Clark's Estate*, 181 N.W.2d 138

Prior stipulations not affected

U.S.—Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co., D.C. Cal., 232 F.Supp. 556, rev'd on oth. grds., C.A., 351 F.2d 925, cert. den. 86 S.Ct. 620, 382 U.S. 1011, 15 L.Ed.2d 526

page 95

30. *N.H.—Colby v. American Exp. Co.*, 94 A. 198, 77 N.H. 548

31. *U.S.—Emmanuel v. Omaha Carpenters Dist. Council*, D.C. Neb., 422 F.Supp. 204, affd., C.A., 560 F.2d 382.

32. *U.S.—Morse Boulder Destructor Co. v. Camden Fibre Mills, Inc.*, C.A. Pa., 239 F.2d 382

NY—Hewig v. Kleinman, 125 N.Y.S.2d 712, 282 App. Div. 1001, rearg. and app. den. 128 N.Y.S.2d 584, 283 App. Div. 767—*Frost v. Stone*, 144 N.Y.S.2d 481, rev'd on oth. grds., A.D., 165 N.Y.S.2d 260, 4 A.D.2d 780

33. *U.S.—U.S. v. Town of Clarksville, Va.*, C.A. Va., 224 F.2d 712

D.C.—Majatico v. Novick, Mun. App., 108 A.2d 540

34. *U.S.—Berry v. C.I.R.*, C.A., 254 F.2d 471—*Central Distributors, Inc. v. M.E.T., Inc.*, C.A. Fla., 403 F.2d 943.

Hawaii—Matter of 711 Motors, Inc., 547 P.2d 1343, 56 Haw. 644

38. *U.S.—Osborne v. U.S.*, C.A. Mo., 351 F.2d 111

Cal.—Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 251 C.A.2d 689, 29 A.L.R.3d 988.

N.Y.—Chisholm-Ryder Co. v. State, 227 N.E.2d 396, 19 N.Y.2d 848, 280 N.Y.S.2d 579.

STIRPS.

1. Similarly defined

"Stirp" means the root or trunk, a person from whom a branch of a family is descended—*Wachovia Bank & Trust Co. v. Bryant*, 128 S.E.2d 758, 761, 258 N.C. 482

STITCH.

8. Similarly defined

U.S.—Dolliff & Co. v. U.S., Cust.Ct., 319 F.Supp. 1392, 1396, affd. 458 F.2d 146, 59 CCPA 101

As a noun, the word "stitch" means a single complete in-and-out movement of a threaded needle in sewing, embroidering, or suturing.^{10,5}

10.5. *U.S.—Dolliff & Co. v. U.S., Cust.Ct.*, 319 F.Supp. 1292, 1396, affd. 458 F.2d 146, 59 CCPA 101

page 99

STOLE. A woman's garment similar to an ecclesiastical stole, but usually broader and made of fur or cloth.^{81 50}

81.50. N.Y.—In re Winfield's Estate, 172 N.Y.S.2d 27, 28, 11 Misc.2d 149

Ecclesiastical stole is a vestment consisting of a long narrow band worn around neck and falling over shoulders of bishops and priests.—In re Winfield's Estate, 172 N.Y.S.2d 27, 28, 11 Misc.2d 149

STONE.

85. U.S.—U.S. v. Pumice Supply Co. v. C.I.R., C.A., 308 F.2d 766, 770

STOP.

As a verb.

95. As used by police officer

Word "stop" as used by police officer is not necessarily to be construed in every instance as communication of intention to arrest.—People v. Clay, 111 App., 273 N.E.2d 254, 256, 133 Ill.App.2d 344

STORAGE.

page 100

10. Mich.—City of Detroit v. General Foods Corp., 197 N.W.2d 315, 322, 39 Mich.App. 180.

N.Y.—Breslerman v. Newark Ins. Co., 275 N.Y.S.2d 343, 347, 52 Misc.2d 118

Similarly defined

(1) "Storage" means the act of storage, or state of being stored; specifically, the safekeeping of goods in a warehouse or other depository.—Hoyle v. State, 62 So.2d 380, 382, 216 Miss. 330

13. N.Y.—Breslerman v. Newark Ins. Co., 275 N.Y.S.2d 343, 347, 52 Misc.2d 118.

Similarly expressed

(1) Term "storage" connotes permanency and not transient situation.—State v. Gargiulo, 246 A.2d 738, 740, 103 N.J.Super. 140

It is not the same as possession.^{13 1}

13.1. Miss.—Hoyle v. State, supra, n. 10

Not synonymous with "possession" or "custody"

N.Y.—Breslerman v. Newark Ins. Co., 275 N.Y.S.2d 343, 347, 52 Misc.2d 118.

STORE.

As a Noun

page 101

28. La.—C.J.S. cited in Norton v. Lay, App., 360 So.2d 239, 242.

N.J.—C.J.S. quoted in Maplewood Tp. v. Tannenhaus, 165 A.2d 300, 304, 64 N.J.Super. 80.

29. N.J.—C.J.S. quoted in Maplewood Tp. v. Tannenhaus, 165 A.2d 300, 304, 64 N.J.Super. 80.

Similarly defined

(4) A business establishment where goods are kept for retail sale.—Vitolo v. Chave, 314 N.Y.S.2d 51, 57, 63 Misc.2d 971

page 102

41. Similarly expressed

(1) A "store" means a place where merchandise is sold and may be a dwelling house, shop, butcher shop, popcorn stand, saloon, or a filling station.—W. S. Butterfield Theatres, Inc. v. Department of Revenue, 91 N.W.2d 269, 271, 353 Mich. 345.

62. Space occupied by physician not "store"
N.Y.—Sterling v. Lapidus, 199 N.Y.S.2d 216, 220, 10 A.D.2d 180.

Phrases

page 104

5. Phrases

(8) "Rolling store" is generally understood to be a miniature store stocked with all kinds of merchandise usually carried in general merchandise and grocery stores, placed on motor vehicle chassis, so that the store can be moved from house to house and the merchandise sold therefrom, the same as it would be sold from a store at a fixed location.—Franks v. City of Jasper, 68 So.2d 306, 314, 259 Ala. 641

STOREBREAKING.

A term applied to a statutory offense.

Va.—Willoughby v. Smyth, 72 S.E.2d 636, 638, 194 Va. 267

See Burglary § 23b.

STOREHOUSE.

12. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290

14. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290

Md.—Hardison v. State, 172 A.2d 407, 410, 226 Md. 53

Similarly defined

(3) The word "storehouse" means place where goods are stored or kept for sale at wholesale or retail, such as shop or store.—Mash v. State, 82 S.E.2d 881, 882, 90 Ga.App. 322

15. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290.

16. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290

Similarly defined

Neb.—State v. Hoyer, 118 N.W.2d 325, 327, 174 Neb. 409

(1) Any repository or source of abundant supplies.—Hardison v. State, 172 A.2d 407, 410, 226 Md. 53

17. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290.

page 105

21. Ala.—Gaskin v. State, 161 So.2d 503, 505, 42 Ala.App. 290

46. Md.—Hardison v. State, 172 A.2d 407, 410, 226 Md. 53

STORER.

52. In sugar refinery "storer" moves sugar from flat truck onto freight car and stacks it.—Madison v. American Sugar Refining Co., La.App., 134 So.2d 646, 648

STOREROOM.

53. Similarly defined

(2) "Storeroom" is a room in which stores are kept, a room or space for storage.—Hardison v. State, 172 A.2d 407, 410, 226 Md. 53.

STORM.

As a noun.

page 106

63. Similarly defined

(1) A "storm" is a disturbance of the atmosphere, attended by wind, rain, snow, hail, sleet, or thunder and lightning; hence, often, a heavy fall of rain, snow, or hail, whether accompanied with wind or not.—Pearson v. Aroostook County Patrons Mut. Fire Ins. Co., 101 A.2d 183, 185, 149 Me. 313.

page 107

STORY.

85. Held not to include basement

Mass.—Selvetti v. Building Inspector of Revere, 233 N.E.2d 915, 918, 353 Mass. 645, app. after remand 249 N.E.2d 744, 356 Mass. 720

STRAIN.

page 108

7. Deformation as strain

(1) When a body is subjected to stress, it is deformed to some extent, and the deformation is known as "strain"—Baldwin-Lima-Hamilton Corp. v. Tatnall Measuring Systems Co., D.C. Pa., 169 F.Supp. 1, 6.

Accidental injury

N.Y.—Falardeau v. Standard Shade Roller Corp., 251 N.Y.S.2d 60, 61, 21 A.D.2d 945.

9. Similarly defined

(1) A "strain" is a stretching of a ligamentous structure.—Luquette v. Bouillion, La.App., 184 So.2d 766, 768

(2) "Strain" is hurt or injury of a body part or organ resulting or such as results from excessive tension, effort, or use, or an injury resulting from a wrench or twist and involving overstretching of muscles or ligaments.—People v. Lares, 68 Cal.Rptr. 144, 147, 261 C.A.2d 657

STRANGER.

page 109

34. Ark.—C.J.S. quoted in Rye v. Bauman, 329 S.W.2d 161, 165, 231 Ark. 278

35. Ark.—C.J.S. quoted in Rye v. Bauman, 329 S.W.2d 161, 165, 231 Ark. 278

38. Ark.—C.J.S. cited in Watkins v. Johnson, 372 S.W.2d 243, 245, 237 Ark. 184

STRANGLE.

page 110

49. Death caused by choking

Or.—State v. Nunn, 321 P.2d 356, 366, 212 Or. 546

STREAM.

page 112

96. Wyo.—Binning v. Miller, 102 P.2d 54, 63, 55 Wyo. 451.

page 113

9. La.—Esso Standard Oil Co. v. Jones, 98 So.2d 236, 244, 233 La. 915, foll. 98 So.2d 250

May be wholly dry at times

Ga.—Parker v. Adamson, 135 S.E.2d 487, 491, 109 Ga.App. 172.

11. Cal.—Rancho Santa Margarita v. Vail, 81 P.2d 533, 560, 11 Cal.2d 501.

14. Okl.—Franks v. Rouse, 137 P.2d 899, 902, 192 Okl. 520.

Overflow waters flowing in the natural flood channel of a running stream are a part of the stream.—Cooper v. Sanitary Dist. No. 1 of Lancaster County, 19 N.W.2d 619, 625, 146 Neb. 412.

page 114

25. Similarly defined

A body of water through which a current flows or runs with such capacity and velocity and power as to form accretions.—State v. Cockrell, La.App., 162 So.2d 361, 368

page 115

Other phrases:

36. Phrases

(2a) "Underground streams" are waters passing through ground beneath surface in definite channels.—

STREAM

Page 115

Canada v City of Shawnee, 64 P 2d 694, 696, 179 Okl 53

(2b) Underground streams are divided into two distinct classes. Those whose channels are known or defined, and those unknown or undefined. Regarding the laws governing these two classes, it must be known that if underground waters flow in well-defined and known channels, the course of which can be distinctly traced, they are governed by the same rules of law that govern streams flowing upon the surface of the earth. But for this purpose the underground water must flow in known and well-defined channels, so that the riparian owner may invoke the same rules as are applied to surface streams. Subterranean waters, whose channels are unknown and undefined, although there are undoubtedly a great many underground streams whose waters flow in confined channels, but whose courses are not known, are all classed with percolating waters—Deadwood Cent R Co. v Barker, 86 NW 619, 621, 14 SD 558

(4) "Intermittent stream" means a stream, the flow of which in the state of nature is interrupted either from time to time during the year or at various places along its course, or both—US v Fallbrook Public Utility Dist., D.C. Cal., 109 F Supp. 28, 78

STREET.

38. Phrases

(6a) A certificate of stock is in "street name" where issued in name of individual or firm and endorsed in blank so that it may be negotiated without further endorsement—R. Baruch & Co. v. Springer, D.C. Mun App., 184 A.2d 206, 207.

STREET RAILROADS

§ 1. Street Railroad

Library References

Urban Railroads ⇨1.

page 126

12. "Tramway", defined

Tenn.—High Point Coal Co. v. East Tennessee Iron & Coal Co., 296 S.W.2d 845, 201 Tenn. 43

page 127

29. Tenn.—C.J.S., quoted at length in High Point Coal Co. v. East Tennessee Iron & Coal Co., 296 S.W.2d 845, 847, 201 Tenn. 43

page 129

Various other terms relating to street railroads have been defined.³⁴⁵

54.5. Trolley-car

Ga.—Thompson v. Georgia Power Co., 37 S.E.2d 622, 630, 73 Ga.App. 587

Trackless trolley

Ga.—Thompson v. Georgia Power Co., 37 S.E.2d 622, 630, 73 Ga.App. 587

Pa.—Izzi v. Philadelphia Transp. Co., 195 A.2d 784, 412 Pa. 559.

Trolley service wire

Or.—Gentzkow v. Portland Ry. Co., 102 P 614, 616, 54 Or. 114, 135 Am S.R. 821

Trolley stand

U.S.—Thompson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co., Conn., 75 F. 1005, 1006, 22 CCA 1—Morrin v. Robert White Engineering Co., C.C.N.Y., 138 F 68, 71, mod on oth. grds. 143 F 519, 74 C.C.A. 466

Trolley system

Md.—Hooper v. Baltimore City Pass. R. Co., 37 A. 359, 361, 85 Md. 509, 38 L.R.A. 509

64 C.J. p 1313 note 73

Trolley wires

Or.—Gentzkow v. Portland Ry. Co., 102 P 614, 615, 54 Or. 114, 135 A.L.R. 821

64. Trolley car synonymous

Ga.—Thompson v. Georgia Power Co., 37 S.E.2d 622, 630, 73 Ga.App. 587

§ 8. Constitutional and Statutory Provisions in General

Library References

Modern Legal Forms Ch. 25, Corporations.

Urban Railroads ⇨2.

page 132

14. N.Y.—Salzman v. Impellitteri, 124 N.Y.S.2d 369, 203 Misc.486, aff'd 122 N.Y.S.2d 787, two cases, 281 App. Div. 1023, 1024, mod on oth. grds. 113 N.E.2d 543, 305 N.Y. 414

Tex.—City of Humble v. Metropolitan Transit Authority, App. 3 Dist., 636 S.W.2d 484, err. ref. n.r.e., app. dism. 104 S.Ct. 47, 464 U.S. 802, 78 L.Ed.2d 68

§ 9. Incorporation and Organization in General

Library References

Urban Railroads ⇨2.

page 133

17. N.Y.—Long Island R. Co. v. United Transp. Union, 425 N.Y.S.2d 518, 103 Misc.2d 220

21. Under general corporation laws

Hawaii—Monta v. Public Utilities Commission of the Territory of Hawaii, 40 Haw. 579

§ 11. Reorganization

Library References

Urban Railroads ⇨2.

page 135

53. U.S.—In re Third Ave. Transit Corp., D.C.N.Y., 173 F.Supp. 702, cert. den. 79 S.Ct. 1285, 360 U.S. 903, 3 L.Ed.2d 1255, reh. den. 80 S.Ct. 44, 361 U.S. 855, 4 L.Ed.2d 94

Recapitalization. The rights of dissenting stockholders require determination according to statute providing therefor.⁶⁰⁵

60.5. Valuation of stock by appraisers held proper

Md.—Warren v. Baltimore Transit Co., 154 A.2d 796, 220 Md. 478

§ 12. Officers and Agents

Library References

Urban Railroads ⇨2.

page 136

63. Qualification of directors

(1) Statutes applicable

U.S.—Rubin v. Chicago South Shore & South Bend R.R., 217 F.2d 177, stating Indiana law. Cert. den. 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

(2) Validity of by-law.

U.S.—Rubin v. Chicago South Shore & South Bend R.R., supra.

Statute inapplicable

N.Y.—Doyle v. Gordon, 158 N.Y.S.2d 248.

§ 17. Amendment or Modification of Charter

Library References

Urban Railroads ⇨2.

page 140

28. R.I.—United Transit Co. v. Hawksley, 133 A.2d 132, 86 R.I. 53.

§ 18. Dissolution or Revocation of Charter; Winding Up

40. Statute no longer operative

Mass.—Bateman v. Massachusetts Bay Transp. Authority, 416 N.E.2d 982, 11 Mass. App. 940

page 143

§ 22. Authority and Permission of Municipality

70. N.Y.—While You Wait Photo Corp. v. Department of Consumer Affairs of City of New York, 450 N.Y.S.2d 334, 87 A.D.2d 46

§ 31. Rights Conferred in General

Library References

Urban Railroads ⇨6.

page 152

6. Engaging in other corporate business permitted

Hawaii—Monta v. Public Utilities Commission of the Territory of Hawaii, 40 Haw. 579.

§ 32. Conditions or Reservations

Library References

Urban Railroads ⇨6.

page 153

12. D.C.—Washington, Marlboro & Annapolis Motor Lines v. Public Utilities Commission of District of Columbia, D.C., 114 F.Supp. 321

page 154

General rules of construction apply as to a constitutional provision prohibiting the legislature from granting a right to operate a street railroad within any city or town without first requiring consent of a majority of the electors.²⁸⁵

28.5. Neb.—Application of Omaha Transit Co., 94 N.W.2d 461, 167 Neb. 703

§ 36. Modification and Amendment of Franchise or Grant

Library References

Urban Railroads ⇨6.

page 161

38. Minn.—City of Saint Paul v. St. Paul City Ry. Co., 82 N.W.2d 369, 249 Minn. 357.

§ 37. Privileges in Streets and Highways in General

Library References

Urban Railroads ⇨6.

page 162

50. Del.—City of Wilmington v. Delaware Coach Co., 230 A.2d 762, 43 Del.Ch. 343

§ 38. Use of Bridges in General

Library References

Urban Railroads ⇨6.

page 163

55. Refusal held not arbitrary

Pa.—Pittsburgh Rys. Co. v. Pennsylvania Public Utility Commission, 119 A.2d 804, 180 Pa. Super. 201

§ 72. Nature and Extent of Rights Acquired in General

Library References

Urban Railroads ⇨6.

page 184

77. Minn.—City of Saint Paul v. St. Paul City Ry Co., 82 N W 2d 369, 249 Minn 357

87. Pa.—Rice v Philadelphia Transp Co., 147 A 2d 627, 394 Pa 454

88. Superior right

Pa.—Rice v Philadelphia Transp Co., 147 A 2d 627, 394 Pa 454

89. Pa.—Rice v Philadelphia Transp Co., 147 A 2d 627, 394 Pa 454

§ 73. Exclusive and Conflicting Grants

Library References

Urban Railroads ⇨6.

page 186

99. Operation by public authority

U S.—South Suburban Safeway Lines, Inc v City of Chicago, D C Ill., 285 F Supp 676, affd., C A., 416 F 2d 535

§ 85. Bridges

Library References

Urban Railroads ⇨6.

page 198

71. Apportionment of cost of altering bridge

Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa Super 415

§ 86. Turnpikes and Toll Roads

Library References

Urban Railroads ⇨6.

83. 65 C.J. p 1150 note 67

86. 65 C.J. p 1151 note 68

§ 87. Duration and Termination in General

Library References

Urban Railroads ⇨6.

page 200

14. Property incorporated as part of street does not belong to company

Minn.—City of Saint Paul v St. Paul City Ry Co., 82 N W 2d 369, 249 Minn 357

page 201

18. Minn.—City of Saint Paul v St. Paul City Ry Co., 82 N W 2d 369, 249 Minn 357

§ 89. Revocation

Library References

Urban Railroads ⇨6.

page 203

57. Substitution of new franchise revokes the old one

Minn.—City of Saint Paul v St. Paul City Ry Co., 82 N W 2d 369, 249 Minn 357.

§ 90. Surrender

Library References

Urban Railroads ⇨6.

page 205

72. Md.—D C Transit System, Inc v State Roads Commission of Md., 290 A 2d 807, 265 Md 622

§ 98. Usurpation of Franchise

Library References

Urban Railroads ⇨6.

page 214

9. Pa.—Cope v Lehigh Valley Transit Co., 8 D & C 2d 511, 6 Bucks 207

§ 103. Duty to Construct

Library References

Urban Railroads ⇨7.

page 220

82. U S.—City of Fairfax, Va v Washington Metropolitan Area Transit Authority, C A Va., 582 F 2d 1321, cert den 99 S Ct 1229, 440 U S 914 59 L Ed 2d 463

§ 108. — Remedies

page 226

81. No recovery allowed

U S.—City of Fairfax Va v Washington Metropolitan Area Transit Authority, C A Va., 582 F 2d 1321, cert den 99 S Ct 1229, 440 U S 914, 59 L Ed 2d 463

§ 112. Duty to Repair Street in General

Library References

Urban Railroads ⇨7, 8.

page 229

17. U S.—Fisher v Capital Transit Co., C A., 246 F 2d 666, 100 U S App 2d 385

18. Pa.—Macrane v Philadelphia Transp Co., 1 Pa Dist & Co 2d 227—Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299

23. Mass.—Bateman v Massachusetts Bay Transp Authority, 416 N E 2d 982, 11 Mass App. 940

page 230

33. D C.—Fisher v Capital Transit Co., C A., 246 F 2d 666, 100 U S App D C 385

§ 115. Scope and Extent of Duty

Library References

Urban Railroads ⇨7, 8.

page 233

82. Mo.—Kansas City Terminal Ry Co v Kansas City Transit, Inc., 359 S W 2d 698, cert den 83 S Ct 551, 371 U S 968, 9 L Ed 2d 539—Kansas City v Kansas City Transit, Inc., 406 S W 2d 18, cert den 87 S Ct 776, 385 U S 1036, 17 L Ed 2d 682, reh den 87 S Ct 1019, 386 U S 969, 18 L Ed 2d 126

Apportionment of costs

Mo.—Union Pac R Co v Kansas City Transit Co., App., 401 S W 2d 528

Continuation of duty after substitution of buses for street cars

Mo.—Union Pac R Co v Kansas City Transit Co., App., 401 S W 2d 528.

84. Pa.—Pennsylvania Dept of Highways v Pennsylvania Public Utility Commission, 98 A 2d 199, 173 Pa Super 581.

§ 119. — Bridges

Library References

Urban Railroads ⇨7, 8.

page 236

24. Pa.—Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299

page 237

29. Mo.—Kansas City Terminal Ry Co v Kansas City Transit, Inc., 359 S W 2d 698, cert den 83 S Ct 551, 371 U S 968, 9 L Ed 2d 539

33. Public authority without rail facility at crossing held not assessable

Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 237 A 2d 602, 427 Pa 562

38. Pa.—Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299

Public authority acquiring private transportation system as not assuming obligations of transferor

Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 237 A 2d 602, 427 Pa 562.

§ 121. — Restoration of Streets after Removal of Tracks

Library References

Urban Railroads ⇨7, 8.

page 240

71. Pa.—Pennsylvania Dept of Highways v Pennsylvania Public Utility Commission, 98 A 2d 199, 173 Pa Super 581

Requirement by public utility commission

Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa Super 415

§ 124. Termination of, and Exemption from, Duty

Library References

Urban Railroads ⇨7, 8.

page 245

54. Mo.—Kansas City Terminal Ry Co v Kansas City Transit, Inc., App., 350 S W 2d 828, transf to, Sup., 359 S W 2d 698, cert den 83 S Ct 551, 371 U S 968, 9 L Ed 2d 539

page 246

74. Pa.—Pennsylvania Dept of Highways v Pennsylvania Public Utility Commission, 98 A 2d 199, 173 Pa Super 581

78. Pa.—Sculley v City of Philadelphia, 112 A 2d 321, 381 Pa 1

§ 133. Mode of Crossing

Library References

Urban Railroads ⇨7, 8.

page 257

31. Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 83 Dauph. 84

§ 136. In General

Library References

Urban Railroads ⇨7, 8.

page 258

43. D C.—Chvala v D C Transit System, Inc., 306 F 2d 778, 113 U S App D C 171.

49. D C.—Fisher v Capital Transit Co., C A., 246 F 2d 666, 100 U S App D C 385

Maintenance of safety zone

Mo.—Hiltner v Kansas City, 293 S W 2d 422

Page 258

§ 138. Actions

Library References

Urban Railroads ⇨7, 8.

page 259

60. Pa—Macrane v Philadelphia Transp Co, 1 Pa Dist & Co 2d 227

page 260

64. Mich—City of Detroit v Burke Rental Service, Inc, 142 N.W.2d 473, 3 Mich App 353

65. Held for jury

- (1) Mo—Corte v St. Louis Public Service Co, 370 S.W.2d 297

§ 142. Motive Power

Library References

Urban Railroads ⇨7, 8.

page 262

97. Mo—C.J.S. cited in Kansas City Terminal Ry Co v Kansas City Transit, Inc, 359 S.W.2d 698, 704, cert. den 83 S.Ct. 551, 371 U.S. 968, 9 L.Ed.2d 539

§ 143. Change of Motive Power

Library References

Urban Railroads ⇨7, 8.

page 263

12. Power of commission, and validity and effect of orders

(6) Other cases

- Pa.—City of Philadelphia v Pennsylvania Public Utility Commission, Super, 138 A.2d 698, 185 Pa Super 598

§ 154. Bonds

Library References

Urban Railroads ⇨1.

page 273

57. Pa.—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 173 A.2d 109, 404 Pa 541

58. Pa.—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 22 D. & C.2d 181

page 274

68. Pa.—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 22 D. & C.2d 181

69. Pa.—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 22 D. & C.2d 181

Recovery of income-interest where income not determined according to accepted principles of accounting

- Pa.—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 173 A.2d 109, 404 Pa 541—Fidelity-Philadelphia Trust Co v Philadelphia Transp Co, 22 D. & C.2d 181

§ 160. Power to Regulate

Library References

Urban Railroads ⇨20, 22.

page 282

71. Minn.—State ex rel City of Minneapolis v Minneapolis St. Ry. Co, 56 N.W.2d 564, 238 Minn 218.

- Mo—State ex rel Kansas City Transit, Inc. v Public Service Commission, 406 S.W.2d 5.

page 283

74. Ariz.—Arizona Public Service Co v Town of Paradise Valley, 610 P.2d 449, 125 Ariz 447

§ 161. — Municipality

page 285

11. Minn—State ex rel City of Minneapolis v Minneapolis St. Ry. Co, 56 N.W.2d 564, 238 Minn 218

§ 162. — Public Board, Commission, or Officers in General

Library References

Urban Railroads ⇨20, 22.

26. Mo—State ex rel Kansas City Transit, Inc. v Public Service Commission, 406 S.W.2d 5

page 286

28. Mo—State ex rel Kansas City Transit, Inc. v Public Service Commission, 406 S.W.2d 5

31. Acts held not in excess of power

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A.2d 80, 198 Pa Super 415

page 287

43. Credibility of witnesses

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A.2d 80, 198 Pa Super 415

Weight of evidence

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A.2d 80, 198 Pa Super 415

Reasonable exercise of discretion not reversed

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A.2d 80, 198 Pa Super 415

Orders

- Mo—State ex rel Kansas City Transit, Inc. v Public Service Commission, 406 S.W.2d 5

§ 163. Particular Regulations

47. Regulation of vehicles or motor vehicles

(4) Other matters

- Pa.—Vaughn v Philadelphia Transp Co, 209 A.2d 279, 417 Pa 464.

Allocation of costs in alteration of crossing

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A.2d 80, 198 Pa Super 415

Prohibition against reducing operational funds

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Port authority operating transportation system as not subject to orders of commission

- Pa.—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 237 A.2d 602, 427 Pa. 562

§ 167. — As to Equipment of Cars

Library References

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page 291

17. Cal.—Dropo v City and County of San Francisco, 334 P.2d 972, 167 C.A.2d 453.

§ 168. — As to Movement and Speed of Cars

Library References

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27. Statutory purpose

- N.J.—Sharp v. Cresson, 164 A.2d 303, 63 N.J. Super 215.

§ 169. — As to Signals and Look-outs

Library References

Urban Railroads ⇨20, 22.

page 292

45. No duty to provide mechanical stop-light device

- Pa.—Vaughn v Philadelphia Transp Co, 209 A.2d 279, 417 Pa 464

§ 174. License Fees and Taxes

Library References

Urban Railroads ⇨20, 22.

page 295

99. Seat tax

- Md.—Baltimore Transit Co v Metropolitan Transit Authority, 194 A.2d 643, 232 Md 509

§ 177. Duty to Operate

page 300

81. Pa.—City of Pittsburgh v Pennsylvania Public Utility Commission, 404 A.2d 786, 45 Pa Cmwlth 80

§ 180. Interference with Operation

Library References

Urban Railroads ⇨20.

page 302

20. Pa.—Lewis v Pittsburgh Rys Co., 105 P.L.J. 114, affd 126 A.2d 454, 386 Pa 490

page 303

§ 181. Discontinuance of Operation

Library References

Urban Railroads ⇨20.

38. Standing to sue

- U.S.—Stavisky v Metropolitan Transp. Authority, D.C. N.Y., 533 F.Supp. 1146

page 304

53. Pa.—Allegheny County v Pennsylvania Public Utility Commission of Pittsburgh R. Co., 192 A.2d 904, 201 Pa Super 417, app. quashed 203 A.2d 544, 415 Pa 313

54. Pa.—Pittsburgh Railways Co v Pennsylvania Utility Commission, 83 Dauph 84.

§ 182. — Proceedings to Discontinue Operation

Library References

Urban Railroads ⇨20.

page 305

61. Order before completion of hearing held arbitrary

- Pa.—Allegheny County v Pennsylvania Public Utility Commission of Pittsburgh R. Co., 192 A.2d 904, 201 Pa Super 417, app. quashed 203 A.2d 544, 415 Pa 313.

Imposition of terms

- Wis.—Chicago & Milwaukee Elec Ry Co v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551

page 306

70. Intervention

- Pa.—Smith v Pennsylvania Public Utility Commission, 101 A.2d 435, 174 Pa Super 252

Order of temporary discontinuance held appeal-able

Pa.—Allegheny County v. Pennsylvania Public Utility Commission of Pittsburgh R. Co., 192 A 2d 904, 201 Pa Super 417, app. quashed 203 A 2d 544, 415 Pa 313

Appeal rendered moot

Pa.—Pennsylvania Public Utility Commission v. Allegheny County, 203 A 2d 544, 415 Pa 313

Discretion of commission

Pa.—Wagner v. Pennsylvania Public Utility Commission, 225 A 2d 87, 209 Pa Super 102

Scope of review

Pa.—Wagner v. Pennsylvania Public Utility Commission, 225 A 2d 87, 209 Pa Super 102

Evidence

Pa.—Wagner v. Pennsylvania Public Utility Commission, 225 A 2d 87, 209 Pa Super 102

75. Reversal of finding

Pa.—Wagner v. Pennsylvania Public Utility Commission, 225 A 2d 87, 209 Pa Super 102

§ 183. — Effect of Discontinuance**Library References**

Urban Railroads ⇨20.

78. Public Utility Commission may require less than full performance

Pa.—Pennsylvania Dept. of Highways v. Pennsylvania Public Utility Commission, 98 A 2d 199, 173 Pa Super 581

City has duty of removal

D.C.—Joseph v. District of Columbia, D.C., 366 F Supp 757, affd., C.A., 495 F 2d 1075, 162 U.S. App D.C. 19

Company only has to pay cost of removal when incurred

D.C.—Joseph v. District of Columbia, D.C., 366 F Supp 757, affd., C.A., 495 F 2d 1075, 162 U.S. App D.C. 19

79. Pa.—Pennsylvania Dept. of Highways v. Pennsylvania Public Utility Commission, supra, n 78

§ 185. In General**Library References**

Urban Railroads ⇨23.

page 308

1. Cal.—Hession v. City and County of San Francisco, 265 P 2d 542, 122 C A 2d 592.

§ 189. In General**Library References**

Urban Railroads ⇨23.

page 310

38. General rules of negligence applicable

Ga.—Atlantic Coast Line R. Co. v. Coxwell, 91 S E 2d 135, 93 Ga App 159.

39. "Neglect" construed

Neb.—Sullivan v. Omaha & Council Bluffs St. Ry. Co., 70 N W 2d 98, 160 Neb. 342.

§ 190. Acts of Servants or Employees**Library References**

Urban Railroads ⇨23.

page 311

§ 192. Degree of Care Required**Library References**

Urban Railroads ⇨23.

page 312

84. Cal.—Reilly v. California St. Cable R. Co., 173 P 2d 872, 76 Cal App 2d 620—Riggs v. City and County of San Francisco, 304 P 2d 19, 146 C A 2d 481.

Mo.—Wilson v. Kansas City Public Service Co., 291 S W 2d 110—Schneider v. Bi-State Development Agency, App., 447 S W 2d 788

§ 194. Duties and Care as to Licensees in General**Library References**

Urban Railroads ⇨23.

page 318

70. D.C.—Hryn v. Capital Transit Co., Mun App., 116 A 2d 158

§ 195. Duties and Care to Invitees

76. Mo.—C.J.S. cited in Hiltner v. Kansas City, 293 S W 2d 422, 427

§ 196. Construction and Equipment of Cars

page 319

90. N.Y.—Javeline v. Long Island R.R., 435 N.Y.S.2d 513, 106 Misc 2d 814

§ 197. Vigilance of Persons in Charge of Car**Library References**

Urban Railroads ⇨23.

page 320

11. Mo.—Brooks v. Terminal R. Ass'n, App., 276 S W 2d 600

Pa.—Potochnik v. Pittsburgh Rys. Co., 108 A 2d 733, 379 Pa 154—Di Giannantonio v. Pittsburgh Rys. Co., 166 A 2d 28, 402 Pa 27

Any speed hazardous if operator looking elsewhere

Mo.—Kelly v. Kansas City Public Service Co., 335 S W 2d 159

Momentarily looking elsewhere improper

Mo.—Kelly v. Kansas City Public Service Co., 335 S W 2d 159

page 322

35. Mo.—Pijut v. St. Louis Public Service Co., 350 S.W.2d 778

§ 198. Rate of Speed and Control of Car**Library References**

Urban Railroads ⇨23.

page 323

49. Pa.—Di Giannantonio v. Pittsburgh Rys. Co., 166 A 2d 28, 402 Pa 27

Degree of control

(1) Pa.—Potochnik v. Pittsburgh Rys. Co., 108 A 2d 733, 379 Pa. 154

page 325

69. Pa.—Scholl v. Philadelphia Suburban Transp. Co., 51 A 2d 732, 356 Pa 217.

§ 199. — Reducing Speed and Stopping Car**Library References**

Urban Railroads ⇨23.

82. Minn.—Waldo v. St. Paul City Ry. Co., 70 N W 2d 289, 244 Minn 416

Mo.—Wilson v. Kansas City Public Service Co., 291 S W 2d 110

§ 202. Signals or Warnings**Library References**

Urban Railroads ⇨23.

page 327

5. Mo.—Wilson v. Kansas City Public Service Co., 291 S W 2d 110

§ 208. — Between Street Crossings**Library References**

Urban Railroads ⇨23.

page 331

73. Cal.—Gerace v. Key System Transit Lines, 304 P 2d 88, 146 C A 2d 667

75. Cal.—Gerace v. Key System Transit Lines, 304 P 2d 88, 146 C A 2d 667

Reasonable excuse for crossing between street crossings

Pa.—Bosack v. Pittsburgh Railways Co., 189 A 2d 877, 410 Pa 558.

76. Pa.—Potochnik v. Pittsburgh Rys. Co., 108 A 2d 733, 379 Pa 154

§ 209. — At Street Crossings**Library References**

Urban Railroads ⇨23.

page 334

3. Md.—Lehman v. Baltimore Transit Co., 177 A 2d 855, 227 Md 537

13. Pa.—Bigler v. Pittsburgh Rys. Co., 117 A 2d 723, 383 Pa 58

§ 212. Proximate Cause of Injury**Library References**

Urban Railroads ⇨23.

page 338

57. Cal.—Hession v. City and County of San Francisco, 265 P.2d 542, 122 C A 2d 592

§ 213. In General**Library References**

Urban Railroads ⇨23.

page 341

77. N.Y.—Amodeo v. New York City Transit Authority, 203 N.Y.S.2d 204, 10 A.D.2d 982, motion den 214 N.Y.S.2d 329, 9 N.Y.2d 711, 174 N.E.2d 318, affd. 215 N.Y.S.2d 69, 9 N.Y.2d 760, 174 N.E.2d 743

84. Discontinuance of service

(2) Other matters

Mo.—Vanacek v. St. Louis Public Service Co., 358 S.W.2d 808, cert. den 83 S.Ct. 287, 371 U.S. 920, 9 L.Ed.2d 229.

Duty compared with that of municipality

Pa.—Bosack v. Pittsburgh Railways Co., 189 A 2d 877, 410 Pa 558.

85. Mo.—Vanacek v. St. Louis Public Service Co., 358 S.W.2d 808, cert. den 83 S.Ct. 287, 371 U.S. 920, 9 L.Ed.2d 229

page 342

89. Held not insurer

Pa.—Bosack v. Pittsburgh Rys. Co., 189 A.2d 877, 410 Pa 558.

90. Pa.—Bosack v. Pittsburgh Rys. Co., 189 A 2d 877, 410 Pa 558

Page 429

87. Plaintiff not charged with anticipating break down

Pa—Kurtz v Philadelphia Transp Co, 147 A 2d 347, 394 Pa 324

§ 282. — Occupant of Vehicle Driven by Another

Library References

Urban Railroads ⇨26.

page 430

98. Pa—Bragdon v Pittsburgh Rys Co, 100 A 2d 378, 375 Pa 307

1. Mo—Jones v Illinois Terminal R Co, 272 S.W.2d 272, 364 Mo 1102, stating Illinois law

page 431

17. Mo—Jones v Illinois Terminal R Co, 272 S.W.2d 272, 364 Mo 1102, stating Illinois law

page 432

20. Mo—Jones v Illinois Terminal R Co, 272 S.W.2d 272, 364 Mo 1102, stating Illinois law

§ 287. Proximate Cause

page 435

83. Mich—Niewiadomski v City of Detroit, 68 N.W.2d 778, 342 Mich 133.

Wis.—Mayr v Milwaukee & Suburban Transport Corp, 80 N.W.2d 761, 274 Wis 616

page 436

84. Pa—Kaplan v Philadelphia Transp. Co, 171 A 2d 166, 404 Pa 147

89. Mo—Romandel v. Kansas City Public Service Co, 254 S.W.2d 585

§ 287. Proximate Cause

Library References

Urban Railroads ⇨26, 27.

§ 290. — Cessation or Continuance of Plaintiff's Negligence

Library References

Urban Railroads ⇨28.

page 437

1. Cal—Doran v. City and County of San Francisco, 283 P.2d 1, 44 C 2d 477

§ 291. Danger or Peril

Library References

Urban Railroads ⇨28.

page 438

12. Mo.—Hill v St Louis Public Service Co, 340 S.W.2d 712.

14. Mo.—Silverstein v. St Louis Public Service Co, 295 S.W.2d 37.

§ 292. — Plaintiff's Knowledge or Ignorance of Peril

Library References

Urban Railroads ⇨28.

page 439

31. Cal.—Doran v City and County of San Francisco, 283 P 2d 1, 44 C 2d 477

§ 293. — Defendant's Knowledge or Ignorance of Peril

Library References

Urban Railroads ⇨28.

page 440

36. Mo—Doelling v St Louis Public Service Co, App, 258 S.W.2d 244 Reese v St Louis Public Service Co, App, 368 S.W.2d 540

40. Imminent peril

Mo—Smith v St Louis Public Service Co, App, 252 S.W.2d 83, affd 259 S.W.2d 692, 364 Mo 104

page 441

48. Mo—Silverstein v St Louis Public Service Co, 295 S.W.2d 37

§ 294. Ability and Opportunity to Avoid Injury

Library References

Urban Railroads ⇨28.

51. Mo—Romandel v Kansas City Public Service Co, 254 S.W.2d 585

§ 295. Care Required after Peril Is, or Should Be, Discovered

Library References

Urban Railroads ⇨28.

page 443

72. Pa.—Andrews v West Penn Ry Co, 35 West Co 103

74. Md—Joeckel v. Baltimore Transit Co, 119 A 2d 373, 208 Md. 586

76. Cal—Nesje v Metropolitan Coach Lines, 295 P.2d 979, 140 C A 2d 807

§ 296. In General

Library References

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79. Mo—Graham v. Illinois Terminal R Co, App, 260 S.W.2d 846—Wilson v Kansas City Public Service Co, 291 S.W.2d 110

Alleged status as volunteer not defense

Pa—Guca v Pittsburgh Rys Co, 42 Mun 97, 98 Pittsb Leg.J 557, affd in part and set aside in part on oth grds. 80 A 2d 779, 367 Pa 579

Claimed nuisance not defense

Minn—Sheldon v Minneapolis St. Ry Co, 114 N.W 1134, 103 Minn 520.

§ 301. Notice of Claim

Library References

Urban Railroads ⇨30.

page 444

93. Statute inapplicable

Ill—Sims v. Chicago Transit Authority, 115 N.E.2d 96, 351 Ill.App. 314, revd. on oth. grds. 122 N.E.2d 221, 4 Ill 2d 60.

§ 302. Complaint, Declaration, or Petition

Library References

Urban Railroads ⇨30.

page 445

6. Mo.—Hiltner v. Kansas City, 293 S.W.2d 422

page 446

23. Mo—C.J.S. cited in Vanacek v St Louis Public Service Co, 358 S.W.2d 808, 811, cert den 83 S Ct 287, 371 U S 920, 9 L Ed 2d 229

Allegations held insufficient

Mo—Hiltner v Kansas City, 293 S.W.2d 422

§ 303. Plea or Answer and Other Pleadings

Library References

Urban Railroads ⇨30.

page 449

63. Mo—Brisboise v Kansas City Public Service Co, 303 S.W.2d 619

75. Pleading not necessary

Ohio—Kish v City of Cleveland, 131 N.E.2d 260, 102 Ohio App 453

§ 304. Issues, Proof, and Variance

Library References

Urban Railroads ⇨30.

page 452

9. Mich.—Niewiadomski v. City of Detroit, 68 N.W.2d 778, 342 Mich 133

§ 305. Presumptions and Burden of Proof

Library References

Urban Railroads ⇨30.

page 454

51. Mo—McClanahan v St Louis Public Service Co, App, 242 S.W.2d 265, revd on oth grds. 251 S.W.2d 704, 363 Mo 500.

page 455

68. Mass—Landrigan v Metropolitan Transit Authority, 105 N.E.2d 849, 329 Mass 25

§ 306. — Negligence of Defendant

Library References

Urban Railroads ⇨30.

71. Ohio—Kish v City of Cleveland, 131 N.E.2d 260, 102 Ohio App 453.

page 456

90. Mo—Doelling v. St Louis Public Service Co, App, 258 S.W.2d 244

page 457

6. Wis—Mayr v Milwaukee & Suburban Transport Corp, 80 N.W.2d 761, 274 Wis 616

page 458

19. Pa—Izzi v. Philadelphia Transp Co, 195 A 2d 784, 412 Pa 559.

§ 307. — Contributory Negligence

Library References

Urban Railroads ⇨30.

page 460

62. Cal—Hughes v. City and County of San Francisco, 322 P 2d 623, 158 C A 2d 419.

68. Pa.—Potochnik v Pittsburgh Rys. Co, 108 A.2d 733, 379 Pa 154.

§ 308. Admissibility of Evidence

Library References

Urban Railroads ⇨30.

page 461

85. Pa—Pressler v City of Pittsburgh, 214 A 2d 616, 419 Pa 440

§ 309. — Negligence of Defendant

Library References

Urban Railroads ⇨30.

page 462

94. Mass—Herwitz v Massachusetts Bay Transp Authority, 233 N E 2d 726, 353 Mass 594

3. Cal—Dropo v City and County of San Francisco, 334 P 2d 972, 167 C A 2d 453

page 463

27. Mass—Hebert v Massachusetts Bay Transp Authority, 305 N E 2d 869, 1 Mass App 670

page 469

37. Cal—Corsetto v Pacific Elec Ry, 289 P 2d 116, 136 C A 2d 631

§ 312. Weight and Sufficiency of Evidence

Library References

Urban Railroads ⇨30.

page 472

5. Wis—Coney v Milwaukee & Suburban Transport Corp, 99 N W 2d 713, 8 Wis 2d 520

Evidence held sufficient

- (1) Mo—Hermann v St Louis Public Service Co, App, 345 S W 2d 399.

- Pa—Troy v Pittsburgh Rys Co, 132 A 2d 189, 389 Pa 59—Carminati v Philadelphia Transp Co, 176 A 2d 440, 405 Pa 500

Evidence held insufficient

- N.Y.—Malone v New York City Transit Authority, 247 N Y S 2d 661, 20 A D 2d 768, aff'd 212 N E 2d 777, 16 N.Y.2d 978, 265 N.Y.S.2d 291

- Pa—Roberts v Pittsburgh Rys Co, 132 A 2d 237, 389 Pa 81

10. Evidence held insufficient

- Tex—Dallas Ry. Terminal Co v Van Gilder, Civ App, 301 S W 2d 724, err ref no rev err

11. Evidence held sufficient

- Cal—Gerace v Key System Transit Lines, 304 P.2d 88, 146 C A 2d 667

- D.C.—Grober v Capital Transit Co, D.C., 119 F Supp 100.

- La.—Moore v Shreveport Transit Co., App, 115 So 2d 218.

Evidence held insufficient

- Ala.—Simpson v Birmingham Elec. Co., 75 So.2d 111, 261 Ala. 599.

- N.Y.—Central Square Tchrs Ass'n v Board of Ed. of Central Square Central School Dist., 419 N E 2d 341, 52 N.Y.2d 918, 437 N.Y.S.2d 663

§ 313. — Relation of Defendant to Cause of Injury

Library References

Urban Railroads ⇨30.

page 473

19. Evidence held sufficient

- D.C.—Grober v Capital Transit Co., supra, n. 11.

§ 314. — Acts of Employees

Library References

Urban Railroads ⇨30.

22. Evidence held sufficient

- Mo.—DeMariano v St. Louis Public Service Co, 340 S.W.2d 735.

83 CJS. 1986 P.P.—2

23. Evidence held sufficient

- Mo.—DeMariano v St. Louis Public Service Co, 340 S.W.2d 735

§ 315. — Defects in Tracks, Street, or Equipment

Library References

Urban Railroads ⇨30.

24. Pa—Izzi v Philadelphia Transp Co, 195 A 2d 784, 412 Pa 559

page 474

34. Evidence held insufficient

- U.S.—Mease v Shreveport Rys Co, D.C. La., 116 F Supp 611

§ 316. — Operation of Cars

Library References

Urban Railroads ⇨30.

42. Evidence held insufficient

- La—Hingle v New Orleans Public Service, Inc., App., 90 So 2d 904

- Minn—Peterson v Truelson, 83 N W 2d 236, 249 Minn. 530

page 475

43. N.Y.—Heyward v New York City Transit Authority, 428 N Y S 2d 721, 76 A D 2d 880, aff' 418 N E 2d 670, 52 N.Y.2d 846, 437 N.Y.S.2d 77

46. Evidence held sufficient

- Pa—Pressler v City of Pittsburgh, 214 A 2d 616, 419 Pa 440

47. Evidence held sufficient

- Pa—Potochnik v Pittsburgh Rys Co, 108 A 2d 733, 379 Pa. 154

48. Evidence held sufficient

- Pa—Potochnik v Pittsburgh Rys Co, 108 A 2d 733, 379 Pa. 154

53. Evidence held insufficient

- Ill—Jones v Chicago Transit Authority, 163 N E 2d 546, 23 Ill App 2d 504

55. Evidence held insufficient

- Tex.—Dallas Ry & Terminal Co v Van Gilder, Civ App, 301 S.W.2d 724, err. ref no rev err

page 476

57. Evidence held sufficient

- Mo.—Silverstein v St. Louis Public Service Co, 295 S W 2d 37

60. Evidence held insufficient

- La.—Walker v Shreveport Rys. Co., App, 71 So 2d 683

72. Evidence held sufficient

- La.—Murray v Shreveport Transit Co., App, 188 So.2d 710—Kelly v Bonnet, App., 299 So.2d 884

page 477

73. Evidence held sufficient

- Ill—Mills v Chicago Transit Authority, 117 N.E.2d 401, 1 Ill.App.2d 236.

- Ohio—Kish v City of Cleveland, 131 N.E.2d 260, 102 Ohio App 453

Concurring negligence

Evidence held sufficient to sustain findings of concurrent negligence in operation of street car and crossing vehicle.—Coleman v Moore, D.C.D.C., 108 F.Supp 425.

80. Evidence held sufficient

- Md—Baltimore Transit Co. v Mitchell, 135 A.2d 145, 214 Md. 346

- Mo.—Kagan v St. Louis Public Service Co., App., 360 S.W.2d 261—Suchara v St. Louis Public Service Co., App., 410 S.W.2d 93.

Evidence held insufficient

- Pa—Maier v Pittsburgh Rys Co, 168 A 2d 632, 194 Pa Super 523

page 478

83. La—Bonono v New Orleans Public Service, Inc., App, 216 So 2d 356

92. Evidence held sufficient

- Wis—Mayr v Milwaukee & Suburban Transport Corp., 80 N W 2d 761, 274 Wis 616

95. Evidence held sufficient

- Wis—Mayr v Milwaukee & Suburban Transport Corp., 80 N W 2d 761, 274 Wis 616

96. Pa—Bragdon v Pittsburgh Rys Co, 100 A 2d 378, 375 Pa 307

98. Evidence held insufficient

- La—Hingle v New Orleans Public Service, Inc., App., 90 So 2d 904

- Tex—Dallas Ry & Terminal Co v Van Gilder, Civ App, 301 S W 2d 724, err ref no rev err.

§ 317. — Power of Defendant to Avoid Injury; Last Clear Chance

Library References

Urban Railroads ⇨30.

page 480

29. Evidence held sufficient

- Cal—Ransdell v Los Angeles Metropolitan Transit Authority, 8 Cal Rptr 302, 185 C A 2d 335

- Mo—Nored v St. Louis Public Service Co, 319 S.W.2d 608—Triplett v St. Louis Public Service Co, App., 372 S.W.2d 515

Evidence held insufficient

- La—Moore v Shreveport Transit Co, App, 115 So 2d 218

33. Pa—Selly v Ciocca, 155 A.2d 814, 397 Pa 409.

34. Mo—Smith v St. Louis Public Service Co, App., 252 S.W.2d 83, aff'd., 259 S.W.2d 692, 364 Mo 104

Evidence held sufficient

- D.C.—Capital Transit Co v Bingman, C.A., 212 F.2d 241, 94 U.S.App D.C. 75

Evidence held insufficient

- Mo—Smith v St. Louis Public Service Co, supra.

§ 318. — Willful or Wanton Injury and Gross Negligence

Library References

Urban Railroads ⇨30.

page 481

48. Pa—Corona v Pittsburgh Rys. Co, 209 A.2d 425, 418 Pa 136.

§ 319. — Contributory Negligence

Library References

Urban Railroads ⇨30.

51. All evidence considered

- Ohio—Burnside v Cincinnati St. Ry. Co., 114 N.E.2d 848, 94 Ohio App. 240.

52. Evidence held sufficient

- La.—Lewis v New Orleans Public Service, App., 78 So.2d 76.

- Pa.—Forcinal v Pittsburgh Rys. Co., 135 A.2d 746, 390 Pa. 409.

page 482

59. Minn.—Webster v St. Paul City Ry Co., 64 N.W.2d 82, 241 Minn. 515.

68. Evidence held sufficient

- D.C.—Lampiris v Capital Transit Co, Mun.App., 107 A.2d 124.

Page 482

Wis—Coney v Milwaukee & Suburban Transport Corp., 99 N.W.2d 713, 8 Wis.2d 520

page 483

69. La—Bonono v New Orleans Public Service Inc App., 216 So.2d 356

70. Evidence held sufficient

Ill—Jones v Chicago Transit Authority, 163 N.E.2d 546, 23 Ill.App.2d 504

71. Pa—Potochnik v Pittsburgh Rys Co., 108 A.2d 733, 379 Pa. 154

78. Evidence held sufficient

Mich—Niewiadomski v City of Detroit, 68 N.W.2d 778, 342 Mich. 133

Evidence held insufficient

La—Greenberg v New Orleans Public Service, App., 74 So.2d 771

80. Neb—Corbitt v Omaha Transit Co., 77 N.W.2d 144, 162 Neb. 598

§ 321. — Proximate Cause of Injury

Library References

Urban Railroads ⇌30.

page 484

88. Pa—Izzi v Philadelphia Transp Co., 195 A.2d 784, 412 Pa. 559

Evidence held sufficient

Cal—Hession v City and County of San Francisco, 265 P.2d 542, 122 C.A.2d 592

D.C.—Grober v Capital Transit Co., D.C., 119 F.Supp. 100

Mass—Chandler v Metropolitan Transit Authority, 117 N.E.2d 823, 331 Mass. 190

Wis—Mayr v Milwaukee & Suburban Transport Corp., 80 N.W.2d 761, 274 Wis. 616

92. Evidence held insufficient

Pa—Cuthbert v City of Philadelphia, 209 A.2d 261, 417 Pa. 610

page 485

95. La—Brooks v Roussel, App., 384 So.2d 576, 15 A.L.R. 4th 513

Evidence held sufficient

Wis—Coney v Milwaukee & Suburban Transport Corp., 99 N.W.2d 713, 8 Wis.2d 520

98. Evidence held sufficient

La—Moore v Shreveport Transit Co., App., 115 So.2d 218

1. Evidence held sufficient

Mo—Nored v St. Louis Public Service Co., 319 S.W.2d 608

6. Evidence held sufficient

La—Greenberg v New Orleans Public Service, 74 So.2d 771—Hingle v New Orleans Public Service, Inc., App., 90 So.2d 904

Wis—Coney v Milwaukee & Suburban Transport Corp., 99 N.W.2d 713, 8 Wis.2d 520

7. Evidence held sufficient

Neb—Corbitt v Omaha Transit Co., 77 N.W.2d 144, 162 Neb. 598

8. Evidence insufficient to show negligence was not proximate cause

Tex—Dallas Ry & Terminal Co. v Van Gilder, Civ. App., 301 S.W.2d 724, err. ref. no rev. err.

§ 322. Questions of Law and Fact

Library References

Urban Railroads ⇌30.

page 486

11. Minn.—Teas v Minneapolis St. Ry. Co., 70 N.W.2d 358, 244 Minn. 427.

Evidence held to warrant submission to jury
Pa—Selly v Crocca, 155 A.2d 814, 397 Pa. 409

Credibility of witnesses, etc.

Pa—Escher v Pittsburgh Rys Co., 166 A.2d 537, 194 Pa. Super. 66

Invitee

Ill—Hectus v Chicago Transit Authority, 122 N.E.2d 587, 3 Ill.App.2d 439

§ 324. — Negligence of Defendant

Library References

Urban Railroads ⇌30.

page 488

31. Mo—Emert v St. Louis Public Service Co., 370 S.W.2d 366

Pa—Litwinko v Gray, 407 A.2d 42, 267 Pa. Super. 541

32. Mass—Herwitz v Massachusetts Bay Transp Authority, 233 N.E.2d 726, 353 Mass. 594—Shaw v Massachusetts Bay Transp Authority, 275 N.E.2d 31, 360 Mass. 856

Pa—Bigler v Pittsburgh Rys Co., 117 A.2d 723, 383 Pa. 58—Lewis v Pittsburgh Rys Co., 126 A.2d 454, 386 Pa. 490—Izzi v Philadelphia Transp Co., 195 A.2d 784, 412 Pa. 559

36. Minn—Peterson v Truelson, 83 N.W.2d 236, 249 Minn. 530

39. Mo—Pijut v St. Louis Public Service Co., 350 S.W.2d 778

page 489

42. N.Y.—Amodeo v New York City Transit Authority, 203 N.Y.S.2d 204, 10 A.D.2d 982, motion den. 214 N.Y.S.2d 329, 9 N.Y.2d 711, 174 N.E.2d 318, aff'd 215 N.Y.S.2d 69, 9 N.Y.2d 760, 174 N.E.2d 743

Pa—Cuthbert v City of Philadelphia, 209 A.2d 261, 417 Pa. 610

43. Cal—Hession v City & County of San Francisco, 258 P.2d 50, 122 C.A.2d 592, subs. op., Sup., 265 P.2d 542—Hession v City and County of San Francisco, 265 P.2d 542, 122 C.A.2d 592

48. Pa—Vaughn v Philadelphia Transp Co., 209 A.2d 279, 417 Pa. 464

51. Minn—Miller v Minneapolis St. Ry. Co., 59 N.W.2d 923, 239 Minn. 547—Teas v Minneapolis St. Ry. Co., 70 N.W.2d 358, 244 Minn. 427

Pa—Vaughn v Philadelphia Transp Co., 209 A.2d 279, 417 Pa. 464

Wis—Coney v Milwaukee & Suburban Transport Corp., 99 N.W.2d 713, 8 Wis.2d 520

Evidence held sufficient to go to jury

Mo—Doggendorf v St. Louis Public Service Co., App., 333 S.W.2d 302—Hermann v St. Louis Public Service Co., App., 345 S.W.2d 399

page 490

52. Minn—Peterson v Truelson, 83 N.W.2d 236, 249 Minn. 530

55. Cal—Urland v French, 296 P.2d 568, 141 C.A.2d 278

59. Cal—Gerace v Key System Transit Lines, 304 P.2d 88, 146 C.A.2d 667

60. U.S.—Cleaves v Robinson, C.A. Pa., 242 F.2d 147.

Ill—Bracher v Illinois Terminal R. Co., 125 N.E.2d 687, 5 Ill.App.2d 375

Mo—Hausherr v Kansas City Public Service Co., App., 268 S.W.2d 433—Wilson v Kansas City Public Service Co., 291 S.W.2d 110.

page 491

67. Pa—Lescznski v Pittsburgh Railways Co., 185 A.2d 538, 409 Pa. 102

72. U.S.—Cleaves v Robinson, C.A. Pa., 242 F.2d 147.

Ill—Hectus v Chicago Transit Authority, 122 N.E.2d 587, 3 Ill.App.2d 439

La—George v Shreveport Transit Co., App., 136 So.2d 711

Minn—Webster v St. Paul City Ry. Co., 64 N.W.2d 82, 241 Minn. 515

Mo—Pitt v Kansas City Public Service Co., 272 S.W.2d 193

Pa—Potochnik v Pittsburgh Rys Co., 103 Pittsb. Leg. J. 53, aff'd 108 A.2d 733, 379 Pa. 154

page 492

76. Minn—Webster v St. Paul City Ry. Co., supra, n. 72

page 493

85. Ill—Hectus v Chicago Transit Authority, 122 N.E.2d 587, 3 Ill.App.2d 439

Mo—Heninger v Roth, App., 260 S.W.2d 855—Silverstein v St. Louis Public Service Co., 295 S.W.2d 37

86. Mo—Heninger v Roth, supra, n. 85

91. U.S.—Frankel v Philadelphia Suburban Transp Co., C.A. Pa., 422 F.2d 1261

Minn—Le May v Minneapolis St. Ry. Co., 71 N.W.2d 826, 245 Minn. 192

Mo—Markovich v Kansas City Public Service Co., 266 S.W.2d 641—Suchara v St. Louis Public Service Co., App., 410 S.W.2d 93

page 494

95. Minn—Le May v Minneapolis St. Ry. Co., 71 N.W.2d 826, 245 Minn. 192

page 495

10. Mass.—Doyle v Massachusetts Bay Transp Authority, 325 N.E.2d 301, 3 Mass. App. 726

11. D.C.—Hryn v Capital Transit Co., Mun. App., 116 A.2d 158

Pa—Lescznski v Pittsburgh Railways Co., 185 A.2d 538, 409 Pa. 102

§ 325. — Contributory Negligence

Library References

Urban Railroads ⇌30.

page 497

28. Ga.—Buice v Atlanta Transit System, Inc., 125 S.E.2d 795, 105 Pa. App. 795

Mass—Herwitz v Massachusetts Bay Transp. Authority, 233 N.E.2d 726, 353 Mass. 594

N.Y.—Doyle v City of New York, 119 N.Y.S.2d 71, 281 App. Div. 821

29. Cal—Gelini v City and County of San Francisco, 18 Cal. Rptr. 853, 199 C.A.2d 340

Ohio—Burnside v Cincinnati St. Ry. Co., 114 N.E.2d 848, 94 Ohio App. 240

Pa—Zawoytski v Pittsburgh Railways Co., 204 A.2d 463, 415 Pa. 563

38. Cal—Dropo v City and County of San Francisco, 334 P.2d 972, 167 C.A.2d 453.

Ill—Hectus v Chicago Transit Authority, 122 N.E.2d 587, 3 Ill.App. 439

Mass—Landrigan v Metropolitan Transit Authority, 105 N.E.2d 849, 329 Mass. 25

Mich—Citizens' Mut. Auto Ins. Co. v City of Detroit, 83 N.W.2d 218, 348 Mich. 329

Minn—Miller v Minneapolis St. Ry. Co., 59 N.W.2d 923, 239 Minn. 547—Teas v Minneapolis St. Ry. Co., 70 N.W.2d 358, 244 Minn. 427.

Mo—Markovich v Kansas City Public Service Co., 266 S.W.2d 641—Hausherr v Kansas City Public Service Co., App., 268 S.W.2d 433—Woodworth v Kansas City Public Service Co., 274 S.W.2d 264—Wilson v Kansas City Public Service Co., 291 S.W.2d 110—Nored v St. Louis Public Service Co., 319 S.W.2d 608—Emert v St. Louis Public Service Co., 370 S.W.2d 366.

Ohio—Kish v City of Cleveland, App., 113 N.E.2d 397.

Pa—McGavern v Pittsburgh Rys Co., 105 A.2d 342, 378 Pa. 13—Bigler v Pittsburgh Rys. Co., 117 A.2d 723, 383 Pa. 58—Kurtz v Philadelphia

Transp. Co., 147 A.2d 347, 394 Pa. 324—Rice v. Philadelphia Transp. Co., 147 A.2d 627, 394 Pa. 454—Echer v. Pittsburgh Rys. Co., 166 A.2d 537, 194 Pa. Super. 66—Bosack v. Pittsburgh Railways Co., 189 A.2d 877, 410 Pa. 558

page 498

40. Mich.—Barron v. City of Detroit, 82 N.W.2d 463, 348 Mich. 213

page 499

41. Mass.—Doyle v. Massachusetts Bay Transp. Authority, 325 N.E.2d 301, 3 Mass. App. 726
Minn.—Webster v. St. Paul City Ry. Co., 64 N.W.2d 82, 241 Minn. 515
Mo.—Markovich v. Kansas City Public Service Co., supra, n. 38

page 500

42. Minn.—Webster v. St. Paul City Ry. Co., supra, n. 41
Pa.—Di Giannantonio v. Pittsburgh Rys. Co., 166 A.2d 28, 402 Pa. 27
45. Pa.—Potochnik v. Pittsburgh Rys. Co., 103 Pittsb. Leg. J. 53, aff'd, 108 A.2d 733, 379 Pa. 154

page 501

52. Ill.—Bracher v. Illinois Terminal R. Co., 125 N.E.2d 687, 5 Ill. App.2d 375
54. Md.—Lehman v. Baltimore Transit Co., 177 A.2d 855, 227 Md. 537
57. La.—George v. Shreveport Transit Co., App., 136 So.2d 711

page 502

58. Mo.—Randel v. Kansas City Public Service Co., 254 S.W.2d 585
60. Mo.—Randel v. Kansas City Public Service Co., supra, n. 58
66. Cal.—James v. Key System Transit Lines, 270 P.2d 116, 125 C.A.2d 278

page 504

77. U.S.—Frankel v. Philadelphia Suburban Transp. Co., C.A. Pa., 422 F.2d 1261
Pa.—Andrews v. West Penn. Ry. Co., 35 West Co. 103—Bires v. Pittsburgh Ry. Co., 102 Pittsb. Leg. J. 227

§ 326. — Last Clear Chance

Library References

Urban Railroads ⇐30.

79. U.S.—Illinois Terminal R. Co. v. Creek, C.A. Mo., 207 F.2d 475
Cal.—Sills v. Los Angeles Transit Lines, 255 P.2d 795, 40 C.2d 630
D.C.—Finney v. Capital Transit Co., D.C., 108 F.Supp. 434
Mich.—Dunn v. City of Detroit, 84 N.W.2d 501, 349 Mich. 228
Mo.—Randel v. Kansas City Public Service Co., 254 S.W.2d 585—Caswell v. St. Louis Public Service Co., 262 S.W.2d 40—McClanahan v. St. Louis Public Service Co., App., 242 S.W.2d 265, rev'd on oth. grds. 251 S.W.2d 704, 363 Mo. 500—Alexander v. Kansas City Public Service Co., App., 268 S.W.2d 451—Sheerin v. St. Louis Public Service Co., 300 S.W.2d 483—Millard v. St. Louis Public Service Co., App., 330 S.W.2d 147.

Questions held for jury

(4) Mo.—Doelling v. St. Louis Public Service Co., App., 258 S.W.2d 244.

page 505

80. Mo.—Smith v. St. Louis Public Service Co., App., 252 S.W.2d 83, aff'd, 259 S.W.2d 692, 364 Mo. 104

81. Evidence held sufficient for jury

Mo.—Hill v. St. Louis Public Service Co., 340 S.W.2d 712

82. Mo.—Smith v. St. Louis Public Service Co., supra, n. 80

83. Mo.—Smith v. St. Louis Public Service Co., supra, n. 80

§ 327. — Willful, Wanton, or Reckless Injury

Library References

Urban Railroads ⇐30.

86. Test of evidence to raise question

Pa.—Corona v. Pittsburgh Rys. Co., 209 A.2d 425, 418 Pa. 136

§ 328. — Proximate Cause; Unavoidable Accident

Library References

Urban Railroads ⇐30.

page 506

87. U.S.—Cleaves v. Robinson, C.A. Pa., 242 F.2d 147—Frankel v. Philadelphia Suburban Transp. Co., C.A. Pa., 422 F.2d 1261

Cal.—Hession v. City and County of San Francisco, 265 P.2d 542, 122 C.A.2d 592

Ill.—Mils v. Chicago Transit Authority, 117 N.E.2d 401, 1 Ill. App.2d 236

Mo.—McClanahan v. St. Louis Public Service Co., App., 242 S.W.2d 265, rev'd on oth. grds. 251 S.W.2d 704, 363 Mo. 500—Silverstein v. St. Louis Public Service Co., 295 S.W.2d 37—Pjyt v. Saint Louis Public Service Co., 330 S.W.2d 747.

Pa.—Di Giannantonio v. Pittsburgh Rys. Co., 166 A.2d 28, 402 Pa. 27

88. Cal.—Urland v. French, 296 P.2d 568, 141 C.A.2d 278

§ 330. Instructions

Library References

Urban Railroads ⇐30.

page 507

97. Ill.—Handell v. Chicago Transit Authority, 173 N.E.2d 529, 30 Ill. App.2d 1

1. Mo.—Kagan v. St. Louis Public Service Co., App., 360 S.W.2d 261

§ 331. — Negligence of Defendant

Library References

Urban Railroads ⇐30.

4. Requested instructions held properly refused

Cal.—Dropo v. City and County of San Francisco, 334 P.2d 972, 167 C.A.2d 453.

5. Cal.—Dropo v. City and County of San Francisco, 334 P.2d 972, 167 C.A.2d 453

D.C.—Grober v. Capital Transit Co., D.C., 119 F.Supp. 100

Instruction held sufficient or not erroneous

Cal.—Gerace v. Key System Transit Lines, 304 P.2d 88, 146 C.A.2d 667

Instructions held incorrect

Cal.—Hughes v. City and County of San Francisco, 322 P.2d 623, 158 C.A.2d 419.

Mo.—Schneider v. Bi-State Development Agency, App., 447 S.W.2d 788.

Instructions held misleading

Mo.—Wilson v. Kansas City Public Service Co., 291 S.W.2d 110.

page 508

6. Instructions held sufficient or not erroneous
Mich.—Citizens' Mut. Auto. Ins. Co. v. City of Detroit, 83 N.W.2d 218, 348 Mich. 329

Instructions held erroneous

Mo.—Wilson v. Kansas City Public Service Co., 291 S.W.2d 110

Instructions permissible only if required by ordinance

Mo.—Wilson v. Kansas City Public Service Co., supra

8. D.C.—Grober v. Capital Transit Co., supra, n. 5.

Instructions held sufficient or not erroneous
Cal.—Gerace v. Key System Transit Lines, 304 P.2d 88, 146 C.A.2d 667

Mo.—Pitt v. Kansas City Public Service Co., 272 S.W.2d 193

Instructions held erroneous

Mo.—Wilson v. Kansas City Public Service Co., 291 S.W.2d 110

Instructions held permissible only if required by ordinance

Mo.—Wilson v. Kansas City Public Service Co., supra

page 509

9. Cal.—Dropo v. City and County of San Francisco, 334 P.2d 972, 167 C.A.2d 453.

Instructions held misleading

Mo.—Jones v. Illinois Terminal R. Co., 272 S.W.2d 272, 364 Mo. 1102

10. Instructions held sufficient or not erroneous

Cal.—Gerace v. Key System Transit Lines, 304 P.2d 88, 146 C.A.2d 667

Mo.—Millard v. St. Louis Public Service Co., App., 330 S.W.2d 147

13. U.S.—Frankel v. Philadelphia Suburban Transp. Co., C.A. Pa., 422 F.2d 1261

Minn.—Le May v. Minneapolis St. Ry. Co., 71 N.W.2d 826, 245 Minn. 192

Instructions held erroneous

Mo.—Johnson v. St. Louis Public Service Co., 255 S.W.2d 815

§ 332. — Contributory Negligence

Library References

Urban Railroads ⇐30.

page 510

16. Mo.—Emert v. St. Louis Public Service Co., 370 S.W.2d 366

Instructions held sufficient or not erroneous
Ill.—Bracher v. Illinois Terminal R. Co., 125 N.E.2d 687, 5 Ill. App.2d 375.

Minn.—Miller v. Minneapolis St. Ry. Co., 59 N.W.2d 923, 239 Minn. 547

Mo.—Kelly v. Kansas City Public Service Co., 335 S.W.2d 159.

Instructions held erroneous

Ill.—Price v. Chicago Transit Authority, 115 N.E.2d 345, 351 Ill. App. 376.

Requested instructions held properly refused

Ill.—Handell v. Chicago Transit Authority, 173 N.E.2d 529, 30 Ill. App.2d 1.

Requested instructions held erroneously refused
Ohio—Kish v. City of Cleveland, App., 113 N.E.2d 397.

Question raised by instructions

N.Y.—Coleman v. New York City Transit Authority, 332 N.E.2d 850, 37 N.Y.2d 137, 371 N.Y.S.2d 663.

17. Instructions held sufficient or not erroneous

Mo.—Randel v. Kansas City Public Service Co., 254 S.W.2d 585.

Ohio—Kish v. City of Cleveland, App., 131 N.E.2d 260, 102 Ohio App. 453

Page 510

18. Mo—Pjut v St Louis Public Service Co, 350 S W 2d 778

§ 333. — Last Clear Chance; Willful Injury

Library References
Urban Railroads ⇨30.

page 511

21. Mich—Niewiadomski v City of Detroit, 68 N W 2d 778, 342 Mich 133

Instructions held sufficient or not erroneous
Mo—Romandel v Kansas City Public Service Co, 254 S W 2d 585—Caswell v St Louis Public Service Co, 262 S W 2d 40—Pitt v Kansas City Public Service Co, 272 S W 2d 193

Instructions held erroneous
Mo—Sheerin v St Louis Public Service Co, 300 S W 2d 483—Landau v St Louis Public Service Co, 322 S W 2d 132

Instructions held applicable
US—Illinois Terminal R Co v Creek, C A Mo, 207 F.2d 475

Cal—Ransdell v Los Angeles Metropolitan Transit Authority, 8 Cal Rptr 302, 185 C A 2d 335

Requested instructions held properly refused
US—Illinois Terminal R Co v Creek, supra

Evidence held applicable
D C—Capital Transit Co v Bingman, C A, 212 F 2d 241, 94 U.S.App D C 75

Mich—Citizens' Mut Auto Ins. Co v City of Detroit, 83 N.W.2d 218, 348 Mich 329

§ 334. — Proximate Cause

Library References
Urban Railroads ⇨30.

page 512

23. **Instructions held sufficient or not erroneous**

Pa.—Kurtz v Philadelphia Transp Co, 147 A 2d 347, 394 Pa 324

Requested instructions held properly refused
Mo.—Suchara v St Louis Public Service Co, App, 410 S W 2d 93

§ 335. — Damages

Library References
Urban Railroads ⇨30.

§ 336. Verdict and Findings

Library References
Urban Railroads ⇨30.

page 513

25. **Verdicts held not inconsistent**
Pa.—Zawoycki v Pittsburgh Railways Co, 204 A 2d 463, 415 Pa 563

26. Pa.—Pascarella v Pittsburgh Rys Co, 131 A 2d 445, 389 Pa. 8.

30. Tex.—Nelson v Dallas Ry & Terminal Co., Civ App, 302 S.W.2d 436, err ref. no ref err

Wis.—Mayr v Milwaukee & Suburban Transport Corp, 80 N.W.2d 761, 274 Wis. 616

§ 337. Appeal and Error

Library References
Urban Railroads ⇨30.

36. **Judgment notwithstanding verdict**
Ill.—Olender v Gottlieb, 101 N.E.2d 622, 344 Ill.App 552

page 514

39. Ala.—Harrison v Mobile Light & R Co, 171 So 742 233 Ala 393

Cal.—Paolini v City and County of San Francisco, 164 P 2d 916, 72 Cal App 2d 579—Newton v Los Angeles Transit Lines, 237 P 2d 682 107 C A 2d 624—Newman v Los Angeles Transit Lines, 262 P 2d 95, 120 C A 2d 685

Ill.—Scott v Chicago Transit Authority, 105 N E 2d 922, 347 Ill App 76

Mo—Brungs v St Louis Public Service Co, App, 230 S W 2d 181

Pa—Potochnik v Pittsburgh Rys Co, 108 A 2d 733, 379 Pa 154

Error held prejudicial

Minn—Zubryski v Minneapolis St Ry Co, 68 N W 2d 489 243 Minn 450

Ohio—Davis v Community Traction Co, 9 N E 2d 169, 55 Ohio App 138

Pa—Nestor v George, 46 A 2d 469, 354 Pa 19

Subsequent appeals. Questions or matters decided on the first appeal are the law of the case and cannot be considered on a subsequent appeal.^{41 5}

41.5. Minn—Nees v Minneapolis St Ry Co, 22 N W 2d 164, 221 Minn 396

Pa—Rex v Lehigh Valley Transit Co, 199 A 324, 330 Pa 275

§ 338. Damages

Library References
Urban Railroads ⇨30.

42. **Award not improper**

La—Kelly v Bonnet, App, 299 So 2d 884
N Y—Javeline v Long Island R R, 435 N Y S 2d 513, 106 Misc 2d 814

§ 341. By Municipality

Library References
Urban Railroads ⇨4, 21.

page 515

67. **Subway**
N Y—People v St Clair, 288 N Y S 2d 388, 56 Misc 2d 326

69. Cal.—Dropo v City and County of San Francisco, 334 P.2d 972, 167 C A.2d 453

Negligence

Cal—Hession v City & County of San Francisco, 258 P 2d 50, 122 C A 2d 592, subd. op, Sup, 265 P.2d 542

Interference with conflicting grant of railroad improper—Hession v City and County of San Francisco, 265 P 2d 542, 122 C A 2d 592.

page 516

70. **No liability for relocation of gas mains**
Ill.—Peoples Gas Light & Coke Co. v. City of Chicago, 109 N.E.2d 777, 413 Ill 457

§ 342. — Extent of System, and Application of Special Fund

Library References
Urban Railroads ⇨4, 21.

82. **Passenger cannot demand accounting**
Ill.—Kanter v City of Chicago, 117 N.E.2d 790, 1 Ill.App.2d 420

§ 345. By State

Library References
Urban Railroads ⇨4, 21.

page 521

N Y—Payton v New York City Transit Authority, 184 N Y S 2d 820, 8 A D 2d 602, affd 201 N Y S 2d 108, 8 N Y 2d 737, 167 N E 2d 649—Feczko v New York City Transit Authority, 182 N Y S 2d 385, 15 Misc 2d 667—Hines v New York City Transit Authority, 185 N Y S 2d 56, 15 Misc 2d 452, app den 185 N.Y.S.2d 752, 8 A D 2d 621

STRENGTH.

1. **Tensile strength** means, to those skilled in engineering field in general and in metalized plastic sheet and metallic yarn fields, the resistance of material to lengthwise stress, measured in terms of force per unit area of cross-section that material can bear without breaking or tearing apart—Metal Film Co v Metron Corp, D C N Y, 316 F Supp 96, 100

37. **Transit authority**

Mass—Lambert v Metropolitan Transit Authority, 157 N E 2d 869, 339 Mass 94

STRESS.

page 522

6. **Similarly defined**

(1) The load or force, which is applied to a body, is known as "stress"—Baldwin—Lima—Hamilton Corp v Tainall Measuring Systems Co, D C Pa, 169 F Supp 1, 6

STRIKE.

page 523

26. Miss—Williams Bros Co v McIntosh 84 So 2d 692, 695

S C—C.J.S. cited in Dean v American Fire & Cas Co, 152 S E 2d 247, 249, 249 S C 39

27. S C—C.J.S. cited in Dean v American Fire & Cas Co, 152 S E 2d 247, 249, 249 S C 39

Similarly defined

(1) To come into contact forcibly
S C—C.J.S. cited in Dean v American Fire & Cas Co, 152 S E 2d 247, 249, 249 S C 39

28. S C—C.J.S. cited in Dean v American Fire & Cas Co, 152 S E 2d 247, 249, 249 S C 39

32. S C—C.J.S. cited in Dean v American Fire & Cas Co., 152 S E 2d 247, 249, 249 S C 39

Phrases:

33. **Phrases**

(6) "Strike suit" is a term used to signify a shareholder derivative action

Pa—Shapiro v Magaziner, 210 A 2d 890, 894, 418 Pa 278

In the Industrial or Labor Sense In General.

34. Conn—C.J.S. cited in Tedesco v Turner & Seymour Manufacturing Co., 110 A 2d 650, 654, 19 Conn Sup 192

35. Conn.—C.J.S. cited in Tedesco v Turner & Seymour Manufacturing Co, supra, n. 34.

page 524

36. Conn—C.J.S. cited in Tedesco v Turner & Seymour Manufacturing Co., supra, n. 34.

39. Conn—C.J.S. cited in Tedesco v Turner & Seymour Manufacturing Co, supra, n. 34

Definitions.

—As a Noun.

page 525

55. D C—United Federation of Postal Clerks v. Blount, D C D.C., 325 F.Supp. 879, 884.

Word of common use

Cal.—C.J.S. cited in People v. Smith, 284 P.2d 203, 206, 133 C A 2d Supp. 777.

page 526

57. Similarly defined

(2) A temporary stoppage of work—Ayers v E F Johnson Co, 70 N W 2d 296, 299, 244 Minn 375

58. Pa—Armour Leather Co v Unemployment Compensation Bd of Review, 159 A 2d 772, 775, 192 Pa Super 190

Similarly expressed

A controversy of some degree where there is a cessation of work by employees in an effort to get compliance with demands made on their employer.

RI—C.J.S. cited in Fontaine v Board of Review of Dept of Employment Sec, 210 A 2d 867, 870, 100 R I 37

60. RI—C.J.S. cited in Fontaine v Board of Review of Dept of Employment Sec, 210 A 2d 867, 870, 100 R I 37

62. Del—C.J.S. cited in City of Wilmington v General Teamsters Local Union 326, Supr, 321 A 2d 123, 126

page 527

67. Pa—Dimitroff v Unemployment Compensation Bd of Review, 149 A 2d 135, 138, 188 Pa Super 638—Punxsutawney Co v Unemployment Compensation Bd of Review, 149 A 2d 683, 688, 690, 188 Pa Super 569—Glen Alden Corp v Unemployment Compensation Bd of Review, 150 A 2d 591, 594, 189 Pa Super 286

69. Pa—Burleson v Unemployment Compensation Bd of Review, 98 A 2d 762, 765, 173 Pa Super 527—Dimitroff v Unemployment Compensation Bd of Review, 149 A 2d 135, 138, 188 Pa Super 638—Punxsutawney Co v Unemployment Compensation Bd of Review, 149 A 2d 683, 688, 690, 188 Pa Super 569—Glen Alden Corp v Unemployment Compensation Bd of Review, 150 A 2d 591, 594, 189 Pa Super 286

70. Pa—Dimitroff v Unemployment Compensation Bd of Review, 149 A 2d 135, 138, 188 Pa Super 638—Glen Alden Corp v Unemployment Compensation Bd of Review, 150 A 2d 591, 594, 189 Pa Super 286

72. Ky—Detroit Harvester Co v Kentucky Unemployment Ins Commission, Ky, 343 S W 2d 365, 366

Ohio—Leach v Republic Steel Corp, 199 N E 2d 3, 5, 176 Ohio St 221

RI—C.J.S. cited in Fontaine v Board of Review of Dept of Employment Sec, 210 A 2d 867, 870, 100 R I 37

Wis—Marathon Elec. Mfg Corp v Industrial Commission, 69 N W 2d 573, 580, 269 Wis 394

Similarly defined

(5) A cessation of work by a body of workmen as a means of enforcing compliance with demand or demands made upon the company—Tedesco v Turner & Seymour Manufacturing Co, 110 A 2d 650, 654, 19 Conn Supp 192

73. Ill—City of Rockford v Local No 413, Inter Ass'n of Firefighters, 240 N E 2d 705, 707, 98 Ill App 2d 36

page 528

75. RI—C.J.S. cited in Fontaine v Board of Review of Dept of Employment Sec, 210 A 2d 867, 870, 100 R I 37.

76. RI—C.J.S. cited in Fontaine v Board of Review of Dept of Employment Sec, R I, 210 A 2d 867, 870, 100 R I 37

page 529

Legality of strike.

page 530

—As Dependent on Purpose.

12. Strike for one purpose may not be a strike for another purpose

NY—Bryne v Long Island State Park Commission, 323 N Y S 2d 442, 449, 66 Misc 2d 1070

Characteristics, Elements, or Ingredients of Strike.

page 537

Continuance of relationship.

7. Wis—Marathon Elec Mfg Corp v Industrial Commission, 69 N W 2d 573, 580, 269 Wis 394

8. Wis—Fredricks v Kohler Co, 91 N W 2d 93, 96, 4 Wis 2d 519

page 538

Status of strikers.

23. Wis—Marathon Elec Mfg Corp v Industrial Commission, 69 N W 2d 573, 580, 269 Wis 394

Similarly expressed

(1) The general concept of a strike is that employees who go out on strike do not quit their employment, but ordinarily the relationship of employer and employee continues until one or the other of the parties acts to sever the relationship or they mutually act to accomplish that purpose—Ayers v E F Johnson Co, 70 N W 2d 296, 299, 244 Minn 375—Kitchen v G R Herberger's Inc, 114 N W 2d 64, 67, 262 Minn 135

25. Wis—Marathon Elec Mfg Corp v Industrial Commission, supra, n 23

page 539

—Cessation from, or Interruption of, Work.

34. Synonymous terms

A "work stoppage" is synonymous with the work "strike"—City of Grandview v Moore, Mo App, 481 S W 2d 555, 557

38. "The right to strike as commonly understood is the right to cease work—nothing more"

US—American Ship Bldg Co v N L R B, Dist Col, 85 S Ct 955, 963, 380 U S 300, 13 L Ed 2d 855

Classifications.

page 545

Termination of Strike.

5. Wildcat strike

A "wildcat strike" is an unauthorized strike—Campbell v Jones & Laughlin Steel Corp, D C Pa, 70 F Supp 996, 1002

Whipsaw strike

A strike called by a union against one member of a multiemployer bargaining group—Atlantic Coast Line R Co v Brotherhood of R R Trainmen, D C D.C., 262 F Supp 177, 188

(2) A "whipsaw strike" is strike against only one member of multi-employer bargaining unit in attempt by use of economic pressure to force that member and each subsequent member to come to an agreement separately—International Ass'n v Machinists and Aerospace Workers v National Ry Labor Conference, D C D.C., 310 F Supp 905

16. Resumption of full production not required

"Strike" ends when the worker stops striking and not at some later date when, because of the employer's method of doing business, the struck plant is again ready for full production—In re Weiss' Claims, 270 N E 2d 294, 296, 28 N Y 2d 267, 321 N Y S 2d 561

page 546

Early conception of a strike as a conspiracy see supra p. 523 note 34.

STRIKEBREAKER.

20. Ohio—Building Service and Maintenance Union Local No. 47 v St Lukes Hospital, 227 N E 2d 265, 268, 11 Ohio Misc 218

21. Ohio—C.J.S. quoted in Building Service and Maintenance Union Local No 47 v St Lukes Hospital, 227 N E 2d 265, 268, 11 Ohio Misc 218

STRINGER or STRINGERS.

26. As newspaper writers

(1) "Stringers" are men who are not regular employees of a newspaper but are paid on the basis of what they write—New York Times Co v Connor, C A Ala, 365 F 2d 567, 569

(2) "Stringers" are known in the publishing business as independent third parties who send unsolicited articles or photographs to publishing houses or newspapers throughout the United States.—Ex parte Martin, 199 So 2d 836, 837, 281 Ala 135

27. Otherwise defined

(1) "Stringers" are long steel "I beams" placed between bents and are the lengthwise carrying members of the structure—M De Matteo Const Co v Com, 156 N E 2d 659, 665, 338 Mass 568.

STRIP.

page 547

32. Narrow in relation to length

US—Sommers Plastic Products Co v U S, Cust Ct., 268 F Supp 490, 495

Phrases.

Phrases

"Strip and gore" doctrine—Angelo v Biscamp, Tex., 441 S W 2d 524, 526

STRIP SCARIFICATION. Technique for site preparation for reforestation in which barrel scarifier is dragged on ground behind vehicle and, as it is dragged along, it rotates, with small fins exposing bare soil by clearing away the duff and, if seeding is desired, seed is dropped onto small cleared areas.³⁶⁵

36.5. US—Minnesota Public Research Group v Butz, D C Minn, 358 F Supp 584, 615

STRIPTEASE. Also called "strip act."³⁶⁵⁰

36.50. Pa—In re Tahiti Bar, Inc, 150 A 2d 112, 115, 395 Pa 355

It is the removal of substantially all of a female entertainer's apparel and the performance of "bumps and grinds" involving the gyration of portions of the entertainer's body backward and forward in both fast and slow motion.³⁶⁵¹

36.51. La.—City of New Orleans v Kiefer, 164 So 2d 336, 339, 246 La. 305

Pa—In re Tahiti Bar, Inc, 150 A 2d 112, 115, 395 Pa. 355

STRUCTURE.

45. Mo—C.J.S. cited in Grossman Wrecking Co v Bituminous Casualty Corp, Mo., 518 S W 2d 719, 725

46. Tex—Mitchell v Gauling, Civ App, 483 S W 2d 41, 43, 75 A L R 3d 1090

47. Mo—C.J.S. quoted at length in Easy Living Mobile Manor, Inc v Eureka Fire Protection Dist, Mo App., 513 S W 2d 736, 739

page 548

49. S D—City of Sioux Falls v Cleveland, 70 S W 2d 62, 64, 75 S.D. 548.

50. U.S.—C.J.S. cited in New York Cent. R. Co v General Motors Corp, D C Ohio, 182 F Supp 273, 286

Mass—Scott v Board of Appeal of Wellesley, 248 N E 2d 281, 282, 356 Mass 159

51. U.S.—C.J.S. cited in *New York Cent. R. Co. v. General Motors Corp.*, D.C. Ohio, 182 F.Supp 273, 286
54. N.Y.—*Cervini v. Shorten*, 152 N.Y.S.2d 905, 908, 12 Misc.2d 721
- Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
55. Ill.—C.J.S. cited in *Ayrshire Coal Co. v. Property Tax Board*, 310 N.E.2d 667, 671, 19 Ill.App.3d 41
- Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
- Wash.—*State v. Roadhs*, Wash., 430 P.2d 586, 588, 71 Wash.2d 705

Similarly defined

- (1) The word "structure" is defined as manner of building, form, make, construction, figuratively, the interrelation of parts as dominated by the general character of the whole, as, the structure of society, the structure of a sentence—*La Fleur v. City of Baton Rouge*, La App., 124 So.2d 374, 378
57. Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324
58. Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324
59. Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
- Vt.—*In re Willey*, 140 A.2d 11, 12, 120 Vt. 359
60. Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
61. U.S.—C.J.S. cited in *New York Cent. R. Co. v. General Motors Corp.*, D.C. Ohio, 182 F.Supp 273, 286
- Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
62. Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
63. U.S.—C.J.S. cited in *New York Cent. R. Co. v. General Motors Corp.*, D.C. Ohio, 182 F.Supp 273, 286
- Tex.—*Abel v. Bryant*, Civ. App., 353 S.W.2d 322, 324—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
64. Mo.—C.J.S. quoted in *Greenberg v. Koslow*, 475 S.W.2d 434, 437

page 549

68. U.S.—C.J.S. quoted in *United States v. 52 67 Acres of Land*, D.C. Ill., 150 F.Supp 347, 350

Similarly defined

- (1) Word "structure" means anything which is constructed or erected and use of which requires more or less permanent location on ground or attachment to something having permanent location on ground—*Holsey Appliance Co. v. Burrow*, Okl., 281 P.2d 426, 427
- Cal.—*San Diego County v. McClurken*, 234 P.2d 972, 976, 37 Cal.2d 683
- Okl.—*Holsey Appliance Co. v. Burrow*, supra
69. U.S.—C.J.S. quoted in *United States v. 52 67 Acres of Land*, D.C. Ill., 150 F.Supp 347, 350
71. U.S.—C.J.S. quoted in *United States v. 52 67 Acres of Land*, D.C. Ill., 150 F.Supp 347, 350
- Mo.—C.J.S. quoted in *Greenberg v. Koslow*, 475 S.W.2d 434, 437
72. U.S.—C.J.S. quoted in *United States v. 52 67 Acres of Land*, D.C. Ill., 150 F.Supp 347, 350
73. Conn.—*Katsoff v. Lucertini*, 103 A.2d 812, 814, 141 Conn. 74
74. Conn.—*Katsoff v. Lucertini*, supra, n. 73
75. **Equally applicable to building or apple box**
- Wash.—*State v. Roadhs*, Wash., 430 P.2d 586, 588, 71 Wash.2d 705
78. **Held to include**
- (11) Docks

Docks which owner of lake shore property constructed into lake were part of owner's lots, and as such were "structures" within covenant restricting improvements to residences, garages and no other structures—*Ottawa Shores Home Owners Ass'n v. Lechlak*, 73 N.W.2d 840, 843, 344 Mich. 366

- (12) House trailer
- N.Y.—*People v. Murray*, 224 N.Y.S.2d 864, 867, 32 Misc.2d 757
- (13) Swimming pool
- Mo.—*Greenberg v. Koslow*, Mo., 475 S.W.2d 434, 437
- (14) Sewer system
- Ill.—*Navlyt v. Kalimich*, 290 N.E.2d 219, 220, 53 Ill.2d 137

page 550

79. Conn.—*Katsoff v. Lucertini*, supra, n. 73
80. Tex.—*Alexander Schroeder Lumber Co. v. Corona*, Civ. App., 288 S.W.2d 829, 834
82. Mo.—C.J.S. quoted in *Greenberg v. Koslow*, 475 S.W.2d 434, 437
83. **Radio tower**
- Tex.—*Mitchell v. Gaulding*, Civ. App., 483 S.W.2d 41, 43, 75 A.L.R.3d 1090
84. Mo.—C.J.S. quoted in *Greenberg v. Koslow*, 475 S.W.2d 434, 437
85. **Held not to include**
- (3) A wooden stairway located within a municipal park area, which ran from the top of a bluff to a beach at the bottom thereof
- U.S.—*U.S. v. Wilson*, C.A.N.Y., 235 F.2d 251, 253
- Wis.—*Weiss v. City of Milwaukee*, 68 N.W.2d 13, 15, 268 Wis. 377
- (4) Trailer or trailer camp
- N.Y.—*Fairmeadows Mobile Village, Inc. v. Shaw*, 211 N.Y.S.2d 592, 595, 30 Misc.2d 143
- (5) Fences
- N.M.—*Cardinal Fence Co., Inc. v. Commissioner of Bureau of Revenue*, App., 502 P.2d 1004, 1008, 84 N.M. 314
- (6) Pa.—*Jones v. Zoning Hearing Board of Lower Merion Tp.*, 298 A.2d 664, 667, 7 Pa.Cmwlth. 284

STUFF.

page 551

10. **In illegal narcotics trade**
- The word "stuff" has a customary meaning peculiar to illegal narcotics trade—*Parente v. U.S.*, C.A. Cal., 249 F.2d 752, 754
- (2) "Stuff" in the jargon of narcotics peddlers and users means heroin—*U.S. v. Lugo-Baez*, C.A. Mo., 412 F.2d 435, 437
- "Stuffing" consists of inserting paper or some other material inside telephone coin return throat or hopper so that coins back up and can be removed—*People v. Wong*, 54 Cal.Rptr. 273, 274, 245 C.A.2d 844
12. **Phrases**
- (5) "Stuffing gang" loads cargo into containers used in containerized shipping—*Handcor, Inc. v. Director, Office of Workers' Compensation Programs*, U.S. Dept. of Labor, C.A., 568 F.2d 143, 144

STUMP.

Phrases

- (3) "Stump cut" is a portion of a tree stump severed from top of stump in effort to later match the portion cut with tree previously removed—*Wattenburg v. U.S.*, C.A. Cal., 388 F.2d 853, 855

page 552

SUA SPONTE.

18. N.M.—*Branch v. Mays*, 554 P.2d 1297, 1299, 89 N.M. 536

SUBDIVIDE.

30. Similarly defined

- "Subdivide" is to further divide (what has already been divided) to divide parts into more parts—In re

Symonds' Estate, C.A.D.C., 424 F.2d 928, 930, 138 U.S.App.D.C. 15

SUBDIVIDING is the taking of an entire tract of land and dividing it into smaller units designated as lots, sites, or parcels—the area or tract so divided into smaller units being known as a subdivision and evidenced by a drawing known as a plat.^{31 5}

- 31.5. Ohio—C.J.S. cited in *McKain v. Toledo City Plan Commission*, 270 N.E.2d 370, 373, 26 Ohio App.2d 171

SUBDIVISION.

Similarly defined

- (1) A smaller part or parcel of land taken from a larger tract by reason of a divisional process by the landowner
- Ohio—C.J.S. cited in *McKain v. Toledo City Plan Commission*, 270 N.E.2d 370, 373, 26 Ohio App.2d 171

page 553

Phrases.

36. Phrases

- (4) "Subdivision of a state" is a body of people less in number than the total number of the state, politically organized, and occupying a part of the territorial area of the state—hence a city, borough or town—*City of Norwalk v. Daniele*, 119 A.2d 732, 143 Conn. 85

SUBJECT.

page 554

As a Verb

67. Iowa—C.J.S. quoted in *In re Estate of Kraft's*, 186 N.W.2d 628, 631
77. Iowa—C.J.S. quoted in *In re Estate of Kraft's*, 186 N.W.2d 628, 631

As an Adjective

Subject to.

page 555

90. Ariz.—C.J.S. cited in *Del Rio Land, Inc. v. Haumont*, 514 P.2d 1003, 1005, 110 Ariz. 7
91. **Similarly expressed**
- "Subject to" are words of qualification and notice and not words of assumption
- Va.—*S. L. Nusbaum & Co. v. Atlantic Virginia Realty Corp.*, 146 S.E.2d 205, 209, 206 Va. 673
94. Va.—C.J.S. quoted in *S. L. Nusbaum & Co. v. Atlantic Virginia Realty Corp.*, 146 S.E.2d 205, 209, 206 Va. 673
95. Va.—C.J.S. quoted in *S. L. Nusbaum & Co. v. Atlantic Virginia Realty Corp.*, 146 S.E.2d 205, 209, 206 Va. 673
98. Cal.—*Matthews v. Starrmt.*, 60 Cal.Rptr. 857, 859, 252 C.A.2d 884
- Hawai—*State v. Wilburn*, 426 P.2d 626, 630, 49 Haw. 651
- Iowa—*In re Estate of Kraft's*, 186 N.W.2d 628, 631
- Inferior to**
- Iowa—*In re Estate of Kraft's*, 186 N.W.2d 628, 631
- N.D.—*Chandler v. Hjelle*, 126 N.W.2d 141, 147
- Subordinate or inferior to**
- Ill.—*Young v. Wilson*, 160 N.E.2d 709, 712, 22 Ill. App.2d 304
- "Subordinate" synonymous**
- N.D.—*Chandler v. Hjelle*, 126 N.W.2d 141, 147

page 556

99. U.S.—*Texaco, Inc. v. Pigott*, D.C. Miss., 235 F.Supp 458, 463
- Iowa—*In re Estate of Kraft's*, 186 N.W.2d 628, 631

N.D.—Chandler v Hjelle, 126 N.W.2d 141, 147
S.D.—Renner v Crisman, 127 N.W.2d 717, 721, 80 S.D. 532

1. Iowa—In re Estate of Kraft's, 186 N.W.2d 628, 631

N.D.—Chandler v Hjelle, 126 N.W.2d 141, 147

2. S.D.—Renner v Crisman, 127 N.W.2d 717, 721, 80 S.D. 532

3. Iowa—In re Estate of Kraft's, 186 N.W.2d 628, 631

N.D.—Chandler v Hjelle, 126 N.W.2d 141, 147

5. U.S.—Texaco, Inc v Pigott, D.C. Miss., 235 F.Supp. 458, 463

Hawaii—C.J.S. cited in State v Willburn, 426 P.2d 626, 630, 49 Haw. 651

S.D.—Renner v Crisman, 127 N.W.2d 717, 721, 80 S.D. 532

7. Hawaii—C.J.S. cited in State v Willburn, Hawaii, 426 P.2d 626, 630, 49 Haw. 651

8. Governed or affected by

Iowa—In re Estate of Kraft's, 186 N.W.2d 628, 631

10. Condition to one party's duty of performance and not promise by other

Ariz.—Scaffidi v Puckett, 578 P.2d 1018, 1019, 118 Ariz. 589

14. Contingent or conditioned upon

Ill.—Young v Wilkinson, 160 N.E.2d 709, 712, 22 Ill. App.2d 304

SUBJECTIVE.

page 557

19. "Subjective impossibility", is impossibility which is personal to promisor and does not inhere in the nature of act to be performed—B's Co v B. P. Barber & Associates, Inc, C.A.S.C., 391 F.2d 130, 137

Subjective symptoms.

21. Mo.—Coleman v Hercules Powder Co., App., 284 S.W.2d 32, 38

Tenn.—State v Holt, 440 S.W.2d 591, 592, 222 Tenn. 721

22. Wash.—Lyster v Metzger, 412 P.2d 340, 343

SUBMISSION.

29. Mo.—C.J.S. cited in State v Kitchin, 282 S.W.2d 1, 3

SUBMISSION OF CONTROVERSY

§ 1. Definition and Nature

Library References

Submission of Controversy ¶1.

page 560

8. Mo.—State v Kitchin, 282 S.W.2d 1, foll. 282 S.W.2d 5

10. Ind.—Schadle v Miller, 162 N.E.2d 702, 131 Ind. App. 289, transf. den., 170 N.E.2d 662, 241 Ind. 170

Proceeding held submission as agreed case

Ind.—Equitable Life Assur. Soc. of U.S. v Brank, 259 N.E.2d 706, 147 Ind. App. 335

§ 2. Statutory Provisions

14. Statute providing remedy repealed

N.C.—Spooner's Creek Land Corp v Styron, 172 S.E.2d 54, 276 N.C. 494.

15. N.Y.—Time Writers, Inc v Coleman, 323 N.Y. S.2d 862, 67 Misc.2d 258.

16. N.Y.—Time Writers, Inc v Coleman, 323 N.Y. S.2d 862, 67 Misc.2d 258

Case held not within statute

N.C.—Swartzberg v Reserve Life Ins. Co., 113 S.E.2d 270, 252 N.C. 150

Okl.—Whitten v Kroeger, 82 P.2d 668, 183 Okl. 327

§ 3. Courts Having Jurisdiction

18. N.Y.—Red Apple Rest, Inc v McMorran, 237 N.Y.S.2d 707, 12 N.Y.2d 203, 188 N.E. 137—Reliance Ins. Co v O'Neill, 430 N.Y.S.2d 239, 105 Misc.2d 1018

Statute providing remedy repealed

N.C.—Spooner's Creek Land Corp v Styron, 172 S.E.2d 54, 276 N.C. 494

§ 4. Controversies Which May Be Submitted

Library References

Submission of Controversy ¶3.

page 561

25. N.Y.—Aetna Cas. & Sur. Co v General Cas. Co. of America, 140 N.Y.S.2d 670, 285 App. Div. 767

Conveyance of title by deed

N.C.—Peel v Moore, 94 S.E.2d 491, 244 N.C. 512

Where action ancillary to pending action

N.C.—Byerly v Delk, 103 S.E.2d 812, 248 N.C. 553

Statute providing remedy repealed

N.C.—Spooner's Creek Land Corp v Styron, 172 S.E.2d 54, 276 N.C. 494

26. Hawaii—Kahua Ranch, Ltd v Hustace, 43 Haw. 233

N.C.—Griffin v Springer, 92 S.E.2d 682, 244 N.C. 95

Declaratory judgment action

(3) Other matters

S.D.—State Highway Commission v Sweetman Const. Co., 153 N.W.2d 682, 83 S.D. 27

27. Criminality of act

Cal.—Colusa County v Strain, 30 Cal. Rptr. 415, 215 C.A.2d 472

31. N.Y.—Fraiohi v Fraiohi, 150 N.Y.S.2d 665, 1 A.D.2d 967

33. N.Y.—In re Cohn's Trust, 180 N.Y.S.2d 441, 7 A.D.2d 713

34. Cal.—Colusa County v Strain, 30 Cal. Rptr. 415, 215 C.A.2d 472

N.Y.—167 Greenwich Realty Co v Kehoe, 158 N.Y.S.2d 1005, 3 A.D.2d 659, rearg. den. 160 N.Y.S.2d 805, 3 A.D.2d 709

35. N.Y.—In re Cohn's Trust, 180 N.Y.S.2d 441, 7 A.D.2d 713

page 562

37. N.C.—Bragg Development Co v Braxton, 79 S.E.2d 918, 239 N.C. 427

Future rights

(3) Other matters

Cal.—Colusa County v Strain, 30 Cal. Rptr. 415, 215 C.A.2d 472

§ 5. Persons Who May Submit Controversy and Parties

46. N.Y.—Russel v Russel, 164 N.Y.S.2d 174, 3 A.D.2d 1007—Justino v Fassi, 224 N.Y.S.2d 173, 15 A.D.2d 676

N.C.—Peel v Moore, 94 S.E.2d 491, 244 N.C. 512
R.I.—Coe v Zwetckhenbaum, 153 A.2d 517, 89 R.I. 358

47. Intervention

Hawaii—Guntert v Richardson, 394 P.2d 444, 47 Haw. 662

48. R.I.—Coe v Zwetckhenbaum, 153 A.2d 517, 89 R.I. 358

§ 6. Requisites of Submission

Library References

Submission of Controversy ¶5–9, 11.

page 563

53. Procedure by joint petition treated as submission by stipulation

S.D.—State Highway Commission v Sweetman Const. Co., 153 N.W.2d 682, 83 S.D. 27

Statute providing remedy repealed

N.C.—Spooner's Creek Land Corp v Styron, 172 S.E.2d 54, 276 N.C. 494

54. Pa.—Cselouch v Sariti, 52 Lack. Jur. 185

58. Hawaii—Guntert v Richardson, 394 P.2d 444, 47 Haw. 662

N.C.—Bragg Development Co v Braxton, 79 S.E.2d 918, 239 N.C. 427—Southeastern Baptist Theological Seminary, Inc v Wake County, 103 S.E.2d 472, 248 N.C. 420

59. N.Y.—Martin v Martin, 172 N.Y.S.2d 636, 5 A.D.2d 307

The legal question presented for adjudication should be clear and specific.^{60, 5}

60.5. Ky.—Matthews v Ward, 350 S.W.2d 500

66. Pa.—Cselouch v Sariti, supra, n. 54

67. N.Y.—Goodman v Human, 153 N.Y.S.2d 241, 2 A.D.2d 751—Martin v Martin, 172 N.Y.S.2d 636, 5 A.D.2d 307

70. N.C.—Bragg Development Co v Braxton, 79 S.E.2d 918, 239 N.C. 427

No controversy between interested parties shown

Mass.—Town of Wakefield v Attorney General, 138 N.E.2d 197, 334 Mass. 632.

page 564

71. N.Y.—Satz v Crimsval v Realty Corp., 144 N.Y.S.2d 850, 286 App. Div. 1023

§ 7. Affidavit of Reality of Controversy

81. Case held not within statute

N.Y.—Nott v Klein, 285 N.Y.S. 1025, 159 Misc. 35

§ 10. Operation and Effect of Submission

page 565

3. Attack on judgment claiming lack of jurisdiction of subject matter held not permissible

Cal.—Jackson v Jackson, 62 Cal. Rptr. 121, 253 C.A.2d 1026

5. Waiver of hearing

N.Y.—In re Sorock's Estate, 207 N.Y.S.2d 190, 25 Misc.2d 450

§ 11. Dismissal and Cancellation of Agreement for Submission

Library References

Submission of Controversy ¶16.

page 566

9. Mass.—North End Auto Park, Inc v Petringa Trucking Co., 150 N.E.2d 735, 337 Mass. 618

11. N.Y.—Gilbert v Village of Larchmont, 116 N.Y.S.2d 890, 280 App. Div. 1000—Graham v East 88th St. Corp., 122 N.Y.S.2d 634, 282 App. Div. 754—Royal Norwegian Government v Frango Corp., 135 N.Y.S.2d 168, 284 App. Div. 957, rearg. and app. den. 137 N.Y.S.2d 623, 826, 285 App. Div. 872—Capasso v Square Sanitarium, 140 N.Y.

Page 566

- S 2d 781, 285 App Div 1131—Cormeny v American Bosch Arma Corp., 183 N.Y.S.2d 47, 7 A.D.2d 912
20. N.Y.—Gingold v Apps, 123 N.Y.S.2d 707, 282 A.D. 345—Stell Mfg Corp v Century Industries, Inc., 260 N.Y.S.2d 547, 23 A.D.2d 281, motion den 211 N.E.2d 530, 16 N.Y.2d 874, 264 N.Y.S.2d 111, aff'd 213 N.E.2d 313, 16 N.Y.2d 1020, 265 N.Y.S.2d 902
22. N.Y.—Beaumont v Pennsylvania R. Co., 127 N.Y.S.2d 216, mod on oth grds 131 N.Y.S.2d 652, 284 App Div 354, aff'd 127 N.E.2d 80, 308 N.Y. 920, cert den 76 S.Ct. 75, 350 U.S. 838, 100 L.Ed. 747

§ 13. — Scope of Inquiry and Powers of Court in General

page 567

30. N.C.—City of Greensboro v Wall, 101 S.E.2d 413, 247 N.C. 516—Ahoskie Production Credit Ass'n v Whedbee, 110 S.E.2d 795, 251 N.C. 24
31. N.Y.—Friedman v Rothschild, 202 N.Y.S.2d 328, 10 A.D.2d 984—Ditmars-31' St Development Corp v Punia, 235 N.Y.S.2d 796, 17 A.D.2d 357
33. Hawaii—Chikasyue v Lota, 444 P.2d 904, 50 Haw 511, 589
- Ind.—Schadle v Miller, App., 162 N.E.2d 702, 131 Ind.App. 298, transf. den., Sup., 170 N.E.2d 662, 241 Ind. 170
- N.Y.—Goodman v Hyman, 153 N.Y.S.2d 241, 2 A.D.2d 751

Question raised by members of court, not by submission, not determined

- Hawaii—Kimura v Hawaii County, 417 P.2d 977, 49 Haw 336

37. N.Y.—Cormeny v American Bosch Arma Corp., 183 N.Y.S.2d 47, 7 A.D.2d 912.

Pa.—Logan v Aliquippa Borough, 20 Beaver 14

Statements or claims in briefs

- (1) N.Y.—Ditmars-31' St Development Corp v Punia, 235 N.Y.S.2d 796, 17 A.D.2d 357
- (2) N.Y.—Town of Pelham v City of Mount Vernon, 103 N.Y.S.2d 494, 278 App Div. 79, rev'd on oth grds 105 N.E.2d 604, 304 N.Y. 15, rearg. den 107 N.E.2d 85, 304 N.Y. 594
- (3) Other briefs

- N.Y.—Employers Mut Liability Ins Co of Wis v Aetna Cas & Sur Co., 181 N.Y.S.2d 813, 7 A.D.2d 853

Statute providing remedy repealed

- N.C.—Spooner's Creek Land Corp v Styron, 172 S.E.2d 54, 276 N.C. 494

38. Hawaii—Gunter v Richardson, 394 P.2d 444, 47 Haw 662

- N.Y.—Ditmars-31' St Development Corp v Punia, 235 N.Y.S.2d 796, 17 A.D.2d 357

- S.C.—Miller v Stuyvesant Ins Co of New York, 130 S.E.2d 913, 242 S.C. 322

39. Hawaii—Chikasyue v Lota, 462 P.2d 192, 51 Haw 443, 477

- N.Y.—167 Greenwich Realty Co v Kehoe, 158 N.Y.S.2d 1005, 3 A.D.2d 659, rearg. den 160 N.Y.S.2d 805, 3 A.D.2d 1009—Russell v Russell, 164 N.Y.S.2d 174, 3 A.D.2d 707—Cormeny v American Bosch Arma Corp., 183 N.Y.S.2d 47, 7 A.D.2d 912.

page 568

56. N.Y.—Satz v Cnmslaw Realty Corp., 144 N.Y.S.2d 850, 286 App Div 1023—Goodman v Hyman, 153 N.Y.S.2d 241, 2 A.D.2d 751—Russell v Russell, 164 N.Y.S.2d 174, 3 A.D.2d 1007—Martin v Martin, 172 N.Y.S.2d 636, 5 A.D.2d 307—Employers Mut Liability Ins Co of Wis v Aetna Cas & Sur Co., 181 N.Y.S.2d 813, 7 A.D.2d 853—Friedman v Rothschild, 202 N.Y.S.2d 328, 10 A.D.2d 984—Ditmars-31' St Development Corp v Punia, 235 N.Y.S.2d 796, 17 A.D.2d 357
- N.C.—Ahoskie Production Credit Ass'n v Whedbee, 110 S.E.2d 795, 251 N.C. 24
- Pa.—Logan v Aliquippa Borough, 20 Beaver 14

page 569

60. N.Y.—University of Buffalo v Leslie, 164 N.Y.S.2d 103, 4 A.D.2d 161

68. Pa.—Mount Vernon Hebrew Camps Inc v Wayne County Com'rs, 189 A.2d 924, 201 Pa.Super 5

§ 16. Appeal and Error

page 570

87. N.C.—Convent of Sisters of St Joseph of Chestnut Hill v City of Winston-Salem, 90 S.E.2d 879, 243 N.C. 316

89. N.C.—Southeastern Baptist Theological Seminary, Inc v Wake County, 103 S.E.2d 472, 248 N.C. 420

page 571

90. N.C.—Southeastern Baptist Theological Seminary, Inc v Wake County, 103 S.E.2d 472, 248 N.C. 420

91. Appeal decided on merits

- Pa.—Cooke v Borough of Greenville, 278 A.2d 182, 2 Pa.Cmwlth 417

SUBMIT.

3. Mo.—C.J.S. quoted in Nichols v. Pendley, 331 S.W.2d 673, 677

4. Mo.—C.J.S. quoted in Nichols v. Pendley, 331 S.W.2d 673, 677

Similarly defined

- (1) "Submit" means to yield to the will of another—People v. Bendig, 235 N.E.2d 284, 286, 91 Ill.App.2d 337

page 572

SUBORDINATION.

Similarly defined

- (1) "Subordination" means to place in a lower order or class, to make subject to or subservient—Providence Institution for Sav v Sims Tex Civ App., 435 S.W.2d 295, 298

SUBROGATION

§ 1. Definition

Library References

Subrogation §1.

Bogert, Trusts and Trustees § 23.

page 575

1. U.S.—C.J.S. cited in Chouest v A & P Boat Rentals, Inc., D.C.La., 321 F.Supp. 1290, 1292, rev'd in part on oth grds., C.A., 472 F.2d 1026, cert den 93 S.Ct. 3012, 412 U.S. 949, 37 L.Ed.2d 1002

- Ga.—Southern Ry. Co v Overnite Transp. Co., 158 S.E.2d 387, 223 Ga. 825—Liberty Mut Ins Co v Alisco Const., Inc., 240 S.E.2d 899, 144 Ga.App. 307

- Kan.—Cnss v Folger Drilling Co., 407 P.2d 497, 195 Kan. 552—Hartford Fire Ins Co v Western Fire Ins., 597 P.2d 622, 226 Kan. 197

- Mo.—C.J.S. cited in State ex rel McCubbin v McMillan, 349 S.W.2d 453, 461

- Neb.—State Auto and Cas Underwriters v Farmers Ins. Exchange, 282 N.W.2d 601, 204 Neb. 414

- Tenn.—C.J.S. quoted in Castleman Const. Co v Pennington, 432 S.W.2d 669, 674, 222 Tenn. 82

- Tex.—Fisher's Fine Furniture v Rice Food Market, Civ App., 474 S.W.2d 539, err. dism.

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- N.J.—Matter of Guardianship of Jones, 406 A.2d 1331, 170 N.J.Super 478

2. U.S.—Wolverine Ins Co v Phillips, D.C.Iowa, 165 F.Supp. 335, app. dism., C.A., 283 F.2d 518—U.S. v Greene, D.C.Ill., 266 F.Supp. 976

- Ariz.—D.W. Jaquays & Co v. First Sec. Bank, 419 P.2d 85, 101 Ariz. 301

- Cal.—Employers Mut Liability Ins Co. of Wis v. Pacific Indem. Co., 334 P.2d 658, 167 C.A.2d 369.

- Fla.—Russell v Shelby Mut. Ins. Co., 128 So.2d 161, cert. discharged, Sup., 137 So.2d 219—DeCespedes v Prudence Mut. Cas. Co. of Chicago, Ill., App., 193 So.2d 224, aff'd, Sup., 202 So.2d 561

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- Ohio—American Ins. Group v McCowin, 218 N.E.2d 746, 7 Ohio App.2d 62—Aetna Cas. & Sur. Co. v Hensgen, 258 N.E.2d 237, 22 Ohio St.2d 83

- Tex.—McBroome-Bennett Plumbing, Inc. v Villa France, Inc., Civ App., 515 S.W.2d 32, err. ref. no rev. err.

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- (1) U.S.—Maryland Cas. Co. v Bank of Charlotte, D.C.N.C., 227 F.Supp. 649. Aff'd in part and rev'd in part on oth grds., C.A., 340 F.2d 550

- Me.—Unity Tel. Co v Design Service Co., 201 A.2d 177, 160 Me. 188

- N.C.—Dowdy v Southern Ry. Co., 75 S.E.2d 639, 237 N.C. 519

- (2) Mass.—Provident Co-op Bank v James Talcott, Inc., 260 N.E.2d 903, 358 Mass. 180

- (7) N.M.—State Farm Mut. Auto Ins. Co. v Foundation Reserve Ins. Co., 431 P.2d 737, 78 N.M. 359

- (8) Vt.—Walker Process Equipment Co. v Cooley Bldg. Corp., 278 A.2d 714, 129 Vt. 333—Norfolk & Dedham Fire Ins. Co. v Aetna Cas. & Sur. Co., 318 A.2d 659, 132 Vt. 341

(11) Other definitions

- U.S.—Rehrer v Service Trucking Co., D.C.Del., 112 F.Supp. 24—Jorski Mill & Elevator Co. v Farmers Elevator Mut. Ins. Co., C.A. Okl., 404 F.2d 143—Thurston Nat. Ins. Co. v Zurich Ins. Co., D.C. Okl., 296 F.Supp. 619

- Ariz.—Harleysville Mut. Ins. Co. v Lea, 410 P.2d 495, 2 Ariz. App. 538

- Ill.—First Nat. Bank of Belleville v Heatherly, 291 N.E.2d 280, 8 Ill.App.3d 1073

- Kan.—Halpin v Frankenberger, 644 P.2d 452, 231 Kan. 344

- La.—Bond v Commercial Union Assur. Co., 407 So.2d 401, on remand, App. 3 Cir., 415 So.2d 572

- Mass.—Frost v Porter Leasing Corp., 436 N.E.2d 387, 386 Mass. 425

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- N.J.—Busch v Home Ins. Co., 234 A.2d 250, 97 N.J. Super 54

- N.M.—Fireman's Fund American Ins. Companies v Phillips, Carter, Reister & Associates, Inc., App., 546 P.2d 72, 89 N.M. 7, cert. den 546 P.2d 70, 89 N.M. 5

- N.Y.—American Motorists Ins. Co. v Snyder, 313 N.Y.S.2d 200, 63 Misc.2d 690

- Okla.—Fidelity & Cas. Co. of New York v National Bank of Tulsa, 388 P.2d 497—Commercial Union Fire Ins. Co. v Kelly, 389 P.2d 641

- Pa.—Olin Corp. (Plastics Division) v Workmen's Compensation Appeal Bd., 324 A.2d 813, 14 Pa.Cmwlth 603

- Tex.—Forney v Jorrie, Civ App., 511 S.W.2d 379, err. ref. no rev. err.

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- Wis.—First Nat. Bank of Columbus v Hansen, 267 N.W.2d 367, 84 Wis.2d 422

page 576

3. U.S.—Chittick v State Farm Mut. Auto Ins. Co., D.C.Del., 170 F.Supp. 276

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Ky—Employers Mut Liability Ins Co of Wis v Griffin Const Co, 280 S W 2d 179, 53 A L R 2d 967.
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RI—Hospital Service Corp of RI v Pennsylvania Ins Co, 227 A 2d 105, 101 R I 708.
Tenn—Wilson v Tennessee Farmers Mut Ins Co, 411 S W 2d 699, 219 Tenn 560.
Va—Collins v Blue Cross of Virginia, 193 S E 2d 782, 213 Va. 540, 73 A L R 3d 1134.

Subrogation amounts to an assignment

US—Rohner, Gehrig & Co v Capital City Bank, C A Ga., 655 F.2d 571.
Ariz—State Farm Fire & Cas Co v Knapp, 484 P 2d 180, 107 Ariz 184.

Assignment distinguished

Mo—Kroeker v State Farm Mut Auto Ins Co, App., 466 S W 2d 105.

Not practically different from assignment of cause of action

Cal—Finney v Manpower, Inc., 177 Cal Rptr 74, 123 C A 3d 1066.
Conn—Berlinski v Ovellette, 325 A 2d 239, 164 Conn 482.

Lien distinguished

NY—Hayes v New York City Health and Hospitals Corp., 412 N Y S 2d 324, 97 Misc 2d 748.

5. US—Jorski Mill & Elevator Co v Farmers Elevator Mut Ins Co, C A Okl., 404 F 2d 143—Millers Mut Fire Ins Co of Tex v Farmers Elevator Mut Ins Co, C A Tex., 408 F 2d 776—Thurston Nat Ins Co v Zurich Ins Co, D C Okl., 296 F Supp 619.

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page 577

6. U.S.—Public Service Co of Okl v Black and Veatch, Consulting Engineers, D C Okl., 328 F.Supp. 14.

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7. US—Continental Cas. Co v Canadian Universal Ins Co, C A La., 605 F 2d 1340, cert. den 100 S Ct 1317, 445 U.S. 929, 63 L Ed 2d 762.

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8. U.S.—Maryland Cas. Co v Brown, D C Ga., 321 F Supp 309.

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Ill—Bost v Paulson's Enterprises, Inc., 343 N E 2d 168, 36 Ill App 3d 135.

Okl—Lawyers' Title Guaranty Fund v Sanders, 571 P 2d 454.

10. US—Jorski Mill & Elevator Co v Farmers Elevator Mut Ins Co, C A Okl., 404 F 2d 143.

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§ 2. Origin, Nature, and Purpose of Doctrine

page 578

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Tenn—C.J.S. quoted at length in Castleman Construction Company v Pennington, 432 S W 2d 669, 674, 222 Tenn 82.

15. US—Hartford Acc & Indem Co v First Nat Bank & Trust Co of Tulsa, Okl., C.A.Okl., 287 F 2d 69—Compania Anonima Venezolana De Navegacion v A J Perez Export Co, C A La., 303 F 2d 692, cert den 83 S Ct 321, 371 U S 942, 9 L Ed 2d 276.

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Or—MacNab v Fireman's Fund Ins Co., 413 P 2d 413, 243 Or. 267—Mayer v First Nat Bank of Or., 489 P 2d 385, 260 Or 119.

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17. US—Atlantic Mut Ins Co v Cooney, C A Cal., 303 F 2d 253—Western Cas & Sur Co v Brooks, C A W Va 362 F 2d 486.

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page 579

18. US—Petition of New York Trap Rock Corp., D C N Y., 172 F Supp 638—US v Com of Pa., Dept of Highways, D C Pa., 349 F Supp 1370.

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19. U.S.—American Fidelity & Cas Co v U S Fidelity & Guaranty Co, C A Miss., 305 F 2d 633—Travelers Indem Co v Peacock Const Co, C A Fla., 423 F 2d 1153.

Cal—Liberty Mut. Fire Ins Co v Auto Spring Supply Co., 131 Cal Rptr 211, 59 C A 3d 860.

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(2) Md—City of Baltimore v Blibaum, 374 A.2d 1152, 280 Md 652

(4) U.S.—Maryland Cas Co v Bank of Charlotte, D.C.N.C., 227 F.Supp 649 Affd in part and rev'd in part on oth grds., C.A., 340 F.2d 550—Bunge Corp v St Louis Terminal Field Warehouse Co., D.C.Miss., 295 F.Supp 1231

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page 580

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Not unique to field of suretyship or insurance
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22. Ark—Baker v Leigh, 385 S.W.2d 790, 238 Ark 918.

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page 581

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page 582

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page 583

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38. Tenn.—State v. Holland, 367 S W 2d 791, 51 Tenn App 344

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§ 3. — Legal Subrogation

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page 584

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Assignment is unnecessary, etc.

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§ 3 SUBROGATION

Page 584

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Right of surety

(3) Subrogation not precluded by fact that surety borrowed money to pay principal's debt
US—In re Worley, D C Va, 251 F Supp 725

(4) Other matters

US—President and Directors of Georgetown College v Madden, D C Md, 505 F Supp 557, affd in part, app dism in part, C A, 660 F 2d 91

Implies liability

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page 585

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The rules relating to the right of legal subrogation in conventional debts also apply to delictual obligations.^{52.5}

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page 586

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Express or implied agreement

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City charter provision

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page 587

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Subrogation ⇨ 29

page 588

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page 589

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page 590

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page 591

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page 592

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page 593

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§ 5 SUBROGATION

Page 593

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Subrogation ⇐ 1, 40.

page 594

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page 595

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page 596

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Disregard of stop payment order
(2) Provision of Uniform Commercial Code permits subrogation to rights of drawer or maker only when drawer or maker has right to recover from payee or holder
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66. Tenn—C.J.S. quoted in Castleman Const Co v Pennington, 432 S W 2d 669, 676, 222 Tenn 82

page 597

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page 598

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83. Ariz—Peterman—Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz, Phoenix, 408 P 2d 841, 2 Ariz App 321

§ 7. Necessity for Obligation and Right or Privilege Aiding in Enforcement Thereof

page 599

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Right of recovery
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page 600

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page 601

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§ 9. — Volunteers

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Subrogation ⇨26.

page 602

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Statutory exceptions strictly construed

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Not acting officially

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page 603

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Page 603

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Person not a volunteer

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page 604

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Property attached to secure payment

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Wife's economic interest in husband's financial well-being

Or—Hult v Ebinger, 352 P 2d 583, 222 Or 169

Right dependent on equitable right as against other claimants

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Payment on behalf of subcontractor

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page 605

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page 606

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page 607

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page 608

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Rule subject to limitation

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page 609

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page 610

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§ 11. When Right to Subrogation Accrues

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94. Agent of state

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page 611

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Prerequisites to impairment of subrogation rights

La—Papania v Aetna Cas & Sur Co., App., 291 So 2d 908, writ den, Sup., 294 So 2d 835.

Release of underlying obligation.

Where a person settles claims against two sets of tortfeasors, one set of tortfeasors may not pursue the remedy of equitable subrogation against the other.⁷⁵

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Transfer of interest after discharge of encumbrance

Fla—Meckler v Weiss, 80 So 2d 608

page 612

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No priority where payment not defendant's obligation

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Wis—D'Angelo v Cornell Paperboard Products Co., 120 N W 2d 70, 19 Wis.2d 390

An assignment is a form of conventional subrogation, etc.

Md—Security Ins Co. of New Haven—The Connecticut Indem Co v Mangan, 242 A 2d 482, 250 Md 241.

(2) Assignment based on payment of partnership debts

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12. Ga—Harrell v Carlton, 232 S E 2d 384, 141 Ga App 41

Page 612

Ill—Remsen v Midway Liquors, Inc., 174 N.E.2d 7, 30 Ill App 2d 132

Remedy kept alive for benefit of person paying debt

Ill—Damhesel v Hardware Dealers Mut Fire Ins Co., 209 N.E.2d 876, 60 Ill App 2d 279

14. N.Y.—King v Pelkofski, 266 N.Y.S.2d 61, 24 A.D.2d 1003, app dism 219 N.E.2d 884, 18 N.Y.2d 688, 273 N.Y.S.2d 438, affd and mod on oth grds 229 N.E.2d 435, 20 N.Y.2d 326, 282 N.Y.S.2d 753

15. Tex.—C.J.S. cited in Fishel's Fine Furniture v Rice Food Market, Civ App, 474 S.W.2d 539, 541, err dism

16. U.S.—Potomac Ins Co v Stanley, C.A.Ind. 281 F.2d 775—U.S. Bureau of Revenue of State of N.M., D.C.N.M., 217 F.Supp 849—In re Bessemer Materials, Inc., D.C.Ala., 225 F.Supp 314—Maryland Cas Co v Bank of Charlotte, D.C.N.C., 227 F.Supp 649, affd in part and revd in part on oth grds, C.A., 340 F.2d 550—Truck Ins Exchange v Board of County Road Com'rs of Montcalm County, D.C.Mich., 244 F.Supp. 782—Barrett v U.S., Ct Cl., 367 F.2d 834, 177 Ct Cl 380

D.C.—Travelers Ins. Co v District of Columbia, App, 382 A.2d 269

Ill—Dworak for Use of Allstate Ins Co v Tempel, 152 N.E.2d 197, 18 Ill App 2d 225, affd 161 N.E.2d 258, 17 Ill 2d 181

La—C.J.S. cited in Stevens v Mitchell, 102 So 2d 237, 242, 234 La 977—Williams v Manonnewaux, App, 116 So 2d 57, revd on oth grds 124 So 2d 919, 240 La 713—White v Plodzik, App, 213 So 2d 68

S.C.—Meaders Bros v Skelton, 107 S.E.2d 1, 234 S.C. 134

17. U.S.—U.S. v Halton Tractor Co, C.A.Cal., 258 F.2d 612—Compania Anonima Venezolana De Navegacion v A J Perez Export Co, C.A.La., 303 F.2d 692, cert den 83 S.Ct. 321, 371 U.S. 942, 9 L.Ed.2d 276

Mich—Michigan Medical Service v Sharpe, 64 N.W.2d 713, 339 Mich. 574

Miss—C.J.S. cited in American Nat Ins Co. v U.S. Fidelity & Guaranty Co, 215 So 2d 245, 250

Va—Thompson v Miller, 79 S.E.2d 643, 195 Va 513 Wash—Credit Bureau Corp v Beckstead, 385 P.2d 864, 63 Wash 2d 183

Wis—C.J.S. cited in Employers Ins of Wausau v Sheedy, 166 N.W.2d 220, 222, 42 Wis 2d 161

page 613

18. U.S.—C.J.S. cited in First Farmers and Merchants Nat Bank of Troy v Columbia Cas Co, C.A.Ala., 226 F.2d 474, 475—Barrett v U.S., Ct Cl., 367 F.2d 834, 177 Ct Cl 380

Mo.—Holt v Myers, App, 494 S.W.2d 430

N.J.—Sanner v Government Emp Ins. Co, 376 A.2d 180, 150 N.J.Super. 488, affd 383 A.2d 429, 75 N.J. 460

Tex.—Anchor Cas Co. v Robertson Transport Co, Civ App, 389 S.W.2d 135, err ref no rev err.—C.J.S. cited in Insurance Co of North America v Fredonia State Bank, Civ App, 469 S.W.2d 248, 252

19. U.S.—U.S. Fidelity & Guaranty Co v U.S., D.C. Md., 164 F.Supp 703—Hartford Acc & Indem Co v First Nat Bank & Trust Co of Tulsa, Okl., C.A.Okla., 287 F.2d 69

Cal—Jusi v City Title Ins Co., 28 Cal Rptr 893, 213 C.A.2d 582

Fla—Eagle Family Discount Stores, Inc v Board of County Com'rs of Dade County, App, 403 So 2d 558

La—Williams v Marionnewaux, 116 So.2d 57, revd on oth grds. 124 So.2d 919, 240 La 713—Great Am. Ins Co v Hill, App, 125 So.2d 669—C.J.S. cited in Ohio Cas Ins Co v Nunez, 134 So.2d 309, 311

Mich—Michigan Medical Service v Sharpe, supra, n 17

20. U.S.—National Sur Corp v Western Fire & Indem Co, C.A.Tex., 318 F.2d 379—U.S. v Bureau

of Revenue of State of N.M., D.C.N.M., 217 F.Supp 849—American Cas Co of Reading, Pa v Line Materials Industries, C.A.N.M., 332 F.2d 393, cert den 85 S.Ct 646, 379 U.S. 960, 13 L.Ed.2d 555—Truck Ins Exchange v Board of County Road Com'rs of Montcalm County, D.C.Mich., 244 F.Supp 782—Northwestern Mut Ins Co v Jackson Vibrators, Inc., C.A.Mich., 402 F.2d 37—C.J.S. cited in Winston Bros Co v U.S., D.C.Minn., 371 F.Supp 130, 136

Cal—Hartman v Smith, 33 Cal Rptr 147, 219 C.A.2d 415

Ill—New Amsterdam Cas Co v Gern, 133 N.E.2d 723, 9 Ill App 2d 545—Dworak for Use of Allstate Ins Co v Tempel, 152 N.E.2d 197, 18 Ill App 2d 225, affd 161 N.E.2d 258, 17 Ill 2d 181—McCormick v Zander Reum Co, 184 N.E.2d 882, 25 Ill 2d 241

Ind—Merchants Nat Bank & Trust Co v Winston, 159 N.E.2d 296, 129 Ind App 588

La—Great Am Indem Co v Laird, App, 73 So 2d 6—C.J.S. cited in Ohio Cas Ins Co v Nunez, 134 So 2d 309, 311

Minn—Employers Liability Assur Corp v Morse, 111 N.W.2d 620, 261 Minn 259

N.Y.—State Bank of Albany v Dan-Bar Contracting Co, 212 N.Y.S.2d 386, 12 A.D.2d 416, app den 218 N.Y.S.2d 587, 14 A.D.2d 459, affd 187 N.E.2d 19, 12 N.Y.2d 804, 235 N.Y.S.2d 835

Tex—Fishel's Fine Furniture v Rice Food Market, 474 S.W.2d 539, err dism

21. U.S.—Maryland Casualty Co v Independent Metal Products Co, D.C.Neb. 99 F.Supp 862, affd, C.A., 203 F.2d 838—Atlantic Mut Ins Co v Poseidon Schiffahrt, D.C.Ill., 206 F.Supp 15, affd, C.A., 313 F.2d 872, cert den 84 S.Ct 56, 375 U.S. 819, 11 L.Ed.2d 53

Tex—Williams v Advanced Technology Center, Inc, Civ App, 537 S.W.2d 531, err ref no rev err

24. Mich—C.J.S. quoted in Earl Dubey & Sons v Macomb Contracting Corp, 296 N.W.2d 582, 585, 97 Mich App 553

page 614

27. U.S.—Atlantic Mut Ins Co v Cooney, C.A.Cal., 303 F.2d 253—C.J.S. cited in Maryland Cas Co v Brown, 321 F.Supp 309, 312

Ga—C.J.S. cited in Southern Ry Co v Malone Freight Lines, 330 S.E.2d 371, 376, 174 Ga App 405

Pa—Demmery v National Union Fire Ins Co, 232 A.2d 21, 210 Pa Super 193

Wis.—C.J.S. cited in D'Angelo v Cornell Paperboard Products Co, 120 N.W.2d 70, 76, 19 Wis 2d 390

28. U.S.—C.J.S. cited in Carolina Cas Ins Co v Local No 612 Intern Broth of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Ala., 136 F.Supp 941, 943

Cal—Robinson v Felch, 318 P.2d 759, 155 C.A.2d 842

Wis—D'Angelo v Cornell Paperboard Products Co, 120 N.W.2d 70, 19 Wis 2d 390

29. U.S.—C.J.S. cited in Carolina Cas Ins Co v Local No 612 Intern Broth of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Ala., 136 F.Supp 941, 943

The grant of a subrogation right, like a sale in the ordinary commercial sense, connotes a genuine economic transaction effecting a change in economic relationship between the parties and the property.^{31 5}

31.5. U.S.—Holbrook v C.I.R., C.A.Tex., 450 F.2d 134, reh den 451 F.2d 1350

§ 15. Persons Interested in Administration of Estates

Library References Subrogation —19.

33. Fla—Furlong v Leybourne, 138 So.2d 352

Kan—In re Bertrand's Estate, 363 P.2d 412, 188 Kan 531

Miss—C.J.S. quoted at length in Kellner v Kellner, 129 So 2d 391, 395, 241 Miss 53

Persons claiming under deceased surety or guarantor

Fla—Ulery v Asphalt Paving, Inc., App, 119 So 2d 432

34. La—Sanders v Sanders, App, 85 So 2d 61

page 615

37. Ohio—McAdams v Bolsinger, 129 N.E.2d 878

page 616

51. Pa—In re Caimotto's Estate, 15 Cumb 81, 15 Fiduciary 7—In re Green's Estate, 43 Wash Co 127

52. N.M.—In re Skarda's Will, 537 P.2d 1392, 88 N.M. 130

§ 16. Persons Liable for Loss or Injury Caused by Fault of Another

Library References Subrogation —11.

55. Ill—C.J.S. quoted at length in Remsen v Midway Liquors, Inc., 174 N.E.2d 7, 12, 30 Ill App 2d 132

Tenn—C.J.S. quoted at length in McGee v Wilson County, 574 S.W.2d 744, 747

56. U.S.—Virginia Metal Products Corp v Hartford Acc & Indem Co, C.A.N.Y., 219 F.2d 931—Gulf Atlantic Transp Co v Becker County Sand & Gravel Co, D.C.N.C., 122 F.Supp 13—Aetna Ins Co v U.S., 159 F.Supp 831, 142 Ct Cl 771, reh den 162 F.Supp 442—Petition of New York Trap Rock Corp, D.C.N.Y., 172 F.Supp. 638—U.S. v Raley Contracting Co, D.C.Miss., 210 F.Supp 54—National Cash Register, Co v UN-ARCO Industries, Inc., C.A.Ill., 490 F.2d 285

Fla—DeCespedes v Prudence Mut. Cas Co of Chicago, Ill., App, 193 So 2d 224, affd., Sup, 202 So 2d 561

Hawai—Alamida v Wilson, 495 P.2d 585, 53 Haw 398

Ill—Geneva Const Co v Martin Transfer & Storage Co, 114 N.E.2d 906, 351 Ill App. 289, affd 122 N.E.2d 540, 4 Ill 2d 273—C.J.S. cited in Geneva Const Co v Martin Transfer & Storage Co, 122 N.E.2d 540, 544, 546, 4 Ill.2d 273—Dworak for Use of Allstate Ins Co v Tempel, 152 N.E.2d 197, 18 Ill App 2d 225, affd 161 N.E.2d 258, 17 Ill 2d 181—People for Use of Illinois State Police v Hamm, 374 N.E.2d 13, 15 Ill Dec 720, 58 Ill App 3d 177

Kan—Revroad v Kansas Power & Light Co, 388 P.2d 832, 192 Kan 343

La—Cousin v Hornsby, App., 87 So.2d 157

Minn—New York Cas Co v Szazenski, 60 N.W.2d 368, 240 Minn 202

Mo—Cole v Morris, 409 S.W.2d 668—C.J.S. cited in Automobile Club Inter-Insurance Exchange By and Through Club Exchange Corp. v Farmers Ins Co., Inc., App, 646 S.W.2d 838, 840.

Neb—Rawson v City of Omaha, 322 N.W.2d 381, 212 Neb 159

N.Y.—High Point Chemical Co v New York Federal Sav & Loan Ass'n, 241 N.Y.S.2d 671, 39 Misc.2d 974

Pa—Employers Mut. Liability Ins Co of Wis v Melcher, 107 A.2d 874, 378 Pa 598—Helm's Exp, Inc., v Savage, 17 D & C 2d 109—Bell Tel. Co v Roe, 108 P.L.J 381—Topelski v Universal South Side Autos, Inc., 180 A.2d 414, 407 Pa 339—Demmery v National Union Fire Ins Co, 85 Dauph 316, affd. 232 A.2d 1, 210 Pa Super 193.

Tenn—Norman v Tennessee State Bd of Claims, 533 S.W.2d 719.

Wis—Interstate Fire & Cas Co v City of Milwaukee, 173 N.W.2d 187, 45 Wis 2d 331

Statute inapplicable

Ala—City of Birmingham v Walker, 101 So 2d 250, 267 Ala 150, 70 A L R 2d 464

Conn—Regal Steel, Inc v Farmington Ready Mix, Inc, 414 A 2d 816, 36 Conn Super 137

Effect of release of wrongdoer

Or—United Pac Ins Co v Schetky Equipment Co, 342 P 2d 766, 217 Or 422

Original tort-feasor

US—Fietzer v Ford Motor Co, D C Wis, 383 F Supp 33

58. Mo—C.J.S. quoted in Korek v State Farm Mut Auto Ins Co, App, 466 S W 2d 105, 110 Utah—Holmstead v Abbott G M Diesel, Inc, 493 P 2d 625, 27 Utah 2d 109

However, under a statute so providing a collateral source which provides medical expenses or other benefits to a plaintiff in a medical malpractice case is precluded from obtaining reimbursement from the medical malpractice defendant.^{58 5}

58.5 Cal—Barne v Wood, 207 Cal Rptr 816, 689 P 2d 446, 37 C 3d 174

page 617

59. Ark—Lyman Lamb Co v Arkansas Shell Homes, Inc, 406 S W 2d 708, 241 Ark 83

61. US—Simpson v Townsley, C A Kan., 283 F 2d 743, 92 A L R 2d 526—Munson v US, C A Ohio, 380 F 2d 976

Ala—C.J.S. cited in American Southern Ins Co v Dime Taxi Service, Inc, 151 So 2d 783, 787, 275 Ala 51, 4 A L R 3d 611

N.Y.—Kipp v International Harvester Co., 200 NY S 2d 977, 23 Misc 2d 649, stating Ohio law, mod on oth grds 202 N.Y.S.2d 959, 11 A D 2d 896

Tex—Knutson v Morton Foods, Inc, Civ App, 580 S W 2d 876, err gr

62. Cal—Robinson v Felch, 318 P 2d 759, 155 C A 2d 842—Heves v Kershaw, 17 Cal Rptr 837, 198 C A 2d 340

Judgment against operator

(2) Failure to pass on operator's negligence

Cal—Skeen v Payne, 7 Cal Rptr 185, 183 C A 2d 605

64. US—Aetna Ins Co v US, 159 F Supp 831, 142 Ct Cl 771, reh den 162 F Supp. 442

Miss—Presley v American Guarantee & Liability Ins Co, 116 So 2d 410, 237 Miss 807

N.J.—George M Brewster & Son v Catalytic Const Co, 109 A 2d 805, 17 N J 20

65. Overlapping terms

Idaho—May Trucking Co v International Harvester Co, 543 P 2d 1159, 97 Idaho 319

67. Ala—City of Birmingham v Walker, 101 So 2d 250, 267 Ala 150, 70 A L R 2d 464.

Ga.—Southern Nitrogen Co v Stevens Shipping Co, 151 S E 2d 916, 114 Ga App 581

Wages and medical expenses

(7) The subrogation rights of a municipal corporation or any other person paying hospital charges with respect to the lien for such charges are governed by statutory provisions

Ill.—Sullivan v Sudiak, 333 N.E.2d 60, 30 Ill App 3d 899

Va.—City of Richmond v Hanes, 122 S E 2d 895, 203 Va 102

(8) Under Federal Medical Care Recovery Act

US—Phillips v. Trame, D C Ill., 252 F Supp 948

(9) Other matters

La—Pringle-Associated Mortg. Corp v Eanes, 226 So.2d 502, 254 La. 705.

page 618

68. Idaho—C.J.S. quoted in Williams v Johnston, 442 P 2d 178, 186, 92 Idaho 292

Tort-feasor settling with injured party

Ky—Com Dept of Transp, Bureau of Highways v All Points Const Co, App, 566 S W 2d 171

70. US—C.J.S. quoted in US Lines, Inc v US, C A Ga, 470 F 2d 487, 493

Ga—C.J.S. quoted in Southern Nitrogen Co v Stevens Shipping Co, 151 S E 2d 916, 921, 114 Ga App 581

N.M.—Fireman's Fund American Ins Companies v Phillips, Carter, Reister & Associates, Inc, App, 546 P 2d 72, 89 N M 7, cert den 546 P 2d 70 89 N M 5

Likewise, where by statute the right of action for wrongful death vests in the personal representative one who discharges the liability has no right of subrogation.^{70 5}

70.5. US—Crab Orchard Imp Co v Chesapeake & O Ry Co, 33 F Supp 580, affd 115 F 2d 277 cert den 61 S Ct 807, 312 US 702, 85 L Ed 1135

71. Mo—Holt v Myers, App, 494 S W 2d 430
N.J.—Daily v Somborg, 146 A 2d 676, 28 N J 372, 69 A L R 2d 1024

Joint tort-feasor

(1) N.C.—Nationwide Mut Ins Co v Bynum, 148 S E 2d 114, 267 N C 289

§ 17. Persons Jointly or Jointly and Severally Liable for Same Debt**Library References****Subrogation ⇨3.**

74. US—Denver & R G W R Co v Goldman, Sachs & Co, C A Colo, 212 F 2d 627—In re Parker, Bkrtcy Ala, 10 B R 562

Cal—St Paul Fire & Marine Ins Co v Murray Plumbing & Heating Corp, 135 Cal Rptr 120, 65 C A 3d 66.

Ill—C.J.S. cited in Pozsgay v Free, 409 N E 2d 554, 557, 42 Ill Dec 939, 87 Ill App 3d 1113

La—Keller v Thompson, App, 121 So 2d 575—R F Mestayer Lumber Co v Cusack, App, 141 So 2d 166—Harvey v Travelers Ins Co, App, 163 So 2d 915—Danks v Maher, App, 177 So 2d 412—La-grue v Murhee, App, 291 So 2d 844, application den, Sup, 294 So 2d 829

N.J.—Pennsylvania Greyhound Lines, Inc v Rosenthal, 102 A 2d 587, 14 N J 372

page 619

78. US—C.J.S. quoted in In re Chemo Puro Mfg Corp, 202 F Supp 140, 142, affd, C A, 309 F 2d 65

Cal—American Title Co v Anderson, 125 Cal Rptr 24, 52 C A 3d 255

N.J.—Baird v Moore, 141 A 2d 324, 30 N J Super 156

§ 18. — Joint Mortgagors and Vendees

80. Fla—C.J.S. cited in Meckler v Weiss, 80 So 2d 608, 609

La—Hilgenfeld v Hilgenfeld, App, 180 So 2d 236

Md—Aiello v Aiello, 302 A 2d 189, 268 Md 513

Wis—Eloff v Riesch, 111 N W 2d 578, 14 Wis 2d 519

§ 19. — Joint Judgment Debtors**page 620**

86. La—Killian v Modern Iron Works, Inc, App, 96 So 2d 377

Equity will not permit shifting of obligation

Cal—American Title Co v Anderson, 125 Cal Rptr 24, 52 C A 3d 255.

87. Fla—Meckler v Weiss, 80 So 2d 608

La—Casualty Reciprocal Exchange v Richey Drilling & Well Service, App, 137 So 2d 127

Person held not jointly liable

Okla—Bank of Meeker v Hair, 261 P 2d 870

20. Limited partners entitled to subrogation

Ill—Northern Illinois Gas Co v Hartnett-Shaw Environmental, Inc, 368 N E 2d 742, 53 Ill App 3d 562.

§ 21. — Cotenants**page 621**

97. Wash—Walters v Walters, 466 P 2d 174, 1 Wash App 849

98. Ala—Draper v Sewell, 82 So 2d 303, 263 Ala 250

Cal—C.J.S. cited in A F C, Inc v Brockett, 64 Cal Rptr 771, 773, 257 C A 2d 40—Caito v United California Bank, 144 Cal Rptr 751, 516 P 2d 466, 20 C 3d 694

Fla—Meckler v Weiss, supra, n 87

Wash—Cook v Vennigerholz, 269 P 2d 824, 44 Wash 2d 612

§ 23. — Subrogation of Parties Liable on Instrument**Library References****Subrogation ⇨4.**

2. La—Gisclair v First Nat Bank of Lafayette, App, 180 So 2d 595

Tex—W T Burton Co v Keown Contracting Co., Civ App, 353 S W 2d 909, err ref no rev err

6. US—Universal CIT Credit Corp v Guaranty Bank & Trust Co, D C Mass, 161 F Supp 790

Colo.—American Nat Bank of Denver v First Nat Bank of Denver, 277 P 2d 951, 130 Colo 557

D.C.—Ammerman v Miller, C A, 488 F 2d 1285, 159 US App D C 385

Fla—Freed v Giuliani, App, 164 So 2d 234

Ind—American Nat Bank & Trust Co, v St Joseph Valley Bank, 389 N E 2d 379, 180 Ind App 546, reh den 391 N E 2d 685, 180 Ind App 546

N.J.—South Shore Nat Bank v Donner, 249 A 2d 25, 104 N J Super 169

N.Y.—Sunshine v Bankers Trust Co, 314 N.E.2d 860, 34 N Y 2d 404, 358 N Y S 2d 113

Okla—C.J.S. cited in Moyer v Colyer, 283 P 2d 815, 818

Pa—Aljax Corp v Connecticut Mut Life Ins Co, 333 A 2d 469, 458 Pa 57

page 622

7. N.M.—Johnson v. Sowell, 459 P 2d 839, 80 N M 677

8. US—In re Appliance Packing & Warehousing Corp, C A N Y, 475 F 2d 1011

Mass—Ronan v Ronan, 159 N E 2d 653, 339 Mass 460

Ohio—Rainbow Stone Co v Ten Color Stone Co, App, 141 N E 2d 266

11. N.J.—Bruno v Collective Federal Sav and Loan Ass'n, 370 A 2d 874, 147 N J Super 115

Pa—Aljax Corp v Connecticut Mut Life Ins Co, 333 A 2d 469, 458 Pa 57

15. Fla—Furlong v Leybourne, App, 138 So 2d 352

N.Y.—Pearns v Goldschmidt, 325 N Y S 2d 506, 37 A.D.2d 1001

Or—Reimann v Hybertsen, 550 P 2d 436, 275 Or 235, mod. on oth grds 553 P 2d 1064, 276 Or 95

Basis of rule

Ind—American Nat Bank & Trust Co v St Joseph Valley Bank, 389 N E 2d 379, 180 Ind App 546, reh den 391 N E 2d 685, 180 Ind App 546

Tex—Eggleston v George Braun Packing Co, Civ App, 470 S W 2d 69

Statute inapplicable

US—In re Appliance Packing & Warehousing Corp, D C N Y, 358 F Supp 84, affd, C A, 475 F 2d 1011

16. Conn.—Savings Bank of Manchester v Kane, Com Pl, 396 A 2d 952, 35 Conn Sup 82

18. Comaker

La—Soileau v Gibbs, 87 So 2d 312, 229 La 976

page 623

31. Coobligor

U.S.—In re Appliance Packing & Warehousing Corp., D C N Y, 358 F Supp 84, affd, C A, 475 F 2d 1011

§ 25. Persons Acting in Representative, Fiduciary, or Official Capacity

Library References Subrogation ⇨10.

page 624

42. Cal.—Grant v De Otte, 265 P 2d 952, 122 C A 2d 724

43. Ga.—National Life Assur Co of Canada v Massey-Ferguson Credit Corp., 220 S E 2d 793, 136 Ga App 311

page 625

In other instances a receiver has been deemed entitled to subrogation.^{49.5}

49.5. Ga.—Parramore v Williams, 109 S E 2d 745, 215 Ga 179

A corporate officer's liability for failure to collect, account for, and pay over corporate taxes being separate from the liability of the corporation, no right of subrogation exists to afford priority over other tax claims.^{50.5}

50.5. U.S.—Singer v District Director of Internal Revenue, C A N Y, 354 F 2d 992.

§ 26. — Agent

54. Or.—MacNab v Fireman's Fund Ins Co, 413 P 2d 413, 243 Or 267

57. Pa.—In re Camuso's Estate, 81 Pa Dist & Co 82, 2 Fiduciary 357, 11 Lawrence Law J 63

§ 29. — Sheriff or Other Public Officer

page 628

9. Tex.—Niell v Mooney, Civ.App., 575 S W 2d 147, err ref no rev err

page 629

18. Md.—Maddox v Shanks, 214 A 2d 323, 240 Md 348

§ 30. — Trustee

27. U.S.—In re Federal Facilities Realty Trust, C A Ill., 220 F 2d 495

§ 31. Persons Discharging Encumbrances

Library References

Subrogation ⇨14-18.

page 630

35. Fla.—Universal C I T Credit Corp v Thursday Chevrolet Co, App, 136 So 2d 15

Mont—Stallings v Erwin, 419 P 2d 480, 148 Mont 227

Wash.—Coy v Raabe, 418 P 2d 728, 69 Wash.2d 346.

36. U.S.—Pipola v Chicco, D C N Y, 169 F Supp 229, mod. on oth grds, C A, 274 F.2d 909

Ark.—C.J.S. quoted in Baker v Leigh, 385 S W 2d 790, 796, 238 Ark 918

Ill.—Detroit Steel Products Co v Hudes, 151 N E 2d 136, 17 Ill App 2d 514

Neb.—C.J.S. quoted at length in Jones v Rhodes, 75 N W 2d 616, 618, 162 Neb 169

N Y—Global Realty Corp v Charles Kannel Corp, 170 N Y S 2d 16, 9 Misc 2d 241—Big Apple Supermarkets, Inc v Corkdale Realty, Inc, 305 N Y S 2d 531, 61 Misc 2d 483

Pa—Kline v Evans 9 D & C 2d 156, 27 Leh L J 43

Tex—Gant v Stewart, Civ App, 347 S W 2d 1, err ref no rev err

Right to accelerate on default of mortgagor Ky—DeLaney v Reasor, 479 S W 2d 615

37. Ark.—Branch v Standard Title Co, 480 S W 2d 568, 252 Ark 737

Neb—Stribor v Farrell, 129 N W 2d 449, 177 Neb 437

39. Discharge of liens by holder of forged mortgage

Pa—First Federal Sav & Loan Ass'n v Reedy, 35 D & C 2d 299, 54 Luz L Reg 101

page 631

45. Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 N W 2d 923, 244 Iowa 316

46. N Y—Dominion Financial Corp v 275 Washington St Corp, 316 N Y S 2d 803, 64 Misc 2d 1044

47. N Y—C.J.S. cited in Tymon v McArdle, 145 N Y S 2d 298, 300, 208 Misc 817

page 632

53. La—Guillory v Desormeaux, App, 179 So 2d 456

57. U.S.—U.S. v Halton Tractor Co, C A Cal, 258 F 2d 612—Pipola v Chicco, D C N Y, 169 F Supp 229, mod on oth grds, C A, 274 F 2d 909

N Y—Big Apple Supermarkets, Inc v Corkdale Realty, Inc, 305 N Y S 2d 531, 61 Misc 2d 483

S C—Meaders Bros v Skelton, 107 S E 2d 1, 234 S C 134

page 633

59. Idaho—C.J.S. cited in Idaho Bank of Commerce v Chastain, 383 P 2d 849, 854, 86 Idaho 146

60. No right to subrogation under circumstances

Wis—Lee v Threshermen's Mut Ins Co, 132 N W 2d 534, 26 Wis 2d 361

§ 32. — Persons in Status of Purchaser of Encumbered Property in General

73. Fla—C.J.S. cited in Price v Sharps, App, 405 So 2d 1043, 1044

Tex—Cheswick v Weaver, Civ.App., 280 S W 2d 942, err ref no rev err

74. U.S.—U.S. v Jane B. Corp, D C Mass, 167 F Supp. 252—U.S. v Certain Parcels of Land in City of Philadelphia, Philadelphia County, Com of Pa, D C Pa., 213 F Supp. 904

La—Bierhorst v Frutthaler, 91 So 2d 1, 231 La 176

Tex—National Educators Life Ins Co. v Master Video Systems, Inc, Civ.App., 398 S W 2d 358, err ref no rev err

§ 33. — Application to Discharge of Particular Encumbrances

page 635

90. Cal—Fleming v Kagan, 11 Cal Rptr 737, 189 C A 2d 791.

Fla—Furlong v Leybourne, App., 138 So 2d 352

La—National Acceptance Co. of America v Wallace, App, 194 So 2d 194, writ ref 196 So 2d 533, 250 La 467, and 196 So 2d 534, 250 La 470.

N Y—Hirsch v Approved Properties, Inc, 216 N Y S 2d 889, 29 Misc 2d 848, affd 227 N Y S 2d 110, 16 A D 2d 674

Tenn—State v Holland, 367 S W 2d 791, 51 Tenn App 344

Tex—Johnson v Koenig, Civ App, 353 S W 2d 478, err ref no rev err

92. Mass—Altman v Stiegel, 209 N.E.2d 191, 349 Mass 768

page 636

1. U.S.—Pipola v Chicco, C A N Y, 274 F 2d 909

9. La—Jacobs v Sikes, App, 253 So 2d 112

Reasons for rule

(2) Okl—Durkee v Hazan, 452 P 2d 803

11. Wis—Fitzgerald v Buffalo County, 58 N W 2d 457, 264 Wis 62

page 639

48. Tex—Cheswick v Weaver, Civ App, 280 S W 2d 942, err ref no rev err

page 640

54. Ark—Moon Realty Co, Inc v Arkansas Real Estate Co, Inc, 560 S W 2d 800, 262 Ark. 703

66. Ill—Western United Dairy Co v Continental Mortg Co., 170 N E 2d 650, 28 Ill App 2d 132

69. Okl—J A Tobin Const. Co v Grandview Bank, 424 P 2d 81

§ 34. — Purchasers of Equity of Redemption

page 641

82. Cal—A F C, Inc v Brockett, 64 Cal Rptr 771, 257 C A 2d 40

§ 35. — Purchasers at Execution Foreclosure, Judicial, and Similar Sales

page 642

88. U.S.—U.S. v. Amos, D C Ill., 287 F Supp. 886

92. N J—J T Evans Co. v Fanelli, 157 A 2d 36, 59 N J Super 19

Purchaser not subrogated

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page 643

9. Ill—C.J.S. cited in Dixon v City Nat Bank of Metropolis, 410 N E 2d 843, 845, 43 Ill Dec 710, 81 Ill 2d 429

11. U.S.—C.J.S. cited in Russell v Sarkeys, C A Tex., 286 F 2d 736, 739

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Plaintiff held not purchaser at sale

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13. U.S.—C.J.S. cited in Russell v Sarkeys, C A Tex., 286 F 2d 736, 739

§ 36. — Subsequent Encumbrancers

page 644

23. U.S.—Pipola v Chicco, D C N.Y., 169 F Supp. 229, mod. on oth grds., C A, 274 F.2d 909.

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Denial of surety's claim conferred unjust enrichment

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24. Tax lien

NY—Laventall v Pomerantz, 188 NE 271, 263 NY 110

29. Ariz—Del E Webb Hotel Co v Bentley, 446 P 2d 687, 8 Ariz App 408

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page 645

34. Wis—Syver v Hahn, 74 N.W.2d 803, 272 Wis 165

38. Cal—Jones v Gore, 297 P 2d 474, 141 CA 2d 667

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45. NY—Union Sav Bank of Patchogue v Dudine, 242 N.Y.S.2d 692, 40 Misc 2d 155

47. Or—C.J.S. cited in Wright v Ogle, 584 P 2d 737, 283 Or. 505

page 646

50. U.S.—Pipola v Chicco, C.A.N.Y., 274 F 2d 909

57. Pa—First Federal Sav & Loan Ass'n of Pittston v Reedy, 35 D. & C 2d 299, 54 Luz L Reg 101

§ 37. — Grantors or Mortgagors Paying after Transfer of Mortgaged Property

page 647

76. Neb—Jones v Rhodes, 75 NW 2d 616, 162 Neb 169

N.C.—C.J.S. quoted at length in Hatley v Johnston, 143 S.E.2d 260, 267, 265 NC 73

Payment to protect interest required

Tex—Zapata v Torres, Civ App, 464 SW 2d 926

77. Ala—Toler v Baldwin County Sav. and Loan Ass'n, 239 So.2d 751, 286 Ala 320

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page 648

Partial subrogation

(2) Mortgagor-grantor who makes payments to protect his interest on default of purchaser subrogated pro tanto to rights of mortgagee where no intervening rights prejudiced

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§ 38. Third Persons Advancing Means to Discharge Debt or Encumbrance Securing It

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page 649

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2. Neb—Rapp v Rapp, 112 NW 2d 777, 173 Neb 136

page 650

4. US—US v Gregory—Beaumont Equipment Co., C.A.Ark., 243 F.2d 591—Gallup v U.S., D C Neb., 358 F Supp. 776

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page 651

16. Tex—Means v United Fidelity Life Ins Co., Civ App, 550 SW 2d 302, err ref no rev err, mod on oth grds, Sup, 576 SW 2d 794

24. Ky—York v Cline Const Co, 336 SW 2d 34

25. Tenn—Miller v Insurance Co of North America, 366 SW 2d 909, 211 Tenn 620

page 652

30. US—Marsden v Southern Flight Service, Inc., D C N.C., 227 F Supp 411

35. US—Bunge Corp v St Louis Terminal Field Warehouse Co., D C Miss., 295 F Supp 1231

38. No right of priority

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§ 39. — Mortgage or Deed of Trust

page 654

56. US—US v Fidelity & Deposit Co of Md., C.A.Miss., 214 F 2d 565

N.C.—Peek v Wachovia Bank & Trust Co., 86 S.E.2d 745, 242 N.C. 1

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page 655

64. US—U.S. Aviation Underwriters, Inc v WTAE Flying Club, D C Pa., 300 F Supp 341

67. Contrary rule

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page 656

84. Wis—Syver v Hahn, 74 NW 2d 803, 272 Wis 165

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page 657

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§ 39 SUBROGATION

Page 657

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12. **Loan in excess of amount applied on mortgage**

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page 658

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page 659

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§ 40. — Maritime Lien

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page 660

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page 661

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§ 42. — Vendor's Lien

55. Persons held volunteers

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page 662

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§ 43. Third Person Making Advancements for Necessarys, or to Discharge Encumbrance on Property of, Person Incompetent to Contract

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Subrogation ⇨24.

page 663

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No right to subrogation under circumstances

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79. Mo.—Williams v Vaughan, 253 S.W.2d 111, 363 Mo 639

Ohio—Bureau of Support in Dept of Mental Hygiene & Correction v Kreitzer, 243 N.E.2d 83, 16 Ohio St 2d 147.

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79.1. Cal.—San Bernardino County v Simmons, 296 P.2d 329, 46 C.2d 394.

80. Okl.—General Creditors of Harms' Estate v. Cornett, 416 P.2d 398

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page 664

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page 665

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page 666

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Not "security interest" within statute

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page 667

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Okla.—Frank v. National Printing & Office Supply Co., 343 P.2d 1085—National Printing & Office Supply Co. v. Frank, 343 P.2d 1090—National Printing & Office Supply Co. v. Frank, 343 P.2d 1092—National Bank of Commerce of Tulsa v. ABC Const. Co., 442 P.2d 269

Tenn.—C.J.S. cited in Ottenheimer Publishers, Inc. v. Regal Publishers, Inc., App., 626 S.W.2d 276

Tex—Fulton v. Edge, Civ. App., 435 S.W.2d 263, err. ref. no rev. err.

Vt.—Putney Credit Union v. King, 286 A.2d 282, 130 Vt. 86

Property not subject to federal tax lien

US—Atlantic Refining Co. v. Continental Cas. Co., D.C. Pa., 183 F.Supp. 478

Rights not altered by Uniform Commercial Code

US—Home Indem. Co. v. U.S., 433 F.2d 764, 193 Ct. Cl. 266

Mich—American Oil Co. v. L. A. Davidson, Inc., 290 N.W.2d 144, 95 Mich. App. 358

N.J.—Stevlee Factors, Inc. v. State, 346 A.2d 624, 136 N.J. Super. 461, affd. 365 A.2d 713, 144 N.J. Super. 346

Okla.—Mid-Continent Cas. Co. v. First Nat. Bank & Trust Co. of Chickasha, 531 P.2d 1370

Subrogated to state claims

N.J.—Stevlee Factors, Inc. v. State, 346 A.2d 624, 136 N.J. Super. 461, affd. 365 A.2d 713, 144 N.J. Super. 346

Subject to rights of owner to withhold payment

US—McAtee v. U.S. Fidelity & Guaranty Co., D.C. Fla., 401 F.Supp. 11

page 668

18. N.C.—C.J.S. quoted in Hatley v. Johnston, 143 S.E.2d 260, 268, 265 N.C. 73

19. US—In re Jack's Club & Hotel, D.C. Puerto Rico, 138 F.Supp. 620

Fla—Freed v. Giuliani, App., 164 So.2d 234

Term "surety" within statute, etc.

Ala—City of Birmingham v. Trammell, 101 So.2d 259, 267 Ala. 245

Strict compliance with statute

Ala—Continental Bank & Trust Co. v. Alabama General Ins. Co., 150 So.2d 688, 274 Ala. 622

Equitable doctrine not limited by statute

Okla.—Maryland Cas. Co. v. King, 381 P.2d 153

20. Tex—Paulus v. Lawyers Sur. Corp., App., 625 S.W.2d 843, err. ref. no rev. err.

On payment of the debt by the guarantor

(1) US—In re Reliable Mfg. Corp., D.C. Ill., 17 B.R. 899, affd., C.A., 703 F.2d 996

Kan—Mountain Iron & Supply Co. v. Jones, 441 P.2d 795, 201 Kan. 401, reh. den. 443 P.2d 185, 201 Kan. 824

(2) N.Y.—Sportservice Corp. v. Grande, 282 N.Y. 52d 63, 54 Misc.2d 229.

(4) Other matters

US—In re Luscombe Engineering Co., C.A. Pa., 268 F.2d 683

page 669

22. Wife held not to have right to subrogation
Ga—Parramore v. Williams, 109 S.E.2d 745, 215 Ga. 179

23. Cal—C.J.S. cited in Hartford Acc. & Indem. Co. v. All Am. Nut. Co., 34 Cal. Rptr. 23, 33, 220 C.A.2d 545

Me—Unity Tel. Co. v. Design Service Co., 201 A.2d 177, 160 Me. 188

27. US—In re William P. Bray Co., D.C. Conn., 127 F.Supp. 627

Minn—LeRoy v. Marquette Nat. Bank of Minneapolis, 277 N.W.2d 351

Vt—First Vermont Bank & Trust Co. v. Village of Poultney, 349 A.2d 722, 134 Vt. 28

Government need not wait until default

US—Matter of Penn Central Transp. Co., D.C. Pa., 406 F.Supp. 907

page 670

28. US—Gray v. Travelers Indem. Co., C.A. Wash., 280 F.2d 549—US for Use of Home Indem. Co. v. American Emp. Ins. Co., D.C. N.D., 192 F.Supp. 873—In re Bruce Const. Corp., D.C. Fla., 217 F.Supp. 926—United Pac. Ins. Co. v. First Nat. Bank of Or., D.C. Or., 222 F.Supp. 243—Indemnity Ins. Co. of North America v. Lane Contracting Corp., D.C. Neb., 227 F.Supp. 143—Industrial Bank of Washington v. U.S., C.A., 424 F.2d 932, 138 U.S.App.D.C. 19—National Sur. Corp. v. U.S., D.C. Ala., 319 F.Supp. 45

Alaska—Alaska State Bank v. General Ins. Co., 579 P.2d 1362

Cal—Pacific Emp. Ins. Co. v. State, 91 Cal. Rptr. 273, 477 P.2d 129, 3 C.3d 573

D.C.—Glassman Const. Co. v. Fidelity & Cas. Co. of New York, C.A., 356 F.2d 340, 123 U.S.App.D.C. 1, cert. den. 86 S.Ct. 1890, 384 U.S. 987, 16 L.Ed.2d 1005

Ga—Royal Indem. Co. v. Mayor, etc., of City of Savannah, 73 S.E.2d 205, 209 Ga. 383

Kan—U.S. Fidelity & Guaranty Co. v. First State Bank of Salina, 494 P.2d 1149, 208 Kan. 738

Md—Finance Co. of America v. U.S. Fidelity & Guaranty Co., 353 A.2d 249, 277 Md. 177

Mass—Canter v. Schlager, 267 N.E.2d 492, 358 Mass. 789

Minn—First Nat. Bank of St. Paul v. McHasco Elec. Inc., 141 N.W.2d 491, 273 Minn. 407

Miss—State, for Use of National Sur. Corp. v. Malva-ney, 72 So.2d 424, 221 Miss. 190, 43 A.L.R.2d 1212

Rights of sureties on construction contractors' bonds

US—Fidelity and Deposit Co. of Md. v. U.S., 393 F.2d 834, 183 Ct. Cl. 908

§ 48. — Matters Essential to Creation or Existence of Right

32. US—U.S. v. Continental Cas. Co., C.A. Fla., 512 F.2d 475

Fla—Ulery v. Asphalt Paving, Inc., App., 119 So.2d 432

Ga—Argonaut Ins. Co. v. C and S Bank of Tifton, 232 S.E.2d 135, 140 Ga. App. 807—C.J.S. cited in Jesse v. First Nat. Bank of Atlanta, 267 S.E.2d 803, 805, 154 Ga. App. 209

Ill—C.J.S. cited in Village of Crainville v. Argonaut Ins. Co., 410 N.E.2d 5, 7, 43 Ill. Dec. 5, 81 Ill.2d 399

Md.—Northwestern Nat. Ins. Co. v. Goldstein, 368 A.2d 1095, 35 Md. App. 30

N.J.—Montefusco Excavating & Contracting Co., Inc. v. Middlesex County, 414 A.2d 961, 82 N.J. 519

Wyo—Commercial Union Ins. Co. v. Postin, 610 P.2d 984

No reservation of assets for person having prospective right of subrogation

Cal—Hausmann v. Farmers Ins. Exchange, 29 Cal. Rptr. 75, 213 C.A.2d 611

34. U.S.—In re Buildice Co., D.C.Ill. 146 F.Supp. 911
Fla.—Newkirk Constr. Corp. v. Gulf County, App., 366 So.2d 813
N.Y.—State Bank of Albany v. Dan-Ban Contracting Co., 212 N.Y.S.2d 386, 12 A.D.2d 416, aff'd 218 N.Y.S.2d 587, 14 A.D.2d 459, aff'd 187 N.E.2d 19, 12 N.Y.2d 804, 235 N.Y.S.2d 835
35. Ala.—City of Birmingham v. Trammell, 101 So.2d 259, 267 Ala. 245
36. Ala.—Continental Bank & Trust Co. v. Alabama General Ins. Co., 150 So.2d 688, 274 Ala. 622
Ga.—Gilbert v. Dunn, 128 S.E.2d 739, 218 Ga. 531
42. Ark.—Cooper Tire & Rubber Co. v. Northwestern Nat. Cas. Co., 595 S.W.2d 938, 268 Ark. 334
D.C.—Evans v. U.S. Fidelity & Guaranty Co., Mun. App., 127 A.2d 842
N.Y.—Fidelity & Cas. Co. of N.Y. v. Finch, 159 N.Y.S.2d 391, 3 A.D.2d 141
44. N.Y.—Fidelity & Cas. Co. of N.Y. v. Finch, 159 N.Y.S.2d 391, 3 A.D.2d 141

45. Mich.—Earl Dubey & Sons, Inc. v. Macomb Contracting Corp., 296 N.W.2d 582, 97 Mich. App. 553
Mo.—Quality Wood Chips, Inc. v. Adolphsen, App., 636 S.W.2d 94
46. Tex.—C.J.S. cited in La-Rey, Inc. v. Kowalski, 433 S.W.2d 530, 533
52. U.S.—In re Buildice Co., D.C.Ill., 146 F.Supp. 911—C.J.S. cited in U.S. v. Gisi, D.C.Colo., 213 F.Supp. 616, 618
Ind.—Willard v. Automobile Underwriters, Inc., App., 407 N.E.2d 1192
La.—Weber v. Press of H. N. Cornay, Inc., App., 144 So.2d 581
Mo.—State ex rel. Paden v. Carrel, App., 597 S.W.2d 167
Ohio—Lauric v. Hockman, 217 N.E.2d 721, 6 Ohio Misc. 223
Tenn.—Third Nat. Bank in Nashville v. Highlands Ins. Co., 603 S.W.2d 730
Vt.—Walker Process Equipment Co. v. Cooley Bldg. Corp., 278 A.2d 714, 129 Vt. 333
Fact that surety has separate indem. contract, etc.
U.S.—U.S. v. Gisi, D.C.Colo., 213 F.Supp. 616

53. U.S.—C.J.S. cited in U.S. v. Gisi, D.C.Colo., 213 F.Supp. 616, 618—National Shawmut Bank of Boston v. New Amsterdam Cas. Co., C.A.Mass., 411 F.2d 843
Ala.—Continental Bank & Trust Co. v. Alabama General Ins. Co., 150 So.2d 688, 274 Ala. 622
Surety bound for only part of debt
(6) Other cases
U.S.—In re Buildice Co., D.C.Ill., 146 F.Supp. 911

54. Ariz.—Stanford v. Aulick, App., 605 P.2d 465, 124 Ariz. 487
66. Ohio—Lauric v. Hockman, 217 N.E.2d 721, 6 Ohio Misc. 223

67. Ind.—Willard v. Automobile Underwriters, Inc., App., 407 N.E.2d 1192
69. Ala.—City of Birmingham v. Trammell, 101 So.2d 259, 267 Ala. 245
Ky.—Grubbs v. Slater, 266 S.W.2d 85.
Knowledge by principal unnecessary
N.Y.—Fidelity & Cas. Co. of N.Y. v. Finch, 159 N.Y.S.2d 391, 3 A.D.2d 141.

82. U.S.—In re Dan Hixon Chevrolet Co., Bkrtcy. Tex., 20 B.R. 108
La.—Settoon v. Settoon, App. 1 Cir., 413 So.2d 634
Tenn.—Ottenheimer Publishers, Inc. v. Regal Publishers, Inc., App., 626 S.W.2d 276
Tex.—Arndt v. National Supply Co., App. 14 Dist., 633 S.W.2d 919, err. ref. no rev. err.

§ 49. — Right of Subrogation as Dependent on, or Affected by, Acts of Creditor in General

83. U.S.—New Mexico Asphalt & Refining Co. v. Williams, D.C.Colo., 131 F.Supp. 297
86. N.Y.—Mayn v. Schutte, 186 N.Y.S.2d 965, 20 Misc. 471
87. Miss.—State, for Use of National Sur. Corp. v. Malvaney, 72 So.2d 424, 221 Miss. 190, 43 A.L.R.2d 1212

§ 50. — Assignment by Creditor

96. N.J.—Marine View Sav. and Loan Ass'n v. Androlonis, 106 A.2d 559, 31 N.J. Super. 378
Pa.—U.S. Steel Homes Credit Corp. v. South Shore Development Corp., 419 A.2d 785, 277 Pa. Super. 308

Equitable subrogation not allowed

- U.S.—U.S. v. Hughes, C.A. Ark., 499 F.2d 322

97. Cal.—Snider v. Basinger, 132 Cal. Rptr. 637, 61 C.A.3d 819
Neb.—Sheridan v. Dudden Implement, Inc., 119 N.W.2d 64
Ohio—Aetna Cas. & Sur. Co. v. Hensgen, 258 N.E.2d 237, 22 Ohio St.2d 83
Tex.—First Hutchings-Sealy Nat. Bank of Galveston v. Aetna Cas. & Sur. Co., Civ. App., 532 S.W.2d 114, err. ref. no rev. err.
Va.—Home Bldg. Ass'n v. Mackall, 135 S.E.2d 171, 205 Va. 73
Wis.—Syver v. Hahn, 74 N.W.2d 803, 272 Wis. 165
99. U.S.—Bank of Fort Mill v. Lawyers Title Ins. Corp., C.A.S.C., 268 F.2d 313
Cal.—Fidelity & Deposit Co. of Md. v. De Strayman, 29 Cal. Rptr. 855, 215 C.A.2d 10
1. U.S.—Bank of Fort Mill v. Lawyers Title Ins. Corp., C.A.S.C., 268 F.2d 313.
Minn.—LeRoy v. Marquette Nat. Bank of Minneapolis, 277 N.W.2d 351
R.I.—Harrington v. Harrington, 427 A.2d 1314
2. N.Y.—First Nat. Bank of Highland v. Koriba, Inc., 453 N.Y.S.2d 838, 89 A.D.2d 713
3. N.C.—Ingram v. Nationwide Mut. Ins. Co., 129 S.E.2d 222, 258 N.C. 632
Pa.—Pasquini v. Reed, 102 A.2d 219, 174 Pa. Super. 566

§ 51. — Waiver by Surety

10. Ga.—Resolute Ins. Co. v. Brayton, 167 S.E.2d 398, 119 Ga. App. 412.
Pa.—Travelers Ins. Co. v. Hartford Acc. & Indem. Co., 294 A.2d 913, 222 Pa. Super. 546
11. D.C.—Evans v. U.S. Fidelity & Guaranty Co., Mun. App., 127 A.2d 842
No denial of subrogation on basis of inequitable conduct
Ind.—Ertel v. Radio Corp. of America, 307 N.E.2d 471, 261 Ind. 573, on remand 354 N.E.2d 783, 171 Ind. App. 51
12. U.S.—Davis v. Gerstenslager Co., D.C.Pa., 302 F.Supp. 742

15. ND—St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304

Rights not waived

- Ind.—White v. Household Finance Corp., 302 N.E.2d 828, 158 Ind. App. 394
Mich.—American Oil Co. v. L. A. Davidson, Inc., 290 N.W.2d 144, 95 Mich. App. 358.
Miss.—Travelers Indem. Co. v. Clark, 254 So.2d 741
16. Neb.—In re Nebraska State Bank of Valentine, 215 N.W.2d 869, 191 Neb. 427
N.C.—O'Grady v. First Union Nat. Bank, 250 S.E.2d 587, 296 N.C. 212

Settlement with principal

- (2) Other matters
N.Y.—Manufacturers Hanover Trust Co. v. AVA Industries, Inc., 414 N.Y.S.2d 425, 98 Misc.2d 614

§ 52. — Extent and Limitations of Subrogation Generally

21. U.S.—Luckenbach v. Pedrck, D.C.N.Y., 116 F.Supp. 268, aff'd, C.A., 214 F.2d 914
S.C.—St. Paul-Mercury Indem. Co. v. Donaldson, 83 S.E.2d 159, 225 S.C. 476—Travelers Indem. Co. v. Canal Ins. Co., 173 S.E.2d 656, 254 S.C. 92
23. U.S.—American Fidelity Co. v. Delaney, D.C.Vt., 114 F.Supp. 702
Bankruptcy
S.C.—St. Paul-Mercury Indem. Co. v. Donaldson, supra, n. 21
24. U.S.—United Pac. Ins. Co. v. U.S., Ct. Cl., 362 F.2d 805, 176 Ct. Cl. 176—Pa.R. Truck Leasing Inc. v. Bonanza Inc., C.A. Okl., 425 F.2d 695—Mutual Trust Life Ins. Co. v. Wemyss, D.C.Me., 309 F.Supp. 1221—Bourget v. Government Emp. Ins. Co., D.C. Conn., 313 F.Supp. 367—C.J.S. cited in Chicago Title Ins. Co. v. Aetna Cas. & Sur. Co., D.C. Va., 312 F.Supp. 239, 243—U.S. v. Winter, D.C. La., 319 F.Supp. 520
Ariz.—Employers Mut. Liability Ins. Co. of Wis. v. Robert E. McKee General Contractors, Inc., 491 P.2d 27, 16 Ariz. App. 77
Cal.—Lazzareschi Inv. Co. v. San Francisco Federal Sav. & Loan Ass'n, 99 Cal. Rptr. 417, 22 C.A.3d 303
Colo.—Employers Cas. Co. v. Wainwright, 473 P.2d 181, 28 Colo. App. 292
Ga.—Cornett v. Manheim Services Corp., 259 S.E.2d 723, 151 Ga. App. 336
Ill.—William Aupperle & Sons, Inc. v. American Indem. Co., 394 N.E.2d 725, 31 Ill. Dec. 523, 75 Ill. App.3d 722
La.—C.J.S. cited in Stevens v. Mitchell, 102 So.2d 237, 242, 234 La. 977
Mass.—U.S. Fidelity & Guaranty Co. v. N.J.B. Prime Investors, 377 N.E.2d 440, 6 Mass. App. 455
Minn.—Travelers Indemnity Co. v. Vaccari, 245 N.W.2d 844, 310 Minn. 97
Miss.—Meridian Production Credit Ass'n v. Edwards, 231 So.2d 806
Mo.—Starman v. John Wolfe, Inc., App., 490 S.W.2d 377
N.J.—Mayfair Fabrics v. Henley, 244 A.2d 344, 101 N.J. Super. 363
N.Y.—Cansto Const. Corp. v. Diners Financial Corp., 257 N.Y.S.2d 423, 45 Misc.2d 549—Solomon v. Consolidated Resistance Co. of America, Inc., 2 Dept., 468 N.Y.S.2d 532, 97 A.D.2d 791.
N.C.—Dowdy v. Southern Ry. Co., 75 S.E.2d 639, 237 N.C. 519—Montsinger v. White, 82 S.E.2d 362, 240 N.C. 441
Okla.—Moore v. White, 603 P.2d 1119.
Or.—State, By and Through Healy v. Smither, 626 P.2d 356, 290 Or. 827.
Tex.—Marsalis v. Garre, Civ. App., 391 S.W.2d 522, err. ref. no rev. err.—Lockard v. American Fidelity Fire Ins. Co., Civ. App., 475 S.W.2d 286, err. ref. no rev. err.
Wash.—Timms v. James, 621 P.2d 798, 28 Wash. App. 76

Wis—Employers Ins of Wausau v Sheedy, 166 NW 2d 220, 42 Wis 2d 161

page 681

25. Ohio—Homan v Michles, 194 NE 2d 162, 118 Ohio App 289

26. US—American Fidelity Co v Delaney, D C Vt, 114 F Supp 702—Travelers Indem Co v Evans Pipe Co, C A Ohio, 432 F 2d 211—Maryland Cas Co v Brown, D C Ga, 321 F Supp 309

Neb—Barnes v Hampton, 252 NW 2d 138, 198 Neb 151

Okl—Moore v. White, 603 P 2d 1119

27. US—Fillippo v S Bonaccorso & Sons, Inc, D C Pa, 466 F Supp 1008

Or—Mayer v First Nat Bank of Or, 489 P 2d 385, 260 Or 119

Tenn.—McGee v Wilson County, App, 574 S W 2d 744

Loss of security interest by creditor precludes surety's right of recovery

Okl—Beneficial Finance Co of Norman v Marshall, App, 551 P 2d 315

28. US—First Nat Bank of Pennsylvania v US, D C Pa, 398 F Supp 100

N C—Montsinger v White, supra, n 24

30. La—Danks v Maher, App, 177 So 2d 412

34. US—C.J.S. cited in Carolina Cas Ins Co v Local No 612 Intern Broth of Teamsters Chauffeurs, Warehousemen and Helpers of America, D C Ala, 136 F Supp 941, 943—Ruckman & Hansen, Inc v Contracting & Material Co, C A Ind, 328 F 2d 744—Morgan v Southern Farm Bureau Cas Ins Co, D C La, 223 F Supp 996, affd, C A., 339 F 2d 755, motion den 42 FRD 25—Travelers Indem Co v Evans Pipe Co, C A Ohio, 432 F 2d 211—C.J.S. cited in Maryland Cas Co v Brown, D C Ga, 321 F Supp 309, 312

Cal—Bess v Wise, 79 Cal Rptr. 611, 275 CA 2d 158

Ga—C.J.S. cited in Southern Ry Co v Malone Freight Lines, 330 SE 2d 371, 376, 174 Ga.App 405

Idaho—Williams v Johnston, 442 P 2d 178, 92 Idaho 292

Ind—State v Cowdell, App, 421 NE 2d 667

Kan—Rexroad v Kansas Power & Light Co, 388 P 2d 832, 192 Kan 343

La—R F Mestayer Lumber Co v Cusack, App, 141 So.2d 166—Smith v Insurance Co of State of Pa, App, 161 So 2d 903, writ ref 164 So 2d 350, 246 La 344

Mo—Starman v John Wolfe, Inc, App, 490 S W 2d 377

Mont—Brandner v Travelers Ins Co, 587 P 2d 933, 179 Mont 208

N.J.—Colonial Penn Ins Co v Ford, 411 A 2d 736, 172 N.J.Super 242

N.Y.—Pisano v Rand, 291 N.Y.S 2d 82, 30 A D 2d 173

N.C.—Montsinger v White, 82 SE 2d 362, 240 NC 441

Ohio—Motorists Mut. Ins Co. v Jones, 223 NE 2d 381, 9 Ohio Misc 113

Okl—National Bank of Commerce of Tulsa v ABC Const Co, 442 P 2d 269

Or.—Columbia County v Randall, 620 P 2d 937, 49 Or App 643

Pa.—In re Biron's Estate, 4 D & C 2d 729, 6 Fiduciary 46

S.D.—City of Lemmon v US Fidelity & Guaranty Co, 293 NW 2d 433

Tex—Providence Institution for Sav v Sims, 441 S W 2d 516

Necessary expenditures

(2) Other cases

Hawai—Honolulu Iron Works Co v Bigelow, 33 Haw 607

page 682

36. Okl—National Printing & Office Supply Co v Frank, 343 P 2d 1090—National Printing & Office Supply Co v Frank, 343 P 2d 1092

37. Wis—State Farm Mut Auto Ins Co v Geline, 179 NW 2d 815, 48 Wis 2d 290

§ 54. — Rights and Remedies to Which Subrogated

46. US—Matter of Ollag Const Equipment Corp, C A N.Y., 578 F 2d 904, app after remand 665 F 2d 43

Cal—Aetna Cas and Sur Co v Board of Administration, Public Emp Retirement System, 153 Cal Rptr 62, 89 CA 3d 766

N.Y.—US v Fidelity & Guaranty Co v E W Smith Co, 387 NE 2d 604, 46 NY 2d 498, 414 NY S 2d 672—Solomon v Consolidated Resistance Co of America, Inc, 2 Dept, 468 NY S 2d 532, 97 A D 2d 791

N.C.—C.J.S. cited in Wachovia Bank & Trust Co v Wayne Finance Co, 138 SE 2d 481, 484, 262 NC 711

49. N.J.—Montefusco Excavating & Contracting Co, Inc v Middlesex County, 414 A 2d 961, 82 NJ 519

page 683

50. US—Alabama-Tennessee Natural Gas Co v Lehman-Hoge & Scott, supra, n 24—Gray v Travelers Indem Co, C A Wash, 280 F 2d 549—Maryland Cas Co v Brown, D C Ga, 321 F Supp 309

Conn—Employers' Liability Assur Corp v Crandall, 173 A 2d 926, 22 Conn Sup 404

Ind—Capps v Klebs, 382 NE 2d 947, 178 Ind App 293

Mo—Anison v Rice, 282 S W 2d 497

N.Y.—Gombert v George C Fuller Contracting Co, 139 NYS 2d 464, 285 App Div 1053

Tex—Smart v Tower Land and Inv Co, 597 S W 2d 333, app after remand, App 5 Dist, 635 S W 2d 615, err ref no rev err

Va—Thompson v Miller, 79 SE 2d 643, 195 Va 513

52. US—St Paul Fire & Marine Ins Co v US C A Fla, 370 F 2d 870

Ga—Bowman v Poole, 91 SE 2d 770, 212 Ga 261

La—Cox v W M Heroman & Co, Inc 298 So 2d 848

Mo—Anison v Rice, 282 S W 2d 497

Pa.—Weissman v A Weissman, Inc, 114 A 2d 797, 382 Pa 189

S.C.—St. Paul—Mercury Indem. Co v Donaldson, 83 SE 2d 159, 225 SC 476

Tenn—Kincaid v Alderson, 354 S W 2d 775, 209 Tenn 597

Knowledge of principal not imputed to surety

D.C.—Evans v US Fidelity & Guaranty Co, Mun App, 127 A 2d 842

56. US—Sterling Const Co v Humboldt Nat Bank, C A Colo, 345 F 2d 994—In re Yale Exp System, Inc, C A N.Y., 362 F 2d 111—Fink v Sheridan Bank of Lawton, Okl, D C Okl, 259 F Supp 899

Ark—American Insurers' Life Ins Co v First Nat Bank in Blytheville, 367 S W 2d 97, 236 Ark 361

Ga—Gilbert v Dunn, 128 SE 2d 739, 218 Ga 531

N.M.—Simson v Bilderbeck, Inc, 417 P 2d 803, 76 NM 667

N.Y.—Sterling Factors Corp v Freeman, 271 NYS 2d 343, 50 Misc 2d 715, affd 279 NYS 2d 577, 27 A D 2d 956

Tex—Smart v Tower Land and Inv Co, 597 S W 2d 333, app after remand, App 5 Dist, 635 S W 2d 615, err ref. no rev err

Right to repossession

US—Commercial Credit Equipment Corp v Hatton, D C Tex, 429 F Supp 997

page 685

67. US—Western Cas & Sur Co v Brooks, C A W Va, 362 F 2d 486—Swiss Credit Bank v Balink, C A N.M., 614 F 2d 1269

Colo—Behlen Mfg Co v First Nat Bank of Englewood, 472 P 2d 703, 28 Colo App 300

Ill—Mobile Const Co v Phoenix Ins Co, 256 NE 2d 149, 119 Ill App 2d 329

La—Standard Homes, Inc v Prestndge, App, 193 So 2d 100

Mass—Frost v Porter Leasing Corp, 436 NE 2d 387, 386 Mass 425

Miss—American Nat Ins Co v US Fidelity & Guaranty Co, 215 So 2d 245

N.J.—Montefusco Excavating & Contracting Co, Inc v Middlesex County, 414 A 2d 961, 82 NJ 519

N.C.—Montsinger v White, 82 SE 2d 362, 240 NC 441

Ohio—McAdams v Bolsinger, 129 NE 2d 878

Okl—Yaffe v Bank of Chelsea, 271 P 2d 365—Foster v Frank, 363 P 2d 282

Pa—Pasquonelli v Reed, 102 A 2d 219, 174 Pa Super. 566

Tex—Fulton v South Oak Cliff State Bank, Civ.App, 439 S W 2d 730, err ref no rev err.

68. Executions

(3) Other matters

US—Virginia Elec & Power Co v Westinghouse Elec Corp, C A Va, 485 F 2d 78, cert den 94 SCt 1450, two cases, 415 US 935, 39 L Ed 2d 493

La—R F Mestayer Lumber Co v. Cusack, App, 141 So 2d 166

69. N.J.—Gutermuth v Ropiecki, 387 A 2d 385, 159 NJ Super 139

Tex—La-Rey, Inc v Kowalski, Civ App, 433 S W 2d 530

70. US—Sus v Belle Acton Stables, Inc, C A N.Y., 360 F 2d 704, on remand, D.C., 261 F Supp 219—Aetna Cas & Sur Co v Sherwood Distilling Co, D C Md, 271 F Supp 381

Cal—Filippi v McMartin, 10 Cal Rptr 180, 188 CA 2d 135

N.Y.—Maber, Inc v Factor Cab Corp, 244 NYS 2d 768, 19 A D 2d 500

Tex.—Leonard v Brazosport Bank of Texas, App 14 Dist, 628 S.W.2d 216, err ref no rev err

Maritime liens

US.—P T Perusahaan Pelayaran Samudera Trikoru Lloyd v Salzachtal, D C N.Y., 373 F Supp. 267.

Tax lien

Tex—Henry S Miller Co v Wood, Civ App, 584 S W 2d 302, affd, Sup, 597 S W 2d 332

72. US—Marsden v Southern Flight Service, Inc, D C N.C., 227 F.Supp 411

Cal—Union Bank v Gradskey, 71 Cal.Rptr 64, 265 CA 2d 40

Ga—Gilbert v Dunn, 128 SE 2d 739, 218 Ga 531

Ky.—Non-Marine Underwriters at Lloyd's London v Carrs Fork Coal Co, 421 S W 2d 852

Neb—Hoppe v Phoenix Homes, Inc, 318 NW 2d 878, 211 Neb 419

N.J.—Kaplan v Walker, 395 A 2d 897, 164 NJ Super 130

N.Y.—Long Island City Sav & Loan Ass'n v Skow, 270 NYS 2d 234, 25 A D 2d 880

Va—Thompson v Miller, 79 SE 2d 643, 195 Va. 513.

Wash—MGIC Financial Corp v H. A. Briggs Co, 600 P 2d 573, 24 Wash App 1.

75. US—Bruce v McClure, C A Fla, 220 F.2d 330

77. Tex—Gummelt v Southwestern Indem Co., Civ. App, 363 S W 2d 379, err ref. no rev. err

78. US—In re Fago Const Corp, D.C.N.Y., 162 F Supp 238, revd on oth grds, C.A., 259 F.2d 33

page 686

81. La.—Allied Mortg & Development Co v Warner, App, 185 So 2d 635

Page 686

86. U.S.—American Sur Co v Morton, D C Ill, 200 F Supp 82, affd, C A, 311 F 2d 222—Broward County, Florida Commission for Use and Benefit of General Elec Co v Continental Cas Co, D C Fla, 243 F Supp 118—Liberty Nat Bank & Trust Co of Savannah v Interstate Motel Developers, Inc, D C Ga, 346 F Supp 888

page 687

89. N.J.—National Spring Co, Inc v Pierpont Associates, Inc, 368 A 2d 973, 146 N.J. Super 63
Ok!—Foster v Frank, 363 P 2d 282
92. Fla.—C.J.S. quoted in Ruwitch v First National Bank of Miami, 291 So 2d 650, 653, app after remand 327 So 2d 833
Mont.—General Ins Co of America v State Highway Commission, 414 P 2d 526, 147 Mont 450.
95. Insurer
N.Y.—American Home Assur Co v Flushing Sav Bank, 416 N.Y.S.2d 591, 68 A.D.2d 170, aff 420 N.E.2d 92, 52 N.Y.2d 1010, 438 N.Y.S.2d 294
Ok!—Scott v Metropolitan Life Ins Co., 398 P 2d 822
96. Ok!—Citizens State Bank of Tulsa v Pittsburg County Broadcasting Co, 271 P 2d 725

page 688

98. U.S.—Peerless Ins Co v Cerny Associates, Inc, D.C. Minn, 199 F Supp 951—American Sur Co v Morton, D C Ill, 200 F Supp 82, affd, C A, 311 F 2d 222
Kan.—Western Sur Co v Loy, 594 P 2d 257, 3 Kan App 2d 310
Pa.—Puller v Puller, 110 A 2d 175, 380 Pa 219
1. U.S.—American Sur Co v Morton, D C Ill, 200 F Supp 82, affd, C A, 311 F 2d 222
7. Mo.—C.J.S. cited in Western Cas & Sur Co v First State Bank of Bonne Terre, App., 390 S.W.2d 913, 920

§ 55. —Against Whom Surety May Enforce Liens and Securities of Creditor

page 690

15. Mass.—Aetna Cas & Sur Co v Harvard Trust Co, 181 N.E.2d 673, 344 Mass 160
May not be asserted to detriment of those whom it intended to protect
U.S.—Leo v L & M Realty Corp, C A Va, 228 F 2d 89, cert den 76 S.Ct. 438, 350 U.S. 969, 100 L.Ed.2d 841

page 691

16. Mass.—Aetna Cas & Sur Co v Harvard Trust Co, 181 N.E.2d 673, 344 Mass 160
17. U.S.—U.S. v Gregory—Beaumont Equipment Co, C A Ark, 243 F 2d 591
19. U.S.—Western Cas & Sur Co v Brooks, C A W Va, 362 F 2d 486—American Fire & Cas Co v First Nat City Bank of New York, C A Puerto Rico, 411 F 2d 755, cert den 90 S.Ct. 563, 396 U.S. 1007, 24 L.Ed.2d 499
Kan.—Western Sur Co v Loy, 594 P 2d 257, 3 Kan App 2d 310
Mo.—Quality Wood Chips, Inc v Adolphsen, App, 636 S.W.2d 94
N.J.—Stevlee Factors, Inc v State, 346 A 2d 624, 136 N.J. Super 461, affd 365 A 2d 713, 144 N.J. Super 346
Unpaid materialmen
Nev.—globe Indem Co v Peterson—McCaslin Lumber Co, 303 P 2d 414, 72 Nev 282, 61 A.L.R.2d 895
21. U.S.—Fireman's Fund Ins Co v S.E.K. Const Co., C.A. Okl., 436 F 2d 1345
N.C.—Montsinger v. White, 82 S.E.2d 362, 240 N.C. 441
Vt.—St. Johnsbury & L.C.R.R. v Skeels & Weidman, Inc, 196 A 2d 485, 124 Vt. 25

- Purchasers without notice of theft protected
Cal.—Federal Ins Co v Allen, 92 Cal Rptr 125, 13 C A 3d 648

§ 56. —Subrogation as between Successive and Independent Sureties

page 692

24. U.S.—Compania General De Seguros, S A v First Nat City Bank, D.C. Canal Zone, 306 F Supp 1360
Cal.—Continental Cas Co v Hartford Acc & Indem Co, 52 Cal Rptr 533, 243 C A 2d 565
Miss.—Reliance Ins Co v First Mississippi Nat Bank, 263 So 2d 555
Cosureties
Cal.—Regents of University of California v Hartford Acc & Indem Co, 147 Cal Rptr 486, 581 P 2d 197, 21 C 3d 624

§ 57. Subrogation to Rights of Principal

Library References
Subrogation ⇌ 8.

page 693

34. U.S.—Travelers Indem Co v Evans Pipe Co, C A Ohio 432 F 2d 211—Home Indem Co v U.S., 433 F 2d 764, 193 Ct Cl 266—Fidelity & Deposit Co of Md v Scott Bros Const Co, C A Ala., 461 F 2d 640
Ala.—Lloyd Wood Const Co v Con-Serv, Inc, 232 So 2d 649 285 Ala 409
Cal.—Continental Cas Co v Hartford Acc & Indem Co, 52 Cal Rptr 533 243 C A 2d 565
Del.—C.J.S. cited in Hartford Accident and Indemnity Co v Long, 245 A 2d 800, 803
Fla.—U.S. Fidelity & Guaranty Co v North Am Steel Corp., App., 335 So 2d 18
Ind.—National Mut Ins Co of Washington, D C v Maryland Cas Co, 187 N.E.2d 575, 136 Ind App 35
La.—Hartford Acc & Indem Co v Byles, App, 280 So 2d 624
Mass.—Canter v Schlager, 267 N.E.2d 492, 358 Mass 789
Minn.—St. Paul Ins Companies v Fireman's Fund American Ins Companies, 245 N.W.2d 209, 309 Minn 505
Mont.—General Ins Co of America v State Highway Commission, 414 P 2d 526, 147 Mont 450
N.Y.—Long Island City Sav & Loan Ass'n v Skow, 270 N.Y.S.2d 234, 25 A.D.2d 880—Rondout Marine, Inc v Brydon Const Corp, 322 N.Y.S.2d 890, 67 Misc 2d 1
Ok!—Maryland Cas Co v King, 381 P 2d 153
Or.—Jenks Hatchery, Inc v Elliott, 448 P 2d 370, 252 Or 25
Pa.—Zurich General Acc & Liability Ins Co v Klein, 56 Lack Jur 13.
Tenn.—Central Towers Apartments, Inc v Martin, 453 S.W.2d 789, 61 Tenn App 244

Conversion

- Mo.—National Sur Corp v Hochman, App, 313 S.W.2d 776

- Surety held to have no right of subrogation
U.S.—Bank of Fort Mill v Lawyers Title Ins. Corp, C A S.C., 268 F 2d 313.

- Surety entitled to all rights in bank account
Wis.—Bender v Neillsville Bank of Neillsville, 102 N.W.2d 744, 10 Wis 2d 282

Funds, progress payments, or retained percentages

- U.S.—Reliance Ins Companies v Alaska State Housing Authority, D.C. Alaska, 323 F Supp 1370

Right unaffected by filing requirements of Uniform Commercial Code

- Miss.—Travelers Indem Co v Clark, 254 So 2d 741

Availability of rights of laborers and materialmen

- U.S.—Travelers Indem Co v First Nat State Bank of N.J., D.C.N.J., 328 F Supp 208

"UCC" not applicable

- U.S.—First Alabama Bank of Birmingham v Hartford Acc & Indem Co, Inc, D C Ala., 430 F Supp 907

Rights against principal's liability insurer

- Fla.—Western World Ins Co, Inc v Travelers Indem Co, App, 358 So.2d 602

page 694

35. U.S.—National Shawmut Bank of Boston v New Amsterdam Cas Co, D C Mass, 290 F Supp 664, affd, C A, 411 F 2d 843
La.—Lambert v Maryland Cas Co, App, 403 So 2d 739, affd, Sup, 418 So 2d 553
Miss.—Travelers Indem Co v Clark, 254 So 2d 741
Tenn.—Third Nat Bank in Nashville v Highlands Ins Co, 603 S.W.2d 730

Rights superior to assignee's

- Ark.—Equilease Corp v U.S. Fidelity & Guaranty Co, 565 S.W.2d 125, 262 Ark 689

38. N.J.—Graybar Elec Co v Manufacturers Cas Co, 117 A 2d 196, 37 N.J. Super 284, affd 122 A 2d 624, 21 N.J. 517

- N.Y.—U.S. Cas Co v Jungreis, 250 N.Y.S.2d 749, 21 A.D.2d 769

40. U.S.—U.S. for Use of Briggs v Grubb, C A Cal, 358 F 2d 508

42. U.S.—U.S. v Greene, D C Ill, 266 F Supp 976—Fireman's Fund Ins Co v S.E.K. Const Co, C A Okl., 436 F 2d 1345

- La.—C.J.S. cited in Stevens v Mitchell, 102 So 2d 237, 242, 234 La 977

No defense

- U.S.—In re Kuhn Const Co, Inc, Bkrcty W Va, 11 B.R. 746

- Mo.—National Sur Corp. v Hochman, App, 313 S.W.2d 776

43. U.S.—Maryland Cas Co v Mullett, D C Pa, 295 F Supp 875

- Pa.—Martin v National Sur Corp, 262 A 2d 672, 437 Pa 159

- Vt.—Walker Process Equipment Co v Cooley Bldg Corp, 278 A 2d 714, 129 Vt 333

44. Mo.—First State Bank v Reorganized School Dist R-3, Bunker, App, 495 S.W.2d 471

§ 59. Sureties for Particular Purposes or Types of Persons

page 698

68. La.—CIT Corp v Rosenstock, App., 205 So 2d 81

69. U.S.—First Nat Bank of Sikeston, Mo v Jefferson Sales & Distributors, Inc., D C Miss, 341 F Supp 659, affd, C.A., 460 F 2d 1059

- Ind.—Merchants Nat Bank & Trust Co v Winston, 159 N.E.2d 296, 129 Ind App 588.

- Miss.—Stribling Bros Corp v Euclid Memphis Sales, 235 So 2d 239

page 699

79. U.S.—Pearlman v Reliance Ins Co, N.Y., 83 S.Ct. 232, 371 U.S. 132, 9 L.Ed.2d 190—Fidelity & Cas Co of New York v Dykstra D C Minn, 208 F Supp 717—Midtown Bank of Miami v Travelers Indem Co, C A Fla, 366 F 2d 459—Fireman's Fund Ins Co v U.S., 421 F.2d 706, 190 Ct Cl 804—Home Indem Co v U.S., D.C. Mo, 313 F Supp 212—U.S. v Com. of Pa, Dept. of Highways, D.C. Pa., 349 F Supp 1370.

- D.C.—American Fidelity Co v National City Bank of Evansville, C.A., 266 F 2d 910, 105 U.S.App D.C. 312—Glassman Const Co v Fidelity & Cas Co of New York, C.A., 356 F.2d 340, 123 U.S.App D.C. 1, cert den 86 S.Ct. 1890, 384 U.S. 987, 16 L.Ed.2d 1005

Ky—National Sur Corp. v State Nat Bank of Frankfort, 454 S W 2d 354, overruling Movl Construction Company v Covington Trust and Banking Company, 258 Ky 485, 80 S W 2d 560 and Southern Exchange Bank v American Surety Co, 284 Ky 251, 144 S W 2d 203

Mass—Aetna Cas & Sur Co v Harvard Trust Co, 181 N E 2d 673, 344 Mass 160

Minn—First Nat Bank of St Paul v McHasco Elec, Inc., 141 N W 2d 491, 273 Minn 407

Mo—First State Bank v Reorganized School Dist R-3, Bunker, App, 495 S W 2d 471

NJ—Guarantee Co of North America v Tandy & Allen Const Co, 184 A 2d 426, 76 N J Super 274

NY—(American) Lumbermans Mut Cas Co of Ill v Great Atlantic Const Corp, 158 N Y S 2d 115, 11 Misc 2d 491.

Pa—Jacobs v Northeastern Corp, 206 A 2d 49, 416 Pa 417, 11 A L R 3d 1220

80. Ark—Exchange Bank & Trust Co v Texarkana School Dist No 7, Miller County, U S Fidelity & Guaranty Co, Intervenor, 301 S W 2d 453, 227 Ark 759

Del—Hartford Acc & Indem Co v Long, Ch, 245 A 2d 800

Hawai—Honolulu Iron Works Co v Bigelow, 33 Haw 607

NY—Aetna Cas & Sur Co v Perrotta, 308 N Y S 2d 613, 62 Misc 2d 252

Tex—Trinity Universal Ins Co v Bellmead State Bank of Waco, Civ App, 396 S W 2d 163, err ref no rev err

Wash—Levinson v Linderman, 322 P 2d 863, 51 Wash 2d 855

page 700

81. U.S.—Pearlman v Reliance Ins Co, N Y, 83 S.Ct. 232, 371 U.S. 132, 9 L Ed 2d 190—Hanover Ins Co v U.S., D C N Y, 279 F Supp 851—Ben-Tom Supply Co v V N Green & Co, D C W Va., 338 F Supp 59

Ark—Western Sur Co v Washington County, 429 S W 2d 99, 244 Ark 1227

Conn—Employers' Liability Assur Corp v Crandall, 173 A 2d 926, 22 Conn Sup 404.

D C—American Fidelity Co v National City Bank of Evansville, C A, 266 F 2d 910, 105 U S App D C 312

Ill—Board of Ed of Bourbonnais School Dist No 53, Kankakee County for Use of Anning-Johnson Co v Hartford Acc & Indem Co, 208 N E 2d 51, 60 Ill App 2d 320

Rights against United States

U.S.—Phoenix Indem. Co v Earle, C A Or, 218 F 2d 645—Fireman's Fund Ins Co v U.S., D C Kan, 362 F Supp 842

Defenses against owner

La—State v Preferred Acc Ins Co of New York, App, 149 So 2d 632

82. Tenn—C.J.S. cited in Third Nat Bank in Nashville v Highlands Ins Co, 603 S W 2d 730, 733

page 701

83. U.S.—U.S. v Raley Contracting Co, D C Miss, 210 F Supp 54—Hanover Ins Co v U.S., D C N Y, 279 F Supp 851

Cal—U.S. Fidelity & Guaranty Co v Oak Grove Union School Dist of Sonoma County, 22 Cal Rptr 907, 205 C A 2d 226.

N.J.—Guarantee Co. of North America v Tandy & Allen Const Co, 184 A 2d 426, 76 N J Super 274

Okl—Maryland Cas. Co v King, 381 P 2d 153

85. Del—Hartford Acc & Indem Co v Long, Ch, 245 A 2d 800

88. U.S.—Aetna Cas & Sur Co v U.S., 526 F 2d 1127, 208 Ct Cl 515, cert den 96 S Ct 2172, 425 U S 973, 48 L Ed 2d 797

page 702

89. U.S.—American Sur Co of N Y v Hinds, C A Colo, 260 F 2d 366

D C—American Fidelity Co v National City Bank of Evansville, C A, 266 F 2d 910, 105 U S App D C 312

Mo—National Sur Corp v Fisher, Century Indem Co, Intervenor—Respondent, 317 S W 2d 334

97. Va—Fidelity & Cas Co of New York v First Nat Exchange Bank of Virginia, 193 S E 2d 678, 213 Va 531

98. U.S.—Fidelity & Cas Co of New York v Dykstra, D C Minn, 208 F Supp 717

Conn—Employers' Liability Assur Corp v Crandall, 173 A 2d 926, 22 Conn Sup 404

page 703

1. U.S.—United Bonding Ins Co v Catalytic Const Co, C A Nev, 533 F 2d 469

2. Equitable lien founded on assignment of future payments

(1) U.S.—Midtown Bank of Miami v Travelers Indem Co, C A Fla, 366 F 2d 459

page 704

7. U.S.—Fidelity & Cas Co of New York v Dykstra, D C Minn, 208 F Supp 717—Framingham Trust Co v Gould—National Batteries, Inc, C A Mass., 427 F 2d 856—U.S. Fidelity & Guaranty Co v Housing Authority of Town of Berwick, C A La., 557 F 2d 482

Del—C.J.S. black letter summary quoted in Hartford Accident and Indemnity Co v Long, 245 A 2d 800, 804

Minn—First Nat Bank of St Paul v McHasco Elec, Inc., 141 N W 2d 491, 273 Minn 407

8. NY—(American) Lumbermans Mut Cas Co of Ill v Great Atlantic Const Corp, 158 N Y S 2d 115, 11 Misc 2d 491

10. Fla—U.S. Fidelity & Guaranty Co v North Am Steel Corp, App, 335 So 2d 18

12. Ga—Pembroke State Bank v Balboa Ins Co, 241 S E 2d 483, 144 Ga App 609

Minn—First Nat Bank of St Paul v McHasco Elec, Inc., 141 N W 2d 491, 273 Minn 407

Mo—First State Bank v Reorganized School Dist R-3, Bunker, App, 495 S W 2d 471

15. U.S.—United Bonding Ins Co v Catalytic Const Co, C A Nev, 533 F 2d 469

page 705

19. D C—American Fidelity Co v National City Bank of Evansville, C A, 266 F 2d 910, 105 U S App D C 312

Mo—First State Bank v Reorganized School Dist R-3, Bunker, App, 495 S W 2d 471

NJ—National Sur Corp v Barth, 89 A 2d 104, 20 N J Super 100, affd 95 A 2d 145, 11 N J 506

20. U.S.—United Bonding Ins Co v Catalytic Const Co, C A Nev, 533 F 2d 469

page 706

25. U.S.—Logan Planing Mill Co v Fidelity & Cas Co of New York, D C W Va., 212 F Supp 906

Mo—First State Bank v Reorganized School Dist R-3, Bunker, App, 495 S W 2d 471

page 707

26. NY—Caristo Const Corp v Diners Financial Corp, 257 N Y S 2d 423, 45 Misc 2d 549

30. Del—Hartford Acc & Indem Co v Long, Ch, 245 A 2d 800

32. D C—American Fidelity Co v National City Bank of Evansville, C A, 266 F 2d 910, 105 U S App D C 312

page 709

45. Minn—First Nat Bank of St Paul v McMasco Elec, Inc., 141 N W 2d 491, 273 Minn 407.

§ 60. — Sureties for Fiduciaries and Officials

50. U.S.—National Sur Corp v U.S., 133 F Supp. 381, 132 Ct Cl 724, cert den 76 S Ct 181, 350 U S 902, 100 L Ed 793

NY—American Sur Co of N Y v St Lawrence County Nat Bank, 201 N Y S 2d 965

page 710

Conversely, no such right of subrogation exists where the creditor has no rights.⁵²¹

52.1. Surety of city official

(1) Subrogation barred as to acts not proximately causing damage to creditor

U.S.—Fidelity & Deposit Co of Maryland v Aberdeen Nat Bank & Trust Co, C C A S D, 124 F 2d 973

(2) Hence, lack of damage may be shown as a defense

U.S.—Fidelity & Deposit Co of Maryland v Aberdeen Nat Bank & Trust Co, supra.

(3) Duty of creditor to restore diverted funds bars surety's subrogation

U.S.—Fidelity & Deposit Co of Maryland v Aberdeen Nat Bank & Trust Co, supra

(4) Creditor's receipt of benefit bars subrogation

U.S.—Fidelity & Deposit Co of Maryland v Aberdeen Nat Bank & Trust Co, supra

page 712

75. Appropriation by court of ward's assets held not to preclude recovery

Mo—Western Cas & Sur Co v First Bank of Bonne Terre, App, 390 S W 2d 913

79. NJ—Fengya v Fengya, 383 A 2d 1170, 156 N J Super 340

Tex—U.S. Fidelity & Guaranty Co v Harper, Civ App, 561 S W 2d 630

§ 61. — Sureties on Bonds in Judicial Proceedings

page 713

95. Surety as standing in judgment creditors' shoes

D C—Brem v U.S. Fidelity & Guaranty Co, App, 206 A 2d 404

Surety's duty, to enter satisfaction of judgment

D C—Brem v U.S. Fidelity & Guaranty Co, App, 206 A 2d 404.

§ 62. Indemnitors of Sureties

page 714

4. U.S.—Dannerbeck v Palmer, C A Ariz, 502 F 2d 686, cert den 95 S Ct 626, 419 U S 1050, 42 L Ed 2d 645

Cal—Massachusetts Bonding & Ins Co v Osborne, 43 Cal Rptr 761, 233 C A 2d 648

Ill—C.J.S. cited in Kuch and Watson, Inc. v Woodman, 331 N E 2d 350, 354, 29 Ill App 3d 638

Mo—C.J.S. cited in Westerhold v Carroll, 419 S W 2d 73, 76

§ 63. In General

Library References Subrogation ⇐ 41.

5. U.S.—C.J.S. quoted at length in Markman v Russell State Bank, C A Okl., 358 F 2d 488, 491

Cal—Benton v Cravens, Dargan & Co, 10 Cal Rptr 740, 188 C A 2d 637

Pa—Travelers Ins Co v Hartford Acc & Indem Co, 294 A 2d 913, 222 Pa Super 546.

6. Tex—Rhiddlehoover v Boren, Civ App, 260 S W 2d 431

8. U.S.—U.S. v Greene, D C Ill, 266 F Supp 976

Mich—Michigan Medical Service v Sharpe, 84 N W 2d 713, 339 Mich 574

page 715

10. US—C.J.S. quoted at length in Markman v Russell State Bank, C A Okl, 358 F 2d 488, 491

Basis of right of action

N J—A & B Auto Stores of Jones St, Inc v City of Newark, 248 A 2d 258, 103 N J Super 559

Okl—Scott v Metropolitan Life Ins Co, 398 P 2d 822

Requisites for subrogation

Ky—Bryan v Henderson Elec Co, App, 566 S W 2d 823

12. Mich—Lake States Engineering Corp v Lawrence Seaway Corp, 167 N W 2d 320, 15 Mich App 637

Mo—Giambelluca v Missouri Pac R Co, 320 S W 2d 457

13. Statute held to presuppose right of direct action

La—Ledbetter v Hammond Milk Corporation, App, 126 So 2d 658—Bean v Toney, App, 173 So 2d 31—Leonard v Travelers Ins Co, App, 183 So 2d 447

§ 64. Nature and Form of Remedy

14. Del—C.J.S. cited in Phillips v Liberty Mut Ins Co, 235 A 2d 835, 838, 43 Del Ch 436

Okl—Travelers Ins Co v Leedy, 450 P 2d 898

16. Ga—State Farm Mut Auto Ins Co v Jones, 104 S E 2d 725, 98 Ga App 46

17. US—Hartford Acc & Indem Co v First Nat Bank & Trust Co of Tulsa, Okl, C A Okl, 287 F 2d 69

Cal—A.F.C., Inc v Brockett, 64 Cal Rptr 771, 257 C A 2d 40

Md—C.J.S. cited in George L Schnader, Jr, Inc v Cole Bldg Co, 202 A 2d 326, 236 Md 17

18. US—Petition of New York Trap Rock Corp, D C N Y, 172 F Supp 638

22. Ariz—Liberty Mut Ins Co v Thunderbird Bank, 555 P 2d 333, 113 Ariz. 375

Summary judgment available

N Y—Fidelity & Cas Co of N Y v Finch, 159 N Y S 2d 391, 3 A D 2d 141

Third party claim proceeding

Cal—A.F.C., Inc v Brockett, 64 Cal Rptr 771, 257 C A 2d 40

23. Mo—Cantor v Union Mut Life Ins Co, App, 547 S W 2d 220.

24. Ala—Holder v Brooks, 73 So 2d 355, 261 Ala 127

Mass—Brady v Brady, 404 N E 2d 75, 383 Mass 480

Purpose of statute

La—Carl Heck Engineers, Inc v Daigle, App, 219 So 2d 294, application den 221 So 2d 517, 253 La 1082

page 716

30. Fla—Ulery v Asphalt Paving, Inc, App, 119 So 2d 432

Pa—Furna v City of Philadelphia, 118 A 2d 236, 180 Pa Super 50

Only in original action

Pa—Gramby v Philadelphia Transp Co, 22 D & C 2d 366

Motion held sufficient to present issue

Wash—Credit Bureau Corp v Beckstead, 385 P 2d 864, 63 Wash 2d 183

§ 65. Conditions Precedent

page 717

43. Summary notice sufficient

US—United Bonding Ins Co v Catalytic Const Co, C A Nev, 533 F 2d 469

Degree of notice

US—United Bonding Ins Co v Catalytic Const Co, C A Nev, 533 F 2d 469

Default notices not precondition

US—A O Smith v F T C, D C Del, 417 F Supp 1068

48. Kan—Criss v Folger Drilling Co, 407 P 2d 497, 195 Kan 552

50. N Y—Big Apple Supermarkets, Inc v Corkdale Realty, Inc, 305 N Y S 2d 531, 61 Misc 2d 483

Tex—Security State Bank v Commercial Standard Title Ins Co, Civ App, 605 S W 2d 673, err dism

§ 66. Time to Sue, Limitations, and Laches

page 718

56. US—US v Bureau of Revenue of State of N M, D C N M, 217 F Supp 849

Miss—Meridian Production Credit Ass'n v Edwards, 231 So 2d 806

62. US—Compania Anonima Venezolana De Navegacion v A J Perez Export Co, C A La, 303 F 2d 692, cert den 83 S Ct 321, 371 US 942, 9 L Ed 2d 276

Ohio—In re Gardner's Estate, 160 N E 2d 20, affd 176 N E 2d 316, 112 Ohio App 462

page 719

70. US—Bunge Corp v St Louis Terminal Field Warehouse Co, D C Miss, 295 F Supp 1231

§ 67. Parties

Library References

Barron and Holtzoff, Federal Practice and Procedure § 482.

75. US—Chittick v State Farm Mut Auto Ins Co, D C Del, 170 F Supp 276—Continental Bus Systems, Inc v Rohwer, D C Colo, 172 F Supp 487—Markman v Russell State Bank, C A Okl, 358 F 2d 488

R I—Hospital Service Corp of R I v Pennsylvania Ins Co, 227 A 2d 105, 101 R I 708

76. N C—Ingram v Nationwide Mut Ins Co, 129 S E 2d 222, 258 N C 632

77. Holder liable for attorney fees where avails of litigation accepted

Minn—Engelrup v Potter, 224 N W 2d 484, 302 Minn 157

78. US—Rohner, Gehrig & Co. v Capital City Bank, C A Ga, 655 F 2d 571

79. US—US v Dold, D C S D, 462 F Supp. 801

The right of a partial subrogee to bring actions has been adjudicated.^{80,5}

80.5. Cal—Cal-Farm Ins Co v Phillips, 99 Cal Rptr 452, 22 C A 3d 441

Not indispensable party

La—State Farm Fire & Cas Co v Sentry Indem Co, App, 316 So 2d 185, app after remand 346 So 2d 1331

81. Mo—C.J.S. cited in Kroeker v State Farm Mut Auto Ins Co, App, 466 S W 2d 105, 111

Wash—Moore v Moore, 583 P 2d 1249, 20 Wash.App 909

page 720

82. D C—Emmco Ins Co v White Motor Corp, App, 429 A 2d 1385

Ill—Brosam v Employer's Mut Cas Co, 209 N E 2d 350, 61 Ill App 2d 183

N Y—Union Sav Bank of Patchogue v. Dudine, 242 N Y S 2d 692, 40 Misc 2d 155

N C—General Ins Co of America v Faulkner, 130 S E 2d 645, 259 N C 317, 8 A L R 3d 601

Okl—Aetna Cas & Sur Co v Associates Transports, Inc, 512 P 2d 137

Tex—Fort Worth & Denver Ry Co v Ferguson, Civ App, 261 S.W.2d 874, err dism

Suit by real party in interest not required

Cal.—Hausmann v Farmers Ins Exchange, 29 Cal Rptr 75, 213 C A 2d 611.

Disclosure of interest required

Ill—Shaw v Close, 235 N E 2d 830, 92 Ill App 2d 1

83. La—Carl Heck Engineers, Inc v Daigle, App, 219 So 2d 294, application den. 221 So 2d 517, 253 La 1082

Pa—Hartford Acc & Indem Co v Ominsky, 18 D & C 2d 750—Wolf v Allegheny County, 281 A 2d 82, 3 Pa Cmwlth 27

Tex—Fort Worth & Denver Ry Co v Ferguson, supra, n 82

Rule gives plaintiff, and not the court, the right of choice, etc.

Pa—Spitzer v Smith, 10 D & C 2d 243, 57 Lack Jur 181

85. Ala—Corona v Southern Guaranty Ins Co, Inc, 314 So 2d 61, 294 Ala 184

Tex—Grace v Rahlfs, Civ App, 508 S.W.2d 158, err ref no rev err

Where two parties have interest, either may sue

US—Avis, Inc v Charmatz, D C Mo, 208 F Supp 932

86. US—Cleaves v De Lauder, D C W Va, 302 F Supp 36—Travelers Indem Co v Westinghouse Elec Co, C A La, 429 F 2d 77

92. Joinder required

Cal—Bank of the Orient v Superior Court in and for City and County of San Francisco, 136 Cal Rptr 741, 67 C A 3d 588

La—Southern Farm Bureau Cas Ins Co v Sonnier, 406 So 2d 178

§ 68. Pleading

94. Pa—First Federal Sav. & Loan Ass'n v Reedy, 35 D & C 2d 299, 54 Luz L Reg. 101.

page 721

98. Or—Reid v Reid, 348 P 2d 29, 219 Or 500

2. Ga—US Cas Co v Peachtree Roxboro Corp, 120 S E 2d 161, 103 Ga App 532—Southern Nitrogen Co v Stevens Shipping Co, 151 S E 2d 916, 114 Ga App 581

N Y—C.J.S. cited in Zemo v County Trust Co, 133 N Y S 2d 291, 293

Or—Stein v Gable Park, Inc., 353 P 2d 1034, 223 Or 17

Bills, petitions, and complaints held sufficient or not demurrable

(1) US—Industrial Development Bd of Town of Section, Ala v Fuqua Industries, Inc, C A Ala, 523 F 2d 1226

Fla—Ulery v Asphalt Paving, Inc, App, 119 So 2d 432—Washington Sec Co v Tracy's Plumbing & Pumps Inc, App, 166 So 2d 680

Ga—Peachtree Roxboro Corp v US Cas Co, 114 S E 2d 49, 101 Ga App 340

Md—George L Schnader, Jr, Inc v Cole Bldg Co., 202 A 2d 326, 236 Md 17

Mo—National Sur Corp v Hochman, App, 313 S W 2d 776

N Y—US Cas Co v Jungreis, 250 N Y S 2d 749, 21 A D 2d 769

Okl—Scott v Metropolitan Life Ins. Co, 398 P 2d 822

Or—Jenks Hatchery, Inc v Elliott, 448 P 2d 370, 252 Or 25

Bills, petitions, or complaints held insufficient or demurrable

(1) Fla—Meyer v Levy, App, 169 So 2d 339

Ga—State Farm Mut. Auto Ins. Co. v Jones, 104 S E 2d 725, 98 Ga App 46

N Y—Zemo v County Trust Co., 133 N Y S 2d 291

N C—Home Ins Co v Ingold Tire Co, Inc, 206 S E 2d 320, 22 N C App 237, revd. 210 S E 2d 414, 286 N C 282

Necessary allegations

- (5) Other matters
- Mo—Western Cas & Sur Co v First State Bank of Bonne Terre, App, 390 S.W.2d 913
5. Ala—Holder v Brooks, 73 So.2d 355, 261 Ala 127
6. Cal—Iusi v City Title Ins Co, 28 Cal Rptr 893, 213 C.A.2d 582

page 722

12. Wis—Perkins v Worzala, 143 N.W.2d 516, 31 Wis.2d 634

page 723

21. Variance immaterial

- Mo—National Sur Corp v Hochman, App, 313 S.W.2d 776
22. Cal—Iusi v City Title Ins Co, 28 Cal Rptr 893, 213 C.A.2d 582
23. Or—MacNab v Fireman's Fund Ins Co, 413 P.2d 413, 243 Or 267

§ 69. Evidence

25. U.S.—In re Federal Facilities Realty Trust, C.A. III, 220 F.2d 495—In re Worley, D.C. Va., 251 F.Supp. 725—In re Marine Sulphur Transport Corp, D.C. N.Y., 312 F.Supp. 1081, aff'd in part, rev'd in part, C.A., 460 F.2d 89, cert den 93 S.Ct. 318, 326, 409 U.S. 982, 34 L.Ed.2d 246.
- Ariz—C.J.S. cited in Del E. Webb Hotel Co v Bentley, 446 P.2d 687, 690, 8 Ariz App 408
- Ark—North Ark Mill Co v Lipari, 333 S.W.2d 713, 231 Ark 965
- Cal—Benton v. Cravens, Dargan & Co., 10 Cal Rptr 740, 188 C.A.2d 637
- Kan—Criss v Folger Drilling Co, 407 P.2d 497, 195 Kan 552
- Md—Security Ins Co of New Haven—The Connecticut Indem. Co v Mangan, 242 A.2d 482, 250 Md 241
- Mo—Street v Lincoln Nat Life Ins Co., App., 347 S.W.2d 455
- N.M.—Fireman's Fund American Ins Companies v Phillips, Carter, Reister & Associates, Inc., App., 546 P.2d 72, 89 N.M. 7, cert den 546 P.2d 70, 89 N.M. 5
- N.Y.—Sunshine v Bankers Trust Co, 314 N.E.2d 860, 34 N.Y.2d 404, 358 N.Y.S.2d 113
- Okl—Citizens State Bank of Tulsa v Pittsburg County Broadcasting Co, 271 P.2d 725
- Pa—In re Green's Estate, 202 A.2d 17, 415 Pa. 161
- Tenn.—Title Guaranty & Trust Co. v Johnson, App., 485 S.W.2d 764
30. N.Y.—Walzer v Walzer, 151 N.Y.S.2d 550, 1 A.D.2d 482, aff'd, 163 N.Y.S.2d 632, 3 N.Y.2d 8, 143 N.E.2d 361.

page 724

The grant of subrogation rights is so ordinary that a court would not presume them to be a sham or lacking in economic reality without affirmative proof.³⁹

- 39.5. U.S.—Holbrook v. C.I.R., C.A.Tex., 450 F.2d 134, reh. den. 451 F.2d 1350.
40. U.S.—Fidelity & Deposit Co. of Maryland v. Aberdeen Nat. Bank & Trust Co., C.C.A.S.D., 124 F.2d 973.

Evidence held admissible

- (3) La.—Forcum-James Co. v. Duke Transp. Co., 93 So.2d 228, 231 La. 953.
- Mo—National Sur. Corp. v Hochman, App., 313 S.W.2d 776.

Evidence held inadmissible

- (2) Or.—MacNab v Fireman's Fund Ins Co, 413 P.2d 413, 243 Or. 267.

Evidence held sufficient

- (1) U.S.—Fidelity & Deposit Co. of Maryland v. Aberdeen Nat. Bank & Trust Co. C.C.A.S.D., 124 F.2d 973

Mo—Anison v Rice, 282 S.W.2d 497

Evidence held insufficient

- (1) N.C.—Peek v Wachovia Bank & Trust Co., 86 S.E.2d 745, 242 N.C. 1
- (2) U.S.—Fidelity & Deposit Co. of Maryland v. Aberdeen Nat. Bank & Trust Co., supra

Parol evidence admissible to prove subrogation agreement

- La.—Forcum-James Co. v. Duke Transp. Co., 93 So.2d 228, 231 La. 953

41. U.S.—U.S. for Use and Benefit of James E. Simon Co. v. Ardelt-Horn Const. Co., C.A.Neb., 446 F.2d 820, cert den 92 S.Ct. 740, 404 U.S. 1060, 30 L.Ed.2d 747

- III—First Nat. Bank of Belleville v. Heatherly, 291 N.E.2d 280, 8 Ill. App.3d 1073

- Ky—York v. Cline Const. Co., 336 S.W.2d 34

Statements as to evidence required

- (5) Other statements

- D.C.—Evans v. U.S. Fidelity & Guaranty Co., Mun. App., 127 A.2d 842

Evidence held sufficient

- (1) U.S.—Bunge Corp. v. St. Louis Terminal Field Warehouse Co., D.C. Miss., 295 F.Supp. 1231—Dampskibsselskabet Den Norske Afrika og Australieline v. Intalco Aluminum Corp., D.C. Wash., 306 F.Supp. 170, aff'd, C.A., 457 F.2d 889, cert den 93 S.Ct. 466, 409 U.S. 1024, 34 L.Ed.2d 316—Murphy Pac. Corp. v. Westinghouse Elec. Corp., D.C. Wash., 331 F.Supp. 1348

- Cal—Benton v. Cravens, Dargan & Co., 10 Cal Rptr 740, 188 C.A.2d 637

- Okl—Fidelity & Cas Co. of New York v. National Bank of Tulsa, 388 P.2d 497

- (4) Or.—Hult v. Ebinger, 352 P.2d 583, 222 Or. 169

Evidence held insufficient

- (1) D.C.—Firemen's Ins. Co. of Washington, D.C. v. Amerada Hess Corp., App., 315 A.2d 837

- Fla—Silver Waters Corp. v. Murphy, App., 177 So.2d 897

- Ga—City of Elberton v. J. C. Pool Realty Co., 143 S.E.2d 407, 111 Ga.App. 765

- Pa—In re Green's Estate, 202 A.2d 17, 415 Pa. 161

- (2) U.S.—Wright v. Hartford Acc. & Indem. Co., D.C. Okl., 258 F.Supp. 841

§ 70. Trial

page 725

42. Evidence held sufficient to submit to jury
- Mo—National Sur. Corp. v. Hochman, App., 313 S.W.2d 776

43. Mo—National Sur. Corp. v. Hochman, App., 313 S.W.2d 776.

44. Ga—Gilbert v. Dunn, 128 S.E.2d 739, 218 Ga. 531.

Equitable questions

- N.Y.—Tishman Realty & Const. Co. v. Schmitt, 330 N.Y.S.2d 174, 69 Misc.2d 584.

45. Questions held for jury

- (3) Other questions

- Ark—Bryan v. Thomas, 292 S.W.2d 552, 226 Ark. 646
- Tex—Marek v. Childers, Civ.App., 326 S.W.2d 27

§ 71. Judgment or Decree

46. U.S.—Russell v. Sarkeys, C.A.Tex., 286 F.2d 736—Markman v. Russell State Bank, C.A.Okl., 358 F.2d 488—Bunge Corp. v. St. Louis Terminal Field Warehouse Co., D.C. Miss., 295 F.Supp. 1231

- Mont.—Bower v. Tebbas, 314 P.2d 731, 132 Mont. 146

page 726

52. U.S.—Travelers Indem. Co. v. Peacock Const. Co., C.A. Fla., 423 F.2d 1153.

54. Measure of damages

- Mo—National Sur. Corp. v. Hochman, App. 313 S.W.2d 776

A subrogee who does not come into the action, but accepts its benefits, is liable for his proportionate share of the expenses thereof.⁵⁴

- 54.5. Neb—United Services Auto. Ass'n v. Hills, 109 N.W.2d 174, 172 Neb. 128, 2 A.L.R.3d 1422

§ 72. Review

58. Cal—Robinson v. Felch, 318 P.2d 759, 155 C.A.2d 842

SUBSCRIBE.

—Subscribed.

page 729

62. Signed at the end

- N.Y.—In re Marques' Will, 123 N.Y.S.2d 877, 880

65. Not a word of art, and as such does not require the signature at the end of the writing, and the signature need not be manually affixed, but may be printed, stamped, or typewritten—In re Kossack, D.C. Cal., 113 F.Supp. 884, 888

SUBSCRIPTION.

page 730

73. Same as signing

- Minn—Radke v. Brenon, 134 N.W.2d 887, 891, 271 Minn. 35

SUBSCRIPTIONS**§ 1. Definition and Nature**

page 731

1. Fla—Jordan v. Mount Sinai Hospital of Greater Miami, Inc., App., 276 So.2d 102, aff'd., Sup., 290 So.2d 484

2. Pledge not obligatory

- Iowa—Pappas v. Bever, 219 N.W.2d 720

§ 2. Form and Contents**Library References**

Subscriptions ⇨ 2.

Modern Legal Forms Ch. 34,
Gifts and Subscriptions.

page 732

7. N.Y.—In re Field's Will, 181 N.Y.S.2d 922, 15 Misc.2d 950, mod. on oth. grds. 204 N.Y.S.2d 947, 11 A.D.2d 774

- Tex—C.J.S. cited in Thompson v. McAllen Federated Woman's Bldg. Corp., Civ.App., 273 S.W.2d 105, 109, err. dism.

8. May be implied

- N.Y.—Liberty Maamondes Hospital v. Felberg, 158 N.Y.S.2d 913, 4 Misc.2d 291

9. N.Y.—In re Lipsky's Estate, 256 N.Y.S.2d 429, 45 Misc.2d 320

- Tex—C.J.S. cited in Thompson v. McAllen Federated Woman's Bldg. Corp., Civ.App., 273 S.W.2d 105, 107, err. dism.

17. La.—Dillard University v. Local Union 1419, Intern. Longshoremen's Ass'n, App., 144 So.2d 710, app. after remand 169 So.2d 221, application den. 170 So.2d 864, 247 La. 342.

19. Public right to know

- N.Y.—State v. Francis, 407 N.Y.S.2d 611, 95 Misc.2d 381, aff'd. 412 N.Y.S.2d 340.

§ 3 SUBSCRIPTIONS

Page 732

§ 3. Execution and Delivery

page 733

26. N.Y.—Liberty Maimonides Hospital v. Felberg, 158 N.Y.S.2d 913, 4 Misc.2d 291

§ 4. Acceptance

Library References

Modern Legal Forms Ch. 34,
Gifts and Subscriptions

page 734

38. N.Y.—In re Field's Will, 181 N.Y.S.2d 922, 15 Misc.2d 950, mod on oth grds 204 N.Y.S.2d 947, 11 A.D.2d 774

41. N.Y.—In re Eckel's Will, 124 N.Y.S.2d 448—Liberty Maimonides Hospital v. Felberg, 158 N.Y.S.2d 913, 4 Misc.2d 291—In re Field's Will, 181 N.Y.S.2d 922, 15 Misc.2d 950, mod on oth grds 204 N.Y.S.2d 947, 11 A.D.2d 774

What law governs

- N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427

44. Notification implied

- N.Y.—Liberty Maimonides Hospital v. Felberg, 158 N.Y.S.2d 913, 4 Misc.2d 291

§ 5. Consideration

49. Md.—Maryland Nat. Bank v. United Jewish Appeal Federation of Greater Washington, Inc., 407 A.2d 1130, 286 Md. 274

50. Charitable subscription

- Fla.—Jordan v. Mount Sinai Hospital of Greater Miami, Inc., App., 276 So.2d 102, affd., Sup., 290 So.2d 484

page 735

54. Tex.—Thompson v. McAllen Federated Woman's Bldg. Corp., Civ. App., 273 S.W.2d 105, err. dism.
58. La.—Dillard University v. Local Union 1419, Intern. Longshoremen's Ass'n, App., 144 So.2d 710, app. after remand 169 So.2d 221, application den. 170 So.2d 864, 247 La. 342

59. La.—Dillard University v. Local Union 1419, Intern. Longshoremen's Ass'n, App., 144 So.2d 710, app. after remand 169 So.2d 221, application den. 170 So.2d 864, 247 La. 342
Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518.

Charitable subscription

- Iowa—Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609

61. Fla.—C.J.S. cited in Jordan v. Mount Sinai Hospital of Greater Miami, Inc., App., 276 So.2d 102, 107 Affd. Sup., 290 So.2d 484

62. N.Y.—In re Lipsky's Estate, 256 N.Y.S.2d 429, 45 Misc.2d 320

page 736

69. Ohio—Hirsch v. Hirsch, 289 N.E.2d 386, 32 Ohio App.2d 200

73. Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518

- Tex.—C.J.S. cited in Thompson v. McAllen Federated Woman's Bldg. Corp., Civ. App., 273 S.W.2d 105, 108, err. dism.

page 737

75. U.S.—Rochester Civic Theatre, Inc. v. Ramsay, C.A. Minn., 368 F.2d 748.

- N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427—In re Kirby's Will, 240 N.Y.S.2d 214, 39 Misc.2d 190—In re Lipsky's Estate, 256 N.Y.S.2d 429, 45 Misc.2d 320—Cohoes Memorial Hospital v. Mossey, 266 N.Y.S.2d 501, 25 A.D.2d 476.

76. N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427.

78. Consideration implied by acceptance of note

- Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518

84. Iowa—C.J.S. cited in Pappas v. Hauser, 197 N.W.2d 607, 613

Application of promissory estoppel doctrine

(4) Other applications

- Fla.—Mount Sinai Hospital of Greater Miami, Inc. v. Jordan, 290 So.2d 484

page 738

85. Mich.—Timko's Estate v. Oral Roberts Evangelistic Ass'n, 215 N.W.2d 750, 51 Mich. App. 662

88. Donee must show actual reliance

- Fla.—Mount Sinai Hospital of Greater Miami, Inc. v. Jordan, 290 So.2d 484

90. Mich.—Petition of Upper Peninsula Development Bureau, 110 N.W.2d 709, 364 Mich. 179—Congregation B'nai Shalom v. Martin, 173 N.W.2d 504, 382 Mich. 659

91. Fla.—Jordan v. Mount Sinai Hospital of Greater Miami, Inc., App., 276 So.2d 102, affd., Sup., 290 So.2d 484

- N.Y.—In re Field's Will, 181 N.Y.S.2d 922, 15 Misc.2d 950, mod on oth grds 204 N.Y.S.2d 947, 11 A.D.2d 774

page 739

99. Ariz.—Dunaway v. First Presbyterian Church of Wickenburg, 442 P.2d 93, 103 Ariz. 349

§ 6. — Failure of Consideration

page 740

7. N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427

8. Consideration unaffected by conditions in note consistent with contract

- Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518

9. Pa.—In re Brooks' Estate, 40 D. & C.2d 491, 58 Berks 108, 16 Fiduciary 410

§ 7. Validity of Assent in General

12. Cal.—Board of Regents State Universities, State of Wis., 141 Cal.Rptr. 670, 74 C.A.3d 862

§ 8. Fraud and Misrepresentation

17. Fraud held no defense to promise for future action

- N.Y.—Cohoes Memorial Hospital v. Mossey, 266 N.Y.S.2d 501, 25 A.D.2d 476

§ 10. Construction

Library References

Corbin on Contracts § 927.

page 742

37. Cal.—Board of Regents State Universities, State of Wis., 141 Cal.Rptr. 670, 74 C.A.3d 862

- N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427

Binding subscriptions and pledges

- Iowa—Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609

39. Ohio—Hirsch v. Hirsch, 289 N.W.2d 386, 32 Ohio App.2d 200.

Subscription held not obligatory

- Iowa—Pappas v. Hauser, 197 N.W.2d 607

40. Writings on back of note not inconsistent with its terms

- Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518

42. Rights not changed by agreement between other parties

- Mo.—Becker v. Tower Nat. Life Inv. Co., 406 S.W.2d 553

45. Language held precatory

- N.Y.—Woodmere Academy v. Steinberg, 363 N.E.2d 1169, 41 N.Y.2d 746, 395 N.Y.S.2d 434, 97 A.L.R.3d 1047

§ 13. Performance of Conditions

page 744

71. Time of enforcement test

- Colo.—Colorado Woman's College v. Bradford-Robinson Printing Co., 157 P.2d 612, 114 Colo. 237

No debt established

- N.J.—Armitage v. Trustees of Mount Fern Methodist Episcopal Church, 110 A.2d 154, 33 N.J. Super. 367

Conditions as not destroying consideration for contract

- Neb.—In re Couch's Estate, 103 N.W.2d 274, 170 Neb. 518

Contract held not binding

- Mo.—In re Bachelier's Estate, App., 437 S.W.2d 132

Representations held opinions

- N.Y.—Woodmere Academy v. Steinberg, 395 N.Y.S.2d 434, 41 N.Y.2d 746, 363 N.E.2d 1169, 41 N.Y.2d 746, 395 N.Y.S.2d 434, 97 A.L.R.3d 1047

Parol evidence not admissible

- N.Y.—Woodmere Academy v. Steinberg, 395 N.Y.S.2d 434, 41 N.Y.2d 746, 363 N.E.2d 1169, 41 N.Y.2d 746, 395 N.Y.S.2d 434, 97 A.L.R.3d 1047

72. Pa.—Schreckengost v. Gospel Tabernacle, 40 West. 241, affd. 149 A.2d 542, 188 Pa. Super. 652
Tex.—Thompson v. McAllen Federated Woman's Bldg. Corp., Civ. App., 273 S.W.2d 105, err. dism.

§ 14. — Time of Performance

page 747

26. N.Y.—In re Eckel's Will, 124 N.Y.S.2d 448

§ 15. — Change of Plan or Purpose

page 748

37. Neb.—Barker v. Wardens and Vestrymen of St. Barnabas Church, 126 N.W.2d 170, 176 Neb. 327.

§ 16. — Abandonment of Undertaking

40. Neb.—Barker v. Wardens and Vestrymen of St. Barnabas Church, 126 N.W.2d 170, 176 Neb. 327.

§ 17. — Subscription Conditioned on Other Subscriptions

page 749

55. N.Y.—In re Field's Will, 181 N.Y.S.2d grds. 204 N.Y.S.2d 947, 11 A.D.2d grds 204 N.Y.S.2d 947, 11 A.D.2d 774.

56. N.Y.—In re Field's Will, 181 N.Y.S.2d 922, 15 Misc.2d 950, mod on oth grds 204 N.Y.S.2d 947, 11 A.D.2d 774.

57. Writing also required

- N.Y.—Woodmere Academy v. Steinberg, 395 N.Y.S.2d 434, 41 N.Y.2d 746, 363 N.E.2d 1169, 41 N.Y.2d 746, 395 N.Y.S.2d 434, 97 A.L.R.3d 1047

59. Estoppel

- N.Y.—In re Field's Will, 204 N.Y.S.2d 947, 11 A.D.2d 774.

§ 18. Payment

page 750

65. Iowa—C.J.S. cited in Pappas v. Hauser, 197 N.W.2d 607, 611.

§ 19. Revocation and Lapse

page 751

86. Tex.—Thompson v McAllen Federated Woman's Bldg Corp., Civ App, 273 S.W.2d 105, err. dismissed.
87. N.Y.—In re Eckel's Will, 124 N.Y.S.2d 448.
- Tex.—Thompson v McAllen Federated Woman's Bldg Corp., supra, n. 86.

§ 21. Recovery Back of Subscriptions

page 752

- Neb.—C.J.S. black letter summary quoted in Barker v Wardens and Vestrymen of St. Barnabas Church, 126 N.W.2d 170, 177, 176 Neb. 327.
13. La.—Jacobi v Sewerage & Water Bd. of New Orleans, App., 119 So.2d 158.

§ 22. Actions

Library References

Subscriptions ⇐ 21.

page 753

A subscriber is estopped from avoiding his obligation where he has accepted the benefits of the subscription agreement.^{26.5}

- 26.5. Ill.—Board of Ed. of Community Consol. School Dist. No. 59 of Cook County v. E. A. Herzog Const. Co., 172 N.E.2d 645, 29 Ill.App.2d 138.

Where one makes a payment on a subscription contract, after an action has been commenced to enforce said contract, he is deemed to have ratified it, so as to be estopped from denying its validity.^{26.10}

- 26.10. N.Y.—Cohoes Memorial Hospital v. Mossey, 266 N.Y.S.2d 501, 25 A.D.2d 476.

29. Real party in interest

(5) Other matters

- N.Y.—Liberty Maimonides Hospital v. Felberg, 138 N.Y.S.2d 913, 4 Misc.2d 291.

page 755

48. La.—Dillard University v. Local Union 1419, Intern. Longshoremen's Ass'n, App., 144 So.2d 710, app. after remand 169 So.2d 221, application denied 170 So.2d 864, 247 La. 342.

page 757

93. Evidence held inadmissible

- Iowa—Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609.

page 758

5. Evidence held sufficient

- (1) Iowa—Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609.
- N.Y.—In re Field's Estate, 172 N.Y.S.2d 740, 11 Misc.2d 427.

Evidence held insufficient

(2) Other matters.

- La.—Dillard University v. Local Union 1419, Intern. Longshoremen's Ass'n, App., 169 So.2d 221, application denied. 170 So.2d 864, 247 La. 342.

10. Evidence held insufficient

- Ill.—Board of Ed. of Community Consol. School Dist. No. 59 of Cook County v. E. A. Herzog Const. Co., 172 N.E.2d 645, 29 Ill.App.2d 138.

page 759

16. U.S.—Rochester Civic Theatre, Inc. v. Ramsay, C.A. Minn. 368 F.2d 748.

SUBSIDENCE.

page 760

As used in relation to land, any movement of the soil from its natural position, and a shifting, falling, slipping, seeping, or oozing of the soil is a subsidence.^{14.50}

- 14.50. Md.—Levi v. Schwartz, 95 A.2d 322, 326, 201 Md. 575, 36 A.L.R.2d 1241.

- N.J.—Terminal Const. Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Authority, 113 A.2d 787, 804, 18 N.J. 294.

Right to lateral support of land see Adjoining Landowners § 1 et seq.

Similarly defined

(1) "Subsidence", of surface of land, is the falling downward or lowering or shifting downward thereof—Kenny v. Texas Gulf Sulphur Co., Tex. Civ. App., 351 S.W.2d 612.

(2) "Subsidence" is a falling, lowering or flattening out and that which falls or subsides as a sediment in a liquid—Alpert v. Com., Mass., 258 N.E.2d 755, 768, 357 Mass. 306.

SUBSIDY.

17. Cal.—C.J.S. quoted in Los Angeles County v. State Dept. of Public Health, 322 P.2d 968, 973, 158 C.A.2d 425.

Not intended as mere gratuities or bounties—U.S.—In re Hooper's Estate, C.A. Virgin Islands, 359 F.2d 569, 575, cert. den. 87 S.Ct. 206, 385 U.S. 903, 17 L.Ed.2d 133.

18. Cal.—C.J.S. quoted in Los Angeles County v. State Dept. of Public Health, 322 P.2d 968, 973, 158 C.A.2d 425.

19. Cal.—C.J.S. quoted in Los Angeles County v. State Dept. of Public Health, 322 P.2d 968, 973, 158 C.A.2d 425.

20. U.S.—C.J.S. quoted in In re Hooper's Estate, C.A. Virgin Islands, 359 F.2d 569, 575.

- Cal.—C.J.S. quoted in Los Angeles County v. State Dept. of Public Health, 322 P.2d 968, 973, 158 C.A.2d 425.

21. Cal.—C.J.S. quoted in Los Angeles County v. State Dept. of Public Health, 322 P.2d 968, 973, 158 C.A.2d 425.

SUBSIST.

22. Ill.—People ex rel. Hafer v. Flynn, 150 N.E.2d 183, 193, 13 Ill.2d 368.

SUBSISTENCE.

25. N.C.—Sayland v. Sayland, 148 S.E.2d 218, 222, 267 N.C. 378.

26. N.C.—Sayland v. Sayland, 148 S.E.2d 218, 222, 267 N.C. 378.

27. N.C.—Sayland v. Sayland, 148 S.E.2d 218, 222, 267 N.C. 378.

28. N.C.—Sayland v. Sayland, 148 S.E.2d 218, 222, 267 N.C. 378.

page 761

29. "Subsisting" is defined to mean to have existence, to be, to exist or continue to exist—Dillinger v. North Sterling Irr. Dist., 266 P.2d 776, 780, 129 Colo. 17.

SUBSTANCE.

38. N.J.—J. D. Loizeaux Lumber Co. v. Davis, 124 A.2d 593, 599, 41 N.J. Super. 231.

55. Substance foreign to the human body is any matter or thing other than flesh, blood or bone.—

Mathis v. Hegna, 248 N.E.2d 767, 770, 109 Ill. App.2d 356.

page 762

Phrases:

58. Phrases

(6) "Volatile substance" is that which passes off readily in the form of a vapor—Standard Oil Co. v. Lyons, C.C.A. Iowa, 130 F.2d 965, 971.

SUBSTANTIAL.

60. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140.
- Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

- Minn.—State by Lord v. Pahl, 95 N.W.2d 85, 89, 254 Minn. 349.

- Ohio—C.J.S. quoted at length in State v. Owens, 339 N.E.2d 853, 856, 44 Ohio App. 428, 73 O.O.2d 540.

Derived from word "substance"

- U.S.—Panduit Corp. v. Stahl Bros. Fibre Works, Inc., D.C. Mich., 338 F.Supp. 1240, 1244.

61. Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

No rule of thumb, etc.

- Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

64. U.S.—C.J.S. cited in U.S. v. Taylor, D.C. Pa., 334 F.Supp. 1050, 1059.

- Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

65. Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

66. Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

67. U.S.—C.J.S. quoted in Busch v. Service Plastics, Inc., D.C. Ohio, 261 F.Supp. 136, 142.

- Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140.

- Iowa—C.J.S. cited in Smith v. City of Fort Dodge, 160 N.W.2d 492, 498.

- Ohio—McHugh v. Prestodial, Inc., Ohio Com. Pl., 241 N.E.2d 102, 104, 18 Misc. 111.

Meaning gauged by circumstances

- Minn.—State by Lord v. Pahl, 95 N.W.2d 85, 89, 254 Minn. 349.

68. Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 224, 269 Wis. 262.

73. U.S.—Levenson v. U.S., D.C. Ala., 157 F.Supp. 244, 250.

- Pa.—Carter v. Vecchione, 133 A.2d 297, 300, 183 Pa. Super. 595.

page 763

74. U.S.—Levenson v. U.S., D.C. Ala., 157 F.Supp. 244, 250.

- Pa.—Carter v. Vecchione, 133 A.2d 297, 300, 183 Pa. Super. 595.

75. Ind.—Baker v. State, 138 N.E.2d 641, 644, 236 Ind. 55.

76. U.S.—U.S. v. Taylor, D.C. Pa., 334 F.Supp. 1050, 1059.

- Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala. App. 115, cert. den. 96 So.2d 195, 266 Ala. 700.

- Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140.

- Kan.—State ex rel. Smith v. Fairmont Foods Co., 410 P.2d 308, 314, 196 Kan. 73.

78. U.S.—U.S. v. Taylor, D.C. Pa., 334 F.Supp. 1050, 1059.

- Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala. App. 115, cert. den. 96 So.2d 195, 266 Ala. 700.

- Kan.—State ex rel. Smith v. Fairmont Foods Co., 410 P.2d 308, 314, 196 Kan. 73.

80. Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

Similarly defined

(4) "Substantial" means that is such in substance or in the main, or of pertaining to substance or main part of anything.—Smith v. City of Fort Dodge, Iowa, 160 N.W.2d 492, 497, 498

81. U.S.—Pantuit Corp. v. Stahl Bros. Fibre Works Inc., D.C. Mich., 338 F.Supp. 1240, 1244

Similarly defined

(1) Of or pertaining to the substance or main part of anything.—Carter v. Vecchione, 133 A.2d 297, 300, 183 Pa. Super. 595

(2) Of or relating to the main part of something.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

82. Actually existing

Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

83. U.S.—U.S. v. Taylor, D.C. Pa., 334 F.Supp. 1050, 1059

Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Kan.—State ex rel. Smith v. Fairmont Foods Co., 410 P.2d 308, 314, 196 Kan. 73

85. Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Kan.—State ex rel. Smith v. Fairmont Foods Co., 410 P.2d 308, 314, 196 Kan. 73

86. Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

88. Iowa.—Smith v. City of Fort Dodge, 160 N.W.2d 492, 497.

Being of moment

Ariz.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

Similarly defined

(1) "Substantial" means something of moment or an important or material matter, thing or part.—Pierson v. Hermann, 210 N.E.2d 893, 897, 3 Ohio App.2d 398

89. Ariz.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

90. Ariz.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Iowa.—Smith v. City of Fort Dodge, 160 N.W.2d 492, 497

91. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Iowa.—Smith v. City of Fort Dodge, 160 N.W.2d 492, 497

page 764

94. Ariz.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

S.D.—Lipp v. Corson County, 78 N.W.2d 172, 174, 76 S.D. 343.

96. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

S.D.—Lipp v. Corson County, 78 N.W.2d 172, 174, 76 S.D. 343.

97. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

S.D.—Lipp v. Corson County, 78 N.W.2d 172, 174, 76 S.D. 343.

98. Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 193, 39 Ala App. 115, cert. den. 96 So.2d 195, 266 Ala. 700

Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

S.D.—Lipp v. Corson County, 78 N.W.2d 172, 174, 76 S.D. 343

1. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

S.D.—Lipp v. Corson County, 78 N.W.2d 172, 174, 76 S.D. 343

2. **Firmly or stoutly constructed**
Ariz.—State ex rel. Lassen v. Harpham, 410 P.2d 100, 110, 2 Ariz. App. 478

Other terms have been compared or distinguished.⁸¹

8.1. Terms compared or distinguished

(1) "Substantial" is synonymous with fundamental, material, vital and important.—Presbyterian Church in U.S. v. Eastern Heights Presbyterian Church, 159 S.E.2d 690, 696, 224 Ga. 61

SUBSTANTIALLY.

page 765

10. U.S.—Todd v. Sears Roebuck & Co., D.C.N.C., 119 F.Supp. 38, 41—John Blue Co. v. Dempster Mill Mfg. Co., D.C.Neb., 172 F.Supp. 23, 26

12. U.S.—John Blue Co. v. Dempster Mill Mfg. Co., D.C.Neb., 172 F.Supp. 23, 26

Employed to modify terms intended to be close approximations.—Janzen v. Phillips, Wash., 437 P.2d 189, 191, 73 Wash.2d 174

14. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

17. U.S.—Todd v. Sears, Roebuck & Co., supra, n. 10

Ind.—Sutto v. Board of Medical Registration and Examination of Indiana, 180 N.E.2d 533, 538, 242 Ind. 556

Equated with the words "about" and "essentially"—American Federation of Government Employees, AFL-CIO v. Rosen, D.C. Ill., 418 F.Supp. 205, 206

Wash.—Janzen v. Phillips, Wash., 437 P.2d 189, 191, 73 Wash.2d 174

18. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Similarly defined

(1) Strongly, for the most part.—Todd v. Sears Roebuck & Co., supra, n. 10

20. Cal.—Atchison, T. & S.F. Ry. Co. v. Kings County Water Dist., 302 P.2d 1, 3, 47 C.2d 140

Phrases:
27. **Phrases**

(5a) "Substantially the same" does not mean identical, but means the same in substance or in the main, and it is a relative term and should be interpreted in context, so that when a thing is substantially the same it means that it is the same in all important particulars.—Darlington v. Studebaker-Packard Corp., D.C. Ind., 191 F.Supp. 438, 439.

SUBSTITUTE.

page 766

34. Tex.—C.J.S. cited in Atlantic Ins. Co. v. Gonzalez, Civ. App., 358 S.W.2d 716, 718.

Va.—C.J.S. cited in Day v. Abernathy, 133 S.E.2d 299, 303, 204 Va. 723

Existence of thing to be replaced

Tex.—Southwest Sav. Ass'n v. Dunagan, Civ. App., 392 S.W.2d 761, 767.

35. U.S.—Gordillo v. State Marine Lines, D.C. Cal., 13 F.R.D. 445, 446

36. Similarly defined

(1) One who takes another's place in case of the latter's absence.—Lommasson v. School Dist. No. 1, Multnomah County, Or., 261 P.2d 860, 866, 201 Or. 71

37. U.S.—Gordillo v. State Marine Lines, supra, n. 35

43. U.S.—Gordillo v. State Marine Lines, supra, n. 35

46. U.S.—Gordillo v. State Marine Lines, supra, n. 35

47. U.S.—Gordillo v. State Marine Lines, supra, n. 35

Substituted.

49. Iowa.—C.J.S. cited in Manila Community School District v. Halverson, 101 N.W.2d 705, 709, 251 Iowa 496

La.—C.J.S. quoted in Fullilove v. U.S. Casualty Company of New York, 125 So.2d 389, 393, 240 La. 859—Little v. Safeguard Ins. Co., 137 So.2d 415, 420

Va.—C.J.S. quoted in Day v. Abernathy, 133 S.E.2d 299, 303, 204 Va. 723

50. Iowa.—C.J.S. cited in Manila Community School District v. Halverson, 101 N.W.2d 705, 709, 251 Iowa 496

La.—C.J.S. quoted in Fullilove v. U.S. Casualty Company of New York, 125 So.2d 389, 393, 240 La. 859—Little v. Safeguard Ins. Co., 137 So.2d 415, 420

Va.—C.J.S. quoted in Day v. Abernathy, 133 S.E.2d 299, 303, 204 Va. 723

51. Iowa.—C.J.S. cited in Manila Community School District v. Halverson, 101 N.W.2d 705, 709, 251 Iowa 496

La.—C.J.S. quoted in Fullilove v. U.S. Casualty Company of New York, 125 So.2d 389, 393, 240 La. 859—Little v. Safeguard Ins. Co., 137 So.2d 415, 420

Va.—C.J.S. quoted in Day v. Abernathy, 133 S.E.2d 299, 303, 204 Va. 723

52. Iowa.—C.J.S. cited in Manila Community School District v. Halverson, 101 N.W.2d 705, 709, 251 Iowa 496

La.—C.J.S. quoted in Fullilove v. U.S. Casualty Company of New York, 125 So.2d 389, 393, 240 La. 859—Little v. Safeguard Ins. Co., 137 So.2d 415, 420

Va.—C.J.S. quoted in Day v. Abernathy, 133 S.E.2d 299, 303, 204 Va. 723

SUBSTITUTION.

page 767

56. **Similarly defined**
"Substitution" means stepping into the shoes of one who has acquired a status, in the same capacity as the one is replaced

Minn.—Mondale v. Commissioner of Taxation, 116 N.W.2d 82, 85, 263 Minn. 121

SUBTERFUGE.

66. **Similarly defined**
Subterfuge means a device, plan or the like to which one resorts for escape or concealment, an artifice employed to escape censure or the force of an argument, or to justify opinions or conduct, an evasion

D.C.—Camden Trust Co. v. Givney, C.A., 301 F.2d 521, 523, 112 U.S.App.D.C. 197

page 768

SUCCEED. It is also defined as meaning to follow one next after, as by being the heir or the elected or appointed successor.^{83 1}

83.1. N.J.—Gill v. Board of Ed. of Hamilton, Tp., Mercer County, 129 A.2d 753, 755, 44 N.J. Super. 79.

Similarly expressed

(1) One "succeeds" who follows or takes the place another has left and sustains the like part or character

—Albury v. Central and Southern Florida Flood Control Dist., Fla. App., 99 So.2d 248, 252.

SUCCESSION.

page 769

Phrases

(3) "Universal succession" is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to the rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying "mobilia sequuntur personam", but, being a fiction, it is not allowed to obscure the facts when the facts become important—*Blackstone v. Miller*, N.Y., 23 S.Ct. 277, 278, 188 U.S. 189, 47 L.Ed. 439.

In the civil law, a succession is an ideal, a juridical person, independent from those having an interest therein.⁹⁹

99.1. La—*Succession of Levy*, 39 So. 37, 39, 115 La. 377, 8 L.R.A., N.S., 1180, 5 Ann. Cas. 871—*Succession of Martin*, 100 So. 2d 509, 512, 234 La. 566.

SUCCESSIVE.

4. One following another

Va.—*Lamb v. Parsons*, 78 S.E.2d 707, 709, 195 Va. 353.

Similarly defined

"Successive" means following each other or another without interruption or interval.

Mo.—*Copher v. Barbee*, App., 361 S.W.2d 137, 145.

(2) "Successive" means following one upon another—*Tarsia v. Nick's Laundry & Linen Supply Co.*, 399 P.2d 28, 29, 239 Or. 562.

page 770

SUCCESSOR.

25. Cal.—*Citizens Suburban Co. v. Rosemount Development Co.*, 53 Cal. Rptr. 551, 557, 244 C.A.2d 666.

SUCCINCT.

27. Ind.—*White v. Crow*, 198 N.E.2d 222, 224, 245 Ind. 276.

SUCH.

page 771

31. N.J.—*C.J.S. cited in State v. E. H. Miller Transp. Co., Inc.*, 181 A.2d 537, 539, 74 N.J. Super. 474—*Wayne Co. v. Newco, Inc.*, 182 A.2d 369, 372, 75 N.J. Super. 100.

Ohio—*Chase Rand Corp. v. Pick Hotels Corp. of Youngstown*, 147 N.E.2d 849, 855, 167 Ohio St. 299.

Va.—*Sharlin v. Neighborhood Theatre, Inc.*, 167 S.E.2d 334, 337, 209 Va. 718.

33. N.J.—*C.J.S. cited in State v. E. H. Miller Transp. Co., Inc.*, 181 A.2d 537, 539, 74 N.J. Super. 474—*Wayne Co. v. Newco, Inc.*, 182 A.2d 369, 75 N.J. Super. 100.

Ohio—*Chase Rand Corp. v. Pick Hotels Corp. of Youngstown*, 147 N.E.2d 849, 855, 167 Ohio St. 299.

Va.—*Sharlin v. Neighborhood Theatre, Inc.*, 167 S.E.2d 334, 337, 209 Va. 718.

A rather slippery word

U.S.—*C.J.S. cited in Federal Trade Commission v. Tuttle*, C.A.N.Y., 244 F.2d 605, 611.

36. N.J.—*C.J.S. cited in State v. E. H. Miller Transp. Co., Inc.*, 181 A.2d 537, 539, 74 N.J. Super. 474.

38. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

39. Mo.—*C.J.S. text has been quoted with approval as well stated.—Joseph L. Pohl, Contractor v. State Highway Commission*, Mo., 431 S.W.2d 99, 105.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

Meaning not to be determined in isolation

Va.—*Sharlin v. Neighborhood Theatre, Inc.*, 167 S.E.2d 334, 337, 209 Va. 718.

40. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

41. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

42. U.S.—*C.J.S. cited in Federal Trade Commission v. Tuttle*, C.A.N.Y., 244 F.2d 605, 611.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

43. Md.—*C.J.S. cited in Board of Supervisors of Elections v. Weiss*, 141 A.2d 734, 737, 217 Md. 133.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

44. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

45. Iowa—*In re De Lescaillie's Estate*, Iowa, 187 N.W.2d 741, 744.

N.J.—*Wayne Co. v. Newco, Inc.*, 182 A.2d 369, 75 N.J. Super. 100.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

Ohio—*Chase Rand Corp. v. Pick Hotels Corp. of Youngstown*, 147 N.E.2d 849, 855, 167 Ohio St. 299.

Va.—*Sharlin v. Neighborhood Theatre, Inc.*, 167 S.E.2d 334, 337, 209 Va. 718.

46. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

Ohio—*Chase Rand Corp. v. Pick Hotels Corp. of Youngstown*, 147 N.E.2d 849, 855, 167 Ohio St. 299.

47. Md.—*Board of Sup'rs of Elections of Baltimore City v. Weiss*, 141 A.2d 734, 737, 217 Md. 133.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

48. Ill.—*Luciani v. Certified Grocers of Ill., Inc.*, 245 N.E.2d 523, 527, 105 Ill. App.2d 448.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

49. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

Similarly stated

(2) "Such" refers to something which has been mentioned before.—*Richardson-Merrell, Inc. v. Main*, 402 P.2d 746, 748, 240 Or. 533.

50. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

51. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

52. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

Va.—*Sharlin v. Neighborhood Theatre, Inc.*, 167 S.E.2d 334, 337, 209 Va. 718.

page 772

53. N.D.—*C.J.S. quoted in Backman v. Guy*, 126 N.W.2d 910, 915.

56. U.S.—*C. J. Tower & Sons of Buffalo, Inc. v. U.S., Cust. Ct.*, 295 F.Supp. 1104, 1108.

Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

57. U.S.—*C. J. Tower & Sons of Buffalo, Inc. v. U.S., Cust. Ct.*, 295 F.Supp. 1104, 1108.

Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

62. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

65. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

66. Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

page 773

73. U.S.—*C. J. Tower & Sons of Buffalo, Inc. v. U.S., Cust. Ct.*, 295 F.Supp. 1104, 1108.

Mo.—*Joseph L. Pohl, Contractor v. State Highway Commission*, 431 S.W.2d 99, 105.

74. U.S.—*C. J. Tower & Sons of Buffalo, Inc. v. U.S., Cust. Ct.*, 295 F.Supp. 1104, 1108.

SUDDEN.

85. Similarly defined

(1) "Sudden" means happening quickly without warning, coming unexpectedly or in an instant, happening without previous notice or with very brief notice; coming or occurring unexpectedly, unforeseen, unprepared for; as sudden shower, death, emergency, turn for the better, or attack of the enemy—*Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.*, 333 P.2d 938, 940, 53 Wash.2d 404.

SUDDENLY.

page 774

98. Word in common usage

Or.—*Plasker v. Fazio*, Or., 485 P.2d 1075, 1079, 259 Or. 171.

1. Mo.—*Lafferty v. Wattle*, App., 349 S.W.2d 519, 525.

Similarly defined

(1) Happening without previous notice or with very brief notice, coming or occurring unexpectedly, unforeseen, unprepared for—*Plasker v. Fazio*, 485 P.2d 1075, 1079, 259 Or. 171.

SUDSY. A common word meaning full of suds; frothy; foamy.

450. U.S.—*Roselux Chemical Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 860, 49 CCPA 931.

SUE.

5. Ill.—*Hindman v. Holmes*, 124 N.E.2d 344, 345, 4 Ill. App.2d 279.

Ohio—*Sanford Const. Co. v. Rosenblatt, Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

6. Ill.—*Hindman v. Holmes*, supra, n. 5.

page 775

7. Ill.—*Hindman v. Holmes*, supra, n. 5.

Similarly defined

(1) To institute legal proceedings in court; to bring suit.

Ohio—*Sanford Const. Co. v. Rosenblatt, Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

8. Ohio—*Sanford Const. Co. v. Rosenblatt, Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

Similarly expressed

(1) "While we have no doubt the word 'sue' in certain contexts means simply the bringing of an action or suit, the common and usual meaning of the word encompasses not only the bringing of the action but the prosecution of such action to a conclusion."

Ill.—*Hindman v. Holmes*, 124 N.E.2d 344, 345, 346, 4 Ill. App.2d 279.

9. Ill.—*Hindman v. Holmes*, supra, n. 5.

10. Ohio—*Sanford Const. Co. v. Rosenblatt, Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

11. Ill.—*Hindman v. Holmes*, supra, n. 5.

12. Ohio—*Sanford Const. Co. v. Rosenblatt, Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

Similarly defined

Ill.—*Hindman v. Holmes*, supra, n. 5.

The word "sue" is properly applicable to civil actions and suits and to criminal prosecutions.¹³⁵

135. Ohio—*Sanford Const. Co. v. Rosenblatt, Ohio Mun.*, 266 N.E.2d 267, 268, 25 Ohio Misc. 99.

Sue and be sued.

SUE**Page 775**

14. NC—C.J.S. quoted in J A Jones Construction Co v Local Union 755 of Intern Broth of Elec Workers (A F of L), 98 S E2d 852, 857, 246 NC 481

15. US—Sigona v Slusser, D C Conn., 124 F Supp 327, 329

NC—C.J.S. quoted in J A Jones Construction Co v Local Union 755 of Intern Broth of Elec Workers (A F of L), 98 S E2d 852, 857, 246 NC 481

SUFFER.**page 776**

41. NJ—Feldman v Urban Commercial, Inc., 209 A.2d 640, 648, 87 NJ Super 391

42. NJ—Feldman v Urban Commercial, Inc., 209 A.2d 640, 648, 87 NJ Super 391

43. NJ—Feldman v Urban Commercial, Inc., 209 A.2d 640, 648, 87 NJ Super 391.

56. Similarly defined

(1) In the layman's customary sense of the word, the verb "suffer" is most usually considered to mean the subjection of one to physical or mental pain or enduring with stress or suffering pain of body or grief of mind, it is also defined as meaning to have the feeling or sensation that arises from the action of something painful, distressing or the like, or to feel or endure pain, mental or physical.—Hudson v Cole, 115 S E2d 825, 828, 102 Ga App 300, citing CJS

SUFFERANCE.**page 777****63. Similarly expressed**

(1) "Sufferance" implies knowledge or opportunity through reasonable diligence to acquire knowledge, which presupposes in most cases a fair measure at least of continuity and permanence.—Migliaccio v O'Connell, 122 N.E.2d 914, 915, 307 NY 566

SUFFOCATE.**page 778****88. Impossibility of breathing**

"Suffocate" commonly refers to conditions in which breathing is impossible through lack of available oxygen or through presence of noxious or poisonous gas, and also to situations in which breathing is impossible because mouth and nose are covered.—Langley v Durham Life Ins. Co of Raleigh, N.C., 135 S E2d 38, 41, 261 NC 459.

SUFFOCATION.**page 779****92. Similarly defined**

"Suffocation" is defined as the act of suffocating or state of being suffocated; stoppage of breathing.—Langley v Durham Life Ins. Co of Raleigh, N.C., 135 S.E.2d 38, 41, 261 N.C. 459

SUGGEST.**1. Used in sense of recommendation**

N.J.—In re Erie R. System, 115 A.2d 89, 97, 19 N.J. 110.

SUGGESTIVE.

Tending to suggest thoughts, ideas, etc.; conveying a suggestion or intimation; giving a seeming indication of something; sometimes, such as to suggest something improper or indecent.^{3.50}

3.50. N.J.—State v. Gagliardi, 154 A.2d 581, 583, 57 N.J. Super. 238.

SUFFICIENT.**page 778**

Other terms have been compared or distinguished.^{82.1}

82.1. "Valid" equivalent

NY—Dennis v Massachusetts Ben Assoc., 24 NE 843, 845, 120 NY 496, 17 Am S R 660, 9 L R A 189

page 780**SUI.****4. Phrases**

(1) Mo—Potter v Patee, App., 493 S W2d 58, 61

SUICIDE**§ 1. Definition****Library References****Suicide ⇐1.****page 781**

3. Wis—Bisenius v Karns, 165 NW2d 377, 42 Wis2d 42, app dism 89 S Ct 2033, 395 US 709, 23 L Ed 2d 655

As crime or offense

(1) Ariz.—C.J.S. cited in State v Willits, 409 P.2d 727, 729, 2 Ariz App 443

Ind—Wallace v State, 116 NE2d 100, 232 Ind 700

4. Other definitions

(1) Tenn—Ray v Leader Federal Sav & Loan Ass'n, 292 S.W.2d 458, 40 Tenn App. 625, 60 A L R 2d 564

page 782

7. NC—State v. Willis, 121 S E2d 854, 255 NC 473

10. Ga—Liberty Nat Life Ins. Co v Cox, 106 S E2d 182, 98 Ga App. 582

§ 2. Criminality

14. Cal—Tate v Canonica, 5 Cal Rptr. 28, 180 C.A.2d 898

Md—Wilmington Trust Co. v Clark, 424 A.2d 744, 289 Md 313

19. Divine ordination not valid exception

D.C.—Application of President and Directors of Georgetown College, Inc., C.A., 331 F.2d 1000, 118 U.S.App.D.C. 80, 9 A L.R.3d 1367 (Opinion of Wright, J., sitting alone) Rehearing en banc denied 331 F.2d 1010, 118 U.S.App.D.C. 90, cert den 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746

20. Cal—Tate v Canonica, 5 Cal.Rptr. 28, 180 C.A.2d 898.

Neb.—State v. Fuller, 278 NW2d 756, 203 Neb 233, op. supp. 281 NW2d 749, 204 Neb 196

Wis.—Bisenius v Karns, 165 NW2d 377, 42 Wis.2d 42, app dism. 89 S Ct. 2033, 395 US 709, 23 L.Ed.2d 655.

Withdrawal of extraordinary life-supporting system by choice

NY—Application of Eichner, 423 N.Y.S.2d 580, 102 Misc.2d 184, mod. on oth. grds., 426 N.Y.S.2d 517, 73 A.D.2d 431, and 420 N.E.2d 64, 52 N.Y.2d 363, 458 N.Y.S.2d 266, cert. den. 102 S.Ct. 309, 454 U.S. 858, 70 L.Ed.2d 153.

page 783

23. NY—Von Holden v. Chapman, 450 N.Y.S.2d 623, 87 A.D.2d 66.

26. Wis.—C.J.S. cited in Bisenius v. Karns, 165 N.W.2d 377, 382, 42 Wis.2d 42, app. dism. 89 S Ct. 2033, 395 U.S. 709, 23 L.Ed.2d 655.

27. Valid prosecution for attempted suicide negated

NJ—Matter of Quinlan, 355 A.2d 647, 70 NJ 10, 79 A.L.R.3d 205, cert den 97 S.Ct. 319, 429 US 922, 50 L Ed 2d 289

§ 3. Attempts**Library References****Suicide ⇐2.****28. Insanity a defense**

NC—State v. Willis, 121 S E2d 854, 255 NC 473.

29. Ariz.—C.J.S. cited in State v. Willits, 409 P.2d 727, 729, 2 Ariz App 443

Misdemeanor

NC—State v. Willis, 121 S.E.2d 854, 255 NC 473

30. Indictable misdemeanor

NC—State v. Willis, 121 S E2d 854, 255 NC 473

32. Ind—Wallace v State, 116 NE2d 100, 232 Ind 700

Tenn—State ex rel Swann v Pack, 527 S.W.2d 99, cert den 96 S Ct 1429, 424 US 954, 47 L.Ed.2d 360

§ 4. Advising, Aiding, or Inciting to Commit

36. NC—State v. Willis, 121 S E2d 854, 255 N.C 473

page 784**37. Prosecution negated**

NJ—Matter of Quinlan, 355 A.2d 647, 70 N.J. 10, 79 A.L.R.3d 205, cert. den 97 S.Ct. 319, 429 U.S. 922, 50 L Ed 2d 289

45. Cal—C.J.S. cited in In re Joseph G., 194 Cal Rptr. 163, 667 P.2d 1176, 1182, 34 C 3d 429

§ 6. Prosecution and Punishment**47. Indictment for attempt to commit suicide held sufficient**

NC—State v. Willis, 121 S.E.2d 854, 255 N.C 473

SUITABLE.**page 786**

10. Judicially defined to mean actually, practically and commercially fit for the use described.—Mattoon & Co. v U.S., Cust Ct., 297 F.Supp. 1404, 1406

It is also defined to mean reasonable.^{19.5}

19.5. S.D.—Headley v Ostroot, 76 N.W.2d 474, 475, 76 S.D. 246

SUITE. A number of things constituting a set, series, complement, sequence, group, collection, or the like.^{23.50}

23.50. Tex.—Blum v. Dismuke, Civ.App., 314 S.W.2d 635, 641

page 787

SULFATION. Refers generally to the formation of lead sulfate on the surface and in the pores of the active material of lead-acid battery plates.^{26.25}

26.25. U.S.—General Battery Corp. v. Gould, Inc., D.C.Del., 545 F.Supp. 731, 736.

SULLEN. Ill-humored, unsocial; hence, gloomily silent.^{26.50}

26.50. Tex.—Monett v. State, 323 S.W.2d 456, 458, 168 Tex.Cr.R. 124.

SULPHUR.**33. Similarly defined**

(1) "Sulphur" is a solid, nonmetallic element existing in many allotropic forms, and asserted by some to be a Compound—*Smith v State Bd of Medicine of Idaho*, 259 P.2d 1033, 1036, 74 Idaho 191

Phrases

(2) "Sulfur dioxide," In a gaseous form, a heavy colorless nonflammable gas of pungent, suffocating odor *Public Service Co of New Mexico v New Mexico Environmental Imp Bd*, 549 P.2d 638, 645, 89 NM 223

SUM.

Tex—*C.J.S. cited in Anderson Development Co v Producers Grain, Tex Civ App*, 558 S.W.2d 924, 929, err ref no rev err

SUMMARILY.

page 788

64. Without delay or formality

S.D.—*C.J.S. cited in State v Greene*, 192 N.W.2d 712, 718, 86 S.D. 177, cert den 92 S.Ct. 1805, 405 U.S. 929, 32 L.Ed.2d 131

SUMMARIZE.

To tell in, or reduce to, a summary; present briefly.^{65 50}

65.50. U.S.—*Dickinson v U.S.*, C.A. Cal., 203 F.2d 336, 341

SUMMARY.

As a noun.

page 789

69. Similarly defined

(1) "Summary" is an abstract, abridgement or compendium, especially one recapitulating sum or substance of preceding discourse—*Dickinson v U.S.*, C.A. Cal., 203 F.2d 336, 341

(2) A "summary" is a brief statement or restatement of main points, especially as a conclusion to a work—*Van Lloyd v Yellow Cab. Co.*, 154 A.2d 906, 909, 220 Md. 488.

(3) As used in connection with legal proceedings it means a short, concise, and immediate proceeding. Mo—*C.J.S. cited in State v. White*, 429 S.W.2d 277, 280.

71. Ohio—*Seyler v Clark*, 175 N.E.2d 881, 883

75. N.J.—*Alfour Inc. v Lightfoot*, 301 A.2d 197, 202, 123 N.J. Super. 1

SUMMARY PROCEEDINGS

§ 2. Nature**Library References**

Action ⇨20.

page 790

4. La.—*State ex rel. Torrance v. City of Shreveport*, 93 So.2d 187, 231 La. 840.

§ 4. Procedure

Ohio—*C.J.S. quoted in In re Gottwald's Estate*, 131 N.E.2d 586, 590, 164 Ohio St. 405.

page 791

5. Expedition of litigation as aim

N.J.—*Bergen County v. S. Goldberg & Co.*, 189 A.2d 4, 39 N.J. 377, on remand 201 A.2d 734, 8 N.J. Super. 252.

page 793

43. N.J.—*C.J.S. quoted at length in Alfour Inc. v Lightfoot*, 301 A.2d 197, 202, 123 N.J. Super. 1

page 794

49. N.J.—*Bergen County v. S. Goldberg & Co.*, 189 So.2d 4, 39 N.J. 377, on remand 201 A.2d 734, 8 N.J. Super. 252

SUMMER.

page 795

Phrases

(5) "Summer vacation" is the period between Spring and Fall school terms—*Koehler v Roosevelt Field, Inc.*, 123 N.Y.S.2d 275, 277, 282 App. Div. 296

SUMMONS.**4. Other meaning**

"Summon" does not mean only compulsion but also has another signification, namely, notification—*U.S. ex rel. Sturdivant v. State of N.J.*, D.C.N.J., 188 F. Supp. 227, 230

SUNDAY

§ 1. Definition, Origin, and Nature**Library References**

Sunday ⇨1.

page 799

1. N.J.—*Walinski v Mayor & Council of City of Gloucester*, 95 A.2d 625, 631, 25 N.J. Super. 122

2. Mo.—*ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876

4. Mo.—*ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876

N.J.—*Walinski v Mayor & Council of City of Gloucester*, supra, n. 1

5. Mo.—*ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876

N.Y.—*People v. Polar Vent of America, Inc.*, 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621

9. N.J.—*Walinski v Mayor & Council of City of Gloucester*, supra, n. 1

12. N.Y.—*People v. Polar Vent of America, Inc.*, 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621.

13. N.Y.—*People v. Polar Vent of America, Inc.*, 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621.

§ 2. Duration of Day

page 800

23. N.C.—*Blevins v. France*, 93 S.E.2d 549, 244 N.C. 334.

24. *Submission of newspapers to be published on Sunday*

Mass—*Brattle Films, Inc. v. Commissioner of Public Safety*, 127 N.E.2d 891, 333 Mass. 58.

§ 3. Constitutional and Statutory Provisions

30. N.C.—*C.J.S. cited in Clark's Charlotte, Inc. v Hunter*, 134 S.E.2d 364, 369, 261 N.C. 222

Ohio—*C.J.S. quoted at length in State v. Haase*, 116 N.E.2d 224, 230, 97 Ohio App. 377.

Repeal of inconsistent earlier law

N.J.—*Two Guys From Harrison, Inc. v. Furman*, 160 A.2d 265, 32 N.J. 199.

Policy not abandoned by repeal of prior statutes

Mo.—*Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109.

Construction of statutes

Md.—*Hechinger Co. v. State's Attorney for Prince George's County*, 326 A.2d 742, 272 Md. 706.

31. N.C.—*C.J.S. cited in Clark's Charlotte, Inc. v Hunter*, 134 S.E.2d 364, 369, 261 N.C. 222

Sunday closing statute held not repealed

Ky—*Com v. Arlan's Dept. Store of Louisville*, 357 S.W.2d 708, app. dism. 83 S.Ct. 277, 371 U.S. 218, 9 L.Ed.2d 264.

32. N.Y.—*People v. Spinelli*, 282 N.Y.S.2d 354, 54 Misc.2d 485

page 801

37. Fla.—*C.J.S. cited in Moore v. Thompson*, 126 So.2d 543, 545

Statute construed

Ala.—*Piggly-Wiggly v. Jacksonville, Inc. v. City of Jacksonville*, 336 So.2d 1078

N.J.—*Town of West Orange v. Jordan Corp.*, 146 A.2d 134, 52 N.J. Super. 533.

38. N.Y.—*C.J.S. cited in Twin Fair Distributors Corp. v. Cosgrove*, 380 N.Y.S.2d 933, 935, 85 Misc.2d 901

Pa.—*Com v. Bauder*, 145 A.2d 915, 188 Pa. Super. 424

40. U.S.—*McGowan v. State of Md.*, Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393

Conn.—*State v. Hurliman*, 123 A.2d 767, 143 Conn. 502

Ind.—*Tinder v. Clarke Auto Co.*, 149 N.E.2d 808, 238 Ind. 302

Md.—*McGowan v. State*, 151 A.2d 156, 220 Md. 117, aff'd 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393—*Atlantic Dept. Store, Inc. v. State's Attorney for Prince George's County*, 323 A.2d 617, 22 Md. App. 381.

Tex.—*State v. Spartan's Industries, Inc.*, 447 S.W.2d 407, app. dism. 90 S.Ct. 1359, 397 U.S. 590, 25 L.Ed.2d 596

Effect of provision for time off to attend church
S.C.—*State v. Solomon*, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270

Other statements of purpose

Ala.—*Piggly-Wiggly of Jacksonville, Inc. v. City of Jacksonville*, 336 So.2d 1078.

Me.—*State v. S.S. Kresge, Inc.*, 364 A.2d 868

Mo.—*State ex rel. McNary v. Levitz Furniture Co. of Missouri, Inc.*, App., 502 S.W.2d 370.

N.J.—*State v. K-Mart*, 338 A.2d 230, 134 N.J. Super. 76, aff'd 359 A.2d 492, 141 N.J. Super. 546.

41. U.S.—*McGowan v. State of Md.*, Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393.

Me.—*Opinion of the Justices*, 191 A.2d 637, 159 Me. 410.

N.J.—*Auto-Rate Supply Co. v. Mayor and Township Committee of Woodbridge Tp.*, 135 A.2d 515, 25 N.J. 188—*State v. Patrignani*, 167 A.2d 671, 65 N.J. Super. 303—*Vornado, Inc. v. R. H. Macy & Co.*, 187 A.2d 620, 78 N.J. Super. 102.

N.Y.—*People v. Binstock*, 170 N.Y.S.2d 133, 7 Misc.2d 1039—*People v. Rubenstein*, 182 N.Y.S.2d 548, 17 Misc.2d 10—*Kearns v. Barney's Clothes, Inc.*, 239 N.Y.S.2d 318, 38 Misc.2d 787

N.D.—*City of Bismarck v. Maten*, 177 N.W.2d 530.

Ohio—*State ex rel. Skilton v. Miller*, 122 N.E.2d 662, 99 Ohio App. 481, aff'd 128 N.E.2d 47, 164 Ohio St. 163, 49 A.L.R.2d 1279

W. Va.—*State ex rel. Heck's, Inc. v. Gates*, 141 S.E.2d 369, 149 W. Va. 421

Considerations in enacting statute

Me.—*State v. Karmil Merchandising Corp.*, 186 A.2d 352, 158 Me. 450.

N.C.—*Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 174 S.E.2d 542, 276 N.C. 661.

Ohio—*State v. Ullner*, 143 N.E.2d 849, 105 Ohio App. 546, aff'd 150 N.E.2d 413, 167 Ohio St. 521, app. dism. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, and 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225.

42. Del.—*C.J.S. cited in State v. Rogers*, 180 A.2d 735, 736, 4 Story 494, rev'd. on oth. grds., Sup., 199 A.2d 895.

La.—*State v. Wiener*, 161 So.2d 755, 245 La. 889.

Mo.—*State v. Halliburton, App.*, 276 S.W.2d 229.

Page 801

- NH—State v. Rogers, 200 A.2d 740, 105 N.H. 366
 NY—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621—People on Information of Ferguson v. Andob Corp., 206 N.Y.S.2d 89, 25 Misc.2d 542
 NC—Raleigh Mobil Home Sales, Inc. v. Tomlinson, 172 S.E.2d 276, 7 N.C.App. 289, aff'd 174 S.E.2d 542, 276 N.C. 661
 ND—State v. Gamble Skogmo, Inc., 144 N.W.2d 749
 Tex.—Hill v. Gibson Discount Center, Civ. App., 437 S.W.2d 289, err. ref. no rev. err.
 43. NY—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621

In enacting laws for the prohibition of transaction of business on Sundays, the legislature is not required to assign a reason for fixing that specific day.^{43.5}

- 43.5. Ohio—State v. Ullner, 143 N.E.2d 849, 105 Ohio App. 546, aff'd 150 N.E.2d 413, 167 Ohio St. 521, app. diss. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, and 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225
 44. US—Two Guys From Harrison-Allentown, Inc. v. McGinley, Pa., 81 S.Ct. 1135, 366 U.S. 582, 6 L.Ed.2d 551, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69
 Colo.—C.J.S. cited in Mosko v. Dunbar, 309 P.2d 581, 591, 135 Colo. 172
 Ky.—Gibson Products Co. of Bowling Green, Ky. v. Lowe, 440 S.W.2d 793
 Mo.—McKaig v. Kansas City, 256 S.W.2d 815, 363 Mo. 1033
 Neb.—Skag-Way Dept. Stores, Inc. v. City of Grand Island, 125 N.W.2d 529, 176 Neb. 169
 S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270
 W.Va.—State ex rel. Heck's Inc. v. Gates, 141 S.E.2d 369, 149 W.Va. 421
 45. Colo.—C.J.S. cited in Mosko v. Dunbar, 309 P.2d 581, 591, 135 Colo. 172
 NH—State v. Rogers, 200 A.2d 740, 105 N.H. 366
 Pa.—Com. v. Bauder, 14 D. & C.2d 571, 28 Lehl.J. 20, aff'd 145 A.2d 915, 188 Pa.Super. 424—Berters's Hopewell Foodland, Inc. v. Masters, 236 A.2d 197, 428 Pa. 20, app. diss. 88 S.Ct. 1261, 390 U.S. 597, 20 L.Ed.2d 158
 47. US—Two Guys From Harrison-Allentown, Inc. v. McGinley, D.C.Pa., 179 F.Supp. 944, app. diss., C.A., 273 F.2d 954, cert. den. 80 S.Ct. 876, 366 U.S. 961, 4 L.Ed.2d 876, aff'd 81 S.Ct. 1135, 366 U.S. 582, 6 L.Ed.2d 551, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69
 Conn—State v. Hurliman, 123 A.2d 767, 143 Conn. 502
 N.Y.—People v. Kupparth, 171 N.Y.S.2d 457, 11 Misc.2d 731, rev'd on oth. grds. 180 N.Y.S.2d 628, 7 A.D.2d 739. Rev'd on oth. grds. 188 N.Y.S.2d 483, 6 N.Y.2d 88, 160 N.E.2d 38
 Pa.—Com. v. Bauder, 14 D. & C.2d 571, 28 Lehl.J. 20, aff'd 145 A.2d 915, 188 Pa.Super. 424.

Sanctity of Sabbath

Tenn.—Smith v. State, 385 S.W.2d 748, 215 Tenn. 314.

The legitimate purpose of some statutes has been said to be to enable worshipping free from disturbance.^{47.5}

- 47.5. Conn.—State v. Picheco, Cir.A.D., 203 A.2d 242, 2 Conn.Cir. 584.
 Ill.—Richardson v. Moore, 107 Ill. 429, 47 Am.R. 445—Pacesetter Homes, Inc. v. Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247.

page 802

48. US—Zayre v. Georgia, Inc. v. City of Atlanta, D.C.Ga., 276 F.Supp. 892.

Conn—Knights v. Columbus Council No. 3884 (Reverend Edward Shaughnessy Council) v. Mulcahy, 227 A.2d 413, 154 Conn. 583
 ND—City of Bismarck v. Materi, 177 N.W.2d 530

Purpose valid

Mass—Zayre Corp. v. Attorney General, 362 N.E.2d 878, 372 Mass. 423
 49. NJ—Town of West Orange v. Carr's Dept. Store, 147 A.2d 97, 53 N.J. Super. 237
 51. US—Zayre v. Georgia, Inc. v. City of Atlanta, D.C.Ga., 276 F.Supp. 892

Ark—Taylor v. City of Pine Bluff, 289 S.W.2d 679, 226 Ark. 309, cert. den. 77 S.Ct. 125, 352 U.S. 894, 1 L.Ed.2d 85

Ill—Courtesy Motor Sales v. Ward, 179 N.E.2d 692, 24 Ill.2d 82

Miss—C.J.S. quoted at length in City of Tupelo v. Walton, 116 So.2d 808, 809, 237 Miss. 892, 76 A.L.R.2d 870

N.J.—Two Guys From Harrison, Inc. v. Furman, 156 A.2d 57, 58 N.J. Super. 313, rev'd on oth. grds. 160 A.2d 265, 32 N.J. 199

NY—People v. Schellberg, 125 N.Y.S.2d 868, 204 Misc. 733—People v. Welt, 178 N.Y.S.2d 313, 14 Misc.2d 275—People v. Alhprantis, 187 N.Y.S.2d 477, 8 A.D.2d 276

N.C.—C.J.S. cited in Clark's Charlotte, Inc. v. Hunter, 134 S.E.2d 364, 369, 261 N.C. 222

Ohio—State v. Cimminello, 201 N.E.2d 710, 120 Ohio App. 172

Va.—C.J.S. quoted in Rich v. Com., 94 S.E.2d 549, 555, 198 Va. 445

Law invalid

NC—State v. Smith, 143 S.E.2d 293, 265 N.C. 173
 52. US—Moss v. Hornig, D.C.Conn., 214 F.Supp. 324, aff'd 314 F.2d 89

Ala.—Lane v. McFadyen, 66 So.2d 83, 259 Ala. 205—Reynolds v. McFadyen, 66 So.2d 89, 259 Ala. 235

Ark—Lockwood v. State, 462 S.W.2d 465
 Conn—Caldor's, Inc. v. Bedding Barn, Inc., 417 A.2d 343, 177 Conn. 304, 10 A.L.R. 4th 230.

Fla.—Henderson v. Antonacci, 62 So.2d 5.

Ga.—Berta v. State, 154 S.E.2d 594, 223 Ga. 267.
 Iowa—State v. Lindsey, 165 N.W.2d 807

Kan.—State v. Hill, 369 P.2d 365, 189 Kan. 403, 91 A.L.R.2d 750—Boyer v. Ferguson, 389 P.2d 775, 192 Kan. 607

La.—State v. Deutch, 161 So.2d 730, 245 La. 819.

Me.—State v. Karmil Merchandising Corp., 186 A.2d 352, 158 Me. 450.

Mich.—Petition of Berman, 75 N.W.2d 8, 344 Mich. 598

Mo.—State v. Halliburton, App., 276 S.W.2d 229—Gem Stores, Inc. v. O'Brien, 374 S.W.2d 109

Neb.—Terry Carpenter, Inc. v. Wood, 129 N.W.2d 475, 177 Neb. 515

N.C.—Clark's Charlotte, Inc. v. Hunter, 134 S.E.2d 364, 261 N.C. 222—High Point Surplus Co. v. Pleasants, 142 S.E.2d 697, 264 N.C. 650—S.S. Kresge Co. v. Tomlinson, 165 S.E.2d 236, 275 N.C. 1—Whitney Stores, Inc. v. Clark, 177 S.E.2d 418, 277 N.C. 322—State v. Greenwood, 187 S.E.2d 8, 280 N.C. 651—State v. Underwood, 195 S.E.2d 489, 283 N.C. 154.

Tenn.—Kirk v. Oligatti, 308 S.W.2d 471, 203 Tenn. 1
 W.Va.—State ex rel. Heck's, Inc., 141 S.E.2d 369, 149 W.Va. 421.

Discrimination with class and not competition as between classes as test of validity—State v. Towery, N.C. 79 S.E.2d 513, 239 N.C. 274, app. diss. 74 S.Ct. 532, 347 U.S. 925, 98 L.Ed. 1079.

Law invalid

Fla.—Moore v. Thompson, 126 So.2d 543.

Ga.—McAllister v. State, 140 S.E.2d 828, 220 Ga. 570.

Mich.—Arlan's Dept. Stores, Inc. v. Kelley, 130 N.W.2d 892, 374 Mich. 70

NH.—Opinion of the Justices, 229 A.2d 188, 108 N.H. 103.

N.J.—Two Guys From Harrison, Inc. v. Furman, 160 A.2d 265, 32 N.J. 199.

Ohio—State v. Woodville Appliance, Inc., 171 N.E.2d 565

53. US—McGowan v. State of Md., Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393—Gallagher v. Crown Kasher Super Market of Mass., Inc., Mass., 81 S.Ct. 1122, 366 U.S. 617, 6 L.Ed.2d 536—Two Guys From Harrison-Allentown, Inc. v. McGinley, Pa., 81 S.Ct. 1135, 366 U.S. 582, 6 L.Ed.2d 551, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69—Braunfeld v. Brown, Pa., 81 S.Ct. 1144, 366 U.S. 599, 6 L.Ed.2d 563, reh. den. 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70—Southway Discount Center, Inc. v. Moore, D.C.Ala., 315 F.Supp. 617—Hames Mobile Homes, Inc. v. Sellers, D.C.Iowa, 343 F.Supp. 12

Ala.—Lane v. McFadyen, supra, n. 52

Ark—Taylor v. City of Pine Bluff, 289 S.W.2d 679, 226 Ark. 309, cert. den. 77 S.Ct. 125, 352 U.S. 894, 1 L.Ed.2d 85

Cal.—Mandel v. Hodges, 127 Cal.Rptr. 244, 54 C.A.3d 596, 90 A.L.R.3d 728, app. after remand 155 Cal.Rptr. 269, 92 C.A.3d 747, app. after remand 183 Cal.Rptr. 702, 133 C.A.3d 1, hearing gr.

Conn—State v. Hurliman, 123 A.2d 767, 143 Conn. 502—State v. Shuster, 145 A.2d 196, 145 Conn. 554—State v. Gorra Bros., Inc., Cir.A.D., 236 A.2d 345, 4 Conn.Cir. 488

Del—State v. Rogers, Super., 180 A.2d 735, 4 Story 494, rev'd on oth. grds., 199 A.2d 895

Ga.—Wilder v. State, 207 S.E.2d 38, 232 Ga. 404

Iowa—Brown Enterprises, Inc. v. Fulton, 192 N.W.2d 773

Ky.—Com. v. Arlan's Dept. Store of Louisville, 357 S.W.2d 708, app. diss. 83 S.Ct. 277, 371 U.S. 218, 9 L.Ed.2d 264—Walters v. Bindner, 435 S.W.2d 464

La.—State v. Scallion, 374 So.2d 1232.

Me—State v. Karmil Merchandising Corp., 186 A.2d 352, 158 Me. 450

Md.—McGowan v. State, 151 A.2d 156, 220 Md. 117, aff'd 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393—Richards Furniture Corp. v. Board of County Com'rs of Anne Arundel County, 196 A.2d 621, 233 Md. 249—Steimel v. Board of Election Sup'rs of Prince George's County, 357 A.2d 386, 278 Md. 1.

Mass—Com. v. Chernock, 145 N.E.2d 920, 336 Mass. 384—Mosey Cafe, Inc. v. Mayor of Boston, 154 N.E.2d 591, 338 Mass. 207—Com. v. Chamberlain, 175 N.E.2d 486, 343 Mass. 49

Mich—Irishman's Lot, Inc. v. Cleary, 62 N.W.2d 668, 338 Mich. 662

Minn.—G.E.M. of St. Louis, Inc. v. City of Bloomington, 144 N.W.2d 552, 274 Minn. 471

Miss—Walton v. City of Tupelo, 133 So.2d 531, 241 Miss. 894

Mo—State v. Halliburton, App., 276 S.W.2d 229—ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876—State v. Katz Drug Co., 352 S.W.2d 678—Gem Stores, Inc. v. O'Brien, 374 S.W.2d 109.

N.H.—Opinion of the Justices, 229 A.2d 188, 108 N.H. 103.

N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super. 533—Two Guys from Harrison, Inc. v. Furman, 156 A.2d 57, 58 N.J. Super. 313, rev'd on oth. grds. 160 A.2d 265, 32 N.J. 199—State v. Fass, 162 A.2d 608, 62 N.J. Super. 265, aff'd 175 A.2d 193, 39 N.J. 102, cert. den. and app. diss. 82 S.Ct. 1167, 370 U.S. 47, 8 L.Ed.2d 398—State v. Monteleone, 165 A.2d 39, 63 N.J. Super. 596, aff'd 175 A.2d 207, 36 N.J. 93—State v. Fass, 175 A.2d 193, 36 N.J. 102—State v. Monteleone, 175 A.2d 207, 36 N.J. 93—State v. K-Mart, 359 A.2d 492, 141 N.J. Super. 546.

NY—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 854, 151 N.E.2d 621—People v. Pam, 238 N.Y.S.2d 363, 38 Misc.2d 296, aff'd 250 N.Y.S.2d 877, 43 Misc. 357—People v. Paine Drug Co., 241 N.Y.S.2d 946, 39 Misc.2d 824, rev'd on oth. grds. 254 N.Y.S.2d 492, 22 A.D.2d 156, aff'd 208 N.E.2d 176, 16 N.Y.2d 503, 260 N.Y.S.2d 444, cert. den. 86 S.Ct. 86, 382 U.S. 838, 15 L.Ed.2d 80—People v. Cooks of New York, Inc., 318 N.Y.S.2d 960, 65

Misc 2d 790—People v L A Witherill, Inc., 29 N.Y.2d 446, 278 N.E.2d 905, 328 N.Y.S.2d 668
N.C.—State v Towery, 79 S.E.2d 513, 239 N.C. 274, app. dism. 74 S.Ct. 532, 347 U.S. 925, 98 L.Ed. 1078—S.S. Kresge Co v Tomlinson, 165 S.E.2d 236, 275 N.C. 1—Raleigh Mobile Home Sales, Inc v Tomlinson, 174 S.E.2d 542, 276 N.C. 661—Raleigh Mobile Home Sales, Inc v Tomlinson, 174 S.E.2d 542, 270 N.C. 661—Whitney Stores, Inc v Clark, 177 S.E.2d 418, 277 N.C. 322—State v Greenwood, 187 S.E.2d 8, 280 N.C. 651—State v Atlas, 195 S.E.2d 496, 283 N.C. 165

N.D.—State v Gamble Skogmo, Inc., 144 N.W.2d 749
Ohio—C.J.S. cited in State v Kidd, 150 N.E.2d 413, 416, 167 Ohio St. 521, app. dism. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, app. dism. 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225—State v Gilfether, App., 184 N.E.2d 673—State v Dimacchia, 188 N.E.2d 69, 116 Ohio App. 319—State v Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278—State v Laughlin, 225 N.E.2d 298, 10 Ohio Misc. 219

Pa.—Com v Grochowiak, 136 A.2d 145, 184 Pa.Super 522, app. dism. 79 S.Ct. 40, 358 U.S. 47, 3 L.Ed.2d 44, reh. den. 79 S.Ct. 219, 358 U.S. 901, 3 L.Ed.2d 151—Com v Bauder, 145 A.2d 915, 188 Pa.Super 424—Com v Bauder, 14 D & C.2d 571, 28 Lehigh J. 20, aff'd 145 A.2d 915, 188 Pa.Super 424—Bargain City U.S.A., Inc v Dilworth, 179 A.2d 439, 407 Pa. 129—Com v Rubin, 77 Montg. 77—Com v Ottey, 85 Montg. 440

S.C.—State v Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270—Whitney Trading Corp. v McNair, 176 S.E.2d 572, 255 S.C. 8

Tenn.—Kirk v Olgiati, 308 S.W.2d 471, 203 Tenn. 1

Tex.—Clark v State, 319 S.W.2d 726, 167 Tex.Cr. 204—State v Spartan's Industries, Inc., 447 S.W.2d 407, app. dism. 90 S.Ct. 1359, 397 U.S. 590, 25 L.Ed.2d 596—Levitz Furniture Co v State, Civ. App., 450 S.W.2d 96, err. ref. no rev. err.—Sundaco, Inc v State, Civ. App., 463 S.W.2d 528, err. ref. no rev. err.

Vt.—State v Giant of St. Albans, Inc., 268 A.2d 739, 128 Vt. 539—State v Gilfel of Rutland, Inc., 270 A.2d 153, 128 Vt. 595

Va.—Mandell v Haddon, 121 S.E.2d 516, 202 Va. 979

Statute held unconstitutional

Ark.—Handy Dan Improvement Center, Inc v Adams, 633 S.W.2d 699, 276 Ark. 268

Colo.—Dunbar v Hoffman, 468 P.2d 742, 171 Colo. 481

Conn.—State v. Anonymous (1976-12), Com Pl., 366 A.2d 200, 33 Conn. Sup. 146

Fla.—Moore v. Thompson, 126 So.2d 543

Ga.—Rutledge v Gaylord's, Inc., 213 S.E.2d 626, 233 Ga. 694

Ill.—Pacesetter Homes, Inc v Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247

Kan.—State v. Hill, 369 P.2d 365, 189 Kan. 403, 91 A.L.R.2d 750

Mass.—Brattle Films, Inc v Commissioner of Public Safety, 127 N.E.2d 891, 333 Mass. 58—Times Film Corp. v Commissioner of Public Safety, 127 N.E.2d 893, 333 Mass. 62

Neb.—Terry Carpenter, Inc v. Wood, 129 N.W.2d 475, 177 Neb. 515

N.Y.—People v. Fay's Drug Co. of Fairmount, 326 N.Y.S.2d 311, 68 Misc.2d 143—Twin Fair Distributors Corp. v Cosgrove, 380 N.Y.S.2d 933, 85 Misc.2d 901—People v. Abrahams, 353 N.E.2d 574, 40 N.Y.2d 277, 386 N.Y.S.2d 661

Ohio—State v. Woodville Appliance, Inc., 171 N.E.2d 365—State v. Grimes, 190 N.E.2d 588

Pa.—Kroger Co. v. O'Hara Tp., 392 A.2d 266, 481 Pa. 101

Vt.—State v. Shop and Save Food Markets, Inc., 415 A.2d 235, 138 Vt. 332—State v. Ludlow Supermarkets, Inc., 448 A.2d 791, 141 Vt. 261

Automobile dealers

Fla.—moore v. Thompson, 126 So.2d 543.

Ind.—Tinder v. Clarke Auto Co., 149 N.E.2d 808, 238 Ind. 302

Iowa—Diamond Auto Sales, Inc v Erbe, 105 N.W.2d 650, 251 Iowa 133—State v Lindsey, 165 N.W.2d 807

N.J.—Gundacker Central Motors, Inc v Gassert, 127 A.2d 566, 23 N.J. 71, app. dism. 77 S.Ct. 1397, 354 U.S. 933, 1 L.Ed.2d 1533

Tex.—Ralph Williams Gulfgate Chrysler Plymouth, Inc v State, Civ. App., 466 S.W.2d 639, err. ref. no rev. err.

Utah—Dodge Town, Inc v Romney, 480 P.2d 461, 25 Utah 2d 267

Provisions for referendum held valid

N.J.—Two Guys From Harrison, Inc v Furman, 160 A.2d 265, 32 N.J. 199

Reasonable classification

Ark.—Lockwood v State, 462 S.W.2d 465, 249 Ark. 941

La.—Harry's Hardware, Inc v Parsons, 410 So.2d 735, cert. den. 103 S.Ct. 178, 459 U.S. 881, 74 L.Ed.2d 145

Me.—State v S.S. Kresge, Inc., 364 A.2d 868

Md.—Giant of Maryland, Inc v State's Attorney for Prince George's County, 298 A.2d 427, 267 Md. 501, app. dism. 93 S.Ct. 2733, 412 U.S. 915, 37 L.Ed.2d 141, app. after remand 334 A.2d 107, 274 Md. 158

Miss.—City of Jackson v Luckett, 336 So.2d 776

Neb.—Skag-Way Dept. Stores, Inc v City of Omaha, 140 N.W.2d 28, 179 Neb. 707

N.D.—Rothe v S-N-Go Stores, Inc., 308 N.W.2d 872

R.I.—City of Warwick v Almac's, Inc., 442 A.2d 1265

Effect of invalidity

Minn.—State v Target Stores, Inc., 156 N.W.2d 908, 279 Minn. 447

Unreasonable classification

Conn.—Caldor's Inc v Bedding Barn, Inc., 417 A.2d 343, 177 Conn. 304, 10 A.L.R. 4th 230.

Ga.—Hughes v Reynolds, 157 S.E.2d 746, 223 Ga. 727

Rational basis required

Mass.—Zayre Corp v Attorney General, 362 N.E.2d 878, 372 Mass. 423

Considered legislative question

Tex.—Gibson Products Co., Inc v State, 545 S.W.2d 128, cert. den. 97 S.Ct. 2677, 431 U.S. 955, 53 L.Ed.2d 272

Equal protection not violated

Tex.—Ex parte Robbins, App. 8 Dist., 661 S.W.2d 740

54. Conn.—Caldor's, Inc v Bedding Barn, Inc., 417 A.2d 343, 177 Conn. 304, 10 A.L.R. 4th 230.

N.J.—Hertz Washmobile System v Village of South Orange, 124 A.2d 68, 41 N.J. Super 110, aff'd 135 A.2d 524, 25 N.J. 207

55. U.S.—McGowan v State of Md., Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393

Md.—Supermarkets General Corp v State, 409 A.2d 250, 286 Md. 611, app. dism. 101 S.Ct. 45, 449 U.S. 801, 66 L.Ed.2d 5

Neb.—Skag-Way Dept. Stores, Inc v City of Omaha, 140 N.W.2d 28, 179 Neb. 707

N.Y.—C.J.S. cited in People v Acme Markets, Inc., 334 N.E.2d 555, 37 N.Y.2d 326, 372 N.Y.S.2d 590, 595.

56. N.J.—C.J.S. cited in State v. Patrignani, 167 A.2d 671, 673, 65 N.J. Super 303.

57. Ga.—Berta v State, 154 S.E.2d 594, 223 Ga. 267. Minn.—Mangold Midwest Co. v Village of Richfield, 143 N.W.2d 813, 274 Minn. 347

N.J.—Town of West Orange v Jordan Corp., 146 A.2d 134, 52 N.J. Super. 533.

N.Y.—People on Information of Ferguson v. Andob Corp., 206 N.Y.S.2d 89, 25 Misc.2d 542.

N.C.—State v. Towery, 79 S.E.2d 513, 239 N.C. 274, app. dism. 74 S.Ct. 532, 347 U.S. 925, 98 L.Ed. 1079—C.J.S. cited in Clark's Charlotte, Inc v Hunter, 134 S.E.2d 364, 369, 261 N.C. 222—Clark's Greenville, Inc v. West, 151 S.E.2d 5, 268 N.C. 527—State v. Underwood, 195 S.E.2d 489, 283 N.C. 154

Validity not dependent upon facts found in particular case

Ill.—Pacesetter Homes, Inc v Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247

Effect of inoperative city council resolution

N.H.—State v Rogers, 200 A.2d 740, 105 N.H. 366

Ordinance held unconstitutional

La.—West v Town of Winnsboro, 211 So.2d 665, 252 La. 605

Neb.—Skag-Way Dept. Stores, Inc v. City of Grand Island, 125 N.W.2d 529, 176 Neb. 169—Skag-Way Dept. Stores, Inc v City of Omaha, 140 N.W.2d 28, 179 Neb. 707

N.J.—Hurwitz v Boyle, 284 A.2d 190, 117 N.J. Super 196

N.C.—S.S. Kresge Co v Davis, 178 S.E.2d 382, 277 N.C. 654

Okla.—Spartan's Industries, Inc v Oklahoma City, 498 P.2d 399.

Wash.—Spokane County v Valu-Mart, Inc., 419 P.2d 993, 69 Wash.2d 712

Wyo.—Nation v Giant Drug Co., 396 P.2d 431

Ordinance prohibiting all business activity per se held invalid

Ill.—Pacesetter Homes, Inc v Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247

Ordinance held constitutional

Ark.—Green Star Supermarket, Inc v Stacy, 411 S.W.2d 871, 242 Ark. 54

Me.—State v S.S. Kresge, Inc., 364 A.2d 868.

Mich.—People's Appliance & Furniture, Inc v City of Flint, 99 N.W.2d 522, 358 Mich. 34—Marks Furs, Inc v City of Detroit, 112 N.W.2d 66, 365 Mich. 108—Watnick v City of Detroit, 113 N.W.2d 876, 365 Mich. 600

Miss.—City of Jackson v Luckett, 336 So.2d 776

N.J.—Dock Watch Hollow Quarry Pit, Inc v Warren Tp., 361 A.2d 12, 142 N.J. Super 103, aff'd 377 A.2d 1201, 74 N.J. 312

N.C.—Raleigh Mobil Home Sales, Inc v Tomlinson, 172 S.E.2d 276, 7 N.C. App. 289, aff'd 174 S.E.2d 542, 276 N.C. 661

N.D.—City of Bismarck v Materi, 177 N.W.2d 530

Tenn.—Bookout v City of Chattanooga, 442 S.W.2d 658, 59 Tenn. App. 576

Invidious discrimination prohibited

La.—West v Town of Winnsboro, 211 So.2d 665, 252 La. 605

58. Ill.—C.J.S. cited in Humphrey Chevrolet, Inc v. City of Evanston, 131 N.E.2d 70, 72, 7 Ill.2d 402, 57 A.L.R.2d 969

Neb.—Skag-Way Dept. Stores, Inc v City of Grand Island, 125 N.W.2d 529, 176 Neb. 169—Skag-Way Dept. Stores, Inc v City of Omaha, 140 N.W.2d 28, 179 Neb. 707

N.C.—State v Smith, 143 S.E.2d 293, 265 N.C. 173.

Okla.—Spartan's Industries, Inc v Oklahoma City, 498 P.2d 399

Wash.—Spokane County v Valu-Mart, Inc., 419 P.2d 993, 69 Wash.2d 712

Wide latitude

La.—West v Town of Winnsboro, 211 So.2d 665, 252 La. 605.

59. Ark.—Hickinbotham v Williams, 303 S.W.2d 563.

N.J.—C.J.S. cited in City of Elizabeth v Windsor-Fifth Ave., 106 A.2d 9, 11, 31 N.J. Super 187—Hertz Washmobile System v Village of South Orange, 124 A.2d 68—Auto-Rite Supply Co. v Mayor and Township Committeemen of Woodbridge Tp., 135 A.2d 515, 25 N.J. 188—Town of West Orange v Jordan Corp., 146 A.2d 134, 52 N.J. Super. 533.

N.Y.—Sa-Bleu, Inc v. Village of Port Chester, 247 N.Y.S.2d 943, 42 Misc.2d 360.

Ordinance not invalidated by repeal of statute
N.J.—Masters-Jersey, Inc v. Mayor and General Council of Borough of Paramus, 160 A.2d 841, 32 N.J. 296.

Page 803

Local option

Me—State v. Karmil Merchandising Corp., 186 A 2d 352, 158 Me 450

Use of power boats on lake

Wis.—Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 51 Wis 2d 70

60. Ill.—Humphrey Chevrolet, Inc. v. City of Evanston, 131 N.E.2d 70, 7 Ill.2d 402, 57 A.L.R.2d 969—Pacesetter Homes, Inc. v. Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247
Ky.—Boyle v. Campbell, 450 S.W.2d 265.

N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533—Borough of Collingswood v. Boyer, 158 A.2d 227, 59 N.J. Super 561—State v. Patrignam, 167 A.2d 671, 65 N.J. Super 303

N.Y.—Sa-Bleu, Inc. v. Village of Port Chester, 247 N.Y.S.2d 943, 42 Misc.2d 360

N.C.—State v. Chestnutt, 85 S.E.2d 297, 241 N.C. 401
Okla.—Ex parte Higgs, 263 P.2d 752, 97 Okla. Cr. 338
Wyo.—Nation v. Giant Drug Co., 396 P.2d 431

Effect of authority to suspend state Sunday laws

N.H.—State v. Rogers, 200 A.2d 740, 105 N.H. 366

62. Mass.—Weinstein v. Chief of Police of Fall River, 182 N.E.2d 525, 344 Mass. 314

Miss.—C.J.S. quoted in City of Tupelo v. Walton, 116 So.2d 808, 809, 237 Miss. 892, 76 A.L.R.2d 870

N.J.—Town of West Orange v. Carr's Dept. Store, 147 A.2d 97, 53 N.J. Super 237

Sunday ordinance cannot prohibit that which is harmless in itself or require that to be done which does not tend to promote health, comfort, safety, or welfare of society.^{62.5}

62.5. Neb.—Skag-Way Dept. Stores, Inc. v. City of Grand Island, 125 N.W.2d 529, 176 Neb. 169—Skag-Way Dept. Stores, Inc. v. City of Omaha, 140 N.W.2d 28, 179 Neb. 707

63. N.J.—Town of West Orange v. Carr's Dept. Store, 147 A.2d 97, 53 N.J. Super 237

64. Ark.—Hickinbotham v. Williams, 296 S.W.2d 897, 227 Ark. 126, cert. den. 77 S.Ct. 867, 353 U.S. 961, 1 L.Ed.2d 909

Ill.—Humphrey Chevrolet, Inc. v. City of Evanston, 131 N.E.2d 70, 7 Ill.2d 402, 57 A.L.R.2d 969

N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533

An unconstitutional statute does not operate to supersede and replace a valid ordinance.^{64.5}

64.5. N.C.—Clark's Charlotte, Inc. v. Hunter, 134 S.E.2d 364, 261 N.C. 222

§ 4. Scope and Extent of Sunday Laws in General

Library References

Sunday ⇨ 3 et seq.

65. Tenn.—Smith v. State, 385 S.W.2d 748, 215 Tenn. 314

67. N.Y.—Banko v. Weber, 192 N.Y.S.2d 260, 9 A.D.2d 720, aff'd 193 N.Y.S.2d 670, 7 N.Y.2d 758, 162 N.E.2d 750

Strictly construed

Pa.—Com v. Schugardt, 29 D. & C.2d 632, 55 Berks 126

68. N.J.—Vornado, Inc. v. R. H. Macy & Co., 187 A.2d 620, 78 N.J. Super 102

Pa.—Com v. Alberici, 41 D. & C.2d 98, 54 Del. Co. 180

Va.—Rich v. Com., 94 S.E.2d 549, 198 Va. 445

Liberal construction

N.Y.—McCormick v. Hazard, 136 N.Y.S. 91, 77 Misc. 190—People v. Welt, 178 N.Y.S.2d 313, 14 Misc.2d 275

Strict construction of exceptions

N.Y.—People ex rel. DePaul v. Berkowitz, 281 N.Y. S.2d 449, 54 Misc.2d 156

69. W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710

Impossibility of enforcement not shown

Mass.—Zayre Corp. v. Attorney General, 362 N.E.2d 878, 372 Mass. 423

Strict construction against state

N.J.—State v. F. W. Woolworth Co., 382 A.2d 51, 154 N.J. Super 550

70. Md.—Giant of Maryland, Inc. v. State's Attorney for Prince George's County, 298 A.2d 427, 267 Md. 501, app. dism. 93 S.Ct. 2733, 412 U.S. 915, 37 L.Ed.2d 141, app. after remand 334 A.2d 107, 274 Md. 158

N.Y.—People v. Deen, 160 N.Y.S.2d 962, 3 A.D.2d 836, aff'd 171 N.Y.S.2d 100, 4 N.Y.2d 708, 148 N.E.2d 311—People v. Welt, 178 N.Y.S.2d 313, 14 Misc.2d 275

Ordinance not to be expanded by construction

Ill.—Village of River Forest v. Vignola, 178 N.E.2d 364, 23 Ill.2d 411

Public policy opposing commission of secular acts

Tenn.—Smith v. State, 385 S.W.2d 748, 215 Tenn. 314

Carrying on of public business enjoined

N.Y.—Westchester County v. Westchester County Civil Service Emp. Ass'n, Inc., 378 N.Y.S.2d 952, 85 Misc.2d 251

71. Violative of due process and equal protection

N.Y.—Twin Fair Distributors Corp. v. Cosgrove, 380 N.Y.S.2d 933, 85 Misc.2d 901

§ 5. — Work or Labor

page 804

75. Conn.—Knights of Columbus Council No. 3884 (Reverend Edward Shaughnessy Council) v. Mulcahy, 227 A.2d 413, 154 Conn. 583

Va.—Rich v. Com., 94 S.E.2d 549, 198 Va. 445

Public policy

N.J.—Gundaker Central Motors, Inc. v. Gassert, 127 A.2d 566, 23 N.J. 71, app. dism. 77 S.Ct. 1397, 354 U.S. 933, 1 L.Ed.2d 1533—Town of West Orange v. Carr's Dept. Store, 147 A.2d 97, 53 N.J. Super 237

N.Y.—People ex rel. DePaul v. Berkowitz, 281 N.Y. S.2d 449, 54 Misc.2d 156

79. U.S.—State of Tenn. ex rel. Leech v. Highland Memorial Cemetery, Inc., D.C. Tenn., 489 F.Supp. 65

N.Y.—People v. Deen, 160 N.Y.S.2d 962, 3 A.D.2d 836, aff'd 171 N.Y.S.2d 100, 4 N.Y.2d 708, 148 N.E.2d 311—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621.

Ohio—State v. Kidd, 150 N.E.2d 413, 167 Ohio St. 521, app. dism. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, app. dism. 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225

80. Tex.—Suttle v. State, Civ. App., 457 S.W.2d 344

81. "Labor" construed

N.Y.—People v. Polar Vent of America, Inc., 174 N.Y. S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621

82. N.Y.—People v. Gill, 134 N.Y.S.2d 622, 206 Misc. 585.

Operation of builder's showroom

N.Y.—People v. Federal Builders & Home Modernization Corp., 317 N.Y.S.2d 942, 65 Misc.2d 407

84. N.Y.—People v. Gill, 134 N.Y.S.2d 622, 206 Misc. 585

89. N.Y.—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621

page 805

Other matters pertaining to compelling the labor of others on Sunday have been adjudicated.^{4.5}

4.5. Statute construed

Ky.—Com v. Southerland, 601 S.W.2d 908.

Md.—Giant of Maryland, Inc. v. State's Attorney for Prince George's County, 334 A.2d 107, 272 Md. 158

Refusing to work after agreeing to

U.S.—Ciba-Geigy Corp. v. Local No. 2548, United Textile Workers of America, AFL-CIO, D.C.R.I., 391 F.Supp. 287

§ 6. — Business or Occupation

Library References

Sunday ⇨ 5.

5. N.J.—Auto-Rite Supply Co. v. Mayor and Tp. Committeemen of Woodbridge Tp., 124 A.2d 612, 41 N.J. Super 303

6. Ga.—Brooks v. Hicks, 197 S.E.2d 711, 230 Ga. 500, app. after remand 203 S.E.2d 492, 231 Ga. 658

N.Y.—People on Complaint of Godfrey v. Seuss, 313 N.Y.S.2d 552, 63 Misc.2d 813

Tex.—Clark's-Gamble, Inc. v. State, Civ. App., 486 S.W.2d 840, err. ref. no rev. err.

Statute construed

Conn.—State v. Picheco, Cir. A.D., 203 A.2d 242, 2 Conn. Cir. 584—State v. Gorra Bros., Inc., Cir. A.D., 236 A.2d 345, 4 Conn. Cir. 488

Md.—Giant of Maryland, Inc. v. State's Attorney for Prince George's County, 334 A.2d 107, 274 Md. 158

N.Y.—People v. Kaplan, 188 N.Y.S.2d 673, 8 A.D.2d 163, motion gr. 191 N.Y.S.2d 960, 6 N.Y.2d 987, 161 N.E.2d 743

Pa.—Com v. Ottey, 85 Montg. 440

Vt.—State v. Rockdale Associates, Inc., 218 A.2d 718, 125 Vt. 495

Mobile home as "motor vehicle"

U.S.—Hames Mobile Homes, Inc. v. Sellers, D.C. Iowa, 343 F.Supp. 12

Iowa—Brown Enterprises, Inc. v. Fulton, 192 N.W.2d 773

Operation of billiard rooms

Ga.—Wilder v. State, 207 S.E.2d 38, 232 Ga. 404

Exemption of nurserymen

Md.—Hechinger Co. v. State's Attorney for Prince George's County, 326 A.2d 742, 272 Md. 706.

7. N.C.—State v. McGee, 75 S.E.2d 783, 237 N.C. 633, app. dism. 74 S.Ct. 50, 346 U.S. 802, 98 L.Ed. 334, reh. den. 74 S.Ct. 272, 346 U.S. 918, 98 L.Ed. 413

Val.—Malibu Auto Parts, Inc. v. Com., 237 S.E.2d 782, 218 Va. 467

page 806

14. La.—State v. Penniman, 68 So.2d 770, 224 La. 95—West v. Town of Winnsboro, 211 So.2d 665, 252 La. 605

Mass.—Town of Foxborough v. Bay State Harness Horse Racing and Breeding Ass'n, Inc., 366 N.E.2d 773, 5 Mass. App. 613

N.Y.—People v. Law, 142 N.Y.S.2d 440, 16 Misc.2d 696—People v. Bielecki, 291 N.Y.S.2d 217, 56 Misc.2d 730

Tex.—Ex parte Wilson, Cr., 374 S.W.2d 229.

15. Mo.—State ex rel. McNary v. Levitz Furniture Co., of Missouri, Inc., App., 502 S.W.2d 370.

N.Y.—People v. Law, 142 N.Y.S.2d 440, 16 Misc.2d 696

16. N.Y.—People ex rel. DePaul v. Berkowitz, 281 N.Y.S.2d 449, 54 Misc.2d 156.

19. Tex.—Suttle v. State, Civ. App., 457 S.W.2d 344.

§ 7. — Keeping Open Shop

21. Mass.—Com v Chernock, 145 N.E.2d 920, 336 Mass 384.

Ohio—State v Ullner, 143 N.E.2d 849, 105 Ohio App 546, affd 150 N.E.2d 413, 167 Ohio St 521, app dism 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, and 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225

Tex.—State v Spartan's Industries, Inc., 447 S.W.2d 407, app dism 90 S.Ct. 1359, 397 U.S. 590, 25 L.Ed.2d 596

Particular store not within exception

Pa.—Goodman v Kennedy, 329 A.2d 224, 459 Pa. 313

24. Ala.—Lane v McFadyen, 66 So.2d 83, 259 Ala 205

Me.—C.J.S. cited in State v Karmil Merchandising Corp., 186 A.2d 352, 366, 158 Me 450

page 807

32. Fla.—Henderson v Antonacci, 62 So.2d 5.

38. N.J.—C.J.S. cited in State v Patignani, 167 A.2d 671, 675, 65 N.J. Super 303

39. Neb.—City of Omaha v Lewis & Smith Drug Co., 57 N.W.2d 269, 156 Neb 650

page 808

50. N.J.—C.J.S. quoted in State v Patignani, 167 A.2d 671, 675, 65 N.J. Super 303

52. N.J.—C.J.S. quoted in State v Patignani, 167 A.2d 671, 675, 65 N.J. Super 303

55. Ala.—Lane v McFadyen, 66 So.2d 83, 259 Ala 205

56. Me.—State v Karmil Merchandising Corp., 186 A.2d 352, 158 Me 450

58. Me.—State v Karmil Merchandising Corp., 186 A.2d 352, 158 Me 450

§ 8. — Disturbance of Public

page 809

73. Ill.—Pacesetter Homes, Inc v Village of South Holland, 163 N.E.2d 464, 18 Ill.2d 247

N.Y.—People v. Law, 142 N.Y.S.2d 440, 16 Misc.2d 696

77. N.Y.—People v. Hilton, 119 N.Y.S.2d 692—People v. Binstock, 170 N.Y.S.2d 133, 7 Misc.2d 1039

page 810

80. N.Y.—People v. Sacks, 150 N.Y.S.2d 222, 2 Misc.2d 201.

§ 10. — Exceptions in General

page 811

5. U.S.—Fass v. Roos, D.C.N.J., 221 F.Supp. 448

Me.—State v. Karmil Merchandising Corp., 186 A.2d 352, 158 Me 450

Md.—Giant v. Maryland, Inc v. State's Attorney for Prince George's County, 298 A.2d 427, 267 Md 501, app. dism. 93 S.Ct. 2733, 412 U.S. 915, 37 L.Ed.2d 141, app. after remand 334 A.2d 107, 274 Md. 158.

N.C.—Raleigh Mobile Home Sales, Inc. v. Tomlinson, 174 S.E.2d 542, 276 N.C. 661.

S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270.

Tenn.—Kirk v. Olgati, 308 S.W.2d 471, 203 Tenn. 1

Exemption valid

Mass.—Zayre Corp. v. Attorney General, 362 N.E.2d 878, 372 Mass. 423.

6. U.S.—McGowan v. State of Md., Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393—Two Guys From Harrison—Appentown, Inc. v. McGinley, Pa., 81 S.Ct. 1135, 366 U.S. 582, 6 L.Ed.2d 551—Zayre of Georgia, Inc. v. City of Atlanta, D.C. Ga., 276 F.Supp. 892.

Me.—State v. Karmil Merchandising Corp., 186 A.2d 352, 158 Me 450

Mass.—Ralph's Market, Inc v. City of Beverly, 233 N.E.2d 755, 353 Mass 588

N.J.—Two Guys from Harrison, Inc v. Furman, 156 A.2d 57, 58 N.J. Super. 313, revd. on oth. grds 160 A.2d 265, 32 N.J. 199

N.Y.—People v. D'Andre, 122 N.Y.S.2d 585

Pa.—Com v. Bauder, 14 D & C.2d 571, 28 Lehigh J. 20, affd 145 A.2d 915, 188 Pa. Super 424

Employments required by recreation excluded from law

N.J.—Masters—Jersey, Inc v. Mayor and General Council of Borough of Paramus, 160 A.2d 841, 32 N.J. 296

Exemption of small stores

U.S.—Bertera's Hopewell Foodland, Inc v. Masters, 236 A.2d 197, 428 Pa. 20, app. dism. 88 S.Ct. 1261, 390 U.S. 597, 20 L.Ed.2d 158

Me.—Opinion of the Justices, 191 A.2d 637, 159 Me 410

Mass.—Zayre Corp v. Attorney General, 362 N.E.2d 878, 372 Mass. 423

Grocery stores having less than four employees

Ala.—Caola v. City of Birmingham, 262 So.2d 602, 288 Ala 486

N.D.—Rothe v. S—N—Go Stores, Inc., 308 N.W.2d 872.

Small business

Md.—Giant v. Maryland, Inc v. State's Attorney for Prince George's County, 298 A.2d 427, 267 Md 501, app. dism. 93 S.Ct. 2733, 412 U.S. 915, 37 L.Ed.2d 141, app. after remand 334 A.2d 107, 274 Md 158

Private market

La.—National Food Stores of Louisiana, Inc v. Cefalu, 280 So.2d 903

Sale of parts for motor vehicles not forbidden

La.—Pick's Auto Parts No. 2, Inc v. Hodge's Auto Parts, App., 334 So.2d 547

7. Ga.—Hughes v. Reynolds, 157 S.E.2d 746, 223 Ga 727

Neb.—Skag-Way, Inc v. Douglas, 133 N.W.2d 12, 178 Neb 290

Unlawful discrimination not shown

U.S.—Two Guys From Harrison—Allentown, Inc v. McGinley, D.C. Pa., 179 F.Supp. 944, app. dism. C.A., 273 F.2d 954, cert. den. 80 S.Ct. 876, 362 U.S. 961, 4 L.Ed.2d 876, affd 81 S.Ct. 1135, 366 U.S. 582, 6 L.Ed.2d 551, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69.

Me.—State v. Karmil Merchandising Corp., 186 A.2d 352, 158 Me 450

9. Neb.—Skag-Way Dept. Stores, Inc. v. City of Grand Island, 125 N.W.2d 529, 176 Neb. 169.

N.C.—State v. McGee, 75 S.E.2d 783, 237 N.C. 633, app. dism. 74 S.Ct. 50, 346 U.S. 802, 98 L.Ed. 334, reh. den. 74 S.Ct. 272, 346 U.S. 918, 98 L.Ed.2d 413

11. U.S.—Zayre v. Georgia, Inc. v. City of Atlanta, D.C. Ga., 276 F.Supp. 892

page 812

12. Ill.—Humphrey Chevrolet, Inc. v. City of Evanston, 131 N.E.2d 70, 7 Ill.2d 402, 57 A.L.R.2d 969

N.Y.—People v. White of Massapequa, Inc., 171 N.Y.S.2d 452, 12 Misc.2d 254

Ohio—State v. Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278.

Nurseryman exception

Me.—State v. S.S. Kresge, Inc., 364 A.2d 868

Md.—Hechinger Co. v. State's Attorney for Prince George's County, 313 A.2d 715, 19 Md.App. 707, affd 326 A.2d 742, 272 Md. 706

§ 11. — Necessity or Charity

Library References

Sunday ☞7.

16. N.Y.—People v. Gill, 134 N.Y.S.2d 622, 206 Misc. 585

Held "Work of necessity"

Ga.—Blanchard v. Westview Cemetery, Inc., 183 S.E.2d 399, 124 Ga. App. 195, revd. on oth. grds 186 S.E.2d 92, 228 Ga. 461, mand. conf. to 187 S.E.2d 551, 125 Ga. App. 322—Daffron v. State, 190 S.E.2d 37, 229 Ga. 237.

N.Y.—Harocche v. Leary, 314 N.Y.S.2d 553, 64 Misc.2d 191, affd 331 N.Y.S.2d 1005, 38 A.D.2d 972—People v. Meyer, 326 N.Y.S.2d 429, 68 Misc.2d 162

Statute construed

N.J.—State v. K—Mart, 338 A.2d 230, 134 N.J. Super 76, affd 359 A.2d 492, 141 N.J. Super. 546

Purpose of exception

N.J.—State v. K—Mart, 338 A.2d 230, 134 N.J. Super. 76, affd 359 A.2d 492, 141 N.J. Super. 546

22. N.Y.—People v. Rubenstein, 182 N.Y.S.2d 548, 17 Misc.2d 10—People v. Spinelli, 282 N.Y.S.2d 354, 54 Misc.2d 485

Ohio—State v. Haase, 116 N.E.2d 224, 97 Ohio App. 377—State v. Ginnis, 158 N.E.2d 553, 109 Ohio App. 261.

Business held not necessary

Ky.—Arlan's Dept. Store of Louisville v. Com., 369 S.W.2d 9, app. dism. 84 S.Ct. 636, 376 U.S. 186, 11 L.Ed.2d 603—City of Ashland v. Heck's, Inc., 407 S.W.2d 421

N.J.—State v. Fair Lawn Service Center, 114 A.2d 487, 35 N.J. Super 549 revd. on oth. grds 120 A.2d 233, 20 N.J. 468—Borough of Collingswood v. Boyer, 158 A.2d 227, 59 N.J. Super. 561

N.Y.—People v. Kaplan, 188 N.Y.S.2d 673, 8 A.D.2d 163, motion gr. 191 N.Y.S.2d 960, 6 N.Y.2d 987, 161 N.E.2d 743—People v. Welt, 191 N.Y.S.2d 403, 19 Misc.2d 462, affd 204 N.Y.S.2d 189, 9 N.Y.2d 961, 168 N.E.2d 854—People on Complaint of Godfrey v. Seuss, 313 N.Y.S.2d 552, 63 Misc.2d 813

Ohio—State v. Keich, App., 145 N.E.2d 532—State v. Gilfether, App., 184 N.E.2d 673

23. N.Y.—People v. Gill, 134 N.Y.S.2d 622, 206 Misc. 585

Va.—Mandell v. Haddon, 121 S.E.2d 516, 202 Va. 979

25. Mo.—C.J.S. cited in State v. Katz Drug Co., 352 S.W.2d 678, 681

Ohio—State v. Kidd, 150 N.E.2d 413, 167 Ohio St. 521, app. dism. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, app. dism. 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225

S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270.

26. Mo.—C.J.S. cited in State v. Katz Drug Co., 352 S.W.2d 678, 681

Va.—Rich v. Com., 94 S.E.2d 549, 198 Va. 445.

Interpretation avoiding fatal weakness

N.J.—Masters—Jersey, Inc v. Mayor and General Council of Borough of Paramus, 160 A.2d 841, 32 N.J. 296.

page 813

27. N.Y.—People v. Schellberg, 125 N.Y.S.2d 868, 204 Misc. 733.

29. S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270.

32. N.J.—State v. Fair Lawn Service Center, 114 A.2d 487, 35 N.J. Super. 549, revd. on oth. grds. 120 A.2d 233, 20 N.J. 468

33. N.J.—C.J.S. quoted in State v. Patignani, 167 A.2d 671, 675, 65 N.J. Super. 303.

35. N.J.—C.J.S. quoted at length in State v. Patignani, 167 A.2d 671, 675, 65 N.J. Super. 303.

45. Actual emergency not required

Tex.—State v. Shoppers World, Inc., 380 S.W.2d 107.

page 814

53. Ark.—Taylor v. City of Pine Bluff, 289 S.W.2d 679, 226 Ark. 309, cert. den. 77 S.Ct. 125, 352 U.S. 894, 1 L.Ed.2d 85

75. N.Y.—People v Rubenstein, 182 N.Y.S.2d 548, 17 Misc.2d 10

§ 12. — Persons Observing Another Day

Library References
Sunday 8.

82. N.Y.—People on Complaint of Powell v Oser, 170 N.Y.S.2d 277, 9 Misc.2d 585—People on Complaint of Follar v Finkelstein, 239 N.Y.S.2d 835, 38 Misc.2d 791, affd 244 N.Y.S.2d 727, 41 Misc.2d 35, affd 198 N.E.2d 265, 14 N.Y.2d 608, 248 N.Y.S.2d 889, cert den 84 S.Ct. 1944, 377 U.S. 1006, 12 L.Ed.2d 1055—People v Bielecki, 291 N.Y.S.2d 217, 56 Misc.2d 730

84. N.H.—Opinion of the Justices, 229 A.2d 188, 108 N.H. 103
N.Y.—People v Rosenthal 345 N.Y.S.2d 377, 74 Misc.2d 724.

Statute or ordinance held valid

- U.S.—Moss v Hornig, D.C.Conn., 214 F.Supp. 324, affd 314 F.2d 89
Ark.—Lockwood v State, 462 S.W.2d 465, 249 Ark. 941

Statute construed

- N.Y.—People v Schwebel, 255 N.Y.S.2d 760, 44 Misc.2d 1035, affd 209 N.E.2d 724, 16 N.Y.2d 724, 262 N.Y.S.2d 107—People v Korman, 263 N.Y.S.2d 511, 47 Misc.2d 945

87. Mich.—Petition of Berman, 75 N.W.2d 8, 344 Mich. 598

88. N.Y.—People on Information of Moylan v Kur, 350 N.Y.S.2d 990, 76 Misc.2d 825.

§ 13. Particular Acts or Transactions Permitted or Prohibited

89. Purpose of statute exempting "farmers' markets"

- N.Y.—People v White of Massapequa, Inc., 171 N.Y.S.2d 452, 12 Misc.2d 254

96. N.Y.—People v. Hilton, 119 N.Y.S.2d 692.

21. Statute construed

- S.C.—Mullis v Celanese Corp. of America, Celirver Division, 108 S.E.2d 547, 234 S.C. 380

86. R.I.—City of Warwick v. Almac's, Inc., 442 A.2d 1265

Car washing

- N.Y.—People v Gill, 134 N.Y.S.2d 622, 206 Misc.585—People v Gordon, 152 N.Y.S.2d 614, 1 A.D.2d 1044—People on Complaint of Godfrey v Seuss, 313 N.Y.S.2d 552—People v Meyer, 326 N.Y.S.2d 429, 68 Misc.2d 162.

- Ohio—State v Applebaum, Ohio Mun., 187 N.E.2d 526

Laundromat

- (1) Participation by defendant.

- N.Y.—People v Rubenstein, 182 N.Y.S.2d 548, 17 Misc.2d 10—People v Aliprantis, 187 N.Y.S.2d 477, 8 A.D.2d 276.

- (2) No participation by defendant

- N.Y.—People v Welt, 178 N.Y.S.2d 313, 14 Misc.2d 275—People v Gwyer, 179 N.Y.S.2d 987, 7 A.D.2d 711—People v Kaplan, 188 N.Y.S.2d 673, 8 A.D.2d 163, motion gr 191 N.Y.S.2d 960, 6 N.Y.2d 987, 161 N.E.2d 743—People on Information of Ferguson v. Andob Corp., 206 N.Y.S.2d 89, 25 Misc.2d 542

- N.J.—State v Patrignani, 167 A.2d 671, 65 N.J. Super. 303

- (4) Other matters

- Mass.—Com v Chamberlain, 175 N.E.2d 486, 343 Mass. 49

- N.Y.—Schacht v City of New York, 243 N.Y.S.2d 272, 40 Misc.2d 303, affd 281 N.Y.S.2d 973, 27 A.D.2d 987

Sale of monuments

- N.Y.—People v Kupprat, 188 N.Y.S.2d 483, 6 N.Y.2d 88, 160 N.E.2d 38

Junk yard

- Ohio—City of Akron v Klein, 168 N.E.2d 564, 171 Ohio St. 207

Sale of toys

- Pa.—Com v Montag, 34 D. & C.2d 530, 57 Berks 24

Variety store

- Tenn.—Bookout v City of Chattanooga, 442 S.W.2d 658, 59 Tenn. App. 576

90. Conn.—Knights of Columbus Council No 3884 (Reverend Edward Shaughnessy Council) v Mulcahy, 227 A.2d 413, 154 Conn. 583.

4. Ga.—Prosser v. Horns A. Ward, Inc., 180 S.E.2d 270, 123 Ga. App. 205

8. Tenn.—Tucker v Jollay, 311 S.W.2d 324, 43 Tenn. App. 655

§ 14. — Barber Shops and Drug Stores

18. Statute invalid

- Del.—Rogers v State, 199 A.2d 895, 7 Storey 334

27. Ohio—C.J.S. quoted at length in State v Bunn, 187 N.E.2d 630, 635, 118 Ohio App. 491

29. Ohio—State v Footlick, 207 N.E.2d 759, 2 Ohio St.2d 206

34. Establishments held not drug stores

- Me.—State v Karmil Merchandising Corp., 186 A.2d 352, 158 Me. 450

§ 15. — Buying and Selling Generally

39. Colo.—Mosko v Dunbar, 309 P.2d 581, 135 Colo. 172

Provision that no inference shall arise from enumeration

- W.Va.—State ex rel. Heck's, Inc. v Gates, 141 S.E.2d 369, 149 W.Va. 421

40. U.S.—McGowan v State of Md., Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393

- Conn.—State v Shuster, 145 A.2d 196, 145 Conn. 554.

- La.—State v Wiener, 161 So.2d 755, 245 La. 889—Baker's Carrollton Shoe Store, Inc v Circle Shoes, Inc., App., 161 So.2d 600

- Me.—State v Karmil Merchandising Corp., 186 A.2d 352, 158 Me. 450

- Mo.—State ex rel. Eagleton v McQueen, 378 S.W.2d 449

- N.J.—State v Monteleone, 165 A.2d 39, 63 N.J. Super. 596, affd 175 A.2d 207, 36 N.J. 93

- N.Y.—People v Kupprat, 188 N.Y.S.2d 483, 6 N.Y.2d 88, 160 N.E.2d 38

- Pa.—Com v Schugardt, 29 D. & C.2d 632, 55 Berks 126

- Tex.—Ex parte Wilson, Cr., 374 S.W.2d 229

Liberal construed

- N.Y.—People v. D'Andre, 122 N.Y.S.2d 585

Statute held unconstitutional

- N.J.—Sarnier v Union Tp., Union County, 151 A.2d 208, 55 N.J. Super. 523

Acts prohibited

- Va.—State v. ...

- Md.—Richards Furniture Corp v Board of County Com'ts of Anne Arundel County, 196 A.2d 621, 233 Md. 249

- N.J.—Town of West Orange v Carr's Dept Stores, 147 A.2d 97, 53 N.J. Super. 237

- N.Y.—People v Kless, 190 N.Y.S.2d 82, 17 Misc.2d 7

- Ohio—State v Giffether, App., 184 N.E.2d 673

Terms construed

- N.J.—Vornado, Inc v R. H. Macy & Co., 187 A.2d 620, 78 N.J. Super. 102

- Tex.—State v Shoppers World, Inc., 380 S.W.2d 107

41. N.H.—State v Rogers, 200 A.2d 740, 105 N.H. 366

42. Act held public in character
N.Y.—People v Kupprat, 171 N.Y.S.2d 457, 11 Misc.2d 731, revd on oth grds 180 N.Y.S.2d 628, 7 A.D.2d 739, revd. on oth grds 188 N.Y.S.2d 483, 6 N.Y.2d 88, 160 N.E.2d 38

43. N.J.—C.J.S. cited in State v Fass 175 A.2d 193, 200, 36 N.J. 102

Act not public in character

- N.Y.—People on Complaint of Powell v Oser, 170 N.Y.S.2d 277, 9 Misc.2d 585—People v Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, affd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621

44. N.Y.—People v Binstock, 170 N.Y.S.2d 133, 7 Misc.2d 1039

47. N.J.—Vornado, Inc v R. H. Macy & Co., 187 A.2d 620, 78 N.J. Super. 102

49. "Person" includes corporation

- Tex.—Ralph Williams Gulfgate Chrysler Plymouth, Inc v State, Civ.App., 466 S.W.2d 639, err. ref. no rev. err.

- Alleged lease held evasive subterfuge

- Tex.—Sundaco, Inc v State, Civ App 463 S.W.2d 528, err. ref. no rev. err.

Statutory prohibition of public selling of personal property does not include services.⁵⁵

- 55.5. N.Y.—People v Gwyer, 179 N.Y.S.2d 987, 7 A.D.2d 711

59. Ohio—State v Footlick, 207 N.E.2d 759, 2 Ohio St.2d 206

Sale of shoes

- La.—State v Wiener, 161 So.2d 755, 245 La. 889—Baker's Carrollton Shoe Store, Inc v Circle Shoes, Inc., App., 161 So.2d 600

- Pa.—Com v Levy, 178 A.2d 858, 197 Pa. Super. 297

- Permitting public to browse in store not prohibited

- Ill.—Village of River Forest v. Vignola, 178 N.E.2d 364, 23 Ill.2d 411

"Wearing apparel"

- La.—State v Wiener, 161 So.2d 755, 245 La. 889

60. Tex.—Shoppers World, Inc v. State, Civ App., 373 S.W.2d 374, affd., Sup., 380 S.W.2d 107.

Certification of emergency or necessity

- Tex.—State v. Shoppers World, Inc., 380 S.W.2d 107—A.M. Servicing Corp of Dallas v State, Civ App., 380 S.W.2d 747—Atlantic Mills Thrift Center of San Antonio, Inc v State, Civ App., 385 S.W.2d 487.

- § 17. — Furnishing Food or Refreshments

24. Va.—Bonnie Belo Enterprises, Inc v Com., 225 S.E.2d 395, 217 Va. 84.

Exception not applicable

- Ala.—Langan v Mobile Winn-Dixie, Inc., 173 So.2d 672, 277 Ala. 583

25. Ohio—City of Euclid v MacGillis, 179 N.E.2d 131, 117 Ohio App 281

page 830

28. "Meals", "prepared food" construed
N.J.—Borough of Collingswood v Boyer, 158 A.2d 227, 59 N.J. Super 561

29. Pa.—Com v McChesney, 41 D. & C.2d 378, 16 Bucks 403

31. Other sales held not included within exception

- N.Y.—People v. White of Massapequa, Inc., 171 N.Y. S.2d 452, 12 Misc.2d 254

34. Furnishing of particular items held necessary

- N.H.—Mason v Town of Salem, 167 A.2d 433, 103 N.H. 166

§ 18. — Sports and Entertainment

Library References

Sunday ⇨6.

page 831

57. Md.—McGowan v. State, 151 A.2d 156, 220 Md. 117, aff'd 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393

- Mass.—Town of Foxborough v Bay State Harness Horse Racing and Breeding Ass'n, Inc., 366 N.E.2d 773, 5 Mass. App. 613

- Statute inapplicable to second class townships
Pa.—Com v Hamme, 35 D. & C.2d 539, 56 Mun. 229, 78 York 174

- Billiard rooms may be prohibited from operating

- Ga.—Wilder v State, 207 S.E.2d 38, 232 Ga. 404

- Statute not impliedly repealed

- Ga.—Kilpatrick v State, 256 S.E.2d 900, 243 Ga. 799

60. Ohio—State v Corn, 177 N.E.2d 289, 113 Ohio App. 50—City of Euclid v MacGillis, 179 N.E.2d 131, 117 Ohio App. 281.

page 833

Sale of particular items have been held not a sale of a commodity incidental to entertainment within exception to Sunday closing laws.⁸¹⁵

81.5. Television antenna

- Ohio—State v Herwald, 193 N.E.2d 525, 118 Ohio App. 79

95. Concerts of dance music not prohibited
Conn.—State v Morais, Cir.A.D., 199 A.2d 351, 2 Conn. Cir. 372.

99. N.Y.—Sa-Bleu, Inc v Village of Port Chester, 247 N.Y.S.2d 943, 42 Misc.2d 360.

Lack of rational classification

- Ill.—Milhkan v. Jensen, 281 N.E.2d 401, 4 Ill. App.3d 580

page 834

3. S.C.—C.J.S. quoted at length in Carolina Amusement Co. v Martin, 115 S.E.2d 273, 276, 236 S.C. 558, app. dism. and cert. den. 81 S.Ct. 1914, 367 U.S. 904, 6 L.Ed.2d 1248

Drive-in Theater

- Md.—Carrier v Lynch, 121 A.2d 246, 209 Md. 349.

page 835

25. Ordinance held reasonable or valid

- N.C.—State v. McGee, 75 S.E.2d 783, 237 N.C. 633, app. dism. 74 S.Ct. 50, 346 U.S. 802, 98 L.Ed. 334, reh. den. 74 S.Ct. 272, 346 U.S. 918, 98 L.Ed. 413

page 838

64. Pa.—Com v Taber, 145 A.2d 908, 188 Pa. Super. 415.

66. Turkey shoot

- Pa.—Com v Taber, 14 D. & C.2d 591

73. Me.—Chenard v Marcel Motors, 387 A.2d 596

74. S.C.—State v Galloway, 124 S.E.2d 910, 240 S.C. 136

75. Ala.—Lane v McFadyen, 66 So.2d 83, 259 Ala. 205

page 839

76. S.C.—State v Galloway, 124 S.E.2d 910, 240 S.C. 136

§ 19. Prosecutions for Violation of Criminal Statutes

Library References

Sunday ⇨29.

page 841

9. Ohio—State v Carney, 177 N.E.2d 799, 113 Ohio App. 280

- Va.—Rich v Com., 94 S.E.2d 549, 198 Va. 445.

12. N.J.—State v Fair Lawn Service Center, 120 A.2d 233, 20 N.J. 468

- N.Y.—People v Niosi, 342 N.Y.S.2d 864, 73 Misc.2d 604

- N.C.—State v McGee, 75 S.E.2d 783, 237 N.C. 633, app. dism. 74 S.Ct. 50, 346 U.S. 802, 98 L.Ed.2d 334, reh. den. 74 S.Ct. 272, 346 U.S. 918, 98 L.Ed. 413

- Va.—Rich v Com., 94 S.E.2d 549, 198 Va. 445

Dancing as misdemeanor

- Ga.—Bolden v State, 78 S.E.2d 368, 88 Ga. App. 871

Statute not discriminatorily enforced

- Pa.—Goodman v Kennedy, 329 A.2d 224, 459 Pa. 313

Discriminatory enforcement shown

- Conn.—State v Anonymous (1976-7), 364 A.2d 244, 33 Conn. Sup. 55.

- N.J.—State v F W Woolworth Co., 382 A.2d 51, 154 N.J. Super. 550

15. Vt.—State v. Giant of St. Albans, Inc., 268 A.2d 739, 128 Vt. 539

18. Tex.—Hill v. Gibson's Discount Center, Civ. App., 437 S.W.2d 289, err. ref. no rev. err.

20. Pa.—Com. v. Bauder, 145 A.2d 915, 188 Pa. Super. 424—Com. v. Bauder, 14 D. & C.2d 571, 28 Lehigh. 420, aff'd. 145 A.2d 915, 188 Pa. Super. 424

No discriminatory enforcement shown

- N.Y.—People on Information of Moylan v Kur, 350 N.Y.S.2d 990, 76 Misc.2d 825.

A Sunday law may not be invalid because it creates an offense without the necessity of criminal intent.²⁰⁵

- 20.5. Conn.—State v Morais, Cir.A.D., 199 A.2d 351, 2 Conn. Cir. 372.

The sufficiency of other defenses has been adjudicated.²⁰¹⁰

- 20.10. Tex.—Hill v Gibson's Discount Center, Civ. App., 437 S.W.2d 289, err. ref. no rev. err.—Levitz Furniture Co. v. State, Civ. App., 450 S.W.2d 96, err. ref. no rev. err.

Defendant as corporate officer

- Conn.—State v. Picheco, Cir.A.D., 203 A.2d 242, 2 Conn. Cir. 584.

Defendant as manager of store

- N.Y.—People on Information of Moylan v Kur, 350 N.Y.S.2d 990, 76 Misc.2d 825.

"Necessity or charity"

- N.J.—State v K-Mart, 338 A.2d 230, 134 N.J. Super. 76, aff'd 359 A.2d 492, 141 N.J. Super. 546.

§ 20. — Complaint, Indictment, or Information

21. Ohio—State v Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278

Persons indictable

- Conn.—State v Zwerdling, Cir.A.D., 206 A.2d 485, 3 Conn. Cir. 33.

- N.H.—State v Sukoff, 192 A.2d 622, 105 N.H. 70

- N.Y.—People v Kless, 190 N.Y.S.2d 82, 17 Misc.2d 7

- Ohio—State v Ullner, 143 N.E.2d 849, 105 Ohio App. 546, aff'd 150 N.E.2d 413, 167 Ohio St. 521, app. dism. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, and 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225—State v Katz, 192 N.E.2d 203, 117 Ohio App. 348, dism. 188 N.E.2d 292, 174 Ohio St. 231.

Prosecution on affidavit instead of complaint

- (1) Held proper

- Ohio—State v Hamilton House Furniture, Inc., 193 N.E.2d 299, 118 Ohio App. 63—State v Herwald, 193 N.E.2d 525, 118 Ohio App. 79—State v Ciminnello, 201 N.E.2d 710, 120 Ohio App. 172

- (2) Held improper

- Ohio—State v Bowman, 187 N.E.2d 627, 116 Ohio App. 285—City of South Euclid v Bondy, 200 N.E.2d 508.

- (3) Prosecution may be caused either by filing affidavit with judge or clerk or by filing affidavit with prosecuting attorney who shall in turn file complaint.

- Ohio—State v Maynard, 203 N.E.2d 332, 1 Ohio St.2d 57, cert. den. 86 S.Ct. 105, 382 U.S. 871, 15 L.Ed.2d 110.

Matters not constituting defects

- N.Y.—People v Smith, 348 N.Y.S.2d 694, 75 Misc.2d 554.

22. S.C.—State v Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270

Allegations held sufficient

- La.—State v. Gerstenberger, 255 So.2d 720, 260 La. 145.

- Mass.—Com. v. Chernock, 145 N.E.2d 920, 336 Mass. 384.

- Ohio—State v. Carney, 177 N.E.2d 799, 113 Ohio App. 280—State ex rel Richardson v Gorman, 187 N.E.2d 411, 117 Ohio App. 244—State v Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278.

Allegations held insufficient

- Ohio—State v. Schottenstein, 188 N.E.2d 217—State v. Laughlin, 225 N.E.2d 298, 10 Ohio Misc. 219.

Allegation of prior conviction and subsequent offense

- Ohio—State v Dimacchia, 188 N.E.2d 69, 116 Ohio App. 319—State v. Bowman, 187 N.E.2d 627, 116 Ohio App. 285

23. N.Y.—People v. Glaser, 155 N.Y.S.2d 700, 2 A.D.2d 352.

page 842

25. Allegations held sufficient

- S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270.

26. Ohio—State v. Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278.

Names of purchasers not required

- S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. dism. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270.

35. Allegations held sufficient

- Ohio—State v. Whitt, 210 N.E.2d 279, 3 Ohio App.2d 278

43. Scienter need not be alleged

- Ga.—Berta v State, 154 S.E.2d 594, 223 Ga. 267.
Ohio—State v. Corn, 177 N.E.2d 289, 113 Ohio App. 50—State v. Carney, 177 N.E.2d 799, 113 Ohio App. 280

44. Ohio—State v. Ullner, 142 N.E.2d 849, 105 Ohio App 546, aff'd 150 N.E.2d 413, 167 Ohio St 521, app. diss. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, and 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225

page 843

47. N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533
48. Ohio—State v. Haase, 116 N.E.2d 224, 97 Ohio App 377
49. N.J.—State v. K-Mart, 338 A.2d 230, 134 N.J. Super 76, aff'd 359 A.2d 492, 141 N.J. Super 546
- Ohio—State v. Haase, supra, n. 48—State v. Corn, 177 N.E.2d 289, 113 Ohio App 50—State v. Carney, 177 N.E.2d 799, 113 Ohio App 280—City of South Euclid v. Bondy, 192 N.E.2d 139—State v. Whitt, 210 N.E.2d 279, 3 Ohio App 2d 278
- S.C.—C.J.S. cited in State v. Solomon, 141 S.E.2d 818, 825, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270
52. N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533
- Pa.—Com. v. Bauder, 14 D. & C.2d 571, 28 Lehigh L.J. 20, aff'd 145 A.2d 915, 188 Pa. Super 424
56. S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270

§ 21. — Evidence

62. Ga.—Berta v. State, 154 S.E.2d 594, 223 Ga. 267
- S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270
- Va.—C.J.S. cited in Rich v. Com., 94 S.E.2d 549, 553, 198 Va. 445

page 844

64. Kan.—State v. Hill, 369 P.2d 365, 189 Kan. 403, 91 A.L.R.2d 750
- N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533
65. Md.—Supermarkets General Corp. v. State, 409 A.2d 250, 286 Md. 611, app. diss. 101 S.Ct. 45, 449 U.S. 801, 66 L.Ed.2d 5
66. N.J.—State v. K-Mart, 338 A.2d 230, 134 N.J. Super 76, aff'd 359 A.2d 492, 141 N.J. Super 546

A person accused of selling prohibited items on Sunday in violation of a statute has the burden to come forward with proof to show a pattern of discrimination consciously practiced against him in order to show that the statute was void.⁶⁶⁵

- 66.5. N.Y.—People v. Utica Daw's Drug Co., 211 N.Y.S.2d 446, 28 Misc.2d 576, rev'd. on oth. grds. 225 N.Y.S.2d 128, 16 A.D.2d 12, 4 A.L.R.3d 393—People v. Wegman's Food Markets, Inc., 362 N.Y.S.2d 902, 80 Misc.2d 89

Proof of prosecution of every known violator held not necessary

- Ky.—City of Ashland v. Heck's, Inc., 407 S.W.2d 421
68. Ohio—State v. Whitt, 210 N.E.2d 279, 3 Ohio App 2d 278
- S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270
79. Conn.—State v. Gorra Bros., Inc., Cir.A.D., 236 A.2d 345, 4 Conn. Cir. 488
- Tex.—Cook's Bryan, Inc. v. State, Civ. App., 459 S.W.2d 682, writ ref. no rev. err.

Evidence held inadmissible

- N.J.—State v. Monteleone, 165 A.2d 39, 63 N.J. Super 596, aff'd 175 A.2d 207, 36 N.J. 93
- N.Y.—People v. Cooks of New York, Inc., 318 N.Y.S.2d 960, 65 Misc.2d 790

page 845

86. S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270

89. Ohio—State v. Carney, 177 N.E.2d 799, 113 Ohio App 280

Evidence held sufficient

- (6) Ala.—Winn v. State, 79 So.2d 75, 38 Ala App 156
- Ark.—Taylor v. City of Pine Bluff, 294 S.W.2d 341, 226 Ark 749
- Conn.—State v. Voelkel, Cir.A.D., 202 A.2d 250, 2 Conn Cir 459—State v. Gorra Bros., Inc., Cir.A.D., 236 A.2d 345, 4 Conn Cir 488
- Ga.—Berta v. State, 154 S.E.2d 594, 223 Ga. 267
- Iowa—State v. Lindsey, 165 N.W.2d 807
- N.Y.—People v. Polar Vent of America, Inc., 174 N.Y.S.2d 789, 10 Misc.2d 378, aff'd 175 N.Y.S.2d 825, 4 N.Y.2d 954, 151 N.E.2d 621—People v. Rubenstein, 182 N.Y.S.2d 548, 17 Misc.2d 10—People v. Welt, 191 N.Y.S.2d 403, 19 Misc.2d 462, aff'd 204 N.Y.S.2d 189, 8 N.Y.2d 961, 168 N.E.2d 854
- Ohio—State v. Kidd, 150 N.E.2d 413, 167 Ohio St 521, app. diss. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, app. diss. 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225—State v. Corn, 177 N.E.2d 289, 113 Ohio App 50—City of South Euclid v. Bondy, 192 N.E.2d 139—State v. Whitt, 210 N.E.2d 279, 3 Ohio App 2d 278
- S.C.—State v. Galloway, 124 S.E.2d 910, 240 S.C. 136
- Tex.—Famous Dept. Store v. State, Civ. App., 371 S.W.2d 76—Cook's Bryan, Inc. v. State, Civ. App., 459 S.W.2d 682, writ ref. no rev. err.

Evidence held insufficient

- (2) Other evidence
- Ark.—Hickinbotham v. City of Little Rock, 305 S.W.2d 844, 228 Ark. 67
- Ill.—Village of River Forest v. Vignola, 178 N.E.2d 364, 23 Ill.2d 411
- N.Y.—People v. Kahl, 262 N.Y.S.2d 23, 46 Misc.2d 1088—People v. Cooks of New York, Inc., 318 N.Y.S.2d 960, 65 Misc.2d 790
- N.C.—State v. Atlas, 195 S.E.2d 496, 283 N.C. 165
- Ohio—State v. Dimacchia, 188 N.E.2d 69, 116 Ohio App 319—State v. Ciminello, 201 N.E.2d 710, 120 Ohio App 172
- S.C.—Whitney Trading Corp. v. McNair, 176 S.E.2d 572, 255 S.C. 8
- Va.—Rich v. Com., 94 S.E.2d 549, 198 Va. 445

§ 22. — Trial and Review

99. N.Y.—People v. Gill, 134 N.Y.S.2d 622, 206 Misc 585
- Ohio—State v. Kidd 150 N.E.2d 413, 167 Ohio St 521, app. diss. 79 S.Ct. 230, 358 U.S. 131, 3 L.Ed.2d 225, app. diss. 79 S.Ct. 235, 358 U.S. 132, 3 L.Ed.2d 225

page 846

4. Md.—McGowan v. State, 151 A.2d 156, 220 Md 117, aff'd 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393
7. Conn.—State v. Gorra Bros., Inc., Cir.A.D., 236 A.2d 345, 4 Conn. Cir. 488
- N.J.—Town of West Orange v. Jordan Corp., 146 A.2d 134, 52 N.J. Super 533
- Ohio—State v. Footlick, 207 N.E.2d 759, 2 Ohio St 2d 206
8. Ky.—Arlan's Dept. Store of Louisville v. Com., 369 S.W.2d 9, app. diss. 84 S.Ct. 636, 376 U.S. 186, 11 L.Ed.2d 603

Instruction held proper

- S.C.—State v. Solomon, 141 S.E.2d 818, 245 S.C. 550, app. diss. 86 S.Ct. 396, 382 U.S. 204, 15 L.Ed.2d 270
18. Ohio—State v. Ginnis, 158 N.E.2d 553, 109 Ohio App 261

Instruction held not incomplete

- Ohio—State v. Ginnis, 158 N.E.2d 553, 109 Ohio App 261

21. Mo.—State v. Katz Drug Co., App., 362 S.W.2d 80

page 847

27. N.Y.—People v. Utica Daw's Drug Co., 225 N.Y.S.2d 128, 16 A.D.2d 12, 4 A.L.R.3d 393

Conviction under inapplicable statute is ground for reversal

- Pa.—Com. v. Hamme, 35 D. & C.2d 539, 56 Mun 229, 78 York 174

§ 23. Actions and Proceedings under Penal Statutes

Library References

Sunday ⇨28.

30. N.C.—State v. McGee, 75 S.E.2d 783, 237 N.C. 633, app. diss. 74 S.Ct. 50, 346 U.S. 802, 98 L.Ed. 334, reh. den. 74 S.Ct. 272, 346 U.S. 918, 98 L.Ed. 413
32. N.J.—State v. F. W. Woolworth Co., 382 A.2d 51, 154 N.J. Super 550
- Particular method of operation by single dealer**
- Ind.—Tinder v. Clarke Auto Co., 149 N.E.2d 808, 238 Ind 302
33. Pa.—Bertera's Hopewell Foodland Inc. v. Masters, 236 A.2d 197, 428 Pa. 20, app. diss. 88 S.Ct. 1261, 390 U.S. 597, 20 L.Ed.2d 158

Particular fines

- US.—Whitney Stores, Inc. v. Summerford, D.C.S.C., 280 F.Supp 406, aff'd 89 S.Ct. 44, 393 U.S. 9, 21 L.Ed.2d 9
36. Mich.—People's Appliance & Furniture, Inc. v. City of Flint, 99 N.W.2d 522, 358 Mich 34

§ 24. What Law Governs

Library References

Corbin on Contracts § 1477 et seq.

page 848

49. N.J.—Naylor v. Conroy, 134 A.2d 785, 46 N.J. Super 387, 67 A.L.R.2d 689

§ 26. — Negotiations for Contracts and Preliminary Transactions

Library References

Sunday ⇨12.

58. Ga.—Sprayberry v. Wright, 159 S.E.2d 102, 116 Ga App 748
- N.J.—National City Bank of New York v. Borowicz, 123 A.2d 382, 40 N.J. Super 414
- Tex.—Fraleigh v. Zales Jewelry Co., Civ. App., 289 S.W.2d 416

page 849

65. Conn.—Vachon v. Tomascak, 230 A.2d 5, 155 Conn. 52
- Mass.—Wasserman v. Roach, 146 N.E.2d 909, 336 Mass. 564
- N.J.—Naylor v. Conroy, 134 A.2d 785, 46 N.J. Super 387, 67 A.L.R.2d 689

§ 27. — Formation and Consummation of Contracts

68. U.S.—Callwood v. Callwood, D.C. Virgin Islands, 129 F.Supp. 582, aff'd., C.A., 233 F.2d 784
- Me.—Payson v. Cohen, 183 A.2d 510, 158 Me. 297
- N.J.—Naylor v. Conroy, 134 A.2d 785, 46 N.J. Super 387, 67 A.L.R.2d 689. Stating New York law—Mercner v. Fay, 177 A.2d 481, 71 N.J. Super. 519

page 850

69. Ga.—Sewell v. Gould, 119 S.E.2d 598, 103 Ga. App. 456

Md.—Patton v Graves, 224 A.2d 411, 244 Md. 528—
Woel v Griffith, 253 A.2d 353, 253 Md. 451
N.J.—National City Bank of New York v Borowicz,
123 A.2d 382, 40 N.J. Super. 414—Naylor v Con-
roy, 134 A.2d 785, 46 N.J. Super. 387, 67 A.L.R.2d
689

Pa.—Great Lakes Cherry Producers Marketing Co-op,
Inc., v The C. H. Musselman Co., 3 Adams L.J.
95.

70. U.S.—Hunt v. Rhodes, C.A. Mass., 369 F.2d 623
Ala.—Sauls v. Stone, 241 So.2d 836, 286 Ala. 461—
Humphrey v. Boschung, Civ. App., 253 So.2d 760,
affd. 253 So.2d 769.

Ga.—Sprayberry v. Wright, 159 S.E.2d 102, 116 Ga.
App. 748.

73. Ala.—Sauls v. Stone, 241 So.2d 836, 286 Ala. 461

78. Pa.—Andrien v. Bennett, 9 Chest. 16, revd. on
oth. grds. 155 A.2d 206, 191 Pa. Super. 150

83. Ga.—Browne v. Snipes, 102 S.E.2d 634, 97 Ga.
App. 149

84. N.H.—Brown v. Teel, 236 A.2d 699, 108 N.H.
365.

page 851

97. U.S.—Hunt v. Rhodes, C.A. Mass., 369 F.2d 623
Md.—Patton v Graves, 224 A.2d 411, 244 Md. 528
Mass.—Wasserman v. Roach, 146 N.E.2d 909, 336
Mass. 564

Check

Ala.—Williams v. State, 333 So.2d 613.

Contract valid

Mass.—Cameron v. Gunstock Acres, Inc., 348 N.E.2d
791, 370 Mass. 378.

2. U.S.—Hunt v. Rhodes, C.A. Mass., 369 F.2d 623.

page 852

5. Miss.—Nerren v. W. T. Rawleigh Co., 75 So.2d 78,
222 Miss. 21.

page 853

20. Date of delivery controls

Ala.—McNeel Marble Co. v. Robinette 65 So.2d 221,
259 Ala. 66.

21. Ala.—Griffin v. State, 253 So.2d 340, 287 Ala.
574.

§ 28. — Miscellaneous Transactions

23. Ky.—C.J.S. cited in Hall v. Childress, 420 S.W.2d
398, 399

Tenn.—Tucker v. Jollay, 311 S.W.2d 324, 43 Tenn. App.
655

§ 31. Ratification or Renewal of Sunday Acts or Contracts

Library References

Corbin on Contracts §§ 236,
1478, 1479.

page 856

73. Ala.—McNeel Marble Co. v. Robinette, 65 So.2d
221, 259 Ala. 66.

Mich.—Zitomer v. Kelmenson, 134 N.W.2d 211, 375
Mich. 206.

74. U.S.—Sears v. Pauly, C.A. Mass., 261 F.2d 304.
Pa.—Perri v. Chiavaroli, 24 Northumb. Leg. J. 62, revd.
on oth. grds. 88 A.2d 798, 370 Pa. 495.

Tex.—Fraleigh v. Zales Jewelry Co., Civ. App., 289
S.W.2d 416.

77. U.S.—Hunt v. Rhodes, C.A. Mass., 369 F.2d 623

80. U.S.—Sears v. Pauly, C.A. Mass., 261 F.2d 304—
Hunt v. Rhodes, C.A. Mass., 369 F.2d 623

§ 32. Contracts Contemplating or Requiring Sunday Performance

Library References

Corbin on Contracts §§ 1477,
1480.

page 858

16. N.Y.—Zinchuk v. Taddonio, 182 N.Y.S.2d 268,
16 Misc.2d 545.

17. N.Y.—Zinchuk v. Taddonio, 182 N.Y.S.2d 268,
16 Misc.2d 545

22. Mass.—Fisher v. MacDonald, 127 N.E.2d 484,
332 Mass. 727

§ 35. — Right of Action and Defenses

Library References

Sunday § 19.

page 860

46. Pa.—Andrien v. Bennett 155 A.2d 206, 191 Pa. Super.
150

49. Pa.—Andrien v. Bennett, 9 Chest. 16, revd. on
oth. grds. 155 A.2d 206, 191 Pa. Super. 150

page 861

72. Conn.—Stratoudis v. Hanczaryk, 139 A.2d 68,
20 Conn. Sup. 443

Me.—Payson v. Cohen, 183 A.2d 510, 158 Me. 297

§ 36. — Pleadings

page 862

79. Ky.—Diaz v. Goodwin Bros. Leasing, Inc., 511
S.W.2d 680

Me.—C.J.S. cited in Payson v. Cohen, 183 A.2d 510,
158 Me. 297

§ 37. — Evidence

page 865

24. Mass.—Wasserman v. Roach, 146 N.E.2d 909, 336
Mass. 564

Miss.—C. Buck Bush Realty Co. v. Whetstone, 266
So.2d 135.

26. Ala.—McNeel Marble Co. v. Robinette, 65 So.2d
221, 259 Ala. 66

27. Ala.—Kirkman v. Pittman, 111 So.2d 583, 269
Ala. 159

page 866

42. Evidence held sufficient

(4) Ala.—Kirkman v. Pittman, 111 So.2d 583, 269
Ala. 159

Mich.—Zitomer v. Kelmenson, 134 N.W.2d 211, 375
Mich. 206

N.H.—Brown v. Teel, 236 A.2d 699, 108 N.H. 365

Tex.—Fraleigh v. Zales Jewelry Co., Civ. App., 289
S.W.2d 416

Evidence held insufficient

Ala.—Humphrey v. Boschung, 253 So.2d 769, 287 Ala.
600.

43. Evidence held insufficient

Ind.—Timberlake v. J. R. Watkins Co., App., 209
N.E.2d 909, 138 Ind. App. 554, reh. den. 211
N.E.2d 193, 138 Ind. App. 554.

Miss.—C. Buck Bush Realty Co. v. Whetstone, 266
So.2d 135.

§ 38. — Trial, Judgment and Review

page 867

55. U.S.—Sears v. Pauly, C.A. Mass., 261 F.2d 304.

A finding of legality may be based
on an implied contract.⁶⁴⁵

64.5. U.S.—Sears v. Pauly, C.A. Mass., 261 F.2d 304

§ 41. In General

Library References

Sunday § 30.

page 870

2. Ark.—Chester v. Arkansas State Bd. of Chiro-
practic Examiners, 435 S.W.2d 100, 245 Ark. 846
Cal.—People v. Lee, 83 Cal. Rptr. 715, 3 C.A.3d 514.
D.C.—Dayton Power & Light Co. v. Federal Power
Commission, D.C., 251 F.2d 875, 102 U.S. App.
D.C. 164

N.J.—State v. Rhodes, 95 A.2d 383, 11 N.J. 515

N.Y.—Hessel v. Hessel, 164 N.Y.S.2d 519, 6 Misc.2d
861, stating Georgia law

Tex.—Housing Authority of City of Dallas v. Black-
man, Civ. App., 254 S.W.2d 548, affd., 254 S.W.2d
103, 152 Tex. 21

3. Ark.—Chester v. Arkansas State Bd. of Chiro-
practic Examiners, 435 S.W.2d 100, 245 Ark. 846.

Pa.—Com. v. Bevil, 9 D. & C.2d 519, 6 Bucks 166, 48
Mun. 189—Com. v. Bevil, 9 D. & C.2d 519, 6
Bucks 166, 48 Mun. 189

Tenn.—Smith v. State, 385 N.W.2d 748, 215 Tenn. 314.
W.Va.—State ex rel. Varney v. Ellis, 142 S.E.2d 63, 149
W.Va. 522

5. Public policy

Tenn.—Smith v. State, 385 S.W.2d 748, 215 Tenn. 314

Necessity for statute authorizing performance
of judicial act

Tenn.—Smith v. State, 385 S.W.2d 748, 215 Tenn. 314.

Strict construction

Ark.—Chester v. Arkansas State Bd. of Chiropractic
Examiners, 435 S.W.2d 100, 245 Ark. 846

§ 42. Civil Process

6. Miss.—C.J.S. quoted at length in Robb v. Ward,
266 So.2d 133, 134.

Signing of writ by attorney

Vt.—Harrington v. Gaye, 200 A.2d 262, 124 Vt. 164

Issuance of writ over attorney's signature

Vt.—Harrington v. Gaye, 200 A.2d 262, 124 Vt. 164

7. N.Y.—Cutler v. Cutler, 217 N.Y.S.2d 185, 28
Misc.2d 526.

Pa.—Alexander v. Long, 33 Northumb. L.J. 79

page 871

Show cause order may be properly
granted by a justice acting out of court
on Sunday in the absence of statutory
prohibition.¹⁶⁵

16.5. N.Y.—Banko v. Weber, 192 N.Y.S.2d 260, 9
A.D.2d 720, affd. 193 N.Y.S.2d 670, 7 N.Y.2d
758, 162 N.E.2d 750—Cutler v. Cutler, 217 N.Y.
S.2d 185, 28 Misc.2d 526

17. Miss.—C.J.S. quoted at length in Robb v. Ward,
266 So.2d 133, 134.

Summons and complaint

Ala.—Calhoun v. Calhoun, Civ., 243 So.2d 37, 46 Ala.
App. 381, 63 A.L.R.3d 414

N.Y.—Chase Manhattan Bank, N.A. v. Powell, 445
N.Y.S.2d 928, 111 Misc.2d 1011

18. N.Y.—Cutler v. Cutler, 217 N.Y.S.2d 185, 28
Misc.2d 526.

19. Jurisdiction

(2) Other instances

N.Y.—Hessel v. Hessel, 164 N.Y.S.2d 519, 6 Misc.2d
861—Anonymous v. Anonymous, 428 N.Y.S.2d
608, 104 Misc.2d 611

page 872

Ga—Trammel v National Bank of Georgia, 285 S E 2d 590, 159 Ga App 850

23. Ga—Evans v Evans, 192 S E 2d 158, 229 Ga 418

Strict construction

Fla—Harden v Harden, App, 125 So.2d 124

24. Affidavit respecting necessity

(2) Fla—Harden v Harden, App, 125 So.2d 124
26. Conn—Souza v Great Atlantic & Pacific Tea Co., 199 A 2d 170, 25 Conn Sup 174, app dism 203 A 2d 674, 152 Conn 727

§ 45. Criminal Process

page 873

41. N.Y.—Hessel v. Hessel, 164 N.Y.S.2d 519, 6 Misc.2d 861

S.C.—State v Poinsett, 157 S.E.2d 570, 250 S.C. 293
Warrantless arrest not invalid

Or—State v Kaser, 515 P.2d 1330, 15 Or App. 411

42. Pa—Com. v. De Pietro, 89 Pa Dist & Co. 113, 4 Bucks Co L.R. 8—Com v Heyman, 1 D & C 2d 580, 16 Beaver 139—Com v Gardner, 9 Lycoming 38.

43. Pa—Com v Heyman, 1 Pa Dist & Co 2d 580, 16 Beaver Co L.R. 139—Com v Cash, 56 Sch L.R. 54

44. Operating motor vehicle while under influence of intoxicating liquor

Pa—Com v Tankesley, 58 Lanc Rev 175

45. S.C.—State v Poinsett, 157 S.E.2d 570, 250 S.C. 293

page 874

47. Ohio—State v McCoy, 131 N.E.2d 679, 99 Ohio App 161.

Pa—Com v Cunningham, 30 D. & C.2d 148, 46 Enr 16

A plea of not guilty, will cure an infirmity in arresting defendant on Sunday without a warrant.^{49.5}

49.5. Ohio—City of Piqua v Collett, App, 151 N.E.2d 770

§ 46. — Search Warrants

50. Ga—Veasey v State, 147 S.E.2d 515, 113 Ga App 187

Pa.—Com. v. Magaro, 64 Dauph Co 63

51. N.Y.—People v Childers, 283 N.Y.S.2d 336, 54 Misc.2d 752

Pa—Com. v Prussia, 87 Pa. Dist & Co. 70.

53. Pa.—Com v Christ, 64 Dauph. Co. 81

54. Pa.—Com v. Heyman, 1 D. & C.2d 580, 16 Beaver 139.

Gambling devices

(2) Since publication of Corpus Juris Secundum it has been held that service of warrant on Sunday is not void.—Com. v. Magaro, 103 A.2d 449, 175 Pa. Super 79.

Since the publication of Corpus Juris Secundum the case of Commonwealth v. McQuaid, 53 Dauph Co 105, has been overruled in a decision that service of a search warrant was valid under circumstances.—Com. v. Magaro, 64 Dauph Co 63

§ 47. Notices and Publications

55. N.Y.—Goldhirsch v New York City Dept of Transp., 447 N.Y.S.2d 634, 112 Misc.2d 849.

page 875

59. Minn.—Kantack v. Kreuer, 158 N.W.2d 842, 280 Minn. 232.

65. Ga.—Gay v. Laurens County, 100 S.E.2d 271, 213 Ga. 518.

68. Ky.—Oeth v. Felty, 421 S.W.2d 860.

§ 48. Bail and Other Bonds and Recognizances

74. Wis—Reimers v State, 143 N.W.2d 525, 31 Wis 2d 457, cert den 87 S.Ct. 528, 385 U.S. 980, 17 L Ed 2d 442

§ 49. Filing Pleadings and Other Papers

page 876

However, where an information is executed and filed on Sunday, it will be set aside.^{86.5}

86.5. Pa—Com v D'Ambrosio, 16 D. & C.2d 485—Com v Cunningham, 30 D. & C.2d 148, 46 Enr 16—Com v Weaver, 30 D. & C.2d 631, 11 Chest 150

§ 50. Taking of Depositions

90. US—Shenker v US, D.C.N.Y., 25 FRD 96

§ 51. Holding Court

Library References

Sunday ⇐ 80(6).

page 877

94. Mo—State v Lee, 486 S.W.2d 412 App after remand, App, 522 S.W.2d 63

N.Y.—Jones v East Meadow Fire Dist., 249 N.Y.S.2d 771, 21 A.D.2d 129

Pa—Com v Bevil, 9 D. & C.2d 519, 6 Bucks 166, 48 Mun 189

W.Va—State ex rel Varney v Ellis, 142 S.E.2d 63, 149 W.Va 522

96. N.Y.—People v Reedy, 164 N.Y.S.2d 658, 6 Misc.2d 963, affd, 173 N.Y.S.2d 1, 4 N.Y.2d 123, 149 N.E.2d 509

Wis—Reimers v State, 143 N.W.2d 525, 31 Wis 2d 457, cert den 87 S.Ct. 528, 385 U.S. 980, 17 L Ed 2d 442

97. N.Y.—People v. Reedy, 164 N.Y.S.2d 658, 6 Misc.2d 963, affd 173 N.Y.S.2d 1, 4 N.Y.2d 123, 149 N.E.2d 509

98. N.Y.—People v Ives, 159 N.Y.S.2d 656, 4 Misc.2d 827—People v Reedy, 173 N.Y.S.2d 1, 4 N.Y.2d 123, 149 N.E.2d 509—People v Rogers, 241 N.Y.S.2d 996, 39 Misc.2d 687.

2. Tenn—Smith v State, 385 S.W.2d 748, 215 Tenn 314

page 878

4. US—C.J.S. cited in Williams v National Sur Corp., D.C. Ala., 153 F.Supp 540, 543, affd, C.A., 257 F.2d 771—Williams v. National Sur Corp., C.A. Ala., 257 F.2d 771

Tex.—Rowan & Hope v. Valadez, Civ App, 258 S.W.2d 395, err ref no rev err

7. Iowa—C.J.S. cited in Lessenhop v Norton, 153 N.W.2d 107, 115, 261 Iowa 44

8. Tenn—Smith v. State, 385 S.W.2d 748, 215 Tenn 314.

§ 53. Judgment, Order, or Decree, and Proceedings for Review

page 879

30. Discontinuance does not result
Ala.—Ex parte Shade, 43 So.2d 319, 253 Ala. 139

page 880

37. Pa.—Com v. Bevil, 9 D. & C.2d 519, 6 Bucks 166, 48 Mun. 189.

38. N.Y.—People v. Reedy, 164 N.Y.S.2d 658, 6 Misc.2d 963, affd. 173 N.Y.S.2d 1, 4 N.Y.2d 123, 149 N.E.2d 509.

39. N.Y.—People v Ives, 159 N.Y.S.2d 656, 4 Misc.2d 827—People v Reedy, 164 N.Y.S.2d 658, 6 Misc.2d 963, affd 173 N.Y.S.2d 1, 4 N.Y.2d 123, 149 N.E.2d 509—People ex rel Crawford v O'Hara, 183 N.Y.S.2d 648, 17 Misc.2d 152—People v Rogers, 241 N.Y.S.2d 996, 39 Misc.2d 687

§ 54. Arbitration and Award

Under statute prohibiting judicial proceedings on Sunday arbitration proceedings and awards have been held void where hearings have been held on Sunday.^{51.5}

51.5. N.Y.—Katz v Uvegi, 187 N.Y.S.2d 511, 18 Misc.2d 576, affd 205 N.Y.S.2d 972, 11 A.D.2d 773

§ 55. Miscellaneous Matters of Judicial or Official Nature

page 881

54. Pa—Com v Heyman, 1 Pa Dist & Co 2d 580, 16 Beaver Co L.R. 139

Disciplinary proceedings by administrative board

N.Y.—Jones v East Meadow Fire Dist., 249 N.Y.S.2d 771, 21 A.D.2d 129

Permission for certain acts held not extended to other transactions

Ohio—Drockton v. Board of Elections of Cuyahoga County, 240 N.E.2d 896, 16 Ohio Misc. 211

Adoption of zoning regulations

Conn—Old Lyme Associates Corp. v. Zoning Commission of Town of Old Lyme, 333 A.2d 406, 31 Conn Sup 440

page 882

84. N.Y.—Jones v East Meadow Fire Dist., 249 N.Y.S.2d 771, 21 A.D.2d 129

SUNSET.

page 884

What constitutes "sunset" within the meaning of regulations proscribing the time when hunting is permitted see Game § 10b.

SUPERINTEND.

page 887

58. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ App., 365 S.W.2d 650, 656.

59. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ App., 365 S.W.2d 650, 656.

60. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ App., 365 S.W.2d 650, 656.

61. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ.App., 365 S.W.2d 650, 656.

62. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ.App., 365 S.W.2d 650, 656.

63. Tex.—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ.App., 365 S.W.2d 650, 656.

65. Tex—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ.App., 365 S.W.2d 650, 656.

66. Tex.—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ.App., 365 S.W.2d 650, 656.

page 888

SUPERIOR.**89. Similarly defined**

"Superior" means one who is above another in rank, station or office—Abbott v Myers, 251 N.E.2d 869, 873, 20 Ohio App.2d 65

SUPERSEDE.

page 889

96. Similarly defined

(3) To stand as a substitute for—U.S. v. Eller, D.C. N.C., 144 F.Supp. 284, 285

Cal.—Woodmansee v Lowery, 334 P.2d 991, 995, 167 C.A.2d 645

98. U.S.—U.S. v. Eller, supra, n. 96

Similarly defined

(2) Word "supersede" means "to set aside or cause to be set aside as invalid, useless, or obsolete usually in favor of something mentioned"—Bielat v Folta, Ind., 228 N.E.2d 888, 892, 141 Ind.App. 446

99. U.S.—U.S. v. Eller, supra, n. 96

1. Ala.—Randle v. Payne, 107 So.2d 907, 910, 39 Ala.App. 652

7. Cal.—Woodmansee v Lowery, 334 P.2d 991, 995, 167 C.A.2d 645

Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

9. Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

10. U.S.—U.S. v. Eller, D.C.N.C., 114 F.Supp. 284, 285.

Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247.

11. Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

12. Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

13. Cal.—Woodmansee v Lowery, 334 P.2d 991, 995, 167 C.A.2d 645.

Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

N.Y.—People v. Schildhaus, 180 N.Y.S.2d 377, 379, 15 Misc.2d 377

14. Colo.—C.J.S. quoted in City of Canon City v. Merris, 323 P.2d 614, 619, 137 Colo. 169—C.J.S. quoted in Woolvorton v. City and County of Denver, 361 P.2d 982, 984, 146 Colo. 247

N.Y.—People v. Schildhaus, 180 N.Y.S.2d 377, 379, 15 Misc.2d 377

"Superseded."**17. Similarly defined**

(1) The word "superseded" means to make void or useless especially by superior power; to cause to be set aside; to render obsolete, and to take the place of.—Jacobs v Leggett, Mo., 295 S.W.2d 825, 829

SUPERSEDEAS**§ 1. Definition, and Nature and Scope of Remedy****Library References**

Appeal and Error ⇨7; Superse-
deas ⇨1.

page 890

2. Del.—Ellis D. Taylor, Inc. v. Craft Builders, Inc., Ch., 260 A.2d 180

4. Wash.—In re Koome, 514 P.2d 520, 82 Wash.2d 816

5. Cal.—Musicians Club of Los Angeles v. Superior Court In and For Los Angeles County, 331 P.2d 720, 165 C.A.2d 67

page 891

7. Ill.—C.J.S. cited in Cahokia Sportservice, Inc. v. Illinois Liquor Control Commission, 336 N.E.2d 276, 280, 32 Ill.App.3d 801

11. Ill.—Fairfield Sav. and Loan Ass'n v. Central Nat. Bank in Chicago, 154 N.E.2d 333, 19 Ill.App.2d 465

Not absolute right except when expressly provided by statute

Conn.—City of Hartford v. Public Utilities Commission, Com. Pl., 309 A.2d 844, 30 Conn.Sup. 244

Neb.—Hall v. Hall, 126 N.W.2d 839, 176 Neb. 555

12. Cal.—People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 72 Cal.Rptr. 790, 446 P.2d 790, 69 C.2d 533

17. N.J.—C.J.S. cited in Two Guys From Harrison, Inc. v. Furman, 157 A.2d 351, 353, 59 N.J.Super 135

Amounts to granting or refusing injunctive relief

Ill.—Cahokia Sportservice, Inc. v. Illinois Liquor Control Commission, 336 N.E.2d 276, 32 Ill.App.3d 801

18. Stay of execution

(3) Other instances

N.J.—C.J.S. cited in Two Guys From Harrison, Inc. v. Furman, 157 A.2d 351, 353, 59 N.J.Super 135

19. Distinguished from injunctions and restraining orders

Wash.—In re Koome, 514 P.2d 520, 82 Wash.2d 816

21. Tenn.—Royal Clothing Co. v. Holloway, 347 S.W.2d 491, 208 Tenn. 572

22. Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368

26. Ala.—Southern Elec. Supply Co., Inc. v. Borden, Civ., 295 So.2d 256, 52 Ala.App. 535

27. Ala.—Southern Elec. Supply Co., Inc. v. Borden, Civ., 295 So.2d 256, 52 Ala.App. 535

§ 2. Jurisdiction and Authority to Grant Supersedeas

page 892

29. U.S.—Berryhill v. Gibson, D.C. Ala., 331 F.Supp. 122, cert. den. 92 S.Ct. 2487, 408 U.S. 920, 33 L.Ed.2d 331

Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368—People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 72 Cal.Rptr. 790, 446 P.2d 790, 69 C.2d 533

30. Tenn.—State v. Johnson, 569 S.W.2d 808.

34. Ky.—C.J.S. cited in City of Louisville v. City of St. Matthews, 316 S.W.2d 210, 211

39. Cal.—Dorsch v. King, 13 Cal.Rptr. 765, 192 C.A.2d 800

S.C.—City of Spartanburg v. Belk's Department Store of Clinton, 20 S.E.2d 157, 199 S.C. 458

§ 3. What May Be Superseded**Library References**

Supersedeas ⇨2.

page 893

54. Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368

Wis.—C.J.S. quoted in Slabosheske v. Chikowske, 77 N.W.2d 497, 503, 273 Wis. 144

56. N.D.—Haaland v. Verendrye Elec. Co-op., 66 N.W.2d 902

58. Grounds

Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368

61. Tex.—Kantor v. Herald Pub. Co., Inc., App. 12 Dist., 632 S.W.2d 656

§ 4. Proceedings to Obtain

page 894

72. Facts authorizing writ presumed to exist
Tex.—Pruett v. Hamilton, Civ. App., 259 S.W.2d 916

Application not required

Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368

77. Cal.—Sun-Maid Raisin Growers of Cal. v. Paul, 40 Cal.Rptr. 352, 229 C.A.2d 368.

§ 8. Operation and Effect

page 896

26. U.S.—Fehlhaber v. Fehlhaber, C.A. Fla., 664 F.2d 260

Fla.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barrett, App., 174 So.2d 417

27. U.S.—In re Chong, Bkrtcy. Hawaii, 16 B.R. 1
Fla.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barrett, App., 174 So.2d 417

Mass.—Healy v. McAbee, 366 N.E.2d 769, 5 Mass.App. 608

Ohio—C.J.S. cited in Dibert v. Ross Pattern Foundry & Development Co., 160 N.E.2d 862, 865.

page 897

29. Cal.—Superior Court of Los Angeles County v. District Court of Appeal, Second Appellate Dist., Division One, 54 Cal.Rptr. 119, 419 P.2d 183, 65 C.2d 293.

30. Pa.—Westmoreland Cas. Co. v. Workmen's Compensation Appeal Bd., 379 A.2d 1080, 32 Pa. Cmwlth. 492

A self-executing judgment is not affected by supersedeas.³⁵

35.5. Miss.—Mississippi Power & Light Co. v. Town of Coldwater, 99 So.2d 443, 234 Miss. 615

§ 10. Bonds

48. Fla.—Florida East Coast Ry. Co. v. Atlantic Coast Line R. Co., App., 178 So.2d 215

Order directing clerk to file bond held properly refused

Ohio—Dieckman v. Heneghan, App., 177 N.E.2d 798

page 898

53. Ala.—Gibson v. Elba Exchange Bank, 96 So.2d 756, 266 Ala. 426

page 899

SUPERSONIC. In physics, pertaining to vibrations and waves whose frequencies are greater than those which affect the human ear, that is, greater than about 20,000 per second.¹⁵⁰

1.50. Webster New Int. D.

"Supersonic corridor" is a theoretical avenue in the air, normally 20 nautical miles wide and from 300 to 600 nautical miles long and corridors are adopted by Strategic Air Command in conjunction with U.S. Air Force—Neher v. U.S., D.C. Minn., 265 F.Supp. 210, 213

"Supersonic flight" is one in which aircraft travels at speeds in excess of speed of sound.—Neher v. U.S., D.C. Minn., 265 F.Supp. 210, 212

SUPERVISE.

5. Fla.—Continental Cas Co v Borthwick, App, 177 So 2d 687, 689
7. Va.—Bacigalupo v Fleming, 102 S.E.2d 321, 325, 199 Va 827
8. Fla.—Continental Cas Co v Borthwick, App, 177 So 2d 687, 689
9. Fla.—Continental Cas Co v Borthwick, App, 177 So 2d 687, 689
- Tex.—Nederlandsch—Amerikaansche—Stoomvaart—Maatschappij, Holland—America Line v Vassallo, Civ App, 365 S.W.2d 650, 656

11. Similarly defined

- (1) To superintend or oversee with power of direction.—State ex rel Board of Ed of Whithall City School Dist. v Board of Ed of Columbus City School Dist., 179 N.E.2d 347, 348, 172 Ohio St 533
- (2) Supervise means to co-ordinate, direct, and inspect continuously and at first hand the accomplishment of another, or to oversee with powers of direction and decision the implementation of one's own or another's intentions.—Saxton v St. Louis Stair Co., Mo App, 410 S.W.2d 369, 377

14. Fla.—Continental Cas Co v Borthwick, App, 177 So 2d 687, 689

SUPERVISION.

page 900

29. N.Y.—C.J.S. cited in Application of Combs, 237 N.Y.S.2d 857, 863, 38 Misc 2d 242
30. N.Y.—C.J.S. cited in Application of Combs, 237 N.Y.S.2d 857, 863, 38 Misc 2d 242
32. To oversee with direction
Mo—Schabbing v Seabaugh, App, 395 S.W.2d 256, 259
33. Fla.—Continental Cas Co v Borthwick, App, 177 So 2d 687, 689

34. Being under someone's control

- Ill.—Lotrich v Life Printing & Pub Co., 253 N.E.2d 899, 902, 117 Ill.App.2d 89

37. Similarly defined

- Word "supervision" means the direction and critical evaluation of instruction.—Continental Cas. Co. v Borthwick, App, 177 So 2d 687, 689

page 901

SUPINATION. The rotation of the hand and arm so that the palm is turned up. It involves one hundred and eighty degrees of rotation.^{43 50}

- 43,50. N.J.—Wilson v. Greenacres Country Club, 125 A.2d 539, 542, 41 N.J. Super 530

SUPPLEMENT.

46. Other definitions of similar import

- N.J.—Holland v Lincoln Nat. Life Ins Co., 131 A.2d 428, 45 N.J. Super 66

SUPPLEMENTAL.

page 902

61. N.J.—Holland v. Lincoln National Life Insurance Co., 131 A.2d 428, 429, 45 N.J. Super. 66
- Wyo.—In re Bridger Val Water Conservancy Dist., 401 P.2d 289, 291

Similarly defined

- Iowa—Herman M Brown Co v. Johnson, 82 N.W.2d 134, 143, 248 Iowa 1143.
62. N.J.—Holland v Lincoln National Life Insurance Co., 131 A.2d 428, 429, 45 N.J. Super. 66.
- Wyo.—In re Bridger Val Water Conservancy Dist., 401 P.2d 289, 291
63. N.J.—Holland v Lincoln National Life Insurance Co., 131 A.2d 428, 429, 45 N.J. Super 66
- Wyo.—In re Bridger Val Water Conservancy Dist., 401 P.2d 289, 291

68. Similarly expressed

- Iowa—Smaha v Simmons, 60 N.W.2d 100, 102, 245 Iowa 163

SUPPLY or SUPPLIES.

page 903

80. As applied to a vessel, the word "supplies" means those articles which a boat may find to be necessary for consumption and use on a voyage.—Waterman S.S. Corp v State, 124 So 2d 65, 67, 271 Ala 441.

page 904

14. Insurance premiums not included

- Fla—Santa Rosa County for Use and Benefit of J E Daniels, Inc v Raymond Blanton Const Co., App, 138 So 2d 518, 520
16. U.S.—Minneapolis Moline Co v. U.S., 149 F Supp 146, 148, 137 Ct Cl 790
17. U.S.—Minneapolis Moline Co v U.S., 149 F Supp 146, 148, 137 Ct Cl 790

SUPPORT.

page 905

27. Similarly defined

- "Support" is sustenance, maintenance, subsistence, sustentation, livelihood, living—Strite v McGinnes, C.A. Pa., 330 F.2d 234, 239

31. Similarly defined

- "Support" means to hold up or in position, to serve as foundation or a prop for—Susskind v 1136 Tenants Corp., 251 N.Y.S.2d 321, 329, 43 Misc 2d 588

page 906

Support of persons.

54. N.Y.—Gallin v Stafford, 188 N.Y.S.2d 137, 140, 18 Misc 2d 786

Similarly defined

- (1) "Support" generally imports the provision of the necessities of life and means of livelihood, including food, shelter and clothing—Rice v Rice, 232 A.2d 709, 713, 96 N.J. Super 214

62. La.—Burns v Burns, App., 197 So 2d 89, 92
63. La.—Burns v Burns, App., 197 So 2d 89, 92
64. La.—Burns v Burns, App., 197 So.2d 89, 92.
66. "Support" in its ordinary signification includes not merely board, but everything necessary to proper maintenance.—In re Morizzo, Mass., 139 N.E.2d 719, 720, 335 Mass. 251
67. N.Y.—Gallin v Stafford, 188 N.Y.S.2d 137, 140, 18 Misc 2d 786
68. N.Y.—Gallin v Stafford, 188 N.Y.S.2d 137, 140, 18 Misc 2d 786
70. N.Y.—Gallin v Stafford, 188 N.Y.S.2d 137, 140, 18 Misc 2d 786

page 907

71. Mass.—In re Morizzo, 139 N.E.2d 719, 720, 335 Mass 251
76. Ohio—Day v. Brooks, 224 N.E.2d 557, 561, 10 Ohio Misc. 273.

page 909

17. To effectively prevent from using
U.S.—Rodgers v U.S., D.C. Cal., 158 F Supp 670, 680

page 910

SUPREMACY CLAUSE. As Article 6, § 2 of the federal Constitution see C.J.S. Constitutional Law § 3.

page 911

SURFACTANT. A substance used to break down the wax on a weed so that a weed-killing substance can enter the plant.^{48 5}

- 48,5. Tex.—Geigy Chemical Corp. v Hall, Civ App., 449 S.W.2d 115, 117

SURPLUS.

page 912

58. Cal.—Comstock v Fiorella, 67 Cal Rptr. 104, 107, 260 C.A.2d 262
59. Cal.—Comstock v Fiorella, 67 Cal Rptr 104, 107, 260 C.A.2d 262
60. Cal.—Comstock v Fiorella, 67 Cal Rptr 104, 107, 260 C.A.2d 262

65. Similarly defined

- (1) The amount over and above a reasonable amount held for contingencies—Gordon v Brunson, 253 So 2d 183, 187, 287 Ala 535

66. Nev.—Tupper v Kroc, 494 P.2d 1275, 1280, 88 Nev 146

Similarly defined

- (1) U.S.—Anderson v U.S., D.C. Cal., 131 F.Supp 501

69. Cal.—Comstock v Fiorella, 67 Cal Rptr 104, 107, 260 C.A.2d 262

page 913

76. U.S.—U.S. v Zions Sav & Loan Ass'n, C.A. Utah, 313 F.2d 331, 335
- Cal.—Piedmont Pub Co v Rogers, 14 Cal Rptr 133, 144, 193 C.A.2d 171—Comstock v Fiorella, 67 Cal Rptr. 104, 107, 260 C.A.2d 262
- La.—National Manufacture & Stores Corp v Fontenot, App., 86 So 2d 238

77. Similarly expressed

- (1) Mo—American Life & Acc Ins. Co. v Love, Mo., 431 S.W.2d 177, 180

79. Similarly defined

- (1) The excess of gross assets over the par value of its outstanding shares without deduction of debts or liability—Household Finance Corp. v Robertson, Mo., 364 S.W.2d 595, 601

SURPLUSAGE.

page 916

33. Tex.—C.J.S. cited in Morrow v Morrow, Civ App., 382 S.W.2d 785, 786

SURPRISE.

36. Cal.—Tammen v San Diego County, 58 Cal.Rptr 249, 255, 426 P.2d 753, 66 C.2d 468—People By and Through Dept of Public Works v Hunt, 82 Cal Rptr 546, 553, 2 C.A.3d 158

page 917

37. Mo—Hamm v Hamm, App., 437 S.W.2d 449, 453

SURRENDER.

page 918

In conveyancing.

67. Fla.—Kanter v Safran, 68 So.2d 553, 556
- N.H.—Wein v Arlen's, Inc., 103 A.2d 86, 88, 98 N.H. 487

SURREPTITIOUS.

page 919

71. Similarly defined

- (1) "Surreptitious" means (1) done, acquired, etc., by stealth, or without proper authority; clandestine; (2) acting, or doing something, clandestinely, stealthy.—Application of Joiner, 4 Cal.Rptr. 667, 669, 670, 180 C.A.2d 250

SURREPTITIOUSLY.

72. Similarly defined

- (1) "Surreptitiously" means fraudulently or without proper authority.—Taylor v. S & M Lamp Co., 12 Cal Rptr 323, 326, 190 C.A.2d 700.

SURROUND.**74. Not complete enclosure**

The verb "surround" in its normal usage does not require that surrounded object be enclosed in all planes, and it is sufficient if object is encompassed in given plane—*Meulenberg v. Scott*, 314 F.2d 538, 543, 50 CCPA 1058

SURVEY.

page 920

81. Similarly expressed

(1) A "survey" is the act by which quantity of a parcel of land is ascertained—*Miller v. Lawyers Title Ins. Corp.*, D.C. Va., 112 F.Supp. 221, 224

Other definitions

U.S.—*Gehrig, Hoban & Co. v. U.S.*, Cust.Ct., 293 F.Supp. 433, 437

82. Similarly defined

(1) A "survey" is process by which parcel of land is measured and its contents ascertained—*Overstreet v. Dixon*, 131 S.E.2d 580, 583, 107 Ga.App. 835

85. U.S.—*Miller v. Lawyers Title Ins. Corp.*, supra, n 81

Similarly expressed

(1) A statement of or a paper showing the result of the survey with the courses and distances and quantity of the land.—*Overstreet v. Dixon*, Ga.App., 131 S.E.2d 580, 583

96. Other definitions

U.S.—*Gehrig, Hoban & Co. v. U.S.*, Cust.Ct., 293 F.Supp. 433, 437

Phrases.

97. **Hydrographic survey** is a very extensive survey made by qualified engineers, the end product of which is a map illustrating and defining all the water features of a particular area, including streams, springs, wells, or other water sources, the distribution systems including ditches, pipelines, or other means of conveyance, and the lands upon which the water is used in the area surveyed.—*In re Escalante Val. Drainage Area*, 355 P.2d 64, 65, 11 Utah 2d 77

Surveying.**Similarly defined**

(1) "Surveying" is the science of determining the positions of the points on the earth's surface for the purpose of making a graphic representation of the area, and it is not limited to land measuring alone—*Gehrig, Hoban & Co. v. U.S.*, Cust.Ct., 293 F.Supp. 433, 437

1. Hydrographic surveying

U.S.—*Gehrig, Hoban & Co. v. U.S.*, Cust.Ct., 293 F.Supp. 433, 437.

SURVIVOR.

page 922

45. N.C.—*Hummell v. Hummell*, 85 S.E.2d 144, 145, 241 N.C. 254

S.C.—*Croft v. McKie*, 111 S.E.2d 210, 213, 214, 235 S.C. 231.

46. S.C.—*Croft v. McKie*, 111 S.E.2d 210, 213, 214, 235 S.C. 231

49. Similarly defined

(1) One who outlives another person, a time or an event

N.C.—*Hummell v. Hummell*, supra, n 45

51. N.C.—*Hummell v. Hummell*, supra, n 45.

SUSPEND.

page 924

70. Ariz.—*Anonymous v. Superior Court In and For Pima County*, 457 P.2d 956, 960, 10 Ariz.App. 243

73. May mean permanent stop

Though word suspend usually connotes something temporary, it can be used to mean "a permanent stop"

or "discontinuation"—*Ridenhour v. Millman Pub. Co.*, 383 N.E.2d 803, 805, 23 Ill.Dec. 36, 66 Ill.App.3d 1049

78. N.J.—*La Polla v. Board of Chosen Freeholders of Union County*, 176 A.2d 821, 829, 71 N.J.Super 264

84. Ariz.—*Anonymous v. Superior Court In and For Pima County*, 457 P.2d 956, 960, 10 Ariz.App. 243

page 925

96. Ark.—C.J.S. quoted in *Russ v. Civil Service Commission of Pine Bluff*, 262 S.W.2d 137, 138, 222 Ark. 666

97. Ark.—C.J.S. quoted in *Russ v. Civil Service Commission of Pine Bluff*, supra, n 96

Suspended.

3. Ark.—*Gerard v. State*, 363 S.W.2d 916, 917, 235 Ark. 1015

5. Ark.—*Gerard v. State*, 363 S.W.2d 916, 917, 235 Ark. 1015

6. Ark.—*Gerard v. State*, 363 S.W.2d 916, 917, 235 Ark. 1015

7. May mean or imply termination

"Suspended" normally means temporary cessation but in the connection with which it is used, it can mean or imply termination—*Gaston v. Pittman*, D.C. Fla., 285 F.Supp. 645, 649

SUSPENSION.

page 926

12. May mean permanent stop

Though word "suspension" usually connotes something temporary, it can be used to mean "a permanent stop" or "discontinuation"—*Ridenhour v. Mollman Pub. Co.*, 383 N.E.2d 803, 805, 23 Ill.Dec. 36, 66 Ill.App.3d 1049

13. Similarly defined

(1) Suspension is a temporary stop of a right, a law, or the like—*Sunny Brook Farms v. Omdahl*, 259 P.2d 383, 385, 42 Wash.2d 788.

(2) "Suspension," given its common and ordinary meaning, connotes simply a temporary cessation or a holding in abeyance—*Kansas State Bd. of Healing Arts v. Seasholtz*, 504 P.2d 576, 578, 210 Kan. 694

14. Neb.—*Flamingo, Inc. v. Nebraska Liquor Control Commission*, 173 N.W.2d 369, 371, 185 Neb. 22

It infers an expectation or purpose of resumption.¹⁶¹

16.1. Neb.—*Flamingo, Inc. v. Nebraska Liquor Control Commission*, 173 N.W.2d 369, 371, 185 Neb. 22

25. Wash.—*Sunny Brook Farms v. Omdahl*, supra, n 13

26. Wash.—*Sunny Brook Farms v. Omdahl*, supra, n. 13

SUSPICION.

page 927

33. Similarly defined

The act or an instance of suspecting; imagination or apprehension of something wrong or hurtful without proof or on slight evidence—*State v. Barick*, 389 P.2d 170, 175, 143 Mont. 273

39. S.C.—*State v. Hyder*, 131 S.E.2d 96, 100, 242 S.C. 372.

Wis.—C.J.S. cited in *Gordon v. Gordon*, 71 N.W.2d 386, 392, 270 Wis. 332.

SWAGE.

page 929

56. **Swaging** tap forms threads by deforming the metal and displacing it into the form of the desired thread—*Bendix Corp. v. Balax, Inc.*, C.A. Wis., 421 F.2d 809, 811

SWAMP.

58. Ga.—*Sharpe v. Savannah River Lumber Corp.*, 87 S.E.2d 398, 400, 211 Ga. 570

SWAMPER.**61. Similarly defined**

(1) A "swamper" on a "rig up" truck is one who gives orders or directions to another—*Fontenot v. National Transfer Co.*, La.App., 99 So.2d 795, 806

SWEAR.

65. Conn.—*Bell & Zajcek, Inc. v. Heyward-Robinson Co.*, 182 A.2d 339, 340, 23 Conn.Sup. 296.

SWEAT.

"Sweat battens" are wooden dividers placed between cargo and hull of a ship to prevent condensation on the hull from damaging cargo.⁷⁰⁵

70.5. U.S.—*Lemon v. Bank Lines, Ltd.*, C.A. Ga., 656 F.2d 110, 112

SWIFT.

page 930

SWIM.

The term is also employed to denote an apparatus on which coils of wire are put in such a manner that the wire may be drawn through a tempering furnace.⁸⁸¹

88.1. N.J.—*Lonnec v. John A. Roebling's Sons Co.*, 96 A.2d 687, 25 N.J.Super 457

page 931

Swimming pool.**90. Held to be swimming pool**

(1) Basin of concrete with bottom running from depth of 0 to 44 inches and several thousand square feet in area which was designed to be filled with water, was a swimming pool rather than a children's amusement device—*Berni & Murru, Inc. v. Streiffhaus*, 214 N.E.2d 252, 253, 5 Ohio App.2d 164

page 932

SYMBOL.**15. Similarly defined**

(1) A "symbol" is merely a vehicle by which concept is transmitted from one person to another—*Davis v. Firmint*, D.C. La., 269 F.Supp. 524, 527.

Representative of idea

Unless it represents a particular idea a "symbol" becomes meaningless, and is, in effect, not really a symbol at all

U.S.—*Davis v. Firmint*, D.C. La., 269 F.Supp. 524, 527.

SYMPATHIZE. To suffer with; to agree in nature, disposition, qualities, or fortunes; to feel compassion; to condole; to approve or incline to approve.¹⁸⁵⁰

18.50. D.C.—*U.S. v. Lattimore, C.A.*, 215 F.2d 847, 849, 94 U.S.App.D.C. 268.

SYMPATHY. A sharing of sorrow or a feeling of compassion. It is not something that is generally thought of as being expressed by the payment of money.²⁰⁵⁰

20.50. U.S.—*Tomlinson v. Hine*, C.A. Fla., 329 F.2d 462, 466

SYNCHRONIZATION.

page 933

As the operation of two radio broadcasting stations simultaneously upon the same frequency and with identical programs see Telegraphs, Telephones, Radio, and Television § 293.

SYNCOPE. EPISODES. Psychomotor seizures which cause the patient to lose contact with his surroundings and stare into space.^{28 50}

28.50. Pa—Auerbach v Philadelphia Transp Co, 221 A.2d 163, 170, 421 Pa 594

SYNDROME.

page 934

41. Similarly defined

(2) A "syndrome" is a group of signs that collectively point to a disorder—In Interest of A N, N D, 201 N W 2d 118, 120.

Shoulder-hand syndrome

A syndrome characterized by severe constant intractable pain in the shoulder and arm, limited joint-motion, diffuse swelling of the distal part of the upper extremity, fibrosis and atrophy of muscles, and decalcification of underlying bones. The cause is not well understood. It is similar to and may be identical with, or may be a form of, causalgia (reflex sympathetic dystrophy)—Kashin v Food Fair, Inc., Fla, 97 So 2d 609, 613

42. Collection of symptoms

U S—Hall v U S, D C La., 136 F.Supp. 187, 194

Dumping syndrome. Dumping syndrome is a condition whereby food is prematurely dumped by the stomach into the small intestine prior to proper digestion.^{45 5}

45.5 Me—Perry v Hartford Acc and Indem Co, 481 A.2d 133, 135

SYNERGISM. In physiology, co-operative action of discrete agencies such that the total effect is greater than the sum of the two effects taken independently.^{45 50}

45.50. U.S.—University of Illinois Foundation v Block Drug Co, C.A. Ill., 241 F.2d 6, 13—Application of Davis, 305 F.2d 501, 504, 49 CCPA 1196—Metropolitan Life Ins Co. v Main, C.A. Fla, 383 F.2d 952, 956

Similarly expressed

"Synergism" is a very broad term meaning combined action of two or more agents which is greater than the sum of action of one of agents used alone

U.S.—Application of Luvisi, Cust & Pat. App., 342 F.2d 102, 109, 52 CCPA 1063—Cleaton v Hewlett-Packard Co, D.C.Md., 343 F.Supp 1215, 1225.

SYNERGISTIC. A product containing two drugs is said to be "synergistic" if the combined therapeutic effect of the two drugs taken together is greater than the sum of the effects of the drugs taken separately.^{45 70}

45.70. U.S.—U S v Chas Pfizer & Co, D.C.N.Y., 245 F.Supp 801, 807

page 935

SYNTHETIC. With respect to chemistry, of, pertaining to, or formed by artificial synthesis.^{56 5}

56.5. U S—Application of Wakefield, Cust & Pat App, 422 F.2d 897, 902, 904

Similarly defined

(1) Noting or pertaining to compounds formed by chemical reaction in a laboratory, as opposed to those of natural origin

U S—Application of Wakefield, Cust & Pat App, 422 F.2d 897, 902, 904

SYSTEM.

60. Phrases

(3) "Vendor system" is a method of distributing milk under which milk is sold by dairy companies to vendors operating their own trucks who resell to retailers—Milk Wagon Drivers' Union v Lake Valley Farm Products, Inc., Ill., 61 S Ct 122, 124, 311 U S 91, 85 L Ed 63—Milk Wagon Drivers Union of Chicago, Local 753, v Meadowmoor Dairies, Ill., 61 S Ct 552, 554, 312 U S 287, 85 L Ed 836, 132 A L R 1200

(4) "Volumetric system" is one wherein all fluid pumped by pump goes to actuators, speed of which may be controlled by variable delivery pump—W F & John Barnes Co v International Harvester Co, D C Ill., 51 F.Supp. 254, 281

(5) "Wet sprinkler system", is a system in which water, at city pressure, remains at all times in all parts of system and sprays out into building through various sprinkler heads when system is activated by a fire or other cause—Firemen's Mut Ins Co. v High Point Sprinkler Co, 146 S E 2d 53, 56, 266 N C 134

61. Similarly defined

(1) A "system" is an organized or methodically arranged set of ideas; a complete exhibition of principles or facts, arranged in a rational dependence or connection—Associated Indem Corp v. Oil Well Drilling Co., Tex Civ App, 258 S W 2d 523, 529

SYSTEMIC.

page 936

73. "Systemic herbicide" is a herbicide which, when applied to the soil surrounding a plant, enters that plant and destroys the root system—Phillips v Carlson, 278 F.2d 732, 733, 47 CCPA 1007

TABLE.

Phrases.

80. Phrases

(5) "Water table" is the upper limit of the portion of ground wholly saturated with water, which may be near the surface or many feet below it—Beaver Creek Lumber Co v Russe, 212 P 1056, 1057, 123 Wash 525

(6) Hi-lo table is one which the patient walks onto or stands upon after which it is lowered hydraulically with patient lying in prone position face down for adjustment of the spine—Ison v McFall, Tenn App, 400 S W 2d 243, 246, 55 Tenn App 326

TACHYCARDIA.

86. Similarly defined

(1) "Tachycardia" means excessively rapid heartbeat, a symptom which can result from several different causes—Bertrand v Coal Operators Cas Co, La.App., 204 So.2d 620, 621

TACIT.

87. La.—Bell v Tyner, App., 97 So 2d 448, 450

Similarly defined

"Tacit" is defined to mean silent, not expressed, implied—State v Terry, 215 A 2d 374, 377, 89 N J Super 445

page 937

90. La.—Bell v Tyner, App., 97 So 2d 448, 450

TACTOGRAPH. An instrument containing a clock and a paper dial which is fastened to a motor vehicle in such a way that a needle will indicate on the paper the speed of the vehicle at any given time, and also each stop made by the vehicle as well as the time thereof.^{3 50}

3.50. Ark—Bell v Kroger Co, 323 S W 2d 424, 426, 230 Ark 384, 73 A L R 2d 1019

page 938

TAILGATE. To drive a motor vehicle too close behind another.^{6 50}

6.50. Ala—Mitchell v State, 191 So 2d 385, 391, 43 Ala App 427

Tailgate gas. "Tailgate gas" is gas which is delivered at the tailgate of a processing plant and from which the plant has removed all liquid hydrocarbons and impurities.^{6 55}

6.55. Tex—Exxon Corp v Middleton, Civ App, 571 S W 2d 349, 355

TAKE.

16. Iowa—C.J.S. cited in State v Walker, 218 N W 2d 915, 918

20. Similarly defined

(1) To lay or get hold of with arms, hands, or fingers Fla—American Bankers Life Assur Co of Fla v Williams, App., 212 So 2d 777, 778

24. Similarly defined

(2) "Take" means to get into one's hands or into one's possession, power or control by force or stratagem—American Bankers Life Assur Co of Fla v Williams, Fla App, 212 So 2d 777, 778

page 939

The ordinary meaning of the word includes but does not require the movement or change of position of the person or object taken.^{40 5}

40.5. Pa—Com. v Russell, 310 A 2d 296, 297, 225 Pa Super 133

43. Phrases

(5) "Take home pay" represents total wage owed to an employee less deductions for taxes which he, the employee, owes the government—Smith v Daniels, 471 P 2d 571, 573, 93 Idaho 716

—Taking.

page 940

Phrases:

49. Taking the fifth in common parlance is refusing to testify on the ground of self-incrimination.

U S—U S v Compton, C.A. Tenn., 365 F.2d 1, 4

—Taken.

51. As not meaning damaged

Ohio—McKee v City of Akron, 199 N.E.2d 592, 594, 176 Ohio St 282.

TALES.

57. Such or like

Ohio—State ex rel. Burton v Smith, 189 N.E.2d 876, 879, 174 Ohio St. 429.

TAMP.

66. Tamping is to back fill with the same material and then press or tamp it—Leo F Piazza Paving Co v Bebek & Brkich, 296 P.2d 368, 369, 141 C A 2d 226

page 941

TAMPER.

68. Conn.—State v. Parker, 222 A.2d 582, 585, 3 Conn.Cir. 598, app den., Sup., 219 A.2d 373, 153 Conn. 743.

page 942

"Tampering" defined

- (1) The making of unauthorized alterations or changes.—State v. Arnett, Iowa, 168 N.W.2d 807, 808.

TANGIBLE.

75. R.I.—State v. Ricci, 268 A.2d 692, 697, 107 R.I. 582.
76. R.I.—State v. Ricci, 268 A.2d 692, 697, 107 R.I. 582.
77. R.I.—State v. Ricci, 268 A.2d 692, 697, 107 R.I. 582.

TAP. The term is also used to signify a tool used to form threads on a cylindrical inner surface of a hole.^{88.5}

- 88.5. U.S.—Bendix Corp. v. Balax, Inc., C.A.Wis., 421 F.2d 809, 811.

Tap-in. "Tap-in" or "tap" is any entry into a water line for the purpose of serving individually occupied units.^{88.10}

- 88.10. "Tap-in" or "tap" is any entry into a water line for the purpose of serving individually occu-

pied units.—O'Brien v. Missouri Cities Water Co., App., 574 S.W.2d 13, 17.

page 943

TAPER. In the drywall construction business, one who fills in joints or gaps between pieces of drywall with "mud" and covers the cracks to keep the "mud" from cracking.^{94.50}

- 94.50. U.S.—Kurio v. U.S., D.C.Tex., 281 F.Supp. 252, 257.

TARE. The weight of "bagging" and "ties" in which baled cotton is contained.^{97.5}

- 97.5. Ga.—Swift Textiles, Inc. v. Lawson, 219 S.E.2d 167, 170, 135 Ga.App. 799.

TARIFF.

99. U.S.—C.J.S. quoted in Bernard v. U.S. Aircoach, D.C.Cal., 117 F.Supp. 134, 138—Turoff v. Eastern Airlines, D.C.Ill., 129 F.Supp. 319, 321.

Similarly defined

- (1) Any schedule or system of rates, charges, etc.; as a tariff of fees, or of railroad fares.—Bernard v. U.S. Aircoach, D.C.Cal., 117 F.Supp. 134, 138.

Statement of services and prices

"Tariff" is statement by carrier to possible shippers that it will furnish certain services under certain conditions for certain price.—Union Pac. R. Co. v. Higgins, D.C.N.D., 223 F.Supp. 396, 401.

1. U.S.—Bernard v. U.S. Aircoach, D.C.Cal., 117 F.Supp. 134, 138.

TASK FORCES

"Task forces" denotes groups of individuals working together on a specific project or general goal.^{1.50}

- 1.50. Okl.—International Ass'n of Firefighters, Local 2479 v. Thorpe, Okl., 632 P.2d 408, 410.

TASS. The Telegraph Agency of the Soviet Union of the USSR Council of Ministers and the organ of the Soviet State.^{1.5}

- 1.5. U.S.—Yessenin-Volpin v. Novosti Press Agency, D.C.N.Y., 443 F.Supp. 849, 852.

TATTOOING. "Tattooing" consists of puncturing the skin in the pattern desired and rubbing in coloring materials so that the pattern is indelibly fixed.^{5.5}

- 5.5. Fla.—Golden v. McCarty, Fla., 337 So.2d 388, 390, 81 A.L.R.3d 1206.

page 944

TAVERNIZED. Intoxicated.^{5.50}

- 5.50. La.—Johnson v. Gill, App., 148 So.2d 383, 387.

TAXABLE.

12. Wash.—Crown Zellerbach Corp. v. State, 278 P.2d 305, 309, 45 Wash.2d 749.

